Journal of Criminal Law and Criminology

Volume 80
Issue 4 *Winter*

Article 7

Winter 1990

Fifth Amendment--Coercion and Clarity: The Supreme Court Approves Altered Miranda Warnings

David B. Altman

0091-4169/90/8004-1086
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 80, No. 4

Printed in U.S.A.

FIFTH AMENDMENT—COERCION AND CLARITY: THE SUPREME COURT APPROVES ALTERED MIRANDA WARNINGS

Duckworth v. Eagan, 109 S. Ct. 2875 (1989).

I. INTRODUCTION

In *Duckworth v. Eagan*,[1] the United States Supreme Court ruled that advising a suspect that counsel could only be appointed for him "if and when you go to court" does not render *Miranda*[2] warnings inadequate because the warnings in *Duckworth* reasonably conveyed to the suspect his rights.[3] This opinion is justified since the warnings in *Duckworth* accurately reflect the procedure employed in obtaining appointed counsel. Thus, criticism of the warnings should be directed at this procedure and not at the content of the warnings. In a concurring opinion, the Court also hinted that it would consider extending *Stone v. Powell*[4] to bar the relitigation in federal habeas corpus proceedings of nonconstitutional claims under *Miranda*.[5] This extension of *Stone* would be inappropriate since applying the reasoning in *Stone* to *Miranda* claims would not lead to the exclusion of those claims in habeas proceedings.

II. FACTS OF THE CASE

On the evening of May 16, 1982, Gary James Eagan (hereinafter "Eagan") and some companions picked up a woman in South Chicago, Illinois.[6] They then joined a larger group and drove to a beach in Indiana along the Lake Michigan shoreline where the woman had sex with several men in this group.[7] Eagan and his com-

1 109 S. Ct. 2875 (1989).

2 Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (the Court established the requirement of warning suspects of their constitutional rights as a procedural safeguard to protect the privilege against self-incrimination).

3 109 S. Ct. at 2878-79.

4 428 U.S. 465 (1976). *See infra* notes 161-67 and accompanying text for an explanation of the holding in *Stone*.

5 *Id.* at 2881-85 (O'Connor, J., concurring).

6 Eagan v. Duckworth, 843 F.2d 1554, 1555 (7th Cir. 1988).

7 *Duckworth*, 109 S. Ct. at 2878.

panions then separated from the larger group apparently desiring to continue having sex with the victim, but the victim refused their advances.[8] A struggle ensued, and the victim was stabbed nine times.[9] Eagan then fled the scene of the crime and returned to his apartment in Chicago where he called a Chicago policeman to report that he had seen the naked body of a dead woman lying on a beach.[10]

The policeman and his partner then met Eagan at his apartment, and Eagan led them to the location of the victim where they found her moaning and screaming for help.[11] Upon seeing Eagan, the victim exclaimed, "Why did you stab me? Why did you stab me?"[12] Eagan denied stabbing the woman, claiming that he had discovered the woman while he was "there for a party."[13] Later, upon ascertaining that the crime had been committed in Indiana, the Chicago Police turned over the investigation to the Hammond, Indiana Police Department.[14]

Hammond police detectives arrived at the scene of the crime on the morning of May 17, 1982, where they talked with Eagan.[15] He told the detectives that he had been attacked on the lakefront that evening, and that the woman had been abducted by several men.[16] Eagan then went to a local police station to fill out a battery claim.[17] Later, the detectives asked Eagan to come down to the Hammond police headquarters to make a statement and be questioned.[18] Eagan agreed, and shortly after 11:00 that morning, the detectives questioned the petitioner about the incident.[19]

Before questioning, Eagan was read the following warnings from a waiver form entitled "Voluntary Appearance; Advice of Rights."[20] The form stated:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can and will be used against you in court. *You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you

8 *Eagan*, 843 F.2d at 1555.
9 *Id.*
10 *Id.* at 1558.
11 *Duckworth*, 109 S. Ct. at 2877.
12 *Id.*
13 *Eagan*, 843 F.2d at 1559.
14 *Duckworth*, 109 S. Ct. at 2877.
15 *Eagan*, 843 F.2d at 1559.
16 *Duckworth*, 109 S. Ct. at 2877.
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*

> cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.[21]

Eagan then signed the form and repeated his exculpatory explanation of his activities on that previous evening.[22] Eagan was subsequently placed in the "lock-up" in the basement of the Hammond police headquarters.[23]

Approximately twenty-nine hours later, the detectives again interviewed Eagan.[24] They advised him of his rights by reading to him a waiver of rights form which stated:

> 1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
>
> 2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
>
> 3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> 4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.
>
> 5. That if I cannot hire an attorney, one will be provided for me.[25]

After reading and signing this form, Eagan confessed to stabbing the woman.[26] The next morning he led the detectives to the beach where the incident occurred.[27] There, the police recovered the knife used in the stabbing as well as several items of the victim's clothing.[28] Eagan was subsequently put on trial for rape and attempted murder.[29]

At a suppression hearing before his trial, the defense moved to suppress Eagan's confession, initial statement, the knife, and the

---

21 *Id.* (emphasis in original).

22 *Eagan*, 843 F.2d at 1560.

23 The detectives had probable cause to believe that Eagan was the assailant since they were aware of the victim's statement and "were also aware of certain discrepancies in the story [Eagan] originally told them, which they believed inconsistent with established facts." Respondent's Brief at 12, Duckworth v. Eagan, 109 S. Ct. 2875 (1989) (No. 88-317).

24 *Eagan*, 843 F.2d at 1560.

25 *Duckworth*, 109 S. Ct. 2877-78.

26 *Id.* at 2878.

27 *Id.*

28 *Id.*

29 *Id.*

clothing.[30] This motion was denied, and over an objection, the state court admitted all this evidence in a jury trial.[31] The jury found Eagan guilty of attempted murder, and he was sentenced to thirty-five years imprisonment.[32]

Eagan appealed to the Indiana Supreme Court alleging that the trial court erred in admitting his statements as well as the physical evidence uncovered with his assistance because the first waiver did not comply with the requirements of *Miranda* and thus was constitutionally defective.[33] The court upheld the conviction, stating that "the record supports the trial court's conclusion that [the] Defendant's first statement was voluntary, and therefore admissible."[34] One justice dissented, finding the warning containing the "if and when you go to court" phrase to be uncertain in that this phrase conditioned his right to an attorney on a possible future event, and in that the second set of warnings did not adequately clarify this uncertainty.[35]

Eagan then sought a writ of habeas corpus in the United States District Court for the Northern District of Indiana under 28 U.S.C. § 2254, repeating the claims made in front of the Indiana Supreme Court.[36] The court denied the petition and held that the police adhered to the requirements of *Miranda* in taking Eagan's first and second statements.[37] Eagan then appealed to the United States Court of Appeals for the Seventh Circuit.[38] That court held that the warning containing the "if and when you go to court" phrase was "constitutionally defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation."[39] The warning was held unclear because "[t]he

---

30 Joint Appendix to Briefs at 51, *Duckworth*, 109 S. Ct. 2875 (1989) (No. 88-317).

31 *Id.*

32 *Duckworth*, 109 S. Ct. at 2878.

33 Eagan v. State, 480 N.E.2d 946 (Ind. 1985).

34 *Id.* at 950.

35 *Id.* at 952 (DeBruler, J., dissenting). Justice DeBruler also found these warnings to be condemned by the holding in California v. Prysock, 453 U.S. 355 (1981). *Id.* (DeBruler, J., dissenting).

36 Joint Appendix to Briefs at 49-52, *Duckworth*, 109 S. Ct. 2875 (1989) (No. 88-317) [hereinafter Joint Appendix].

37 Joint Appendix, *supra* note 36, at 52. Chief Justice Rehnquist characterized the issue decided upon by the district court as clearly in favor of finding the statements to be voluntarily made. *See Duckworth*, 109 S. Ct. at 2878. However, Judge Allen Sharp stated in the district court opinion that "candor requires this court to admit that [the issue of voluntariness] is a close one as is well illustrated by the dissenting opinion of Justice DeBruler." Joint Appendix, *supra*, note 36, at 50.

