Self-Incrimination Protection Under the Alaska Constitution: A Descriptive Analysis

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This article compares the privilege against self-incrimination under the Alaska Constitution with the United States Supreme Court's interpretation of the federal privilege. After providing background on both the privilege and the theory of divergent interpretations of state constitutions, the article presents Alaska decisions that have both expanded and refused to expand the minimum federal constitutional standard when interpreting the Alaska Constitution's self-incrimination provisions. The article concludes with an assessment of the probable effects of Alaska courts' general reluctance to provide broader protection under the Alaska Constitution.

I. INTRODUCTION

Alaska courts, like the courts of other states, are free to interpret their state constitution as affording citizens greater civil and political rights than those provided by the Federal Constitution.[1] Since the 1970's, as the United States Supreme Court has

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1. *See, e.g.*, California v. Trombetta, 467 U.S. 479, 491 n.12 (1984) ("[States] remain free to adopt more rigorous safeguards governing the admissibility of scientific evidence than those imposed by the Federal Constitution."); *see also* Stephan v. State, 711 P.2d 1156, 1160 (Alaska 1985) (quoting *Trombetta*, 467 U.S. at 491 n.12); Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) ("[W]e are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution . . . ."); Roberts v. State, 458 P.2d 340, 342-43 (Alaska 1969) ("[W]e are not limited by decisions of the United States Supreme Court or the United States Constitution when we expound our state constitution; the Alaska Constitution may have broader safeguards than the minimum federal standards."). *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND

generally become more restrictive in interpreting the Federal Constitution, some state courts have granted greater protection under their respective state constitutions.[2] Alaska courts have been at the forefront of this trend.[3]

As at least one commentator has noted, most state courts have been unwilling to provide greater protection to criminal defendants under their constitutions than the federal constitutional minimum.[4] Alaska courts, however, have broadly interpreted various provisions of the Alaska Constitution to confer greater rights to criminal defendants than the Federal Constitution. As early as 1969, in *Roberts v. State*,[5] the Alaska Supreme Court held that the Alaska Constitution's right to counsel should be interpreted more broadly than the Federal Constitution's Sixth Amendment right to coun-

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DEFENSES ¶ 1.01 (2d ed. 1994).

2. *See* FRIESEN, *supra* note 1, ¶ 1.01, at 1-2 ("Since 1970, state supreme courts have handed down hundreds of opinions that grant protection for civil rights and liberties, based on provisions in their state constitutions, that is greater than or equivalent to the protection given these rights under parallel provisions of the United States Constitution as interpreted by the Supreme Court.").

3. From 1968 to 1989, Alaska courts were among the most active of the state courts that relied on their state constitutions in expanding United States Supreme Court rulings. Kermit L. Hall, *Of Floors and Ceilings: The New Federalism and State Bills of Rights*, 44 FLA. L. REV. 637, 659-60 (1992) (reproducing tables from Barry Latzer, *The Hidden Conservatism of the State Court Revolution*, 74 JUDICATURE 190, 193 (1991)).

4. Hall, *supra* note 3, at 655-58. Prior to the early 1970's, few state courts found greater state constitutional rights for criminal defendants. Because federal courts were so active in this area in the 1960's, most state courts saw little need to look to state constitutions for increased protection. *See* FRIESEN, *supra* note 1, ¶ 1.01, at 1-4 to -5; Hall, *supra* note 3, at 638; William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977). Recently, even states whose courts had been fairly active in finding independent state constitutional grounds have been curtailed. In California and Florida, voters have passed initiatives purporting to limit the power of state courts to grant any greater protection to criminal defendants in search and seizure cases than those afforded by the Federal Constitution. CAL. CONST. art. I, § 24; FLA. CONST. art. I, § 12; Hall, *supra* note 3, at 659-60. Professor Friesen reviews the pros and cons of reliance on state constitutional law in FRIESEN, *supra* note 1, ¶ 1.03.

5. 458 P.2d 340 (Alaska 1969). *Roberts* overruled Knudsen v. City of Anchorage, 358 P.2d 375 (Alaska 1960), in which the Alaska Supreme Court held that the right to counsel under the Alaska Constitution was coextensive with the Sixth Amendment's right to counsel. *Id.* at 379.

sel.[6] Alaska courts have also been active in cases involving unreasonable searches and seizures,[7] an area in which Alaska's constitutional right of privacy is a factor as well.[8]

In contrast, Alaska courts have not generally interpreted the self-incrimination provisions of the Alaska Constitution more broadly than the federal standard.[9] In the relatively few cases where Alaska courts do construe the state provisions more broadly, the efficiency and trustworthiness of the judicial fact-finding process

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6. ALASKA CONST. art. I, § 11; U.S. CONST. amend. VI; *Roberts*, 458 P.2d at 342-43.

7. *See, e.g.*, Jackson v. State, 791 P.2d 1023 (Alaska 1990) (holding that search of defendant's wallet for weapons incident to arrest violated state constitution despite United States Supreme Court's decision in United States v. Robinson, 414 U.S. 278 (1973)); Reeves v. State, 599 P.2d 727 (Alaska 1979) (rejecting the United States Supreme Court's limited conception of the privacy interest retained by an arrestee in the context of a pre-incarceration inventory search); State v. Glass, 583 P.2d 872 (Alaska 1978) (holding that federal decisions dealing with the Fourth Amendment to the United States Constitution should not be regarded as determinative of the scope of Alaska's right to privacy amendment); Zehrung v. State, 569 P.2d 189 (Alaska 1977), *modified on reh'g*, 573 P.2d 858 (Alaska 1978) (expanding the privacy interest of an arrestee in connection with searches incident to arrest); Woods & Rhode, Inc. v. State, 565 P.2d 138 (Alaska 1977) (prohibiting warrantless administrative inspections of business premises as a result of the expansive protection afforded by the Alaska Constitution against warrantless searches and seizures and invasions of privacy). The Alaska Constitution provides:

> The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

ALASKA CONST. art. I, § 14.

8. The right of privacy, found in Article I, section 22 of the Alaska Constitution, provides in pertinent part that "[t]he right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. I, § 22.

9. Constitutional guarantees against self-incrimination are found in the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. The Alaska Constitution's self-incrimination provision uses similar language, that "[n]o person shall be compelled in any criminal proceeding to be a witness against himself." ALASKA CONST. art. I, § 9.

In this article, a broad definition of protection against self-incrimination will be used. A number of constitutional provisions besides the Fifth Amendment and Article I, section 9 can be applied to exclude incriminating statements of criminal defendants from admission at trial. *See infra* notes 12-19 and accompanying text.

are at issue.[10] Although Alaska courts have shown concern for the vindication of criminal defendants' self-incrimination rights, they have not been willing to grant greater protection under the Alaska Constitution unless the fair and efficient resolution of factual disputes in court proceedings is implicated as well.

Part II will provide background on the privilege against self-incrimination, and Part III will analyze the practical effects resulting from different interpretations of state and federal constitutional provisions. Part IV will give an overview of Alaska's self-incrimination privilege. Part V concludes by contending that the Alaska courts' resort to the federal constitutional standard of self-incrimination will ultimately result in a greater recourse to federal courts by Alaska criminal defendants.

II. SELF-INCRIMINATION PROTECTION UNDER THE FEDERAL AND ALASKA CONSTITUTIONS

The right to remain silent is a critical part of both the federal and Alaska criminal justice systems. Without protection against self-incrimination, criminal trials would be transformed from the current system, in which the government bears the burden to prove every element of a charge beyond a reasonable doubt, to an "inquisitorial" system, in which defendants would be forced to testify in order to prove their innocence.[11] A criminal defendant's right not to be compelled to be a witness against himself or herself is at the core of the Fifth Amendment to the United States Constitution, as well as Article I, section 9 of the Alaska Constitution.

Although the Fifth Amendment is often considered to be the only provision of the Federal Constitution that protects the privilege against self-incrimination, other provisions also apply. The Due Process Clause of the Fourteenth Amendment is the vehicle by which the Fifth Amendment's self-incrimination

10. *See infra* notes 32-72 and accompanying text.

11. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). An analysis of the development of the privilege against self-incrimination is found in Jeffrey M. Feldman & Stuart A. Ollanik, *Compelling Testimony in Alaska: The Coming Rejection of Use and Derivative Use Immunity*, 3 ALASKA L. REV. 229 (1986). The authors trace the privilege from its origins in Talmudic law, through the abuses of the English Star Chamber court, to its adoption in English common law courts and the United States Constitution. *Id.* at 232-35.

protection is applied to the states.[12] Moreover, the Due Process Clause ensures that the prosecution bears the burden of proof beyond a reasonable doubt in all criminal cases.[13] This allocation of the burden of proof also affects self-incrimination rights. If the defense bore the burden of proof, defendants would often be forced to testify to prove their innocence.

The Sixth Amendment also plays an important role in self-incrimination cases.[14] Confessions taken in violation of a defendant's Sixth Amendment right to counsel are as vulnerable to exclusion as those taken in violation of the Fifth Amendment right against self-incrimination.[15] The Sixth Amendment right to counsel does not attach until adversarial proceedings have begun. Once proceedings have begun and counsel has been retained or appointed, the same requirement as the Fifth Amendment rule applies: an accused may not be questioned outside of the presence of counsel unless he or she initiates the questioning.[16]

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12. The Fifth Amendment was first incorporated into the Fourteenth Amendment Due Process Clause in Malloy v. Hogan, 378 U.S. 1 (1964).

13. In re Winship, 397 U.S. 358, 364 (1970).

14. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

> Alaska's version of the Sixth Amendment provides:
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> In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less that six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident and the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ALASKA CONST. art. I, § 11.

15. *See* Michigan v. Jackson, 475 U.S. 625 (1986); Maine v. Moulton, 474 U.S. 159 (1985); Brewer v. Williams, 430 U.S. 387 (1977).

16. *Jackson*, 475 U.S. at 636. *But see* McNeil v. Wisconsin, 501 U.S. 171 (1991) (holding that the Sixth Amendment, unlike the Fifth Amendment, is offense specific); Moran v. Burbine, 475 U.S. 412 (1986) (noting that while police were under no obligation to inform accused that an attorney hired by his family was at the police station asking to see him, the result would have been different if

There is a very peculiar and complex relationship between the right to counsel under the Fifth and Sixth Amendments. Although there is not usually thought to be a *Fifth* Amendment right to counsel, under *Miranda v. Arizona*,[17] a person accused of a crime has the right to an attorney during custodial interrogation.[18] Once an accused has asserted this right to counsel during custodial interrogation, questioning "must cease until an attorney is present."[19] The *Miranda* rule further safeguards an accused's self-incrimination rights by placing the burden on the authorities to ensure that the accused does not involuntarily incriminate himself or herself.

Thus, when Alaska courts face a self-incrimination claim, they may draw on federal courts' interpretations of a number of provisions of the Federal Constitution. Theoretically, a criminal defendant's statement could be excluded by a number of provisions of the Alaska Constitution other than Article I, section 9. However, as discussed in the cases below, Alaska courts have not developed an extensive self-incrimination analysis distinct from the federal standard. They have generally not found the privilege in any provisions of the Alaska Constitution other than Article I, section 9.

III. PRACTICAL EFFECTS OF DIFFERENT INTERPRETATIONS OF STATE AND FEDERAL CONSTITUTIONS

Some commentators consider differences in interpretation of relatively similar provisions of state and federal constitutions to be entirely in line with notions of federalism.[20] Under this theory, the United States Constitution can be seen as a "floor" that

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adversary proceedings had begun and the Sixth Amendment right to counsel had attached).

17. 384 U.S. 436 (1966).

18. *Id.* at 444-45.

19. *Id.* at 474. The United States Supreme Court later established a "bright-line" rule in Edwards v. Arizona, 451 U.S. 477 (1981), that once an accused invokes his or her right to counsel, the accused may not be subjected to further interrogation by the authorities until counsel has been made available to him or her, unless the suspect unilaterally initiates further conversation. *Id.* at 484-85; *see also* Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (prohibiting re-interrogation without the actual presence of counsel, as the Fifth Amendment provides more than just an opportunity to consult with counsel).

20. *See* FRIESEN, *supra* note 1, ¶ 1.03, at 1-13 to -16; Brennan, *supra* note 4, at 502.

provides the minimum constitutional protections that must be adhered to by both the federal government and the states.[21] A state then has the option to set a "ceiling" of greater rights over and above the federal minimum.[22] On the other hand, a state may simply decide that its constitution does not provide any greater protection than the Federal Constitution. If a state chooses the latter course, its highest court will look to United States Supreme Court decisions only for guidance in resolving claims under its own constitution.[23]

The practical danger of relying solely on federal constitutional grounds is that it leaves little margin for error. It is often difficult to determine the exact parameters of federal constitutional law when the rights of criminal defendants are in question.[24] Furthermore, by only applying the federal standard, a state court makes it easier for a defendant to collaterally attack his or her conviction in

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21. The states are currently obligated to follow nearly every provision of the Federal Constitution pursuant to the Due Process Clause of the Fourteenth Amendment. Brennan, *supra* note 4, at 493-95, provides a historical overview of the gradual incorporation of the Federal Bill of Rights into the Fourteenth Amendment Due Process Clause.

22. Hall, *supra* note 3, at 638 ("In the architecture of the New Federalism, the Supreme Court, interpreting the Bill of Rights, sets the minimum floor for rights, while state supreme courts, interpreting their state bills of rights, fix the ceiling.").

23. Professor Friesen refers to reliance on federal constitutional law in interpreting civil or political rights as the "conformity" or "lock-step" approach to state constitutional interpretation. Other approaches are the "primacy" approach, which looks to state constitutional law first, and the "supplement [or] independent" approach, which views resorting to the state constitution as necessary only when federal law does not protect the right asserted. FRIESEN, *supra* note 1, ¶ 1.06. See *infra* note 31 for a discussion of the approach of Alaska courts.

Under each of these approaches, federal constitutional precedent only consists of the decisions of the United States Supreme Court. The Alaska Supreme Court has adopted the generally followed approach that "[w]here a federal question is involved, the courts of Alaska are not bound by the decisions of federal courts other than the United States Supreme Court." Harrison v. State, 791 P.2d 359, 363 n.7 (Alaska Ct. App. 1990).

24. Professor Friesen notes that "[s]tability" in the applicable law, "disentangled from the changing trends of the federal courts," is one reason why state supreme courts resort to their own constitutions. FRIESEN, *supra* note 1, ¶ 1.03, at 1-15. The decisions of the United States Supreme Court on double jeopardy are an example of changing federal precedent. "While the [Double Jeopardy] Clause itself [is simple], the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernaz v. United States, 450 U.S. 333, 343 (1981).

federal court. If the federal court finds that the state court incorrectly interpreted the minimum protections of the Federal Constitution, it will reverse the conviction.

Reversals by federal courts are often entered many years after the original trial.[25] In self-incrimination cases, where the remedy on reversal most frequently requires a new trial in which the defendant's confession is excluded, retrials can be particularly difficult. The prosecution may have relied heavily on an excluded confession as the centerpiece of its case. As a result, on retrial, other potential witnesses may have died; evidence may not have been preserved; or any number of other problems may have arisen that threaten the prosecution's ability to present a prima facie case years after the offense was committed. On the other hand, if a state court decides in favor of the defense solely on federal constitutional grounds, the prosecution could then appeal[26] and even seek relief from the United States Supreme Court if appeals in state courts prove unavailing.[27]

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25. *See, e.g.*, Smith v. Endell, 860 F.2d 1528 (9th Cir. 1988), *cert. denied*, 498 U.S. 981 (1990). The original Alaska prosecution began in 1981, as State v. Smith, No. 3AN-S81-6231 CR (Alaska Super. Ct. 3d Jud. Dist.), but the decision was not reversed by the federal court until 1988, seven years later.

26. Under the Alaska appellate rules and statutes, if an indictment or charge is dismissed, the prosecution has traditionally had the right to appeal to test the sufficiency of the indictment. ALASKA R. APP. P. 202(c); ALASKA STAT. § 22.07.020(d)(2) (1988 & Supp. 1994). Alaska Statutes section 22.07.020 was recently amended to increase the prosecution's right to appeal to all cases that do not violate double jeopardy. ALASKA STAT. § 22.07.020(d)(2) (Supp. 1994). However, in State v. Walker, 887 P.2d 971 (Alaska Ct. App. 1994), the court of appeals held that the amendment to the statute does not give the prosecution authority to appeal if the judgment is not final.

