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Citation Information

William T. Pizzi, *Waiver of Rights in the Interrogation Room: The Court's Dilemma*, 23 CONN. L. REV. 229 (1991), available at <https://scholar.law.colorado.edu/articles/892>.

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Citation: 23 Conn. L. Rev. 229 1990-1991

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WAIVER OF RIGHTS IN THE INTERROGATION ROOM: THE COURT'S DILEMMA

*William T. Pizzi**

I. INTRODUCTION

FOR over two decades, the Supreme Court has tried to erect a doctrinal structure for station house confessions based on two conflicting premises. The first premise, steadfastly insisted upon by the Court, is that waiver of rights in the station house must meet the *Johnson v. Zerbst*¹ standard of a knowing, intelligent and voluntary waiver of a constitutional right.² Station house interrogations are the only proceedings outside of the courtroom to which the *Johnson v. Zerbst* standard for waiver of a constitutional right has been applied. Given that a judge will not be present to help a suspect understand his rights and to ensure that waivers meet the *Johnson v. Zerbst* standard, the situation a suspect faces in the interrogation room is qualitatively different from what it will be in the courtroom.

The second premise on which the Court has been equally insistent is that the right to counsel under the sixth amendment is not triggered by arrest or even by custodial interrogation, but attaches only when "adversary judicial proceedings have been initiated"³ against a suspect, which, in most cases, is the suspect's first appearance in court.⁴ This

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1. 304 U.S. 458 (1938) (held that the federal court could not validly convict an alleged counterfeiter, who was unable to hire counsel, unless the accused had under the facts and circumstances made a knowing, intelligent, and competent waiver of his sixth amendment right to counsel).

2. *Id.* at 464-65.

3. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). In *Kirby*, the Court ruled that the sixth amendment right to counsel had not yet attached when the arrestee was identified by the victim in a show-up at the station house following arrest but prior to the arrestee's first court appearance. *Id.* at 684, 688-89.

4. See *Brewer v. Williams*, 430 U.S. 387 (1977) (sixth amendment attached when the arrestee

initial appearance for advisement of rights by the judge and setting of bail will normally take place shortly after arrest, but only after the police have had a chance to interrogate the suspect. A constitutional rule based on the Court's second premise leaves the suspect alone and isolated in the interrogation room, armed only with the information conveyed in the *Miranda*⁵ warnings, facing the decision whether to waive his fifth amendment rights. According to *Miranda*, a suspect has a fifth amendment right to counsel, but the suspect will need to go against the wishes of his interrogators to assert his right to counsel before interrogation ceases. Not surprisingly, many arrestees do not assert their right to remain silent nor their right to have counsel present at interrogation.⁶

Over the last few years, the tension between these two premises has resulted in a series of disturbing decisions. Whether or not one agrees with the results in the individual cases, taken together, they lead one to believe that the Court has built a structure on a very shaky foundation. The reasoning in these decisions is strained and unconvincing, and the opinions in the cases lead inevitably to a weak standard of constitutional waiver for the station house, which is guaranteed to

was arraigned following his arrest on a warrant).

5. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that arrestees must be warned of their rights under the fifth amendment. The litany of rights to be read by the police includes: the right to silence, the right to have counsel present, the right to appointed counsel if indigent, and the right to know that anything said can be used against him in a court of law. *Id.* at 479.

6. Two empirical studies of the effect of *Miranda* warnings conducted in the late 1960s in the District of Columbia and in Pittsburgh found that roughly 40% of arrestees give statements to the police. See Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1351-52 (1968); Seeburger & Wetick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 11 (1967).

The two studies have figured prominently in the debate over *Miranda*. Professor Caplan, criticizing *Miranda*, relies on the Pittsburgh study because it suggests a drop in the confession rate from 54.4% before *Miranda* to 37.5% after *Miranda*. See Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1464 (1985). In reply, Professor White argues that the Pittsburgh study is the only one to find a significant decrease in the rate of confessions after *Miranda* was implemented. He points out that the District of Columbia study concluded that *Miranda* had little effect on the confession rate in Washington, D.C. See White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 18-19 (1986). Those studies may even understate the percentage of suspects giving statements to the police. More recent studies show tremendous variations in the rate of suspects making statements to the police, ranging from one-fourth to two-thirds of the arrestees. See Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 127 (1986). Studies in England have consistently found that from two-thirds to three-fourths of suspects questioned by police made incriminating statements. *Id.* See also P. SOFTLEY, POLICE INTERROGATION: AN OBSERVATIONAL STUDY IN FOUR POLICE STATIONS 21 (Home Office Research Study No. 61, 1980) (Table 3.4).

cause lower courts considerable confusion in the years ahead. This Article will focus on the theoretical and practical problems constraining the Court in cases involving waiver of constitutional rights in station houses. It will also focus on the Court's attempt to wriggle its way out of the predicament caused by these problems, which has resulted in a series of decisions that pay lip service to the traditional standards of constitutional waiver but undercut those standards in practice.

The case that best demonstrates the Court's dilemma—insisting on warnings about counsel, yet keeping counsel away from suspects—is *Moran v. Burbine*,⁷ which upheld a waiver despite the fact that the police intentionally kept the arrestee in the dark about the fact that a lawyer, alerted to the arrest by the suspect's family, was trying to reach him in order to advise him. For the police to warn an arrestee of his right to counsel and the availability of appointed counsel, but fail to tell him that his counsel is trying to reach him, seems inconsistent. The Court itself seemed uncomfortable with its decision and even reminded state courts that they could reach a different conclusion as a matter of state law.⁸ Not surprisingly, some state courts have done just that.⁹

For all of its inconsistency, though, *Burbine* is more a symptom of the Court's problems than a cause. This Article will look closely at three cases which, taken together, show dramatically the pressure the Court has been under to redefine the notion of waiver of rights in the interrogation room: *Colorado v. Connelly*,¹⁰ *Colorado v. Spring*,¹¹ and *Patterson v. Illinois*.¹² *Connelly* isolates the issue of voluntariness in the *Johnson v. Zerbst* standard. *Spring* probes the meaning of a knowing and intelligent waiver under *Johnson v. Zerbst* when a suspect is unsure of exactly which crimes the police wish to discuss in the interrogation room. *Patterson* raises the issue of the appropriate standard of waiver in the interrogation room when the suspect's sixth amendment rights have attached and the police desire to interrogate the suspect

7. 475 U.S. 412 (1986).

8. *Id.* at 428.

9. *See, e.g.,* *People v. Houston*, 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986) (failure of police to inform detainee during questioning that his attorney had arrived at the station house to speak to him invalidated the defendant's earlier waiver of the right to counsel and rendered his confession during questioning inadmissible); *State v. Stoddard*, 206 Conn. 157, 537 A.2d 446 (1988) (failure of police to inform the defendant of counsel's efforts to contact him invalidates earlier waiver of counsel unless state can show the defendant would not have invoked the right to counsel if informed of the counsel's attempted contact).

10. 479 U.S. 157 (1986).

11. 479 U.S. 564 (1987).

12. 487 U.S. 285 (1988).

before he has had a chance to confer with counsel.

II. THE SOURCES OF THE PROBLEM

A. *Johnson v. Zerbst in the Interrogation Room*

In *Miranda v. Arizona*,¹³ the Supreme Court suggested as a paradigm the story of a suspect in custody who, because of the presence of counsel at his elbow, was emboldened to tell his story to the police freely and more accurately. The problem with this tale is that it is largely myth. In reality, if a suspect does have a chance to consult with counsel prior to interrogation, there will be no interrogation. If the case against a suspect is weak, it would be a mistake to bolster the state's case by answering questions. If the case against a suspect is strong, caution still suggests silence so that the defense attorney at least has some leverage left for plea bargaining. When one additionally considers that a defense attorney at the time of the suspect's arrest may have only an imperfect understanding of the evidence against a suspect or the charges that eventually may be filed, a defense attorney always will tell the suspect not to answer any questions from the police. By talking to the police in such circumstances, there is everything to lose and nothing to gain. Once a suspect makes a request for counsel, the police understand the game is functionally over and there will be no interrogation.¹⁴

This creates a serious problem for a criminal justice system: if any suspect informed by a competent defense attorney in the interrogation room would be told that the smartest thing he or she could do would be to make no statements to the police, how can any waiver by a suspect in that setting be knowing and intelligent? The Court's insistence that waiver in the station house must meet the standards of *Johnson v. Zerbst* has always presented problems. A suspect hardly can be expected to make a knowing and intelligent decision about his constitutional rights when he is alone in the station house, perhaps dealing with

13. 384 U.S. 436, 466 (1966).