38 Eagan v. Duckworth, 843 F.2d 1554, 1555 (7th Cir. 1988).

39 *Id.* at 1557 (citing United States *ex rel.* Williams v. Twomey, 467 F.2d 1248, 1249-50 (7th Cir. 1972) (holding that warnings which contained the sentence, "We have no

'if and when' language limits and conditions an indigent's right to counsel on a future event."[40] The court then held that the second set of warnings did not explicitly correct the confusion created by the first warning.[41] The court therefore reversed the district court's order and remanded the case for a determination of whether the defendant knowingly and intelligently waived his right to the presence of an attorney during the second interrogation.[42]

One judge dissented from this determination, stating that the majority's "formalistic, technical, and unrealistic application of *Miranda* has been soundly rejected by the vast majority of other circuits deciding the issue. . . ."[43] Furthermore, he determined that the first statement was given voluntarily, that the second set of warnings was constitutionally sufficient, and that the second statement was made voluntarily.[44] Therefore, relying upon *Oregon v. Elstad*,[45] he found a remand to be unnecessary.[46] The court of appeals denied rehearing en banc, and the Supreme Court granted certiorari in 1988.[47]

III. SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

Chief Justice Rehnquist, writing for the Court,[48] initially noted that the Court granted certiorari in this case to "resolve a conflict among the lower courts as to whether informing a suspect that an attorney would be appointed for him 'if and when you go to court'

way of furnishing you with an attorney, but one will be appointed for you, if you wish, if and when you go to court," were unclear and thus did not satisfy the requirements of *Miranda*)).

40 *Id.* at 1557.

41 *Id.* at 1558.

42 *Id.* This determination was not made by the court presumably because the majority believed that without the trial court transcript there was not a sufficient factual basis to find the second statement admissible. *See* Respondent's Brief at 34-36, Duckworth v. Eagan, 109 S. Ct. 2875 (1989) (No. 88-317).

43 *Eagan*, 843 F.2d at 1562 (Coffey, J., dissenting).

44 *Id.* at 1571-75 (Coffey, J., dissenting).

45 470 U.S. 298, 312 (1985) (holding that a suspect who voluntarily answers questions before receiving *Miranda* warnings may still be considered to have voluntarily waived his rights at a later interrogation). This case was cited for the proposition that inadequate warnings on one occasion will not necessarily make a court determine that all statements made after that occasion are coerced. *Eagan*, 843 F.2d at 1572-73 (Coffey, J., dissenting).

46 *Eagan*, 843 F.2d at 1571-75 (Coffey, J., dissenting). This finding is questionable since the evidence which he relied upon may not have been properly part of the record before the court. *See supra* note 31.

47 109 S. Ct. 218 (1988).

48 The opinion of the Court was joined by Justices White and Kennedy.

renders *Miranda* warnings inadequate."[49] The Chief Justice delineated the issues properly before the Court by noting that the issue of whether to extend *Stone* to the facts of this case was not argued by the petitioner, and therefore would not be decided in the case at bar.[50] Also, because the Chief Justice upheld the validity of the warnings in question, the Court did not need to discuss the voluntariness of the second statement.[51]

Chief Justice Rehnquist began his analysis by stating the impact of *Miranda*[52] on modern criminal procedure. The Supreme Court in *Miranda* "established certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation."[53] The *Miranda* decision further established the rule that statements made under custodial circumstances are inadmissible unless the suspect is specifically warned of his/her rights and freely decides to forego those rights.[54]

The Chief Justice stated that *Miranda* warnings do not have to be given exactly as they are described in the *Miranda* decision.[55] As support for this proposition, several cases were cited in which references were made to possible equivalents of the warnings as stated in *Miranda*.[56] The Chief Justice next pointed out that the required warnings should be regarded as measures taken to protect the suspect's fifth amendment right against compulsory self-incrimination, and not as constitutionally protected rights in and of themselves.[57] Reasoning from these points, the Chief Justice asserted that the ex-

---

49 Duckworth v. Eagan, 109 S. Ct. 2875, 2878 (1989).

50 *Id.* at 2879 n.3.

51 *Id.* at 2881.

52 *See supra* note 2.

53 *Duckworth*, 109 S. Ct. at 2879.

54 *Id.* (citing New York v. Quarles, 467 U.S. 649, 654 (1984)).

55 The exact words used by the Court in *Miranda* read:

> [H]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 479 (1966).

56 *Duckworth*, 109 S. Ct. at 2879 (citing *Miranda*, 384 U.S. at 476 ("the warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to admissibility. . . ."); Rhode Island v. Innis, 446 U.S. 291, 297 (1980) ("the now familiar *Miranda* warnings . . . or their equivalent"); California v. Prysock, 453 U.S. 355, 359 (1981) ("This Court has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. . . . *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures.")).

57 *Duckworth*, 109 S. Ct. at 2880 (citing Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

act language of warnings given pursuant to *Miranda* need not be closely scrutinized.[58] Rather, the inquiry should be "whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.' "[59]

Having established a standard by which to judge the validity of warnings, Chief Justice Rehnquist proceeded to analyze the particular warnings in question. He first stated that the "warnings given to respondent touched all the bases required by *Miranda*,"[60] and noted that Eagan was given every one of the required warnings.[61] The Chief Justice then addressed the sentence in the warning which said, "[The police] have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." The inclusion of this sentence was found to be valid for two reasons, both related to the legal accuracy of the statement.

First, the statement "accurately described the procedure for the appointment of counsel in Indiana."[62] Under Indiana law, indigents are appointed counsel at their initial court appearance.[63] Thus, the inclusion of the statement would correctly answer a possible question of a suspect. As the Court said, "We think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel. The 'if and when' advice simply anticipates that question."[64]

Second, the statement is accurate in that *Miranda* does not require that appointed counsel be "producible on call"[65] or that "each police station must have a 'station house lawyer' present at all times to advise prisoners."[66] So, when an indigent suspect asks for a lawyer, the police are not required to provide counsel that instant. Rather, the police are merely required to cease their interrogation

---

58 *Id.* at 2880.

59 *Id.* (quoting *Prysock*, 453 U.S. at 361).

60 *Id.* at 2880.

61 *Id.*

62 *Id.*

63 IND. CODE § 35-33-7-6 (1988). This appearance would be the suspect's arraignment since, under Indiana law, charges must be filed at or before that hearing. IND. CODE § 35-33-7-3(a) (1988). Respondent suggested that this procedure was violative of his rights, arguing that "[i]t is no answer to say . . . that the instant warnings are acceptable because the police did nothing more than explain the Indiana procedure. An accurate description of a constitutionally deficient procedure does not make the procedure proper." Brief for Respondent at 35, Duckworth v. Eagan, 109 S. Ct. 2875 (1989) (No. 88-317). However, the issue of the constitutionality of the procedure for obtaining appointed counsel in Indiana was never presented before the Court.

64 *Duckworth*, 109 S. Ct. at 2880 (footnote omitted).

65 *Id.*

66 *Id.* (citing Miranda v. Arizona, 384 U.S. 436, 474 (1966)).

of the suspect until a lawyer is appointed for him.[67] Therefore, since the warning accurately states that appointed counsel is not instantly obtainable, it is a valid warning.

The opinion next turns to an analysis of *California v. Prysock*,[68] where the Court stated in dicta that *Miranda* warnings would be defective if the reference to the right to appointed counsel was linked to a future point in time after the police interrogation.[69] Chief Justice Rehnquist interpreted *Prysock* as meaning that any warnings that "would not apprise the accused of his right to have an attorney present if he chose to answer questions" would be defective.[70] The Chief Justice then concluded that, because the warning advised the suspect both of his right to the presence of counsel before any questioning and of his right to stop answering questions at any time, the warning, in its totality,[71] could not have suffered from this defect.[72] In other words, it did not matter that a link was made between an indigent suspect's *ability* to obtain appointed counsel and a future event so long as a link was not made between that suspect's *right* to appointed counsel and a future event. Accordingly, the judgment of the Seventh Circuit was reversed.

