CRIMINAL PROCEDURE—CONFESSIONS—WAIVER OF PRIVILEGE AGAINST SELF-INCRIMINATION HELD INVALID DUE TO POLICE FAILURE TO INFORM SUSPECT OF ATTORNEY'S ATTEMPT TO CONTACT HIM—*State v. Reed*, 133 N.J. 237, 627 A.2d 630 (1993).

Arguably the most fundamental purpose of the American judicial system is to determine the guilt or innocence of a person accused of committing a crime.[1] One would expect that a full confession[2] from the accused would be irrefutable proof of that person's guilt.[3] This is not always true, however, because some con-

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[1] *See* Miranda v. Arizona, 384 U.S. 436, 439 (1966) (noting that the prosecution of individuals for crime goes to the core of American jurisprudence).

[2] In defining "confession," Wigmore noted that two views exist. 3 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 821, at 308 (James H. Chadbourn ed., rev. vol. 1970). The early view defined confession as "*an acknowledgment in express words*, by the accused in a criminal case, *of the truth of the guilty fact charged* or *of some essential part of it*." *Id.* The modern view holds that although admissions and allegedly exculpatory statements are not truly "confessions" as defined by the early view, they should nevertheless be treated as confessions for the purpose of implicating exclusionary rules which restrict the admissibility of confessions. *Id.* at 326; *see also* BLACK'S LAW DICTIONARY 296 (6th ed. 1990) (defining confession as "[a] voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or the share and participation which he had in it."). According to Black's, a confession is distinguished from an "admission" in that a confession admits or acknowledges all of the facts required for conviction of a crime, while an admission is an acknowledgement of facts tending to establish guilt which falls short of acknowledging all of the essential elements of a crime. *Id.* at 297. Similarly, an "inculpatory statement" is a statement which tends to establish guilt or otherwise incriminate the speaker, while falling short of completely admitting to the commission of the crime. *Id.* at 768. Alternatively, an "exculpatory statement" is one which tends to absolve, clear, or excuse a suspect from alleged wrongdoing or guilt. *Id.* at 566.

In *Ashcraft v. Tennessee*, the United States Supreme Court indicated that due process analysis does not meaningfully distinguish between coerced confessions and coerced admissions. Ashcraft v. Tennessee, 327 U.S. 274, 276, 278-79 (1946). Moreover, in *Miranda v. Arizona*, the Court stated that "[n]o distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense." *Miranda*, 384 U.S. at 476. The *Miranda* Court further professed that "no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" *Id.* at 477. Accordingly, confessions, admissions, and allegedly exculpatory statements will be treated as synonymous for the purpose of this Note.

[3] *See* Brown v. Walker, 161 U.S. 591, 596 (1896) (observing that suspects' free and voluntary admissions or confessions have always ranked high on the scale of inculpating evidence); *see also* Hopt v. Utah, 110 U.S. 574, 584-85 (1884) (noting that a free and voluntary confession is evidence of the "most satisfactory character[,]" and that a deliberate, voluntary confession is one of the most effective proofs in the law); 3 SIR WILLIAM O. RUSSELL, KNT., A TREATISE ON CRIMES AND MISDEMEANORS 365 (Charles S. Greaves ed., vol. 1865) (declaring "[a] free and voluntary confession of guilt made by a prisoner . . . is admissible in evidence as the highest and most satisfactory proof, be-

fessions are inaccurate or made involuntarily.[4] For example, a suspect may be tortured, tricked, or coerced into giving a false confession.[5] The courts therefore have had to develop a body of law to ensure that only honest and trustworthy confessions are considered in determining a suspect's guilt or innocence.[6]

One rule promulgated by the United States Supreme Court in this area of law is that a suspect must be advised of certain constitutional rights prior to being questioned by police.[7] The right

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cause it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true.").

[4] *See Miranda*, 384 U.S. at 446 (examining various techniques used by police to obtain involuntary confessions); *see also* Dr. Gisli H. Gudjonsson, *The Psychology of False Confessions*, 57 THE MEDICO-LEGAL J. 93 (1989) [hereinafter Gudjonsson, *Psychology*]; Dr. Gisli H. Gudjonsson, *The Psychology of False Confessions*, 142 NEW L.J. 1277 (1992) [hereinafter Gudjonsson, *False Confessions*]. Dr. Gudjonsson, an authority on suggestibility under interrogation, concluded that people undoubtedly confess to crimes that they did not commit. Gudjonsson, *Psychology*, *supra*, at 93-94. Dr. Gudjonsson discovered that there is no single reason why individuals falsely confess to crimes, and that false confessions usually result from a combination of factors. Gudjonsson, *False Confessions*, *supra*, at 1277. Most often, Dr. Gudjonsson related, false confessions occur in cases of alleged murder and serious sex offenses. Gudjonsson, *Psychology*, *supra*, at 95. Dr. Gudjonsson found that false confessors are generally under a great deal of stress resulting from their arrest and subsequent interrogation, and they focus on the immediate, desirable consequences of confessing (e.g. an end to the interrogation) rather than the negative, long term consequences (conviction and incarceration for a crime they did not commit). *Id.* at 97, 101. False confessions also result, the author learned, when suspects begin to accept suggestions offered by police (e.g. "Well, it looks like I did it"; "If the polygraph says that I did it I must have done it[.]") *Id.* at 102. Dr. Gudjonsson also determined that, as a group, alleged false confessors have a significantly lower I.Q. and are noticeably more suggestible and compliant than confessors as a whole. *Id.* at 106. Another study, the author noted, found that low intelligence, psychological disturbance, poor literacy, suggestibility, and low mental age were factors that led to false confessions. *Id.* at 100.

[5] *Miranda*, 384 U.S. at 446, 453. For an example of a suspect being tortured into giving a false confession, see *Ziang Sung Wan v. United States*, 266 U.S. 1, 8-13 (1924) (police interrogate and physically torment a sick and feeble murder suspect for eleven days to extract a confession). For other examples of suspects incriminating themselves as a result of police torture, trickery, or coercion, see *Rhode Island v. Innis*, 446 U.S. 291, 294-95 (1980) (police coax a robbery suspect into revealing the location of a sawed-off shotgun by emphasizing the importance of recovering the weapon before it could be found by a handicapped child from a nearby school); *Brewer v. Williams*, 430 U.S. 387, 392-93 (1977) (police induce a murder suspect into revealing the location of the victim's body by stressing the importance of finding the body quickly so that the victim could receive a proper Christian burial); *Watts v. Indiana*, 338 U.S. 49, 52-53 (1949) (police obtain a confession by depriving the suspect of food or sleep, interrogating him night and day for five days, and secluding him in a cell known as "the hole").

[6] *See generally Miranda*, 384 U.S. at 458-66 (discussing the evolution of the privilege against self-incrimination in the United States).

[7] *Id.* at 444. Specifically, *Miranda* requires police, prior to any questioning, to inform a suspect that "he has a right to remain silent, that any statement he does

against compelled self-incrimination,[8] which allows a suspect to remain silent and to refuse to answer questions, is one of the most important constitutional rights possessed by a suspect.[9] Only if the

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make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*

[8] The "right against compelled self-incrimination" stems from certain provisions contained in both the United States Constitution as well as many state constitutions. 22A C.J.S. *Criminal Law* § 645 (1993). These provisions prohibit the government from forcing a suspect to be a witness or give evidence against himself. *Id.* Further, any incriminating evidence that a suspect is compelled to provide in violation of this right is inadmissible against the suspect in court. *Id.*

[9] *See generally, Miranda*, 384 U.S. at 442, 457-58. In *Miranda*, Chief Justice Warren described the right against self-incrimination as "one of our Nation's most cherished principles[,]" and emphasized that this "precious" right was secured in the Constitution only after hundreds of years of struggle and persecution. *Id.* At early common law, courts placed no restrictions on the admissibility of confessions and accepted all self-incriminating statements into evidence. WIGMORE, *supra* note 2, at § 818 (noting that confessions were admitted during the 1500s and 1600s "without question as to their proceeding from hope of promises or from fear of threats, even of torture."). *See also* Note, *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954 (1966) (reporting that all confessions, including those which had been obtained through the use of torture, were admissible at early common law). *But see* R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European* Ius Commune, 65 N.Y.U. L. REV. 962, 967 (1990) (professing that the ancient English common law tenet forbidding compelled self-incrimination appeared as early as the year 1234). In the late 1700s, courts began to question the practice of admitting all confessions into evidence and recognized that certain self-incriminatory statements should be excluded as untrustworthy. WIGMORE, *supra* note 2, at § 819 (declaring that Lord Mansfield made the first judicial declaration restricting the admissibility of confessions in 1775 in *The King v. Rudd*, 168 Eng. Rep. 160-61 (K.B. 1775)). *See also* George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U. L.Q. 275, 279-80 (1975) [hereinafter Dix, *Modern Confessions*] (stating that confessions made under promises and threats were inadmissible in early English practice); and WAYNE R. LAFAVE AND JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.2, at 294 (2d ed. 1992) (noting that English trial judges began imposing restrictions on the admission of confessions during the mid-eighteenth century). By the mid-1800s, the principle of exclusion was fully developed, and judges would eagerly reject confessions and incriminatory statements obtained under circumstances that suggested that the statements were not made voluntarily. WIGMORE, *supra* note 2, at § 820. *See also* Kevin Urick, *The Right Against Compulsory Self-Incrimination in Early American Law*, 20 COLUM. HUM. RTS. L. REV. 107, 115 (1988) (examining the broad scope of the right against self-incrimination in America from the late 1700s to the late 1800s). Today, the right against self-incrimination is expressly secured by the Fifth Amendment, which states, "No person shall . . . be compelled in any criminal case to be a witness against himself[.]" U.S. CONST. amend. V.

In addition to the Fifth Amendment's privilege against self-incrimination, a suspect possesses the right to have an attorney present during custodial interrogation. *Miranda*, 384 U.S. at 469. The right to counsel in this context, however, does not stem from the Sixth Amendment's express conferral of that right. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."). Instead, the right to the presence of counsel during custodial interrogation emanates from the Fifth Amendment. *See* James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA

suspect is advised of and validly waives this right may a confession be used against him in court.[10]

Recently, the New Jersey Supreme Court ruled on the validity of a suspect's waiver of rights and the admissibility of the suspect's subsequent confession in *State v. Reed*.[11] In *Reed*, the New Jersey Supreme Court held that when police fail to inform a suspect of an attorney's attempts to contact him, any subsequent waiver of the privilege against self-incrimination by the suspect will be deemed invalid.[12] The *Reed* court further declared that any confession obtained under such circumstances will be inadmissible against the suspect in court.[13]

On March 16, 1987, police asked John Reed to come to the Somerset County Prosecutor's Office for questioning about the murder of Susan Green.[14] Reed and his girlfriend, Fran Varga,

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L. REV. 975, 976 (1986) (noting that the Supreme Court has identified an implicit entitlement to assistance of counsel in the Fifth Amendment's privilege against self-incrimination). Although the Fifth Amendment does not expressly guarantee a right to counsel, the Court has held that the right to have an attorney present during interrogation is "indispensable" to protect the privilege against self-incrimination. *Miranda*, 384 U.S. at 469. Thus, the right to have an attorney present during interrogation is an indispensable conjunct of the Fifth Amendment's privilege against self-incrimination. *Id.* at 471. For further discussion of the rights to counsel guaranteed by the Fifth and Sixth Amendments, see *infra* note 71 and accompanying text.

10 *Miranda*, 384 U.S. at 444, 476. In *Miranda*, Chief Justice Warren declared that a defendant may waive his right against self-incrimination, provided that the waiver is made "voluntarily, knowingly and intelligently." *Id.* at 444. The *Miranda* Court further provided that unless the prosecution established at trial that a defendant was advised of and waived his rights, no evidence obtained from the interrogation could be used against him. *Id.* at 479.

11 133 N.J. 237, 627 A.2d 630 (1993).

12 *Id.* at 261-62, 627 A.2d at 643.

13 *Id.* at 269, 627 A.2d at 647.