14. There may not even be a statutory mechanism for the appointment of fifth amendment counsel in the interrogation room in some jurisdictions. Because there was no statutory mechanism or system worked out for the appointment of fifth amendment counsel in the station house prior to interrogation, the police in *Duckworth v. Eagan*, 109 S. Ct. 2875 (1989), had added to the *Miranda* warnings the following caveat: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." Because the *Miranda* warnings have a prophylactic purpose and are not themselves rights protected by the Constitution and because the full set of warnings given *Eagan* "touched all of the bases required by *Miranda*," *id.* at 2880, the Court upheld the waiver despite the added language. *Id.* at 2881.

the shock of arrest, worried about bail, and uninformed of the implications of his choices. While the *Miranda* warnings are an important protection against the compulsion inherent in the station house atmosphere, they are limited in what they tell a suspect. The *Miranda* warnings tell a suspect in custody that he has the right to remain silent, but do not tell him of the trial or bail consequences if he insists on remaining silent. The warnings also do not give a suspect the sort of contextual information about the case that would necessarily inform a decision whether to waive the right to counsel in the courtroom setting. A suspect who is arrested may not understand the full range of charges he faces. He will frequently have imperfect knowledge of the evidence against him. There also may be collateral evidentiary confusions that might lead a suspect to believe oral statements will not be admissible.¹⁵ Obviously, no set of warnings can clarify all these confusions. The fifth amendment and the issues related to the fifth amendment are too sophisticated and complicated for many laypersons to understand, especially those who are trying at the same time to come to grips with a sudden loss of liberty.

B. Attachment of the Right to Counsel at the Start of Adversarial Judicial Proceedings, Shortly After Interrogation Has Concluded

The Court's insistence that the right to counsel under the sixth amendment attaches shortly after arrest (but subsequent to interrogation) has its own conceptual problems, independent of station house waiver issues. The period shortly after arrest seems an arbitrary point at which to afford indigent citizens the right to counsel. In many cases, it is much too late to provide an arrestee with the skills that a good lawyer can provide. For instance, in white collar prosecutions or other complicated criminal investigations, the government is usually committed to prosecuting weeks or even months prior to "the initiation of adversary judicial criminal proceedings."¹⁶ "Targets" often will be aware

15. This may be what occurred in *Connecticut v. Barrett*, 479 U.S. 523 (1987), where the suspect told the police that he would not give any written statements to the police until his attorney was present, but proceeded to talk with the police about the crime. The Court rejected Barrett's contention that his expressed desire for counsel prior to giving a written statement was an invocation of his right to counsel which should have required the police to cease interrogating him. *Id.* at 529.

One study found that 45% of the suspects studied thought, despite having received *Miranda* warnings, that oral statements could not be used against them. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1, 15 (1970).

16. See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

of their status as targets well before the indictment is returned¹⁷ and many of the legal skirmishes that define the contours of the criminal case will take place in the months prior to the return of an indictment.¹⁸ During this preindictment period, certain targets also will be able to negotiate favorable plea bargains or other dispositions, which may not be available or may be much less attractive once indictments are returned. Obviously, a target armed with counsel will usually be in a much better position to understand the ramifications of grand jury proceedings and to negotiate and bargain in an effort to avoid or lessen criminal liability than a target who cannot afford counsel. In complicated cases, therefore, the sixth amendment right to counsel seems to attach much too late. Consequently, in these cases, indigent defendants are placed at a distinct disadvantage.

If, however, the right to counsel under the sixth amendment is meant to attach at a point at which the "government has committed itself to prosecute" and "the adverse positions of government and defendant have solidified,"¹⁹ attachment of the sixth amendment right at a defendant's first appearance in court is too early in many routine criminal cases. Unlike white collar cases where the timing of a suspect's arrest (and, hence, the triggering of the attachment of the sixth amendment right to counsel) will be within the control of the prosecutor, police dealing with ordinary street crimes—robberies, burglaries, or rapes, for example—will often have little choice but to arrest the suspect on the spot or else risk losing all possibility of solving the crime. Consider, for example, a suspect whom airport security personnel find in possession of drugs or contraband as he boards an aircraft. In such circumstances, the authorities have little choice but to make the arrest immediately. It may turn out that the items are not what they appear to be, that they were planted on the suspect, or that others are involved in a broader criminal plot which may take weeks to unravel. Whatever the results of the later investigation, however, there is no time for inquiry prior to arrest. Furthermore, once a suspect is arrested, there is also no choice but to bring the suspect in front of a judge shortly there-

17. While "target" warnings are not constitutionally required, see *United States v. Washington*, 431 U.S. 181, 189 (1977), Justice Department policy is to give warnings to targets. See 9 CRIMINAL DIVISION, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL ch. 11, § 263 (June 15, 1984).

18. For a lively account of the preindictment skirmishing in a major criminal prosecution, see J.B. STEWART, *THE PROSECUTORS* 35-43 (1987) (discussing the McDonnell-Douglas bribery case).

19. *Kirby*, 406 U.S. at 689.

after,²⁰ even though investigation is only at a preliminary stage. If attachment of the sixth amendment is supposed to mark the end of police inquiry and a commitment by the state to prosecute, a defendant's first appearance does not in fact draw such a line. In many felony cases, the investigation into the crime will then only be beginning and there will be no commitment on the part of the state to prosecute the suspect until much later. If the sixth amendment right to counsel is meant to attach, as the Court tells us in *Kirby*, only when "the government has committed itself to prosecute" and "the adverse positions of government and defendant have solidified,"²¹ the logical point for attaching the sixth amendment is the return of an indictment (or the filing of an information) which turns an arrestee into a defendant and clearly indicates the government's decision to prosecute. In contrast, when the suspect first appears in court, the prosecutor will often not have had a chance to talk to the arresting officer, to interview witnesses, or even to evaluate the file.²²

III. VOLUNTARY WAIVERS IN THE STATION HOUSE:

Colorado v. Connelly

A. *The Background of the Decision*

The Court's attempt to have it both ways—insisting that waiver in the station house is to be evaluated by the strict standards of *Johnson v. Zerbst* while trying to keep sixth amendment counsel out of the interrogation room—has resulted in a string of cases that have plainly been difficult for the Court to resolve. One of the stiffest challenges to the Court's insistence that the standard of waiver applicable in station house interrogation be the same standard as that applied in the courtroom was *Colorado v. Connelly*.²³ *Connelly* presented the Court with dramatic facts that isolated the voluntariness issue for constitutional waiver in the station house better than any hypothetical a law professor could concoct.

20. While there is no constitutionally set time period within which a suspect must be brought before a magistrate, state law generally requires that a suspect be brought before a magistrate without unnecessary delay, which usually means within 24 hours after the arrest, or if the suspect is arrested on a Friday, the following Monday. See generally W. LAFAVE & J. ISRAEL, 1 CRIMINAL PROCEDURE 21 (1984).

21. *Kirby*, 406 U.S. at 689.

22. In many urban judicial districts less than 30% of all felony arrests will result in the filing of an indictment or information. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 17 (7th ed. 1990).

23. 479 U.S. 157 (1986).

The case arose on August 18, 1983, when Francis Connelly approached a police officer who was in uniform but working in an off-duty capacity in downtown Denver and told the puzzled officer that he had killed someone and wanted to talk about it.²⁴ The officer immediately advised Connelly of his *Miranda* rights.²⁵ Connelly stated that he understood them but that he still wanted to talk about the murder.²⁶ Connelly told the officer that he had taken the life of a young female traveling companion in November or December of 1982 and gave the officer the general street location in west Denver where the killing had taken place.²⁷

The officer telephoned the Denver Police Department. A detective was dispatched to the scene to interview Connelly.²⁸ After the detective told him again of his *Miranda* rights, Connelly explained to the detective that he had just flown to Denver from Boston in order to confess to the murder of Mary Ann Junta, a young girl whom he had killed in Denver sometime during November of 1982.²⁹ Connelly was taken to police headquarters where a check of departmental records indicated that the decomposed body of an unidentified female had been discovered in April of 1983 in the general area described by Connelly.³⁰ At the station Connelly repeated his statement about the murder and indicated that he would be glad to show the officers exactly where the killing had occurred.³¹ Connelly was placed in a police car and he directed the officers to the area where the killing had taken place.³²

24. *Id.* at 160.

25. *Id.*

26. *Id.*

27. *People v. Connelly*, 702 P.2d 722, 725 (Colo. 1985), *rev'd sub nom. Colorado v. Connelly*, 479 U.S. 157 (1986).

28. *Id.*

29. *Colorado v. Connelly*, 479 U.S. 157, 160 (1986).

