POLICE DECEPTION OF A CRIMINAL SUSPECT'S ATTORNEY: AN ANALYSIS OF *MORAN v. BURBINE* UNDER THE ALASKA CONSTITUTION

I. INTRODUCTION

In *Moran v. Burbine,*[1] a decision that Justice Stevens felt "trampled on well-established legal principles and flouted the spirit of our accusatorial system of justice,"[2] the United States Supreme Court upheld a criminal suspect's waiver of his right to counsel and his fifth amendment privilege against self-incrimination. The Court found the waiver valid although the police had deceived an attorney who had been retained for the suspect by his sister.[3] This deception prevented the attorney from representing the suspect at a series of police interviews during which the suspect confessed to a murder.[4] Not surprisingly, this case has generated a substantial amount of commentary,[5] and several state courts have had to decide whether their state constitutions should be interpreted in the same manner.[6]

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1. 475 U.S. 412 (1986).
2. *Id.* at 468 (Stevens, J., dissenting).
3. *See infra* note 9.
4. *Moran,* 475 U.S. at 417-18.
5. Stevens, *The Third Branch of Liberty,* 41 U. MIAMI L. REV. 277, 285 (1986); Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches,* 38 HASTINGS L.J. 1, 64 (1986); Note, Moran v. Burbine: *The Decline of Defense Counsel's "Vital" Role in the Criminal Justice System,* 36 CATH. UNIV. L. REV. 253 (1986) [hereinafter Note, *Decline of Defense Counsel's "Vital" Role*]; Note, *A Farewell to* Miranda: Knowing and Intelligent Waiver After Moran v. Burbine, 20 CREIGHTON L. REV. 111 (1986) [hereinafter Note, *A Farewell to* Miranda]; Note, *Criminal Procedure - Confessions - Waiver of Fifth Amendment Rights Held Valid Although Police Failed to Inform Suspect of Attorney's Attempts to Contact Him* — Moran v. Burbine, 17 SETON HALL L. REV. 402 (1987) [hereinafter Note, *Waiver of Fifth Amendment Rights*]; *The Supreme Court, 1985 Term — Leading Cases,* 100 HARV. L. REV. 100, 125-35 (1986) [hereinafter *Leading Cases*].
6. Expressly rejecting *Moran* for the purpose of interpreting their state constitutions are People v. Houston, 42 Cal. 3d 595, 610, 724 P.2d 1166, 1174, 230 Cal. Rptr. 141, 149 (1986) ("For purposes of the California Constitution, we adhere generally to the reasoning adopted by the [*Moran*] dissent . . . ."), Haliburton v. State, 514 So. 2d 1088, 1089 (Fla. 1987) (per curiam) (rationale of [*Moran*] dissent found persuasive and deceptive conduct by police held violative of due process clause of the Florida Constitution), and State v. Stoddard, 206 Conn. 157, __ A.2d __ (1988) (due process

The problem of police deception of a criminal suspect's attorney has not yet arisen in Alaska. However, given the likelihood that this issue will reach the Alaska courts and its importance to criminal procedure, this note will examine Alaska's probable reaction to the *Moran* decision. This note discusses whether the conclusions of *Moran* will be accepted by the Alaska courts for the purposes of articulating a criminal suspect's right to counsel, privilege against self-incrimination, and right to due process guaranteed by the Alaska Constitution.[7]

This note will first delineate the arguments presented by Brian K. Burbine that the deception by the Rhode Island police violated his rights under the fifth, sixth, and fourteenth amendments of the United States Constitution and then discuss the Court's subsequent rejection of those arguments. Section II also examines Justice Stevens' dissent and some of the reactions of courts and commentators to the decision. Section III compares a criminal suspect's right to counsel under the sixth amendment of the United States Constitution and under article I, section 11, of the Alaska Constitution. This Section first presents cases that indicate that Alaska will perhaps reject the *Moran* Court's sixth amendment analysis, and then discusses a case indicating that Alaska might in fact accept the Supreme Court's conclusion. It concludes that, given present Alaska precedent, the Alaska Supreme Court will not broaden the coverage of the article I, section 11, right to counsel to include defendants such as Burbine. Although the courts of Alaska have interpreted the article I, section 11, right to counsel to extend beyond the guarantees of the sixth amendment, they have also

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clause of Connecticut Constitution creates a duty to inform a suspect of timely efforts by counsel to provide legal assistance).

In contrast, the Wisconsin Supreme Court followed *Moran* for the purpose of interpreting its state constitution in State v. Hanson, 136 Wis. 2d 195, 213, 401 N.W.2d 771, 779 (1987) ("We believe [*Moran*] to be a reasonable consideration of the limit to which *Miranda* will be extended and that the Wisconsin Constitution does not require greater protection."). Also indicating likely acceptance of *Moran* for the purpose of interpreting its state constitution is People v. Behm, 154 Ill. App. 3d 987, ___, 507 N.E.2d 1274, 1281 (Ill. App. Ct. 1987) (if faced with this issue, appellate court would follow *Moran* since the court believed the Illinois Supreme Court would do so).

