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CONSTITUTIONAL LAW—PEOPLE v. GRIGGS: ILLINOIS IGNORES MORAN v. BURBINE TO EXPAND A SUSPECT'S MIRANDA RIGHTS

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CONSTITUTIONAL LAW—*PEOPLE V. GRIGGS*: ILLINOIS IGNORES *MORAN V. BURBINE* TO EXPAND A SUSPECT'S *MIRANDA* RIGHTS

INTRODUCTION

The Fifth Amendment privilege against self-incrimination provides that a criminal defendant may not be compelled to be a witness against himself or herself.[1] In *Miranda v. Arizona*,[2] the United States Supreme Court created the presumption that a defendant's statement made during a custodial interrogation is compelled unless the defendant is first warned of his or her right to silence and right to an attorney, and, then, waives these rights.[3] Such a waiver of the right to remain silent and the right to counsel is valid, provided that it is made voluntarily, knowingly, and intelligently.[4] Since *Miranda*, courts repeatedly have confronted scenarios in which a suspect purports to waive his or her right to counsel without being informed of the present availability of an attorney who is requesting to consult with the suspect. The issue is whether the purported waiver is knowing and intelligent.

In *People v. Griggs*,[5] a suspect, who knew that his sister was in the process of retaining an attorney for him, waived his right to have counsel present during interrogations.[6] The Supreme Court of Illinois determined that the waiver was invalid because, although Griggs was fully informed of his right to an attorney before the interrogation commenced, he was never informed that his attorney had arrived at the police station and had demanded to consult with him.[7] The court reasoned that the waiver was not made knowingly and intelligently.[8] Although the court based its decision on the Federal Constitution, it seemed to ignore United States Supreme

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1. See *infra* note 14 for the text of the Fifth Amendment.
2. 384 U.S. 436 (1966).
3. *Id.* at 444-45; see *infra* notes 21-36 and accompanying text for a discussion of *Miranda*.
4. *Miranda*, 384 U.S. at 444.
5. 604 N.E.2d 257 (Ill. 1992).
6. *Id.* at 258.
7. *Id.* at 269.
8. *Id.* at 269-70.

Court precedent, *Moran v. Burbine*,[9] in which a suspect, who was unaware that an attorney had been retained for him and had sought to speak with him, waived his right to counsel.[10] The *Burbine* Court held that such a waiver was valid.[11] Instead, the *Griggs* court based its decision on *People v. Smith*,[12] in which the Illinois Supreme Court had held that such waivers are invalid.[13]

This Note critiques the *Griggs* court's analysis. Part I provides an examination of case law on this issue. Part II discusses the facts and majority, concurring and dissenting opinions of *People v. Griggs*. Part III analyzes the majority opinion of *Griggs* and concludes that the court reached the correct conclusion, but with a faulty analysis. Finally, in Part III, this Note will present a more convincing analysis which supports the *Griggs* conclusion.

I. Background

A. *The Fifth Amendment Right to Counsel and Right Against Self-Incrimination*

The Fifth Amendment of the United States Constitution establishes the privilege against self-incrimination.[14] One consequence of this provision is that police officers, detectives, prosecutors, and other governmental parties opposing the interests of a defendant in a criminal prosecution are prevented from compelling a defendant to testify against his or her interests.[15] If testimonial statements are compelled, they will not be admitted in a subsequent prosecution.[16]

Since the 1930s, the United States Supreme Court has relied on various means to regulate police interrogation procedures.[17] Such

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9. 475 U.S. 412 (1986).
10. *Id.* at 417-18.
11. *Id.* at 421-24.
12. 442 N.E.2d 1325 (Ill. 1982), *cert. denied*, 461 U.S. 937 (1983).
13. *Id.* at 1329.
14. The Fifth Amendment of the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V (emphasis added).

15. *See* Miranda v. Arizona, 384 U.S. 436, 457-58 (1966).
16. *Id.* at 478-79.
17. The Supreme Court first attempted to control abuses resulting from coercive

regulatory devices were necessary to nullify the inherently coercive nature of police interrogations, which were made significantly more coercive by various police tactics.[18] In 1966, the United States Supreme Court turned to the Fifth Amendment[19] to curb abuses which occur during the interrogation process.[20]

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interrogations through a Fourteenth Amendment due process approach, called the voluntariness test. *See Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954-84 (1966); Laurence A. Benner, *Requiem for* Miranda: *The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 113-17 (1989); Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1428-35 (1985); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 891-924 (1979). Realizing that the ad hoc nature of the due process approach was unworkable, the Supreme Court briefly applied the Sixth Amendment right to counsel protection to pre-indictment interrogation proceedings. *See* Escobedo v. Illinois, 378 U.S. 478, 484-92 (1964). *See also Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 996-1021 (1966). However, this approach was extremely criticized and subsequently abandoned, once the Supreme Court established that the Sixth Amendment right to counsel only attaches once a defendant has been indicted. Massiah v. United States, 377 U.S. 201, 206 (1964).

18. *Miranda*, 384 U.S. at 445-58. Various techniques and procedures were adopted by police departments to nearly ensure that a self-incriminating statement would eventually be made. In the early part of this century, physical brutality was a common method of obtaining confessions. *Id.* at 445-46 & n.5. More recently, however, police officers turned to psychological coercion. *Id.* at 448. A study of police manuals found that interrogators were advised to employ a variety of tactics to secure a confession. This study demonstrated that successful interrogations must be conducted in private. *Id.* at 449 (quoting INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (1962)). Furthermore, these manuals provided that:

> To highlight the isolation and unfamiliar surroundings, . . . the police [are instructed] to display an air of confidence in the suspect's guilt and . . . to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his [or her] comments toward the reasons why the subject committed the act, rather than . . . asking the subject whether he [or she] did it. . . .
> [T]he major qualities an interrogator should possess are patience and perseverance. . . . [The interrogator] "must dominate his [or her] subject and overwhelm him [or her] with his [or her] inexorable will to obtain the truth. He [or she] should interrogate for a spell of several hours . . . . In a serious case, the interrogation may continue for days . . . with no respite from the atmosphere of domination."
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> . . .
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> The interrogators sometimes are instructed to induce a confession out of trickery . . . [and] to point out the incriminating significance of . . . refus[ing] to talk. . . .

Id. at 450-54 (citations omitted) (quoting O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956)).

19. In using the Fifth Amendment as the source of protection of criminal defendants during custodial interrogations, the Supreme Court did not displace Sixth Amendment or Fourteenth Amendment protections. Rather, it supplemented them. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

20. *See infra* notes 21-36 and accompanying text.

Miranda v. Arizona[21] is the landmark decision that established concrete guidelines for police interrogations in order to ensure that a suspect's Fifth Amendment privilege against self-incrimination is protected.[22] The Supreme Court created the *Miranda* warnings as a protective device to make a suspect aware of his or her rights, thus diminishing the coercive nature of interrogations.[23] Before custodial interrogations[24] commence, a suspect must be warned of his or her rights *and* must waive them. *Miranda* mandates that police provide the following warnings:

> He [or she] has the right to remain silent, that anything he [or she] says can be used against him [or her] in a court of law, that he [or she] has the right to the presence of an attorney, and that if he [or she] cannot afford an attorney one will be appointed for him [or her] prior to any questioning if he [or she] so desires.[25]

Although *Miranda* does not require that this precise statement be given, the statement which is provided must be equally effective.[26]

The requirement of advising a suspect that he or she has the right to have counsel present during police questioning is an added method of eliminating the inherently coercive nature of an interrogation and safeguarding a suspect's Fifth Amendment rights.[27] "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his [or her] privilege by his [or her] interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . ."[28]

Having been provided with a *Miranda* warning, a suspect may choose to waive his or her right to remain silent and to have counsel present during the interrogation and proceed to make a state-

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21. 384 U.S. 436 (1966).

22. *Id.* at 441-42.

23. *Id.* at 457-58, 467-68.

24. The term "custodial interrogations" refers to questioning that occurs after a suspect has been taken into police custody. *Id.* at 444. For further analysis and definitions of custody and interrogation, see Maria Sileno DeLoughry, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1990-1991*, 80 GEO. L.J. 939, 1078-83 (1992).

25. *Miranda*, 384 U.S. at 479. Once this warning is given, all subsequent questioning must cease if a suspect requests an attorney at any time during the interrogation. *Id.* at 473-74. The police must not initiate further questioning unless an attorney is present. *Id.* at 474. However, having invoked the right to counsel, a suspect may still waive it by voluntarily initiating a conversation and providing information. *Id.* at 475.

26. *Id.* at 467-68.

27. *Id.* at 469-74.

28. *Id.* at 469.

ment.[29] A presumption arises, however, against a valid waiver of a constitutional right.[30] In addition, the Supreme Court in *Miranda* explicitly stated that the government has a "heavy burden" to prove that the waiver was in fact made knowingly, intelligently, and voluntarily.[31] As the Court has subsequently clarified, a voluntary waiver is one that is free from coercion, intimidation, deception,[32] threats, trickery, or cajoling.[33] An intelligent and knowing waiver is one "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[34]

To determine if a waiver is valid, a "totality of the circumstances" approach is used in which the background, experience, and conduct of the accused are considered.[35] If it is determined that a suspect validly waived his or her Fifth Amendment privilege, the police may question the suspect and use any information obtained in a subsequent court proceeding.[36]

B. *The Validity of Waivers*

Although the judicial creation of the *Miranda* warnings served to protect an interrogated suspect's Fifth Amendment privilege, the application of this protective approach has not been easy. One issue that frequently arises is the validity of a waiver of the Fifth Amendment right to counsel in the following situation. Often, a suspect is arrested, brought to a police station or jail, read his or her *Miranda* warnings, and, upon waiving them, interrogated. Meanwhile, unknown to the suspect, a relative or friend has retained an attorney to assist the suspect. The attorney subsequently telephones or arrives at the location where the suspect is being held and asks to consult with the suspect-client. However, the police prevent the attorney from doing so. The suspect is not informed of his or her attorney's efforts until after the suspect has produced an incriminating statement.