30. *Id.*

31. *Id.*

32. *Id.* at 160-61. Justice Brennan argued in his dissent that there was no corroboration in the record of Connelly's statements and that there was no finding that they were even reliable. *Id.* at 183. This argument is a bit misleading given that the trial court never got to the issue of reliability because it ruled that due process would bar the statements in any case. There is another reason, however, that the reliability of the statements was never raised in the record, even as a part of the due process argument: there was overwhelming corroboration of the statements in the police report. The police report shows that, through the use of dental records and the identification of the clothes of the victim, the police were able to confirm that the victim was indeed Mary Ann Junta, a 14-year-old runaway Indian girl. Denver Police Department, Police Report No. 826-269, at 11-12 (copy on file with author). Interviews with some of Connelly's relatives in the Boston area following Connelly's arrest also confirmed that the victim had been a companion of Connelly's in late 1982. *Id.*

Subsequent evidence revealed that Connelly had serious mental problems. A psychiatrist employed at the state mental hospital testified at a pretrial hearing on a motion to suppress Connelly's statements to the police³³ that Connelly was suffering from chronic schizophrenia that manifested itself in "command hallucinations"³⁴ which interfered with Connelly's "volitional abilities."³⁵ The psychiatrist explained that Connelly's mental disease caused him to begin to experience the "voice of God," which had instructed Connelly to withdraw money from his bank and to fly from Boston to Denver.³⁶ When Connelly arrived in Denver, the psychiatrist further explained, the voice became stronger and it told Connelly either to confess his guilt to the police or to commit suicide.³⁷ Reluctantly following the command of the voices, Connelly approached a police officer and confessed. The psychiatrist testified that Connelly's illness did not impair his cognitive abilities and, thus, that Connelly understood his *Miranda* warnings, but the psychiatrist concluded that Connelly's mental disease had impaired his volitional capacity with the result that Connelly had no choice in deciding whether or not to confess.³⁸

33. Connelly's attorney filed his motion to suppress prior to the preliminary hearing. Although it decided to address the merits of the suppression motion, the Colorado Supreme Court expressed its disapproval of the practice of filing a motion to suppress prior to a preliminary hearing. *People v. Connelly*, 702 P.2d 722, 726-27 (Colo. 1985), *rev'd sub nom. Colorado v. Connelly*, 479 U.S. 157 (1986). The court explained that such a practice threatens to disrupt the expeditious determination of probable cause and places considerable pressure on the defense and the prosecution, which are often not ready to argue complicated issues of suppression within the rigid time restrictions required for holding preliminary hearings. *Id.*

34. Brief for Amicus Curiae American Psychological Ass'n at 21, *Colorado v. Connelly*, 479 U.S. 157 (1986) (No. 85-660) ("[T]he term 'command hallucination' does not actually appear as a recognized technical term. . . . The term is used, however, in published articles in the professional literature. . . . It refers to auditory hallucinations in which the recipients hear a voice or voices commanding them to perform some action.").

35. *Colorado v. Connelly*, 479 U.S. 157, 161 (1986).

36. *Id.*

37. *Id.*

38. *Id.* The American Psychological Association (APA) in its amicus brief filed in *Connelly* took strong exception to the testimony of the state psychiatrist at the suppression hearing who had stated that although Connelly's chronic schizophrenia had not impaired his cognitive abilities, his "command hallucinations" had impaired his "volitional abilities." Brief for Amicus Curiae American Psychological Ass'n at 3, *Colorado v. Connelly*, 479 U.S. 157 (1986) (No. 85-660). The APA agreed with the psychiatrist's statement that Connelly's cognitive capacities were not impaired by his schizophrenia, but argued that the psychiatrist was not testifying as a scientist when he claimed that Connelly's command hallucinations impaired his volitional capacity. *Id.* at 25. The APA argued that even if the psychiatrist had meant to testify simply that command hallucinations are "coercive" in a statistical sense, such testimony is completely unsupported by the professional literature and is contrary to clinical experience that strongly suggests that people who receive

The bizarre facts of *Connelly* raised difficult due process and fifth amendment issues. On the one hand, Connelly himself approached the police to confess. The police seem to have treated Connelly respectfully and to have done nothing wrong during the questioning. Furthermore, Connelly's statements enabled the police to solve an unsolved murder case. On the other hand, the only expert testimony at the hearing emphatically stated that due to mental disease, Connelly could not help but follow his inner voices and confess to the police.

The state supreme court suppressed all of Connelly's statements to the police.³⁹ The court ruled that Connelly's initial incriminating statements to the police prior to his arrest had to be suppressed because they were the involuntary manifestations of his mental disease and their use at trial would violate Connelly's due process rights.⁴⁰ The court also ruled that, even though Connelly had been warned of his right to remain silent at least twice and had indicated that he understood his options, the statements he gave to the police after being taken into custody were inadmissible because Connelly "was incapable of making an intelligent and free decision with respect to his constitutional right of silence."⁴¹

B. *The Decision in Connelly*

In *Connelly*, the United States Supreme Court reversed the Colorado Supreme Court's decision on both the due process and *Miranda* claims.⁴² The Court found the due process issue easier to resolve than the fifth amendment claim. Writing for the majority, Chief Justice Rehnquist reviewed the history of the due process cases from the Court's seminal confession case, *Brown v. Mississippi*,⁴³ to the present. Chief Justice Rehnquist maintained that in all of these cases, which span a fifty year period, the focus of the Court's opinions had

command hallucinations do not obey them. *Id.* at 25-26. According to statistics in the APA brief, clinical experience demonstrates that less than one percent of the people who receive command hallucinations actually obey them and the brief suggested this percentage is likely to be even lower for persons who receive command hallucinations instructing them to act in ways contrary to their self-interest. *Id.* at 26.

39. *People v. Connelly*, 702 P.2d 722, 726 (Colo. 1985), *rev'd sub nom. Colorado v. Connelly*, 479 U.S. 157 (1986).

40. *Id.* at 728-29.

41. *Id.* at 729.

42. *Colorado v. Connelly*, 479 U.S. 157 (1986). On the due process issue, the Court was split 7-2. On the *Miranda* waiver issue, though, the vote was 6-3.

43. 297 U.S. 278 (1936).

always been on the "crucial element of police overreaching."⁴⁴ The Chief Justice explained that while one's "mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's mind can never conclude the due process inquiry."⁴⁵ He argued that even the two cases relied upon by Connelly—*Blackburn v. Alabama*,⁴⁶ which involved a defendant who was probably insane, and *Townsend v. Sain*,⁴⁷ which involved a defendant who had been given a drug with truth-serum properties—could be harmonized with the majority's position because police overreaching, in the form of exploitation of those mental weaknesses, was central to those decisions.

The Court's due process analysis answered only the first part of the problem, because many of Connelly's statements were obtained after he was in custody. A more difficult question for the Court remained: even if the admission of involuntary statements for which the state has no causative responsibility does not violate due process, how can a mentally ill defendant who, in the opinion of a psychiatric expert, felt compelled to confess to the police be said to have voluntarily waived his constitutional rights in conformity with the standards of *Johnson v. Zerbst*?

The Court answered that question by narrowing the waiver inquiry so that only state pressure on a suspect to confess was relevant to the result. Having decided in the first part of the *Connelly* opinion that voluntariness for purposes of due process required some state responsibility for the involuntariness of the confession, it reached exactly the same conclusion on the fifth amendment issue. The Court declared that "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'"⁴⁸ The voluntariness of a waiver of the fifth amendment, therefore, depends "on the absence of police overreaching, not on 'free choice' in any broader sense of the word."⁴⁹ From these premises, the Court concluded that Connelly's "perception of coercion flowing from the 'voice of God,' however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak."⁵⁰

44. *Connelly*, 479 U.S. at 163.

45. *Id.* at 165.

46. 361 U.S. 199 (1960).

47. 372 U.S. 293 (1963).

48. *Connelly*, 479 U.S. at 170 (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)).

49. *Id.*

50. *Id.* at 170-71.