7. A criminal suspect's right to counsel is guaranteed by article 1, section 11, of the Alaska Constitution. *See infra* note 35 and accompanying text. A criminal suspect's privilege against self-incrimination is contained in article I, section 9, of the Alaska Constitution. *See infra* note 89 and accompanying text. Article I, section 7, of the Alaska Constitution contains the state's due process guarantee. *See infra* note 143 and accompanying text.

By virtue of the supremacy clause, the Alaska Supreme Court may not, of course, limit the scope of *Moran* when determining its applicability in Alaska. *See* U.S. CONST. art. VI. However, the Alaska courts may interpret the provisions of their constitution to provide broader rights than the United States Constitution requires. *See infra* Section IIIA. But these broader rights cannot in turn violate an individual's federal constitutional rights.

indicated an unwillingness to do this in the custodial interrogation context, the area critical to Burbine's claim.

Section IV examines a criminal suspect's privilege against self-incrimination under the fifth amendment of the United States Constitution and article I, section 9, of the Alaska Constitution. It first discusses cases indicating that Alaska might accept the Supreme Court's fifth amendment conclusion, and then examines cases to the contrary. This Section concludes that due to Alaska's broader privilege, Alaska courts will not accept the Supreme Court's interpretation of the fifth amendment for the purpose of construing article I, section 9. Thus, a waiver such as Burbine's would be held invalid. Section V then compares a *Moran*-type defendant's right to due process of law under article I, section 7, of the Alaska Constitution with his corresponding right under the fourteenth amendment of the United States Constitution. This Section also concludes that Alaska courts will not accept the Supreme Court's interpretation of the fourteenth amendment's due process clause for the purpose of defining the scope of article I, section 7. Finally, Section VI summarizes the conclusions of this note and highlights the probable arguments that would be advanced should a *Moran*-type case be litigated in Alaska.

II. *MORAN V. BURBINE*

In June of 1977, the Cranston, Rhode Island, police arrested Brian K. Burbine and two companions on suspicion of burglary. While in custody, Burbine also became a suspect in the murder of a woman whose body had been discovered in a Providence parking lot three months earlier. Burbine refused to execute a written waiver of his *Miranda* rights,[8] which were read to him after he became a suspect in the Providence murder. A Cranston detective then questioned his two companions, who further implicated him in that incident. The detective subsequently telephoned the Providence police, who in turn sent three officers to Cranston to question Burbine about the murder. They arrived in Cranston about 7:00 p.m.

Upon learning that Burbine had been charged with breaking and entering, but unaware that he was implicated in a murder case, Burbine's sister called the Public Defender's office to obtain counsel for him. The attorney who took this call eventually contacted Allegra Munson, an Assistant Public Defender. The attorney told Munson

8. A criminal suspect's *Miranda* rights refer to the procedural safeguards required by the fifth amendment to protect a suspect's privilege against self-incrimination. "Prior to any questioning, the [suspect] must be warned that he has a 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).

about Burbine's arrest and his sister's request for counsel. Munson then telephoned Cranston police headquarters at 8:15 p.m. and had her call forwarded to the detective division. She identified herself to the individual in the division as someone who would act as Burbine's counsel if the police planned to question him or place him in a lineup that evening. Responding to Munson's questions, the person in the detectives' division acknowledged that Burbine was being held but stated that "the police would not be questioning [him] or putting him in a lineup and that they were through with him for the night."[9] Munson was not told that Burbine was under suspicion for murder and that three Providence police officers were presently at the Cranston station. Based on the assurances she received, Munson made no further attempt to contact the Cranston police or Burbine that evening.

At about 9:00 p.m., six hours after Burbine was arrested, the first of a series of question sessions regarding the murder began.[10] The police read Burbine his *Miranda* rights prior to each interview, and he signed three separate waivers, each of which indicated that he wished to proceed without the assistance of counsel. At no relevant point, however, was Burbine informed that his sister had telephoned the Public Defender's office, that an attorney had called the Cranston police, and that this attorney was willing to come to the station if he was to be questioned. Burbine subsequently signed three statements admitting to the Providence murder.

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9. Moran v. Burbine, 475 U.S. 412, 414 (1986) (quoting State v. Burbine, 451 A.2d 22, 24 (R.I. 1982)). It is not clear to whom Munson spoke in the detective division. The Rhode Island Supreme Court reported that "the trial justice found as a fact that Ms. Munson did make the call, but further found that there was no collusion or conspiracy on the part of the police to secrete Burbine from his attorney." State v. Burbine, 451 A.2d 22, 24 (R.I. 1982). The *Moran* Court declared "whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." 475 U.S. at 423. Addressing this issue, Justice Stevens stated that since the person responding to the phone call at the Cranston station acknowledged that Burbine was indeed at the station, there was no effort to "secrete" him. *Id.* at 444 n.22 (Stevens, J., dissenting). More importantly, Justice Stevens declared that there was undisputed testimony by Lieutenant Ricard that at the time in question only he or Detective Ferranti would have answered a call placed to the detective division. Thus, it was "perfectly clear" that one of them knew of the call, Justice Stevens declared. *Id.* Detective Ferranti later questioned Burbine with Lieutenant Ricard's full awareness of this fact. This note accepts Justice Stevens' conclusions, and proceeds on the assumption that Munson was purposefully deceived by the Cranston police.