This issue has been considered under both the Federal Consti-

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29. *Id.* at 475.

30. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Ohio Bell Tel. Co. v. Public Utils. Comm'n of Ohio, 301 U.S. 292, 307 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882)).

31. *Miranda*, 384 U.S. at 475.

32. Moran v. Burbine, 475 U.S. 412, 421 (1986).

33. *Miranda*, 384 U.S. at 476.

34. *Burbine*, 475 U.S. at 421.

35. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

36. *Miranda*, 384 U.S. at 475-76, 478-79.

tution and state constitutions.[37] Courts have disagreed whether a waiver of the right to counsel in this situation is valid.

1. Federal Constitutional Analysis

a. State Courts' Application of the Federal Constitution Before Burbine

Well before *People v. Smith*[38] was decided, various state courts set the stage for what was to eventually become the holding in *Smith*.[39] One case which was relied on by both *Smith* and *Griggs* is *State v. Haynes*.[40] In *Haynes*, the Supreme Court of Oregon held that statements made by a suspect following a waiver of the right to have an attorney present during questioning are not admissible at trial when the police do not inform the suspect, who is unaware that an attorney has been retained, of the attorney's availability and efforts to consult with the suspect.[41] The court held that these statements were inadmissible because a suspect cannot knowingly and intelligently waive the right to counsel without this information.[42]

The *Haynes* court's reasoning has been restated in many subsequent cases, and was based on both the United States Constitution and the Oregon Constitution.[43] In reaching its conclusion that a waiver under these circumstances is neither intelligent nor knowing, the Supreme Court of Oregon reasoned:

> To pass up an abstract offer to call some unknown lawyer is very

37. *See infra* notes 38-140 and accompanying text.

38. See *infra* notes 46-60 and accompanying text for a discussion of *Smith*.

39. *See, e.g.*, Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969). In *McKenna*, the defendants had each asked their relatives to call an attorney. However, the defendants were never informed that their attorneys attempted to reach them. The court held that the attorneys invoked the defendants' right to counsel on their behalf, that the sergeant had a "heavy" duty to inform the defendants of their attorneys' efforts, and that his failure to do so denied the defendants their opportunities to exercise their Fifth Amendment right to counsel. As a result, the waivers became invalid because without awareness of the attorneys' presence, the defendants could not knowingly and intelligently waive this right. *Id.* at 564-66. *See also, e.g.*, Commonwealth v. Hilliard, 370 A.2d 322, 324 (Pa. 1977) (holding that "[i]f counsel has expressed a desire to be present during interrogation, a waiver of counsel obtained in counsel's absence should be held invalid as a matter of law" and that the right to counsel has not been validly waived when an attorney has been denied access to a client, even if the client has failed to request counsel); State v. Jones, 578 P.2d 71, 73 (Wash. Ct. App. 1978) (holding that a waiver is not knowing and intelligent when a defendant has not been made aware of his or her attorney's efforts to offer advice).

40. 602 P.2d 272 (Or. 1979) (en banc), *cert. denied*, 446 U.S. 945 (1980).

41. *Id.* at 277.

42. *Id.*

43. *Id.* at 279.

> different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. If the attorney appears on request of one's family, that fact may inspire additional confidence. . . . [W]hen law enforcement officers have failed to admit counsel to a person in custody or to inform the person of the attorney's efforts to reach him [or her], they cannot thereafter rely on defendant's "waiver" for the use of his [or her] subsequent uncounseled statements or resulting evidence against him [or her].[44]

Haynes and several similar decisions[45] formed the basis for the decision in *People v. Smith*.[46] In *Smith*, the Supreme Court of Illinois held that where an attorney is present in the police station in which a suspect is being held, and requests to speak with this suspect-client, if the police do not inform the suspect of such attorney's efforts to consult with him or her, any waiver of the right to counsel is invalid.[47] Therefore, any statements made by the suspect are inadmissible in court and violate the Fifth Amendment of the Federal Constitution.[48]

In this case, the defendant, Dan Smith, was arrested and charged with murder and armed robbery on September 1, 1978.[49] On the morning of September 2, he met with an attorney, Joseph Spiezer, who agreed to represent him.[50] Later that day, this attorney telephoned his partner, Carol Ellerby, and asked her to consult with the defendant in jail.[51] Ellerby went to the jail at 3 p.m. on September 2.[52] She was told by an employee at the jail that she could not see the defendant because he was experiencing heroin withdrawal.[53] Since she was not allowed to see him, she instead asked the employee to give the defendant her business card, on which she had written that she was a partner of Spiezer and that the defendant should not provide any statements to the police without the presence of one of his attorneys.[54] The defendant received this

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44. *Id.* at 278-79 (footnotes omitted).
45. *See supra* notes 39-44 and accompanying text.
46. 442 N.E.2d 1325 (Ill. 1982), *cert. denied*, 461 U.S. 937 (1983).
47. *Id.* at 1329.
48. *Id.*
49. *Id.* at 1326.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*

card.[55] However, he was never told of Ellerby's request to see him.[56] On September 3, the defendant gave an incriminating statement in which he confessed to murder.[57] Relying on various state court cases,[58] including *State v. Haynes*,[59] the Supreme Court of Illinois concluded that the defendant did not knowingly and intelligently waive his right to counsel since the police interfered with his attorney's attempts to consult with him.[60]

b. *The United States Supreme Court's Application of the Federal Constitution:* Moran v. Burbine

In *Moran v. Burbine*,[61] the United States Supreme Court took the opposite approach on the matter of waivers in factual situations similar to *Smith* and *Haynes*. The Court held that where a suspect is unaware that an attorney has been retained and is attempting to consult with him or her, that suspect's waiver of the right to counsel is valid even though the police do not inform the suspect of the attorney's efforts or availability.[62] In *Burbine*, defendant Brian Burbine was arrested for burglary.[63] On the evening of his arrest, his sister contacted the public defender's office to retain counsel for him.[64] Assistant Public Defender Allegra Munson took the case and telephoned the police station to notify the police that she would represent Burbine during any questioning.[65] She was told that Burbine would not be questioned that day. However, one hour later, the police began the first of many interrogations of Burbine.[66] The defendant was not aware that his sister had retained counsel for him and was never informed of the attorney's telephone call.[67] During the interrogations, the defendant waived his right to counsel

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55. *Id.* at 1327.
56. *Id.*
57. *Id.* at 1326.
58. *See, e.g.*, State v. Matthews, 408 So. 2d 1274 (La. 1982); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969); Commonwealth v. Hilliard, 370 A.2d 322 (Pa. 1977); State v. Jones, 578 P.2d 71 (Wash. Ct. App. 1978). For a discussion of these cases, see *supra* note 39 and *infra* note 99.
59. 602 P.2d 272 (Or. 1979) (en banc), *cert. denied*, 446 U.S. 945 (1980); see *supra* notes 40-44 and accompanying text for a discussion of *Haynes*.
60. *Smith*, 442 N.E.2d at 1328-30.
61. 475 U.S. 412 (1986).
62. *Id.* at 421-24.
63. *Id.* at 416.
64. *Id.*
65. *Id.* at 417.
66. *Id.*
67. *Id.*

and eventually confessed to a murder that had occurred several months earlier.[68] This confession was put in the form of signed written statements, which were admitted into evidence at trial.[69] Consequently, Burbine was convicted of murder.[70] The Court of Appeals for the First Circuit reversed his conviction on the grounds that the waiver was invalid because, by failing to inform the defendant of his attorney's phone call, the police officer deprived him of information which was essential to his ability to waive his rights knowingly and intelligently.[71] The United States Supreme Court granted certiorari to resolve this matter.[72]

On appeal to the Supreme Court, Burbine argued that he did not knowingly and intelligently waive his right to counsel because the police's failure to notify him of the attorney's call deprived him of information necessary to make a knowing and intelligent waiver.[73] The United States Supreme Court disagreed.[74] The Court concluded that the waiver was knowing and intelligent.[75]

The Supreme Court grounded its holding on various theories. First, it reasoned that events which occur outside of the suspect's presence, and of which he or she is unaware, do not affect his or her ability to knowingly waive the right to counsel.[76] The fact that the police actively interfered with the defendant's learning of this information did not change this result, according to the Court.[77] Instead, the only information that must be supplied to a defendant, and the transmission of which cannot be interfered with, is that information which affects his or her ability to understand the nature of his or her Fifth Amendment rights and the consequences of waiving them.[78] The defendant did not lack such information here because he was

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68. *Id.* at 416-18.

69. *Id.* at 418.

70. *Id.*

71. Burbine v. Moran, 753 F.2d 178, 187-88 (1st Cir. 1985).

72. Moran v. Burbine, 471 U.S. 1098 (1985).

73. Moran v. Burbine, 475 U.S. at 421.

74. *Id.*

75. *Id.* The Court did not examine whether the waiver was voluntary. This factor was not at issue. *Id.* at 421-22.