C. *The Implications of Connelly: Voluntariness in the Interrogation Room Versus Voluntariness in the Courtroom*

On the due process issue, the Court was on solid ground. As long as a suspect is treated properly by the state, internal pressures to confess or even external pressures from family or friends do not seem to raise due process concerns, unless perhaps the statement to the police is clearly unreliable.⁵¹ When the issue shifts from due process in the treatment Connelly received from the police to the issue of whether Connelly waived his fifth amendment rights voluntarily, however, both internal pressures from mental disease and external pressures from third parties seem directly relevant. To be free from state coercion to confess is one thing; to make a voluntary choice to confess and a voluntary statement as a result of that voluntary choice is something else. One suspects that the Court's approach to waiver in the station house would never apply to a waiver of constitutional rights in the courthouse. To understand the problem, consider a defendant who enters a guilty plea. Imagine that the plea was entered because an accomplice had extorted the plea by threatening to kill the defendant's child unless the defendant entered the guilty plea and took sole responsibility for the crime. If later the defendant seeks to have his plea of guilty set aside and is able to prove the coercion he was under when he entered the plea, there is no doubt that the plea would have to be set aside because it was not voluntary, even though the state was not the source of the unlawful pressure on the defendant.

As a standard of constitutional waiver, *Connelly* is deficient. While it is possible that *Connelly* heralds a new standard for voluntariness in assessing constitutional waiver either in the station house or in the courtroom, it seems highly unlikely that the Court would uphold a waiver in the courtroom that was involuntary as the result of mental disease or was involuntary because it was the result of pressure or even extortion by a third person. Instead, the Court in *Connelly* announced a weaker standard of waiver for the interrogation setting. As long as the confession is not the product of state overreaching, a waiver of *Miranda* rights is voluntary even if it would not be a voluntary waiver in a plea situation.

51. The Court made it clear that it was not ruling that Connelly's statements were admissible nor was it denying the fact that statements by someone with Connelly's mental problems may be unreliable. The Court did state, though, that this was a matter to be governed by the evidentiary laws of the forum and not the due process clause. *Id.* at 167.

IV. "KNOWING AND INTELLIGENT" WAIVERS IN THE STATION HOUSE: *Colorado v. Spring*

A. *The Background of the Decision*

Just as *Connelly* raised questions about what it means to waive the fifth amendment voluntarily in the station house, *Colorado v. Spring*⁵² raised questions about the other prongs of a *Johnson v. Zerbst* waiver, namely, what level of understanding is required for a waiver to be truly knowing and intelligent.

The facts in *Spring* are rather mundane compared with the amazing facts of *Connelly*, but for this reason, the case raised issues of broader import. The case began on March 30, 1979, when undercover agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) arrested John Leroy Spring in Kansas City, Missouri, as he was in the process of selling certain stolen firearms to them.⁵³ The agents had received a tip concerning Spring's illegal dealings in firearms from an informant. The informant had, however, also told the agents that Spring had admitted to him that he and a companion had killed a man by the name of Donald Walker while the three men were on a hunting trip in Colorado.⁵⁴

After his firearms arrest, Spring was advised of his *Miranda* rights by the ATF agents at the scene of the arrest and was again advised of his *Miranda* rights at the ATF office.⁵⁵ There, Spring signed a written form stating that he understood and waived his rights, and that he was willing to make a statement and answer questions.⁵⁶ After questioning him about the firearms transactions that led to his arrest, the agents asked him if he had a criminal record. Spring told the officers he had a juvenile record for shooting his aunt when he was ten years old. The agents then asked Spring if he had ever shot anyone else. Spring ducked his head and mumbled, "I shot another guy once."⁵⁷ The agents asked Spring if he had ever been to Colorado and Spring said no. The agents then asked Spring whether he had shot a man named Walker in Colorado and thrown his body down a snowbank. Spring ducked his head again and said no.⁵⁸ The interview then ended.⁵⁹

52. 479 U.S. 564 (1987).

53. *Id.* at 566.

54. *Id.*

55. *Id.* at 567.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

Two months later, on May 26, 1979, Colorado law enforcement officials visited Spring while he was still in jail in Kansas City for the firearms offenses. The officers gave Spring his *Miranda* warnings and Spring stated he was willing to waive them.⁶⁰ The officers then told Spring they wanted to talk to him about the Colorado homicide. Spring indicated that he "wanted to get it off his chest."⁶¹ In an hour-and-a-half interview, Spring confessed to the Colorado murder and talked freely about the killing. Based on the interview, the officers prepared a written statement which Spring read, edited and signed.⁶²

Spring was later convicted of first degree murder at a trial in which Spring's May 26th statement was introduced in evidence. The conviction was reversed on appeal because the Colorado Supreme Court concluded that under the totality of the circumstances the waiver prior to the March 30th statement was invalid because Spring was not aware that the interrogation would cover the subject of the Colorado homicide.⁶³ While the March 30th statement was not introduced at the murder trial, the conviction was reversed because the state had failed to show that the May 26th statement was not the product of the prior illegally obtained statement.⁶⁴

B. *The Decision in Spring*

The Supreme Court reversed by a vote of 7-2 and ruled that Spring's waiver of his rights prior to the interrogation of March 30th was made voluntarily, knowingly and intelligently.⁶⁵ Regarding the voluntariness of the waiver, Justice Powell, writing for the majority, argued that on the facts before the Court, there could be "no doubt" that Spring's decision to waive his fifth amendment privilege was voluntary since there was not even an allegation that the police had submitted Spring to any physical violence or other efforts calculated to break his

60. *Id.*

61. *Id.*

62. *Id.* at 567-68.

63. *People v. Spring*, 713 P.2d 865, 872-73 (Colo. 1985), *rev'd sub nom. Colorado v. Spring*, 479 U.S. 564 (1987).

64. After the Colorado Supreme Court's decision in *Spring*, the Supreme Court decided *Oregon v. Elstad*, 470 U.S. 298 (1985), which held that a voluntary statement obtained in violation of *Miranda* does not taint a later statement preceded by proper *Miranda* warnings. Because the *Elstad* issue was not considered by the lower court, the Supreme Court refused to consider whether *Elstad* might have provided an independent basis for admitting the May 26th statement. *Spring*, 479 U.S. at 572 n.4.

65. 479 U.S. at 573-74.

will.⁶⁶

The issue of whether Spring's waiver of his *Miranda* rights was knowing and intelligent was obviously tougher to decide. Although Spring must have been surprised when the agents who had just arrested him for a firearms violation switched gears during the interrogation and asked him about a shooting that had taken place in another jurisdiction at another time, the Court rejected the relevance of the suspect's assumptions about the scope of interrogation to the issue of waiver.⁶⁷ In the absence of any "official trickery" by the agents, such as affirmative misrepresentations concerning the scope of the interrogation, the Court said a knowing and intelligent waiver does not require that a suspect be aware of the subject of the interrogation.⁶⁸ Quoting from *Moran v. Burbine*,⁶⁹ the Court stated that a "valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might . . . affec[t] his decision to confess.'" ⁷⁰ The Court insisted that as long as Spring understood both that he had the right to remain silent and that anything he said could be used as evidence against him, additional information "could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature."⁷¹ The Court concluded, therefore, that the failure of the law enforcement officials to inform Spring of the subject matter of the interrogation "could not affect Spring's decision to waive his Fifth Amendment privilege in a constitutionally significant manner."⁷²

C. *The Implications of Spring: A Knowing and Intelligent Waiver That Is Not Very Intelligent*

There are strong practical reasons in favor of the outcome in *Spring*, which makes a suspect's beliefs and expectations about the subject of the proposed interrogation irrelevant to the waiver issue. In the interrogation room, conversations will often flow from one crime into another and it would be difficult for a police officer to warn a suspect of the scope of the contemplated interrogation. In a setting similar to that in *Spring*, for example, one might well expect that the ATF agents

66. *Id.*

67. *Id.* at 576.

68. *Id.* at 574.

69. 475 U.S. 412 (1986). For a discussion of *Burbine*, see *supra* text accompanying notes 7-9.

70. *Spring*, 479 U.S. at 576 (quoting *Burbine*, 475 U.S. at 422).

71. *Id.* at 577.

72. *Id.*

might "fish" and ask Spring about other possible firearms offenses in an effort to get a better idea of the extent of Spring's illegal firearms business, the source or sources of Spring's illegal weapons, or any other information demonstrating further criminal activity. Much the same could be expected in drug crimes, burglaries and other high volume crimes, where a fruitful interrogation may permit the police to get a more complete picture of an arrestee's criminal past and possibly solve a number of other crimes. It may also enable the police to arrest suppliers and others who have played a role in the criminal undertakings of the suspect.

Although it may be accurate to say, as does the majority opinion, that more information "could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature,"⁷³ it is harder to claim that a suspect who waives his fifth amendment rights in ignorance of the broader context in which the waiver is being sought has done so intelligently under the standard of *Johnson v. Zerbst*.⁷⁴ The *Zerbst* standard has its origins in courtroom waivers of rights, a situation in which the legal and factual context is clear, defendant's counsel is present, and the defendant must be canvassed by a judge to make sure that the waiver is knowing, voluntary and intelligent. One who claims to use the *Zerbst* standard without the additional protections that a courtroom setting provides has weakened the constitutional standard considerably.