10. It was unclear from the testimony of the officers present whether Burbine or the police initiated the first encounter between the two after the phone call by attorney Munson. *Moran,* 475 U.S. at 447-48 (Stevens, J., dissenting). The majority opinion assumes that Burbine initiated the conversation, *id.* at 421-22, while Justice Stevens notes that this conclusion is dubious in light of the lack of finding on this fact by the state court and the uncertain testimony, *id.* at 447-48 (Stevens, J., dissenting).

After a jury convicted him of first degree murder, Burbine appealed to the Supreme Court of Rhode Island, which affirmed his conviction and the denial by the trial court of his motion to suppress the statements.[11] His petition for a writ of habeas corpus in the United States District Court for the District of Rhode Island was also denied.[12] However, the United States Court of Appeals for the First Circuit reversed that decision.[13] Relying solely on fifth amendment grounds, the court of appeals held that the conduct of the police invalidated Burbine's waiver of his *Miranda* right to counsel.[14]

John Moran, superintendent of the Rhode Island Department of Corrections, subsequently appealed to the United States Supreme Court. Before the Court, Burbine first argued that the failure of the police to inform him of Munson's call and her willingness to represent him deprived him of information necessary for him to "knowingly waive his [f]ifth [a]mendment rights."[15] In an opinion by Justice O'Connor, the Court responded that "[e]vents outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[16] The Court articulated a three-fold response to Burbine's argument that purposeful police deception of counsel retained on behalf of a suspect is so repugnant to the principles protected by *Miranda* that it violated his fifth amendment rights. First, the Court noted that the purpose of the *Miranda* warnings is to lessen compulsion directed toward the suspect. Thus, police treatment of an attorney is outside the scope of the *Miranda* decision.[17] Second, the Court found that "overriding practical considerations" weigh against the adoption of a rule requiring the police to inform a suspect of an attorney's efforts to reach him, as "the legal questions it would spawn are legion."[18] Finally, the Court declared that such a rule would be only minimally beneficial to fifth amendment protections and would significantly infringe upon society's substantial interest in obtaining admissions of guilt.[19]

Burbine's efforts to suppress the statements on sixth amendment grounds were also rejected. The right to counsel, the Court stated, does not attach until "after the first formal charging proceeding" or the commencement of other adversary judicial proceedings, and the

11. State v. Burbine, 451 A.2d 22 (R.I. 1982).
12. Burbine v. Moran, 589 F. Supp. 1245 (D.R.I. 1984).
13. Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985).
14. *Id.* at 187.
15. Moran v. Burbine, 475 U.S. 412, 421 (1986).
16. *Id.* at 422.
17. *Id.* at 425.
18. *Id.*
19. *Id.* at 427.

Cranston police's deception and questioning sessions occurred prior to that time.[20] Burbine's attempt to broaden the sixth amendment's coverage to protect the "integrity of the attorney-client relationship" was rejected as inconsistent with the explicit language of the amendment, which is concerned with "criminal prosecutions."[21] Finally, the Court summarily disposed of Burbine's argument that the offensive conduct exhibited by the Cranston police department deprived him of the fundamental fairness guarantees of the due process clause. Although it noted that more egregious behavior might invoke the protection of the clause, the Court declared that "on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibility of a civilized society as to warrant a federal intrusion into the criminal processes of the States."[22]

In a vigorous dissent from the majority opinion, Justice Stevens, joined by Justices Brennan and Marshall, focused on fifth amendment and due process concerns.[23] Beginning with the premise that it would be "perfectly clear Burbine's waiver was invalid" if a Cranston detective induced it through cajolery, Stevens declared that "there can be no constitutional distinction . . . between a deceptive misstatement and the concealment by the police of the critical fact that an attorney retained by the accused or his family has offered assistance, either by telephone or in person."[24] Similarly, the dissenters argued that the waiver was necessarily invalid "under ordinary principles of agency law," which would hold "the deliberate deception of Munson" to be "tantamount to deliberate deception of her client."[25]

Stevens also condemned as "profoundly misguided" the majority's emphasis on the interest of society in obtaining confessions.[26] Under such a balancing test the value of any trial is merely a "procedural technicality" in the case of "a murderer or a rapist caught redhanded."[27] Berating the Court for devoting only five sentences to its treatment of Burbine's due process claim, Stevens disagreed with the use of an overly simplistic "shock the conscience" test.[28] Rather, Stevens asserted that the proper due process standard is one of fundamental fairness, and police interference with communications between an attorney and his client violates that standard.[29]

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20. *Id.* at 428.
21. U.S. CONST. amend VI. *See Moran,* 475 U.S. at 428-30.
22. *Moran,* 475 U.S. at 433-34.
23. *Id.* at 434 (Stevens, J., dissenting).
24. *Id.* at 453.
25. *Id.* at 462.
26. *Id.* at 457.
27. *Id.*
28. *Id.* at 466.
29. *Id.* at 466-67.