In cases in which evidence is suppressed and the remedy falls short of dismissal of the charges, prosecutors can file for a discretionary interlocutory appeal. In Alaska, this action is called a petition for review and is often granted on the ground that the state would not have a remedy if the case proceeded to trial without the issue having been decided. *See* ALASKA R. APP. P. 401-03; Kott v. State, 678 P.2d 386, 388-91 (Alaska 1984); Stump v. State, 547 P.2d 305, 305-06 (Alaska 1976); State v. Garcia, 752 P.2d 478, 479 n.1 (Alaska Ct. App. 1988).

27. The Court has broadly construed its power to review federal question appeals by the prosecution in criminal cases. In Michigan v. Long, 463 U.S. 1032 (1983), the Court held that it will presume that a state court's decision is based on federal law unless it includes a "plain statement" clearly indicating that the decision is based on independent state grounds. *Id.* at 1041. The Court's interest in reviewing appeals by the prosecution in state court decisions involving federal constitutional rights has been criticized by Justice Stevens. *See id.* at 1069-70

State courts can avoid the uncertainty and delay caused by federal scrutiny of their decisions by developing a body of protection under their respective state constitutions over and above the federal constitutional minimum. By developing and relying on state constitutional protection, state courts can significantly stem the possibility of post-conviction appeals in federal courts, by either the defendant or the prosecution.[28] If a state court ensures that the minimum federal constitutional requirements are satisfied, any further protection that it undertakes to provide based on the state constitution will be insulated from federal review.

IV. ALASKA CASE LAW ON THE PRIVILEGE AGAINST SELF-INCRIMINATION

In *Baker v. City of Fairbanks*,[29] the Alaska Supreme Court held that the Alaska Constitution should be liberally construed to provide greater rights when appropriate:

> [W]e are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.[30]

Thus, Alaska courts have a broad mandate to interpret the language of the Alaska Constitution to provide rights distinct from and broader than those that exist under the Federal Constitution.[31]

(Stevens, J., dissenting) (stating that the Court's docket has become "swollen with requests by States to reverse judgments that their courts have rendered in favor of their citizens"); *see also* FRIESEN, *supra* note 1, ¶ 1.01, at 1-6 to -9.

28. *See* FRIESEN, *supra* note 1, ¶ 1.03, at 1-13.

29. 471 P.2d 386 (Alaska 1970).

30. *Id.* at 401-02.

31. This language was quoted in part in State v. Gonzalez, 853 P.2d 526, 529 (Alaska 1993), where the Alaska Supreme Court used it to justify a broad inquiry into sources of authority other than United States Supreme Court precedent or the intent of the framers of the Alaska Constitution. *Id.* However, Alaska courts have held that they will not entertain arguments for interpretations of the Alaska Constitution that differ from the Federal Constitution unless the issue is properly raised. For example, the Alaska Court of Appeals has noted that "it is incumbent upon a litigant to point this court to something in the text, context, or history of the Alaska Constitution which justifies [a] divergent interpretation." Mitchell v. State, 818 P.2d 1163, 1165 (Alaska Ct. App. 1991) (citations omitted). But see Roberts v. State, 458 P.2d 340 (Alaska 1969), where the Alaska Supreme Court

In view of Alaska's general tradition of granting greater protection under the state constitution than the federal minimum, Alaska courts might be expected to interpret the Alaska Constitution's self-incrimination provisions more broadly than the Federal Constitution's provisions are interpreted. However, Alaska courts have rarely expanded federal constitutional protections in deciding self-incrimination cases. An examination of the relatively few cases where the courts have adopted a divergent interpretation of the Alaska Constitution quickly reveals a theme.

A. Cases in Which Alaska Courts Have Granted Broader Self-Incrimination Protection Under the Alaska Constitution

The most significant recent case in which Alaska courts have found broader self-incrimination protection under the Alaska Constitution than under the Federal Constitution is *State v. Gonzalez*.[32] In *Gonzalez*, the Alaska Supreme Court, affirming a decision by the court of appeals, held that a statute allowing the state to compel testimony on a grant of "use and derivative use" immunity violated Article I, section 9 of the Alaska Constitution.[33] The court held that the defendant must be granted the more comprehensive "transactional" immunity when the state compels him or her to testify in face of the hazard of self-incrimination.[34]

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declared that looking "only to the United States Supreme Court for constitutional guidance would be an abdication by this court of its constitutional responsibilities." *Id.* at 342.

Although the statement in *Roberts* would seem to indicate that Alaska courts are among those who give "primacy" to state constitutional law, the statement in *Mitchell* indicates that some Alaska courts now look to state constitutional law to "supplement" federal interpretations, finding independent state constitutional grounds only when there are persuasive reasons to depart or diverge from federal constitutional law.

32. 853 P.2d 526 (Alaska 1993), *aff'g* 825 P.2d 920 (Alaska Ct. App. 1992).

33. *Id.* at 530. Use and derivative use immunity "prohibits only the use of the compelled testimony and all evidence derived therefrom in future criminal proceedings against the witness." Feldman & Ollanik, *supra* note 11, at 230. Stated another way, use and derivative use immunity "permits prosecution of the witness for crimes referred to in the compelled testimony if the prosecution is based entirely on independently obtained evidence." *Id.* at 230-31.

34. *Gonzalez*, 853 P.2d at 530-32. In contrast, the United States Supreme Court has held that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination .... Transactional immunity ... affords the witness considerably broader protection than does the Fifth Amendment privilege." Kastigar v. United States, 406 U.S. 441, 453 (1972).

The Alaska Supreme Court and Court of Appeals reached the same result by using very different rationales. The court of appeals focused to a large extent on the "Alaska Constitution's unique concern with the rights to liberty and privacy, and the Alaska Supreme Court's vigilant enforcement of these rights."[35] However, the Alaska Supreme Court based its decision almost entirely on the practical problems that would occur in implementing the use and derivative use immunity statute in criminal trials:

> We now reach the question at the center of this case: does a grant of use and derivative use immunity remove the hazard of incrimination? We do not doubt that, in theory, strict application of use and derivative use immunity would remove the hazard of incrimination .... In a perfect world, one could theoretically trace every piece of evidence to its source and accurately police the derivative use of compelled testimony. In our imperfect world, however, the question arises whether the judicial process can develop safeguards to prevent derivative use of compelled testimony that satisfy [A]rticle I, section 9. Because we doubt that the workaday measures can, *in practice*, protect adequately against use and derivative use, we ultimately hold that [Alaska Statutes section] 12.50.101 impermissibly dilutes the protection of [A]rticle I, section 9.[36]

The supreme court justified striking down the statute largely because there would inevitably be a case where the compelled testimony was used against the accused, even if done inadvertently and in good faith. The court's analysis had a practical emphasis. The court was particularly concerned with ensuring the integrity of the judicial fact-finding process. Only when it saw no practical way to protect an accused's privilege against self-incrimination did the court conclude that the statute was unconstitutional under Article I, section 9 of the Alaska Constitution.

Transactional immunity "absolutely precludes prosecution of a witness for crimes referred to in the compelled testimony." Feldman & Ollanik, *supra* note 11, at 230. It is interesting to note that the law review article by Feldman and Ollanik was published in 1986, seven years before *Gonzalez* was decided. The rejection of use and derivative use immunity would be a long time in coming, but Feldman and Ollanik proved correct in their prediction. Like the court in *Gonzalez*, the authors pointed out the practical shortcomings of use and derivative use immunity and stated that, while in theory it provides the same protection as transactional immunity, "[i]n the real-life world of criminal prosecution," it does not. *Id.* at 250.

35. State v. Gonzalez, 825 P.2d 920, 933 (Alaska Ct. App. 1992).

36. State v. Gonzalez, 853 P.2d 526, 530 (Alaska 1993) (citations omitted) (emphasis in original).

Another significant case finding expanded self-incrimination rights under the Alaska Constitution was *Stephan v. State*,[37] in which the supreme court held that, whenever possible, authorities must tape-record advice of *Miranda* rights and statements obtained from a suspect in a place of detention. Although the court based its decision on the Due Process Clause of the Alaska Constitution, it was, of course, greatly concerned with self-incrimination. The court held that due process required the recording rule because in the absence of an "accurate record," an accused's right against self-incrimination and right to counsel during custodial interrogation could be infringed.[38]

However, the court noted that its ruling was not only a "measure to protect the accused."[39] "[T]he public's interest in honest and effective law enforcement, and the individual interests of police officers wrongfully accused of improper tactics," factored into its decision as well.[40] The court noted that recording devices were almost universally available to the police and that current technology ensured their reliability.[41]

The court's main rationale for its holding, as well as its imposition of the exclusionary rule as the remedy, was that the "integrity of [Alaska's] judicial system" would be threatened if the propriety of an interrogation were to be judged solely from the potentially conflicting testimony of the interested parties.[42] The court saw no reason why the courts should have to resolve "swearing matches" between defendants and police officers when these unseemly contests could be avoided with "the mere flip of a

37. 711 P.2d 1156 (Alaska 1985).