No lawyer whose advice was sought by a client facing a decision to talk to a law enforcement agent, a private attorney, a grand jury, or anyone else, could advise the client unless the lawyer had some information about the scope of the inquiry. The Court's rejection of the relevance of the suspect's assumptions about the subject of the interrogation lowers the standards for constitutional waiver. To understand what the Court is doing to the concept of waiver in the station house, imagine that a suspect in the station house were asked, not about his fifth amendment rights, but instead whether or not he would be willing to waive his sixth amendment right to a jury trial. While the right to a jury trial is likely to be better understood by a layperson than the fifth amendment privilege, imagine further that the inquiring officer even explained what a jury trial was to the suspect with a few warnings about the function of jury trials. A waiver in that situation might well

73. *Id.*

74. 304 U.S. 458 (1938). For a summary of the *Johnson v. Zerbst* standard, see *supra* notes 1-2 and accompanying text.

be voluntary in the sense that defendant is free to choose between a jury trial or a nonjury trial. Such a waiver may even be knowing in the limited sense that the defendant understands the difference between a jury trial and a trial to a judge. Without knowledge of the exact charges, the possible witnesses or the evidence to be presented, however, one might have thought, at least prior to *Spring*, that such a waiver would not be intelligent under *Johnson v. Zerbst* if the suspect has to make the waiver decision in ignorance of the broader factual setting in which waiver is sought.

V. OFFICIAL RECOGNITION OF THE DOUBLE STANDARD:

*Patterson v. Illinois*⁷⁵

A. *The Background of the Decision*

In contrast to the fifth amendment waivers that take place in the station house, sixth amendment waivers of rights in the courtroom seem to be evaluated by a much higher standard. In *Faretta v. California*,⁷⁶ the Court held that a defendant has a right to self-representation, but emphasized that waiver of counsel may only be accepted if the suspect has been "made aware of the dangers and disadvantages of self-representation."⁷⁷ While the Court did not give details concerning the nature of the inquiry that is required prior to waiver of counsel at trial, it did note in *Faretta* that the trial judge had warned Faretta "that he thought it was a mistake not to accept the assistance of counsel."⁷⁸ In the wake of *Faretta* it is usually the case that prior to permitting a defendant to waive counsel, a trial judge will try to discourage a defendant from waiving counsel by raising for the defendant's consideration the sorts of issues likely to arise in the particular case and emphasizing the importance of counsel in addressing such issues.⁷⁹

Because a decision to waive sixth amendment counsel is usually a matter of grave concern to a trial judge, traditionally requiring careful inquiry, it is not surprising that a line of cases from the Second Circuit had concluded that the "waiver of Sixth Amendment rights must be

75. 487 U.S. 285 (1988).

76. 422 U.S. 806 (1975).

77. *Id.* at 835.

78. *Id.* at 835-36.

79. *The ABA Standards for Criminal Justice* states that before accepting a waiver of counsel, "the court should inquire whether the accused apprehends the nature of the charges, the offenses included within them, the allowable punishments, possible defenses to the charges, and circumstances in mitigation thereof, among other factors." THE ABA STANDARDS FOR CRIMINAL JUSTICE § 5-7.2 (2d ed. 1980).

measured by a 'higher standard' than are waivers of Fifth Amendment rights."⁸⁰ In order to meet the higher standard of waiver for the sixth amendment, that court required, as part of its supervisory power, that waivers of the sixth amendment right to have counsel present during postindictment interrogation be preceded by a federal judicial officer's explanation of the content and significance of this right.⁸¹

Having adopted, in cases such as *Connelly* and *Spring*, a standard of waiver for the station house that seems considerably softer than the standard usually applied for waivers that take place in the courtroom, it was inevitable that the Court would have to face the next question: what is the proper standard for waiver in the station house when the suspect's sixth amendment right to counsel has attached? If the careful standards for waiver announced in *Faretta* are applicable to the interrogation room, then the *Miranda* warnings seem inadequate to the task. But if the *Miranda* warnings are sufficient for a waiver of both fifth and sixth amendment rights in the interrogation room, how can *Faretta* be reconciled other than by approving a lesser standard of constitutional waiver for the station house?

The case that raised the sixth amendment waiver issue in the Court was *Patterson v. Illinois*.⁸² Patterson was a gang member involved in two confrontations with a rival gang in the early morning hours of August 21, 1983.⁸³ The second confrontation left one person dead. Following his arrest, Patterson waived his *Miranda* rights and gave a statement concerning the initial fight, but denied knowing anything about the second fight and the death of the victim.⁸⁴ Two days later, Patterson was indicted along with two other gang members for the murder.⁸⁵ When the officer who had originally interrogated Patterson went to move him from the "lockup" where he was being held temporarily to the county jail, a conversation ensued. Patterson asked which gang members had been indicted and began to protest the omission of a particular gang member, whom he claimed "did every-

80. *United States v. Mohabir*, 624 F.2d 1140, 1146 (2d Cir. 1980). *See also* *United States v. Satterfield*, 558 F.2d 655, 657 (2d Cir. 1976); *United States v. Massimo*, 432 F.2d 324, 327 (2d Cir. 1970)(Friendly, J., dissenting), *cert. denied*, 400 U.S. 1022 (1971). *See generally* Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 COLUM. L. REV. 363 (1982).

81. *Mohabir*, 624 F.2d at 1153.

82. 487 U.S. 285 (1988).

83. *Id.* at 287.

84. *Id.* at 287-88.

85. *Id.* at 288.

thing.”⁸⁶ Patterson then started to explain that there was a witness who could corroborate his version of the events. At this point, the officer gave Patterson *Miranda* warnings. Patterson signed the waiver form and gave the officer a long statement detailing the role of each gang member, including himself, in the murder.⁸⁷ Later Patterson confessed again, following warnings, in an interview with the prosecutor.⁸⁸ A motion to suppress the two statements was denied and Patterson was convicted of murder.⁸⁹

The short time between the commission of the crime and the indictment in *Patterson* is unusual given the seriousness of the charge. Patterson was indicted only three days after the murder had been committed and the indictment was obtained even before Patterson had been brought into court for his initial appearance following arrest. The opinion did not indicate why the prosecutor's office felt compelled to indict so quickly when there must have been strands of the murder investigation still to be pursued. The result of the speedy indictment meant that adversarial judicial proceedings had begun at a point at which, not only had Patterson not had the indictment explained to him by a judge or by his attorney, but Patterson had not even been brought before a magistrate following his arrest two days earlier.⁹⁰

B. *The Decision in Patterson*

Forced at last to resolve the tension surrounding the suggestion that waiver in the station house is judged by much softer standards than waiver in the courtroom, the Court began its waiver analysis by rejecting the view that the sixth amendment right to counsel is more important than the fifth amendment right to counsel and, thus, the sixth amendment right to counsel requires a higher standard for waiver than does the fifth amendment right to counsel.⁹¹ The Court stated that it has never suggested that “one right is ‘superior’ or ‘greater’ than the other,” nor did the Court find “any support in our cases for the notion that because a Sixth Amendment right may be involved, it is more dif-

86. *Id.*

87. *Id.*

88. *Id.* at 288-89.

89. *Id.* at 289.

90. Had Patterson been brought before a magistrate and had Patterson requested appointed counsel, the authorities would not have been able to approach Patterson in order to try to interrogate him until his counsel was present. *See Michigan v. Jackson*, 475 U.S. 625 (1986).

91. *Patterson*, 487 U.S. at 297-98; *see also supra* text accompanying notes 76-81.

ficult to waive than the Fifth Amendment counterpart."⁹²

While the Court concluded that there was no inherent distinction between the fifth and sixth amendments for purposes of waiver, the Court finessed the apparent differences in the standards being applied in the courtroom and the station house by announcing that the sixth amendment requires different standards of waiver from situation to situation.⁹³ The Court explained that there is a spectrum for waiver of the sixth amendment right to counsel and that the standards for its waiver will vary depending on the nature of the hearing or proceeding at which waiver is sought.⁹⁴ The type of warnings and the procedures that should be required prior to waiver have to be assessed from a "pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding and the dangers to the accused of proceeding without counsel."⁹⁵ Using its new "pragmatic" approach to waiver, the Court placed at one end of the spectrum waiver of counsel prior to the start of trial. Citing *Faretta v. California*,⁹⁶ the Court concluded that waiver in such situations must be obtained under "the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial."⁹⁷ At the other end of the spectrum, the Court put postindictment photographic lineups where there is no right to counsel at all and, thus, waiver is not an issue, even though the sixth amendment has attached.⁹⁸ In the Court's view postindictment questioning falls somewhere in the middle of the spectrum: there is a right to counsel and waiver of counsel is required but it is judged by lesser standards than those applied in *Faretta*.⁹⁹ Employing its new pragmatic waiver approach, the Court concluded that the *Miranda* warnings were sufficient for waiver of counsel in postindictment questioning. The Court reasoned that the role of counsel at such questioning is "relatively limited and simple"¹⁰⁰ and that once the police had told Patterson that any statement he made could be used against him at trial, which the Court referred to as "the ultimate adverse conse-

92. 487 U.S. at 297-98.