B. THE CONCURRING OPINION

Justice O'Connor wrote a separate opinion in order to argue that the rationale of the Court's opinion in *Stone*[73] should be extended to bar relitigation of non-constitutional *Miranda* claims in federal habeas corpus proceedings.[74] The district court noted in its opinion that Eagan's claim may not be cognizable under *Stone*, but considered the claim anyway because the issue has not been resolved by the Supreme Court.[75] Justice O'Connor justified her treatment of this issue by claiming that the opinion is based upon the "equitable nature" of the writ of habeas corpus.[76]

---

67 *Id.*

68 453 U.S. 355 (1981).

69 *Id.* at 360.

70 *Duckworth*, 109 S. Ct. at 2881.

71 The United States specifically argued in an amicus curiae brief that the questionable phrase could not be looked at in isolation, but must be examined in the totality of the circumstances surrounding the warnings including the other advisements made within the warnings. Amicus Brief at 16, *Duckworth* (No. 88-317).

72 *Duckworth*, 109 S. Ct. at 2881.

73 428 U.S. 465 (1976).

74 *Id.* at 2881-85 (O'Connor, J., concurring). The concurring opinion was joined by Justice Scalia.

75 Joint Appendix, *supra* note 36, at 50.

76 *Duckworth*, 109 S. Ct. at 2885 (O'Connor, J., concurring) (citing *Stone* 428 U.S. at 494-95 n.37).

Justice O'Connor's analysis began by noting that while eighteen state and federal judges considered respondent's *Miranda* claims, "None of these judges has intimated any doubt as to [Eagan's] guilt or the voluntariness or probative value of his confession."[77] She then asserted her view that society's interest in punishing criminals outweighs the marginal increase in police adherence to *Miranda* that results from exclusion of evidence on collateral review in federal habeas proceedings.[78] Thus, she concluded that "the federal courts' exercise of habeas jurisdiction in this case has served no one. . . ."[79]

Justice O'Connor then discussed *Stone* and its applicability to this case. In *Stone*, the Supreme Court held that fourth amendment claims could not be litigated in federal habeas proceedings where the issue had been fully and fairly litigated in the state courts.[80] The Court reached this decision by weighing the costs and benefits in federal habeas proceedings of excluding evidence seized in violation of the fourth amendment and deciding that the costs outweighed the benefits.[81] Justice O'Connor weighed the costs of excluding evidence obtained as a result of inadequate or defective *Miranda* warnings against the benefits of applying the *Miranda* exclusionary rule in habeas proceedings and stated that "the scales appear to me to tip further toward finality and repose in this context [technical *Miranda* violations] than in *Stone* itself."[82]

Justice O'Connor noted the costs of enforcing *Miranda* claims in federal habeas proceedings. Habeas proceedings offend principles of federalism by creating situations in which federal district courts sit in "review" of state supreme courts.[83] Furthermore, enforcing these claims is contrary to society's interest in punishing criminals because "[e]xcluding probative evidence years after trial, when a new trial may be a practical impossibility, will often result in the release of an admittedly guilty individual who may pose a threat to

77 *Id.* at 2882 (O'Connor, J., concurring).

78 *Id.* at 2883-84. Justice O'Connor argued that the weighing process favors application of the *Miranda* exclusionary rule to these claims when they are raised in the direct review of criminal convictions. *Id.* at 2883, 2885. Justice O'Connor cited as authority for treating claims differently on collateral review than on direct review the following cases: Greer v. Miller, 483 U.S. 756, 767-69 (1987) (Stevens, J. concurring); United States v. Timmreck, 441 U.S. 780, 784 (1979); Brewer v. Williams, 430 U.S. 387, 420-29 (1977) (Burger, C.J., dissenting).

79 *Duckworth*, 109 S. Ct. at 2882 (O'Connor, J., concurring).

80 *Stone*, 428 U.S. at 494.

81 *Id.* at 489-93. For further discussion of the *Stone* decision, see *infra* notes 161-67 and accompanying text.

82 *Duckworth*, 109 S. Ct. at 2883 (O'Connor, J., concurring).

83 *Id.* at 2884 (O'Connor, J., concurring).

society."[84] Justice O'Connor also observed that "[e]xclusion [of probative evidence in federal habeas review] teaches not respect for the law, but casts the criminal system as a game, and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns."[85] Each of these costs outweigh what Justice O'Connor regards as the minimal benefit of the exercise of federal habeas jurisdiction over *Miranda* claims, which is the slight increase in police adherence to the dictates of *Miranda*.[86] Therefore, Justice O'Connor would bar such claims from being relitigated through collateral review.

To support this view, Justice O'Connor made a distinction between constitutional and nonconstitutional *Miranda* claims. This was based upon the observation that "the *Miranda* rule 'sweeps more broadly than the fifth amendment itself' and 'may be triggered even in the absence of a Fifth Amendment violation.' "[87] Thus, assuming that a claim involves a violation of *Miranda* but not a violation of the fifth amendment—in other words, rights were knowingly and voluntarily waived, but the warnings given were defective—the petitioner's claim would be regarded as a nonconstitutional *Miranda* claim. This type of claim is theoretically not guilt-related since statements which are not the product of coercion are not presumptively unreliable.[88]

C. THE DISSENTING OPINION

In a dissenting opinion joined by Justices Brennan, Blackmun, and Stevens, Justice Marshall charged the majority opinion with "seriously mischaracterizing" the *Miranda* decision in order to reach its opinion.[89] Justice Marshall also expressed disagreement with the concurring opinion on the issue of extending the *Stone* rationale to cases concerning *Miranda* claims.[90]

The dissent began with its own analysis of *Miranda*. While agreeing with the majority that "*Miranda* mandated no specific ver-

---

84 *Id.* (O'Connor, J., concurring).

85 *Id.* (O'Connor, J., concurring).

86 *Id.* (O'Connor, J., concurring).

87 *Id.* at 2883 (O'Connor, J., concurring) (quoting Oregon v. Elstad, 470 U.S. 298, 306-10 (1985)).

88 *Id.* at 2884 (O'Connor, J., concurring) (citing Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 163 (1970)).

89 *Id.* at 2886 (Marshall, J., dissenting).

90 *Id.* 2885-93 (Marshall, J., dissenting). Justices Blackmun and Stevens did not join this part of the dissent.

bal formulation that police must use,"[91] the dissent pointed out that, regardless of the exact form of the warnings, the offer of appointed counsel must be "clear and unequivocal."[92] Thus, a decision which holds that warnings can satisfy the dictates of *Miranda* by merely "reasonably convey[ing]" to the suspect his rights, but not by being clear and unequivocal "makes a mockery of [the *Miranda* decision]."[93]

Turning to the warnings in question, Justice Marshall agreed with the Seventh Circuit that advising Eagan of his right to the presence of counsel before and during questioning, and then telling him that appointed counsel could only be obtained if and when he went to court, could have led Eagan to believe that he did not have the right to an attorney before interrogation if he could not afford to hire one on his own.[94] Eagan may have believed that he was not entitled to an attorney until he went to trial, or if he was not taken to court, that he would not be entitled to an attorney at all.[95]

Justice Marshall also argued that by parsing the questionable warnings in "lawyer-like" fashion, the majority ignored the fact that the warnings are most likely to be given to "frightened suspects unlettered in law, not legal experts schooled in interpreting legal or semantic nuance."[96] These people would be less likely to properly understand the warnings than would the Chief Justice of the Supreme Court or other people with extensive legal training and experience.[97] Therefore, since the warnings in question can be easily misunderstood by laymen, they are defective.

Further, Justice Marshall argued that the warnings do not become valid merely because they accurately describe the Indiana procedure for obtaining appointed counsel. He pointed out that an accurate description of the procedure without a mention of the requirement that the suspect may only be held in custody for a reasonable period of time before he is charged creates "an effective means by which the police can pressure a suspect to speak without the presence of counsel."[98] Thus, he argued that by approving the warning because it does not misrepresent the Indiana procedure for

---

91 *Id.* at 2886 (Marshall, J., dissenting).

92 *Id.* (Marshall, J., dissenting) (citing Miranda v. Arizona, 384 U.S. 436, 471 (1966)).

93 *Id.* at 2886 (Marshall, J., dissenting).

94 *Id.* at 2886-87 (Marshall, J., dissenting).