76. *Id.* at 422. The Court agreed that the information would have been useful, but concluded that the Constitution does not require that the police provide a suspect with all possible information with which to reach a decision. *Id.*

77. *Id.* at 423. In fact, the Court stated that "[a]lthough highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his [or her] *Miranda* rights unless he [or she] were at least aware of the incident." *Id.*

78. *Id.* at 424.

fully informed of his right to remain silent and to an attorney. According to the Court, the fact that an attorney was actually available was not necessary to understand one's Fifth Amendment rights and the resulting consequences of waiving them.[79]

Second, the Court reasoned that creating a rule that forbids the police from deceiving an attorney is not required by the Fifth Amendment.[80] The Fifth Amendment protects a suspect from self-incrimination. It does not protect an attorney's efforts to reach his or her client.[81]

Third, the Court reasoned that a contrary decision would be impractical and unworkable, and would reduce *Miranda*'s clarity.[82] The Court stated that a contrary holding would create various unanswered questions.[83] Courts would be forced to resolve:

> To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself [or herself] know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?[84]

Fourth, although requiring the police to inform a suspect of an attorney's efforts to reach him or her would add to the Fifth Amendment protection against coercive interrogations, the gain in actual protection would be minimal. In contrast, the cost would be great, since it would result in a decrease in the number of confessions.[85] Based on the totality of these reasons, the Court reached

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79. *Id.* In fact, the Court stated that:

> Once it is determined that a suspect's decision not to rely on his [or her] rights was uncoerced, that he [or she] at all times knew he [or she] could stand mute and request a lawyer, and that he [or she] was aware of the State's intention to use his [or her] statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

Id. at 422-23 (footnote omitted).

80. *Id.* at 424-25.

81. *Id.*

82. *Id.* at 425-26.

83. *Id.* at 425.

84. *Id.*

85. *Id.* at 426-27. Confessions of guilt are highly sought after in the criminal justice system. *Id.* at 426. However, imposing a duty on police officers to inform defendants of their attorneys' availability will in effect guarantee that the defendant will not make a statement. Most attorneys advise their clients to remain silent. Escobedo v. Illinois, 378 U.S. 478, 488 (1964).

its conclusion that the waiver in this case was valid.[86]

In addition to the defendant's appeal on a Fifth Amendment basis, Burbine also made an argument under the Fourteenth Amendment.[87] He claimed that the police's conduct in lying to his attorney was so egregious that his Fourteenth Amendment due process rights were violated.[88] On this theory, the Court held that the "conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States."[89] However, the Court did state that police deception might amount to a due process violation if the conduct were more offensive than that here.[90]

The three-member dissent in *Moran v. Burbine*[91] presented four principal arguments. First, the dissent pointed to numerous state court cases that have reached the conclusion that a waiver in this type of case would be invalid, since information concerning an attorney's efforts to reach a client directly impacts an intelligent and knowing waiver of the right to counsel.[92] Second, the dissent argued that the majority's holding is inimical to the American Bar Association's Standards for Criminal Justice, which advise that a suspect in custody should be put in contact with an attorney "'as soon as feasible after custody begins'"[93] or "'[a]t the earliest opportunity.'"[94] Third, the dissent argued that the police's deliberate deception in the form of lying to the attorney and withholding information from the defendant amounted to the type of trickery that the Fifth Amendment condemns and that renders a waiver in-

86. *Burbine*, 475 U.S. at 421-28.

87. *Id.* at 432-34. Defendant Burbine also presented a third argument. He claimed that the police violated his Sixth Amendment right to counsel by preventing his attorney from consulting with him. *Id.* at 428-29. The Court rejected this claim, holding that this right attaches only after a defendant has been formally charged with a crime and adversarial proceedings have commenced. A custodial interrogation, on the other hand, occurs before the suspect has been charged and is not adversarial in nature. *Id.* at 428-32.

88. *Id.* at 432.

89. *Id.* at 433-34.

90. *Id.* at 432.

91. 475 U.S. at 434-68 (Stevens, J., dissenting, joined by Brennan, J. and Marshall, J.).

92. *Id.* at 439 & n.10 (quoting Brief for American Bar Association as *Amicus Curiae* 4, n.2).

93. *Id.* at 440 & n.11 (quoting ABA Standards for Criminal Justice 5-71 (2d ed. 1980)).

94. *Id.*

valid.[95] Fourth, the dissent claimed that the police's interference in the attorney's communication with the defendant amounted to a violation of the Fourteenth Amendment due process requirement of fundamental fairness.[96]

2. State Constitutional Analysis

The question of whether a waiver in this situation is valid has also been brought before many state courts, which have resolved the issue on the basis of the state's own constitution, as opposed to the Federal Constitution.[97] State courts have relied on state constitutions primarily because they have been dissatisfied with the protections provided under the Fifth Amendment of the United States Constitution and have sought to offer additional protection to arrestees under their state constitutions.[98] This has been common practice both before[99] and after[100] *Burbine* was decided. State

95. *Id.* at 452-55; see *supra* notes 30-35 and accompanying text for factors that would render a waiver invalid.

96. 475 U.S. at 466-68. Whereas the majority adopted a "shock the conscience" test to determine if due process has been violated, the dissent adhered to a fundamental fairness test. *Id.* at 466-67. The dissent stated that "due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections." *Id.* at 467.

97. See *infra* notes 99-100 for cases decided on the basis of state constitutions.

98. The Fifth Amendment of the Federal Constitution applies to the states via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 8 (1964). The Federal Constitution provides a baseline of protections below which a state cannot go. Thus, when applying a Federal Constitutional provision, states are required to adhere to the interpretation and application of this provision made by the United States Supreme Court. However, states are permitted to offer greater constitutional protections under their own constitutions. In addition, states are permitted to independently interpret the Federal Constitution in areas where the United States Supreme Court has not spoken. See *infra* notes 228-32 and accompanying text for a discussion of this matter.

99. *See, e.g.*, State v. Matthews, 408 So. 2d 1274 (La. 1982). In *Matthews*, the Supreme Court of Louisiana reasoned that the Louisiana Constitution supports ensuring the assistance of counsel during custodial interrogations and prohibits any interference with this right. Therefore, the court held that a suspect cannot knowingly and intelligently waive his or her right to counsel preceding an interrogation where the police do not inform the suspect of an attorney's efforts to assist him or her. *Id.* at 1277-78.

100. *See, e.g.*, State v. Stoddard, 537 A.2d 446, 451-52 (Conn. 1988) (holding that the Connecticut Constitution requires that police inform a suspect of an attorney's efforts to assist in order to make a subsequent waiver valid); Bryan v. State, 571 A.2d 170, 175-76 (Del. 1990) (holding that the Delaware Constitution creates a heavy presumption against waiver where a suspect has expressed a desire to talk to police only in the presence of an attorney and the police fail to inform the suspect of an attorney's efforts to render assistance); Haliburton v. State, 514 So. 2d 1088, 1089-90 (Fla. 1987), *cert. denied*, 111 S. Ct. 2910 (1991) (holding that the failure of the police to notify the defendant that an attorney requested to consult with him deprived the defendant of infor-

courts have unanimously held that waivers in a *Burbine* situation are invalid.[101]

3. What Have Courts Done Since *Burbine*?

Since *Burbine* was decided, various state courts and three federal courts of appeals have examined this issue. Until the *Griggs* case, all courts that considered this issue under the United States Constitution, both with facts substantially similar to those in *Burbine* or significantly different, have followed the holding in *Burbine*.[102]

a. *Facts That Are Substantially Similar to Burbine*

Since *Burbine*, the Court of Appeals for the Eleventh Circuit and various state courts,[103] including the Supreme Court of Illinois, have considered the issue of the validity of a waiver where a suspect is unaware that someone has retained counsel for him or her and is not informed of his or her attorney's efforts to render assistance. *Burbine*'s holding has been adhered to unanimously.

The Supreme Court of Illinois followed the holding in *Burbine* and rejected its own precedent in *People v. Smith*[104] when it ruled

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mation necessary to make a knowing and intelligent waiver of the right to counsel and violated the due process clause of the Florida Constitution); People v. Wright, 490 N.W.2d 351, 354-57 (Mich. 1992) (holding that the Michigan Constitution requires that the police inform a suspect of an attorney's efforts to contact the suspect and that failure to so inform a suspect, along with deliberate deception of the attorney in stating that the suspect knew of his presence yet did not wish to see him, rendered a waiver of the right to counsel invalid for failure to be voluntary, intelligent, and knowing); State v. Reed, 627 A.2d 630, 646-47 (N.J. 1993) (holding that police must inform a suspect of his or her attorney's availability and desire to consult with the suspect, and failure to do so violates the suspect's right against self-incrimination under the New Jersey Constitution); Roeder v. State, 768 S.W.2d 745, 753-55 (Tex. Ct. App. 1988) (holding that the Texas Constitution requires that a suspect be informed of an attorney's efforts to reach him or her for a waiver to be knowing and intelligent).

101. *See supra* notes 99-100.

102. *See infra* notes 103-40 and accompanying text.

103. *See, e.g.*, Jones v. Dugger, 928 F.2d 1020, 1026-27 (11th Cir.), *cert. denied sub nom.* Jones v. Singletary, 112 S. Ct. 216 (1991) (holding that a waiver of the right to counsel is valid even though a family-retained attorney is prevented from contacting the defendant); Lodowski v. State, 513 A.2d 299, 304 (Md. 1986) (holding that failure of the police to inform the suspect that counsel had been retained for him and was seeking access to him does not violate the Fifth Amendment of the Federal Constitution); State v. Hanson, 401 N.W.2d 771, 776-78 (Wis. 1987) (deciding under Wisconsin Constitution, but since its provision regarding the privilege against self-incrimination is "virtually identical" to that of the Federal Constitution, *Burbine* is applicable; court held that since police officers had no duty to inform the defendant of his attorney's efforts to consult with him, the defendant's waiver is valid).