93. *Id.* at 298.

94. *Id.*

95. *Id.*

96. 422 U.S. 506 (1975). See also *supra* notes 76-79 and accompanying text.

97. *Patterson*, 487 U.S. at 298.

98. *Id.*

99. *Id.*

100. *Id.* at 299.

quence"¹⁰¹ of a decision to talk with the police, Patterson had sufficient information such that his waiver of counsel was knowing and intelligent.

C. *The Implications of Patterson: Many Standards of Waiver . . . But Why A Lesser Standard in the Station House?*

The Court's conclusion that waiver of sixth amendment rights varies depending on the nature of the proceeding for which waiver is sought is not inherently implausible. There are issues and court proceedings where the guiding hand of counsel is much less important than it is at trial. A bail hearing, a preliminary hearing, or even a postindictment lineup at which a suspect has waived counsel is unlikely to do very much to affect the ultimate determination of guilt or innocence and, in the first two examples, a neutral magistrate is present to assure fair treatment for the suspect. However, if the Court wants a graduated scale that correlates the nature of the waiver with the strategic importance and legal complexity of the proceeding, postindictment interrogation should rank very high because, strategically, the presence of counsel at such a proceeding is crucial to protecting the interests of the defendant. A defendant who chooses to go it alone in the interrogation room is almost always strengthening the prosecution's case against him and making a serious tactical mistake.¹⁰² It is no accident that one of the most famous quotations in Supreme Court history is Justice Jackson's comment that when a client is faced with interrogation, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances."¹⁰³ Separated from counsel with only the *Miranda* warnings for guidance, a suspect may not realize the overriding importance of the decision to talk to the police. If the defendant does agree to talk to the police, it will likely undercut any plea bargaining leverage the defendant may have had and may well result in making the trial a formality or a guilty plea a necessity. Asking criminal defense lawyers if it is more important to have a lawyer at a preliminary hearing or at a trial produces an obvious response. To ask whether it is more important to have an attorney present at postindictment interrogation or at trial is a much more complicated question. Because the impact of a statement made during a

101. *Id.* at 293.

102. See Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826 (1987).

103. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., dissenting).

postindictment interrogation is so devastating to the defendant's trial prospects, there is a sense in which it is more important for most defendants to have counsel at interrogation than to have counsel available later at trial. Perhaps a better way to put it is that there will usually be no "real" trial if the defendant chooses to discuss his involvement in the crime with the police.¹⁰⁴

The Court in *Patterson* described the role of counsel at postindictment interrogation as "relatively limited and simple" compared to the role of counsel at trial.¹⁰⁵ This comparison, however, is oversimplified if one thinks of the waiver decision in the interrogation room from the point of view of the defendant. It is certainly true that at trial in a criminal case, there are a host of evidentiary, constitutional, and tactical decisions which a layperson cannot be expected to understand. These range from the art of selecting a jury, to laying the foundation for admitting pieces of evidence, to helping a defendant weigh the pros and cons of the decision whether to testify. The same constitutional confusions, evidentiary misunderstandings, and tactical uncertainties, though, bear on the decision whether or not to answer questions from the police. A defendant without counsel present to explain the law may believe that the failure to talk to the police will bar him from testifying later at trial. He may believe that only oral statements corroborated by written statements are admissible;¹⁰⁶ or he may believe that the failure to give a statement will serve as a basis for a denial of bail or prejudice him in the eyes of the judge or jury. To say, as the Court does, that telling a suspect that "anything he says can be used against him at trial" gives the defendant sufficient information to knowingly and intelligently waive counsel, ignores the range of confusions that may surround this warning in a defendant's mind.

It appears that *Patterson* may not have been well argued by Patterson's attorney. The opinion emphasizes that Patterson's attorney was unable to suggest in oral argument "any meaningful additional information that [Patterson] should have been, but was not, provided in advance of his decision to waive his right to counsel."¹⁰⁷ There are many ways in which a defendant in Patterson's situation might have been

104. "Once a suspect confesses or incriminates herself in a statement to the police, the subsequent trial is often merely a formality; the suspect bears the almost impossible burden of countering the statement and establishing her innocence." Ogletree, *supra* note 102, at 1845 (citing *Colorado v. Connelly*, 479 U.S. 152, 182 (1986) (Brennan, J., dissenting)).

105. 487 U.S. at 299.

106. See Leiken, *supra* note 15, at 33.

107. 487 U.S. at 295.

more fully advised of the consequences of the waiver of counsel. The police might have been required to warn the suspect that it was probably a mistake to talk to the police prior to talking with an attorney,¹⁰⁸ or perhaps a warning to the defendant that most attorneys would advise someone in the defendant's position not to talk to the police. The argument over warnings, though, presupposes that it was proper for the police or the prosecutor to approach Patterson after the sixth amendment right had attached. The Court could have decided that the state should not be permitted to approach an indicted defendant to interrogate him until he has had a chance to read the indictment and a court or an attorney has explained its significance and the nature and theory of its charges.¹⁰⁹

Patterson guarantees that there are a number of interesting issues ahead for the Court as it tries to explicate the standards for waiver of the sixth amendment right to counsel in the station house. For example, suppose that the police had gone to Patterson for purposes of interrogating him, but had not told him that he had been indicted. Would that render invalid the defendant's waiver of the sixth amendment right to counsel, or would the *Miranda* warnings suffice for a valid waiver under the authority of *Patterson*?¹¹⁰ Or suppose that the officer seeking to interrogate Patterson had told Patterson that he was indicted, but was unable to tell Patterson the crimes for which he had been indicted? Suppose the officer simply refused to tell the suspect about the crimes charged. Would waiver following *Miranda* warnings still suffice in these situations?

We can safely predict the outcome of one issue: if Patterson's family had reached an attorney to represent him in the interrogation room and if the attorney tried to reach Patterson, the police must tell Patterson that counsel is trying to contact him or else Patterson's waiver of his sixth amendment rights would not be valid. The reason we know the answer to this situation is that the Court in *Patterson* dropped a footnote telling us that *Moran v. Burbine*¹¹¹ would come out differently if

108. See *supra* text accompanying notes 76-79.

109. Prior to *Patterson*, the Second Circuit had required that waiver of the sixth amendment right to counsel be preceded by explanation of that right by a judicial officer. See *supra* text accompanying notes 80-81.

110. The Third Circuit has ruled that the failure to tell a suspect in custody that he has been indicted prior to custodial interrogation does not invalidate the waiver of the sixth amendment. See *Riddick v. Edmiston*, 894 F.2d 586 (3d Cir. 1990).

111. 475 U.S. 412 (1986). See *supra* text accompanying notes 7-8.

the sixth amendment had attached.¹¹² The Court gives no explanation of why this should be so and one could as easily argue that, given *Burbine*, there should be no distinction between the fifth and sixth amendment rights to counsel in the two cases. Why should the actions of a defendant's family (or his family's financial ability to hire an attorney) bear on the validity or invalidity of the waiver in the interrogation room? If the role of counsel at postindictment interrogation is "relatively simple and limited"¹¹³ and if the defendant knows that he can have counsel present, why is that not sufficient for a knowing and intelligent waiver of the sixth amendment right to counsel if it suffices for waiver of the fifth amendment right to counsel? Because *Patterson* seems so ad hoc in its reasoning, it is difficult to predict what the Court will find important or unimportant for waiver purposes in the future.

VI. WAIVING RIGHTS IN THE STATION HOUSE: ROADS THE COURT HAS NOT TAKEN

A. *Warnings Without Waiver in the Station House*

An important influence on the Court in *Miranda* was the English system of police warnings that are a part of the Judges' Rules,¹¹⁴ which require a British police officer to tell a suspect that he was not required to make a statement and that anything said could be used in evidence.¹¹⁵ Professor Richard Uviller explains that, "with a little rewording and two added stanzas," the Judges' Rules were transformed into the *Miranda* warnings.¹¹⁶ Perhaps, in retrospect, it might have been wiser for the Court to have adhered more closely to the English model: in England, the warnings under the Judges' Rules function simply as warnings and there is no requirement of waiver associated with the obligation to administer warnings.¹¹⁷

Obviously, there is a constitutional aspect to interrogation in this country that is not present in England. Even in this country, however, not every confrontation between a suspect and the police directly affecting a constitutional right is viewed by the Court as presenting a

112. *Patterson v. Illinois*, 487 U.S. 285, 296 n.9 (1988).

