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Repealing Miranda?: Background of the Controversy over Pretrial Interrogation and Self-Incrimination

Paul S. Wallace, Jr., American Law Division

July 20, 2004

Abstract. Miranda remains controversial among policymakers and academics who continue to debate its legitimacy and desirability over 30 years after its judicial creation. One of the major arguments offered for overruling Miranda is that it has caused great difficulty to law enforcement efforts in controlling crime.

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Summary

Although an involuntary confession has been inadmissible in federal cases since the nineteenth century, the Supreme Court did not denounce physically coercive abuses in State cases until its decision in *Brown v. Mississippi*. The *Brown* case established the basis for the Fourteenth Amendment "voluntariness" standard as the due process test for assessing the admissibility of confessions in State cases. Under this standard, the admissibility of a confession was evaluated on a case by case basis which would be governed by the "totality of the circumstances," which included the facts of the case, the background of the accused, and the behavior of the police during the interrogation.

In *Miranda v. Arizona*, the Court established several procedures to safeguard the Fifth Amendment rights of persons during custodial interrogations. The Court reasoned that the suspects needed the safeguards because "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of [the suspect..." and without them no statement can be considered the product of his/her free will.

Miranda was controversial among policy-makers and academics who debated its legitimacy and desirability over thirty years after its judicial creation. One of the major arguments offered for overruling *Miranda* was that it had caused great difficulty to law enforcement efforts in controlling crime. The ruling in *Dickerson v. United States*, 530 U.S. 428 (2000), struck down 18 U.S.C. 3501, a federal law that allowed confessions elicited without a police advisory to be used at trial as long as the "totality of circumstances" demonstrated that they were given voluntarily.

Dickerson made *Miranda*'s constitutional status clear. The *Miranda* decisions announced during the Court's 2003-2004 term, however, suggest that continued vitality of seemingly conficting pre-*Dickerson* caselaw is less clear. *United States v. Patane*, divided the Court so that no single rationale united a majority of its members, although five Justices joined in a plurality decision that declined to overrule its pre-*Dickerson* decisions concerning the admissibility of physical derivate evidence. On the other hand, *Missouri v. Seibert* likewise resulted in a plurality opinion, but in spite of contrary suggestions in the pre-*Dickerson* caselaw five Justices found inadmissible a confession intentionally wrung from the defendant before *Miranda* warnings and re-elicited thereafter. Five Justices did agree in *Yarborough v. Alvarado* that the state courts did not unreasonably apply federal law when -- without considering the inexperienced suspect's age (17 years old) -- they determined that *Miranda*'s custodial threshold had not been crossed. And they all agreed in *Fellers v. United States*, that the lower courts should not have addressed *Miranda/Dickerson* implications raised out of an interrogation that offended Sixth Amendment requirements.

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Introduction

During the 105th Congress, the proposed "Omnibus Crime Control Act of 1997" contained provisions designed to overrule *Miranda*. This is a review of the controversy sparked by this as well as other proposals governing the use of a defendant's confession against him at his criminal trial.

This report reviews the development of the law regarding pretrial interrogation and self-incrimination from the late nineteenth century to the time of the *Miranda* decision and the period covering the aftermath. The topics covered include an historical overview of the case law of pretrial interrogation prior to *Miranda*, that barred use of a confession during a defendant's criminal trial if he had not been given certain warnings before confessing; the *Miranda* decision and related Supreme Court cases; the *McNabb/Mallory* rule, that barred certain confessions made while the defendant was being illegally held in custody; 18 U.S.C. § 3501, that addressed the issues raised by *Miranda* and the *McNabb/Mallory* rule; proposals to replace *Miranda* with a further amended version section 3501; and the Court's decision in *Dickerson*, which appears to have left the *Miranda* rule stronger than at any time in its controversial history.

Historical Overview and Case Law of Pretrial Interrogation Prior to Miranda

In spite of the Fifth Amendment's limitation on the use of coerced confessions,[1] the Supreme Court's early decisions on the admissibility of confessions in federal courts relied upon the common law rule.[2] In the 1897 case of *Bram v. United States*,[3]

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[1] The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."

[2] Under the common law, confessions were admissible at trial without any restriction even to the extent that an incriminating statement which had been obtained by torture was not excluded. *See* 3 J. Wigmore, Evidence § 818(3) and § 822 n. 8 (Chadbourn rev. 1970).

[3] 168 U.S. 532 (1897) (*Bram* involved a triple murder on an American vessel on the high seas. The first mate, Bram, was taken into custody and put in irons after being accused by a crew member, Brown, who also came under suspicion. Bram was informed by the police detective that Brown earlier had made a statement that he saw Bram commit the murders.

the Court attempted to define the Fifth Amendment concept of voluntariness and to base exclusion upon violation of the privilege against self-incrimination, but the Court in a subsequent decision appeared to withdraw from that viewpoint.[4] Nonetheless, the *Bram* "voluntariness" approach was affirmed in *Zhang Sung Wan v. United States*,[5] and it influenced the Court to state the rule of exclusion more broadly, so that it was not merely a matter of whether the confession was reliable or whether a forbidden inducement had been used, but rather whether the confession "was in fact, voluntarily made."[6] According to this doctrine, confessions were admitted only if they had been given voluntarily; confessions were excluded if the suspect's will was subject to police duress.

Due Process Prior to Miranda

It was not until *Brown v. Mississippi*[7] that the Supreme Court applied the due process standard for use of a confession in State criminal proceedings. Prior to that time, the Court had consistently held that the Fifth Amendment did not apply to the states, and considered the admissibility of incriminating statements in state proceedings as a issue of Fourteenth Amendment due process relative to those standards regarding the conventional rule of evidence which prohibits involuntary confessions.[8] In *Brown*, three Black defendants were beaten by sheriff's deputies investigating the murder of a White male. The deputies hung one of the suspects from a tree, let him up and down several times and then beat him twice (while tied to a tree and subsequently on the roadside) until he confessed.[9] The deputies arrested the other two suspects, stripped and placed them over chairs, and then beat both

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Bram replied, "He could not have seen me. Where was he?" "He states he was at the wheel," the detective said. "Well," Bram replied, "he could not have seen me from there." *Id.* at 562. In holding Bram's incriminating statement inadmissible, the Court reasoned that "when the statement was made to him that the other suspected person had charged him with the crime, the result was to produce upon his mind the fear that [,] it would be considered an admission of guilt." *Id.* Therefore, the Court believed that Bram's statement was not "wholly voluntary" because "the answer which he gave and which was required by the situation was ... influenced by the force of hope or fear." *Id.* at 562-63).

[4] *United States v. Cardigan*, 342 U.S. 36, 72 (1951).

[5] 266 U.S. 1 (1924). The case concerned the admissibility of statements obtained from a seriously ill suspect who had been detained and interrogated relentlessly until he finally confessed to three murders. *Id.* at 11. Replying to the prosecution's argument that the incriminating statements were voluntary because there was no police coercion, the Court held that "the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or threat." *Id.* at 14. Although the police did not perform any overtly coercive action, the fact that they persistently questioned the suspect while he was ill cast great doubt on whether his confession was made voluntarily.

[6] *Id.* at 45.

[7] 297 U.S. 278 (1936). The Fifth Amendment privilege against self-incrimination was not made binding on the States until 1964. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

[8] *See Brown v. Mississippi*, *supra* note 7; *Chambers v. Florida*, 309 U.S. 227 (1940).

[9] *Id.* at 281.

suspects with buckled leather straps until they confessed.[10] Since the Fifth Amendment privilege was then not deemed applicable to the states, the Court struck down the confessions based on the theory that interrogation is part of the process by which a state acquires a conviction and thus is subject to the requirements of the Fourteenth Amendment due process clause.[11] The Court unanimously reversed the convictions of all three suspects, deciding that the police tactics violated the Due Process Clause of Fourteenth Amendment.[12]

Having established in *Brown* that due process was violated when a conviction rested exclusively upon a confession which was obtained in this manner, later cases made it clear that the admission at trial of such a confession was unconstitutional.[13] In *Brown*, the Court held that although a State might be able to do away with the privilege against self incrimination completely, a State could not exact a confession by torture.[14] Subsequently, this was commonly referred to as the "Fourteenth Amendment due process voluntariness test" requirement, and it was the standard used by the Court in articulating the due process requisites for its admissibility.[15] Under this standard, the admissibility of a confession was evaluated on a case by case basis according to the "totality of the circumstances,"[16] surrounding each confession.

Four years after *Brown*, the Court in *Chambers v. Florida*,[17] reversed a State conviction based on confessions obtained after five days of interrogation, during which the suspects had no contact with their friends, advisers or counselors.[18] The Court went further than *Brown* and held that even where there was no physical violence,[19] continuous questioning and "other ingenious forms of entrapment of the helpless" could constitute compulsion.[20] Justice Black noted that it has been suggested that the use of these coercive tactics "has lowered the esteem in which

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[10] *Id.* at 282.

[11] Before the *Miranda* decision, the Court used the due process clause of the Fourteenth Amendment ("No State shall deprive any person of life, liberty, or property, without due process of law.") to rule confessions involuntary. *See* Craig R. Johnson, Note, *McNeill v. Wisconsin*: Blurring a Bright Line on Custodial Interrogation, 1992 Wis. L. Rev. 1643 (1992) (discussing the differences between the Fifth and Sixth Amendments).

[12] *Id.* at 287.

[13] *Payne v. Arkansas*, 356 U.S. 560 (1958).

[14] *Brown*, 297 U.S. at 285-86.

[15] *E.g., Watts v. Indiana*, 338 U.S. 49 (1949).

[16] *Haynes v. Washington*, 373 U.S. 503 (1963).

[17] 309 U.S. 227 (1940).

[18] *Id.* at 230-31.

[19] Although there was a conflict regarding the issue of physical violence, the Court did not resolve the issue and stated that its decision was not dependent upon it but was based upon the fact that the confessions resulted from the application of compulsion. *Id.* at 238-39.

[20] *Id.* at 237-39. The Court criticized the dragnet methods of taking the Black tenant farmers into custody without warrants and noted that the Fourteenth Amendment provided protection for those who belonged to helpless and unpopular groups. *Id.* at 238.