38. *Id.* at 1161. Although the United States Supreme Court has never directly considered the recording requirement, the Alaska Supreme Court acknowledged California v. Trombetta, 467 U.S. 479 (1984), in which the Court held that the authorities' failure to preserve a defendant's breath samples was not constitutionally material and thus not a violation of due process. *Stephan*, 711 P.2d at 1160 & n.13. To ensure that it would not be reversed, the *Stephan* court emphatically stated that it based the recording requirement solely on Alaska constitutional law. *Id.*

39. *Stephan*, 711 P.2d at 1161.

40. *Id.*

41. *Id.* at 1161-62. The recording requirement is excused in situations of unavoidable power or equipment failures or where the accused refuses to answer questions because the conversation is being recorded. *Id.* at 1162; *see also* George v. State, 836 P.2d 960, 962 (Alaska Ct. App. 1992) (excusing recording requirement because police in small village did not have a functioning tape recorder).

42. *Stephan*, 711 P.2d at 1164.

switch."[43] In *Stephan*, as in *Gonzalez*, the supreme court based its expansion of self-incrimination protection under the Alaska Constitution on pragmatic concerns about the integrity and efficacy of the judicial fact-finding process. The court again decided that to secure an accused's self-incrimination rights, a blanket rule was appropriate where considerable doubt existed that the fact-finding process itself would provide adequate safeguards.[44]

In *Scott v. State*,[45] the Alaska Supreme Court departed from the federal rule established by *Williams v. Florida*.[46] In *Williams*, the United States Supreme Court upheld a requirement that a defendant give the prosecution pre-trial notice of any defenses that it intended to use as well as the names and addresses of defense witnesses.[47] The Supreme Court held that such a broad discovery order was merely a matter of "timing," because the defense was only being forced to reveal what it would eventually have disclosed anyway.[48]

Although the *Scott* court recognized that the Federal Constitution and decisions from other jurisdictions allowed trial courts to

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43. *Id.* at 1161, 1164.

44. Most other states have declined to follow *Stephan*. *See, e.g.*, State v. Kekona, 886 P.2d 740, 745 (Haw. 1994) (citing cases). However, the Minnesota Supreme Court recently adopted a recording requirement similar to the one in *Stephan*. Scales v. State, 518 N.W.2d 587 (Minn. 1994).

Like the *Stephan* court, the *Scales* court saw no practical reason not to impose the requirement. The facts of *Scales* were a good example of why a recording rule should be in effect. The testimony of police officers and the defendant on what occurred during a custodial interrogation was diametrically opposed. 518 N.W.2d at 590. The sole record of defendant's waiver of *Miranda* rights was a written waiver form. The defendant's statement was in the form of a signed question and answer transcript prepared over three hours after the interrogation began. *Id.* The defendant claimed that he had not been permitted to read the question and answer transcription before he signed it and that he was not actually given *Miranda* warnings until the interrogation was well underway. The defendant further denied that he actually made a number of the statements contained in the transcript. *Id.* Although the court affirmed Scales' conviction due to the overwhelming evidence of his guilt, it was obviously troubled by the lack of reliable evidence to refute the defendant's claims. *Id.* at 590-91. The court decided to impose a recording requirement in the exercise of its supervisory power over the administration of justice. *Id.* at 592.

45. 519 P.2d 774 (Alaska 1974).

46. 399 U.S. 78 (1970).

47. *Id.* at 83.

48. *Id.* at 85.

require extensive pre-trial discovery orders,[49] it held that the order was overly broad under Article I, section 9 of the Alaska Constitution.[50] The first part of the discovery order in *Scott* required the disclosure of the names and addresses of all prospective defense witnesses. The court held that this condition violated Article I, section 9 by potentially furnishing links in the chain of evidence that the prosecution might not have otherwise been able to discover on its own.[51] The next part of the order, which required the defense to turn over any written or recorded statements of witnesses, violated Article I, section 9 for the same reason.[52]

The Alaska Supreme Court refused to apply the *Williams* "timing" rationale because the extensive pre-trial discovery ordered by the trial court affected more than mere "timing."[53] The court observed that under *Williams*, a defendant may have to reveal sources of potentially incriminating information without which the prosecution would be unable to make a prima facie case.[54] The court offered, as an example, a witness known only to the defense who would testify that the defendant did kill the alleged victim, but did so in self-defense.[55] The court reasoned that the defense should not be compelled to reveal the identity of this witness at least until after the prosecution had presented its case.[56] If required to do so earlier, the prosecution would learn of the sole eyewitness, who would have been used, if at all, to present a weak self-defense claim as a last resort.[57] Thus, in *Scott*, the Alaska Supreme Court again emphasized the importance of preserving an accused's privilege against self-incrimination by ensuring that the prosecution's evidence was not obtained in violation thereof.[58]

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49. *Scott*, 519 P.2d at 779-83.

50. *Id.* at 785. However, it did uphold a requirement that the defense give notice of its intent to rely on an alibi defense. *Id.*

51. *Id.* at 786.

52. *Id.*

53. See the discussion of *Scott* in Feldman & Ollanik, *supra* note 11, at 258-59.

54. *Scott*, 519 P.2d at 783.

55. *Id.* at 786 (citing Prudhomme v. Superior Court, 466 P.2d 673, 677 (Cal. 1970)).

56. *Id.*

57. *Id.*

58. Changes to the current discovery rule, ALASKA R. CRIM. P. 16, have been proposed by the Criminal Rules Committee of the Alaska Supreme Court. The proposed changes would require defendants to provide the prosecution with more discovery with regard to expert witnesses, notices of defense, and physical

In *Nelson v. State*,[59] the Alaska Court of Appeals departed from the United States Supreme Court's decision in *Fletcher v. Weir*[60] and held that the admission of a defendant's post-arrest silence before *Miranda* warnings are given violates the right against self-incrimination under Article I, section 9 of the Alaska Constitution.[61] However, the court abandoned its constitutional analysis in *Silvernail v. State*,[62] where it analyzed an accused's pre-arrest silence under Alaska Rule of Evidence 403 rather than under Article I, section 9. The court held that while pre-arrest silence generally has low probative value, its prejudicial effect is great.[63] Following authority from other jurisdictions, notably *People v. Conyers*,[64] the court elected to avoid the constitutional question because the introduction of this prejudicial evidence plainly violated Alaska Rule of Evidence 403.[65] Given courts' general tendency to avoid constitutional issues whenever possible, it is more probable that the court will follow the *Silvernail* approach in the future and decide similar cases under Rule 403 rather than reach the self-incrimination issue raised in *Nelson*.

Two final cases in which Alaska courts have granted greater protection against self-incrimination under the Alaska Constitution are *Skan v. State*[66] and *Pinkerton v. State*.[67] In both cases, the Alaska Supreme Court and the Alaska Court of Appeals respectively held that, contrary to the federal rule,[68] a target of grand jury proceedings must be given self-incrimination warnings if called as a witness. The explicit holding to this effect in *Pinkerton* was

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evidence. A majority of the committee rejected the Department of Law's proposal to implement a "reciprocal discovery" system in Alaska. The proposed rules and position papers regarding reciprocal discovery are included in a memorandum from Christine E. Johnson, Court Rules Attorney, Alaska Court System, to members of the Alaska Bar Association (on file with author).

59. 691 P.2d 1056 (Alaska Ct. App. 1984).

60. 455 U.S. 603 (1982).

61. *Nelson*, 691 P.2d at 1059.

62. 777 P.2d 1169 (Alaska Ct. App. 1989).

63. *Id.* at 1175-77.

64. 420 N.E.2d 933 (N.Y. 1981).

65. *Silvernail*, 777 P.2d at 1177.