Commentators and state courts have also challenged the *Moran* Court's reading of its own precedent. One commentator has concluded that the Court's narrow, formalistic responses to Burbine's arguments sanctioned the very behavior that *Miranda* sought to prohibit.[30] The author declares that the *Moran* Court's focus on Burbine's state of mind in determining whether the waiver was proper ignores *Miranda*'s underlying concern with ensuring more satisfactory police interrogation methods.[31] Another writer views *Moran* as signalling a return to the pre-*Miranda* concept of a "voluntariness" test for determining the admissibility of a suspect's confession.[32] This test, which inquired as to whether a confession was the product of the suspect's free will and unconstrained choice, was criticized by commentators for failing to offer any guidance to police officers and permitting manipulative interrogation techniques.[33]

In interpreting the California Constitution, the Supreme Court of California was similarly unpersuaded by the approach of the *Moran* majority. Justice Grodin held that "whether or not a suspect in custody has previously waived his rights to silence and counsel, the police may not deny him the opportunity, before questioning begins or resumes, to meet with his retained or appointed counsel who has taken diligent steps to come to his aid."[34]

III. ANALYSIS OF *MORAN V. BURBINE* UNDER THE RIGHT TO COUNSEL PROVISION OF THE ALASKA CONSTITUTION

This Section first examines cases that interpret the Alaska Constitution's right to counsel to supply broader guarantees than those provided by the sixth amendment. By broadly interpreting their right to counsel, these cases suggest that Alaska might reject the sixth amendment analysis of the *Moran* Court. This Section ultimately concludes, however, that due to Alaska's refusal to expand the reach of article I, section 11, to the custodial interrogation context, the Alaska Supreme Court will likely not rely on this provision to suppress the statements of a *Moran*-type defendant.

A. Case Law Indicating that Alaska Will Likely Reject the *Moran* Court's Sixth Amendment Conclusion

Article I, section 11, of the Alaska Constitution mirrors the language of the sixth amendment of the United States Constitution in its

30. *See Leading Cases, supra* note 5, at 131-32.
31. *Id.* at 132.
32. *See* Note, *Farewell to* Miranda, *supra* note 5, at 115-22, 143.
33. *Id.* at 115-22.
34. People v. Houston, 42 Cal. 3d 595, 610, 724 P.2d 1166, 1174, 230 Cal. Rptr. 141, 149 (1986).

guarantee of the right to counsel in criminal prosecutions. In relevant part, the Alaska provision states that: "In all criminal prosecutions, the accused shall have the right . . . to have the assistance of counsel for his defense."[35] In construing the guarantees of article I, section 11, the Alaska Supreme Court has repeatedly voiced its independence from the minimal federal standards of the sixth amendment. Several cases indicate that Alaska has consistently defined its right to counsel provision to supply broader rights to criminal defendants than the Supreme Court has interpreted the sixth amendment to provide. Although no one case directly addresses the issue of police deception of a suspect's attorney, collectively the cases indicate a willingness by Alaska courts to provide a more expansive right to counsel than the federal right in order to safeguard the accused from prejudicial procedures.

In *Baker v. City of Fairbanks,*[36] the Alaska Supreme Court defined the term "criminal prosecution" as it relates to the "right to a speedy and public trial by jury" in article I, section 11, to include any "offense a direct penalty for which may be incarceration in a jail or penal institution."[37] Also within the scope of this term are "any offenses which may result in the loss of a valuable license," and "offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term."[38] The court acknowledged that it was clearly interpreting Alaska's right to a jury trial to extend beyond the corresponding sixth amendment guarantee. The court declared that:

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional 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. We need not stand by idly and impassively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.[39]

In *Alexander v. City of Anchorage,*[40] the scope of the term "criminal prosecution" as it relates to the right of an indigent under the

35. ALASKA CONST. art. I, § 11. Similarly, the sixth amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

36. 471 P.2d 386 (Alaska 1970).

37. *Id.* at 402.

38. *Id.*

39. *Id.* at 401-02.

40. 490 P.2d 910 (Alaska 1971).