[the] administration of justice is held by the public and has engendered an attitude of hostility to unwillingness to cooperate with the police....”[21]

Two years later, in *Ward v. Texas*, where the defendant, an Afro-American, under interrogation had been threatened with mob violence, taken by night and day to strange towns in several counties, incarcerated in several jails, and by persistent questioning, coerced to confess, the Supreme Court again ruled for reversal.[22] In these and other similar cases,[23] where the convictions were reversed, the Court indicated its concern for the integrity of the process used for extracting the confession and noted that there was almost no evidence against the defendants. The Court therefore relied on the Fourteenth Amendment to reverse the convictions of what it believed were innocent men. The Court was also protecting minorities from brutality which was being tolerated by the States.[24]

Between the time of *Brown v. Mississippi*[25] and *Miranda v. Arizona*,[26] the due process standard was applied in dozens of cases. During these years, the Court designated certain police practices which weighed the “totality of the circumstances” against a finding of voluntariness and admissibility—including physical force, threats of harm or punishment, lengthy periods of unlawful detention, solitary confinement, denial of food or sleep, and promises of leniency—and therefore were constitutionally impermissible.[27] Typical characteristics of the accused that were also taken into consideration included youth, lack of education or intelligence, member of a racial minority group, poverty, and mental or intellectual disabilities.[28]

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[21] *Id.* at 240-41, n.15.

[22] 316 U.S. 547 (1942).

[23] *Canty v. Alabama*, 309 U.S. 629 (1940); *White v. Texas*, 309 U.S. 631, reh’g denied, 310 U.S. 530 (1940); *Vernon v. Alabama*, 313 U.S. 547 (1941); *Lomax v. Texas*, 313 U. S. 544 (1941).

[24] *See, e.g., Brown v. Mississippi, supra* note 7; *Chambers v. Florida, supra* note 8; *Ward v. Texas*, 316 U.S. 547 (1942).

[25] *Supra* note 7.

[26] 384 U.S. 436 (1966).

[27] *See, e.g., Townsend v. Sain*, 372 U.S. 293 (1963); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Rogers v. Richmond*, 365 U.S. 534 (1961); *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Stein v. New York*, 346 U.S. 156 (1953); *Stroble v. California*, 343 U.S. 181 (1952); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Harris v. South Carolina*, 338 U.S. 68 (1949); *Haley v. Ohio*, 332 U.S. 596 (1948); *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Lisenba v. California*, 314 U.S. 219 (1941); *Ward v. Texas*, 316 U.S. 547 (1942); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936).

[28] W. LaFave & J. Israel, Criminal Procedure § 6.2(c) (2d ed. 1992).

The Precursor to Miranda

Miranda wove together threads from the case law regarding confessions beginning in the late 1940's that provided the basis for significant changes in criminal law investigations and adjudication up to the present time. These changes were designed to impose, among other things, uniform federal standards upon the States which up to that time had many variations in their pretrial procedures.[29]

McNabb/Mallory

Decisions in the area of police interrogations which had a distinct relationship, as precursors, to *Miranda* are as follows:

McNabb v. United States[30] involved the murder of a federal revenue agent during a raid on an illegal still. Several Tennessee mountaineers with limited education were arrested by federal agents between one and two o'clock in the morning and were subjected intermittently to prolonged questioning over the next several days, which resulted in confessions by three of them. The confessions were admitted as voluntary and the defendants were convicted. The Court decided that it was not necessary "...to reach the Constitutional issue pressed upon us"[31] because the case can be resolved by the "...exercise of its supervisory authority over the administration of criminal justice in the federal courts...."[32] Since the record left no doubt that the questioning of the defendants did not take place before a judicial officer in a timely fashion as required by procedures which Congress commanded, the Court concluded that the convictions:

> cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.[33]

Mallory v. United States[34] involved a decision by a unanimous Court which held that the confession was inadmissible because it was procured in violation of a

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[29] Although there is a constitutional right to counsel in federal cases since the adoption in 1791 of the Bill of Rights, this right was first incorporated into State proceedings through the Fourteenth Amendment in capital offenses in 1932 (*Powell v. Alabama*, 287 U.S. 45 (1932)) and subsequently broadened in 1963 to include all felony cases (*Gideon v. Wainwright*, 372 U.S. 335 (1963)).

[30] 318 U.S. 332 (1943).

[31] *Id.* at 340.

[32] *Id.* at 341.

[33] *Id.* at 345.

[34] 354 U.S. 449 (1957).

provision in the federal rules[35] to the effect that an arrested person must be taken before a committing magistrate "without unnecessary delay."[36] *Mallory* is significant because it defined in detail what is considered "unnecessary delay":

> The police may not arrest upon mere suspicion but only on "probable cause." The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined. The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt. The duty enjoined upon arresting officers to arraign "without unnecessary delay" indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession.[37]
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> In every case where the police resort to interrogation of an arrested person and secure a confession, they may well claim, and quite sincerely, that they were merely trying to check on the information given by him.[38]

Application to States

The Fifth Amendment to the Constitution guarantees the criminal suspect the right against self-incrimination.[39] In *Malloy v. Hogan,*[40] the Court incorporated the Fifth Amendment privilege against self-incrimination into the Fourteenth Amendment, thereby requiring the State governments to recognize the constitutional privilege against self-incrimination.[41] The Court pointed out that the Fifth Amendment privilege against self-incrimination demands that the accused be free "of any improper influence" when he is considering whether to remain silent or make a statement.[42] The Court stated that under the Fifth Amendment test, "the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary: that

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[35] Fed. R. Crim. P. 5(a) (Promulgated 1946; did not exist when *McNabb v. United States* was decided).

[36] Mallory, 354 U.S. at 452.

[37] *Id.* at 454-55.

[38] *Id.* at 455-56.

[39] The Fifth Amendment provides that no person "... shall be compelled in any criminal case to be a witness against himself ...."

[40] 378 U.S. 1 (1964).

[41] *Id.* at 7.

[42] *Id.* at 7-8.

is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'"[43] The State and Federal governments were constitutionally compelled to establish guilt by obtaining evidence from independent investigative work and not by coerced confessions.[44]

Warnings

Before the 1960s, there do not appear to be any Federal or State rulings advocating a requirement of warnings in police interrogations.[45] Following the decisions by the Court in two early cases (*Wilson v. United States*[46] and *Powers v. United States*)[47], it was generally established that warnings were not required during pretrial interrogations as a requirement for the admission of a defendant's statements.[48] In the *Wilson* case, the Court held that the defendant's statements depended on their voluntariness, and since they were voluntarily made, the absence of warnings and counsel would not warrant their exclusion.[49] In the *Powers* case, the Court reviewed again the warnings issue but in constitutional terms. At the preliminary hearing, "... the defendant, without counsel and not having been instructed by the commissioner, voluntarily, in his own behalf, testified ...." Following this account by the defendant, the deputy marshal who was present during the hearing asked if he had worked at a still at another time and place. At first, the defendant refused to answer the question, but responded affirmatively after being informed that unless he did so he would be committed to jail. The deputy marshal recounted this admission at trial. The Court held that requiring the defendant to respond to questions under the threat of contempt at the preliminary hearing did not exceed the proper limits, since he had waived his Fifth Amendment right by voluntarily testifying on his own behalf.[50]

The Right to Counsel

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have [a]ssistance of [c]ounsel for his defense."[51] Prior to 1960, it had been established that the constitutional guarantee requires that in federal prosecutions the right of the

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[43] *Id.* at 7.

[44] *Id.* at 8.

[45] *See McNabb v. United States*, 318 U.S. 332, 345-46 (1943).

[46] 162 U.S. 613 (1896).

[47] 223 U.S. 303 (1912).

[48] *Miranda v. Arizona*, 384 U.S. 436, 509 ("... by necessary implication in case after case, the right to warnings [have] been explicitly rebuffed in this Court many years ago", Harlan J., dissenting citing *Wilson and Powers*).

[49] 162 U.S. at 623-24.

[50] 223 U.S. at 313-14.

[51] U.S. Constitution Amendment VI.

defendant to have counsel assigned by the court relates only to proceedings in court and does not include preliminary proceedings before a committing magistrate. However, in *Hamilton v. Alabama*,[52] a 1961 capital case, the Court ruled that an indigent defendant was entitled to appointed counsel at an arraignment where the Alabama law viewed certain defenses, such as insanity, which if not raised at that point as abandoned. Likewise, in *White v. Maryland*,[53] a 1963 decision reversing a murder conviction, the Sixth Amendment right was held to apply where the defendant was asked to enter only a non-binding plea at the preliminary hearing, but his non-binding plea of guilty, though later withdrawn, was still used against him at trial. Subsequent to the *Hamilton v. Alabama* and *White v. Maryland* decisions, which recognized the right to counsel in well defined situations in pretrial judicial proceedings at the State level, the Court took a considerable step by extending the Sixth Amendment right to counsel to solely non-judicial pretrial situations.[54]

In *Massiah v. United States*,[55] Massiah was indicted for federal narcotics violations, for which he retained counsel, pled not guilty and was released on bail. The codefendant, who unknown to Massiah, was cooperating with the authorities when he, with a radio transmitter in his car, invited Massiah to discuss the pending case, and during their conversation in the car, Massiah's admissions were overheard by a federal agent, who testified with respect to the statements at Massiah's trial. The Court reversed Massiah's conviction on the ground that obtaining information from him in this manner violated his Sixth Amendment right to counsel. The central point behind the decision was that statements obtained by federal agents from an indicted defendant who has counsel are, as a matter of course, inadmissible against him if obtained without counsel present.[56] The decision is significant inasmuch as it is the initial expansion of the right to counsel to police interrogations and investigations.

In *Escobedo v. Illinois*,[57] five weeks after *Massiah*, Escobedo was taken into custody and questioned concerning the fatal shooting of his brother-in-law, but his attorney obtained his release. DiGerlando, who was already in police custody and who was later indicted for the murder along with Escobedo, told police that Escobedo had fired the fatal shots, so Escobedo was again arrested. In the course of questioning, Escobedo's repeatedly requested to consult with his attorney, who had come to the police station but was barred from seeing him. After the police arranged a confrontation between DiGerlando and Escobedo, Escobedo incriminated himself in the killing which was admitted at his trial. Deciding that the statements were inadmissible on the ground that Escobedo had been denied the Sixth Amendment right to counsel, the Court reversed the conviction. The Court's decision was limited to the facts of the case:

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[52] 368 U. S. 52 (1961).

[53] 373 U.S. 59 (1963).

[54] *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

[55] 377 U.S. 201 (1964).

[56] *Id.* at 206.

[57] 378 U.S. 478 (1964).

> We hold ... that where, as here, (1) the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, (2) the suspect has been taken into police custody, (3) the police carry out a process of interrogations that lends itself to eliciting incriminating statements, (4) the suspect has requested and been denied an opportunity to consult with his lawyer, and (5) the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' ... and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[58]

Adverse Implication from Silence

At the time of the writing of the Constitution, the accused was subject to questioning by a justice of the peace, and if he failed to respond to his questions, it could be admitted into evidence.[59] Subsequently, the courts developed a general standard or rule of evidence which provided that an accused's silence following accusations against him, which one would normally respond to, could be admitted at trial and made the basis for an adverse inference.[60] The prohibition of adverse comment regarding a defendant's decision to remain silent was rejected by most informed professional opinion; this was reflected in the formulation of the model rules of evidence.[61] During the 1960s, six States allowed adverse comments to be made which stemmed from the silence by the accused.[62] There were no decisions by the Court on this issue regarding the application of the Fifth Amendment for the reason that the Amendment was not applicable to the States[63] until the Court incorporated the Fifth Amendment and made it applicable to the states in *Malloy v. Hogan*[64] During the following year, the Court addressed the Fifth Amendment in reviewing a State case[65] when it struck down the provisions of California's constitution permitting comment by court and counsel on a defendant's "...failure to explain or deny by his testimony any evidence or facts in the case against him...."[66]

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[58] *Id.* at 490-91.