95 Justice Marshall points out that in common parlance, "going to court" means "going to trial." *Id.* at 2887 (Marshall, J., dissenting).

96 *Id.* at 2887 (Marshall, J., dissenting).

97 *Id.* (Marshall, J., dissenting).

98 *Id.* at 2888 (Marshall, J., dissenting). However, a suspect must realize that he will not avoid imprisonment by talking, since if he confesses, he will surely be imprisoned.

obtaining appointed counsel, the Court is sanctioning an inherently coercive state practice.[99] Thus, mere procedural accuracy should not be a justification for approving a particular warning.

Justice Marshall then expressed his disagreement with the majority's interpretation of *Prysock*[100] and offered his own analysis of that case. Unlike the majority, Justice Marshall made no distinction between statements which link the right to counsel with a future event and statements which link the ability to obtain counsel with a future event. He found that *Prysock* condemned all warnings where references to appointed counsel are linked to a future point in time after police interrogation. Since the warning in question makes such a link, it falls into the category of warnings which were condemned in that decision.[101]

Justice Marshall then took issue with the reasoning in the concurring opinion. Justice Marshall argued that the rationale in *Stone* was based on considerations unique to fourth amendment claims and, therefore, this rationale cannot be extended to *Miranda* claims.[102] On a broader level, Justice Marshall expressed his view that *Stone* was a wrongly decided case which should not be followed.[103]

Justice Marshall then considered the reasoning employed in *Stone* and Justice O'Connor's weighing process and concluded that unlike the fourth amendment claims in *Stone*, the benefits of hearing *Miranda* claims on federal collateral review outweigh the costs. He first pointed out that while the evidence being excluded due to fourth amendment violations is physical in nature and therefore both probative and reliable,[104] the evidence excluded due to *Miranda* violations is non-physical and presumptively unreliable.[105] He then asserted that whereas the exclusionary rule was established to

---

99 Justice Marshall stated that the majority's reasoning "let[s] the state-law tail wag the federal constitutional dog." *Id.* (Marshall, J., dissenting).

100 453 U.S. 355 (1981).

101 *Duckworth*, 109 S. Ct. at 2888-89 (Marshall, J., dissenting).

102 *Id.* at 2889 (Marshall, J., dissenting) (citing Stone v. Powell, 428 U.S. 465, 494 n.37 (1976)).

103 *Id.* at 2890-91. (Marshall, J., dissenting). Justice Marshall opposed limiting habeas jurisdiction, stating:

> I vehemently oppose the suggestion that it is for the Court to decide, based on our own vague notions of comity, finality, and the intrinsic value of particular constitutional rights, which claims are worthy of collateral federal review and which are not. Congress already engaged in that balancing process when it created habeas review.

Id. at 2893 (Marshall, J., dissenting) (footnote omitted).

104 *Stone*, 428 U.S. at 490.

105 *Duckworth*, 109 S. Ct. at 2891 (Marshall, J., dissenting) (citing New York v. Quarles, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in part and dissenting in part)).

deter police misconduct,[106] the rights secured by *Miranda* warnings "go to the heart of our accusitorial system"[107] and were established to protect the suspect's right against coercive self-incrimination.[108] Marshall thus weighed the benefits of preventing coercive self-incrimination against the costs of excluding presumptively unreliable evidence and found the benefits of federal habeas review of *Miranda* claims to outweigh its costs.

Finally, Justice Marshall finds the distinction between constitutional and nonconstitutional *Miranda* claims to be both incorrect and impractical. Since *Miranda* decided that no statement taken while in custody can be considered to be voluntary unless the suspect has been advised of his rights, *all* statements made without the warnings or made pursuant to defective warnings must be considered to be the product of coercion.[109] Therefore, there can be no nonconstitutional *Miranda* claim.[110] Furthermore, since federal district courts would have to examine all claims to determine whether they were constitutional or nonconstitutional, the practical benefits of excluding federal habeas jurisdiction would be lost.[111]

IV. ANALYSIS

A. CLARITY AND THE COERCIVE EFFECTS OF THE *DUCKWORTH* WARNINGS

At the core of the controversy in *Duckworth* is a problem which arises when fulfilling the requirements established by *Miranda*. *Miranda* requires the police to advise the suspect that he has the right to the presence of counsel before and during any custodial interrogation, and that if he cannot afford such counsel, he may have an attorney appointed for him prior to being questioned. However, the right to presence of appointed counsel cannot be instantly exercised upon request for two reasons. First, the Supreme Court stated in *Miranda* that police stations need not have "station house lawyers" present at all times to advise suspects who are brought in for questioning.[112] Second, only a judge may determine whether or not the suspect is indigent, and thus eligible to have counsel appointed

106 *Stone*, 482 U.S. at 486.

107 *Duckworth*, 109 S. Ct. at 2892 (Marshall, J., dissenting).

108 *Id.* (Marshall, J., dissenting); *see also* White v. Finkbeiner, 687 F.2d 885, 893 (7th Cir. 1982) (rejecting the extension of *Stone* to *Miranda* claims).

109 Miranda v. Arizona, 384 U.S. 436, 458 (1966).

110 *Duckworth*, 109 S. Ct. at 2892 (Marshall, J., dissenting).

111 *Id.* at 2892-93 (Marshall, J., dissenting).

112 *Id.* at 2880 (citing *Miranda*, 384 U.S. at 474).

for him.[113]

When a suspect requests appointed counsel, *Miranda* requires merely that the police refrain from questioning him at that time.[114] In order to question the suspect, the police must commence adversarial proceedings. This requires an indictment and arraignment in court. The police are required by *Miranda*[115] and *McNabb v. United States*[116] to commence these proceedings "within a reasonable period of time" if they choose to keep the suspect in custody. During this period, the suspect will have to wait in jail until he appears in front of a judge who will determine whether he is entitled to appointed counsel. This wait may be several days.

The problem is that the suspect has the right to the presence of appointed counsel immediately after receiving the *Miranda* warnings and before he is questioned,[117] but the justice system does not provide any mechanism for appointing counsel until long after the suspect has been read his rights. The fact that the right to appointed counsel is temporarily ineffectual may give the indigent suspect the impression that the right does not exist at all.

The actual words used in traditional *Miranda* warnings make no mention of the delay in an indigent suspect's ability to speak with an attorney.[118] The warnings containing the "if and when you go to court" phrase expressly inform the suspect of this delay.[119] The issue before the Court was whether explicitly mentioning the fact that the exercise of the right to appointed counsel is subject to delay made the warnings so unclear as to be inadequate.[120]

Prior to *Duckworth*, there was a split among the courts as to whether warnings containing the "if and when you go to court" caveat are clear under the standard set by *Miranda*.[121] The minority of courts found these warnings to be unclear.[122] The reasoning used

---

113 *See* Thompson v. State, 256 Ind. 48, 54, 267 N.E.2d 49, 52 (1971).

114 *Miranda*, 384 U.S. at 474.

115 The Court stated that "[i]f authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege." *Id.*

116 318 U.S. 322, 344 (1943) (holding that "police must with reasonable promptness show legal cause for detaining arrested persons").

117 Brewer v. Williams, 430 U.S. 387, 410 (1977) (Powell, J., concurring). *Cf.* Escobedo v. Illinois, 378 U.S. 478, 486-87 (1964).

118 See *supra* note 55 for full text of original *Miranda* warnings.

119 See *supra* note 21 and accompanying text for the full text of this warning.

120 Duckworth v. Eagan, 109 S. Ct. 2875, 2878 (1989).

121 *Id.*; Wright v. North Carolina, 415 U.S. 936 (1974) (Douglas, J., dissenting from denial of certiorari).