104. 442 N.E.2d 1325 (Ill. 1982), *cert. denied*, 461 U.S. 937 (1983).

on the validity of a waiver in *People v. Holland*.[105] In *Holland*, the defendant was initially arrested for "improper vehicle registration, driving on a revoked license, and illegal transportation of alcohol."[106] Subsequently, he was connected to a sexual assault that had occurred earlier that day.[107] Meanwhile, the defendant's wife had contacted an attorney, Anthony Rocco, who telephoned the police station and asked that he be notified if the defendant were placed in a lineup.[108] The attorney did not request to speak directly to the defendant, however.[109] Then, without being notified of his attorney's call, the defendant was interrogated on two separate occasions. He had been properly given his *Miranda* warnings before both interrogations.[110] During the second interview, the defendant gave an incriminating statement in which he confessed to the crime.[111] The defendant was eventually permitted to consult with his attorney, but not until after he had incriminated himself.[112]

On appeal from conviction, the state urged the court to adopt the holding in *Moran v. Burbine*, thus validating the waiver.[113] On the other hand, the defendant urged the court to follow the holding in *People v. Smith*, which would render the waiver invalid.[114] The court concluded that *Burbine* was on point, while *Smith* was "clearly distinguishable."[115] *Holland* was similar to *Burbine* since, in both cases, the suspect was unaware that a relative had retained counsel and all communication occurred by telephone.[116] In contrast, the attorney in *Smith* was retained by the suspect and had personally met with the suspect.[117] Also, the attorney's partner went to the jail where the defendant in *Smith* was held and requested to meet with the defendant, instead of merely telephoning.[118] Thus, concluding that *Holland* was similar to *Burbine*, the court applied *Burbine*'s holding and decided that the defendant's waiver of his Fifth Amendment right against self-incrimination was

105. 520 N.E.2d 270 (Ill. 1987), *aff'd*, 493 U.S. 474 (1990).
106. *Id.* at 273.
107. *Id.*
108. *Id.* at 273-74.
109. *Id.* at 274, 282.
110. *Id.* at 273-74.
111. *Id.* at 273-75.
112. *Id.* at 275.
113. *Id.* at 277.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

valid.[119]

b. Facts That Are Different from Burbine

Burbine has also been applied to situations in which the defendants were aware of the efforts of a third party to retain counsel for them. In *People v. Ledesma*,[120] the California Appeals Court reviewed a case in which the defendant had arranged to meet with an attorney at the end of his working day in order to turn himself in.[121] However, before he was able to meet with this attorney, he was arrested.[122] During subsequent interrogations, Ledesma never invoked his right to counsel and proceeded to incriminate himself.[123] In addition, Ledesma was never informed of his attorney's attempts to reach him.[124] However, the California Appeals Court held that Ledesma's waiver was valid under *Burbine*.[125] In fact, the court stated that "[t]he present case affords an even stronger basis for upholding the trial court's admission of a statement obtained during police interrogation than was presented in *Burbine*"[126] since in this case, Ledesma himself had planned to confer with an identified attorney, while in *Burbine*, the defendant was unaware that an attorney had been retained for him.[127]

A similar argument was used by the Court of Appeals for the Eighth Circuit in *Matney v. Armontrout*.[128] In this case, the defendant had personally retained counsel, who was prevented from speaking with his client.[129] The *Matney* court also concluded that the *Burbine* holding must control. Notably, the court said that "[a] defendant who retains counsel, then waives his [or her] right to such counsel upon arrest, exhibits an even greater understanding of the nature of his [or her] legal rights and, consequently, [makes] an intelligent waiver of such rights."[130]

Furthermore, *Burbine* was regarded as controlling in *State v.*

119. *Id.* at 277-78.
120. 251 Cal. Rptr. 417 (Cal. Ct. App. 1988).
121. *Id.* at 418.
122. *Id.*
123. *Id.* at 419.
124. *Id.*
125. *Id.* at 423-24.
126. *Id.* at 423.
127. *Id.*
128. 956 F.2d 824 (8th Cir. 1992).
129. *Id.* at 825.
130. *Id.* at 826.

Earls,[131] a case in which, after being arrested, the defendant telephoned his ex-wife and asked her to contact an attorney.[132] Subsequently, his ex-wife did contact an attorney who, although never retained, telephoned the police station and asked to speak with the defendant.[133] This request was denied.[134] The majority noted that this case differed from *Burbine* in two respects. First, the counsel in this case was never retained and never demanded that the police not question the defendant outside of his presence, whereas the attorney in *Burbine* was retained, demanded that the interrogation stop, and requested to be present during questioning.[135] Second, in this case, the defendant was aware that his ex-wife was contacting an attorney, whereas in *Burbine*, the defendant was not aware of his sister's efforts.[136] The court held that Earls' waiver was valid under *Burbine* because his ability to make a knowing, intelligent, and voluntary waiver was not affected.[137]

Lastly, the Court of Appeals for the Seventh Circuit applied *Burbine* in *Middleton v. Murphy*,[138] a case in which the defendant asked his wife to contact an attorney, who was subsequently denied access to the defendant upon arriving at the police station.[139] The court held that the officers were not required to inform him of his attorney's presence and that the waiver was valid.[140]

The Supreme Court of Illinois had the opportunity to review a similar factual situation in *People v. Griggs*. However, instead of following *Burbine*, the court relied on *People v. Smith*, a Supreme Court of Illinois case that was decided before *Burbine*.

II. *PEOPLE V. GRIGGS*[141]

A. *Facts*

A clash between youths in Chicago provided the setting for *People v. Griggs*. Defendant Terry Griggs and his brother, Milton, were accompanying their niece home from the neighborhood

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131. 805 P.2d 211 (Wash. 1991).
132. *Id.* at 212.
133. *Id.* at 213.
134. *Id.*
135. *Id.* at 219.
136. *Id.*
137. *Id.*
138. Middleton v. Murphy, 996 F.2d 1219 (7th Cir.), *available as* No. 92-1498, 1993 WL 217156, *cert. denied*, 114 S. Ct. 607 (1993).
139. *Id.* at *3.
140. *Id.* at *7.
141. 604 N.E.2d 257 (Ill. 1992).

school when an altercation, which eventually led to the death of an innocent third party, commenced.[142]

Terry and Milton encountered a group of teenage males with whom unfriendly words were exchanged and a physical fight almost ensued.[143] After this first encounter, the defendant and Milton brought their niece to her home, which she shared with the defendant's mother.[144] Then, the defendant procured a gun from his mother's home, and left with Milton to locate the boys.[145] A second fight almost ensued, but was averted.[146] Afterward, the defendant and Milton began to walk back to their mother's house.[147] The group of teenage boys was behind them. The defendant testified that the group of boys wished to provoke another fight and that they were carrying baseball bats.[148] The defendant further testified that the group of boys began to chase him, that they threw something at him, and that they attempted to physically grab him.[149] The defendant claimed that he was afraid of being killed.[150] He stated that this fear led him to remove the gun from his pocket and to begin shooting in the air.[151] A bullet struck and killed Carpel Jahnke, a gas company employee, who happened to be working in the vicinity.[152]

In contrast to the defendant's testimony, the state's witnesses, some of the boys, testified that the defendant and his brother provoked the two fights.[153] Also, they testified that they did not chase the defendant and that they did not have any weapons.[154] Instead, they happened to be following him because they were walking to a 7-11 (a convenience store) which was located in the direction in

142. *Id.* at 261.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 265.

147. *Id.*

148. *Id.* at 265-66.

149. *Id.* at 266.

150. *Id.* The defendant's sister corroborated the defendant's testimony that he and his brother were being chased by this group of boys who were carrying various weapons. *Id.* at 264. The defendant also testified that there had been a previous altercation between the defendant's brother and one of these boys, during which the boy threw a bottle at Milton. *Id.* at 265. They both testified that their neighborhood was rife with gangs. *Id.*

151. *Id.* at 266.

152. *Id.* at 258, 266.

153. *Id.* at 261.

154. *Id.* at 262.

which the defendant and his brother were walking.[155] Finally, they testified that the defendant did not fire his gun into the air, but rather aimed and fired directly at the group of boys.[156]

Within minutes after the shooting, the defendant was arrested and taken to the police station for questioning.[157] Approximately 1-1/2 hours later, or around 5:30 p.m., the defendant spoke with his sister who told him that she and another of his sisters were in the process of procuring an attorney for the defendant.[158] Subsequently, the defendant was interrogated on two separate occasions. The first interrogation of the defendant occurred between 6:00 and 7:00 p.m.[159] The second interrogation occurred between 9:00 and 9:30 p.m.[160] During both interviews, the defendant was informed of his Fifth Amendment right to silence and right to have counsel present during any questioning; yet, during both interrogations, Griggs waived these rights and made oral statements.[161] The second interview, during which he confessed to the murder, was reduced to writing and was signed by the defendant at approximately 10:00 p.m.[162] This statement did not include any information upon which a defense of self-defense could be formulated.[163] The *Miranda* warnings were printed on this document.[164]

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155. *Id.*
156. *Id.*
157. *Id.* at 258.
158. *Id.*
159. *Id.*
160. *Id.* at 259.
161. *Id.* at 258-59.
162. *Id.* at 259. This statement said:

> That on February 5, 1986 at, approximately, 3:15 p.m. Terry and his brother Milton were walking down the street when they ran into about six or seven guys. The six or seven guys started swearing at Terry and Milton. Terry and Milton then get [sic] into a physical fight but continued walking home. Once inside Terry got a .38 caliber gun from under his mother's bed and put it in his coat pocket. Then Terry told Milton that he wanted to go outside and talk with the guys on the street. Terry and Milton walked about a block and a half before they ran into the same guys again. Terry approached them and asked to talk to them. Then they agreed to fight one-on-one. Milton and another guy fought but a girl broke it up by telling Terry and Milton that Milton was too old to fight. After the fight Terry and Milton start—Milton started walking home. During the fight Terry didn't see any weapons drawn by anyone. As they were going home Terry turned around and saw the same guys following them at the same pace. When they were, approximately, one house away from their mother's house Terry took the gun out of his jacket and starting firing four times.

Id. at 263.

163. *Id.* at 270.
164. *Id.* at 263.