[59] Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 14, 16-18 (1949).

[60] *Adoptive Admissions, Arrest and the Privilege Against Self-Incrimination: A Suggested Constitutional Imperative*, 31 U. Chi. L. Rev. 556, 556-59 (1964).

[61] *Friendly, The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 939 n.58 (1965).

[62] *See* 8 J. Wigmore, Evidence § 2272 n.2 (McNaughton rev. 1961).

[63] *See Adamson v. California*, 332 U.S. 46 (1947).

[64] 378 U.S. 1 (1964).

[65] *See Griffin v. California*, 380 U.S. 609 (1965).

[66] *Id.* at 610 n. 2.

A Right Not To Be Questioned

The accused could not cut off pretrial interrogation inasmuch as the right was not recognized by the Court prior to its decision in *Miranda*. For example, in *Crooker v. California*,[67] the accused claimed his voluntary confession should be withheld because it was obtained after the police denied his request to contact his lawyer. The majority rejected this contention, asserting that such a rule "...would effectively preclude police questioning—fair as well as unfair—until the accused was afforded opportunity to call his attorney."[68] The Court found support in the *Betts v. Brady*[69] rule that due process did not impose a flat requirement of appointed counsel in all serious State trials.

The Miranda Decision and Other Developments

Together with four cases, the title case in *Miranda v. Arizona*,[70] arose from Ernesto Miranda's kidnapping and rape of an eighteen-year-old woman. Miranda confessed to the crime shortly after being taken into custody. He made no request to consult with an attorney while being interrogated but neither was he advised by the police that he had a right to have an attorney present. At his trial, the written confession was admitted in evidence.[71] The Court reversed Miranda's conviction based upon the failure of the police to comply with the new rules that were announced in the *Miranda* decision.

Before the Court explained its holding, it discussed "... the nature and setting of ... in-custody[72] interrogation[s] ...."[73] The Court was cognizant of the police violence

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[67] 357 U.S. 433 (1958).

[68] *Id.* at 441.

[69] 316 U.S. 455, 462 (1942).

[70] 384 U.S. 436 (1966). The Court decided *Westover v. United States*, 384 U.S. 436 (1966), rev'g 342 F.2d 684 (9th Cir. 1965); *California v. Stewart*, 384 U.S. 436 (1966), aff'g 400 P.2d 97 (Cal.1965); and *Vignera v. New York*, 384 U.S. 436 (1966), rev'g 207 N.E.2d 527 (N.Y. 1965), together with *Miranda*. These cases involved the issue of whether the statements taken from a defendant, without any warning regarding the defendant's rights, could be admitted as evidence against the defendant at trial.

[71] *Id.* at 491-93.

[72] Under *Miranda*, custody involves being "... deprived of [one's] freedom of action in any significant way." 384 U.S. at 444. The defendant has the burden of proving custody. *See United States v. Charles*, 738 F.2d 686, 692 (5th Cir. 1984).

[73] *Id.* at 445. *Miranda* safeguards only extend to those persons who are subjected to "... questioning initiated by law enforcement officers after ... [they have] been taken into custody ..." *Id.* at 444.

There are various types of questions which do not require *Miranda* warnings: In *Pennsylvania v. Muniz*, 496 U.S. 582, 600-02 (1990), the Court held that "routine booking" questions are not considered part of the interrogation because they are not intended to "... elicit ... incriminating response[s] from the suspect." However, in *Estelle v. Smith*, 451 U.S.

which could occur at that time during custodial interrogations because of the "incommunicado" nature of the proceedings.[74] The Court noted that, while police brutality of the early 1900s[75] was no longer the standard practice, the community still needed protection against the "psychological rather than physically oriented" interrogation.[76] The Court believed that it was necessary to give this protection to suspects because all police interrogation manuals emphasized the need for privacy during the interrogation so that in effect, "[t]he subject ... [was] deprived of every psychological advantage."[77] The Court referred to techniques and psychological tactics interrogators are instructed to use during an interrogation to obtain evidence from the suspect.[78] The Court reasoned that the suspects needed the safeguards because "[t]he circumstance surrounding in-custody interrogation can operate very quickly to overbear the will of [the suspect] ..."[79] and without them no statement can be considered the product of his/her free will.

The rules are designed to safeguard the privilege against self-incrimination, and must be followed in the absence of "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 ...."[80] These rules apply "[a]t the outset", when the person is first subjected to interrogation while in custody at the station or otherwise restricted in the freedom of his/her actions in any meaningful way.[81]

The specific rules (safeguards) enunciated by the Court were as follows:

(1) Regardless of his prior awareness of his rights, if the accused in custody is to be subjected to questioning, "he must first be informed in clear and unequivocal terms that he has the right to remain silent", so that those unaware may learn of this right and so that they will be able to overcome the inherent pressures of the interrogation atmosphere.[82]

454, 468-69 (1981), the Court decided that a "court-ordered psychiatric examination" of the accused did constitute an interrogation requiring *Miranda* warnings.

[74] *Id.*

[75] *See Brown v. Mississippi*, *supra* note 7.

[76] 384 U.S. at 448.

[77] *Id.* at 449.

[78] *Id.* at 453.

[79] *Id.* at 469.

[80] *Id.* at 467.

[81] *Id.* at 467-68, 479.

[82] *Id.* at 467-68. In some situations, statements are admissible even though obtained as a result of a *Miranda* violation. In *New York v. Quarles*, 467 U.S. 649, 655-60 (1984), the Court held that the statements obtained from the suspect while in custody were admissible, even though there was a failure to give *Miranda* warnings, when "... 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." Also, statements obtained in violation of Miranda may be admissible to impeach a defendant's contradictory testimony at trial.

(2) The warning regarding the right to remain silent "... must be accompanied by the explanation that anything said can and will be used against the individual in court" so as to make sure that the suspect will be aware of the consequences of forgoing it.[83]

(3) Because this warning is an absolute prerequisite to interrogation, the suspect "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation" regardless of the circumstances which may indicate "that the person may have [already] been aware of this right ...."[84]

(4) The individual must be warned "that if he is indigent a lawyer will be appointed to represent him," otherwise, "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 ... the funds to obtain one."[85]

(5) 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"; and if he "states that he wants an attorney, the interrogation must cease until an attorney is present."[86]

(6) If during an interrogation, a statement is taken without the presence of an attorney, 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"; and "... 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."[87]

(7) Any statement obtained in violation of these guidelines may not be admitted into evidence inasmuch as the rules do not distinguish degrees of incrimination and it is without regard as to whether it is only an admission of part of an offense or whether the statements are "inculpatory" or "exculpatory."[88]

(8) It is impermissible for one to be penalized for exercising his Fifth Amendment privilege, and therefore the prosecution may not "use at trial the fact that [the accused] stood mute or claimed his privilege in the face of accusation."[89]

Oregon v. Hass, 420 U.S. 714, 723-24 (1975).

[83] *Id.* at 469.

[84] *Id.* at 471-72.

[85] *Id.* at 473.

[86] *Id.* at 473-74.

[87] *Id.* at 475.

[88] *Id.* at 476-77.

[89] *Id.* at 468 n.37.

Subsequently, the Court made two things very clear in *Miranda* which made it unique: (1) Based upon the Court's interpretation, there is a requirement under the Fifth Amendment that suspects must knowingly and voluntarily waive their rights which in effect places an affirmative duty on police officers to inform the accused of his/her rights.[90] (2) No decision prior to *Miranda* in construing the Fifth Amendment had stated that any of the rules imposed by *Miranda* were *required* for compliance with the amendment.[91]

Case Law Developments after Miranda

1. The Right To Counsel.

In 1975, the Court seemed to take a more limited view of the *Miranda* safeguards in *Michigan v. Mosely*.[92] The Court in rejecting the strict application of the *Miranda* safeguards to bar new interrogations, reviewed the circumstances leading to the incriminating statements to determine when a suspect waives his rights.[93] The Court "... concluded 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.'"[94] As for the application of the "scrupulously honored" test, the majority concluded it was met on the facts of the case because "... 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."[95] Hence, the Court appeared to move towards a less rigid approach, permitting limited renewed interrogations rather than an all inclusive *Miranda* coverage.

In 1977, the Court appeared to extend the *Miranda* rights in *Brewer v. Williams*.[96] In deciding that the police violated the suspect's rights to counsel under

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[90] *Miranda*, 384 U.S. at 478-79.

[91] *Id.* at 467-473.

[92] 423 U.S. 96 (1975) (Mosely invoked his right to remain silent after police read him his *Miranda* rights. Id. at 97. The officers stopped their interrogation, but later, a different detective at a different location asked Mosely about an unrelated crime. *Id.* at 97-98. The new officer then read Mosely his rights again, but during this period, Mosely did not invoke his right to remain silent and began to give incriminating statements to the detective voluntarily. *Id.* at 98. Mosely argued that the Court should prohibit these statements from being introduced into evidence). *Id.* at 98-99.

[93] *Id.* at 104.

[94] *Id.*

[95] *Id.* at 106.

[96] 430 U.S. 387 (1977). After police officers arrested the defendant for abducting a 10-year-old girl, they advised him of his *Miranda* rights. *Id.* at 390. The police agreed not to interrogate the defendant while transporting him. *Id.* at 391-92. During the trip to Des Moines, Williams did not express a willingness to be interrogated in the absence of an

Miranda, the Court stated that "... courts [should] indulge in every reasonable presumption against waiver...."[97] The Court noted that "... 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.'"[98] Being aware that a warrant had been issued for his arrest, he had been arraigned on that warrant before a judge, and he had been committed by the court to confinement in jail, the Court concluded "[t]here can be no doubt in the present case that judicial proceedings had been initiated ...."[99] The State has the burden of proving that a suspect actually relinquished his rights, and not merely that he comprehended them.[100] Hence, the Court appeared to be giving expanded *Miranda* protection by making waiver of the right to counsel more difficult.