14 *Id.* at 240, 627 A.2d at 632. At 8:00 a.m. on Monday, March 16th, the Franklin Township Police received a phone call from Fran Varga, Reed's girlfriend and roommate. *Id.* Varga informed the police that Reed had discovered the dead body of his co-worker, Susan Green, in Green's apartment. *Id.* Upon their arrival at Green's apartment, police found the door unlocked and Green's body on the living room floor. *Id.* Green's pants and underwear had been forced down to her knees, and she had been stabbed fifty-three times in the heart, liver, lungs and abdomen. *Id.* Green's skull had also been fractured by a strong blow to the head. *Id.* The police asked Reed and Varga to meet them at the apartment. *Id.* Upon the couple's arrival, police questioned Reed for a short time, and then allowed him to leave. *Id.* When questioned about his knowledge of the murder, Reed told police that Green called him on Friday, March 13th, terrified because some "black man" was pounding on the window. *Id.* at 242, 627 A.2d at 632. Reed alleged that he immediately went to Green's apartment and searched the area. *Id.* Unable to find anyone outside, Reed spoke with Green for a short time and then departed. *Id.* Reed returned to Green's apartment for a dinner engagement at 5:00 p.m. the next day, but went home after Green failed to answer the door. *Id.* Reed was unable to contact Green on Sunday, so he stopped at her apartment on Monday morning before going to work. *Id.*, 627 A.2d

drove to the office where they were separated by police immediately upon their arrival.[15] While police transferred Reed into an interrogation room for questioning, Varga contacted attorney William Aitken from a phone in the office lobby.[16] Without Varga's knowledge, the police then moved Reed to Major Crimes, a satellite office located a few miles away.[17] Shortly after the police transferred Reed, Aitken arrived at the Prosecutor's Office and asked to speak with Reed.[18] An Assistant Prosecutor denied this request, informing Aitken that Reed was not a suspect, but merely a witness, and that Aitken had no right to interfere with an investigation.[19] The Assistant Prosecutor assured Aitken that police would contact

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at 633. Reed found the door unlocked and went inside. *Id.* After discovering Green's body, he immediately called Varga. *Id.*

After Reed gave this statement to the police, he returned home. *Id.* at 240, 627 A.2d at 632. Shortly thereafter, Franklin Police Detectives Nicholas Importico and Clark Shedden arrived at Reed's home and asked him to come to the station for additional questioning. *Id.* at 240-41, 627 A.2d at 632. Because Reed was extremely nervous, Varga offered to drive Reed to the Prosecutor's Office. *Id.* at 241, 627 A.2d at 632. Additionally, Varga claimed that she went to the Prosecutor's Office in order to help the police understand Reed, who stuttered uncontrollably when nervous and had a severe speech impediment attributable to a hare lip and cleft palate. *Id.*

15 *Id.*

16 *Id.* Varga testified that as soon as Reed was taken in to be interrogated, she telephoned her aunt, who told her to call attorney Peter Lanfrit. *Id.* Upon receiving her call, Lanfrit told Varga that he would send an associate, William Aitken, to the Prosecutor's Office at once. *Id.* Lanfrit then instructed Aitken to go to the office and determine whether to represent Reed, Varga, or both. *Id.* Varga claimed that she asked police not to question Reed further until his attorney arrived, and that the officer she spoke with nodded in affirmation. *Id.*

17 *Id.* The New Jersey Supreme Court highlighted the peculiar manner in which the police moved Reed to Major Crimes. *Id.* Instead of exiting the office by way of elevator, which would have required Importico and Shedden to take Reed through the lobby and past Varga, the officers took Reed down four flights of stairs and out the back door of the building. *Id.* The officers later testified that they had taken the stairs with no intention of avoiding Varga, but that it was simply more convenient to use the stairs to exit the building. *Id.*

The Somerset County Prosecutor's Office disputes the New Jersey Supreme Court's version of these events. Jeff May, *Judge Rejects Plea to Bar Prosecutor*, THE COURIER-NEWS, Oct. 9, 1993, at A5. The Prosecutor's Office contends that Reed had actually been out of the office for a half-hour before Varga and Aitken arrived, and that "[t]he Supreme Court . . . is simply wrong on the facts." *Id.*

18 *Reed*, 133 N.J. at 242, 627 A.2d at 633.

19 *Id.* at 242-43, 627 A.2d at 633. It is unclear whether the Assistant Prosecutor notified the interrogating officers of Aitken's request. *Id.* at 243, 627 A.2d at 633. Shedden, who questioned Reed at Major Crimes, testified that he was not aware that an attorney had been retained for Reed, but he did know that an attorney was in the office to represent Varga. *Id.* The Assistant Prosecutor did not testify during the pretrial hearing because he represented the State in Reed's initial trial. *Id.* Therefore, the record does not reveal whether the Assistant Prosecutor notified Shedden that Aitken wished to speak with Reed. *Id.* It is undisputed, however, that no one informed Reed of Aitken's attempt to speak with him. *Id.*

him if and when Reed requested a lawyer.[20] No one, however, informed Reed that an attorney was present and wished to speak with him.[21]

In the meantime, the police and Reed arrived at Major Crimes.[22] Shortly thereafter, the police advised Reed of his Miranda rights for the first time.[23] Reed waived these rights[24] and denied killing Green, but police remained skeptical[25] and asked Reed to take a polygraph test.[26] Reed initially agreed to submit to

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20 *Id.*

21 *Id.*

22 *Id.* at 241-42, 627 A.2d at 632.

23 *Id.* at 242, 627 A.2d at 633. In *Miranda*, the United States Supreme Court held that before interrogation may begin, police must advise a suspect that "he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444 (1966).

24 The *Miranda* Court provided that after police have issued the Miranda warnings, the suspect may knowingly and intelligently waive his rights and agree to make a statement or answer questions. *Miranda*, 384 U.S. at 479. *See infra* notes 90-92 and accompanying text (discussing specific waiver provisions contained in *Miranda*).

In addition to verbally acknowledging that he understood his Miranda rights, Reed signed a Miranda waiver card. *Reed*, 133 N.J. at 242, 627 A.2d at 633. A Miranda waiver card is a card or form which asks questions or contains statements about the Miranda warnings. State v. Reed, 249 N.J. Super. 41, 45, 592 A.2d 4, 6 (1991), *overruled*, 133 N.J. 237, 627 A.2d 630 (1993). The questions are designed to evoke responses which demonstrate that a defendant understands his Miranda rights. *Id.* Although the cards used by individual police departments vary, a typical Miranda waiver form provides the following warnings:

> (1) You have the right to remain silent. (2) Anything you say can and will be used against you in a court of law. (3) You have the right to a lawyer and have him present with you while you are being questioned. (4) If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. (5) You can decide at any time to exercise these rights and not answer any questions or make any statements. (6) Do you understand each of these rights I have explained to you? (7) Having these rights in mind, do you wish to talk to us now?

Miranda Warning (1991) (Somerset County Prosecutor's Office Miranda Waiver Form). Police either read these warnings to the suspect or have the suspect himself read them aloud, and then ask the suspect to initial each of the warnings. Interview with James L. McConnell, Somerset County Assistant Prosecutor, in Somerville, N.J. (Sept. 29, 1993). Police next ask the suspect to sign the following statement: "I, _____ have been read and understand my rights as written above." *Id.* (quoting *Miranda Warning*, *supra*). Lastly, witnessing officers sign and date the form. *Id.*

25 Reed's denial contained inconsistencies from the version of events he originally gave police at Green's apartment. *Reed*, 133 N.J. at 242, 627 A.2d at 633. Most significantly, at the station, Reed stated that on the morning he found Green's body, he covered it with a pillow and jacket, and then went to work. *Id.* *See supra* note 14 (reporting that Reed initially told police that he phoned Varga immediately after discovering Green's body).

26 *Id.* at 242-43, 627 A.2d at 633. A polygraph, more commonly known as a "lie detector," is an "electro-mechanical instrument used to determine whether an ex-

the polygraph; however, after he was advised of and waived his Miranda rights for a second time, Reed changed his mind and refused to take the test.[27] Police resumed questioning,[28] and eventually Reed admitted to murdering Green.[29] Reed was advised of and waived his Miranda rights for the third time, and then gave the police a full, taped confession.[30]

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aminee is truthfully answering questions. It simultaneously measures and records certain physiological changes in the human body which it is believed are involuntarily caused by an examinee's conscious attempt to deceive an interrogator." BLACK'S LAW DICTIONARY 1160 (6th ed. 1990) (citation omitted). *See generally* ANTHONY GALE, THE POLYGRAPH TEST (1988) (discussing the polygraph test and its application in legal practice); JOHN E. REID AND FRED E. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE (2d ed. 1977) (outlining testing procedures and reviewing admissibility).

27 *Reed*, 133 N.J. at 242-44, 627 A.2d at 633.

28 *Id.* at 244, 627 A.2d at 633-34. After Reed refused to take the polygraph, his interrogators utilized the "good cop-bad cop" routine to extract his confession. *Id.* This well-known and highly effective method of interrogation was dubbed the "'friendly-unfriendly'" or "'Mutt and Jeff' act" by Chief Justice Warren in *Miranda*. *Miranda*, 384 U.S. at 452. The *Miranda* Court described the technique as follows:

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

Id. (quotation omitted).

In *Reed*, Somerset County Chief of Detectives Richard Thornburg assumed the role of the "bad cop," yelling at Reed and accusing him of murdering Green because she refused to have sex with him. *Reed*, 133 N.J. at 244, 627 A.2d at 634. Thornburg told Reed that he was "'nothing more than an animal[,]'" and then said that he was leaving to file a homicide complaint. *Id.* Detective Shedden, on the other hand, played the "good cop." *Id.* Shedden was empathetic, and related to Reed that "'he could understand how maybe [Green] could have had this coming to her.'" *Id.* Reed then confessed to the murder. *Id.*

29 *Reed*, 133 N.J. at 244, 627 A.2d at 634.

30 *Id.* In his final account of the murder, Reed claimed that he was upset because Varga had left for the weekend, despite Reed's pleas to her to stay because he felt "'depressed and weak.'" *Id.* After Varga's departure, Reed went to Green's apartment, where the two talked for a while until Green provocatively unbuttoned her pants and tried to initiate intercourse with Reed. *Id.* When Reed declined, Green ridiculed him and the two argued. *Id.* at 244-45, 627 A.2d at 634. The argument escalated and Green wielded a knife. *Id.* at 245, 627 A.2d at 634. Reed responded by telling Green to put it down and "'back off.'" *Id.* According to Reed, Green told him to leave, but then instantly grabbed a board and charged him. *Id.* In response, Reed "'freaked out[,]'" grabbed the knife, and stabbed Green. *Id.*

In May of 1987, a Somerset County grand jury indicted Reed[31] for first-degree murder,[32] first-degree felony murder,[33] first-degree aggravated sexual assault,[34] and third-degree possession of a weapon for an unlawful purpose.[35] Prior to trial, Reed's attorney moved to suppress the confession on the grounds that Reed had not voluntarily, knowingly, and intelligently waived his Miranda rights.[36] The Superior Court, Law Division, Somerset County, denied the motion.[37] The court found that the police had no duty to

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[31] *Id.*

[32] New Jersey law provides:

> [C]riminal homicide constitutes murder when:
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> (1) The actor purposely causes death or serious bodily injury resulting in death; or
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> (2) The actor knowingly causes death or serious bodily injury resulting in death[.]

N.J. STAT. ANN. § 2C:11-3a(1) & (2) (West 1982).

[33] New Jersey law provides:

> [C]riminal homicide constitutes murder when:
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> . . . .
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> (3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants[.]

N.J. STAT. ANN. § 2C:11-3a(3) (West 1982).

[34] New Jersey law provides:

> An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:
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> . . . .
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> (3) The act is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, homicide, aggravated assault on another, burglary, arson or criminal escape;
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> (4) The actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object[.]

N.J. STAT. ANN. § 2C:14-2a (3) & (4) (West 1982).

[35] New Jersey law provides:

> Any person who has in his possession any weapon, except a firearm, with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the third degree.

N.J. STAT. ANN. § 2C:39-4d (West Supp. 1982).

[36] *Reed*, 133 N.J. at 245, 627 A.2d at 634. Reed's attorney argued that Reed's mental limitations, his isolation from Varga, and the failure of the Assistant Prosecutor to inform Reed that Varga had obtained a lawyer for him combined to form an extremely coercive atmosphere. *Id.* This, in turn, prevented Reed from both fully understanding his rights and the significance of waiving them in order to speak with police. *Id.* at 245-46, 627 A.2d at 634. For a discussion of waiver of the Miranda rights, see *supra* notes 90-92 and accompanying text.

[37] *Id.* at 246, 627 A.2d at 634-35.

inform Reed of Aitken's attempt to contact him because Aitken had never been formally retained to represent Reed.[38] The court further declared that no duty to inform would exist even if Aitken had been hired to represent Reed.[39] Consequently, Reed's confession was admitted at trial,[40] and Reed was convicted for knowing murder and aggravated sexual contact.[41]

On appeal, the appellate division rejected Reed's contention that the police had violated his constitutional right against self-incrimination by failing to inform him of Aitken's availability.[42] Ultimately, however, the appellate court reversed Reed's conviction on other grounds.[43] The New Jersey Supreme Court granted certifica-

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38 *Id.*

39 *Id.*, 627 A.2d at 635.

40 *Id.*

41 *Id.* at 245, 627 A.2d at 634. New Jersey law provides:

> An actor is guilty of aggravated criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in 2C:14-2a (2) through (6).

N.J. STAT. ANN. § 2C:14-3a. (West 1982). See *supra* note 34 for an enumeration of the applicable provisions of N.J.S.A. § 2C:14-2a. See also *supra* note 32 for the language of N.J.S.A. § 2C:11-3a(2), New Jersey's knowing murder statute.