66. 511 P.2d 1296 (Alaska 1973).

67. 784 P.2d 671 (Alaska Ct. App. 1989).

68. *See, e.g*, United States v. Washington, 431 U.S. 181 (1977) ("target warnings" not required by the Fifth Amendment).

supported by dicta in *Skan* citing with approval the American Bar Association Standards on this point.[69]

Pinkerton and *Skan* also dealt with court proceedings and the fact-finding process. The courts rested their decisions to a great extent on the Alaska Constitution's right of privacy,[70] as well as on fairness to potential grand jury witnesses.[71] Unless witnesses are advised that they might be a target of prosecution, they do not have enough information to effectively exercise their right against self-incrimination.[72]

Despite the aforementioned decisions, Alaska courts are generally reluctant to grant broader protection for self-incrimination rights under the Alaska Constitution than that afforded by the Federal Constitution. As a result, in most cases in which a criminal defendant claims that his or her privilege against self-incrimination under the Alaska Constitution was violated, Alaska courts will follow the contours of the federal constitutional standard.

B. Cases in Which Alaska Courts Have Not Granted Greater Self-Incrimination Protection Under the Alaska Constitution

1. *Right to Counsel Cases.*[73] In *Thiel v. State*[74] and *Kochutin v. State*,[75] the Alaska Court of Appeals addressed one of the most interesting and complex areas of self-incrimination: when the police may question a person who, personally or through friends or family, has retained or contacted an attorney.

In *Thiel*, the police suspected the defendant of acting as a lookout in a robbery. They contacted him at his father's house and asked him to come to the police station for an interview.[76] Thiel

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69. *Pinkerton*, 784 P.2d at 676; *Skan*, 511 P.2d at 1297 n.6 (citing A.B.A. STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION, §§ 3-3.6(2) (2d ed. 1980)).

70. *See supra* note 8.

71. *Pinkerton*, 784 P.2d at 676.

72. *Id.*

73. As noted above, there is both a Sixth Amendment right to counsel once adversary proceedings have begun and a Fifth Amendment right to counsel during custodial interrogations. *See supra* notes 14-19 and accompanying text.

74. 762 P.2d 478 (Alaska Ct. App. 1988).

75. 813 P.2d 298 (Alaska Ct. App. 1991), *vacated*, 875 P.2d 778 (Alaska Ct. App. 1994). These two decisions will be referred to respectively as *Kochutin I* and *Kochutin II*.

76. *Thiel*, 762 P.2d at 480.

declined. Furthermore, Thiel's father told the police that he had retained an attorney for his son and gave the police the attorney's name.[77] The police then enlisted an erstwhile friend of Thiel's to act as an informant.[78] They obtained a warrant[79] and tape-recorded conversations between the two men in which Thiel admitted his involvement in the robbery.[80]

The court of appeals first noted that federal courts had uniformly refused to consider police-initiated informant contacts to be a violation of the Sixth Amendment.[81] As for the Alaska Constitution, the court held that the right to counsel under Article I, section 11 only attached during adversarial proceedings.[82] The court conceded that previous Alaska decisions extended the right to counsel in Article I, section 11 to some non-courtroom situations, but it emphasized that those cases "all involve[d] some form of adversarial proceeding."[83] The court therefore declined to apply Alaska's right to counsel to Thiel's confession to the police informant because the confession did not meet the characteristics of an adversarial proceeding.[84]

In *Kochutin I*,[85] the defendant was in jail on an unrelated charge when the body of a young boy was found in his home village on St. Paul island in the Bering sea. As a suspect, Kochutin was put in administrative segregation and then was moved to a pre-trial correctional facility in Anchorage.[86] At that point, he contacted the attorney who represented him on the original charge. The attorney called the Alaska State Troopers, who wanted to question Kochutin.[87] After consulting with his attorney, Kochutin decided not to talk to the troopers. His attorney wrote a letter to

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77. *Id.*

78. *Id.*

79. *See* State v. Glass, 583 P.2d 872 (Alaska 1978) (Alaska constitutional law requires a warrant for "consensual" monitoring).

80. *Thiel*, 762 P.2d at 480.

81. *Id.* at 481.

82. *Id.* at 482.

83. *Id.* at 482-83. The Alaska Supreme Court has held that indigent litigants in a variety of criminal and non-criminal cases have a right to court-appointed counsel under the Due Process Clause of the Alaska Constitution. *See, e.g.*, Matter of K.L.J., 813 P.2d 276 (Alaska 1991); *Thiel*, 762 P.2d at 482.

84. *Thiel*, 762 P.2d at 483.

85. Kochutin v. State, 813 P.2d 298 (Alaska Ct. App. 1991).

86. *Id.* at 300.

87. *Id.*

the district attorney and to the troopers asserting Kochutin's right to remain silent and right to counsel.[88]

One year later, the trooper assigned to the case asked the district attorney whether he could question Kochutin, believing that he would be able to get a statement from Kochutin by approaching him without informing his attorney. The district attorney assented, and the trooper questioned Kochutin, eventually obtaining his confession to the murder.[89]

The Alaska Court of Appeals held that the trooper's actions violated the rule announced by the United States Supreme Court in *Edwards v. Arizona*,[90] that once an accused has invoked his Fifth Amendment right to counsel during custodial interrogation, the authorities may not initiate further interrogation until counsel has been made available.[91] Thus, in *Kochutin I*, the court of

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88. *Id.*

89. *Id.* at 301-02.

90. 451 U.S. 477 (1980).

91. *Id.* at 484-85. The *Edwards* rule has gone through several refinements and distinctions since its adoption in 1981. In Moran v. Burbine, 475 U.S. 412 (1986), the Court held that the failure of the police to inform a suspect under custodial interrogation that an attorney hired by his sister was trying to see him did not violate either the Fifth or Sixth Amendment rights to counsel. In Michigan v. Jackson, 475 U.S. 625 (1986), the Court held that once a defendant has invoked his Sixth Amendment right to counsel, here by requesting the appointment of counsel at an arraignment, the police could not initiate further interrogation.

In Arizona v. Roberson, 486 U.S. 675 (1988), the Court held that the *Edwards* rule applied to a suspect who, after invoking his Fifth Amendment right to counsel during interrogation on one burglary charge, was reinterrogated by different officers concerning an unrelated burglary. The Court excluded the confession made during the reinterrogation even though Roberson waived his *Miranda* rights during that interrogation, and even though the officers were unaware that he had asserted his rights during the first interrogation. *Id.* at 686-88. In *Roberson*, the Court made it clear that it meant *Edwards* to be a "bright-line" rule. *Id.* at 681.

In Minnick v. Mississippi, 498 U.S. 146 (1990), the Court further clarified the "bright-line" nature of the rule. The defendant was interrogated by FBI agents and asserted his right to an attorney. *Id.* at 148-49. The questioning ceased, and Minnick was given a chance to consult with a lawyer in jail on two or three occasions. *Id.* at 149. Then, a Mississippi deputy sheriff interrogated Minnick after his jailers told him that he had to go down to the interview. *Id.* Minnick waived his *Miranda* rights and made inculpatory statements. *Id.* The Court held that the statements must be suppressed under *Edwards* because the Fifth Amendment secures not only the right to consult with an attorney, but to have the counsel actually present during custodial interrogation. *Id.* at 154.

Finally, in McNeil v. Wisconsin, 501 U.S. 171 (1991), the Court held that the Sixth Amendment does not provide the blanket protection of the Fifth Amend-

appeals declined to address the breadth of protection that the Alaska Constitution would provide because it relied entirely on the *Edwards* rule. The court noted that the passage of the one-year period of time and the fact that Kochutin was, after the initial interrogation, placed in the general prison population on unrelated charges distinguished *Kochutin I* from *Edwards*. Nonetheless, it held that the bright-line *Edwards* rule was controlling.[92]

As an alternative basis for its decision, the court of appeals held that Kochutin's waiver of his *Miranda* rights was not voluntary.[93] The persuasive factors were Kochutin's expressed desire to deal with the authorities through counsel, the troopers' and the district attorney's deliberate bypassing of Kochutin's attorney, and Kochutin's continuous custody throughout the relevant period.[94]

The *Kochutin II* decision arose upon the discovery, shortly after the publication of *Kochutin I*, that Kochutin had not been in

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ment as interpreted in *Miranda* and *Edwards*. In *McNeil*, the defendant was appointed counsel at arraignment on one charge but was later interrogated on another charge. *Id.* at 173-74. The Court upheld the admission of McNeil's statement. It first held that the appointment of counsel at arraignment did not invoke McNeil's Fifth Amendment rights. *Id.* at 178-79. The appointment did invoke his Sixth Amendment rights, but those rights are "offense specific." *Id.* at 175. The police could not have talked to McNeil about the charges for which he was arraigned, but they could talk to him about other charges without violating his Sixth Amendment right to counsel. *Id.* at 178.