In 1979, the Court appeared to change its position again in *North Carolina v. Butler*.[101] Rather than making waiver more difficult, the Court appeared to make it easier by allowing implicit waivers.[102] Disregarding the rule that only explicit waivers, either written or oral, are effective, the Court placed emphasis on whether the accused waived his rights "knowingly and voluntarily" rather than the form of the accused's waiver.[103] Therefore, according to *Butler*, words and action may be sufficient to waive a suspect's rights but the presumption by the courts must still be against waiver.[104] However, the Court ultimately decided that all the circumstances will be reviewed in order to determine if the waiver was voluntary.[105]

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attorney; instead, he stated several times that "[w]hen I get to Des Moines and see [my lawyer] I am going to tell you the whole story." *Id.* at 392. The detective and the defendant then embarked on a wide-ranging conversation which made the defendant feel guilty based on his religious beliefs. *Id.* at 392-93. As a result of this, the defendant confessed, and his lawyer sought to suppress all evidence resulting from these statements. *Id.* at 393.

[97] *Id.* at 404.

[98] *Id.* at 398.

[99] *Id.* at 399.

[100] *Id.* at 404.

[101] 441 U.S. 369 (1979).

[102] *Id.* at 373.

[103] *Id.* The defendant was given his *Miranda* rights orally at the time of arrest and later at the F.B.I. he read an "Advice of Rights" form which he said he understood, after which he said he would talk to the agents but would not sign the waiver at the bottom of the form. The state supreme court excluded the defendant's incriminating statement on the ground that a waiver of *Miranda* rights "... will not be recognized unless such waiver is 'specifically made' after the *Miranda* warnings have been given", but the Court disagreed. *Id.* at 372.

[104] *Id.* at 373.

[105] *Id.* The Court said: "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

In 1981, the Court once more in *Edwards v. Arizona*,[106] redefined the requirements for an effective waiver. The Arizona Supreme Court, in deciding the issue of voluntariness, applied the totality of the circumstances test in finding that Edwards waived his rights when he voluntarily spoke with police after he had invoked his right to counsel during an interrogation the day before.[107] The Court reversed, holding "... that an accused, ... having expressed his desire to deal with 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."[108] The Court further stated that police cannot "... reinterrogate an accused in custody if he has clearly asserted his right to counsel."[109] It would appear as if the "clearly asserted" language was an indication that there will be a requirement for a clear and precise statement in order to invoke the right to counsel, which has the effect of overruling the "in any manner" guidelines in *Miranda*. It also reveals the significance that the Court attaches to protecting the right to counsel by requiring more than an incognizant waiver of that right; "... the accused himself [must] initiate[] further communication."[110] Opting for the stricter knowing and intelligent waiver over the broader totality of circumstances test, the Court appeared to be seeking a way to affirmatively protect the accused's right to have counsel during the interrogation.[111]

In 1983, the Court had another opportunity to review the *Edwards* test in *Oregon v. Bradshaw*.[112] The Court agreed in *Bradshaw* that the admissibility of a confession given by a defendant who earlier invoked his *Miranda* right to counsel is to be determined by a two-part test. It first must be determined whether the defendant "initiated" further conversation as required by *Edwards*.[113] This means

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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." *Id.*

[106] 451 U.S. 477 (1981).

[107] *Id.* at 480, 483; *see also United States v. Cleveland*, 106 F.3d 1056, 1063 (1st Cir. 1997); *United States v. Maisonneuve*, 950 F. Supp. 1280, 1286 (D. Vermont 1996).

[108] 451 U.S. at 484-85.

[109] *Id.* at 485.

[110] *Id.* at 484-85.

[111] *See Id.* at 485.

[112] 462 U.S. 1039 (1983); *see also United States v. Sriyuth*, 98 F.3d 739, 749 (3rd Cir. 1996).

[113] 462 U.S. at 1045-46. Police arrested Bradshaw and advised him of his *Miranda* rights. *Id.* at 1041. After briefly talking with the police, Bradshaw invoked his right by saying: "I do want an attorney before it goes very much further." *Id.* at 1041-42. The police immediately ended the questioning. *Id.* at 1042. Subsequently, Bradshaw asked a police officer, "Well, what is going to happen to me now?" *Id.* In response, the police officer replied that Bradshaw did not have to say anything since he had already requested a lawyer. *Id.* After Bradshaw said he understood, the police officer discussed with Bradshaw as to where he was being taken. *Id.* Later, Bradshaw admitted his guilt. *Id.*

that the impetus must come from the accused, and not the officers.[114] Under this test, any previous police-initiated interrogation must have ended prior to the suspect's alleged initial remarks, since he/she cannot "initiate" an ongoing interrogation.[115] Second, if it is found that the defendant "initiated" further conversation, it must then be determined if the accused waived his right to counsel and silence, "... that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities."[116]

In 1984, in *Smith v. Illinois*,[117] the Supreme Court was presented with its first opportunity to address an equivocal request for counsel. The Court noted that the issue was whether the accused had invoked his right to counsel so as to come within the *Edwards* test.[118] The Court recognized the three approaches for determining the consequences of such ambiguities but declined to adopt one.[119] The Court stated that "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease."[120] Hence, there appears to be the implication that only unambiguous requests will be sufficient for the recognition of the right to counsel.[121] However, the Court did not answer the question.

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[114] *Id.* at 1043.

[115] *See Id.*

[116] *Id.* at 1045.

[117] 469 U.S. 91 (1984).

[118] This occurs when the suspect's statements preceding or contemporaneous with the purported request for counsel make that request equivocal. The police arrested Smith and the interrogating officers advised him of his *Miranda* rights. *Id.* at 92-93. After the officers advised him of his right to counsel and asked him if he understood, Smith said: "Uh, yeah. I'd like to do that." *Id.* at 93. Instead of halting the interrogation, the detectives continued asking more questions about the right to counsel. *Id.* Smith replied ambiguously until he finally said that he would like to talk to the detectives. *Id.* Upon further questioning, Smith confessed and then invoked his right to counsel. *Id.* at 93-94. The detectives stopped the interrogation immediately. *Id.* at 94. Smith sought to suppress the confession, but both the trial court and the Illinois Appellate Court did not grant the request, deciding that Smith never made an effective request for counsel. *Id.* The Illinois Supreme Court affirmed, holding that Smith's statements were ambiguous and not an effective request for counsel. *Id.*

[119] *Id.* at 96 n. 3. "Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. Still others have adopted a third approach, holding that when an accused makes an equivocal statement that 'arguably' can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to 'clarify' the earlier statement and the accused desires respecting counsel."

[120] *Id.* at 98.

[121] *Id.*

In 1986, the Court in *Michigan v. Jackson*,[122] held that when the Sixth Amendment right to counsel has attached, "... 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."[123] The Court appeared to move toward a lower limit for invoking the right to counsel.[124] The Court stressed the need for protecting a suspect's rights, stating that "... we presume that the defendant requests the lawyer's services at every critical stage of the prosecution."[125] The Court's opinion that "... questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel..."[126] appears to have been an additional indication of the Court's willingness to accept ambiguous requests for counsel.

In 1987, the Court in *Connecticut v. Barrett*,[127] acknowledged for the first time the issue of the ambiguous request for counsel.[128] Though the Connecticut Supreme Court ruled that the ambiguous request for counsel amounted to an invocation to counsel for all purposes, the Supreme Court concluded otherwise stating: "Barrett's limited requests for counsel ... were accompanied by affirmative announcements of his willingness to speak with the authorities. The fact that officials took the opportunity provided by Barrett to obtain an oral confession is quite consistent with the Fifth Amendment. *Miranda* gives the defendant a right to choose between speech and silence, and Barrett chose to speak."[129] Inasmuch as Barrett refused to provide a written statement but would talk to the police, the Court said he only invoked a limited right to counsel.[130] The Court further stated that "... Barrett made clear his

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[122] 475 U.S. 625 (1986).

[123] *Id.* at 636. After the suspects invoked their right to counsel at an arraignment, the police continued the interrogation and elicited their confessions. *Id.* at 627-28. The Court held that the right to counsel attaches during arraignment interrogations, and as with any custodial interrogations, any waiver after an assertion of the right is invalid. *Id.* at 636. *See also Bannister v. Delo*, 100 F.3d 610, 620 (8th Cir. 1996).

[124] 475 U.S. at 636.

[125] *Id.*

[126] *Id* at 633.

[127] 479 U.S. 523 (1987).

[128] After the police advised Barrett of his *Miranda* rights, he said he would talk to the police, but would not "... give a written statement unless his attorney was present ...." *Id.* at 525. Thirty minutes later, the police gave Barrett his *Miranda* rights again, and once more, Barrett said he would talk, but would not provide any written statement. *Id.* He then confessed to the police. *Id.* When the police discovered that they had failed to record the confession, they advised Barrett of his right for the third time. *Id.* at 525-26. After Barrett reiterated his refusal to give any written statement and his willingness to talk, he confessed again. *Id.* at 526. The trial court rejected Barrett's request to suppress the confession, however the Connecticut Supreme Court reversed, deciding that Barrett "... had invoked his right to counsel by refusing to make written statements without the presence of his attorney." *Id.* at 526.

[129] *Id.* at 529.

[130] *Id.* at 529-30 n.3.

intentions," he invoked his right to have counsel present during a written statement, but waived his right to have counsel present while speaking with the authorities.[131]

In 1988, the Court in *Arizona v. Roberson*,[132] provided what appears to be its current approach to the issue of ambiguous request for counsel. The holding in this case suggests that the approach taken in *Edwards v. Arizona*[133] rather than *Michigan v. Mosely*[134] governs even when a subsequent interrogation deals with a different and unrelated crime.[135] In holding that once a suspect invokes the right to counsel, the police cannot initiate questioning, although the officers were not aware of the previous invocation[136] or if the questioning relates to another crime,[137] the Court's objective was to protect the suspect's right to counsel.[138]

In 1990, in *Minnick v. Mississippi*,[139] the Court clarified the "available to him" language in *Edwards* which means "... that when counsel is requested, interrogation

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[131] *Id.* at 529.

[132] 486 U.S. 675 (1988).

[133] *See supra* note 112. A request for counsel under the Edwards rule mandates that all interrogation must cease unless: (1) "the accused ... initiates further communication, exchanges or conversations with the police" or (2) counsel is physically present. Mere arrangements for an attorney or prior consultation with counsel are not sufficient. A violation of the rule results in suppression of the statements, even though the accused is readministered his rights to counsel and waives them. According to *Arizona v. Roberson*, the rule applies to reinterrogation about any crime under investigation, and the officer's good faith lack of knowledge that the accused previously has invoked the right to counsel is no excuse. However, the question of whether an in-custody suspect can be reinterviewed, in violation of Edwards, after a considerable passage of time remains unsettled. *See United States v. Green*, 592 A.2d 985, 988-91 (D.C.App. 1991)(confession suppressed despite passage of more than five months after suspect asked for counsel on an unrelated charge), (*cert. dismissed* after accused died) 113 S.Ct. 1835 (1993).

[134] *See supra* note 92.