113. *Id.* at 299.

114. H. UVILLER, *TEMPERED ZEAL* 195 (1988).

115. See *Miranda v. Arizona*, 384 U.S. 436, 486-88 (1966).

116. H. UVILLER, *supra* note 114, at 195-96.

117. See Home Office Circular No. 89/1978, reprinted in *THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, THE INVESTIGATION AND PROSECUTION OF CRIMINAL OFFENSES IN ENGLAND AND WALES: THE LAW AND PROCEDURE* 153-54 (1981). See Hughes, *English Criminal Justice: Is It Better Than Ours?*, 26 ARIZ. L. REV. 507, 524-26 (1984); Van Kessel, *supra* note 6, at 49.

waiver situation that is judged by the standards of *Johnson v. Zerbst*. For instance, in the area of consent searches, the Court has required that a detainee give consent voluntarily. The Court, though, has stopped short of requiring that there be a warning or a waiver of fourth amendment rights.¹¹⁸

A system of warnings without waiver may seem to undercut *Miranda*, but that is not necessarily the case. It is not inconsistent to argue that the *Miranda* warnings are an important safeguard in the interrogation room, and therefore are necessary given the custodial nature of the confrontation and our concern for the reliability of confessions. At the same time, one must be realistic about what the *Miranda* warnings are able to achieve. The warnings provide important assurance to a suspect that he will not be mistreated. They help make clear to a suspect that, even though he is in the physical control of the state, he has the option of whether to speak and his choice will be respected. They do not, however, provide assurance that a waiver of the fifth amendment privilege is knowing and intelligent if such a waiver is to be judged by the standards applicable to waivers in the courtroom. There are great differences, both intellectually and emotionally, between the situation in the interrogation room, where the suspect is alone often with imperfect knowledge of what is occurring, and the situation in the courtroom, where defense counsel has had a chance to explore with the defendant the consequences that may flow from waiver of a constitutional right. These differences may be too great to expect the *Miranda* warnings to turn the former situation into the latter. If we have reached the stage where the *Miranda* warnings are prophylactic measures, not themselves constitutionally required,¹¹⁹ might it not have been better initially to have left the warnings simply as warnings rather than to have tried to maintain a theory of constitutional waiver that has forced the Court to bend the waiver doctrine to fit the station house?

118. See *Schenckloth v. Bustamonte*, 412 U.S. 218 (1973). Part of the Court's justification for not requiring waiver of fourth amendment rights in the consent search situation is the trustworthiness of the evidence obtained. *Id.* at 227-28.

119. See, e.g., *Oregon v. Elstad*, 470 U.S. 298 (1985) (confession made after *Miranda* warning need not be suppressed solely because the police had obtained an earlier voluntary, but unwarned, admission); *Michigan v. Tucker*, 417 U.S. 433 (1974) (police's failure to advise defendant of constitutional rights does not render defendant's testimony inadmissible).

B. *Making Counsel Readily Available Prior to Station House Interrogation*

The most frequently voiced alternative to the Court's dilemma over waiver is not to move away from the constitutional standards for the station house, but rather to put teeth into those standards by providing arrestees an opportunity to consult with counsel prior to any interrogation or any attempt to have the arrestee waive any constitutional rights.¹²⁰

Typical of the proposals to increase the presence of counsel in the interrogation room is the suggestion that all arrestees be provided with a nonwaivable opportunity to consult with counsel prior to interrogation.¹²¹ This proposal would seem to require only a modest expenditure of financial resources since interrogation usually takes place only a short time prior to a suspect's initial appearance in court, when the sixth amendment will attach in any event.¹²² The proponent of this notion states that this would solve "the numerous problems associated with *Miranda*."¹²³

The problem with this proposal (and any proposal to put counsel into the interrogation room prior to securing a waiver), however, is that it "solves" the *Miranda* "problems" by eliminating most postarrest confessions. As explained earlier,¹²⁴ because there is nothing to gain by answering police questions and much to lose, the percentage of suspects providing statements to the police after arrest would most likely be very small if counsel were provided prior to interrogation. In white collar crimes, the loss of postarrest interrogation as an investigative tool would be of little significance.¹²⁵ In those cases the grand jury, not the police, is the state's main investigative tool. Many white-collar suspects are aware of their status as targets¹²⁶ and are sophisticated enough to

120. See, e.g., Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1, 49 (1970); Lippman, *Miranda v. Arizona, Twenty Years Later*, 9 CRIM. JUST. J. 241, 288 (1987); Ogletree, *supra* note 102, at 1830.

121. Ogletree, *supra* note 102, at 1842.

122. See *supra* note 20 (discussing time within which a suspect must be brought into court).

123. See Ogletree, *supra* note 102, at 1842. To the extent that *Miranda* was driven by equal protection concerns and attempted to put arrestees on an equal footing in the interrogation room, a nonwaivable right to counsel in the interrogation room makes sense. See *Miranda v. Arizona*, 384 U.S. 436, 472-73 (1966). See also Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in Y. KAMISAR, F. INBAU & T. ARNOLD, *CRIMINAL JUSTICE IN OUR TIME* 19-36 (1965).

124. See *supra* text accompanying notes 13-14.

125. See *supra* text accompanying notes 16-18.

126. See *supra* note 17 and accompanying text.

understand the breadth of the privilege against self-incrimination or are wealthy enough to have lawyers to explain it to them. Arrest in those cases, like the timing of the indictment, will be in the hands of the prosecution and there is usually no postarrest interrogation even attempted in such cases.

The white collar crime example is only one model of investigation, though, and it is not the model for the majority of crimes.¹²⁷ Whether the system would suffer too much in terms of the reliability and accuracy of its fact-finding procedures if postarrest confessions were effectively eliminated is a difficult question to answer.¹²⁸ If it is accurate that the percentage of arrestees in felony cases that give statements to the police is forty percent or even more,¹²⁹ a sharp reduction in that percentage to a single digit would seem likely to have tremendous consequences for the accuracy and efficiency of the criminal justice system.¹³⁰ Therefore, the Court is under pressure to maintain the narrow window of opportunity for station house confession that presently exists between arrest and first appearance.

The Court is clearly worried about the impact on the criminal justice system of any expansion of the right to counsel under *Miranda*. In *Moran v. Burbine*,¹³¹ one reason the Court gave for upholding the suspect's waiver, despite the police's failure to tell him that a lawyer was trying to reach him, was the Court's concern that expanding *Miranda* would "work a substantial and . . . inappropriate shift in the subtle balance struck in [*Miranda*]."¹³² This concern may be overstated given the narrow facts of *Burbine*,¹³³ but it raises a question that needs to be

127. See *supra* text accompanying note 15.

128. One reason that it is difficult to know with precision the effects of any proposal aimed at providing counsel after arrest is that one consequence unanticipated by those making such proposals is the likely burgeoning of the law dealing with questioning during forcible stops, because the police are likely to prefer to question suspects prior to arrest if possible to avoid the obligation to provide counsel once arrest takes place.

129. Authors on both sides of the debate over *Miranda* rely on studies suggesting that the percentage of those giving statements to police is in the neighborhood of 40% or more. See *supra* note 6.

130. The debate over the fourth amendment's exclusionary rule and its cost to the system is likely to seem almost insignificant compared to any proposal that results in a drastic reduction in the number of confessions obtained from arrestees. In *United States v. Leon*, 468 U.S. 897 (1984), Justice White cited a study concluding that the fourth amendment exclusionary rule resulted in the nonprosecution of between .6% and 2.35% of arrestees. *Id.* at 907 n.6.

131. 475 U.S. 412 (1986). See *supra* text accompanying notes 7-8.

132. *Id.* at 426.