92. Kochutin v. State, 813 P.2d 298, 304-05 (Alaska Ct. App. 1991).

93. *Id.* at 305; *see infra* notes 116-30 and accompanying text.

94. *Kochutin I*, 813 P.2d at 306. The court was "particularly troubled" that the district attorney directed the police to interrogate Kochutin even though he knew that Kochutin was represented by counsel. *Id.* The trial court held that the district attorney violated the disciplinary rule in effect at the time, ALASKA CODE OF PROFESSIONAL RESPONSIBILITY Rule 7-104(a)(1), *repealed by* ALASKA RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1993). The court of appeals declined to consider the violation as independent grounds for suppressing the confession, but it did find that it was a significant factor in the voluntariness question. *Kochutin I*, 813 P.2d at 306; *see also* Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984).

The issue of prosecutorial contact with represented defendants in apparent violation of disciplinary rules is a matter of some controversy. *See* United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993) (reversing district court's dismissal of charges based on prosecutors' contact with defendant). Prosecutors often argue that such contacts are justified in the absence of formal proceedings because the suspect is not yet a "party" or because such contact is "authorized by law." *Id.* However, the current Alaska rule prohibits contact with a represented person "whether or not [the person is] a party to a formal proceeding." ALASKA RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1993). The new rules do not specifically address whether communications by prosecutors would be "authorized by law."

continuous custody. The court of appeals remanded the case to the trial court, which found that there had been a break of several months in the one-year period between Kochutin's original assertion of his rights and the second interrogation.[95] The court of appeals considered the break in custody to be determinative of both the *Edwards* rule and the voluntariness of waiver issue. The court vacated its opinion in *Kochutin I* and affirmed Kochutin's murder conviction.[96] The *Kochutin II* court was faced with the opportunity to provide broader protection under the Alaska Constitution than the *Edwards* rule, and it refused.

It is noteworthy that in at least one other jurisdiction, the result in *Kochutin II* may have been different. The New York Court of Appeals has held, as a matter of state constitutional law, that when an accused obtains representation by counsel on a particular incident, the police may not question a suspect in custody with regard to that incident without the attorney present.[97] This right attaches even if the suspect is given *Miranda* warnings and agrees to waive his or her Fifth Amendment right to counsel.[98]

Thus, Alaska courts have not yet recognized a greater Fifth Amendment right to counsel in situations covered by the *Edwards* rule. Moreover, based on *Thiel*, it appears unlikely that any rights beyond those set out in the United States Supreme Court's Sixth Amendment case law will be recognized.[99]

2. *Miranda Custody Cases.* Another controversial topic in self-incrimination case law is the question of when a suspect is considered to be "in custody," and, thus, entitled to be advised of *Miranda* rights. Alaska courts have generally considered this issue

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95. Kochutin v. State, 875 P.2d 778, 779 (Alaska Ct. App. 1994).

96. *Id.* at 779-80. In *Kochutin I*, the court did not address the issue of Kochutin's right to counsel under the Alaska Constitution. In dissent, Chief Judge Bryner, noting *Thiel*, would have held that Article I, section 11 conferred greater rights than the Sixth Amendment. *Kochutin I*, 813 P.2d at 310-11 (Bryner, C.J., dissenting). In its short opinion in *Kochutin II*, the court of appeals did not address state constitutional arguments at all. *Kochutin II*, 875 P.2d at 778-80.

97. People v. Bartolomeo, 423 N.E.2d 371 (N.Y. 1981); People v. Rogers, 397 N.E.2d 709 (N.Y. 1979).

98. *See* People v. Cunningham, 400 N.E.2d 360 (N.Y. 1980).

99. *See, e.g.*, Carr v. State, 840 P.2d 1000 (Alaska Ct. App. 1992) (reaffirming that Article I, section 11 of the Alaska Constitution confers no greater rights to counsel than the Sixth Amendment); *see also* Eben v. State, 599 P.2d 700 (Alaska 1979); Abdullah v. State, 816 P.2d 1386 (Alaska Ct. App. 1991).

strictly under the Fifth Amendment, as illustrated in the *Kochutin* cases noted above.

In the leading case of *Hunter v. State*,[100] the Alaska Supreme Court essentially adopted what would later become the United States Supreme Court's approach to the issue.[101] The test is whether a reasonable person in the suspect's situation would feel free to leave, or ask the police to leave, and break off questioning.[102] Under these criteria, a person need not actually be placed under arrest to be in *Miranda* custody. Rather, the standard is applied independently of any formal arrest procedure.[103] In the same vein, it is not determinative of the suspect's entitlement to *Miranda* warnings that he or she could be considered "seized" through an investigative stop under Fourth Amendment analysis.[104]

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100. 590 P.2d 888 (Alaska 1979).

101. *Hunter* was cited in a leading treatise: W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.6(c), at 493 (1984). Professor LaFave believes that an objective test from the point of view of a reasonable person being interviewed is the appropriate one. *Id.*

Hunter also established that three groups of facts are relevant to the determination of *Miranda* custody: (1) facts intrinsic to the investigation; (2) facts pertaining to events before the interrogation; and (3) facts relevant to what happened after the interrogation was over. *Hunter*, 590 P.2d at 895. Although Professor LaFave generally agrees with the *Hunter* approach to resolving the custody issue, he does not believe that what happens after an interrogation is relevant. LAFAVE & ISRAEL, *supra*, at 585-86. The United States Supreme Court expressly adopted an objective test in Berkemer v. McCarty, 468 U.S. 420 (1984). *See* LAFAVE & ISRAEL, *supra*, at 105 (1991 Supp.) (discussing *Berkemer*).

102. *Hunter*, 590 P.2d at 895.

103. *Id.*

104. *See* Blake v. State, 763 P.2d 511 (Alaska Ct. App. 1988) (following *Berkemer* rationale that even though standards used to determine custody under Fourth and Fifth Amendments are very similar, not every instance where a person is considered "seized" under the Fourth Amendment, or under Article I, Section 14 of the Alaska Constitution, will impose the same "coercive pressure" as *Miranda* custody). *Compare* United States v. Mendenhall, 446 U.S. 544 (1980) (Fourth Amendment seizure) *and* Waring v. State, 670 P.2d 357 (Alaska 1983) (Article I, section 14 seizure) *with* Berkemer v. McCarty, 468 U.S. 420 (1984) (Fifth Amendment custody) *and Blake*, 763 P.2d at 515 (Article I, section 9 custody). Once again, in another context, Alaska courts are hesitant to grant any greater protection of self-incrimination rights than that guaranteed under the Federal Constitution. *Blake*, 763 P.2d at 515; *see also* McCollum v. State, 808 P.2d 268 (Alaska Ct. App. 1991) (stop of defendant in store parking lot did not trigger *Miranda* custody).

Generally speaking, one situation where Alaska courts have been willing to find *Miranda* custody is when the police question a suspect during the execution of a search warrant and feel that it is necessary to take intrusive measures to preserve evidence and ensure officer safety.[105] However, courts have rarely found *Miranda* custody in vehicle stop cases,[106] even relatively intrusive ones.[107]

Another frequent situation in which *Miranda* custody issues arise are station house interrogations where the police tell a suspect that he or she is "free to leave" at any time and will not be arrested.[108] Alaska courts will typically follow federal precedent and conclude that *Miranda* custody does not exist, even though the police may have more than enough probable cause for arrest and many suspects would surely conclude that arrest is imminent.[109] Recently, however, the court of appeals has begun to admit that a sufficiently intrusive interrogation by the police can give rise to *Miranda* custody.[110]

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105. *See* Higgins v. State, 887 P.2d 966 (Alaska Ct. App. 1994); Moss v. State, 823 P.2d 671 (Alaska Ct. App. 1991).