[135] The police arrested Roberson for burglary and advised him of his *Miranda* rights. In reply, he stated that "... he 'wanted a lawyer before answering any questions'." *Id.* At 678. Three days later, while Roberson was still in custody, a different officer questioned him about a different burglary, unaware that Roberson had invoked his right to counsel earlier. *Id.* After giving Roberson his rights again, "... the officer obtained an incriminating statement." *Id.* The trial court and the Arizona Supreme Court agreed to suppress the statement. *Id.* at 678-79.

[136] *Id.* at 687-88. The Court noted: "Whether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists." *Id.*

[137] *Id.* at 682-83.

[138] *Id.* at 687-88. *See also Bassett v. Singletary*, 105 F.3d 1385, 1388 (11th Cir. 1997).

[139] 498 U.S. 146 (1990).

must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[140]

In 1994, the Court held in *Davis v. United States*,[141] that the privilege against further questioning does not extend to a suspect whose request for counsel is ambiguous.[142]

Before *Davis*, the Court had not decided what police officers should do when the initial request for an attorney is ambiguous.[143] The lower courts developed and followed one of three approaches.[144] Regarding the threshold-of-clarity standard, "... an attempted invocation of the right to counsel [would have to] satisfy a certain

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[140] *Id.* at 153. In *Minnick*, the Court addressed the issue of whether the protection against further interrogation in *Edwards* ended upon a suspect's consultation with an attorney. *Id.* at 147. The case involved a defendant who was arrested on suspicion of murder. *Id.* at 148. The suspect was read his *Miranda* rights by Federal Bureau of Investigation (F.B.I.) Agents and refused to sign a "rights waiver form" and said that "... he would not answer 'very many' questions." *Id.* at 148. The suspect gave the agents some information but told them to "... '[c]ome back Monday when I have a lawyer,' and stated that he would make a more complete statement ...." *Id.* at 148-49. After the F.B.I. interviewed the suspect, he spoke with a lawyer on two or three occasions. *Id.* at 149. A deputy sheriff came to question the suspect at the jail where he was being held. *Id.* Before he advised the suspect of his rights, the suspect told him that his "... jailers told him that he would 'have to talk' to [the deputy sheriff] and that he 'could not refuse'." *Id.* When the sheriff read the suspect his rights, the suspect refused to sign a rights waiver form and then confessed to the sheriff about the events regarding the crime. *Id.* The trial court allowed into evidence the statements made to the deputy sheriff, and the defendant was sentenced to death. *Id.* The Supreme Court of Mississippi held that the defendant's "... Fifth Amendment right to counsel was satisfied" as a result of his meeting with counsel and that the attorney did not have to be present during the later interrogation to protect the defendant's rights. *Id.* at 150. (quoting *Minnick v. State*, 551 So.2d 77, 83 (Miss. 1988), *cert. granted*, 495 U.S. 903, and rev'd., 498 U.S. 146 (1990)).

[141] 512 U.S. 452 (1994).

[142] *Id.* At 459. The defendant, Navy sailor Davis, was questioned by the Naval Investigative Service (N.I.S.) About the death of a fellow sailor. At the beginning of the interview, the N.I.S. agents informed the defendant that he had a right to remain silent, and that he was entitled to speak with an attorney and to have an attorney present during questioning. *Id.* at 454-55. The defendant, however, waived his rights, both orally and in writing. *Id.* at 455. About an hour and a half into the interview, the defendant said, "Maybe I should talk to a lawyer." *Id.* at 455. The interviewing agents momentarily stopped questioning the defendant and made it clear to him that they did want to violate his rights, and that they would stop the interrogation if he wanted a lawyer. *Id.* The defendant then responded, "No, I am not asking for a lawyer," and "No, I don't want a lawyer." *Id.* The agents, after again reminding the defendant of his rights, continued the questioning. *Id.* After another hour of questioning, the defendant said, "I think I want a lawyer before I say anything else." *Id.* At this point, the agents stopped the interview. Id.

[143] *See Connecticut v. Barrett*, 479 U.S. 523, 530 n. 3 (1987); *Smith v. Illinois*, 469 U.S. 91, 99-100 (1984).

[144] *See* Charles R. Shreffler, Jr., *Judicial Approaches to the Ambiguous Request for Counsel Since Miranda v. Arizona*, 62 Notre Dame L. Rev. 460 (1987).

threshold of clarity before it [could] be considered effective."[145] The other standard, was the "*per se* invocation standard."[146] Under this standard, each post-warning reference to an attorney by the suspect was considered a *per se* invocation of the right to counsel, and any questioning initiated by the police had to cease.[147] The third approach was the clarification standard.[148] Here, the courts permitted the police to pursue the interrogation for the purpose of clarifying the accused's intent following an ambiguous invocation of the right to counsel.[149]

2. The Miranda Rules (Non-Constitutional Status).

Although the *Miranda* rules appear to be inflexible and unyielding, neither the Court nor the lower courts appear to have applied a strict approach in their application. While compliance with *Miranda* is constitutionally required under all circumstances, the Court stated in *Michigan v. Tucker*[150] that:

> "The [*Miranda* decision] recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. ... The suggested safeguards were not intended to 'create a constitutional straightjacket,' ... but rather to provide practical reinforcement for the right against compulsory self-incrimination."[151]

The deviation from *Miranda* in the *Tucker* case appears to be the Court's pronouncement that the Fifth Amendment had not been violated in spite of the fact that the police did not completely comply with *Miranda* nor did they implement any substitute procedural safeguards.[152] Thus, the *Tucker* case appears to represent a weakening of the *Miranda* procedural safeguards inasmuch as it ignores a significant amount of the language in the *Miranda* case.

In *New York v. Quarles*,[153] police officers were approached by a woman who informed them that she had been raped by an armed man, who had gone into a

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[145] *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 Yale L. J. 259, 301 (1993).

[146] *Id.*

[147] *Id.*

[148] *Id.* at 302.

[149] *Id.*

[150] *Michigan v. Tucker*, 417 U.S. 433 (1974) (Case arose from a rape and battery committed by Tucker. Tucker was questioned without full *Miranda* warnings and gave exculpatory responses. Nonetheless, his statements led the police to a witness, Henderson, who gave testimony at trial that was damaging to Tucker. The issue was whether Henderson's testimony should have been excluded, since it was obtained indirectly through an interrogation that was not in compliance with *Miranda*).

[151] *Id.* at 444.

[152] *Id.* at 443-45.

[153] 467 U.S. 649 (1984).

nearby supermarket. The police located the suspect in the supermarket where they arrested him; a frisk uncovered an empty shoulder holster, and the arresting officer asked him, "Where is the gun?" The suspect gestured toward a stack of soap cartons and said, "The gun is over there," and the police found the revolver behind the cartons. The state courts excluded Quarles' response identifying the location of the gun he had discarded because he had not been given the *Miranda* warnings.[154] The Court reversed and concluded that "... on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given ...."[155] Similar to *Michigan v. Tucker*, the Court rejected the notion that the lack of *Miranda* warnings implied that a violation of the Fifth Amendment had occurred.[156] The Court described *Miranda* as a majority which was willing to impose procedural safeguards "... when the primary social cost of those added protections is the possibility of fewer convictions," which should be distinguished from the *Quarles* case whereby the harm would be the incapability "... to insure that further danger to the public did not result from the concealment of the gun in a public area."[157] Thus the Court concluded "... 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."[158] To hold otherwise, the Court in *Quarles* said police officers would be "... 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 and neutralize the volatile situation confronting them."[159]

In *Oregon v. Elstad*,[160] the Court rejected the narrow interpretation of the *Tucker* case and held that Tucker's "... 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."[161] In arriving at this

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[154] *Id.* at 653.

[155] *Id.* at 655.

[156] *Id.* at 657.

[157] *Id.* at 657.

[158] *Id.*

[159] *Id.* at 657-58.

[160] 470 U.S. 298 (1985).

[161] *Id.* at 308 (In Elstad, two officers questioned the defendant at his home without first giving him the *Miranda* warnings. When they expressed their belief that he had been involved in a burglary, he stated, "Yes, I was there." To the extent that this statement was excluded under *Miranda* was not an issue. However, the defendant was questioned again at the Sheriff's headquarters; there, after being given the *Miranda* warnings, and after waiving his rights, he made a full statement explaining his involvement in the burglary. The defendant argued that his statement should be excluded as the fruit of the poisonous tree, however, the Court held that the poisonous fruit doctrine did not apply).

conclusion, the Court once more rejected the concept that a violation of *Miranda* necessarily involves a violation of the Fifth Amendment.[162]

As in *Michigan v. Tucker*, the Court in *New York v. Quarles* rejected the contention that the absence of warnings implied that compulsion in violation of the Fifth Amendment had taken place. Hence, these cases suggest that circumstances may exist such as "public safety" which may justify an exception or repudiation of the doctrinal basis of the *Miranda* decision.

3. Pretrial Silence.

In *Harris v. New York*,[163] the defendant upon direct examination denied having made the charged sale of heroin to the undercover agent. He countered the officer's testimony as to the sale with testimony that he had sold the officer what appeared to be heroin, but the bags contained only baking powder. The prosecutor was allowed to impeach the defendant's credibility by referring to a statement made by him to the police which concededly made that statement inadmissible under *Miranda*. The Court held that the pretrial statements obtained in violation of *Miranda* can be used at trial for impeachment regardless of the contrary dictum in the *Miranda* case.[164] This raised the issue of whether a defendant's silence during custodial interrogation can be used for impeachment purposes, in view of the dictum in *Miranda*[165] advancing the concept that the prosecution cannot use this silence at trial.

In *Doyle v. Ohio*,[166] the Court held that impeachment by the defendant's post-arrest silence after he had received the *Miranda* warnings was impermissible. The Court said not only is "... every post-arrest silence ... insolubly ambiguous because [it] ... may be nothing more than the arrestee's exercise of [his/her] *Miranda* rights,"[167] but also, use of the silence to impeach "... would be fundamentally unfair and a deprivation of due process...." considering the fact that the warnings carry the implicit "... assurance that silence will carry no penalty ...."[168]

The Court distinguished *Doyle v. Ohio* in three subsequent cases. In *Anderson v. Charles*,[169] the Court allowed impeachment by prior inconsistent statements which were given after the *Miranda* warnings. The Court said, *Doyle* bars the use against a criminal defendant of his silence after receipt of governmental assurances that he

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[162] *Id.* at 305.

[163] 401 U.S. 222 (1971). *See also United States v. Moore*, 104 F.3d 377, 388 (D.C. Cir. 1997).

[164] *Id.* at 224-25. *See also Oregon v. Hass*, 420 U.S. 714 (1975) (The same result was reached, although here the suspect was advised of his right for which he then asked for counsel but was questioned without his request being honored).

[165] 384 U.S. at 468 n. 37; 401 U.S. at 230-31 (Brennan, J. dissenting).