Meanwhile, around 6:00 or 6:30 p.m., the defendant's sister retained Attorney Edward Kalish to represent the defendant.[165] Kalish proceeded to the police station, arriving between 9:00 and 9:30 p.m.[166] Upon arriving, Kalish informed the desk sergeant that he wished to speak with the defendant.[167] The desk sergeant responded that Kalish would need to wait because the defendant was being interrogated.[168] Approximately ten minutes later, Kalish again informed the desk sergeant that he wished to meet with the defendant immediately and that the interrogation must cease.[169] The sergeant did not allow Kalish to meet with the defendant.[170] Afterward, Kalish spoke with the state's attorney, restating his need to speak with the defendant.[171] The state's attorney refused to interrupt the interrogation.[172] Kalish was finally permitted to see the defendant after midnight,[173] many hours after the defendant was interrogated and after the defendant had given incriminating statements.

Before trial, the defendant moved to suppress the statement given during the second interrogation on the ground that his waiver was not valid because he was not informed that his attorney, whom he knew his sister was retaining, was attempting to reach him.[174] The circuit judge denied the motion to suppress.[175] Following trial, the defendant was found guilty of murder and sentenced to serve twenty years in prison.[176] The defendant appealed his conviction. The Illinois Appellate Court affirmed.[177] Subsequently, the defend-

165. *Id.* at 259.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 259-60.
171. *Id.* at 260.
172. *Id.*
173. *Id.*
174. *Id.* at 258.
175. *Id.* at 260-61. The judge said:

> I find from listening to the evidence that the defendant did not request to see an attorney either before or during questioning. Whether Kalish was out in the station during the written—during the interrogation which was reduced to writing is unclear. He certainly wasn't there during the time the oral statement was given. But even if he was there during the course of the written interrogation and asked that he would be able to see the defendant I do not think that would invalidate the statement.

Id.

176. *Id.* at 257-58.
177. *Id.* at 258. The Appellate Court's decision is unpublished.

ant filed a petition for leave to appeal, which was allowed by the Supreme Court of Illinois.[178] The Supreme Court of Illinois reversed, holding that Griggs' waiver was invalid.[179]

B. *Majority Opinion*

The Supreme Court of Illinois relied on *People v. Smith*[180] in reaching its decision, rejecting the holdings in both *People v. Holland*[181] and *Moran v. Burbine*.[182] First, the *Griggs* court concluded that *Holland* did not overrule *Smith*[183] because the two cases are factually distinguishable.[184] In *Holland*, there was no evidence that the defendant's attorney ever attempted to consult with the defendant.[185] "Since there was no evidence that the attorney requested access to the client, there could have been no wrongful denial of attorney access and no reason to apply the rule of *Smith* to the facts presented in *Holland*."[186] In fact, the *Griggs* court agreed that it would reach the same decision on the facts presented in *Holland* (where a suspect does not know that an attorney has been retained and where the attorney does not attempt to gain access to the suspect, a waiver is valid).[187] Thus, the court concluded that *Smith* was not overruled and was still good law.[188]

Second, the *Griggs* court reasoned that *Burbine* was inapplicable to *Griggs* because the cases are distinguishable.[189] The court focused on the fact that in *Burbine*, the defendant was not aware that an attorney had been retained for him, whereas it was alleged that Griggs knew that his sister was retaining an attorney for him.[190] Furthermore, the *Griggs* court stated that police interference with an attorney's attempted access to a client does affect a suspect's ability to knowingly and intelligently relinquish the right to coun-

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178. *Id.*

179. *Id.* at 269, 271.

180. 442 N.E.2d 1325 (Ill. 1982), *cert. denied*, 461 U.S. 937 (1983).

181. 520 N.E.2d 270 (Ill. 1987), *aff'd*, 493 U.S. 474 (1990).

182. 475 U.S. 412 (1986).

183. 604 N.E.2d at 267. The state in *Griggs* argued that Illinois adopted the holding of *Burbine* in *Holland* and that, therefore, *Smith* was overruled *sub silentio*. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

sel.[191] The Supreme Court of Illinois concluded that there cannot be a knowing waiver of the right to counsel unless the defendant is informed of an attorney's presence.[192] Without this piece of information, a waiver cannot be made with complete awareness of the right being abandoned and the consequences of abandoning it.[193]

Third, the court pointed to other cases in which courts have suppressed statements made by a defendant during a custodial interrogation where the police have interfered with an attorney's attempts to consult with a suspect.[194] These include cases decided on the basis of state constitutions,[195] and cases decided before *Smith* on the basis of the Federal Constitution.[196] The court specifically mentioned *State v. Haynes*,[197] a case upon which the *Smith* court principally relied.[198]

Having rejected the applicability of *Holland* and *Burbine*, the *Griggs* court concluded that the *Smith* holding was on point.[199] The court reasoned that police interference in the form of failing to notify a suspect of an attorney's presence and efforts to consult with a client significantly affects a knowing and intelligent waiver.[200] This interference bars communication that directly bears on one's decision of whether or not to waive the right to counsel.[201] Thus, the court affirmed the holding in *Smith* that a suspect cannot knowingly and intelligently waive his or her right to counsel if the suspect has not been made aware that the suspect's attorney was present and was attempting to meet with him or her.[202] Specifically, the court held:

> that a suspect's waiver of his [or her] right to counsel is invalid if police refuse or fail to inform a suspect who knows that an attorney has been retained for him [or her] of the efforts of the attor-

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191. *Id.* at 268-69; see *supra* notes 76-79 and accompanying text for the *Burbine* Court's position on this matter.

192. 604 N.E.2d at 269.

193. *Id.* at 268; see *supra* notes 30-35 and accompanying text for the elements of a valid waiver.

194. *Id.* at 267-68.

195. *See supra* notes 99-100 and accompanying text.

196. *See supra* note 39 and accompanying text.

197. 602 P.2d 272 (Or. 1979) (en banc), *cert. denied*, 446 U.S. 945 (1980).

198. 604 N.E.2d at 268; see *supra* notes 40-44 and accompanying text for a discussion of *Haynes*; see also *supra* notes 46-60 and accompanying text for a discussion of *Smith*.

199. 604 N.E.2d at 267-69.

200. *Id.* at 268-69.

201. *Id.* at 268.

202. *Id.* at 269.

> ney, present at the place of interrogation, to render assistance to the suspect.[203]

The *Griggs* majority completed its analysis of this issue[204] by remanding the case to the trial court since the circuit judge had not decided whether Attorney Kalish was available in the police station and had requested to see the defendant before the defendant signed the written statements in which he confessed to murder.[205] Thus, the case was remanded for a new hearing on the defendant's motion to suppress with orders for the circuit court to determine whether the defendant knew that an attorney had been retained for him and whether this attorney was present at the police station before the police completed their interrogation of the defendant.[206]

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203. *Id.*

204. The court's analysis includes a discussion of two additional issues. First, the court concluded that the use of the defendant's statement was not "harmless beyond a reasonable doubt" because the circuit court did use this statement in finding the defendant guilty. *Id.* at 270. At trial, the defendant testified that he fired the gun in self-defense, since the group of boys, some of whom had weapons, was chasing him. *Id.* However, this information was not included in the statement that the defendant signed. *Id.*; *see supra* notes 162-63 and accompanying text. As such, the State was able to use this fact to impeach his trial testimony. 604 N.E.2d at 270. Also, the facts included in the signed statement differed from the facts included in a detective's supplementary case report. *Id.* These discrepancies led the court to conclude that the defendant's statement was not "harmless beyond a reasonable doubt" because it could not "find beyond a reasonable doubt that this did not affect the outcome of the trial." *Id.*

Second, the court found that "the circuit court did not err in refusing to return the indictment to the grand jury" after Count II of the indictment was amended to add the words "or another" following the name of the victim. *Id.* at 270-71. The court reasoned that formal amendments to indictments are allowed, whereas substantive amendments must be returned to the grand jury. *Id.* at 271. Here, the amendment was one of form. *Id.*

205. *Id.* at 269; *see supra* note 175.

206. 604 N.E.2d at 269. The court said:

> If the circuit court determines the attorney retained for defendant was present at the police station before the interrogation of defendant was completed, the circuit court shall determine whether the attorney had requested access to his client before the interrogation of defendant was completed and whether defendant was so informed. If the circuit court finds that defendant knew that an attorney was being retained for him, that the attorney was present and had requested access to defendant before the completion of the custodial interrogation of defendant, and that police refused to so inform defendant of the immediate availability of his attorney, the circuit court shall allow defendant's motion to suppress and set a date for a new trial. Under these circumstances, there would have been no knowing waiver of defendant's constitutional right against self-incrimination.

Id. at 269-70.