Alaska Constitution "to have assistance of counsel" was at issue.[41] Quoting the above language from *Baker,* the Alaska Supreme Court went on to define the term in this situation as broadly as it was construed in *Baker,* despite a more narrow interpretation of the sixth amendment by the United States Supreme Court.[42]

While neither case addresses the issue of police deception, both *Baker* and *Alexander* are nonetheless relevant to the question of whether *Moran* will be followed in Alaska. These two cases provide evidence that the Alaska Supreme Court is willing to exert its authority and interpret the Alaska Constitution to provide broader rights to criminal suspects than those provided by the United States Constitution.

In both *Baker* and *Alexander,* the Alaska Supreme Court cited its earlier decision of *Roberts v. State.*[43] In that case, Gordon Roberts was indicted on forgery charges and furnished with court-appointed counsel. In an interview with a United States Secret Service agent and a Fairbanks detective, Roberts was pressured into supplying handwriting samples with threats of a court order and possible contempt of court proceedings. This interview was held without the presence or consent of Roberts' attorney, although the defendant had requested that his counsel be present. The court held that Roberts' article I, section 11, right to counsel was violated, despite the opinion of the United States Supreme Court in *Gilbert v. California.*[44] *Gilbert* held that a pre-indictment gathering of handwriting samples was not a "critical stage" of the prosecution.[45] Thus, the Court concluded that the defendant could assert no sixth amendment right to counsel. In *Roberts,* however, the Alaska Supreme Court proclaimed that "[w]e are not bound in expounding the Alaska Constitution's Declaration of

41. *Id.* at 913.

42. *Id.* at 914-15.

This definition of "criminal prosecution" as it relates to the article I, section 11, right to counsel remains far more generous than an indigent's corresponding sixth amendment right. In Scott v. Illinois, 440 U.S. 367 (1979), the Supreme Court held that "no indigent criminal defendant can be *sentenced* to a term of imprisonment unless the state has afforded him the right to assistance of counsel in his defense." *Id.* at 373-74 (emphasis added). Thus, an indigent defendant apparently has no guaranteed sixth amendment right to counsel even in prosecutions where he faces a prison term: if the defendant is only fined, the sixth amendment is not implicated.

43. 458 P.2d 340 (Alaska 1969).

44. 388 U.S. 263 (1967).

45. *Id.* at 267. The companion case to *Gilbert,* United States v. Wade, 388 U.S. 218 (1967), declared that an accused's sixth amendment right to counsel attaches at any "critical" stage of the criminal proceeding. *Id.* at 224-25. Any stage of the prosecution "where counsel's absence might derogate from the accused's right to a fair trial" is a critical stage. *Id.* at 226.

Rights by decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution."[46] This case again demonstrates the willingness of the Alaska Supreme Court to diverge from federal precedent to create new rights for criminal suspects.

In *Kirby v. Illinois,*[47] a plurality of the United States Supreme Court held that the sixth amendment right to counsel does not apply to pre-trial identification procedures instituted before the initiation of adversary judicial proceedings such as indictment or arraignment.[48] Again, the Alaska Supreme Court was not persuaded by the Supreme Court's conclusion. In *Blue v. State,*[49] the Alaska Supreme Court declared that the result in *Kirby* provided inadequate protection for criminal defendants. The defendant in *Blue* was identified in a lineup held at a nightclub only three hours after an alleged robbery; the police read him his *Miranda* rights but had not charged or even formally arrested him. The Alaska Supreme Court reiterated that it was not "limited by decisions of the United States Supreme Court or by the United States Constitution when interpreting its state constitution."[50] The court concluded that "a suspect who is in custody is entitled to

46. 458 P.2d at 342. The court also stated that it was important to note that since the taking of Gilbert's handwriting examples occurred before indictment and the appointment of counsel, the *Gilbert* case was clearly distinguishable on its facts. *Id.* at 343.

It is also worth noting that both *Roberts* and *Baker* explicitly overruled language in Knusden v. City of Anchorage, 358 P.2d 375 (Alaska 1960), that sought to bind Alaska courts to Supreme Court interpretations of the sixth amendment. This case, if it were still valid law, would have immediately foreclosed any broadening of article I, section 11, to protect defendants such as Burbine. In delineating the scope of Alaska's right to trial by jury, the court in *Knusden* held that "it was not the intent of the Alaska Constitutional Convention, in adopting a portion of the wording of the [s]ixth [a]mendment, to give article I, section 11 any broader application than that portion of the [s]ixth [a]mendment had been given by the United States Supreme Court." *Id.* at 379. In overruling this passage, the court in *Roberts* stated: "Such a holding in *Knusden* is inconsistent with the constitutional grant of judicial power to this court." 458 P.2d at 342. In *Baker,* the court also dismissed as erroneous the conclusion set forth in *Knusden* that proceedings of the Alaska Constitutional Convention mandated such a proposition. Baker v. City of Fairbanks, 471 P.2d 386, 398 (Alaska 1970).

47. 406 U.S. 682 (1972).