133. Whether an equal protection analysis would allow the line drawn in *Burbine* to be maintained for long—a line that seems heavily to favor suspects whose families have the resources to

addressed regarding the more sweeping proposals offered to "solve" the *Miranda* mess, like the proposal to provide a nonwaivable right to counsel prior to interrogation¹³⁴ or the proposal simply to abolish all custodial interrogation.¹³⁵

C. *Narrowing the Fifth Amendment in the Station House*

If the Court is correct in its belief that the proper balance in our criminal justice system between the state and the individual requires some opportunity to question the suspect once there is probable cause, then perhaps the problems that plague the Court in cases such as *Connelly*, *Spring*, and *Patterson* stem not from application of the *Johnson v. Zerbst* standard in the station house or the presence of counsel in the interrogation room, but from the breadth that the Court has given to the privilege against self-incrimination. Many countries recognize the principle against self-incrimination but this country reads the privilege more broadly than most. In civil law countries defendants have the right to remain silent, although inquiries addressed directly to the defendant from the judge during trial are not unusual.¹³⁶ Access to the defendant as a source of evidence is much more limited in the American and English legal systems and consequently both systems have come to rely heavily on police interrogation.¹³⁷

Over the years, some of this country's most influential judicial scholars, including Walter Schaefer¹³⁸ and Henry Friendly,¹³⁹ have argued that the fifth amendment has been too broadly interpreted and they have built upon a proposal put forward in 1932 by Professor Paul Kauper.¹⁴⁰ Under the "Kauper-Schaefer-Friendly model,"¹⁴¹ interrogation would be removed from police control and put under the supervi-

hire counsel—seems doubtful.

134. See Ogletree, *supra* note 102, at 1842.

135. See Rosenberg & Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C.L. REV. 69 (1989).

136. See Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 526 (1973).

137. See Van Kessel, *supra* note 6, at 126.

138. See W. SCHAEFER, *THE SUSPECT AND SOCIETY* 79-81 (1967).

139. See Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713-16 (1968).

140. See Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

141. The terminology is borrowed from an article by Professor Yale Kamisar discussing the history of Professor Kauper's proposal and its evolution into what he refers to as the "Kauper-Schaefer-Friendly model." See Kamisar, "Kauper's Judicial Examination of the Accused" *Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974).

sion of a judicial officer. The suspect would be provided with counsel and would be given a chance to consult with counsel prior to interrogation. The suspect would be warned that he has the right to remain silent, but he would also be warned that his refusal to answer questions in front of the judicial officer could be brought out at trial.

Other common law countries have wrestled with the merits of proposals that more or less follow the lines of the Kauper-Schaefer-Friendly model. In 1972, a prestigious law reform committee in England proposed that silence in the face of questioning be admissible against a suspect at trial, but the proposal met strong opposition and was never adopted by Parliament.¹⁴² Recently, another government committee in England has put forward a similar proposal and its fate is uncertain.¹⁴³ Scotland, a country long distrustful of police interrogation,¹⁴⁴ has actually adopted a statute that comes close to the Kauper-Schaefer-Friendly model.¹⁴⁵ The Criminal Procedure (Scotland) Act 1975 provides for formal examination of a suspect by a prosecutor in front of a judicial officer. The suspect may refuse to answer any question but such refusal to answer may be commented upon at trial by the prosecutor, the judge or any codefendant "in so far as the accused (or any witness called on his behalf) in evidence avers something which could have been stated appropriately in answer to that question."¹⁴⁶

Any proposal in this country patterned along the lines of the Kauper-Schaefer-Friendly model would face not only substantial legislative hurdles, but also serious constitutional obstacles as well.¹⁴⁷ *Griffin*

142. See Berger, *The Self-Incrimination Debate*, 5 CRIM. JUST. 7, 9-10 (1990). There is, however, a major difference between the English proposals and the Kauper-Schaefer-Friendly model. The latter proposal is aimed at ending back room interrogation by the police and putting all questioning in front of a judicial officer. The English proposals do not contemplate judicial control over interrogation but would allow silence in the face of police questioning, with no judicial supervision, to be used against the suspect.

143. *Id.* at 10, 39-41.

144. In *Miranda v. Arizona*, the Court reported that "Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation." 384 U.S. 436, 488 (1966) (footnote omitted).

145. The Criminal Procedure (Scotland) Act 1975, § 20A, reprinted in K. EWING & W. FINNIE, *CIVIL LIBERTIES IN SCOTLAND: CASES AND MATERIALS* 131-32 (1988). The statute permits the prosecutor to ask the suspect about any statement the suspect has given the police, so it is apparent that the statute does not contemplate that the judicial examination would entirely supplant police interrogation. *Id.* at § (1)(b).

146. The Criminal Procedure (Scotland) Act 1975, § 20A(5), reprinted in K. EWING & W. FINNIE, *supra* note 145, at 132. Unlike the English proposals, see *supra* notes 142-43 and accompanying text, the statute is obviously intended to encourage judicial examination of suspects and would not permit silence in the face of police questioning to be used against a suspect at trial.

147. Judges Schaefer and Friendly both assumed that a constitutional amendment might be

v. California,¹⁴⁸ which prohibits comment at trial on a defendant's failure to take the stand and testify, contains broad language condemnatory of the use of silence against a defendant¹⁴⁹ and there is dicta in *Miranda* indicating that the use of a suspect's refusal to answer questions during police interrogation would violate the privilege against self-incrimination.¹⁵⁰ On the other hand, former federal Judge Marvin Frankel has argued that *Griffin* should be read as limited to police interrogation, and not pertaining to the judicially supervised questioning contemplated by the Kauper-Schaefer-Friendly model. Judge Frankel suggested that a court that understood the value of getting station house interrogation out of the back room and out of police control, might "sustain this rearrangement as more thoroughly consistent with the fifth amendment privilege, and less conducive to genuinely unacceptable coercion, than is the existing situation."¹⁵¹

VII. CONCLUSION

None of these alternatives for bridging the gap between theory and reality in the interrogation room seem likely to be adopted. The tremendous effort that the Court has devoted to redefining the standards for waiver in the station house in cases such as *Connelly*, *Spring* and *Patterson* makes it unlikely that the Court at this late date would separate the *Miranda* warnings from the need to establish waiver in the station house. If the Court will not go backward to cut back on *Miranda*, it will not go forward either to expand on it. *Moran v. Burbine*¹⁵² leaves no doubt that the Court will not broaden the right to counsel under the fifth amendment in the interrogation room even slightly. In addition, while the Court has never had to face directly the constitutional issues presented by the Kauper-Schaefer-Friendly propo-

necessary in order to effectuate their proposals. See W. SCHAEFER, *supra* note 138, at 78; Friendly, *supra* note 139, at 721-22.

148. 380 U.S. 609 (1965).

149. "[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of justice' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614 (citations omitted).

150. "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966).

151. See Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516, 531 (1976). See also M. FRANKEL, *PARTISAN JUSTICE* 99 (1980).

152. 475 U.S. 412 (1986). See *supra* text accompanying notes 7-8.

sal, those proposals have been around for many years and there has been no hint, at least not from the present Court,¹⁵³ that it might be prepared to rethink the scope of the fifth amendment.

The result is the strange bundle of uncomfortable compromises which constitute the *Miranda* legacy. Among the more obvious: we insist on a system of warnings because we are worried about the intimidating effect that the custodial atmosphere has on a citizen, but we ignore the fact that the same custodial pressures will encourage most citizens to cooperate with the authorities by waiving those rights.¹⁵⁴ We tell a suspect in custody that he has the right to remain silent, but we do not tell him that his silence cannot be used against him at trial or even as a basis for a denial of bail. We understand that an attorney is important during interrogation and warn a suspect of that right, but we do not tell him that there is a lawyer outside trying to reach him.¹⁵⁵ We announce that a waiver of rights in the station house must be knowing, intelligent and voluntary under *Johnson v. Zerbst*, but we end up applying a softer standard in the station house. In short, the Court wants very much to protect suspects in their exercise of constitutional rights, but at the same time it worries about the consequences if too many suspects exercise their constitutional right to remain silent in the interrogation room.

There are areas of constitutional criminal procedure that are complicated because the issues are inherently complex. There are also areas of constitutional criminal procedure that are complex because the Court has made them complicated. Station house interrogation is an example of the latter. Building on premises that pull in different directions, the Court has erected an edifice for station house interrogation that is inelegant and unstable, and one that continues to need structural repair.

153. Justice Powell once indicated in 1981 that he would have joined Justices Stewart and White in dissent in *Griffin* had he been on the Court at the time *Griffin* was decided. See *Carter v. Kentucky*, 450 U.S. 305, 307 (1981) (Powell, J., concurring). There may very well have been sufficient votes on the Court at that time to overrule *Griffin*.

154. Justice White highlighted this inconsistency in his dissent in *Miranda*:
But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the Court ever accept his negative answer to the question whether he wants to consult his retained counsel or counsel whom the court will appoint?
384 U.S. 436, 536 (1966) (White, J., dissenting).

155. See *supra* text accompanying notes 7-8.