122 *See, e.g.*, Eagan v. Duckworth, 843 F.2d 1554, 1556-57 (7th Cir. 1988); United States *ex rel.* Williams v. Twomey, 467 F.2d 1248, 1249-50 (7th Cir. 1972); Gilpin v.

in these decisions was basically expressed in *United States* ex rel. *Williams v. Twomey*.[123] There, the court stated:

> [T]he statement that no lawyer can be provided at the moment and can only be obtained if and when the accused reaches court substantially restricts the absolute right to counsel [granted in *Miranda*]; it conveys the contradictory alternative message that an indigent is first entitled to counsel upon an appearance in court at some unknown, future time. The entire warning is therefore, at best, misleading and confusing and, at worst, constitutes a subtle temptation to the unsophisticated indigent accused to forego the right to counsel at this critical moment [when the warnings are read and the suspect must decide whether to waive his rights].[124]

This reasoning is sound in that warnings containing the "if and when you go to court" language are actually conveying a contradictory message. The suspect is told all at once of his right to speak with appointed counsel before any interrogation and of his inability to receive this counsel at the time that the warnings are being read to him. The problem with this reasoning is that although the message conveyed by the "if and when" language is contradictory, it is in fact true because the rights of indigent suspects, as interpreted by the courts, are themselves contradictory.[125]

Also, as Justice Marshall noted, warnings containing the "if and when you go to court" phrase act as a coercive force on the suspect.[126] Justice Marshall quoted Justice DeBruler in his concurrence in *Dickerson v. State*,[127]

"[The suspect] is effectively told that he can talk now or remain in

---

United States, 415 F.2d 638, 641 (5th Cir. 1969); Sullin v. United States, 389 F.2d 985, 988 n.2 (10th Cir. 1968) (dictum); Square v. State, 283 Ala. 548, 550, 219 So. 2d 377, 378-79 (1969); State v. Grierson, 95 Idaho 155, 158 n.1, 504 P.2d 1204, 1207 n.1 (1972) (dictum); State v. Dess, 184 Mont. 116, 120-22, 602 P.2d 142, 144-45 (1979); Commonwealth v. Johnson, 484 Pa. 349, 352-57, 399 A.2d 111, 112-15 (1979); *see also* United States v. Cassell, 452 F.2d 533 (7th Cir. 1971); United States v. Garcia, 431 F.2d 134 (9th Cir. 1970); Lathers v. United States, 396 F.2d 524 (5th Cir. 1968) (decisions rejecting similar warnings). *Cf.* United States v. Vasquez-Lopez, 400 F.2d 593 (9th Cir. 1968) (discussing clarity in the translation of the warnings into Spanish).

123 *Twomey*, 467 F.2d at 1248.

124 *Id.* at 1250.

125 *See supra* notes 112-17 and accompanying text.

126 In Commonwealth v. Johnson, the Pennsylvania Supreme Court stated that the warnings conveyed the message that "[t]here is no way you can get a lawyer now if you can't afford one, but you must still decide, without one, whether you are willing to answer our questions," and that "veiled threats are certainly *not* what the Supreme Court [in *Miranda*] had in mind." 484 Pa. at 356 n.2, 399 A.2d at 115 n.2. However, the police may force a suspect to make this choice on his own even if his attorney is trying to reach him. *See* Moran v. Burbine, 475 U.S. 412 (1986).

127 Duckworth v. Eagan, 109 S. Ct. 2875, 2887 (Marshall, J., dissenting) (quoting Dickerson v. State, 257 Ind. 562, 574, 276 N.E.2d 845, 852 (1972) (DeBruler, J., concurring)).

> custody—in an alien, friendless, harsh world—for an indeterminate length of time. . . . [T]he implication that his choice is to answer questions right away or remain in custody until that nebulous time 'if and when' he goes to court is a coerced choice of the most obvious kind."

This is an accurate statement of what warnings containing the "if and when you go to court" phrase tell indigent suspects.[128] This coercion would also be extenuated by the circumstances surrounding the reading of the warnings.[129]

Keeping a suspect in custody until his first court appearance if he chooses not to speak is certainly coercion because suspects might feel compelled to answer questions in order to avoid this imprisonment. However, if the traditional *Miranda* warnings were given and the suspect asked for an appointed counsel, the police could then explain to the suspect that they will stop questioning him, but that they are going to lock him up until they decide to bring him to court. The courts could not recognize this as being a coercive situation as long as the lock-up was only for a reasonable period of time. Therefore, if this scenario will not be viewed as coercive, then a scenario in which the *Duckworth* warnings are read and the suspect understands his options without having to ask any questions also cannot be seen as coercive. Since the underlying situation is the same regardless of which warning is read to the suspect, the "if and when you go to court" language cannot be seriously considered to be coercive in and of itself.

Justice Marshall's opposition to the insertion of the "if and when you go to court" phrase into the traditional *Miranda* warnings is therefore misplaced. The coercion that he and others complain of is a result of the existing procedure for appointing counsel and not a result of warnings containing the "if and when you go to court" phrase. Indigent suspects will still be imprisoned when they request counsel regardless of which warnings are read to them. Therefore, if Justice Marshall is unwilling to find the existing procedure for appointing counsel coercive, then he should not attack warnings which are merely an accurate reflection of this procedure.[130]

---

128 *See supra* note 119 and accompanying text.

129 These circumstances include the fact that the policeman is being simultaneously put in the opposing roles of advocate and interrogator. *See* Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1843 (1987). Logically, these circumstances also include the suspect's lack of education and his/her fear or anger or both at being in police custody.

130 Justice Marshall stated that "[t]he threat of indefinite deferral of interrogation . . . constitutes an effective means by which the police can pressure a suspect to speak without the presence of counsel." *Duckworth*, 109 S. Ct. at 2888 (Marshall, J., dissenting). But since he would not find Indiana's procedure for appointing counsel to be unconstitutional, this criticism rings hollow.

Courts approving the warnings in *Duckworth* have ignored the "if and when you go to court" phrase. Instead, they concentrated on the suspect's understanding of his/her rights to remain silent and to have counsel before and during questioning, and his/her understanding that the police must refrain from questioning him/her until counsel is appointed. This basic reasoning was relied upon in *United States v. Lacy*[131] where that court found the warning to be adequate because "the defendant was informed that (a) he had the right to the presence of an attorney and (b) that the right was to have an attorney 'before he uttered a syllable.' "[132] The *Lacy* court then noted that the apparent linkage of the appointment of counsel to a future date "seems immaterial since Lacy was informed that he had the right to put off answering any questions until the time when he did have an appointed attorney."[133] Other courts have used similar reasoning by holding that, when read in their entirety, the warnings adequately inform suspects of their rights.[134] Thus, all the courts approving this modified warning have relied upon the presence of other statements which advise the suspect of his right to appointed counsel, and his right to remain silent until this counsel is produced for him.

This reasoning has been subject to the criticism that, while these modified warnings are easily understandable to people who possess a sophisticated knowledge of law or logic, they may not be readily understandable to the uneducated and unsophisticated people who are most often subjected to police questioning.[135] Several

---

[131] 446 F.2d 511 (5th Cir. 1971).

[132] *Id.* at 513.

[133] *Id.*; *see also* Massimo v. United States, 463 F.2d 1171, 1174 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973); Klingler v. United States, 409 F.2d 299, 308 (8th Cir. 1969); Mayzak v. United States, 402 F.2d 152, 155 (5th Cir. 1968) (all holding that the fact that the defendant was not informed of his right to instant counsel is irrelevant to the validity of *Miranda* warnings).

[134] *See* Eagan v. Duckworth, 843 F.2d 1554, 1567 (1988) (Coffey, J., dissenting) (referring to this standard as the "totality of circumstances" test); *see also* Wright v. North Carolina, 483 F.2d 405, 407-08 (1973), *cert. denied*, 415 U.S. 936 (1974); United States v. Johnson, 426 F.2d 1112, 1116 (7th Cir. 1970), *cert. denied*, 400 U.S. 842 (1971); State v. Mumbaugh, 107 Ariz. 589, 596-97, 491 P.2d 443, 450-51 (1971); State v. Sterling, 377 So. 2d 58, 62-63 (La. 1979); People v. Campbell, 26 Mich. App. 196, 201-02, 182 N.W.2d 4, 6-7 (1970), *cert. denied*, 401 U.S. 945 (1971); Harrell v. State, 537 So. 2d 643, 645-46 (Miss. 1978); People v. Swift, 32 App. Div. 2d 183, 186-187, 300 N.Y.S.2d 639, 643-44 (1969), *cert. denied*, 396 U.S. 1018 (1970); Grennier v. State, 70 Wis. 2d 204, 213-15, 234 N.W.2d 316, 321-322 (1975); *see also* Richardson v. Duckworth, 834 F.2d 1366, 1372 (7th Cir. 1987); De La Rosa v. Texas, 743 F.2d 299, 302 (5th Cir. 1984); Coyote v. United States, 380 F.2d 305, 308 (10th Cir. 1967), *cert. denied*, 389 U.S. 992 (1967) (each decision adopts the "totality of the circumstances" test).