C. *Justice Clark's Concurring Opinion*[207]

Justice Clark wrote separately to state that the majority's decision was supported by both the Constitution of Illinois and the Federal Constitution.[208] He indicated that the Illinois Constitution distinctly protects a defendant's privilege against self-incrimination and the right to speak to counsel.[209] Also, Justice Clark noted that when police fail to inform a suspect of his or her attorney's efforts to contact the suspect, this interference may violate state due process protections.[210]

D. *Chief Justice Miller's Dissenting Opinion*[211]

The dissent characterized the decision in *Moran v. Burbine* as dispositive and controlling, and concluded that the majority's holding could not be reconciled with *Burbine*.[212] Chief Justice Miller reiterated many of the arguments from *Burbine* in concluding that defendant Griggs' waivers were valid.[213] First, the dissent reasoned that events that occur outside of the presence of the suspect and of which the suspect is unaware have no significance on the suspect's ability to knowingly waive Fifth Amendment rights.[214] Second, Chief Justice Miller adopted the *Burbine* argument that police interference in this case has no bearing on a suspect's capacity to knowingly and voluntarily waive the right to counsel.[215]

The dissent then reasoned that the majority's attempt to analogize the *Griggs* case to *People v. Smith* and distinguish it from *Burbine* was flawed.[216] The majority distinguished *Burbine* factually in two respects. First, the suspect in *Burbine* did not know that counsel was being retained, whereas the defendant in *Griggs* was aware that his sister was retaining counsel.[217] Second, in *Burbine*, the attorney only telephoned the police station, whereas in *Griggs*, the attorney actually appeared at the police station.[218] However, the dissent concluded that these differences are meaningless and

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207. *Id.* at 271-72 (Clark, J., concurring).
208. *Id.* at 271.
209. *Id.* at 271-72.
210. *Id.* at 272.
211. *Id.* at 272-75 (Miller, C.J., dissenting).
212. *Id.*
213. *Id.* at 272-74.
214. *Id.* at 272-73.
215. *Id.* at 273.
216. *Id.* at 273-74.
217. *Id.* at 273.
218. *Id.* at 273-74.

insignificant.[219] The dissent reasoned that the majority failed to explain the importance of these differences and how they led to a result contrary to *Burbine.* Rather, Chief Justice Miller stated that this factual difference lends support to a finding of a valid waiver because a defendant who is aware that counsel has been retained, yet waives his or her right to counsel, makes a more knowing and intelligent waiver than a defendant who is unaware of the availability of an identified attorney. In addition, Chief Justice Miller reasoned that the physical presence of an attorney at the police station is irrelevant because a defendant's ability to waive or assert his or her right to counsel is independent of any actions by the attorney.[220]

Furthermore, the dissent stated that the majority's rule would be impractical and inefficient.[221] The dissent claimed that the majority's rule would impose an unnecessary burden on police officers to pay more attention to whether a suspect's attorney has entered the police station and would require police officers to add to the traditional *Miranda* warnings the question of whether suspects know if counsel is being retained for them.[222]

Also, the dissent reasoned that the majority's holding would "disturb the balance carefully struck in *Miranda* and its progeny between the legitimate use of police questioning as an effective tool

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219. *Id.*

220. *Id.* Chief Justice Miller stated:

> The grounds on which the majority seeks to distinguish *Burbine* cannot withstand scrutiny. The distinction drawn between suspects who are aware that attorneys have been retained to represent them and suspects who lack that awareness is simply illusory. The majority fails to explain why a suspect's waiver in these circumstances must be deemed less knowing, less intelligent, or less voluntary merely because he [or she] already knows that counsel has been retained on his [or her] behalf. If a suspect's knowledge in this regard is relevant at all, it argues for the contrary conclusion: it would seem that a defendant who is aware that counsel has been retained to represent him [or her] yet chooses anyway to respond to questions has made a more knowing, more intelligent, and more voluntary waiver of his [or her] *Miranda* rights than a suspect who lacks that knowledge.
>
> The majority's additional ground by which it would justify its departure from *Burbine*—that the attorney must actually appear at the station house where the defendant is being held—misapprehends the nature of the right at issue. I fail to see why a defendant's assertion or waiver of his [or her] right to counsel should be at all dependent on the actions of counsel, and on whether or not the attorney happens to show up at the same place where the defendant is then being questioned.

Id. (Miller, C.J., dissenting).

221. *Id.* at 274.

222. *Id.*

of law enforcement and the potential misuse of the interrogation process to obtain coerced confessions."[223] The dissent stated that *Miranda* reconciled these competing interests by giving defendants some control over their interrogations by requiring that questioning cease once a defendant requests counsel and that questioning be reinitiated only at the defendant's request.[224] Therefore, *Miranda* offers sufficient safeguards to protect suspects during custodial interrogations.[225]

Lastly, the dissent mentioned that, in its opinion, a different result would not follow from the Illinois Constitution since it does not suggest a wider basis for the privilege against self-incrimination.[226] Thus, the same result would be reached under state constitutional law.[227]

III. Analysis

The Supremacy Clause of the United States Constitution[228] mandates that federal law, including Federal Constitutional provisions, overrides both state law and state constitutional provisions in matters where the laws or constitutional provisions conflict.[229] Thus, since the Supreme Court of Illinois decided *Griggs* on the basis of the Federal Constitution, it was required to apply United States Supreme Court cases which have ruled on the same issue. However, if the United States Supreme Court had never considered the issue presented in *Griggs*, the Illinois Supreme Court would have been free to develop its own interpretation and resolution of the Fifth Amendment as it applied to this issue.[230] Thus, if the issue presented in *Griggs* differed from that in *Burbine*, the Illinois Supreme Court could reject the holding in *Burbine*. However, if *Burbine* addressed the issue in *Griggs*, the court was required to adhere to *Burbine*.

Alternatively, if a state wishes to provide its citizenry with more expansive protections than those provided by the Federal

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223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. The Supremacy Clause states, in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.
229. *See Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1331-47 (1982).
230. *Id.*

Constitution, a state court can decide an issue on the basis of its state constitution. In such a situation, however, Federal Constitutional protections are a minimum below which a state is not permitted to go.[231] Thus, a state can only grant equivalent or greater protections under its own constitution than the Federal Constitution would grant.[232]

The Illinois Supreme Court decided *Griggs* on the basis of the United States Constitution.[233] However, it found that *Griggs* was sufficiently distinguishable from *Burbine* such that *Burbine* was not controlling.[234] Thus, having determined that it was faced with an issue that the United States Supreme Court had not ruled on, the *Griggs* court adopted the reasoning and holding in *Smith*, a case that it deemed to be extremely similar.[235]

However, the *Griggs* court's efforts to distinguish *Burbine* seem unconvincing. Despite some factual differences between the two cases, the reasoning and principles behind *Burbine* are directly applicable to *Griggs*. Rather than this unpersuasive attempt to distinguish *Burbine*, there are alternative and more convincing analyses that the court could have used to reach its result.

A. *A Distinction Without a Difference—the* Griggs *Court's Analysis Is Unpersuasive*

In *Burbine*, the defendant's sister retained counsel for Burbine, who subsequently telephoned the police station to inform the police that she would represent him during questioning.[236] Burbine was unaware of both his sister's actions and the actions of his attorney.[237] The United States Supreme Court concluded that the defendant's waiver was valid.[238] In contrast, Griggs' sister informed him that she was in the process of retaining an attorney.[239] However, upon arriving at the police station, the attorney was not per-

231. *See* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 171-95 (1983); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1141-80 (1985); Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1485-98 (1990).

232. *See supra* note 231.

233. *See* People v. Griggs, 604 N.E.2d 257 (Ill. 1992).

234. *Id.* at 267.

235. *Id.* at 267-70.

236. Burbine v. Moran, 475 U.S. 412, 416-17 (1986).

237. *Id.* at 417.

238. *Id.* at 424; see *supra* notes 61-96 and accompanying text for a discussion of *Burbine*.

239. *Griggs*, 604 N.E.2d at 258.

mitted to consult with Griggs until he had been interrogated.[240] Griggs was not informed of his attorney's presence and requests to see him until after he had supplied incriminating statements.[241] The Supreme Court of Illinois concluded that Griggs' waiver was invalid.[242]

The *Griggs* court held that *Griggs* was sufficiently distinguishable from *Burbine* so that *Burbine* was not controlling.[243] The Supreme Court of Illinois grounded its conclusion primarily on the facts that, in *Griggs*, the defendant knew that his sister was in the process of retaining an attorney and the attorney was present at the police station, whereas in *Burbine*, the defendant was unaware that his sister had contacted and retained a Public Defender who telephoned the police station. However, aside from disagreeing with the reasoning in *Burbine*, the Supreme Court of Illinois never explained why this factual distinction is relevant and how this distinction caused the court to hold that *Burbine* is not applicable, whereas *Smith* is dispositive.[244]

1. Should *Burbine* Have Been Distinguished?

The *Griggs* court rejected the primary argument that supports *Burbine*, namely that "[e]vents occurring outside of the presence of the suspect and entirely unknown to . . . [the suspect] surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[245] Instead, the *Griggs* court concluded that a waiver obtained without having informed a suspect of his or her attorney's availability cannot be "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it."[246] Thus, according to the *Griggs* majority, a suspect cannot knowingly and intelligently waive his or her right to counsel without having been informed of an attorney's presence and desire to consult with the suspect.[247]

The *Griggs* court's attempt to distinguish *Burbine* is flawed in two respects. First, the distinction that the *Griggs* court draws is

240. *Id.* at 260.

241. *Id.*

242. *Id.* at 269; see *supra* notes 141-227 and accompanying text for a discussion of *Griggs*.

243. *Griggs*, 604 N.E.2d at 267.

244. *See supra* notes 189-93 and accompanying text; *see also supra* notes 212-27 and accompanying text.

245. Moran v. Burbine, 475 U.S. 412, 422 (1986).

246. *Griggs*, 604 N.E.2d at 268 (quoting *Burbine*, 475 U.S. at 421).

247. *Id.* at 269.

meaningless. In both cases, the defendants' attorneys were reaching out to aid their clients and in both cases, their attempts were thwarted by the police.[248] In both situations, therefore, events occurred outside of the presence of the defendants. Yet, if, as *Burbine* decided, an attorney's attempts to consult with a client where the client is unaware of the attorney's identity has no bearing on the client's ability to understand and waive a constitutional right, the fact that a suspect knows that a specific attorney is being retained should not change the result. The police provided Griggs with his complete *Miranda* warnings.[249] He knew that he could remain silent or request an attorney. He also knew that any statements made could be admitted in a subsequent court proceeding. Yet, he still chose to waive his rights and answer the police officer's questions. Thus, his waiver seems no less knowing and intelligent than Burbine's waiver.[250]

Indeed, if anything, Griggs' waiver was even more knowing and intelligent than Burbine's. It would seem that a defendant, armed with the knowledge that there is an identified attorney with whom the defendant can choose to consult by simply invoking the Fifth Amendment right to counsel, makes a more intelligent and more knowing waiver of the right to counsel than a defendant who does not know that there is a particular attorney available with whom to consult.[251] The *Griggs* court's summary conclusion that this waiver was less intelligent and less knowing than that in *Burbine* is unexplained and appears inexplicable.