[166] 426 U.S. 610 (1976).

[167] *Id.* at 617.

[168] *Id.*

[169] 447 U.S. 404 (1980).

will suffer no adverse consequences of any sort for remaining silent.[170] However, "... *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements."[171] This "questioning [process] makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent."[172]

In *Jenkins v. Anderson*,[173] where at his murder trial, the defendant claimed self defense, the Court decided that it was permissible to impeach that story by the defendant's prearrest silence in not reporting the murder to the police for at least two weeks. Likewise, in *Fletcher v. Weir*,[174] the Court followed the rationale of *Jenkins* and made a distinction between *Doyle* in allowing impeachment by the use of post-arrest silence which was not proceeded by *Miranda* warnings, reasoning that this was not "... a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him."[175] In effect, the Court held that the silence of a suspect in custody prior to his receipt of *Miranda* warnings can be admitted for impeachment based upon the following reasoning:

> "The significant difference between the present case and *Doyle* is that the record does not indicate that respondent Weir received any Miranda warnings during the period in which he remained silent immediately after his arrest....[176]
>
> In *Jenkins*, as in other post-*Doyle* cases, we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him....[177]
>
> In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a state to permit cross-examination as to postarrest silence when a defendant chooses to take the stand."[178]

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[170] *Id.* at 408.

[171] *Id.*

[172] *Id.*

[173] 447 U.S. 231 (1980).

[174] 455 U.S. 603 (1982).

[175] *Id.* at 606.

[176] *Id.* at 605

[177] *Id.* at 606.

[178] *Id.* at 607.

Overcoming the *McNabb/Mallory* Rule

18 U.S.C. § 3501[179] was meant to overrule the exclusion of voluntary confessions due to the Court's ruling in *McNabb v. United States,*[180] and *Mallory v. United States*.[181] The Senate Judiciary Committee conducted extensive hearings on the effect of the Court's rulings in *McNabb* and *Mallory* on crime and concluded that they constituted the basis for "[t]he rigid, mechanical exclusion of an otherwise voluntary and competent confession [and it] is a very high price to pay for a 'constable's blunder'."[182]

The rationale of 18 U.S.C. § 3501 was stated as follows in the Senate Committee Report:

> [C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities. The traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored.[183]
>
> The case of *Escobedo v. Illinois* ... set the stage for another most disastrous blow to the cause of law enforcement.... This case... formed the basis for... *Miranda v. Arizona*... In *Miranda*, the Supreme Court held that an otherwise voluntary

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[179] Section 3501 governs the admissibility of confessions brought in criminal proceedings under federal jurisdiction. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 354 (1994). In subsection (a), federal judges are instructed to admit a confession if it "... was voluntarily made ...." To determine the voluntariness of a confession, subsection (b) directs the trial judge to:

> "... take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession." § 3501(b).

[180] *See McNabb, supra* note 30.

[181] *See Mallory, supra* note 34; S.Rept. No. 1097, 90th Cong., 2d Sess. 40 (1968); *Norfolk v. Houston*, 941 F. Supp. 894, 902 (D. Neb. 1995) *United States v. Headdress*, 953 F. Supp. 1272, 1292 (D. Utah 1996).

[182] *See* S.Rept. No. 1097, *supra* note 181, at 38.

[183] *Id.* at 37.

confession ... could not be used in evidence unless a fourfold warning had been given....[184]

The Committee is convinced ... that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement. ... The unsoundness of the majority opinion was forcefully shown by the four dissenting justices, who also predicted the dire consequences of overruling what theretofore had been the law of the land....[185]

[The *Miranda*] decision was an abrupt departure from precedent extending back at least to the earliest days of the Republic. Up to the time of the rendition of this 5-to-4 opinion, the "totality of circumstances" had been the test in our State and Federal courts in determining the admissibility of incriminating statements.... Mr. Justice White's dissent... demonstrates beyond question that ... warnings as to constitutional rights were not required by the Constitution, and that the sole test of admissibility should be "totality of circumstances" as bearing on voluntariness.[186]

The committee is of the view that the [proposed] legislation ... would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws. By the express provisions the proposed legislation the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination. Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors.[187]

The committee is aware that a few have expressed the view that legislation by Congress restoring the voluntariness test to the admissibility of confessions and incriminating statements would be declared unconstitutional, on the ground that the provisions do not measure up to the rigid standards set forth in *Miranda.* The committee is also aware that the opinions of the four dissenting Justices clearly indicate that neither of them would consider these provisions unconstitutional.[188]

The committee feels that it is obvious from the opinion of Justice Harlan and other dissenting Justices... that the overwhelming weight of judicial opinion in this country is that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right. No one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted. The committee has concluded that this approach to the balancing of the rights of society and the rights of the individual served us well over the years, that it is constitutional and that Congress should adopt it, After all, the *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself. The committee feels

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[184] *Id.* at 41.

[185] *Id.* at 46.

[186] *Id*. at 48-49.

[187] *Id*. at 51.

[188] *Id.*

> that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that this legislation would be upheld.[189]

By replacing the *McNabb/Mallory* rule, Congress did not completely eliminate the exclusion of confessions obtained during a delay in presentment. Instead, Congress provided for a six-hour period in which the confession must be made or given following the arrest or other detention.[190] Confessions which have been obtained up to six hours after arrest and before presentment are not to be considered inadmissible by a delay in presentment.[191] It should also be noted that when Congress enacted the statute, it did not intend for every confession made after the six-hour period to be inadmissible.[192] Therefore, it would appear that 18 U.S.C. § 3501(c) has in effect rejected the *McNabb/Mallory* rule for confessions obtained within six hours of arrest or detention. However, this will not be definitively determined until a case comes before the Court which involves a confession made more than six hours after arrest during a delay in presentment.

The Suspension in Implementation of Section 3501

In addition to the *McNabb* and *Mallory* line of decisions which subsection (c) overrules, section 3501 also stemmed from congressional reaction to *Miranda*.[193] It was stated that "[t]he legislation was designed to overrule *Miranda v. Arizona* and certain other decisions that were perceived to be detrimental to law enforcement."[194] The Senate Report provided that "... crime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities."[195] It also viewed the requirements of *Miranda* as "... rigid and inflexible requirements [and they were] unreasonable, unrealistic, and extremely harmful to law enforcement."[196]

Not only was there tension between Congress and the Court over the *Miranda* decision, there was also the lack of a warm reception for section 3501, following its enactment, by the incumbent Administration. Upon signing the Omnibus Crime Control and Safe Streets Act of 1968, President Johnson indicated in his statement

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[189] *Id.*

[190] 18 U.S.C. § 3501 (c) (1994).

[191] *Id.*

[192] *Id.*

[193] One year after the Court decided the *Miranda* decision, Congress passed 18 U.S.C. § 3501, for the purpose of weakening the *Miranda* warnings. *See The Jury And The Search For Truth: The Case Against Excluding Relevant Evidence At Trial: Hearings Before The Committee On The Judiciary, 104th Cong., 1st Sess. 116 (1995).*

[194] Office of Legal Policy, United States Department of Justice, Report to the Attorney General on the Law of Pretrial Interrogation (1986), reprinted in 22 U. Mich. J. L. Ref. 437, 512 (1989) (hereafter Office of Legal Policy).

[195] S.Rept. 1097, *supra* note 181, at 37.

[196] *Id.* at 46.

that he did not believe section 3501 was constitutional as it was intended and stated that it was ambiguous.[197] Excerpts from his signing statement are as follows:

> "Title II of the legislation deals with certain rules of evidence only in Federal criminal trials—which account for only 7 percent of the criminal felony prosecutions in this country. The provisions of Title II, vague and ambiguous as they are, can, I am advised by the Attorney General, be interpreted in harmony with the Constitution and Federal practices in this field will continue to conform to the Constitution.
>
> > Under long-standing policies, for example, the Federal Bureau of Investigation and other Federal law enforcement agencies have consistently given suspects full and fair warning of their constitutional rights. I have asked the Attorney General and the Director of the Federal Bureau of Investigation to assure that these policies will continue."[198]

Pursuant to this directive, the Attorney General informed the U.S. Attorneys to submit for evidence only those confessions which complied with *Miranda*.[199] As a result of the effect which section 3501 had on the Administration, this probably provided the basis for it not being used immediately following its enactment.[200]

In *United States v. Leong*,[201] the Department of Justice, in response to an order from the U.S. Court of Appeals for the 4th Circuit,[202] directing it to state its views regarding the effect of 18 U.S.C. §3501 on the admissibility of Leong's confession, its constitutionality, and its possible effects on *Miranda*,[203] said that *Miranda* is the law and it would not be appropriate for a lower court to apply the statute in lieu of *Miranda's* requirements without the Supreme Court first reconsidering *Miranda*.[204] The Department also said that "[t]he Supreme Court ... is the final authority on the scope and interpretation of constitutional provisions, and when ... the Court has announced a constitutional rule based on its authority to explicate the Constitution,

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[197] 4 Weekly Comp. Pres. Doc. 981, 983 (June 24, 1968).

[198] *Id.* at 983.

[199] *See* Gandara, *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts*, 63 Geo. L. J. 305, 311-12 (1974).

[200] *See Davis v. United States*, 512 U.S. 452, 462-64 (1994)(Scalia, J., concurring). At a minimum, Justice Scalia's concurrence confirms that the Department of Justice continues not to use § 3501).

[201] 116 F.3d 1474 (4th Cir. 1997)(Supplemental Brief No. 96-4876)(Unpublished Disposition) The Court of Appeals affirmed the suppression by the U.S. District Court for the District of Maryland of a confession by Tony Leong, who was arrested for the possession of an illegal firearm without first being read his rights. The government did not raise 18 U.S.C. §3501 and, following the decision dropped the case against Leong by not petitioning for a rehearing *en banc*.

[202] *See* Supplemental Brief, page 2.

[203] *See* Supplemental Brief 2, page 5.

[204] *Id.* at 6-7.

the Executive cannot properly urge lower courts to disregard that rule in favor of a contrary rule established by Congress.[205]

Two years after *Leong*, the same court in *United States v. Dickerson*[206] decided that a confession is voluntary under the criteria set forth in 18 U.S.C. §3501 and it is admissible in evidence in federal criminal trials even if the requirements of *Miranda* are not satisfied. In the 2-1 ruling, the panel decided that the statute superseded the landmark ruling in *Miranda.* The Fourth Circuit identified the principal issue as whether the *Miranda* warnings are required by the Fifth Amendment. If they are not according to the panel, they would be more like Federal Rules of Evidence or "prophylactic" warnings which are not protected by the Constitution for which Congress can modify or eliminate as it sees fit.[207] If on the other hand, the Fifth Amendment mandates the warnings, Congress can't modify it through the enactment of 18 U.S.C. § 3501. The panel held that *Miranda* is a rule of law, and not an explicit constitutional requirement that defendants be told of their right to counsel and to remain silent.[208] It also decided that section 3501 was enacted under Congress' "... legislative authority ... to prescribe the rules of procedure and evidence in the federal courts."[209] The Fourth Circuit, sitting *en banc*, could vacate the panel's decision or it may be appealed to the Supreme Court. Until such time, federal law enforcement officials in the Fourth Circuit who fail to advise defendants of their *Miranda* rights may still be able to use their voluntary statements. State officials, however, remain bound by *Miranda*, because the statute only applies to federal prosecutions.