[135] Duckworth v. Eagan, 109 S. Ct. 2875, 2887 (Marshall, J., dissenting); Commonwealth v. Johnson, 484 Pa. 349, 355, 399 A.2d, 111, 114 (1979).

courts, while approving the content of these warnings, have also recognized the validity of this criticism. Two of these courts admonished police forces not to use these warnings.[136] Also, four of these courts explicitly recognized that, taken in isolation, the "if and when you go to court" phrase is confusing.[137]

These criticisms suggest that the warnings in *Duckworth* cannot seriously be considered to be a more clear and unequivocal advisement of a suspect's rights than the original warnings stated in *Miranda*.[138] This point is illustrated by an examination of the litigation involved in *Duckworth*. Seven of the eighteen judges ruling on this case found the warnings given to Eagan to be ambiguous. This point is also supported by the existence of a split in the courts as to the clarity of these warnings. If judges cannot agree that warnings with the "if and when you go to court" phrase are clear, then it can hardly be argued that uneducated and unsophisticated indigent suspects could find them to be perfectly clear.

Perhaps it was for this reason that the Court in *Duckworth* did not find the warnings given to Eagan to be clear and unequivocal. Rather, the warnings were found valid merely because they reasonably conveyed to the suspect his rights.[139] It is here that this case could have its greatest impact on the analysis of *Miranda* warnings. The Chief Justice lowered the standard for clarity in *Miranda* warnings from the requirement that they must be "clear and unequivocal"[140] to the requirement that they need only reasonably convey to the suspect his rights.[141] In support of this change, Chief Justice Rehnquist stated that a rigorous examination of the language used in the warnings is not necessary.[142] The Chief Justice concluded by

---

136 *Harrell*, 357 So. 2d at 645; *Grennier*, 70 Wis. 2d at 215, 234 N.W.2d at 322.

137 *Sterling*, 377 So. 2d at 63 ("Taken in isolation this language may instill doubt in the mind of the reader that defendant was fairly informed of his rights. . . ."); *Harrell*, 357 So. 2d at 646 ("[The remainder of the warning] certainly offsets any damage done by the quoted sentence."); *Campbell*, 26 Mich. App. at 201-02, 182 N.W.2d at 7 ("The quoted language may not be a triumph in precision of expression. . . ."); *Grennier*, 70 Wis. 2d at 213, 234 N.W.2d at 321 ("The warning . . . was arguably confusing and insufficient.").

138 Indeed one court rejected the warning, stating that "deviation from the prescribed formulation of the various warnings [as stated in *Miranda*] would be permissible only when the offered version is *more* likely to give a suspect a *better* understanding of his constitutional rights. . . ." *Johnson*, 484 Pa. at 355-56, 399 A.2d at 115 (citing Commonwealth v. Singleton, 439 Pa. 185, 190, 266 A.2d 753, 755 (1970)).

139 *Duckworth*, 109 S. Ct. at 2880 (citing California v. Prysock, 453 U.S. 355, 361 (1981)). The use of *Prysock* as authority for this proposition is quite disingenuous since the Court in *Prysock* held that the warnings in question "fully conveyed to respondent his rights as required by *Miranda*." *Prysock*, 453 U.S. at 361.

140 Miranda v. Arizona, 384 U.S. 436, 466-67 (1966).

141 *Duckworth*, 109 S. Ct. at 2880.

142 The Chief Justice stated that courts "need not examine *Miranda* warnings as if

holding that the warnings given to Eagan satisfied the requirements of *Miranda* in their totality.[143] He never held that the warnings containing the "if and when you go to court" phrase were clear and unequivocal.

This change can also be detected in what the Court left out of its opinion. First, the close proximity of the "if and when you go to court" language to the advisement of the right to the presence of counsel was never discussed even though it is the basis for the Seventh Circuit's rejection of the warnings.[144] Also, the majority never discussed the possible confusion that can arise from the use of the phrase "go to court." Justice Marshall pointed out that in common parlance, "going to court" means "going to trial,"[145] and certainly the suspect is entitled to an attorney before that point. The failure of the Court to encourage absolute clarity in *Miranda* warnings indicates that the Court is not concerned with this issue.

As a result of the *Duckworth* decision, courts need only determine that the defendant cannot reasonably claim that he did not understand his rights based on the warnings given to him. In an amicus curiae brief, the United States argued that the validity of warnings should be decided on a case-by-case basis.[146] It would appear that in any future cases in which a defendant challenges the validity of a variation of a *Miranda* warning, the prosecution will have to prove that this variation was reasonable, and that it would be unreasonable to find that the defendant did not understand his rights.[147]

Eagan argued that approving this change could lead to undesirable results since even *Miranda* warnings in their original form do not achieve the goal of giving suspects a clear understanding of their rights.[148] The Court ignored this argument since it serves to

---

construing a will or defining the terms of an easement." 109 S. Ct. at 2880. It is worth noting, however, that this opinion left untouched the burden on the prosecution to show that a particular set of warnings are valid under *Miranda*.

143 *Duckworth*, 109 S. Ct. at 2881.

144 Eagan v. Duckworth, 843 F.2d 1554, 1556-57 (7th Cir. 1988) (citing United States *ex rel.* Williams v. Twomey, 467 F.2d 1248, 1250 (7th Cir. 1972) ("In one breath appellant was informed that he had the right to appointed counsel during questioning. In the next breath, he was told that counsel could not be provided until later.")).

145 *Duckworth*, 109 S. Ct. at 2887 (Marshall, J., dissenting).

146 The brief stated, "[R]ather than measuring particular warnings against the words of the *Miranda* opinion, the Court should determine whether the warnings in each case provide the suspect with the information he needs to make a constitutionally binding decision to speak with the police." Amicus Brief at 19, *Duckworth* (No. 88-317).

147 *Cf. Duckworth*, 109 S. Ct. at 2880.

148 Brief for Respondent at 23 n.4, *Duckworth* (No. 88-317) (citing Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134 (1980); Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 S.D.L. REV. 39 (1970); Leiken, *Police*

disprove Eagan's case. Why should the Court insist on strict compliance with *Miranda* when the exact use of the words in *Miranda* do not adequately inform suspects of their rights? By changing to a case-by-case approach, the courts can focus on the defendant's actual understanding of his rights rather than on semantics which were supposed to serve as a proxy for actual understanding in the first place. When stated in this manner, the change can be seen as positive.

On the other hand, the lowering of the standard of clarity can have harmful consequences. Authorizing textual changes can potentially lead to further erosion of the understandability of the *Miranda* warnings since other parts of the warnings could also be altered. *Miranda* warnings are intended to serve as a procedural safeguard to protect fifth amendment privileges,[149] and the viability of this safeguard is necessary for the protection of fifth amendment rights. As Justice Frankfurter stated in *McNabb*, "The history of liberty has largely been the history of observance of procedural safeguards."[150] Thus, affecting the viability of *Miranda* warnings by lowering the standard of clarity can potentially lead to an erosion of fifth amendment privileges themselves.

Justice Marshall characterized this decision as part of the "continuing debasement" of *Miranda*.[151] This decision can be seen as part of a continuing trend to limit and reduce the impact of the *Miranda* decision.[152] Indeed, in light of *Michigan v. Tucker*,[153] any ruling which finds the warnings in *Duckworth* invalid would be hypocritical. In *Tucker*, the suspect was advised of his right to remain silent and to the presence of counsel, but he was never told of his right to appointed counsel.[154] The Court held that impeaching testimony obtained as a result of the interrogation after these warnings was admissible since the *Miranda* warnings are not themselves constitutional rights,[155] and the suspect's statements were given vol-

Interrogation in Colorado: The Implementation of Miranda, 47 DEN. U.L. REV. 1 (1970); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968)).