Although the Somerset County Prosecutors tried this matter as a capital case, the jury declined to impose the death penalty. *Reed*, 133 N.J. at 245, 627 A.2d at 634. On the murder conviction, the court sentenced Reed to life in prison with a 30 year parole ineligibility period plus a $10,000 Violent Crimes Compensation Board penalty. *Id.* In addition, the court ordered a concurrent five year sentence and $30 V.C.C.B. penalty for Reed's aggravated criminal sexual contact conviction. *Id.*

42 State v. Reed, 249 N.J. Super. 41, 48, 592 A.2d 4, 7 (1991), *overruled*, 133 N.J. 237, 627 A.2d 630 (1993). In rejecting Reed's self-incrimination argument, the appellate division relied in part upon *Moran v. Burbine*. *Id.* at 47-48, 592 A.2d at 7 (citing Moran v. Burbine, 475 U.S. 412 (1986)). In *Moran*, the United States Supreme Court held that under the federal constitution, police have no duty to inform a suspect that an attorney has been contacted on his behalf by a third party. *Moran*, 475 U.S. at 425. See *supra* notes 102-110 and accompanying text for a discussion of *Moran*. The appellate division concluded that the actions of the police had not violated Reed's right against self-incrimination or right to counsel under either federal or New Jersey law. *Reed*, 249 N.J. Super. at 48, 592 A.2d at 7.

43 *Reed*, 249 N.J. Super at 51, 592 A.2d at 7-8. The appellate court reversed Reed's conviction and remanded the matter to the trial court on the ground that the trial court's jury instructions had not permitted the jury to consider the lesser included offense of passion/provocation manslaughter. *Id.* New Jersey defines passion/provocation manslaughter in the following manner: "[c]riminal homicide constitutes manslaughter when: . . . (2) A homicide which would otherwise be murder under section 2C:11-3 is committed in the heat of passion resulting from a reasonable provocation." N.J. STAT. ANN. § 2C:11-4b(2) (West 1982).

In challenging his conviction, Reed advanced four grounds for reversal. *Reed*, 249 N.J. Super. at 44-46, 48, 592 A.2d at 5-7. First, Reed contended that he was unable to understand and knowingly waive his Miranda rights because he was mentally retarded. *Id.* at 45, 592 A.2d at 6. The appellate division determined that it had no reason to disturb the trial court's conclusion that Reed was not mentally retarded. *Id.* at 46, 592 A.2d at 6. Reed's second contention was that he should not have been

tion[44] to determine whether the police's failure to inform Reed of the attorney's request violated Reed's New Jersey state law privilege against self-incrimination.[45]

Writing for the court, Justice Handler held that when an attorney has been retained for a suspect by another, and the attorney is available and requests to speak with the suspect, police have a duty to inform the suspect of the attorney's attempts to contact him.[46] The court explained that the existence of an attorney-client relationship does not depend upon an express request by the suspect, and that such a relationship would be deemed to exist whenever the suspect's friends or family have retained an attorney on the suspect's behalf.[47] Moreover, the majority declared that if the police breach their duty to inform the suspect of the attorney's presence, any ensuing waiver of the privilege against self-incrimination by the suspect will be deemed invalid *per se*.[48] Accordingly, the court pronounced Reed's waiver and subsequent confession invalid because it was obtained in violation of these principles.[49]

In 1844, the United States Supreme Court first recognized that the admission of a confession into evidence implicated the federal constitution in *Bram v. United States*.[50] In *Bram*, the captain

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interrogated without Varga present to assist him. *Id.* at 45, 592 A.2d at 6. The appellate division concluded that this contention was premised upon Reed's claim of mental retardation, and therefore rejected this claim as well. *Id.* at 46, 592 A.2d at 6. Reed's third contention was that the refusal of the police to permit his attorney to speak with him violated his constitutional rights. *Id.* at 47, 592 A.2d at 6. For a discussion of Reed's third assertion, see *supra* note 42 and accompanying text. Reed's final contention, that the jury instructions were erroneous, is discussed above.

44 *State v. Reed*, 127 N.J. 552, 606 A.2d 365 (1991). Both Reed and the State petitioned the New Jersey Supreme Court for certification to appeal. *Reed*, 133 N.J. at 246, 627 A.2d at 635. The court denied the prosecution's cross petition, which was based on the appellate division's conclusion that the trial court had improperly instructed the jury on passion/provocation manslaughter. *Id.*

45 *Reed*, 133 N.J. at 246-47, 627 A.2d at 635. For a discussion of New Jersey's state law privilege against self-incrimination, see *infra* note 117.

46 *Id.* at 261-62, 627 A.2d at 643.

47 *Id.* at 261, 627 A.2d at 643.

48 *Id.* at 262, 627 A.2d at 643.

49 *Id.* at 269, 627 A.2d at 647. The New Jersey Supreme Court affirmed the judgment of the appellate division which reversed Reed's murder conviction, reversed the appellate division's affirmance of Reed's conviction for aggravated sexual contact, and remanded the matter to the trial court. *Id.* at 270, 627 A.2d at 647.

50 168 U.S. 532, 542 (1897). For a discussion of *Bram*, see Dix, *Modern Confessions*, *supra* note 9, at 287 (noting that the United States Supreme Court, by excluding Bram's statement on constitutional grounds, departed from earlier cases which discussed the admissibility of confessions in evidence law terms); Note, *Developments in the Law—Confessions*, *supra* note 9, at 960 (noting the radically different approach to the admissibility of confessions adopted in *Bram*); Howard K. Uniman, Note, *The Soap Box Exception to the* Miranda *Rule: Fifth Amendment Protections Slip Down the Drain*, 15 SETON

of a ship was murdered at sea, and the ship's first mate incriminated himself through a statement made during custodial interrogation.[51] The Supreme Court held that the admissibility of a confession was governed by the Fifth Amendment's privilege against self-incrimination[52] and excluded the first mate's statement

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HALL L. REV. 685, 688 (1985) (stating that *Bram* was the first case in which the Supreme Court used the Fifth Amendment to bar the admission of a confession).

Prior to *Bram*, the Court adhered to the common law rule that excluded confessions on an evidentiary rather than constitutional basis. *Id. See also* Stephen J. Markman, Miranda v. Arizona: *A Historical Perspective*, 24 AM. CRIM. L. REV. 193, 199 (1986) (noting that the admissibility of confessions in early interrogation cases typically hinged on the common law rule of evidence which excluded involuntary confessions); Dix, *Modern Confessions*, *supra* note 9, at 286 (noting that the Supreme Court's initial unwillingness to confront the constitutional issues raised by confession cases was demonstrated by the fact that the Court had resolved such cases on a purely evidentiary basis); George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 234 (1988) [hereinafter Dix, *Federal Confessions*] (asserting that the United States Supreme Court adopted the common law voluntariness requirement to govern the admissibility of confessions in *Hopt v. Utah*, 110 U.S. 574, 584-85 (1884)).

In *Hopt*, the Supreme Court admitted the confession of a murder suspect who, after being left alone for three minutes with one police officer, immediately confessed upon the arrival of another officer. *Hopt*, 110 U.S. at 584. The Court stated that "[a] confession, if freely and voluntarily made, is evidence of the most satisfactory character[,]" and that, "a deliberate, voluntary confession of guilt is among the most effectual proofs in the law . . . ." *Id.* at 584-85. The Court, however, declared that the presumption that an innocent person will not give a false confession ceases to apply when "the confession appears to have been made either in consequence of inducements of a temporal nature," or, "because of a threat or promise by or in the presence of [a person in authority], which, operating upon the fears or hopes of the accused, . . . deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law." *Id.* at 585. For examples of other early cases which excluded confessions on an evidentiary rather than constitutional basis, see *Wilson v. United States*, 162 U.S. 613, 622-23 (1896); *Pierce v. United States*, 160 U.S. 355, 357 (1896); and *Sparf and Hansen v. United States*, 156 U.S. 51, 55 (1895).

[51] *Bram*, 168 U.S. at 535-36, 539. While interrogating the first mate, police stripped him naked and told him that a witness who had been standing at the ship's wheel had watched him commit the murder. *Id.* at 539. The first mate incriminated himself by replying "'he could not see me from there.'" *Id.* For further explanation of "custodial interrogation," see *infra* note 85.

[52] *Id.* at 542. See *supra* note 9 for an enumeration of the relevant provisions of the Fifth Amendment. In *Bram*, the Court specifically held:

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."

Id.

Bram has been heavily criticized by legal commentators for its unsubstantiated assumption that the Fifth Amendment had always been used to determine the voluntariness of a confession. DAVID M. NISSMAN ET AL., LAW OF CONFESSIONS § 3:2 (1985). Nissman observed that Wigmore, a noted legal scholar, described *Bram* as "'the height of absurdity in misapplication of the law.'" *Id.* (quotation omitted). McCor-

as violative of that provision.[53] After examining the English common law, the Court determined that both the Fifth Amendment and the common law voluntariness rule[54] were intended to prevent the same wrongs and secure the same safeguards.[55] Accordingly, the Court concluded that the Fifth Amendment's privilege against self-incrimination was merely a crystallization of the common law voluntariness rule.[56]

Although *Bram* prohibited the admission of involuntary confessions in the federal courts, the decision offered no protection to

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mick, another prominent legal intellectual, characterized *Bram* as a "'historical blunder.'" *Id.* (quotation omitted). The Court itself even criticized *Bram* in later decisions. *Id. See, e.g., Stein v. New York*, 346 U.S. 156, 190-91 n.35 (1953) (stating that *Bram* "is not a rock upon which to build constitutional doctrine.").

[53] *Bram*, 168 U.S. at 542-43, 565. The *Bram* Court stated that the situation surrounding Bram's confession foreclosed any possibility that his statement was purely voluntary. *Id.* at 562. The Court averred that Bram's statement must have resulted from "either hope or fear, or both . . . ." *Id.*

[54] The common law voluntariness rule may be defined as follows: "a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by *any sort* of threats or violence, nor obtained by *any* direct or implied promises, however slight, nor by the exertion of any improper influence . . . ." RUSSELL, *supra* note 3, at 367. In *Hopt v. Utah*, the Supreme Court examined this rule and noted that because the admissibility of a dubious confession "so largely depends upon the special circumstances connected with the confession, . . . it is difficult, if not impossible, to formulate a rule that will comprehend all cases." Hopt v. Utah, 110 U.S. 574, 583 (1884). Although the Supreme Court determined that it was unnecessary to establish a general rule to govern the admissibility of confessions, it concluded that a confession was admissible unless:

> [T]he confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.

Id. at 583, 585. *See infra* note 50 for a discussion of *Hopt*.

[55] *Bram*, 168 U.S. at 543.

[56] *Id. See* Urick, *supra* note 9, at 127 (explaining that it was not surprising that *Bram* rested constitutional confessions law on the right against self-incrimination because that had been the practice at common law since the seventeenth century).

Despite the novel pronouncement contained in *Bram*, its constitutional significance remains uncertain. Dix, *Modern Confessions*, *supra* note 9, at 289. In several cases that arose after *Bram* and involved the admissibility of confessions, the Court ostensibly ignored *Bram* and failed to mention a constitutional foundation for the confessions rule that the Court applied. *Id. See, e.g.*, Ziang Sung Wan v. United States, 266 U.S. 1, 14-17 (1924) (excluding an involuntary confession with no mention of the Fifth Amendment); Perovich v. United States, 205 U.S. 86, 91 (1907) (permitting a third party's testimony of statements made by the suspect without reference of the Fifth Amendment); *see also*, Markman, *supra* note 50, at 199-200 (contending that *Bram* was decided on faulty legal premises, and that Wigmore and other commentators have exposed the insupportable assumptions of the decision).

defendants tried in state courts.[57] Because *Bram*'s holding was based upon the Fifth Amendment, which was not binding on the states until 1964, state courts were not required to exclude confessions obtained in violation of *Bram*'s precepts.[58] The admissibility of confessions in the state courts prior to that time, however, was not completely free from federal judicial review.[59]

The United States Supreme Court barred the admission of a state court confession for the first time in 1936.[60] In *Brown v. Mississippi*,[61] the Court excluded an involuntary confession in a state court proceeding by using the Fourteenth Amendment's Due Process Clause.[62] In *Brown*, Mississippi police tortured three black suspects until they confessed to murdering a white man.[63] The

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57 *See* LAFAVE AND ISRAEL, *supra* note 9, at 294.

58 *Id.* As a result of the Supreme Court's decision in *Barron v. The Mayor and City Council of Baltimore*, specific guarantees contained in the Bill of Rights are not directly binding upon the states and must be incorporated through the Due Process Clause of the Fourteenth Amendment. *See* Barron v. The Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) ("Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have . . . expressed that intention."); see *infra* note 62 for a narration of the relevant provisions of the Fourteenth Amendment.

Originally, the Supreme Court held that the states were not bound by the Fifth Amendment's privilege against self-incrimination. Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 462 (1964). *See* Twining v. New Jersey, 211 U.S. 78, 114 (1908) (holding that "the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution."), *aff'd*, Adamson v. California, 332 U.S. 46 (1947). In 1964, the Supreme Court overruled *Twining* and held that the Fifth Amendment's privilege against self-incrimination was binding upon the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6, 8 (1964). *See infra* notes 72-76 and accompanying text for a discussion of *Malloy*. Thus, at the time *Bram* was decided, the decision offered no protection against the admission of involuntary confessions in the state courts. LAFAVE & ISRAEL, *supra* note 9, at 294.

59 Markman, *supra* note 50, at 205. See *infra* notes 60-68 and accompanying text for a discussion on the admissibility of confessions in the state courts.

60 LAFAVE & ISRAEL, *supra* note 9, at 294 (citing Brown v. Mississippi, 297 U.S. 278, 286 (1936)).

61 297 U.S. 278 (1936).