2. Which State Court Case Should Apply?

Having distinguished *Burbine* on factual grounds, the *Griggs* court then considered the relevant state court cases that have interpreted the Fifth Amendment of the United States Constitution. First, the *Griggs* court rejected[252] *People v. Holland*,[253] a Supreme

248. The fact that the police in *Burbine* accomplished this by misleading the attorney into not coming to the police station, as opposed to physically barring access as in *Griggs*, seemed to make no difference for purposes of *Miranda*. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

249. *Griggs*, 604 N.E.2d at 259, 263.

250. *See supra* note 79.

251. This argument is persuasively made in *Griggs*, 604 N.E.2d at 272-75 (Miller, C.J., dissenting), Matney v. Armontrout, 956 F.2d 824, 826 (8th Cir. 1992), and People v. Ledesma, 251 Cal. Rptr. 417, 423 (Cal. Ct. App. 1988). *See supra* notes 120-30 and 220 and accompanying text.

252. *Griggs*, 604 N.E.2d at 267.

253. 520 N.E.2d 270 (Ill. 1987), *aff'd*, 493 U.S. 474 (1990).

Court of Illinois case decided after *Burbine* and which followed the reasoning and holding of *Burbine*.[254] Since the *Griggs* court distinguished *Burbine*, this rejection of *Holland* was necessary. *Holland* was decided under the Federal Constitution and involved a factual situation similar to *Burbine* and an issue which the United States Supreme Court had already considered in *Burbine*.[255]

Having also distinguished *Holland*, the court then examined *People v. Smith*[256] and found it applicable.[257] The Supreme Court of Illinois, in *Smith*, was confronted with a fact pattern similar to that in *Griggs* in that Smith had personally consulted with and retained an attorney prior to the interrogation.[258] Thus, as in *Griggs*, defendant Smith knew of an identified attorney who was available and could be present during any questioning.[259] However, the *Smith* court did not discuss this fact, aside from including it in a description of the factual background of the case.[260] Instead, the *Smith* court concentrated on the issue of police interference in preventing the attorney, who later arrived at the jail, from consulting with Smith and failing to inform Smith of the attempted consultation.[261]

The *Smith* court's reasoning was supported by various cases which similarly focused solely on police interference with an attorney's attempt to consult with a suspect-client and in which the defendant was unaware that an attorney had been retained.[262] In addition, the *Smith* court's holding stressed this aspect of the case

254. *Id.* at 277-78.

255. See *supra* notes 105-19 and accompanying text for a discussion of *Holland*.

256. 442 N.E.2d 1325 (Ill. 1982), *cert. denied*, 461 U.S. 937 (1983); see *supra* notes 46-60 and accompanying text for a discussion of *Smith*.

257. *Griggs*, 604 N.E.2d at 267-69.

258. *Smith*, 442 N.E.2d at 1326.

259. *Id.*

260. *Id.*

261. *Id.* at 1326-29. The *Smith* court stated that "there was not a knowing and intelligent waiver of the right to counsel during the interrogation in view of the interference with [Attorney] Ellerby's effort to consult with the defendant." *Id.* at 1328.

262. *Id.* at 1328-29. These cases include State v. Matthews, 408 So. 2d 1274 (La. 1982); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969); State v. Haynes, 602 P.2d 272 (Or. 1979) (en banc), *cert. denied*, 446 U.S. 945 (1980); State v. Jones, 578 P.2d 71 (Wash. Ct. App. 1978). See *supra* notes 39-44, and 99 and accompanying text for a discussion of these cases. It is important to note that while, in *McKenna*, the defendants had each asked a relative to contact an attorney, this factor did not play a vital role in the court's decision. A later case, Commonwealth v. Sherman, 450 N.E.2d 566 (Mass. 1983), indicated that this fact was not a distinguishing factor in *McKenna* and that the holding was "expressly based" on the sergeant's failure to notify the defendant that his attorney requested to be present during any interrogations. *Id.* at 570.

and not whether the suspect had, in fact, retained an attorney nor if the suspect knew that an attorney was being retained.[263] The court held that:

> when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him.[264]

Thus, the factor which the *Griggs* court uses to distinguish *Griggs* from *Burbine*, namely the defendant's awareness that an attorney had been retained, is insignificant since the cases that *Griggs* relied upon do not view this factor as important.

The language in the *Smith* court's holding[265] and the cases upon which it relied to reach its holding[266] indicate that the Supreme Court of Illinois sought to establish a rule for Illinois courts to apply when confronted with the situation of interference in an attorney's attempts to access a client who subsequently waives the right to counsel.[267] Thus, the only critical factor is whether an attorney attempted to and was prevented from consulting with a client prior to or during interrogation, regardless of any contacts that a suspect had with an attorney prior to interrogation or any knowledge that an attorney is being or has been retained.[268]

Although *Smith* is applicable to *Griggs*, since its holding encompasses the issue in *Griggs*, *Smith* is not the proper authority for the distinction that the *Griggs* court draws. Rather, *Burbine* is the proper authority since it also addressed the issue presented in *Griggs*. *Burbine* is the United States Supreme Court case interpreting the United States Constitution on this matter; thus, it takes precedence over *Smith*, a state court decision interpreting the United States Constitution.[269]

3. Other "Precedents" or Persuasive Cases

An examination of the other cases that the Supreme Court of Illinois used as precedent in *Griggs* also demonstrates that the ma-

263. *Smith*, 442 N.E.2d at 1329.
264. *Id.*
265. *See supra* note 264 and accompanying text.
266. *See supra* note 262 and accompanying text.
267. *Smith*, 442 N.E.2d at 1328-29.
268. *Id.*
269. See *supra* notes 228-32 and accompanying text for a discussion of the Supremacy Clause.

jority's rejection of *Burbine* and application of *Smith* is unpersuasive. In reaffirming the court's holding in *Smith*, the court points to various cases, none of which support the majority's decision.[270] The court cited many cases with holdings similar to *Smith*, but which were decided on the basis of state constitutions.[271] Although the principles derived from these cases are illustrative, their holdings are ultimately irrelevant to an analysis of *Griggs*, since *Griggs* was decided on the basis of the Federal Constitution.[272]

Aside from those cases that were decided on the basis of a state constitution, the *Griggs* court relied on *State v. Haynes*,[273] a case decided before *Burbine*. However, the *Haynes* decision does not provide a basis for distinguishing *Smith* from *Burbine*, or for distinguishing *Griggs* from *Burbine*. The defendant in *Haynes* was unaware that an attorney had been retained.[274] Thus, the facts in *Haynes* are more similar to those in *Burbine* than to either *Smith* or *Griggs*. As such, *Haynes* is also irrelevant as support for the *Griggs* court's decision to reject *Burbine*.[275]

4. Other Cases That *Griggs* Ignored

The *Griggs* decision also conflicts with various other cases which are remarkably similar to *Griggs* and in which the courts found the defendants' waivers to be valid. In both *People v. Ledesma*[276] and *Matney v. Armontrout*,[277] the defendants had personally retained counsel.[278] In *State v. Earls*[279] and *Middleton v. Murphy*,[280] the defendants had asked their wives to contact attorneys.[281] In *Griggs*, the defendant's sister told him that she would retain an attorney for him.[282] This is identical to both *Earls* and *Middleton*. Also, it is analogous to *Ledesma* and *Matney*, since whether a defendant knows that someone is retaining an attorney on his or her behalf or personally retains one, there is a specified

270. People v. Griggs, 604 N.E.2d 257, 267-68 (Ill. 1992).
271. *Id.*; *see supra* notes 99-100 and accompanying text.
272. *See Griggs*, 604 N.E.2d 257.
273. 602 P.2d 272 (Or. 1979) (en banc), *cert. denied*, 446 U.S. 945 (1980).
274. *Id.* at 273-74; *see supra* notes 40-44 and accompanying text.
275. *Griggs*, 604 N.E.2d at 267-69.
276. 251 Cal. Rptr. 417 (Cal. Ct. App. 1988).
277. 956 F.2d 824 (8th Cir. 1992).
278. *See supra* notes 120-30 and accompanying text.
279. 805 P.2d 211 (Wash. 1991).
280. 996 F.2d 1219 (7th Cir.), *available as* No. 92-1498, 1993 WL 217156, *cert. denied*, 114 S. Ct. 607 (1993).
281. *See supra* notes 131-40 and accompanying text.
282. *Griggs*, 604 N.E.2d at 258.

attorney whose identity the defendant is aware of and whom the defendant can contact. However, while *Burbine* was rejected in *Griggs*, *Burbine* was held binding in all four of these other cases.[283] Thus, the factual difference between *Burbine* and these cases, which is the same fact upon which *Griggs* distinguished *Burbine*, has not persuaded other courts as to the inapplicability of the *Burbine* holding. In fact, the courts noted that *Burbine* was applicable despite the factual difference.[284] Furthermore, the *Ledesma* and *Matney* courts both reasoned that a waiver of the right to counsel is more knowing and intelligent when a defendant personally retains counsel.[285]

B. *An Explanation of the* Griggs *Court's Conclusion and Alternatives to Its Analysis*

1. Criticisms of *Burbine*

Although the analysis in *Griggs* is flawed, it is understandable why the court reached its conclusion. The *Burbine* decision has been plagued with criticisms. The Court of Appeals of Maryland stated that "[e]ven though we do not find the Court's reasoning . . . to be persuasive, we are nevertheless bound by its interpretation of the Federal Constitution."[286] In addition, the holding in *Burbine* has been described as "disturbing" because it sanctions police interference in the attorney-client relationship and misconduct in terms of lying to attorneys and withholding information from suspects.[287] Furthermore, the decision has been labelled as unethical[288] and unclear in that it leaves the door open for suspects to raise a Fourteenth Amendment due process argument in place of a Fifth Amendment right to counsel argument under these facts, yet fails to establish clear guidelines by which courts can determine if due process rights have been violated.[289]

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283. *See supra* notes 120-40 and accompanying text.