48. *Id.* at 689-90. The Supreme Court in *Kirby* refused to extend the exclusionary rule of the companion cases of United States v. Wade, 388 U.S. 218 (1967), and United States v. Gilbert, 388 U.S. 263 (1967). The *Wade-Gilbert* rule holds inadmissible in-court identifications resulting from a post-indictment pre-trial lineup held without notice to and in the absence of the accused's counsel. *Wade,* 388 U.S. at 240.

49. 558 P.2d 636 (Alaska 1977).

50. *Id.* at 641.

have counsel present at a pre-indictment lineup unless exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation."[51]

This case represents a clear divergence from federal precedent on the scope of an accused's right to counsel. While the United States Supreme Court determined that the sixth amendment should not be broadened to apply to a pre-indictment identification procedure, a unanimous Alaska Supreme Court was willing to expand the scope of article I, section 11, to cover such a procedure in order to protect the suspect from possible prejudice and honor his rights to counsel, due process, and confrontation of witnesses. A *Moran*-type defendant in Alaska could thus utilize *Blue* to argue that even though the deception occurred before he was indicted or formally charged with a crime, that fact does not prevent the article I, section 11, right to counsel from attaching. Such a defendant could then argue that in order to protect himself from "prejudicial procedures"[52] the court should find such deceptive police behavior to be violative of his right to counsel under the Alaska Constitution.

A case distinguishing *Blue* and *Roberts,* however, and refusing to invoke article I, section 11, is *Loveless v. State.*[53] Confronting the Alaska Supreme Court in *Loveless* was the question of whether an accused had a right to counsel during a jailhouse psychiatric examination motivated primarily by the concern that the accused was suicidal. The *Loveless* court held admissible the doctor's testimony that the defendant appeared mentally unimpaired during the interview, which was held before the defendant had secured counsel. David Loveless was being prosecuted for first degree murder and had raised an intoxication defense. Loveless argued that conducting the examination without affording him "the opportunity to have an attorney present violated his constitutional right to counsel."[54]

The Alaska Supreme Court responded that *Kirby v. Illinois* precluded his sixth amendment right from attaching at this stage, but that reliance on article I, section 11, was not thereby foreclosed. Nevertheless, Justice Matthews distinguished *Blue* and *Roberts* as extensions of Alaska's right to counsel to protect the accused during "proceedings

51. *Id.* at 642. The court ultimately decided that this case presented such exigent circumstances, however, since creating a right to counsel on these facts would have delayed the identification procedure until the following day, when the victim's memory would not be as fresh as it was only three hours after the incident. *Id.; see also* Benefield v. State, 559 P.2d 91 (Alaska 1977). Benefield, a codefendant of Clifton Blue, argued that his article I, section 11, right to counsel was violated by the same lineup. The court dismissed his claim on the basis of the same exigencies. *Id.* at 94.

52. *Blue,* 558 P.2d at 641 (quoting Kirby v. Illinois, 406 U.S. 682, 691 (1971)).

53. 592 P.2d 1206 (Alaska 1979).

54. *Id.* at 1210.

that are investigatory in nature and which are conducted in an adversary context."[55] The court concluded that this rationale does not apply to pre-indictment physical or psychological examinations primarily concerned with the health of the prisoner and where there was no evidence of an investigatory purpose.[56] This case would not, however, hinder an Alaska court from broadening article I, section 11, to cover a *Moran*-type situation, as Burbine's period of detention in the Cranston police station involved proceedings that were both investigatory and conducted in an adversarial context.[57]

In *Houston v. State,*[58] the Alaska Supreme Court addressed the question of whether a defendant is entitled to the presence of counsel at a mid-trial psychiatric examination. The examination was conducted on behalf of the prosecution pursuant to court order. The court noted that a majority of federal and state cases hold that a defendant at such an examination does not have a right to counsel.[59] However, the court determined that certain precedent of other state courts maintaining that a defendant does have a right to counsel at such proceedings was closer to the "spirit and actual rulings" of the *Roberts* and *Blue* decisions.[60] The *Houston* court concluded that "the

55. *Id.*

56. *Id.*

57. After being apprehended on a burglary charge, Burbine spent approximately four and one-half hours alone in an interrogation room while the Cranston police obtained statements from Burbine's two companions that implicated him in the Hickey homicide. During this period the Cranston police also summoned the Providence police and lied to an attorney seeking to come to the Cranston station to represent Burbine if necessary. 475 U.S. at 446 (Stevens, J., dissenting). At 11:20 p.m., three hours after the public defender was told they were "through" with Burbine, the Providence and Cranston officers were still questioning him. *Id.* at 449. Thus, the conclusion in *Loveless* that the examinations were not conducted for investigatory purposes or in an adversary context would not apply to a *Moran*-type case.

Another case that distinguishes *Blue,* but would not hinder a *Moran*-type defendant in Alaska, is Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979). The *Geber* court held that a suspect does not have the right to be advised that she has the right to have counsel present before being required by police to perform field sobriety tests. *Id.* at 1192. The passage of a few hours would materially alter the suspect's degree of impairment, the court stated, and this passage of time is not as critical in the lineup context present in *Blue. Id.* This need for urgency is not present in the custodial interrogation context either; thus, the state could not rely on this case to limit the application of article I, section 11, in a *Moran*-type case.