62 *Id.* at 287. The Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

63 *Brown*, 297 U.S. at 282-83. In *Brown*, police obtained confessions from three murder suspects through the use of physical torture, including hanging one suspect from a tree and beating the others with buckled leather straps. *Id.* at 281-82. The trial court and the Mississippi Supreme Court admitted the confessions and convicted the suspects. *Id.* at 279-80. On appeal, the United States Supreme Court reversed, finding that the manner in which suspect's confessions were obtained violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 287. The Court, however, did not exclude the confessions on the basis of the suspects' Fifth Amendment right against self-incrimination. *Id.*

Supreme Court held that the admission of the confessions into evidence violated due process because the manner in which the confessions were obtained offended fundamental principles of liberty and justice.[64] The Court reasoned that the states were free to adopt different procedural requirements for their own courts provided that those requirements conformed with due process of law.[65]

The Fourteenth Amendment due process analysis announced in *Brown* required courts to determine, on a case-by-case basis, whether each confession was truly voluntary based upon the totality of the circumstances.[66] Although due process analysis permitted the Supreme Court to review the decisions of state courts, the Court gradually became dissatisfied with this method because it was highly fact specific, not amenable to judicial review, and left little guidance for police concerning interrogation procedure.[67] Consequently, by the mid-1960s, the Court was ready to abandon this method and sought a new approach for determining the admissibility of confessions in state judicial systems.[68]

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64 *Id.* at 286. The Court explained that "[t]he due process clause requires 'that state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Id.* (citation omitted). The Court then declared that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of [the *Brown* defendants] . . . ." *Id.*

65 *Id.* at 285. The Court explained that the states are free to regulate procedure in their own courts in accordance with their own conceptions of policy unless in doing so they offend "'some principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (citation omitted).

66 LAFAVE & ISRAEL, *supra* note 9, at 296. The totality of the circumstances standard generally requires the court to assess the conduct of the police in procuring the confession as well as the status and characteristics of the individual confessing. *Id.*; *see also* Mary A. Crossley, Note, Miranda *and the State Constitution: State Courts Take a Stand,* 39 VAND. L. REV. 1693, 1705 (1986) (discussing the manner in which the Supreme Court utilized the totality of the circumstances approach to exclude involuntary confessions during the 1950s).

67 Alan W. Clark, Note, *Criminal Procedure—Confessions—Waiver of Fifth Amendment Rights Held Valid Although Police Failed to Inform Suspect of Attorney's Attempt to Contact Him,* 17 SETON HALL L. REV. 402, 408 n.65 (1987); Dix, *Federal Confessions, supra* note 50, at 235-36 (enumerating factors that led to the Court's dissatisfaction with the voluntariness test). *See generally* LAFAVE & ISRAEL, *supra* note 9, at 298-99 (critiquing the voluntariness test).

68 Crossley, *supra* note 66, at 1706 (stating that the Court wanted to replace the dubiety of the voluntariness standard with a concrete, objective standard); *see also* LAFAVE & ISRAEL, *supra* note 9, at 299 (noting that the Supreme Court undertook a search for an alternative means of dealing with the confessions problem); Horace W. Jordan, Jr., Review, *Fifth and Sixth Amendments—Changing the Balance of* Miranda, 77 J. CRIM. L. & CRIMINOLOGY 666, 667 (1986) (declaring that the Court became increasingly dissatisfied with the voluntariness test for determining the validity of confessions in the early 1960s).

In a series of cases beginning with *Malloy v. Hogan*[69] and culminating in *Miranda v. Arizona*,[70] the Supreme Court replaced the due process approach to determining the admissibility of confessions with an objective standard based upon the Fifth and Sixth Amendments.[71] In *Malloy*, a suspect subpoenaed to testify in a state court proceeding invoked the Fifth Amendment and refused to answer any questions.[72] The Supreme Court held that the Fifth

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69 378 U.S. 1 (1964). *See infra* notes 72-76 and accompanying text for a discussion of *Malloy*.

70 384 U.S. 436 (1966). See *infra* notes 82-93 and accompanying text for a discussion of *Miranda*.

71 Crossley, *supra* note 66, at 1706. *See* Dix, *Federal Confessions*, *supra* note 50, at 235 (noting that *Miranda* ended the preeminence of due process analysis).

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Fifth Amendment does not explicitly confer a right to counsel; however, the *Miranda* Court concluded that the right to have an attorney present during interrogation was an "indispensable" safeguard to the suspect's Fifth Amendment privilege against self-incrimination. *Miranda*, 384 U.S. at 469. Despite the similar protections afforded by the Fifth and Sixth Amendments, the two provisions are not tautologous because only one of the amendments is implicated in many confession cases. Tomkovicz, *supra* note 9, at 977. In order for the Sixth Amendment right to counsel to arise, there must be deliberate elicitation of statements by the government after the institution of formal legal proceedings. *Id.* at 983. For the Fifth Amendment's ancillary right to counsel to arise, there must be interrogation in a custodial setting. *Id.* at 990-91. Thus, if intentional elicitation occurs after formal legal proceedings have been initiated, but either interrogation or custody of the suspect is lacking, only the Sixth Amendment applies. *Id.* at 977 n.6. *See, e.g.*, United States v. Henry, 447 U.S. 264, 272-75 (1980) (finding the Sixth Amendment applicable while holding the Fifth Amendment inapplicable because of a lack of interrogation). Alternatively, if custodial interrogation has occurred before formal legal proceedings have been initiated, only the Fifth Amendment applies. Tomkovicz, *supra* note 9, at 977 n.6. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 428-32 (1986). For a discussion of *Moran*, see *infra* notes 102-110 and accompanying text.

72 *Malloy*, 378 U.S. at 3. *Malloy* involved a defendant who was arrested in a 1959 gambling raid in Connecticut. *Id.* Two years later, Malloy was subpoenaed to testify in a gambling investigation conducted by the Hartford County Superior Court. *Id.* Malloy invoked the Fifth Amendment's privilege against self-incrimination and refused to answer any questions. *Id.* The Superior Court found Malloy in contempt and imprisoned him until he was willing to answer. *Id.* Malloy applied to the Superior Court for a writ of habeas corpus, but the court denied him such relief. *Id.* The Connecticut Supreme Court of Errors affirmed, holding that the Fifth Amendment's privilege against self-incrimination did not apply in a state court proceeding. *Id.* On appeal, the United States Supreme Court reversed, concluding that the Fifth Amendment was applicable to state court proceedings through the Fourteenth Amendment. *Id.* at 6.

Malloy is significant because it is the first modern case to merge the privilege against self-incrimination with constitutional confessions law. NISSMAN, *supra* note 52 at § 2:13. *See also* Charles E. Moylan, Jr., & John Sonsteng, *The Privilege Against Compelled Self-Incrimination*, 16 WM. MITCHELL L. REV. 249, 250 (1990) (stating that constitutional law concerning the admissibility of confessions differed from the constitutional privilege against compelled self-incrimination). Prior to *Malloy*, *Bram v.*

Amendment's privilege against self-incrimination was binding upon the states by way of the Fourteenth Amendment.[73] The Court announced that the admissibility of confessions in state courts was governed by the same standards employed in the federal courts since *Bram*.[74] Moreover, the Court implicitly denounced the earlier due process approach by explaining that the question was not whether the conduct of the police in extracting the confession was outrageous, but whether the confession itself was free and voluntary.[75] Consequently, the Court held that the suspect's Fifth Amendment invocation was proper even though it had occurred in a state, rather than federal, proceeding.[76]

Immediately following *Malloy*, the Supreme Court announced two decisions which further demonstrated the Court's dissatisfaction with due process analysis.[77] First, in *Massiah v. United States*,[78] the Court held that a defendant possessed a right to counsel during any post-indictment interrogation, and that any confession obtained in contravention of this right was inadmissible as a violation of the Sixth Amendment.[79] Next, in *Escobedo v. Illinois*,[80] the Court

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United States was the only case that equated the coerced confessions rule with the privilege against self-incrimination, and *Bram* has been highly criticized by legal commentators for making that connection. NISSMAN, *supra* note 52 at § 2:13. See *supra* note 52 for a discussion of various critiques of *Bram*. In *Malloy*, Justice Brennan suggested that the Court had been using Fifth Amendment analysis to resolve confession cases since *Brown*. *Malloy*, 378 U.S. at 6 (citing *Brown v. Mississippi*, 297 U.S. 278 (1936)). This assertion was simply inaccurate. NISSMAN, *supra* note 52, at § 2:13. Following *Brown*, the Court decided more than 30 state confessions cases using the Fourteenth Amendment's Due Process Clause, and in none of them did the Court suggest a Fifth Amendment basis for excluding the confession. *Id.*

73 *Malloy*, 378 U.S. at 6. The Court reasoned that the Fourteenth Amendment secured against state infringement the same right that the Fifth Amendment guaranteed against federal intrusion—the right of an individual to remain silent until he decides to speak in the unbridled exercise of his own free will, and to endure no penalty for such silence. *Id.* at 8.

74 *Id.* at 7. The Court elaborated on the state/federal court distinction, noting that "[i]t would be incongruous to have different standards determine the validity of a claim of privilege based upon the same feared prosecution, depending on whether the claim was asserted in a state or federal court." *Id.* at 11. Accordingly, the Court concluded that the same standard must govern whether an accused's silence is justified in both federal and state court proceedings. *Id.*

75 *Id.* at 7. The Court commented that the shift from due process examination to Fifth Amendment analysis reflected the acknowledgment that the American criminal justice system was accusatorial, not inquisitorial. *Id.*

76 *Id.* at 6.

77 Crossley, *supra* note 66, at 1705-06 (noting that the Court's dissatisfaction with due process analysis led to its decisions in *Massiah* and *Escobedo*).

78 377 U.S. 201 (1964).

79 *Id.* at 204-06. Interestingly, *Massiah* did not involve custodial interrogation. *Id.* at 203. In *Massiah*, defendant Massiah was indicted on federal narcotics charges. *Id.* at 202. Massiah retained counsel, entered a not guilty plea, and was released on bail.

extended *Massiah*'s Sixth Amendment protection to a pre-indictment confession by declaring that a suspect's right to counsel attached as soon as police investigation shifts from the investigatory to the accusatory stage.[81]

While *Massiah* and *Escobedo* foreshadowed the demise of due

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Id. Massiah's co-defendant Colson, who unbeknownst to Massiah was working with the police and had a radio transmitter hidden in his car, induced Massiah to discuss the upcoming case and make damaging admissions. *Id.* at 202-03. Authorities monitoring the transmitter overheard Massiah and testified to these admissions at trial over Massiah's objections. *Id.* at 203. The jury convicted Massiah on the narcotics charges, and the court of appeals affirmed. *Id.* Massiah appealed on the grounds that his statements were obtained in violation of the Fourth, Fifth, and Sixth Amendments. *Id.* at 203-04. The Supreme Court reversed the convictions, holding that the use of Massiah's incriminating statements at trial violated his Sixth Amendment right to counsel. *Id.* at 207.

80 378 U.S. 478 (1964).

81 *Id.* at 492. *See* Crossley, *supra* note 66, at 1706 (noting that *Escobedo* was an extension of *Massiah*); Markman, *supra* note 50, at 207 (noting that *Escobedo* was an expansion of *Massiah*'s holding because Escobedo's interrogation preceded his indictment, whereas *Massiah*'s holding specifically applied to post-indictment statements).

In *Escobedo*, police arrested Escobedo and brought him in for questioning concerning the murder of his brother-in-law. *Escobedo*, 378 U.S. at 479. Escobedo asked to speak with his lawyer, and Escobedo's lawyer asked to speak with his client, but police refused both requests. *Id.* at 479-82. Shortly thereafter, police questioned Escobedo, who in response made damaging statements concerning his knowledge of the crime. *Id.* at 482-83. At no time prior to the questioning did police advise Escobedo of his rights. *Id.* at 483. Escobedo moved to suppress his statements, but the trial court denied the motion and convicted Escobedo of murder. *Id.* On appeal, the Supreme Court of Illinois held Escobedo's statements inadmissible and reversed his conviction. *Id.* The State obtained a rehearing, and the Illinois Supreme Court affirmed Escobedo's conviction. *Id.* The United States Supreme Court, citing *Massiah* and *Bram*, concluded that the fact that Escobedo was interrogated prior to being indicted was inapposite and reversed Escobedo's conviction. *Id.* at 484-86, 492. The Court stated that Escobedo's statement occurred at a "'stage when legal aid and advice'" were critical, and held that:

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

Id. at 486, 490-91. The Court clarified that its holding was intended to have no effect on the power of police to investigate "'an unsolved crime,'" but rather determined that "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." *Id.* at 492.

process analysis in the confessions context, the Supreme Court did not completely supplant this approach until two years later in the landmark case of *Miranda v. Arizona*.[82] In *Miranda*, the Court shifted its focus from the Sixth Amendment to the Fifth Amendment and adopted a *per se* rule to regulate the admissibility of confessions.[83] Chief Justice Warren, writing for a sharply divided Court,[84] began by proclaiming a need for specific procedural safeguards to combat the coercive atmosphere of custodial interrogation[85] as well as to ensure protection of the suspect's privilege

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82 384 U.S. 436, 478-79 (1966).