106. McCollum v. State, 808 P.2d 268 (Alaska Ct. App. 1991); *Blake*, 763 P.2d at 511.

107. Tagala v. State, 812 P.2d 604 (Alaska Ct. App. 1991).

108. *See, e.g.*, Henry v. State, 621 P.2d 1, 3 (Alaska 1980) (suspect told he would not be pursued if he decided to leave); *Tagala*, 812 P.2d at 609 ("[The police] repeatedly assured Tagala he was free to leave and not under arrest."); Lowry v. State, 707 P.2d 280, 282 (Alaska Ct. App. 1985) ("[O]ne of the officers expressly advised Lowry that he was not under arrest."). *But see* Hampel v. State, 706 P.2d 1173, 1178-79 (Alaska Ct. App. 1985) ("Even though Hampel was told that he was not formally under arrest, a reasonable person in his situation would not have felt free to leave."); *see also infra* note 111 and accompanying text (discussing Thompson v. State, 768 P.2d 127 (Alaska Ct. App. 1989)).

109. *See, e.g.*, *Tagala*, 812 P.2d at 606-09. Tagala was subjected to a vehicle stop and voluntarily accompanied the police back to the station, where he was questioned about a homicide that occurred in the parking lot of a bar the night before. *Id.* at 606. Tagala and another suspect had left the bar together, and it was generally known that there was "bad blood" between Tagala and the victim. *Id.* Shortly after questioning began, Tagala admitted shooting the victim. The court held that Tagala was not in *Miranda* custody because the police "repeatedly assured [him] that he was free to leave and that he was not under arrest." *Id.* at 609. For representative United States Supreme Court cases applying similar principles, see Stansbury v. California, 114 S.Ct. 1526 (1994); Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam).

110. *See* Edwards v. State, 842 P.2d 1281 (Alaska Ct. App. 1992); Long v. State, 837 P.2d 737 (Alaska Ct. App. 1992).

These "free to leave" cases are without question an active area of litigation. The Alaska courts' efforts to toe the Fifth Amendment line in this area of the law have resulted in an increased resort to the federal courts. For example, the United States Supreme Court has recently granted certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit upholding the Alaska Court of Appeals' determination that the defendant's station house interrogation was noncustodial and voluntary.[111]

3. *Miranda Interrogation.* In addition to being in custody, a suspect must be "interrogated" to trigger the *Miranda* advice requirement. Alaska courts have consistently applied the United States Supreme Court's formula for determining what circumstances are considered interrogation. This test asks whether the words or actions used by the authorities are "'reasonably likely to elicit an incriminating response.'"[112]

The more troubling cases in this area involve re-interrogations.[113] When a suspect remains in continuous custody, re-interrogation is not permitted unless the suspect initiates further conversation with the police.[114] Alaska courts have once again followed United States Supreme Court precedent on the question of what conduct constitutes an initiation of conversation by the suspect.[115]

4. *Miranda Waiver.* Alaska courts have neither expanded the content required in *Miranda* warnings nor increased the standard for a valid waiver of *Miranda* rights beyond the minimum requirements of the United States Supreme Court's decisions. In *Webb v. State*,[116] the Alaska Supreme Court noted that it "has never held that *Miranda* type advisements are required under the

111. Thompson v. State, 768 P.2d 127 (Alaska Ct. App. 1989), *aff'd sub nom* Thompson v. Keohane, 34 F.3d 1073 (9th Cir. 1994) (mem.), *cert. granted*, 115 S.Ct. 933 (1995).

112. Beagle v. State, 813 P.2d 699, 705 (Alaska Ct. App. 1991) (quoting Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980)).

113. For a discussion of this issue in connection with *Kochutin*, see *supra* notes 85-96 and accompanying text.

114. Quick v. State, 599 P.2d 712 (Alaska 1979).

115. *See* May v. State, 856 P.2d 793 (Alaska Ct. App. 1993).

116. 756 P.2d 293 (Alaska 1988), *rev'g* 720 P.2d 953 (Alaska Ct. App. 1986).

Alaska Constitution independent[ly] of the [F]ederal [C]onstitution."[117]

In *Webb*, a motorist was stopped after he picked up a package from an airfreight office.[118] The police knew the package contained marijuana. The police officer asked the defendant for his driver's license and advised him of his *Miranda* rights.[119] However, the officer did not return the license. Instead, he told the defendant that he could retrieve the license by making a statement at the police station.[120] The Alaska Supreme Court held that Webb's *Miranda* waiver was involuntary because the officer impermissibly conditioned the exercise of his Fifth Amendment rights on his driver's license.[121] *Webb* was based solely on federal constitutional law.[122]

There is an important *Miranda* waiver issue that Alaska courts have yet to decide. In *Oregon v. Elstad*,[123] the United States Supreme Court held that a subsequent confession, obtained after *Miranda* warnings were given, was not necessarily the "fruit of the poisonous tree" of a prior confession obtained in violation of *Miranda*.[124] The *Elstad* Court rejected the "cat out of the bag" theory of *United States v. Bayer*,[125] in which the Court held that once an accused has let the "cat of the bag" by confessing, any subsequent statement is *per se* tainted by the first confession despite an otherwise valid *Miranda* waiver.[126]

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117. *Id.* at 296 n.7. Several other states have adopted *Miranda* warnings as a requirement of state constitutional law. *See* FRIESEN, *supra* note 1, ¶ 12.02, at 12-8 n.12.

118. *Webb*, 756 P.2d at 294.

119. *Id.*

120. *Id.* at 295.

121. *Id.* at 297; *see also* Kochutin v. State, 875 P.2d 778 (Alaska Ct. App. 1994) (defendant's waiver of *Miranda* rights valid).

122. *Webb*, 756 P.2d at 297 (citing Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966)).

123. 470 U.S. 298 (1985).

124. *Id.* at 304, 318.

125. 331 U.S. 532 (1947).

126. *Elstad*, 470 U.S. at 303-04. The *Bayer* Court summarized the "cat out of the bag" theory as follows:

> After an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as the fruit of the first.

Bayer, 331 U.S. at 540.

A number of states have rejected the narrow approach of *Elstad* by providing additional protection under state constitutional law.[127] It remains to be seen how the Alaska Supreme Court will rule on the *Elstad* issue. However, applying the *Elstad* rule could require the type of "taint" hearings that the Alaska Supreme Court viewed with disfavor in *State v. Gonzalez*.[128] That possibility, as well as the court's preference for bright-line rules that it exhibited in *Stephan*,[129] provides some room for speculation that the court would reject the *Elstad* approach as a matter of Alaska constitutional law. If the court does reject *Elstad*, it will likely include the importance of accurate judicial fact-finding among its grounds for decision.[130]

5. *Voluntariness.* In addition to requiring waivers of *Miranda* warnings to be voluntary, Alaska decisions also predicate the admissibility of confessions on their voluntariness under the totality of the circumstances. The essential inquiry is whether a suspect's "will was overborne" by coercive police conduct.[131]

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127. *See, e.g.*, Commonwealth v. Smith, 593 N.E.2d 1288 (Mass. 1992); People v. Bethea, 493 N.E.2d 937 (N.Y. 1986). *But see* People v. Lewis, 786 P.2d 892, 899 (Cal. 1990) (finding no broader protection under state law because newly enacted state constitutional amendment eliminated judicially created state remedies for violation of self-incrimination rights that are not federally compelled); State v. Allenby, 847 P.2d 1 (Wash. Ct. App. 1992) (declining to review *Elstad* under state law because prior case law specifically held that state constitutional protection against self-incrimination was not broader than the Fifth Amendment). *See generally* FRIESEN, *supra* note 1, ¶ 12.02[3][a], at 12-9 to -10 (noting that *Elstad* "has not found universal acceptance by state courts").

A number of commentators have criticized *Elstad*. *See, e.g.*, Marte J. Bassi, Note, *Restricting the* Miranda *Presumption and Pruning the Poisonous Tree:* Oregon v. Elstad, 16 GOLDEN GATE U.L. REV. 331 (1986); Karen S. DesRoches, Comment, *"Whither Went* Miranda*?"* — Oregon v. Elstad, 20 SUFFOLK U. L. REV. 1229 (1985); Bettie E. Goldman, Note, Oregon v. Elstad: *Boldly Stepping Backwards to Pre-*Miranda *Days?*, 35 CATH. U. L. REV. 245 (1985); Jeffrey J. Miller, Oregon v. Elstad: *The Supreme Court Goes Back to the Future With a New Voluntariness Test for Unwarned Confessions*, 27 ARIZ. L. REV. 913 (1985).