58. 602 P.2d 784 (Alaska 1979).

59. *Id.* at 792.

60. *Id.* at 795. The court in *Houston* looked to New York and Oregon case law. In Lee v. County Court, 27 N.Y.2d 432, 439-40, 267 N.E.2d 452, 456, 318 N.Y.S.2d 705, 711, *cert. denied,* 404 U.S. 823 (1971), the New York Court of Appeals held that pre-trial psychiatric examinations were a critical stage of the proceedings. The defendant thus had a right to counsel at such an examination. The *Houston* court also cited Shepard v. Bowe, 250 Or. 288, 442 P.2d 238 (1968), and State v. Corbin, 15 Or. App. 536, 516 P.2d 1314 (1973). *Houston,* 602 P.2d at 794 n.19. Both cases addressed

guarantee of effective assistance of counsel afforded by Alaska's constitution required the presence of [defendant's] attorney throughout the psychiatric interview."[61] Once again, this case demonstrates the willingness of the Alaska Supreme Court to interpret expansively its right to counsel provision to safeguard the rights of a defendant, despite a narrower federal rule. This willingness to define broadly article I, section 11, indicates that the *Moran* Court's application of the sixth amendment may not be followed in Alaska.

More recently, in the 1985 decision of *Resek v. State,*[62] the Alaska Supreme Court reaffirmed that "[t]he right to counsel under the Alaska Constitution is more expansive than the corresponding right under the [s]ixth [a]mendment to the United States Constitution."[63] Despite the United States Supreme Court's decision in *Scott v. Illinois*[64] that the only burden the sixth amendment imposes on state courts is that "no indigent criminal defendant can be sentenced to a term of imprisonment" without being afforded the right to counsel,[65] the Alaska Supreme Court stood by its significantly broader right to appointed counsel articulated in *Alexander v. City of Anchorage.*[66]

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the right to counsel at a psychiatric interview in the context of protecting a suspect's fifth amendment privilege against self-incrimination. Each court held that the defendant had a right to counsel in order fully to protect his privilege. *See Shepard,* 250 Or. at 293, 442 P.2d at 240; *Corbin,* 15 Or. App. at 544, 516 P.2d at 1318.

Although not relevant to the *Houston* case, it is also worth mentioning that Oregon invalidated a suspect's waiver on facts very similar to the *Moran* scenario. State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied,* 446 U.S. 945 (1980). In *Haynes,* after an attorney who had been retained for Charles Haynes by his wife learned the whereabouts of the defendant, the attorney called the station and announced that he was coming to provide Haynes with counsel. Before the attorney arrived, however, the police took Haynes from the station, allegedly to search for the murder victim's remains. The police never informed Haynes that an attorney retained on his behalf was attempting to contact him. *Id.* at 65, 602 P.2d at 274. Although Haynes was read his *Miranda* rights upon his arrest, the Oregon Supreme Court held that when the police do not inform a suspect that retained counsel is seeking to consult with him, any prior waiver is invalid as not being given knowingly and intelligently. *Id.* at 72, 602 P.2d at 278. The *Haynes* Court elaborated that "[t]o pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second." *Id.*

61. 602 P.2d at 795.

62. 706 P.2d 288 (Alaska 1985).

63. *Id.* at 291 n.11.

64. 440 U.S. 367 (1979).

65. *Id.* at 373.

66. 490 P.2d 910, 913-16 (Alaska 1971). *See also supra* note 42. The Alaska Supreme Court ultimately decided in *Resek,* however, that an in rem forfeiture proceeding regarding property used in connection with a violation of Alaska drug laws was not a "criminal prosecution" within article I, section 11. 706 P.2d at 293.

As the above cases indicate, the Alaska Supreme Court clearly has extended the right to counsel provided by article I, section 11, of the Alaska Constitution beyond the guarantees of the sixth amendment. In contrast to what one commentator deemed to be an overly "formalistic" analysis and "out of hand rejection" of Burbine's sixth amendment argument in *Moran,*[67] the Alaska Supreme Court thoroughly considers the concerns of a defendant when examining his article I, section 11, rights.[68] Especially important for a suspect seeking to block the admission of confessions such as Burbine's is *Blue v. State. Blue* demonstrates that the Alaska Supreme Court is willing to invoke the right to counsel in the pre-indictment stage of the prosecution, when the sixth amendment is inapplicable. This is the stage at which the police lied to Burbine's lawyer and succeeded in eliciting his confession. Thus, *Blue* provides strong authority for an Alaska court to reject *Moran* and suppress confessions such as Burbine's under the right to counsel provisions of the Alaska Constitution. *Blue,* taken with the other cases discussed above, demonstrates that the Alaska Supreme Court may perhaps disregard the minimum standards of the sixth amendment to safeguard criminal defendants from prejudicial interrogation.