83 *Id.* at 444-45, 467-75. *See* Crossley, *supra* note 66, at 1706 (noting that *Miranda* adopted a *per se* rule respecting the admissibility of confessions). *Miranda* was actually a consolidation of one federal and three state court cases involving similar factual situations. *Miranda*, 384 U.S. at 456-57, 491-99. All four cases involved incommunicado interrogation of suspects in a police-dominated atmosphere, resulting in self-incriminating statements made without sufficient warnings of constitutional rights. *Id.* at 445, 456-57, 491-99.

Miranda itself involved the arrest and interrogation of rape suspect Ernesto Miranda. *Id.* at 491-92. Phoenix police apprehended Miranda at his home and transported him to the stationhouse. *Id.* at 491. At the police station, Miranda was sequestered in an interrogation room and questioned for two hours. *Id.* Eventually, Miranda admitted to committing the rape and kidnapping. *Id.* at 492. Though the officers had not advised Miranda of his right to have an attorney present during the interrogation, Miranda gave the officers a written confession which contained a typewritten paragraph stating that the confession had been made "'with full knowledge of [his] legal rights . . . .'" *Id.* at 491-92. Miranda's confession was admitted at trial, and Miranda was convicted of kidnapping and rape. *Id.* at 492. On appeal, the Arizona Supreme Court affirmed. *Id.* The Arizona court, in concluding that Miranda's rights had not been violated, relied heavily on the fact that Miranda had not requested an attorney. *Id.* The United States Supreme Court reversed, noting that Miranda was not advised of his right to counsel and that the statement contained in the written confession did not amount to a valid waiver of his rights. *Id.*

Following the Court's reversal of his conviction, Miranda was retried on the rape charges by the State of Arizona. *Uniman*, *supra* note 50, at 693 n.66 (citing Evan Thomas, *Court at the Crossroads*, TIME MAG., Oct. 8, 1984, at 33). Miranda was convicted and sentenced to 30 years in prison, but was paroled in 1972. *Id.* Four years after his release, Miranda was stabbed to death over a card game in a Phoenix bar. *Id.*

84 *Miranda* was decided by a five-to-four majority, with Justices Black, Brennan, Douglas, and Fortas joining Chief Justice Warren's opinion, and Justices Clark, Harlan, Stewart, and White dissenting. *Miranda*, 384 U.S. at 439, 499, 504.

85 *Miranda* defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. In determining whether the suspect is "in custody," the question is how a reasonable person in the suspect's position would have perceived his situation. 23 C.J.S. *Criminal Law* § 899(a) (1993) (citing Berkemer v. McCarty, 468 U.S. 420, 442 (1984)). Courts look to whether a reasonable person in the suspect's situation would have considered himself formally arrested or otherwise not free to leave. *Id.*

"Interrogation" is defined as "express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Interrogation includes any police actions or utterances that the maker should know are likely to evoke an incriminating

against self-incrimination.[86] To address this need, the *Miranda* majority declared that, prior to conducting any custodial interrogation, police must administer express warnings to a suspect informing him of certain constitutional rights.[87] Specifically, the Court proclaimed that police must inform a suspect that he has the right to remain silent, that anything he says may be used against him in court, and that he has the right to an attorney, either retained or appointed.[88] Failure to give these warnings, the Court concluded, would render inadmissible any subsequent statement obtained from the suspect.[89]

Although *Miranda* established a new benchmark for protecting the rights of the accused, the majority nevertheless permitted a suspect to forgo the benefits of these constitutional protections by waiving them.[90] In order for a suspect's wavier to be valid, however, the Court insisted that the waiver be made voluntarily, knowingly, and intelligently.[91] Chief Justice Warren, in an attempt to clarify the parameters of a valid waiver, noted that the Court has always set strict standards for the waiver of a constitutional right.[92]

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response from the accused. *Id.* at 301. The United States Supreme Court has declared that "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect . . . amounts to interrogation." *Id.*

86 *Miranda*, 384 U.S. at 467.

87 *Id.* at 468-73.

88 *Id.* at 479. The Court noted, however, that the express warnings in the precise formulation articulated by the Court were not mandated by the United States Constitution. *Id.* at 467 (stating "we cannot say that the Constitution necessarily requires adherence to any particular solution . . . ."). In other words, "the Miranda warnings" themselves were not required by the Constitution. *See id.* Rather, these warnings were merely prophylactic rules designed to ensure that the suspect's privilege against self-incrimination, which *was* Constitutionally mandated, was safeguarded. *Id. See generally*, Michigan v. Tucker, 417 U.S. 433, 444 (1974) (commenting that "[t]he Court recognized that [the Miranda warnings] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.").

89 *Miranda*, 384 U.S. at 479.

90 *Id.* at 444, 479.

91 *Id.* With regard to waiver, *Miranda* forewarned that if, after a suspect has been advised of his rights, interrogation continues in the absence of counsel and a statement is obtained, a "heavy burden" rests on the prosecution to prove that the suspect knowingly and intelligently waived his rights to counsel and against self-incrimination. *Id.* at 475 (citation omitted). Further clarifying waiver, the Court explained that an explicit assertion that a suspect is willing to speak with police, followed immediately by a statement, could comprise a valid waiver; however, the Court cautioned that a waiver could not be inferred from silence or the simple fact that a confession was eventually obtained. *Id.* The Court additionally noted that when custodial interrogation is involved, it is impermissible to conclude that the privilege was waived simply because the suspect answered some questions or gave some information prior to invoking the right to remain silent. *Id.* at 475-76.

92 *Id.* at 475 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The *Miranda*

The Court forewarned that a heavy burden would be placed on the state's shoulders to prove the validity of the waiver if the state sought to use a suspect's statements at trial.[93]

Following *Miranda*, a surfeit of litigation arose concerning the requirements for a valid waiver of the privilege against self-incrimination.[94] To clarify this confusion, the Supreme Court endorsed the "totality of the circumstances" approach for determining the validity of a waiver in *North Carolina v. Butler*.[95] In *Butler*, a suspect who agreed to speak with police sought to have resultant inculpatory statements[96] excluded on the ground that his refusal to sign a

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Court specifically "re-assert[ed]" the *Johnson v. Zerbst* standards as applied to custodial interrogation. *Id.* In *Zerbst*, two defendants were indicted for passing counterfeit notes. *Zerbst*, 304 U.S. at 460. Unable to obtain counsel, the defendants were forced to represent themselves at trial. *Id.* Both defendants were convicted, and thereafter failed to file a timely appeal. *Id.* at 460, 462. The district court denied the defendants' habeas corpus appeal, and the court of appeals affirmed. *Id.* at 459. The Supreme Court granted certiorari, overturned the convictions on the grounds that the defendants may have been denied their Sixth Amendment right to counsel, and remanded the matter on the issue of the defendants' waiver of counsel. *Id.* at 459, 469.

Discussing waiver, the *Zerbst* Court noted that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" *Id.* at 464 (citations omitted). Further, the Court stated that "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* It is worth noting that *Zerbst* involved the Sixth Amendment, which implies that the Court intended a waiver of *Miranda*'s Fifth Amendment rights to be governed by Sixth Amendment standards. NISSMAN, *supra* note 52, at § 6:2.

93 *Miranda*, 384 U.S. at 475. The Court explained that because the State must establish the isolated conditions under which the custodial interrogation takes place, and the State possesses the only means of supplying corroborated evidence of the warnings given during the incommunicado interrogation, "the burden is rightly on its shoulders." *Id.*

94 Althea Kuller, Casenote, Moran v. Burbine: *Supreme Court Tolerates Police Interference With the Attorney-Client Relationship*, 18 LOY. U. CHI. L.J. 251, 261 (1986) (discussing cases following *Miranda* in which the Court further defined the standards required for a valid waiver); *see, e.g.*, Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (creating a conclusive presumption against the validity of a waiver obtained when police initiate further questioning after a suspect has requested an attorney); Fare v. Michael C., 442 U.S. 707, 725 (1979) (declaring that the "totality-of-the-circumstances approach is adequate to determine whether there has been a [valid] waiver . . . ."); North Carolina v. Butler, 441 U.S. 369, 373 (1979) (holding that a waiver need not be explicit; a waiver can be inferred from the suspect's words and actions); Michigan v. Mosley, 423 U.S. 96, 104 (1975) (holding that once a suspect has exercised the right to remain silent, the admissibility of any statements obtained thereafter depends upon whether the police "scrupulously honor[ ]" the suspect's decision).

95 441 U.S. 369, 373 (1979).

96 See *supra* note 2 for a definition of "inculpatory statement."

waiver of rights form had invalidated his waiver.[97] The Court declared that an express waiver was not required because waiver could be inferred from the suspect's words and actions.[98] In accordance with this approach, the Court determined that the suspect's waiver was valid and his statements were admissible at trial.[99]

The totality of the circumstances approach endorsed in *Butler* required courts to review the facts of each case to determine whether the suspect's waiver was truly voluntary.[100] The Supreme Court has indicated that under this standard, a seemingly voluntary waiver may be deemed invalid if elicited in an atmosphere of coercion or obtained as a result of police deceit or trickery.[101] In 1986, the Supreme Court's allegiance to this principle was tested in *Moran v. Burbine*.[102]

The *Moran* Court considered the effect of two questionable

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97 *Butler*, 441 U.S. at 371. See *supra* note 24 for a discussion of *Miranda* waiver forms. In *Butler*, law enforcement officials arrested suspect Willie Butler for felonious assault, kidnapping, and armed robbery. *Id.* at 370. Prior to interrogating Butler, FBI agents provided him with the Bureau's "Advice of Rights" form. *Id.* Butler read the form, and although he told the agents that he understood his rights, he refused to sign the waiver. *Id.* at 371. The agents advised Butler that he was not required to speak to them or sign the form, but that they did wish to speak with him. *Id.* Butler replied, "'I will talk to you but I am not signing any form.'" *Id.* After making this assertion, Butler made inculpatory statements to the agents. *Id.*

At trial, Butler moved to suppress his statements on the grounds that he had not made a valid waiver of his right to counsel. *Id.* The trial court denied the motion, and Butler was convicted of the three charges. *Id.* at 371-72. On appeal, the Supreme Court of North Carolina held Butler's waiver invalid and reversed his convictions. *Id.* at 372. The North Carolina Supreme Court interpreted *Miranda* as requiring an express waiver of the right to counsel, and such a waiver was absent in Butler's case. *Id.* The United States Supreme Court reversed, concluding that an express statement of waiver was not an absolute prerequisite to the finding of a valid waiver of the right to counsel. *Id.* at 373. The Court stated that "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Id.*

98 *Id.* at 373.

99 *Id.* at 373, 376.

100 *Id.* at 374-75. Specifically, the Court stated that "[e]ven when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). See *supra* note 92 for a discussion of the standard for waiver under *Zerbst*.

101 *Miranda v. Arizona*, 384 U.S. 436, 476 (1966). The *Miranda* Court cautioned that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.* *See also* LAFAVE & ISRAEL, *supra* note 9, at 339 (noting that the *Miranda* Court suggested that even absent threats or promises by the police, a waiver obtained under coercive circumstances would not be upheld). *But see, id.* (noting that despite *Miranda*'s intimation that the use of trickery or coercion would result in the *per se* invalidation of a defendant's waiver, lower courts have not adhered to this directive).

102 475 U.S. 412 (1986).

police actions on a suspect's waiver of the privilege against self-incrimination.[103] In *Moran*, police failed to inform a custodial suspect that an attorney had attempted to contact him, and misinformed the suspect's attorney that the suspect would not be questioned.[104] The suspect, Brian Burbine, sought to suppress his confession on the grounds that the police's conduct had violated his rights under the Fifth, Sixth, and Fourteenth Amendments.[105] Justice O'Connor, writing for the Court, rejected each of Burbine's

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103 *Id.* at 415-16.

104 *Id.* at 417. In *Moran*, Cranston, Rhode Island Police arrested Brian Burbine for burglary. *Id.* at 416. While Burbine was in custody, police learned that he may have been involved in the unsolved murder of a young woman that occurred in Providence, Rhode Island earlier that year. *Id.* Cranston Police contacted Providence Police, who in response traveled to Cranston to question Burbine about the murder. *Id.* While Burbine was in custody, his sister, who was unaware of the murder charge, contacted the Public Defender's Officer to obtain an attorney for Burbine for the burglary charge. *Id.* An attorney from the Public Defender's Office contacted the Cranston Police and informed them that she would be available if the police wanted to question Burbine that evening. *Id.* at 417. The police informed the attorney that Burbine would not be questioned until the next day, but they did not inform her that the Providence Police were present or that Burbine was a murder suspect. *Id.* Less than one hour after the Public Defender's call to the police station, Providence Police advised Burbine of his Miranda rights and began their interrogation. *Id.* Burbine waived his rights three times, each time executing a Miranda waiver form, and then confessed to the murder. *Id.* at 417-18. At no time during that evening was Burbine informed of the attorney's phone call, nor did he ever request to speak with an attorney. *Id.*

Burbine moved to suppress his confession prior to trial, but the trial court denied the motion, concluding that Burbine had validly waived his right to counsel and privilege against self-incrimination. *Id.* at 418. At trial, Burbine was convicted of first degree murder. *Id.* The Supreme Court of Rhode Island affirmed the conviction, rejecting Burbine's contention that his Fifth and Fourteenth Amendments had been violated. *Id.* Burbine next applied for a writ of habeas corpus to the Federal District Court for the District of Rhode Island, but the district court denied his motion. *Id.* at 419. The First Circuit Court of Appeals reversed, concluding that Burbine's waiver had been tainted by the failure of the police to inform him of the attorney's phone call. *Id.* On appeal, the United States Supreme Court reversed the court of appeals, finding no violation of Burbine's Fifth, Sixth, or Fourteenth Amendment rights. *Id.* at 420-34. For further discussion of *Moran*, see Gary Hirsch, *Criminal Procedure II: The Privilege Against Self-Incrimination*, 1987 ANN. SURV. AM. L. 251 (1988) (proclaiming that *Burbine* is not likely to induce the total demise of *Miranda*); Jordan, *supra* note 68, at 690 (professing that *Moran* thwarts *Miranda*'s spirit).