On December 6, 1999, the Supreme Court granted *certiorari* in *Dickerson v. United States*.[210] Although the Justice Department prosecuted Dickerson, it took his side in the case despite opposition from federal prosecutors around the nation. In urging the Court to hear the case, Attorney General Janet Reno and Solicitor General Seth Waxman recommended that the Court reaffirm *Miranda* for the sake of precedent and public confidence in the fairness of the legal system.[211] On June 26, 2000, the Supreme Court, in a 7-2 ruling, said in *Dickerson v United States*[212] that the police are still required to give the *Miranda* warnings. The Court said that the *Miranda* warnings are more than prophylactic; the decision in itself represents rights which are protected from unwarranted interrogation under the Fifth Amendment in

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[205] *Id.* at 24.

[206] 166 F.3d 667 (4th Cir. 1999). Upon hearing the news that his home was being searched following a robbery, Dickerson confessed to driving the getaway car. Later, he moved to suppress the evidence against him because he had been in custody, and the police had interrogated him without first reading him his rights.

[207] *Id.* at 689.

[208] *Id*.

[209] *Id*. at 691. 120 S. Ct. 578.

[210] *Cert. granted*, 528 U.S. 1045 (1999).

[211] *See Dickerson v. United States*, On Petition for Writ of *Certiorari*, Brief for the United States, In the Supreme Court of the United States, No. 99-5525.

[212] 530 U.S. 428 (2000).

state and federal courts.[213] Writing for the Court, Chief Justice Rehnquist stated that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively"[214] by enacting a long ignored 1968 law know as Section 3501. In conformity with the rule of *stare decisis*, the Court said "we decline to overrule Miranda...."[215]

Justices Antonin Scalia and Clarence Thomas dissented. Writing for the two, Justice Scalia stated that the decision "... converts *Miranda* from a milestone of judicial overreaching into ... [one] of judicial arrogance."[216]

After Dickerson

In *Missouri v. Seibert*,[217] Seibert was convicted of plotting to set a fire that killed a teenager who had been staying at the family home. The police said she arranged to have her home burned to cover up the death of her 12-year-old son, who had cerebral palsy. Seibert had been worried that she would be charged with neglect in her son's death.

Seibert was questioned for about 40 minutes at 3:00 a.m. a few days after the fire without first being given her *Miranda* warning. At the end of the interrogation, she admitted the fire was set to cover up the death of her son. After a 20-minute break, police read the *Miranda* warning, then turned on a tape recorder and confronted her about the statements she had just made.

Seibert was convicted of second-degree murder, but she successfully appealed to the Missouri Supreme Court to have the statements suppressed in court. The U.S. Supreme Court upheld the ruling.

Testimony revealed that this two-stage questioning often works because suspects may be more willing to talk before they are told they have a right to remain silent.[218] However, the Court noted a growing and worrisome trend in this technique found in many national police training manuals and classes.[219] As a result, the practice raised the issue of whether the rule established in *Oregon v. Elstad*,[220] 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

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[213] *Id*. at 434-435.

[214] *Id* at 437. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined.

[215] *Id*. at 443.

[216] *Id*. at 465.

[217] 124 S.Ct. 2601 (2004).

[218] 124 S.Ct. at 2608.

[219] 124 S.Ct. at 2608-609.

[220] 470 U.S. 298 (1985).

requisite *Miranda* warnings, is abrogated when the initial failure to give the *Miranda* warnings was intentional?

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, in a plurality opinion, concluded that, the postwarning statements were not admissible. The test used by the plurality was whether the intervening *Miranda* warnings, when considered in conjunction with the police officer's prewarning questions and the admissions already made by the defendant, were effective in advising the suspect regarding her postwarning rights.

In applying this test, the plurality focused on the defendant's position and emphasized several of the most excessive events during the "two-step interrogation": the interrogation took place in the station house; the questioning was "systematic, exhaustive, and managed with psychological skill"; the prewarning interrogation caused the suspect in a substantial manner to incriminate herself; and the interrogating police officer did nothing to remedy the defendant's likely misimpression that her prewarning statements would be used against her. These facts, said the plurality, served to distinguish this case from *Oregon v. Elstad*.[221]

The plurality held that their approach was not an application of the "fruit of the poisonous tree" doctrine.[222] However, Justice Breyer in concurrence wrote that "...the plurality's approach in practice will function as a 'fruits' test."[223] Justice Breyer would also apply "... the following simple rule...to the two-stage interrogation technique: Courts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith."[224]

Concurring in the judgment, Justice Kennedy would apply a "narrower" test "... in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning."[225] "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."[226] In other words, the Court left the door open for police to use some confessions obtained after double interviews by proving the interrogation was not done "... in a calculated way to undermine the *Miranda* warning."[227]

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[221] 124 S.Ct. at 2611-612.

[222] 124 S.Ct. at 2610.

[223] *Id.* at 42613.

[224] *Id* .

[225] *Id.*.at 2616.

[226] *Id.*.

[227] *Id.*

Justice O'Connor, with whom Chief Justice Rehnquist, and Justices Scalia, and Thomas joined dissenting, agreed with the plurality in two areas: the "fruit of the poisonous tree" doctrine does not apply; and the subjective intent of the interrogating officer cannot be easily determined and may be more complicated in other situations which are likely to occur and therefore should be irrelevant.[228] This would make it difficult for lower courts to determine if officers had gone too far. Future courts deciding on admissibility of such statements, she wrote, "... will be forced to conduct the kind of difficult, state-of-mind inquiry that we normally take pains to avoid."[229] As opposed to the test adopted by the plurality, the dissent would adopt a different test. If the prewarning admissions were involuntary, the postwarning admissions should only be excluded under two circumstances: (a) following *Elstad*, if the first statement is shown to have been involuntary "the court must examine whether the taint dissipated through the passing of time or a change in circumstances" and (b) if the postwarning statements were involuntary despite the *Miranda* warnings.[230]

The Court, in affirming the Missouri Supreme Court's ruling in *Seibert* in which the interrogating officer testified that he deliberately violated *Miranda*, upheld its ruling in *Dickerson v. United States*,[231] which affirmed that *Miranda* rights are constitutionally based. The Court said: "Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."[232]

In *United States v. Patane*[233] the police officers failed to give the defendant *Miranda* warnings after arresting him for violating a restraining-order and before questioning him about a weapon which was recovered based on the defendant's voluntary statement that he possessed it. The defendant interrupted the police before they could finish giving him his *Miranda* rights, asserting that he knew his rights. The Court considered the issue of whether the failure to properly Mirandize the defendant requires the suppression of the physical evidence which was obtained as a result of the inadmissible, though uncoerced, questioning. The 10th Circuit ruled in Patane's favor, concluding that the confiscated gun could not be used as evidence in court. The 10th Circuit based its decision on the landmark 2000 Supreme Court ruling in *Dickerson v. United States*, which held that *Miranda* rights are constitutional in nature, not merely prophylactic in application. Before *Dickerson*, Miranda rights were seen as a mere safeguard to ensure that law enforcement officials didn't abuse their power to get suspects to confess.

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[228] *Id.*.

[229] *Id.* at 2619.

[230] *Id.*

[231] 530 U.S. 428 (2000)(reaffirmed *Miranda*, holding that *Miranda's* constitutional character prevailed against a federal statute that sought to restore the old method of giving no warnings and litigating most statements which were considered to have been given voluntarily).

[232] 124 S.Ct. at 2612.

[233] 72 U.S.L.W. 4643 (June 28, 2004).

An earlier Supreme Court case such as the Court's opinion in *Oregon v. Elstad* refers to the evidence resulting from an illegal search under the 4th Amendment as "fruits of the poisonous tree," which are not admissible in court. The 10th Circuit ruled that the poisonous fruit doctrine also applied to confessions obtained in violation of a defendant's 5th Amendment protection against self-incrimination.

The government appealed, arguing that the poisonous fruit doctrine does not apply to physical evidence obtained through an un-Mirandized confession. The Supreme Court was asked to settle a disagreement that had arisen between the 10th Circuit and other circuit courts over the past few years.

Justice Thomas, writing for a plurality, which included Justice, Scalia and Chief Justice Rehnquist concluded that suppression was not necessary. The opinion is based on the Court's last term decision in *Chavez v. Martinez,*[234] which held that the Self-Incrimination Clause in the Fifth Amendment is not violated until a defendant's self-incriminating statements are sought to be admitted at trial.[235] Because the failure to provide *Miranda* warnings is not itself a constitutional violation, there is no justification for fashioning a "fruit of the poisonous tree" doctrine in this context in order to deter a non-Mirandized questioning.[236]

Justice Kennedy, with whom Justice O'Connor concurred in the judgment, opined that the practical justifications for admitting the physical evidence in this case were stronger than the justifications for admission in prior cases in which the Court had permitted the admission of evidence obtained during an unwarned interrogation. However, unlike the plurality, Justice Kennedy found it "unnecessary to decide whether the detective's failure to give [the defendant] 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."[237]

Dissenting, Justice Souter writing for Justices Stevens and Ginsburg described as "beside the point" the majority's denial that the Fifth Amendment Self-Incrimination Clause addresses the admissibility of nontestimonial evidence.[238] The real issue, Justice Souter wrote, is whether a "fruit of the poisonous tree" doctrine should be applied lest we create an incentive for the police to omit *Miranda* warnings.[239] "In closing their eyes to the consequences of giving an evidentiary advantage to those who ignore *Miranda*, the majority adds an important inducement for interrogators to ignore the rule in that case."[240] Justice Breyer dissented

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[234] 538 U.S. 760, 764-768 (2003).

[235] 124 S.Ct. at 2626.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

separately, writing that he would extend the "fruit of the poisonous tree approach" to the instant case.[241]

In *Yarborough v. Alvarado*,[242] Detective Cheryl Comstock informed Maria Alvarado that her son, Michael, may have seen something or known something about an incident that had happened and could help with the investigation. Detective Comstock picked up Mrs. Alvarado and her husband along with 17-year-old Michael and went to the sheriff's station for the interview at approximately 12:30p.m.

When Michael's parents asked Detective Comstock if they could be present during the interview, she denied their request.