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

150 318 U.S. 332, 347 (1943).

151 *Duckworth*, 109 S. Ct. at 2886 (Marshall, J., dissenting).

152 This trend began with the Burger Court and has continued to the present. For a full discussion of the decline of *Miranda*, see Ogletree, *supra* note 129, at 1839-42. For a general discussion of the current scope of *Miranda*, *see Project: Criminal Procedure*, 74 GEO. L.J. 499, 594-610 (1986).

153 417 U.S. 433 (1974).

154 *Id.* at 436.

155 *Id.* at 444.

untarily.[156] Thus, if the Court is going to uphold the admissibility of voluntary statements in the complete absence of the right to appointed counsel warning, then it certainly must uphold the admissibility of voluntary statements given in response to warnings which contain the right to appointed counsel warning, but which do not convey this warning in the clearest form possible.

B. THE EXTENSION OF *STONE* TO *MIRANDA* CLAIMS

Another step in limiting (if not overruling) *Miranda* was suggested in Justice O'Connor's concurring opinion. Justice O'Connor contended that "nonconstitutional" or technical claims of *Miranda* violations should not be cognizable in federal habeas corpus proceedings where the issue has been fully and fairly litigated in the state courts.[157] Justice O'Connor's suggestion is derived from the concept that evidence should never be excluded through federal habeas proceedings where it is reliable and probative of the defendant's guilt.[158] The problem with recognizing non-guilt related claims is that since federal habeas proceedings always occur several years after the original trial, a new trial may be impossible, and thus habeas writs can set admittedly guilty criminals free.[159] Judges and legal scholars have recognized this as a problem with exclusionary rules.[160]

The argument that convicted defendants should not go free as a result of the application of the exclusionary rule in federal habeas proceedings was accepted in *Stone*.[161] In that case the Supreme Court held that "[W]here the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that

---

156 *Id.* at 449.

157 Duckworth v. Eagan, 109 S. Ct. 2875, 2883-84 (1989) (O'Connor, J., concurring).

158 *See id.* at 2884 (O'Connor, J., concurring).

159 *Id.* at 2884 (O'Connor, J., concurring).

160 *E.g.*, Brewer v. Williams, 430 U.S. 387, 420-29 (1977) (Burger, C.J., dissenting) ("We exclude evidence only when essential to safeguard the integrity of the truth-seeking process. The test, in short, is the reliability of the evidence."); Kaufman v. United States, 394 U.S. 217, 237, 242 (1969) (Black, J., dissenting) ("In collateral attacks . . . I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt."); People v. Defore, 242 N.Y. 13, 150 N.E. 585, 587-88, *cert. denied*, 270 U.S. 657 (1926) (Discussing the effects of an exclusionary rule, Justice Cardozo stated, "The criminal is to go free because the constable has blundered . . . . We may not subject society to these dangers until the legislature has spoken with a clearer voice." (arguing that the exclusionary rule must be established by legislation or a constitutional amendment)); *see also* Friendly, *supra* note 88, at 142 (seminal article arguing that only claims related to guilt or innocence should be cognizable on federal habeas corpus).

161 428 U.S. 465 (1976).

evidence obtained in an unconstitutional search or seizure was introduced at his trial."[162] This decision was reached by balancing the costs and benefits of applying the exclusionary rule formulated in *Mapp v. Ohio*[163] in federal habeas proceedings. The Court in *Stone* noted that the evidence excluded under this rule tends to be typically reliable and probative, and applying an exclusionary rule tends to set the guilty free.[164] The Court also argued that the *Mapp* exclusionary rule is " 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. . . .' "[165] The Court thus held that since the benefit of deterring police misconduct was marginal at best when the *Mapp* exclusionary rule was applied in federal habeas proceedings,[166] and since the costs of applying this rule were extremely high, fourth amendment claims would no longer be cognizable in federal habeas proceedings.[167]

After *Stone*, the Supreme Court had several opportunities to extend *Stone* to *Miranda* claims, but chose not to do so.[168] The Court refused to extend the *Stone* rationale to bar habeas litigation on the issue of racial discrimination in the selection of a state grand jury foreperson in *Rose v. Mitchell*,[169] and did not discuss the respondent's argument to extend *Stone* to double jeopardy claims in *Greene v. Massey*.[170] In fact, Justice Powell wrote the majority opinion in *Stone* and then cast the fifth vote not to extend it to *Miranda* claims in *Brewer v. Williams*.[171]

Also, the lower federal courts have almost unaminously ruled

---

162 *Id.* at 494. However, these claims must still be entertained on direct review. *Id.* at 493.

163 367 U.S. 643 (1961) (The Supreme Court held that the effectuation of the fourth amendment as applied through the fourteenth amendment requires the exclusion at trial of evidence obtained as a result of an illegal search and seizure and reversal of conviction upon direct review in state criminal trials.)

164 428 U.S. at 490.

165 *Id.* at 486 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

166 *Id.* at 493-94.

167 *Id.* at 494.

168 *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977); Brewer v. Williams, 430 U.S. 387, 413-14 (1977) (Powell, J., concurring).

169 443 U.S. 545 (1979). The petitioner's guilt was not disputed in that case.

170 437 U.S. 19 (1978).

171 430 U.S. 387, 414 (1977) (Powell, J., concurring); *see also* White v. Finkbeiner, 687 F.2d 885, 889 (7th Cir. 1982), *vacated on other grounds*, 465 U.S. 1075 (1984). *But see* Schneckloth v. Bustamonte, 412 U.S. 218, 256-58 (1973) (Powell, J., concurring). Justice Powell apparently agreed with Chief Justice Burger's idea of limiting habeas jurisdiction to claims related to the guilt of the petitioner in that he criticized the "extension" of habeas jurisdiction to permit the litigation of constitutional claims unrelated to guilt.

against the extension of *Stone* to *Miranda* claims.[172] These courts have found that since the Supreme Court has consistently declined to extend *Stone*, they would not do so themselves.[173] Thus, Justice O'Connor's concurring opinion is an invitation for concerned parties to litigate this issue before the Supreme Court so that *Stone* can be extended to include *Miranda* claims. This potentially represents a significant shift in the Court's willingness to limit federal habeas jurisdiction over a variety of constitutional claims.[174]

The analysis in *Stone* could apply to all constitutional claims not related to guilt since there is no logical reason why it must be limited to the *Mapp* exclusionary rule.[175] Indeed, the *Stone* decision was called the "harbinger of future eviscerations" of federal habeas jurisdiction by Justice Brennan in his dissent in that case.[176] Furthermore, *Miranda* and *Mapp* exclusionary rules are, at least superficially, similar. Neither rule is necessarily related to the guilt of the habeas petitioner. Since there can be a technical violation of *Miranda* without any violation of the fifth amendment prohibition of coerced testimony,[177] it is possible for a *Miranda* claim to have no bearing on the question of guilt.[178]

For these reasons, Justice O'Connor applied the weighing process used in *Stone* to determine whether or not to bar relitigation of *Miranda* claims on collateral review. She found the costs of interfering with society's interest in convicting and punishing criminals to

---

172 For cases declining to extend *Stone*, see, for example, the following: McCown v. Callahan, 726 F.2d 1, 5 (1st Cir.), *cert. denied*, 469 U.S. 839 (1984); *White*, 687 F.2d at 888-94; Hinman v. McCarthy, 676 F.2d 343, 349 (9th Cir. 1982), *cert. denied*, 459 U.S. 1048 (1982); Patterson v. Warden of San Luis Obispo, 624 F.2d 69, 70 (9th Cir. 1980); Harryman v. Estelle, 616 F.2d 870, 872 n.3 (5th Cir. 1980) (en banc); Wilson v. Henderson, 584 F.2d 1185, 1189 (2d Cir. 1978), *cert. denied*, 442 U.S. 945 (1979). *See also* Jarrell v. Balkom, 735 F.2d 1242, 1251-52 (11th Cir. 1984), in which the court declined to extend *Stone* to fifth amendment claims generally. *But see* Richardson v. Stone, 421 F. Supp. 577, 578-79 (N.D. Cal. 1976) (the one decision extending *Stone* to *Miranda* claims).