105 *Moran*, 475 U.S. at 421, 428, 432. Specifically, Burbine claimed that the police violated his Fifth Amendment rights by failing to inform him of his attorney's phone call, or, in the alternative, that the Court should condemn such conduct by the police in order to fully protect *Miranda*'s Fifth Amendment values. *Id.* at 421. Burbine next claimed that the conduct of the police had violated his Sixth Amendment right to counsel. *Id.* at 428. Finally, Burbine argued that the actions of the police were so repugnant that they violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 432. Justice O'Connor rejected each of these arguments and upheld Burbine's conviction. *Id.* at 428, 432-34.

contentions and upheld his waiver and conviction.[106]

The Court, in response to Burbine's claim that the conduct of the police had rendered his waiver invalid under the Fifth Amendment, held that events occurring outside of the suspect's presence could not affect the suspect's ability to intelligently waive his rights.[107] Moreover, the Court determined that because the purpose of the warnings required by *Miranda* was to protect the *suspect's* rights, any deceit directed towards the suspect's attorney was irrelevant when considering the validity of the suspect's waiver.[108] Thus, the *Moran* Court concluded that under the federal constitution, police have no duty to inform a suspect of an attorney's attempt to confer with that suspect.[109] The Court noted, however, that states were free to adopt different requirements as a matter of state law.[110]

Six years later, the New Jersey Supreme Court accepted *Mo-*

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106 *Id.*

107 *Id.* at 422. Justice O'Connor criticized the appellate court's reasoning by stressing that "[u]nder the analysis of the Court of Appeals, the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his *Miranda* rights had a lawyer not telephoned the police station to inquire about his status." *Id.* Justice O'Connor observed that "[n]othing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result." *Id.* The Court acknowledged that the additional information would have been valuable to Burbine, and that it may even have altered his decision to confess, but the Court refused to require the police to supply a suspect with a steady stream of information to help that suspect calibrate his self-interest when deciding whether or not to confess. *Id.*

108 *Id.* at 423-24. *See also* Clark, *supra* note 67, at 406 (stating that the *Moran* Court "recognized that *Miranda* warnings are designed to protect the *suspect's* fifth and sixth amendment rights and that any misinformation conveyed to an attorney is, therefore, irrelevant to a fifth amendment analysis."). Additionally, the Supreme Court rejected Moran's Sixth Amendment argument because Burbine's confession occurred before adversarial judicial proceedings had been initiated, a prerequisite for application of the Sixth Amendment. *Moran*, 475 U.S. at 428-32. The Court also rejected Burbine's Fourteenth Amendment claim on the grounds that the conduct of the police fell short of the type of misconduct that "so shocks the sensibilities of civilized society" as to warrant federal intrusion into the operation of state criminal processes. *Id.* at 432-34.

109 *Moran*, 475 U.S. at 425. The *Moran* Court acknowledged that such a rule may further *Miranda*'s purpose of dispelling the inherent coercion of custodial interrogation. *Id.* Justice O'Connor, however, concluded that overriding practical considerations cautioned against the adoption of such a rule. *Id.* Moreover, the Court remarked that adopting such a rule "would have the inevitable consequence of muddying *Miranda*'s otherwise relatively clear waters." *Id.*

110 *Id.* at 428. The Court explained that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." *Id.* The Court's holding was merely that the court of appeals erred in interpreting the Fifth Amendment to mandate the exclusion of Burbine's three confessions. *Id.*

ran's invitation in *State v. Reed*.[111] Specifically, the *Reed* court addressed the issue of whether a suspect's ostensibly voluntary waiver of the privilege against self-incrimination was rendered invalid by the police's failure to inform the suspect of an attorney's attempt to contact him.[112] Justice Handler, writing for the majority, began by noting that a conflict existed between the United States Supreme Court and the majority of the state courts that had considered this issue.[113] The justice explained that while the United States Supreme Court permitted a statement obtained as a result of police interference with attorney/suspect communication to be admitted at trial,[114] the state courts were practically unanimous in excluding a confession obtained under analogous circumstances.[115]

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111 133 N.J. 237, 627 A.2d 630 (1993).

112 *Id.* at 246-47, 627 A.2d at 635.

113 *Id.* at 248-49, 627 A.2d at 636.

114 *See Moran*, 475 U.S. at 428, 432-34 (1986). For a discussion of *Moran*, see *supra* notes 102-110 and accompanying text.

115 *Reed*, 133 N.J. at 248, 627 A.2d at 636. The court noted that "*Moran* signalled a marked departure from the fifth amendment jurisprudence that state and federal courts had established prior to *Moran*." *Id.* The *Reed* court observed that the vast majority of state courts that considered this issue prior to *Moran* held the suspects' waivers invalid. *Id. See, e.g.*, People v. Harris, 703 P.2d 667, 672-73 (Colo. Ct. App. 1985) (holding that a defendant could not knowingly and intelligently waive his right to counsel when police failed to inform him that an attorney sought to consult with him); Weber v. State, 457 A.2d 674, 686 (Del. 1983) (holding that police conduct in failing to inform a suspect of his attorney's presence vitiated the suspect's waiver of the right to counsel); Haliburton v. State, 476 So. 2d 192, 194 (Fla. 1985) (reversing a defendant's conviction on the grounds that the defendant's otherwise valid waiver was negated by the police's failure to inform him that an attorney hired by his sister was present and sought to render assistance), *cert. granted and judgment vacated*, 475 U.S. 1078 (1986), *aff'd on remand*, 514 So. 2d 1088 (Fla. 1987), *cert. denied*, 111 S. Ct. 2910 (1991); People v. Smith, 442 N.E.2d 1325, 1329 (Ill. 1982) (holding that a suspect could not knowingly waive his Fifth Amendment right to counsel when police failed to inform him that an attorney had been retained and wished to consult with him), *cert. denied*, 461 U.S. 937 (1983); State v. Matthews, 408 So. 2d 1274, 1277-78 (La. 1982) (holding that police violated the defendant's state constitutional and statutory right to remain silent and right to counsel by failing to inform the defendant of his attorney's attempts to contact him); Commonwealth v. Sherman, 450 N.E.2d 566, 570 (Mass. 1983) (holding that a defendant's waiver of the right to counsel was vitiated by the failure of police to inform the defendant that counsel appointed to represent him on an unrelated charge sought to render assistance on the present charge); Commonwealth v. McKenna, 244 N.E.2d 560, 566-67 (Mass. 1969) (holding that police's failure to advise a suspect of counsel's presence precluded admission of any statements made by the suspect after counsel's arrival at the stationhouse); People v. Arthur, 239 N.E.2d 537, 539 (N.Y. 1968) (holding that once police are informed that a defendant is represented by counsel, the right to counsel attaches and the defendant cannot waive that right in the absence of counsel); State v. Stephens, 266 S.E.2d 588, 592-93 (N.C. 1980) (holding invalid the defendant's waiver of the right to counsel and the right against self-incrimination because police deceived the defendant and his attorney by failing to inform them that interrogation had commenced); State v. Luck, 472 N.E.2d 1097, 1102-04 (Ohio 1984) (holding that police violated a defend-

Justice Handler observed that *Reed* compelled the New Jersey Supreme Court to examine New Jersey law to decide whether to permit such a confession to be used at trial as well as to establish guidelines for state law enforcement officials to follow while conducting custodial interrogations.[116]

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ant's Sixth Amendment rights by failing to inform her that an attorney had been retained and wished to speak with her), *cert. denied*, 470 U.S. 1084 (1985); Lewis v. State, 695 P.2d 528, 529 (Okla. Crim. App. 1985) (excluding a confession on the ground that the defendant's waiver was not knowingly and voluntarily made when police failed to inform the defendant of his attorney's presence at the police station); State v. Haynes, 602 P.2d 272, 277 (Or. 1979) (holding that a suspect could not knowingly waive his right to counsel when police failed to inform him that an attorney had been retained on his behalf and sought to consult with him), *cert. denied*, 446 U.S. 945 (1980); Commonwealth v. Hilliard, 370 A.2d 322, 323-24 (Pa. 1977) (holding that a defendant's failure to request counsel could not constitute a valid waiver when police refused to inform the defendant that an attorney sought to render assistance); State v. Hickman, 338 S.E.2d 188, 194-95 (W. Va. 1985) (holding that police had a duty to inform a suspect that an attorney had been retained on his behalf).

The New Jersey Supreme Court further noted that several courts have had the opportunity to reconsider this issue following the Supreme Court's decision in *Moran*. *Reed*, 133 N.J. at 249, 627 A.2d at 636. The court observed that some of these courts expressly rejected *Moran* as violative of their respective state constitutions. *Id.*; *see, e.g.*, People v. Houston, 724 P.2d 1166, 1174-77 (Cal. 1986) (holding that police must inform a suspect of an attorney's attempts to contact him), *superseded by statute as stated in* People v. Johnson, 842 P.2d 1, 20-21 (1992) (citing CAL. CONST. ART. I, § 28), *cert. denied*, 114 S. Ct. 114 (1993); State v. Stoddard, 537 A.2d 446, 452 (Conn. 1988) (holding that police have a duty to inform a suspect of an attorney's efforts to contact him); Bryan v. State, 571 A.2d 170, 176 (Del. 1990) (expressly reaffirming *Weber*); Haliburton v. State, 514 So. 2d at 1090 (holding that the police's failure to inform the suspect of the attorney's request violated the due process clause of the Florida state constitution); State v. Isom, 761 P.2d 524, 527 (Or. 1988) (impliedly reaffirming *Haynes*); Roeder v. State, 768 S.W.2d 745, 754-55 (Tex. Ct. App. 1988) (holding that a suspect could not knowingly and intelligently waive his Fifth Amendment rights when police failed to inform him that an attorney had been retained on his behalf and sought to render advice).

The court, however, omitted decisions that deviate from the majority rule and harmonize with *Moran*. *See, e.g.*, Callahan v. State, 557 So. 2d 1292, 1303 (Ala. Crim. App. 1989) (holding that police did not violate a suspect's rights by failing to inform him of the presence of an attorney who was contacted by the suspect's father), *aff'd*, *Ex parte* Callahan, 557 So. 2d 1311 (Ala. 1989), *cert. denied*, 498 U.S. 881 (1990); Blanks v. State, 330 S.E.2d 575, 579 (Ga. 1985) (concluding that a suspect's Fifth Amendment rights were not violated when police refused to inform the suspect that an attorney retained by the suspect's father was present and wished to confer with the suspect), *cert. denied*, 475 U.S. 1090 (1986); Lodowski v. State, 513 A.2d 299, 304-08 (Md. 1986) (admitting into evidence a defendant's statement on remand, based on *Moran*, after previously excluding the same statement in Lodowski v. Maryland, 490 A.2d 1228 (Md. 1985)), *vacated*, Maryland v. Lodowski, 475 U.S. 1078 (1986), *cert. denied*, Lodowski v. Maryland, 475 U.S. 1086 (1986)); State v. Beck, 687 S.W.2d 155, 156-59 (Mo. 1985) (holding a defendant's waiver of the right to counsel valid despite police's failure to inform the defendant that an attorney had been retained and sought to consult with him), *cert. denied*, 476 U.S. 1140 (1986).

116 *Reed*, 133 N.J. at 249-50, 627 A.2d at 636-37.

Justice Handler first discussed New Jersey's state law privilege against self-incrimination.[117] The justice explained that New Jersey's privilege against self-incrimination may be thought of as a core right that is both defined and protected by ancillary rights, such as the right to have an attorney present during interrogation.[118] To fully preserve the underlying core right, Justice Han-

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117 *Id.* at 250-53, 627 A.2d at 637-38. As the colonies acquired statehood in the late 1700s, many states expressly included the right against self-incrimination in their bills of rights. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 409-10 (1986). States that included such a provision were Delaware (1776), Maryland (1776), North Carolina (1776), Pennsylvania (1776), Virginia (1776), Vermont (1777), Massachusetts (1780) and New Hampshire (1784). *Id.* New Jersey, however, was one of four states that did not secure the right against self-incrimination in its state constitution. *Id.* at 410. Thus, the New Jersey State Constitution contains no express provision conferring a right against self-incrimination. *Reed*, 133 N.J. at 250, 627 A.2d at 637. Nevertheless, New Jersey has always recognized the existence of the right against self-incrimination and vigorously protected that right on both a common-law and a statutory basis. *Id.* (citing State v. Fary, 19 N.J. 431, 435, 117 A.2d 499, 501 (1955) (stating that "[a]lthough not written into our State Constitution . . . the privilege has been firmly established in New Jersey since our beginnings as a State[.]") and State v. Zdanowicz, 69 N.J.L. 619, 622, 55 A. 743, 744 (1903) (declaring "[a]lthough we have not deemed it necessary to insert in our constitution [the right against self-incrimination], the common law doctrine . . . is by us deemed to have its full force. In New Jersey, no person can be compelled to be a witness against himself.")); *see also*, In re Martin, 90 N.J. 295, 331, 447 A.2d 1290, 1309 (1982) (stating that the privilege against self-incrimination "is firmly established as part of the common law of New Jersey and has been incorporated into our Rules of Evidence.").