What followed was a two-hour interview conducted solely by Comstock in a room that was behind a locked door. During this time, Comstock questioned Michael about the night of September 22, 1995, which left Francisco Castaneda dead from a bullet wound. Comstock never told Michael that he was under arrest and did not give him *Miranda* warnings explaining his 5th Amendment privileges against self-incrimination. Nor was Michael given a statement to sign indicating that he was voluntarily participating in the interview.

When Michael first explained his version of the events of the night in question, he did not mention the shooting or his role in hiding the gun. When Comstock "expressed disbelief" at Michael's story and told him she had witnesses who had said "quite the opposite," Michael started relaying details of the shooting and the hiding of the gun. It was only after Michael began divulging this information that Detective Comstock informed him he would be free to go home after the interview.

Michael eventually explained the events that took place after midnight on September 22. He, Paul Soto and some others went to a shopping mall in Santa Fe Springs, California. There, they saw Castaneda's truck and attempted to steal it. Soto went to the driver's side of the truck while Michael approached the passenger's side and Soto fired a shot killing Castaneda.

Two months later, Detective Comstock again called Maria Alvarado at work, this time to inform her that Michael had been charged with second-degree murder and attempted robbery.

Before trial, Alvarado moved to have the court exclude from trial the statements he made to Detective Comstock because his parents were not allowed to be present during the interview. The prosecution stated that *Miranda* warnings were not required because Alvarado was not "in custody" during the interview. The 9th Circuit Court of Appeals, held that because Alvarado was a juvenile who had never been arrested and had no prior experience with law enforcement officials, and because his parents brought him to the sheriff's station and were not allowed to be present during the interrogation, Alvarado was objectively "in custody" when he was questioned. The court did not believe that "a reasonable 17-year-old in Alvarado's position would

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[241] *Id.*

[242] 124 S.Ct. 2140.

have felt free to terminate the interview and leave, and ruled that the improper admission of Michael's incriminating statements by the state court had a substantial and injurious affect on the subsequent jury verdict.[243]

The Court upheld the police interrogation by a vote of 5-4, in deciding that the California courts had considered the proper factors in reaching its conclusion that Michael Alvarado was not in custody for *Miranda* purposes during his police interview.

Since the case was in the context of a federal *habeas corpus* petition, the issue was not directly whether Michael Alvarado was in custody or not but whether the state court's decision that he was not was "unreasonable." The majority, in considering all of the facts, believed that it was not unreasonable for the courts to conclude that he was not in custody: The police did not transport him to the station, require him to appear at a particular time, threaten him or suggest he would be placed under arrest; Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief; police appealed to Alvarado's interest in telling the truth and being helpful to a police officer; police twice asked Alvarado if he wanted to take a break; and, at the end of the interview, he went home.[244]

Although the Court concluded that the state failed to consider Alvarado's age and inexperience in deciding that the interview was not custodial, that in itself, it said, would not make the state's decision unreasonable.[245]

The dissent, written by Justice Breyer, concluded that Alvarado was clearly "in custody" when the police questioned him and therefore entitled to *Miranda* warnings. Justice Breyer posed the following question and facts: "what reasonable person in the circumstances-brought to a police station by his parent at police request, put in a small interrogation room, questioned for a solid two hours, and confronted with claims that there is strong evidence that he participated in a serious crime, could have thought to himself, 'well, anytime I want to leave I can just get up and walk out?'"[246]

In *Fellers v. United States*,[247] the Supreme Court was contending with standards governing the admissibility of statements that emerge from two different constitutional protections: (1) a "custodial interrogation" standard applicable to Fifth Amendment self-incrimination cases (the typical *Miranda* situation and (2) the Sixth Amendment right to counsel standard which is used to determine the admissibility of statements made in the absence of counsel or a waiver of counsel. The Court held that officers who went to the home of an indicted defendant to execute an arrest warrant violated his right to counsel by discussing the charge against him in the absence of his counsel. The petitioner, Fellers, was arrested at his home on an arrest

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[243] *Id*. at 2147.

[244] *Id.* 2149-150.

[245] *Id*. at 2152.

[246] *Id.* at 2153.

[247] 124 S.Ct. 1019(2004).

warrant following a federal indictment. He made incriminating statements before being advised of his rights, in response to comments by the police officers that he had been indicted and they were there to discuss both the amphetamine indictment in which he was charged and his association with other suspects. He was later Mirandized at the police station and reiterated his admissions. The Eighth Circuit, while acknowledging that the defendant's incriminating statements made in response to questioning at the time of the arrest must be suppressed, held that subsequent confirming statements, made after the defendant received *Miranda* warnings at the police station, did not have to be suppressed.

The Eighth Circuit concluded that even though the defendant, "responded by stating that he had associated with the named persons and that he used amphetamine," the police conduct did not amount to "a post-indictment interview" with the defendant (in violation of his Sixth Amendment right to counsel) and that the second *Mirandized* statement, reiterating these inculpatory admissions, was voluntary.

The issues presented to the Supreme Court were: (a) did the Eighth Circuit err when it concluded that Feller's Sixth Amendment right to counsel under *Massiah v. United States*[248] was not violated because he was not interrogated by government agents when the proper standard under Supreme Court precedent is whether the government agents deliberately elicited information from him, or must a formal "interrogation" take place in order to establish the right to counsel; and (b) should the second statements, preceded by *Miranda* warnings, have been suppressed as fruits of an illegal post-indictment interview without the presence of counsel.

Writing for a unanimous Court, Justice Sandra O'Connor said the Eighth Circuit Court of Appeals erred in holding that the absence of an "interrogation" foreclosed petitioner's claim that his jailhouse statements should have been suppressed as fruits of the statements taken from him at his home.[249] Under the Sixth Amendment, "deliberate elicitation" is the proper standard, not whether there was "interrogation."[250] Here, the officers deliberately elicited a response by Fellers after he had been indicted, outside of his counsel's presence, and without any waiver of his Sixth Amendment rights.[251] This violates *Massiah v. United States*.[252] As a result, the correct exclusionary rule analysis is under *Massiah*, and not *Miranda*.[253] The difference between *Massiah* and *Oregon v. Elstad*[254] appears to be that while *Elstad* would permit statements that are knowing and voluntary, even if they are poisonous fruits of any earlier *Miranda* violation, the Court has yet to allow *Elstad* to be applied under the same circumstances to a *Massiah* infraction or breach. The

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[248] 377 U.S. 201 (1964).

[249] 124 S.Ct. at 1020.

[250] *Id.*

[251] *Id.*

[252] 377 U.S. 201, 206 (1964).

[253] 124 S.Ct. at 1023.

[254] 470 U.S. 298 (1985).

Eighth Circuit was directed to consider the issue of whether the Sixth Amendment's exclusionary rule allows an exception similar to the Fifth Amendment's exclusionary rule recognized in *Oregon v. Elstad*.[255] The Court's decision also upholds the rule that law enforcement officers' contact with a defendant who has been formally charged outside of his counsel's presence does not have to rise to the level of a formal "interrogation" for the contact to violate the Sixth Amendment right to counsel.

Regarding the second issue of whether the second statement, preceded by *Miranda* warnings should have been suppressed as fruits of an illegal post-indictment interview without the presence of counsel, the Court said the Court of Appeals should address this issue on remand, considering the ruling that the first questioning was unconstitutional.[256] The Court appears to recognize that indicted individuals have special rights but chose not to decide how far those rights extend.

Overview

Since the Fifth Amendment right against self-incrimination did not apply to the states until 1964,[257] its relevance to the admissibility of pretrial statements was limited to federal proceedings. In the earliest cases, beginning in the late nineteenth century, issues of admissibility were decided on the basis of the rule excluding involuntary confessions. During the early 1940s to the late 1950s, these issues were viewed in terms of an exclusionary rule that the Court created to enforce the requirements of federal statutory law that the accused be brought promptly before a magistrate.

The inapplicability of the Fifth Amendment to the states prior to 1964 did not mean that the interrogation process was free of federal judicial scrutiny. Those coercive practices that were considered extreme were held to be inadmissible pursuant to the Fourteenth Amendment due process clause. The germinal case, *Brown v. Mississippi*, in which the Court overturned a murder conviction based upon a confession that had been obtained through torture (hanging and whipping) was considered a violation of the Fourteenth Amendment due process clause.

In the area of police procedures, two decisions had a very close and significant relationship to the *Miranda* decision (*Massiah v. United States* and *Escobedo v. Illinois*). The *Massiah* decision was notable for the extension of the right to counsel to police interrogation. The *Escobedo* case, while grounded upon the Sixth Amendment right to counsel, spoke without reservation of "the right of the accused to be advised by his lawyer of his privilege against self-incrimination."

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[255] *Id.*

[256] 124 S.Ct. at 1023 (The Court said the Eighth Circuit improperly conducted its "fruits" analysis under the Fifth Amendment (custodial interrogation standard) rather than the standards of the Sixth Amendment (right to counsel)).

[257] *See Malloy v. Hogan, supra* note 26.

Two of the most famous elements of *Miranda* are the Court's creation of a *per se* right to consult with counsel during interrogation, and its creation of a *per se* right to be informed that the privilege applies at the police station. The third most famous element of *Miranda* is the Court's determination that "prophylactic" rules are necessary to reduce the inherent coercion which is prevalent in a majority of the custodial interrogations.

Since the *Miranda* decision set forth the right to counsel in 1966, the Court had not defined with sufficient clarity what was required in order to invoke the right to counsel. The lower courts have adopted one of three approaches: the threshold-of-clarity standard, the "*per se* invocation standard," and the clarification standard.[258] When the Court addressed the issue in *Davis v. United States*, many observers were surprised when it chose the clarification standard which allowed the police to ignore an ambiguous request for counsel and continue their interrogation.

Section 3501 of 18 U.S.C. was enacted as a result of the congressional reaction to *Miranda*. The legislation was designed to overrule *Miranda* and certain other decisions that were perceived to be detrimental to law enforcement.

The Court's decision in *Michigan v. Tucker* appeared to declare that the *Miranda* safeguards are no longer viewed as rights protected by the Constitution; they were considered as Court imposed procedural rules. In view of the Court's decisions in *Dickerson v. United States*, which held that *Miranda* announced a constitutional rule that Congress may not supersede legislatively nor may "strategists" drain the substance out of the warnings by training instructors,[259] the *Miranda* warnings appeared to be stronger than at any time in their controversial history. However, considering the decisions in the four cases (Seibert, Patane, Fellers, and Alvarado) which were decided during the 2003-2004 term of the Court (with two favoring law enforcement and the other two placing additional restrictions on the police), it is difficult to determine what the current limits are with regards to the guarantees under the *Miranda* decision.

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[258] *See supra* text accompanying notes 144-49.

[259] *See Missouri v.Seibert*, 124 S.Ct. 2601(2004).