128. 853 P.2d 526 (Alaska 1993), *aff'g* 825 P.2d 920 (Alaska Ct. App. 1992); *see supra* notes 32-36 and accompanying text.

129. Stephan v. State, 711 P.2d 1156 (Alaska 1985); *see supra* notes 37-44 and accompanying text.

130. *But see* Kochutin v. State, 813 P.2d 298, 307 n.3 (Alaska Ct. App. 1991) (questioning whether the fruit-of-the-poisonous-tree doctrine is firmly rooted in Fifth Amendment *Miranda* case law).

131. *See* Edwards v. State, 842 P.2d 1281, 1285 (Alaska Ct. App. 1992).

Involuntary confessions are traditionally excluded on due process grounds rather than through self-incrimination provisions.[132] Challenging the voluntariness of a confession is a frequent basis for appeal, but very few defendants have been successful in their claims.[133] Alaska courts have generally followed the United States Supreme Court in recognizing a lack of voluntariness where a defendant's confession is marred by threats, promises or influence, whether express or implied.[134]

6. *Miscellaneous Issues.* There are a few other self-incrimination cases that deserve to be mentioned. In *State v. J.R.N.*,[135] the Alaska Supreme Court reversed a decision in which the Alaska Court of Appeals excluded a confession obtained from a juvenile before his parents were notified of his arrest. At the time of the case, Delinquency Rule 7(b) provided that the authorities must "immediately" notify a juvenile's parents upon a juvenile's arrest.[136] J.R.N.'s parents were not notified until seven hours after his arrest and, significantly, not until after the he had made a full videotaped confession to killing the alleged victim and stealing his car.[137] The Alaska Supreme Court held that a juvenile was capable of waiving his or her right to parental notification and remanded the case to determine whether the waiver was knowing and voluntary.[138]

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132. *See* LAFAVE & ISRAEL, *supra* note 101, § 6.2(b), at 441-44.

133. See, e.g., State v. Ridgley, 732 P.2d 550, 555-56 (Alaska 1987), *rev'g* 705 P.2d 924 (Alaska Ct. App. 1985); Soovalik v. State, 612 P.2d 1003 (Alaska 1980); Edwards v. State, 842 P.2d 1281 (Alaska Ct. App. 1992); S.R.D. v. State, 820 P.2d 1088 (Alaska Ct. App. 1991); Thompson v. State, 768 P.2d 127 (Alaska Ct. App. 1989), *aff'd sub nom* Thompson v. Keohane, 34 F.3d 1073 (9th Cir. 1994) (mem.), *cert. granted*, 115 S.Ct. 933 (1995) (citing cases), for examples of cases in which the courts have ruled against a defendant's claims of involuntariness. *But see* S.B. v. State, 614 P.2d 786 (Alaska 1980) (remanding to determine whether confession was in fact induced by promise of leniency); Smith v. State, 787 P.2d 1038 (Alaska Ct. App. 1990) (finding that confession was induced by promise of leniency).

134. *S.B.*, 614 P.2d at 789.

135. 861 P.2d 578 (Alaska 1993), *rev'g* 809 P.2d 416 (Alaska Ct. App. 1991). The published appeal after remand is J.R.N. v. State, 884 P.2d 175 (Alaska Ct. App. 1994).

136. ALASKA DEL. R. 7(b). This rule has since been amended to provide that notice to the juvenile authorities shall be "immediately, if possible, and in no event more than 12 hours" after the arrest. *Id.*

137. *J.R.N.*, 861 P.2d at 579.

138. The Alaska Court of Appeals had concluded that parental notification was

Alaska courts have also followed Fifth Amendment case law in concluding that the self-incrimination privilege cannot be asserted unless there is a real or substantial hazard of incrimination.[139] Finally, Alaska courts follow federal case law in reviewing Fifth Amendment violations under the harmless error beyond a reasonable doubt standard.[140]

V. WHAT TO EXPECT IN FUTURE ALASKA CASES INVOLVING RIGHTS AGAINST SELF-INCRIMINATION

It is evident from the preceding sections that Alaska courts have not granted broader protection under the Alaska Constitution's self-incrimination provisions than the federal standard unless the ability of the judicial fact-finding process to protect a criminal defendant's rights against self-incrimination is in question. Given Alaska courts' usual reliance on federal constitutional grounds in self-incrimination cases, their decisions are not as insulated from federal review as if they were based on state constitutional law. Therefore, federal courts have more opportunity to review self-incrimination cases than in, for example, search and seizure cases, where Alaska courts are more prone to find independent state constitutional grounds for decision.

Alaska courts have an excellent record of not being reversed on federal constitutional grounds. With the exception of *Davis v. Alaska*,[141] the United States Supreme Court has never reversed an Alaska state criminal conviction. The United States Court of Appeals for the Ninth Circuit has also infrequently reversed Alaska courts. Recently, however, the Ninth Circuit reversed an Alaska conviction in *Smith v. Endell*.[142] Not surprisingly, this case was reversed on Fifth Amendment grounds.

The defendant in *Smith* was interviewed by Alaska State Troopers, who caught him with drugs at the Anchorage Interna-

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as much the parent's right as the child's. *J.R.N.*, 809 P.2d at 419. However, the Alaska Supreme Court reversed, ruling that parents did not have standing to object to the admission of the confession. State v. J.R.N., 861 P.2d 578, 580 (Alaska 1993).

139. *See* M.R.S. v. State, 867 P.2d 836, 839-41 (Alaska Ct. App. 1994).

140. *See* Lewis v. State, 779 P.2d 806, 808 (Alaska Ct. App. 1989) (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

141. 415 U.S. 308 (1974).

142. 860 F.2d 1528 (9th Cir. 1988), *cert. denied*, 498 U.S. 981, (1990).

tional Airport.[143] The troopers also suspected him of committing a double homicide. Smith was willing to discuss the drug problem, but when the discussion touched upon the homicide, he asked the troopers if they were looking at him as a suspect.[144] If so, he informed them that he was considering asking for a lawyer. Instead of ascertaining whether Smith was invoking his right to counsel, the troopers continued the interrogation.[145]

The Ninth Circuit held that Smith made an ambiguous request for counsel, giving the troopers an obligation to safeguard Smith's Fifth Amendment rights by resolving the matter before continuing the interrogation.[146] Accordingly, the court reversed Smith's conviction.[147]

The validity of *Smith* is questionable now, in light of the United States Supreme Court's decision in *Davis v. United States*.[148] In *Davis*, the Court held that a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[149] The lesson of *Smith* and *Davis* is that by declining to establish clear state constitutional rules in self-incrimination cases over and above the federal minimum, Alaska convictions will be subject to an increasing resort to the ever-changing boundaries of federal constitutional law.[150]

VI. CONCLUSION

Alaska courts have elaborated a rich state constitutional jurisprudence over the past twenty-five years. Unlike many other state courts, Alaska courts have not omitted the rights of criminal defendants from their innovative interpretation of the Alaska Constitution. However, in self-incrimination cases, Alaska courts have been reluctant to afford greater state constitutional rights than

143. *Smith*, 860 F.2d at 1529.
144. *Id.*
145. *Id.* at 1529-30.
146. *Id.* at 1532.
147. *Id.* at 1534.
148. 114 S.Ct. 2350 (1994).
149. *Id.* at 2355.
150. In connection with this point, it will be interesting to note the progress of the litigation before the United States Supreme Court in *Thompson v. Keohane*, 34 F.3d 1073 (9th cir. 1994) (mem.), *cert. granted*, 115 S.Ct. 933 (1995); *see supra* note 111 and accompanying text.

the federal norm. Examining the case law, the only exceptions to this trend are cases in which the courts have practical concerns about the ability of the judicial fact-finding process to adequately protect an accused's rights. As a result of this reluctance to find independent state constitutional grounds, criminal defendants will undoubtedly increase their appeals to federal courts, where the vagaries of federal constitutional self-incrimination law will decide their fate. The Alaska Supreme Court should seize an opportunity to flesh out the text of the self-incrimination provisions of the Alaska Constitution, both to ensure continuity and consistency in Alaska constitutional law, as well as to establish a "ceiling" of rights that accurately reflects "the kind of civilized life and ordered liberty which is at the core of [Alaska's] constitutional heritage."[151]

151. Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970).