The common law privilege against self-incrimination was codified for the first time in New Jersey in the Evidence Act of 1855. *Reed*, 133 N.J. at 250, 627 A.2d at 637 (citing L. 1855, c. 236, § 4). Later, this right was incorporated into the New Jersey Rules of Evidence. *Id.*; *see* N.J. STAT. ANN. §§ 2A:84A-17 to -19 (1976) (Evid. R. 23, 24, and 25) (bestowing the privilege against self-incrimination, setting out its boundaries, and enumerating its exceptions). Thus, there is no question that the right against self-incrimination exists in New Jersey despite the lack of an express constitutional provision guaranteeing this right. *Reed*, 133 N.J. at 250, 627 A.2d at 637.

For further exegesis of New Jersey's state law privilege against self-incrimination, see State v. Adams, 127 N.J. 438, 447-48, 605 A.2d 1097, 1101 (1992) (stating that the validity of a suspect's waiver of the right against self-incrimination is judged by the totality of the circumstances); State v. Bey, 112 N.J. 123, 134, 548 A.2d 887, 892 (1988) (holding that the prosecution must prove the validity of a waiver beyond a reasonable doubt); State v. Hartley, 103 N.J. 252, 267-68, 511 A.2d 80, 88 (1986) (establishing a "'bright line'" requirement of renewed *Miranda* warnings once a suspect invokes his right to remain silent); State v. Kennedy, 97 N.J. 278, 288, 478 A.2d 723, 728 (1984) (holding that, to fully protect the privilege against self-incrimination, law enforcement officials must "diligently honor a defendant's request—however ambiguous—to terminate interrogation or to have counsel present during interrogation.").

118 *Reed*, 133 N.J. at 251, 627 A.2d at 637. In discussing the privilege against self-incrimination, the court referred to "core" and "ancillary" rights. *Id.* In this context, "core right" refers to the right against compulsory self-incrimination; whereas "ancillary rights" refers to the prophylactic rules that courts have promulgated to ensure complete protection of the right against self-incrimination. *See Hartley*, 103 N.J. at 271-72, 511 A.2d at 90; *see also*, *supra* note 88 (discussing *Miranda*'s demarcation of the

dler stated that the court has "actively embraced" opportunities to intensify the ancillary rights, often bestowing upon these ancillary rights even greater protection than is mandated by federal law.[119] The justice explained that by intensifying ancillary rights such as the right to counsel during questioning, the court dispels the inherently coercive atmosphere of custodial interrogation.[120] Decreasing this coercion, the court opined, increases the likelihood that only truly voluntary confessions are obtained, which in turn protects the suspect's right against compelled self-incrimination.[121]

The *Reed* court next examined the rule adopted by the vast majority of state courts that have considered this issue.[122] Justice Handler reiterated that the state courts are practically unanimous in imposing a duty upon police to inform the suspect of the attorney's presence.[123] The justice observed that these courts generally offer one of two rationales for excluding the confession when po-

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constitutionally guaranteed privilege against self-incrimination and the prophylactic rules designed to protect that privilege). Specifically, in *Reed*, Justice Handler explained that "[t]he privilege may be conceived as a 'cluster of rights' that collectively give substance to the right of a person not to incriminate himself or herself under custodial police interrogations." *Reed*, 133 N.J. at 251, 627 A.2d at 637.

119 *Reed*, 133 N.J. at 251-52, 627 A.2d at 638. The court has concluded that certain ancillary rights are vital to the preservation of the privilege against self-incrimination. *Id.* at 251, 627 A.2d at 637. Thus, the court will often endow these ancillary rights with even greater protection under New Jersey law than that conferred upon their federal counterparts. *Id.*, 627 A.2d at 638. *Compare Bey*, 112 N.J. at 134, 548 A.2d at 892 (1988) (holding that the state must prove the validity of a waiver beyond a reasonable doubt) *with* Colorado v. Connelly, 479 U.S. 157, 168 (1986) (holding that the state must prove the validity of a waiver by a preponderance of the evidence); *Hartley*, 103 N.J. at 256, 511 A.2d at 82 (imposing a bright-line rule holding that once a suspect invokes his right to remain silent, police may not resume questioning without administering fresh Miranda warnings) *with* Michigan v. Mosley, 423 U.S. 96, 104 (1975) (holding that the admissibility of confessions obtained after the suspect has exercised his right to remain silent depends upon whether the suspect's "'right to cut off questioning' was 'scrupulously honored[ ]'"); State v. Deatore, 70 N.J. 100, 115, 358 A.2d 163, 172 (1976) (concluding that a defendant is under no duty to immediately offer to police the exculpatory story which he later gives at trial, and that a defendant may not be penalized if he does not do so) *with* Fletcher v. Weir, 455 U.S. 603, 607 (1982) (permitting the use of a defendant's post-arrest silence to impeach his trial testimony in the absence of Miranda warnings).

120 *Reed*, 133 N.J. at 258-59 n.3, 627 A.2d at 641 n.3. The court noted that although strict application of the objective standards established by *Miranda*'s ancillary rights will sometimes prove overinclusive, these standards constitute a vital counterweight to the intrinsically coercive nature of custodial interrogation. *Id.* at 258, 627 A.2d at 641.

121 *Id.* at 255-57, 627 A.2d at 639-40.

122 *Id.* at 253-55, 627 A.2d at 639.

123 *Id.* at 253-54, 627 A.2d at 639. For a discussion of jurisdictions that have considered this issue and concluded that police must inform a suspect of an attorney's presence in order for the suspect's waiver to be valid, see *supra* note 115.

lice breach this duty.[124] Some courts, Justice Handler explained, focus on the suspect's subjective waiver and hold that such a waiver cannot be knowing, intelligent, and voluntary unless the suspect is informed of the attorney's request to render assistance.[125] Other courts, the justice reported, focus on the objective unreasonableness of the actions of the police and impose the duty to inform in an effort to discourage excessive police conduct.[126]

Although the state courts offered differing rationales for excluding the confessions, the *Reed* majority discovered that these courts were unified in a belief that preserving the privilege against self-incrimination required counteracting the coercive atmosphere of custodial interrogation.[127] Because the two rationales were integrated under this supervening principle, Justice Handler concluded that choosing one of the two views was unnecessary.[128] In addition, Justice Handler professed that the *Reed* majority was not troubled by its inability to confidently conclude that a suspect's awareness of an attorney's presence would enhance the suspect's knowledge of his right to counsel.[129] Such a conclusion was super-

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124 *Id.* at 254, 627 A.2d at 639.

125 *Id. See, e.g.*, People v. Harris, 703 P.2d 667, 672-73 (Colo. Ct. App. 1985) (holding that a suspect's waiver of the right to counsel cannot be knowing and intelligent when police fail to inform him of an attorney's efforts to confer with him); State v. Isom, 761 P.2d 524, 527 (Or. 1988) (concluding that unless the suspect was informed that an attorney was present and willing to offer assistance, the suspect could not knowingly and intelligently waive his right to counsel during custodial interrogation).

126 *Reed*, 133 N.J. at 254-55, 627 A.2d at 639. *See, e.g.*, Bryan v. State, 571 A.2d 170, 176 (Del. 1990) (invalidating the suspect's waiver because "[t]o hold otherwise would be to condone 'affirmative police interference in a communication between an attorney and suspect[ ]'"); State v. Stoddard, 537 A.2d 446, 452 (Conn. 1988) (stating "[t]he police may not preclude the suspect from exercising the choice to which he is constitutionally entitled . . . .")

127 *Reed*, 133 N.J. at 255, 627 A.2d at 639-40.

128 *Id.*, 627 A.2d at 639. The court deemed it unnecessary to "engage in an extended debate over the different approaches to dealing with the standards governing the validity of a waiver in this context." *Id.* Such a debate was unnecessary, according to the court, because all of the courts agree that "the atmosphere of custodial interrogation is inherently coercive and protecting the right against self-incrimination entails counteracting that coercion." *Id.*, 627 A.2d at 640. Bolstering its conclusion that choosing one of the rationales was unnecessary, the court proceeded to weave both rationales into one overarching supposition, stating:

> [A]lthough "knowledge" is always a relevant factor in assessing the validity of a waiver of the right against self-incrimination, because the right is against *compelled* self-incrimination, "knowledge" can be best understood as a condition of "voluntariness," which itself denotes the absence of "compulsion." Consequently, standards ostensibly imposed to enhance a suspect's "knowledge" of the *Miranda* rights also counteract coercion and assure "voluntariness."

Id. at 255-56, 627 A.2d at 640.

129 *Id.* at 257, 627 A.2d at 640. The court averred that proof of enhancement of the

fluous, the justice explained, because the court was certain that awareness of the attorney's presence would counteract the inherent coercion of custodial interrogation which, in turn, would safeguard the suspect's privilege against self-incrimination.[130]

After articulating the basis for imposing upon police a duty to inform, the *Reed* majority announced the specifics of this new obligation.[131] First, the court declared that the existence of an attorney-client relationship did not depend upon an explicit request for counsel by the suspect.[132] The majority explained that such a relationship exists when an attorney has been retained on the suspect's behalf by the suspect's friends or family, or alternatively, when the attorney had represented or was representing the suspect in other litigation.[133] Following this pronouncement, the court proclaimed that when an attorney was accessible and requested to speak with the suspect, the police had a duty to relay that information to the suspect before any custodial interrogation could proceed.[134] To ensure that police would comply with this requirement, the court forewarned that failure to inform the suspect of the attorney's request would result in the *per se* invalidation of any subsequent waiver of the privilege against self-incrimination by the suspect.[135] Accordingly, the court declared that Reed's confession was invalidly obtained and therefore inadmissible against him in court.[136]

Justice Stein, in a separate concurring opinion, proffered a different basis for requiring police to inform suspects of an attorney's

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suspect's knowledge of his right to counsel was unnecessary because mere knowledge of the attorney's presence will "surely play an important role in 'dissipat[ing] the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's' right against self-incrimination." *Id.* (citing Moran v. Burbine, 475 U.S. 412, 425 (1986)).

130 *Id.* (citing *Moran*, 475 U.S. at 425).

131 *Id.* at 261-62, 627 A.2d at 643.

132 *Id.* at 261, 627 A.2d 643.

133 *Id.*

134 *Id.* at 261-62, 627 A.2d 643.

135 *Id.* at 262, 627 A.2d at 643. The court withheld judgment on whether the police's conduct violated due process. *Id.* at 268, 627 A.2d at 646. The court further explained that the duty imposed was based upon the New Jersey state law privilege against self-incrimination, and not on the right to counsel found in either the Sixth Amendment or the New Jersey State Constitution. *Id.* at 263, 627 A.2d at 643-44. Finally, the court stated that its intention in announcing this rule was to direct future judicial scrutiny away from the subjective level of coercion experienced by the suspect and toward objective police conduct. *Id.* at 267, 627 A.2d at 646.

136 *Id.* at 269-70, 627 A.2d at 647. The court affirmed the judgment of the appellate division reversing Reed's murder conviction, reversed the appellate division's affirmance of Reed's aggravated criminal sexual contact conviction, and remanded the matter to the trial court. *Id.* at 270, 627 A.2d at 647.

attempts to contact them.[137] Eschewing the majority's focus on objective police conduct, the justice refused to establish a bright-line rule holding waivers invalid *per se*.[138] Focusing instead upon the suspect's subjective waiver, Justice Stein espoused the totality of the circumstances approach to determining whether the suspect's waiver was made knowingly and intelligently despite his ignorance of the attorney's request.[139] Justice Stein opined that when police withhold the information that an attorney has been retained and seeks to confer with a suspect, they deprive that suspect of a full understanding of the right against self-incrimination and the consequences of abandoning it.[140] The justice concluded that under such circumstances, the suspect's subsequent waiver of the privilege could not be truly "knowing" or "intelligent."[141]

In dissent, Justice Clifford admonished the majority for focusing upon objective police conduct while minimizing the suspect's subjective waiver.[142] First, the justice rejected the majority's conclusion that a mentally competent individual's right to counsel could be invoked by a third party.[143] Although Justice Clifford agreed with the majority's appreciation of the importance of the right to counsel in protecting the privilege against self-incrimination, the justice stressed that the suspect himself must make some minimal indication of a desire to speak with an attorney before the

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137 *Id.* at 270, 627 A.2d at 647 (Stein, J., concurring).

138 *Id.* at 276, 627 A.2d at 650-51 (Stein, J., concurring).