284. *See supra* notes 120-40 and accompanying text.

285. *See supra* notes 126-30 and accompanying text; see also *supra* note 220 and accompanying text for Chief Justice Miller's dissenting opinion in *Griggs*.

286. Lodowski v. State, 513 A.2d 299, 304 (Md. 1986).

287. Alexander H. Pitofsky, Comment, *A Missed Opportunity to Curb Police Deception of Criminal Defense Attorneys,* Moran v. Burbine, *106 S. Ct. 1135 (1986)*, 25 AM. CRIM. L. REV. 89, 106-09 (1987).

288. Althea Kuller, Note, Moran v. Burbine*: Supreme Court Tolerates Police Interference With the Attorney-Client Relationship*, 18 LOY. U. CHI. L.J. 251, 280-81 (1986).

289. Daniel J. Lynch, Note, Moran v. Burbine*: Constitutional Rights of Custodial Suspects*, 34 WAYNE L. REV. 331, 349-51 (1987).

Perhaps the most severe criticism of *Burbine* is that it "betrays the spirit of *Miranda*" by allowing police officers to deceive attorneys and by encouraging "incommunicado interrogation."[290] Although not a complete protection of criminal defendants, the *Miranda* warnings were created to reduce the coerciveness that is inherent in police interrogations.[291] In order for these warnings to achieve their stated purpose, it is imperative both that they are provided and that their purpose is not obstructed.[292] Thus, it has been argued that:

> The [*Burbine*] majority . . . failed to recognize the fundamental difference between the abstract right to counsel communicated through a police officer's recital of the *Miranda* litany, and the concrete right to the assistance of a particular lawyer who presently is available and seeking to represent the suspect. A suspect who is willing to waive the abstract right may not be willing to waive the concrete right. Consequently, a suspect's waiver of his [or her] abstract right to counsel should not be deemed sufficient to waive the concrete right to consult with an attorney presently available and seeking to render assistance. When an attorney has attempted to represent a suspect in custody, there should be no finding of valid waiver unless the suspect has been informed of his [or her] attorney's efforts.[293]

By failing to inform a suspect that his or her attorney is presently available to consult with the suspect, *Miranda* becomes a solely formal prescription and an empty promise.[294] Perhaps, by refusing to

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290. *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 126 (1986).

291. *See* Miranda v. Arizona, 384 U.S. 436, 455 (1966).

292. Kuller, *supra* note 288, at 276.

293. Kuller, *supra* note 288, at 276 (footnote omitted).

294. Since *Miranda* was decided, subsequent United States Supreme Court cases have clarified that *Miranda* provides a formalistic limit on police conduct. *See* Moran v. Burbine, 475 U.S. 412, 424-27 (1986). *See also* New York v. Harris, 495 U.S. 14 (1990); Colorado v. Spring, 479 U.S. 564 (1987); Connecticut v. Barrett, 479 U.S. 523 (1987); Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); Edwards v. Arizona, 451 U.S. 477 (1981). *Miranda* presumes that once the warnings are provided, any coercion associated with custodial interrogation has been removed. Thus, once the warnings are given to a suspect and the suspect waives the rights to silence and counsel, *Miranda* has completed its goal in removing the coercion inherent in interrogations. It is unnecessary, therefore, to ask whether a defendant was actually coerced into confessing. *See* Joseph D. Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 245, 258 (1987); *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 131 (1986).

In contrast, the Supreme Court of Illinois, in *Griggs*, offered a functional or substantive view of the right to counsel. It was not enough that Griggs was provided with

admit statements that a criminal defendant makes while his or her attorney is in the next room demanding that the interrogation cease and that he or she be permitted to speak with his or her client, yet being prevented from doing so by the police officers who wish to obtain an incriminating statement from the defendant, the *Griggs* court was attempting to add some substance to this promise and to substantially decrease the coercion inherent in interrogations in order to put suspects and their interrogators on a more equal footing.

2. An Alternative Analysis to Reach the Desired Result of *Griggs*

In an effort to preserve and expand the Fifth Amendment right to counsel during custodial interrogations in Illinois, the court should have analyzed *Griggs* differently to reach the same conclusion. There are two alternative means of analysis that the *Griggs* court could have adopted which would have reached the same result, but in a more convincing manner.

First, the court could have applied a Fourteenth Amendment due process argument, as suggested in *Burbine*,[295] by arguing that the police conduct in *Griggs* was more offensive and egregious than that in *Burbine* such that it "shocked the sensibilities of a civilized society."[296] In *Burbine*, a police officer lied to the defendant's attorney about whether Burbine would be questioned that evening.[297] In contrast, in *Griggs*, the defendant's attorney knew that Griggs was being interrogated, yet was prevented from interrupting the interrogation to speak with his client.[298] Arguably, the police officer's interference in *Griggs* is more offensive because Griggs' attorney was physically present at the police station and demanded that the desk sergeant stop the interrogation. It was quite feasible for the desk sergeant to do so. In *Burbine*, on the other hand, the attorney spoke with an unidentified police officer on the telephone who, while he told the attorney that Burbine would not be questioned that evening, may not have been aware of the actual subsequent interrogation.[299]

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his *Miranda* warnings. The court demanded that the warnings be given effect by informing Griggs of his attorney's desire to consult with him and allowing this consultation to occur. Only then would Griggs be shielded adequately from a coercive interrogation. *See Griggs*, 604 N.E.2d 257.

295. *See supra* notes 88-90 and accompanying text.

296. Moran v. Burbine, 475 U.S. 412, 432-34 (1986).

297. *Id.* at 415.

298. *Griggs*, 604 N.E.2d at 259-60.

299. It is also feasible, however, that a court, upon examining the totality of the

Second, the *Griggs* majority could have decided *Griggs* on the basis of the Illinois Constitution.[300] The Appellate Court of Illinois had the opportunity to do this in *People v. McCauley*.[301] In *McCauley*, a suspect was arrested and brought to the police station. While he waited at the police station, a relative hired an attorney, who subsequently went to the police station and demanded to consult with the defendant.[302] The sergeant refused the attorney access to McCauley.[303] Before trial, the defendant filed a motion to suppress his lineup identification and any statements he made.[304] The Appellate Court of Illinois held that:

> in Illinois, if a suspect's family hires an attorney to represent . . . [the suspect] while he [or she] is in police custody and the police deny the attorney access to him [or her] and later obtain a lineup identification or statements from him [or her], it violates the suspect's self-incrimination protection afforded . . . [Illinois] citizens by the constitution of Illinois.[305]

The court reached this conclusion because it reasoned that the Illinois Constitution gives its citizens more protection than the Federal Constitution as interpreted in *Burbine*.[306] Therefore, if the facts of *Griggs* were presented to an Illinois court again and were analyzed

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circumstances surrounding these incidents, would find the conduct in *Burbine* to be more egregious than that in *Griggs*. The police officer affirmatively lied to and deceived Burbine's attorney, whereas the desk sergeant was truthful with Griggs' attorney. He merely refused to stop the interrogation and let the attorney consult with Griggs. Since the police officers in *Burbine* did not violate the defendant's Fourteenth Amendment due process rights, the rights of Griggs would similarly not have been violated.

It is difficult to predict how a court would rule in such a situation because the *Burbine* majority did not provide a substantive standard to aid lower courts in applying its "shock the conscience" test in police deception and interference cases. *See* Moran v. Burbine, 475 U.S. 412, 432-34, 466-68 (1986). *See also The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 134 (1986); Daniel J. Lynch, Note, Moran v. Burbine*: Constitutional Rights of Custodial Suspects*, 34 WAYNE L. REV. 331, 350-51 (1987); Paul M. Moretti, Comment, Moran v. Burbine*: Duty to Inform, Police Deception and the Egregious Standard for* Miranda, 23 NEW ENG. L. REV. 151, 182-83 (1988).

300. The relevant provision of the Illinois Constitution states: "No person shall be compelled in a criminal case to give evidence against himself [or herself] nor be twice put in jeopardy for the same offense." ILL. CONST. art. I, § 10.

301. 595 N.E.2d 583 (Ill. App. Ct. 1992).

302. *Id.* at 584.

303. *Id.* at 585.

304. *Id.*

305. *Id.* at 585-86.

306. *Id.* at 586. Justice Clark, concurring in *Griggs*, also believed that the Illinois Constitution would render a waiver in a factual situation similar to *Griggs* invalid. *See supra* notes 208-09 and accompanying text.

on the basis of the Illinois Constitution, the court may invalidate the waiver.

Conclusion

The Supremacy Clause of the United States Constitution requires that, where the Federal Constitution is at issue, United States Supreme Court cases which have spoken on the particular issue be applied. *Moran v. Burbine* defined the rights of a criminal defendant when an attorney has been retained and the attorney's attempts to consult with the suspect are thwarted by the police. A similar situation was presented in *People v. Griggs*, with one slight variation. Griggs knew that an attorney was being retained for him, whereas Burbine was unaware of this fact. Yet, while the *Griggs* court used this difference to reject *Burbine*, the distinction is in fact meaningless and does not alter the applicability of *Burbine*.

Thus, the waiver in *Griggs* should have been found to be valid. However, the *Griggs* court arrived at the opposite conclusion, with a strained analysis. While the court reached the desirable result, it did not reach the correct result under the law.

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