173 *McCown*, 726 F.2d at 5; *White*, 687 F.2d at 890; *Harryman*, 616 F.2d at 872 n.1; *Jarrell*, 735 F.2d at 1252.

174 There are potentially enough votes to extend *Stone* to *Miranda* claims as Chief Justice Rehnquist and Justices Blackmun and Stevens were part of the majority in *Stone*, Justice O'Connor wrote this concurring opinion, Justice Scalia joined this concurrence, and neither Justice Stevens nor Justice Blackmun joined in the part of Justice Marshall's dissent which disagreed with Justice O'Connor's concurring opinion. Only Justices White, Brennan, and Marshall seem to disagree with this notion.

175 *White*, 687 F.2d at 891.

176 Stone v. Powell, 428 U.S. 465, 516 (1976) (Brennan, J., dissenting).

177 Duckworth v. Eagan, 109 S. Ct. 2875, 2883 (1989) (O'Connor, J., concurring) (citing New York v. Quarles, 467 U.S. 649 (1984) and Michigan v. Tucker, 417 U.S. 433 (1974)).

178 In fact, the one decision which did extend *Stone* to a *Miranda* claim justified its decision by stating that the petitioner made no claim of innocence to supplement his constitutional claim. Richardson v. Stone, 421 F. Supp. 577, 579 (N.D. Cal. 1976).

outweigh the benefits that come from enforcing the judicially created, prophylactic safeguard of proper *Miranda* warnings through collateral review.[179] Thus, Justice O'Connor concluded that *Miranda* claims seeking suppression of probative evidence should not be cognizable in federal habeas corpus proceedings.[180]

This would be a big mistake. The fact that the *Stone* weighing process can be used to determine whether or not to bar habeas review of *Miranda* claims does not mean that the results would be similar when that process was applied to both fourth amendment and *Miranda* claims. First, the types of evidence which are excluded by the *Mapp* and *Miranda* exclusionary rules are fundamentally different. Evidence obtained as a result of an illegal search and seizure tends to be physical, such as "a pistol, a packet of heroin, counterfeit money, or the body of a murder victim,"[181] and is not rendered untrustworthy by the means of its seizure.[182] Thus, the application of *Mapp* excludes reliable evidence of guilt. On the other hand, evidence obtained as a result of a violation of a suspect's *Miranda* rights is presumptively unreliable.[183] This is because statements obtained as a result of such a violation are presumed to be coerced.[184] So, when a *Miranda* claim is raised, the petitioner is bringing into issue the integrity of the fact-finding process of the trial court by claiming that he was convicted with unreliable evidence.[185] Therefore, while the exclusion of probative evidence through the *Mapp* exclusionary rule interferes with the fact-finding process, the exclusion of unreliable evidence through *Miranda* actually enhances the fact-finding process.

Second, while the *Mapp* exclusionary rule supposedly exists only for the deterrence of police misconduct, the *Miranda* rules primarily exist not only to deter police misconduct, but to "protect a criminal suspect's exercise of the privilege [against self-incrimination] which is one of the distinctive components of our criminal law."[186] As the Court stated in *Miranda*, "The requirement of warnings and waiver of rights is fundamental with respect to the Fifth

---

179 *See supra* notes 83-86 and accompanying text.

180 *Duckworth*, 109 S. Ct. at 2884 (O'Connor, J., concurring).

181 *Stone*, 428 U.S. at 497 (Burger, C.J., concurring).

182 *Id.* at 490 (citing Kaufman v. United States, 394 U.S. 217, 237 (1969) (Black, J., dissenting)).

183 *Duckworth*, 109 S. Ct. at 2891 (Marshall, J., dissenting) (citing New York v. Quarles, 467 U.S. 479, 654 (1984)).

184 Oregon v. Elstad, 470 U.S. 298, 306-07 (1985).

185 *Duckworth*, 109 S. Ct. at 2892 (Marshall, J., dissenting) (citing Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring)).

186 White v. Finkbeiner, 687 F.2d 885, 893 (7th Cir. 1982).

Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."[187] Thus, the benefits that come from federal habeas review of *Miranda* claims are not merely the deterrence of police misconduct as Justice O'Connor claims,[188] but the preservation of the integrity of the fact-finding process.

Finally, Justice O'Connor suggests that the Court should distinguish between constitutional and nonconstitutional *Miranda* claims.[189] In other words, claims of coercion or involuntary waiver of rights would be constitutional *Miranda* claims, while claims of *Miranda* violations without accompanying claims of coercion would be nonconstitutional *Miranda* claims. Constitutional claims would be cognizable in federal habeas proceedings while nonconstitutional claims would not be cognizable. She makes this distinction because the fifth amendment only requires the exclusion of coerced statements.[190] This separation would overrule the basic premise of *Miranda* which is the assumption that "unless a suspect taken into custody is properly advised of his rights, no statement obtained from [the suspect] can truly be the product of his free choice as a matter of federal law."[191] Justice O'Connor's opinion would discredit this assumption, and the federal courts would be forced to return to the case-by-case "totality of circumstances" test to determine the voluntariness of each confession which was largely replaced by *Miranda*.[192]

A return to the case-by-case approach would mean that the supposed benefits of barring federal habeas review of state convictions, the reduction of tension between state and federal courts,[193] and the reduction of the workload of the federal judiciary[194] could not be realized. The case-by-case approach actually increases the judicial workload since much more than the circumstances surrounding the warnings would have to be examined in order to determine the voluntariness of the confession. Even then, it remains difficult to accurately determine the voluntariness of the confession.[195] Furthermore, since the "totality of circumstances" test is more complicated and uncertain, its application is likely to lead to a wider vari-

187 Miranda v. Arizona, 384 U.S. 436, 476 (1966).

188 *Duckworth*, 109 S. Ct. at 2884 (1989) (O'Connor, J., concurring).

189 *Id.* at 2883 (O'Connor, J., concurring).

190 *Id.* at 2883 (O'Connor, J., concurring).

191 *Id.* at 2892 (Marshall, J., dissenting) (citing *Miranda*, 384 U.S. at 458).

192 White v. Finkbeiner, 687 F.2d 885, 893 (7th Cir. 1982); Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 COLUM. L REV. 1, 40 (1982).

193 *Duckworth*, 109 S. Ct. at 2884 (O'Connor, J., concurring).

194 *White*, 687 F.2d at 893.

195 New York v. Quarles, 467 U.S. 649, 683 (1984).

ance in opinions and more opportunity for the federal courts to "overrule" state courts. Thus, tension between federal and state courts would be heightened and not reduced. Justice O'Connor's problems with federal district courts overruling state supreme courts is thus with the existence of federal habeas jurisdiction in general, and not with this particular application of it.

V. CONCLUSION

As a result of *Duckworth*, *Miranda* warnings containing a sentence which says that the suspect can only obtain appointed counsel "if and when he goes to court" is valid because warnings containing this phrase "reasonably convey" to a suspect his/her rights. This decision lowers the standard of clarity required of *Miranda* warnings. While lowering the standard for clarity is not desirable in light of the fact that *Miranda* warnings are not adequately understood by suspects in their traditional form, the *Duckworth* ruling made sense in that the *Duckworth* warnings accurately describe the procedure for obtaining appointed counsel. Since a suspect requesting appointed counsel would be told by the police that he/she will not receive such counsel until he/she goes to court, it does not make sense to say that because the warnings serve to advise the suspect of this fact, they are invalid. If these warnings seem coercive, it is because the procedure is coercive, and if this is troublesome, the procedure for appointing counsel should be changed and not the application of the warnings.

Justice O'Connor signalled that the Supreme Court would consider extending *Stone v. Powell* to bar claims of technical violations of *Miranda* from being cognizable in federal habeas corpus proceedings. While the weighing process used in *Stone* may be used to analyze this contention, the results reached from such a process lead to the conclusion that *Miranda* claims should remain cognizable in federal habeas proceedings. This is because the costs and benefits of applying the *Mapp* exclusionary rule differ dramatically from the those of the *Miranda* exclusionary rule. Therefore, *Stone* should not be extended to cover either technical *Miranda* claims in particular or fifth amendment claims in general.

DAVID B. ALTMAN