139 *Id.* at 276-77, 627 A.2d at 651 (Stein, J., concurring). "Preferably," Justice Stein explained, "the Court should adhere to the settled principle that the waiver's validity 'depend[s], in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Id.* (citation omitted).

140 *Id.* at 276, 627 A.2d at 650 (Stein, J., concurring). The justice explained that a difference exists between informing a suspect of the general right to an attorney and informing a suspect of the presence of a specific attorney already in the police station. *Id.* at 274, 627 A.2d 649. According to Justice Stein, the suspect who is advised of merely a general right to an attorney may decline the offer out of concern that the police would interpret such a request as an acknowledgment of guilt. *Id.* If the same suspect is instead advised that an attorney is already present, he may decide that speaking with the attorney outweighs the risk of antagonizing his interrogators, especially if he has had prior dealings with the attorney or knows that the attorney was retained by friends or family. *Id.* Thus, when such information is withheld, "the suspect's waiver of the right to counsel and to remain silent is more abstract than real, becoming, in effect, a waiver of a theoretical right that is uninformed by the material knowledge that retained counsel, present and available to assist the suspect in the full exercise of his or her rights, is just outside the door." *Id.*

141 *Id.* at 277, 627 A.2d at 651 (Stein, J., concurring).

142 *Id.* at 279, 627 A.2d at 652 (Clifford, J. dissenting).

143 *Id.*

right to counsel can attach.[144] Accordingly, Justice Clifford averred that the majority's decision "goes too far" in holding that the right to counsel could be implicated even if a suspect explicitly and voluntarily waives that right.[145]

Justice Clifford also rejected the majority's conclusion that a suspect's ability to waive his right to counsel could be affected by events occurring outside of the suspect's presence.[146] The justice declared that the United States Supreme Court had correctly decided this issue in *Moran*.[147] Consequently, Justice Clifford professed that the *Reed* court should adopt the reasoning of *Moran* and hold that events occurring outside of a suspect's presence could not affect the suspect's ability to understand and relinquish his right to counsel.[148]

The dissent further professed that the problems caused by the majority's decision would outweigh any benefits.[149] First, Justice Clifford denounced the majority for creating a rule that differentiates between classes of suspects and favors those more apt to have access to legal representation.[150] Next, the dissent opined that the

144 *Id.* at 277, 282, 627 A.2d at 651, 653 (Clifford, J., dissenting).

145 *Id.*, 627 A.2d at 651 (Clifford, J., dissenting).

146 *Id.* at 278-79, 627 A.2d at 652 (Clifford, J., dissenting) (quoting Moran v. Burbine, 475 U.S. 412, 422 (1986)).

147 *Id.*; *see Moran*, 475 U.S. at 425 (holding that police have no duty under the federal constitution to inform a suspect of an attorney's attempts to contact him). *See supra* notes 102-10 and accompanying text for a discussion of *Moran*.

148 *Reed*, 133 N.J. at 278-79, 627 A.2d at 652 (Clifford, J., dissenting).

149 *Id.* at 279-81, 627 A.2d at 652-53 (Clifford, J. dissenting).

150 *Id.* at 279, 627 A.2d at 652 (Clifford, J., dissenting). Justice Clifford drew a distinction between suspects who are arrested in the proximity of others or who have had prior experience with a private attorney or public defender, and suspects who are indigent, arrested while alone, or have no previous experience with the criminal justice system. *Id.* The former are more likely to be the beneficiaries of a phone call to a lawyer on their behalf, whereas the latter are "'out of the loop'" as far as legal aid is concerned. *Id.* Although both suspects will be subjected to the same interrogation, only the former will be found to have been coerced, while the latter will be deemed to have knowingly waived the right to counsel. *Id.* Justice Clifford chided, "[s]uch intolerable incongruities result when the emphasis shifts to *events* entirely unrelated to the suspect's knowledge rather than focusing on the sole person who matters in evaluating the validity of a suspect's waiver—the *suspect*." *Id.*

The majority rejected Justice Clifford's contention that the court's holding was unfairly biased against poor defendants who are arrested while alone. *Id.* at 266, 627 A.2d at 645. Although the majority conceded that "[i]t is probably true that such a person will be less likely to have a lawyer contacted to see him or her[,]" the majority countered by remarking that "[i]n an ideal world, every defendant would have the family, friends, financial means, time, energy, and personal resources to mount the best defense. But we do not live in an ideal world." *Id.* The majority further observed that the court has never accepted "a disparity in the actual ability of differently-situated defendants to make use of a right as an argument against affording that right." *Id.* at 267, 627 A.2d at 645-46. Consequently, the majority concluded that "the fact

court's decision would increase rather than alleviate police coercion during interrogation by causing police to intensify their efforts to obtain a confession before a suspect's attorney can arrive.[151] Finally, the justice lamented that the court would be forced to resolve a multitude of new issues as a result of the majority's holding.[152]

Justice Clifford averred that the majority's stated purpose of enhancing the reliability of confessions by reducing the inherent coercion of custodial interrogation could be adequately protected by careful administration of, and compliance with, the Miranda rights.[153] Applying the rules set forth in *Miranda*, the justice pro-

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that not every suspect will benefit from the rule we announce today is no reason to deny the benefits of that rule to those suspects who may be advantaged by it." *Id.*, 627 A.2d at 646.

151 *Id.* at 280, 627 A.2d at 652 (Clifford, J., dissenting). Justice Clifford speculated:

> Police officers of flexible rectitude who know that the right to question a suspect may terminate once an attorney makes known his or her availability to assist a suspect may be tempted to 'turn up the heat' to secure a confession in what the officers may perceive as a limited window of opportunity.

Id. The majority countered that the only "window of opportunity" currently open for the incentive to elicit an involuntary confession is the period of time between the police gaining awareness of the attorney's presence and the instant when a confession is ultimately extracted. *Id.* at 257, 627 A.2d at 641. The majority then professed that its holding "closes and locks that window." *Id.* at 258, 627 A.2d at 641.

152 *Id.* at 280-81, 627 A.2d at 652-53 (Clifford, J., dissenting). Justice Clifford anticipated that as a result of the majority's decision, the court would have to resolve the following issues:

> [H]ow quickly must the police relay the information that an attorney is available? If an attorney calls the police station, is the officer receiving the call obliged immediately to put aside all other matters and race to inform the investigating officers? Does the right attach at the time of communication or at some reasonable time thereafter? If the suspect should blurt out a confession a moment before an officer seeking to impart the availability of counsel enters the room, does the statement become retroactively involuntary even though the police have made every effort to honor a defendant's rights? . . .
>
> . . . [W]hat duty do police officers have to provide full and accurate information concerning the attorney's identity? . . .
>
> . . . Is an attorney "immediately available" in any circumstance other than one in which the attorney can *at that very moment* proceed to the scene of the interrogation or speak with a defendant? What if an attorney calls to profess availability and thereafter does not appear for several hours? Must the attorney retained communicate with the police, or may another person at a firm or the person who has arranged for the attorney alert the police of the attorney's availability?

Id. The majority dismissed Justice Clifford's predictions, remarking that "[v]irtually any rule is susceptible to a parade of hypothetical inquiries." *Id.* at 266, 627 A.2d at 645.

153 *Id.* at 282, 627 A.2d at 653 (Clifford, J., dissenting).

claimed that the police were under no duty to inform Reed of the attorney's request to speak with him because Reed had made no indication of a desire to speak with an attorney.[154] Therefore, Justice Clifford concluded, Reed's rights had not been violated and his confession should be admitted into evidence on retrial.[155]

Reed presented the New Jersey Supreme Court with an opportunity to strengthen one of the ancillary rights to the privilege against self-incrimination: namely, the right of a suspect to have an attorney present during custodial interrogation.[156] Adhering to the court's prior jurisprudence, the majority seized this opportunity by once again going further than required by federal law to impose a new duty upon police.[157] The majority's stated purpose for imposing this duty was to reduce the coercive atmosphere of custodial interrogation.[158] While the majority's desire to dispel coercion is indeed admirable, it is unclear whether the court's decision will advance or inhibit this aspiration.[159]

Although the majority claims otherwise,[160] it is unlikely that requiring police to notify a suspect of an attorney's availability will greatly diminish the temptation on police to pressure that suspect into confessing before the attorney arrives. Regardless of the obstacles that courts place in their path, police will continually attempt to extract confessions from suspects.[161] As the dissent recognized, the more logical and probable result of the majority's decision is that the police will increase the pressure on the suspect

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154 *Id.* See *supra* notes 82-93 and accompanying text for a discussion of *Miranda*.

155 *Id.*, 627 A.2d at 653-54 (Clifford, J., dissenting).

156 *See id.* at 251-52, 627 A.2d 637-38.

157 *Id.* at 261-62, 627 A.2d at 643. *See supra* note 119 and accompanying text (enumerating circumstances where the New Jersey Supreme Court has mandated stricter requirements then those dictated by the United States Supreme Court).

158 *See id.* at 260, 627 A.2d at 642. Justice Handler stated "it is essential that every reasonable effort be made to overcome the inherent coercive pressures of custodial interrogation." *Id.*

159 *See supra* note 151 and accompanying text for a discussion of Justice Clifford's assertion that the majority's decision is more likely to encourage rather than restrain coercion.

160 *See Reed*, 133 N.J. at 257, 627 A.2d at 640 (professing that requiring police to notify suspects of an attorney's presence will greatly diminish the temptation on police to pressure a suspect into confessing before an attorney acquires access to that suspect).

161 *See* LAFAVE & ISRAEL, *supra* note 9, § 6.1 at 291 (stating that "'[m]any criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual . . . .'") (quotation omitted).

from the moment of arrest in an attempt to "beat the clock."[162] Alternatively, police may simply arrest defendants while they are alone as a means of circumventing the court's decision. With no family or friends present to contact an attorney on the suspect's behalf, the police need only concern themselves with a request for counsel from one person—the suspect himself.

The fact that the majority's holding may exacerbate the very situation that it is intended to rectify is not the only flaw in *Reed*. Additionally, it is difficult to accept the proposition that the validity of a suspect's waiver of rights can hinge upon the conduct of a third party.[163] To better illustrate the illogicality of this premise, envision two suspects arrested for the same crime. Both suspects are advised of their rights, both are subjected to the same interrogation, and both elect to waive their rights and confess. In the meantime, a relative of only one of the defendants phones an attorney, and the police fail to inform that defendant of the availability of that attorney. Can the court logically maintain that the suspects' subjective waivers were any different? It is irrational to find one suspect's waiver valid and the other's invalid when the only difference between the two is that one suspect had the good fortune of having a relative phone an attorney on his behalf.[164]

For almost thirty years, police interrogation has been governed by the rules promulgated in *Miranda v. Arizona*.[165] The United States Supreme Court's decision in *Miranda* strikes an appropriate balance between the suspect's right against self-incrimination and society's legitimate interest in the enforcement of its

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[162] *Reed*, 133 N.J. at 280, 627 A.2d at 652 (1993) (Clifford, J., dissenting). In dissent, Justice Clifford opined:

> [T]he rule the Court fashions today risks increasing the likelihood of police coercion. Police officers of flexible rectitude who know that the right to question a suspect may terminate once an attorney makes known his or her availability to assist a suspect may be tempted to "turn up the heat" to secure a confession in what the officers may perceive as a limited window of opportunity. The right the Court creates intensifies rather than diminishes the pressure on law-enforcement officers to cut corners in the effort to extract an incriminating statement.

Id.

[163] *See id.* at 261, 627 A.2d at 643 (holding that an attorney-client relationship will be deemed to exist when the suspect's family or friends retain an attorney on the suspect's behalf).

[164] In dissent, Justice Clifford opined that "intolerable incongruities" result from a rule that creates two classes of suspects. *Id.* at 279, 627 A.2d at 652 (Clifford, J., dissenting).

[165] 384 U.S. 436 (1966); *see* NISSMAN, *supra* note 52, at § 1:13 (noting that the United States Supreme Court revolutionized confessions law in 1966 with the *Miranda* decision).

laws. As demonstrated by the endurance of the decision, the Miranda warnings adequately and effectively apprise suspects of their constitutional rights. The *Miranda* Court permitted suspects to waive their constitutionally guaranteed rights,[166] and if a suspect imprudently elects to do so, the New Jersey Supreme Court should not spare him from the consequences of his own poor judgment.[167]

In recent history, the New Jersey Supreme Court has demonstrated a willingness to hold a defendant's hand as he traverses the minefield of the criminal justice system.[168] With *Reed*, however, the court has gone one step further and now demonstrates that it is willing to carry a defendant over every potential hazard. Only time will tell if the court's maternal instincts will benefit the criminal justice system and society as a whole.

W. Brian Stack

166 *Miranda*, 384 U.S. at 475-76. See *supra* notes 90-93 and accompanying text for a discussion of *Miranda*'s waiver provisions.

167 As the New Jersey Supreme Court itself has stated, a defendant's waiver is not invalid simply because it is unwise, and the constitution is not "'offended when a guilty man stubs his toe.'" State v. Adams, 127 N.J. 438, 449, 605 A.2d 1097, 1102 (1992) (quoting State v. McKnight, 52 N.J. 35, 52, 243 A.2d 240, 250 (1968)).

168 *See supra* note 119 and accompanying text (outlining instances where the New Jersey Supreme Court has gone further than required by federal law to protect the rights of the accused).