B. Case Law Indicating That Alaska Will Likely Accept the *Moran* Court's Sixth Amendment Conclusion

Although the above cases indicate a willingness on the part of the Alaska Supreme Court to depart from federal articulation of the guarantees of the sixth amendment, the court has also expressly refused to extend the article I, section 11, right to counsel to custodial interrogations. It was in this context that Burbine alleged his right to counsel

67. *See Leading Cases, supra* note 5, at 100, 132.

68. *See, e.g.,* Houston v. State, 602 P.2d 784, 795 (Alaska 1979) (After discussing *Roberts* and *Blue,* the court noted that the mid-trial psychiatric interview potentially prejudiced the defendant because had counsel been present he might have noticed improprieties that the defendant would not have. Thus effective cross-examination of the examining doctor would thereby have been enhanced by counsel's presence.); Blue v. State, 558 P.2d 636, 641 (Alaska 1977) ("The interests of a suspect in having counsel present involve the constitutional guarantee of right to counsel, the right to due process during the lineup procedures and the right to confront witnesses which insures effective cross-examination."); Roberts v. State, 458 P.2d 340, 343 (Alaska 1969) ("The prejudice to appellant" that arose in obtaining the handwriting samples without the appointment or presence of counsel includes the fact that Roberts' attorney "might have noticed improprieties of which this court is not aware, because the accused, a layman[,] probably frightened by the investigation, may have failed to perceive some improprieties." The court went on to list three more possible concerns for appellant Roberts.).

had been violated.[69] Burbine was in police custody at the Cranston station with the Providence officers questioning the other burglary suspects about his involvement in the Hickey homicide when the public defender was falsely informed that Burbine would not be questioned that evening. The refusal to extend Alaska's right to counsel provision to custodial interrogations indicates that however objectionable it finds the *Moran* result to be, the Alaska Supreme Court will likely not look to article I, section 11, to invalidate a waiver such as Burbine's.

The case refusing to extend article I, section 11, to custodial interrogations, *Eben v. State,*[70] held that neither defendant Vincent Eben's federal nor state right to counsel had attached when he made a phone call to a friend while in custody and was overheard making allegedly self-incriminating statements.[71] Eben was arrested at his parents' apartment shortly after stabbing them to death. While handcuffing Eben, an Officer Haakenson attempted to read the suspect his *Miranda* rights, but before the officer could finish Eben stated that he was aware of his rights. After arriving at the police station at 5:30 a.m., Eben was taken to an interview room where Haakenson fully advised him of his rights. Eben replied he understood each of them, but he refused to sign the *Miranda* rights waiver form. Finally, Eben told the officers that he would sign the waiver after he talked with a friend.

Eben at no time indicated that he was willing to make a statement or answer any questions; however, the officers remained in the interview room while Eben spoke with his friend over the telephone. After

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69. In Eben v. State, 599 P.2d 700, 707 n.18 (Alaska 1979), in which the court refused to extend article I, section 11, to the "custodial interrogation context," the alleged deprivation of the defendant's right to counsel took place after he was arrested but before the commencement of any adversarial judicial proceedings. It was in this same context that the alleged violation of Burbine's right to counsel took place. Burbine had been arrested, but not formally charged with any crime. Moran v. Burbine, 475 U.S. 412, 428 (1986).

70. 599 P.2d 700 (Alaska 1979). In Copelin v. State, 659 P.2d 1206 (Alaska 1983), the Alaska Supreme Court disavowed a portion of the *Eben* case addressing an issue of statutory construction. *Id.* at 1210-11. *Copelin,* however, had no effect on the portion of *Eben* dealing with the applicability of article I, section 11, to the custodial interrogation context, the point for which it is discussed in this note.

At issue in *Copelin* were ALASKA STAT. § 12.25.150(b) and its parallel provision, Alaska Rule of Criminal Procedure 5(b). The statute provides:

> Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with [his] attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner or any relative or friends of the prisoner, have the right to immediately visit the person arrested.

ALASKA STAT. § 12.25.150(b) (1984). The court held that both provisions mandate that an individual arrested for driving while intoxicated who asks to consult a lawyer must be given the opportunity to do so before being required to decide whether to take a breathalyzer test. *Copelin,* 659 P.2d at 1215.

71. *Eben,* 599 P.2d at 707.

the phone call, he refused to sign the waiver. At a pre-trial hearing, Eben's motion for a protective order prohibiting the officers who heard the call from testifying as to potential admissions by the defendant was denied. Eben argued that permitting the officers to testify regarding the contents of the call violated his sixth amendment and article I, section 11, right to counsel. Quoting from *Kirby v. Illinois,* the Alaska Supreme Court dismissed Eben's sixth amendment claim, because no "adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment—had been initiated against him."[72]

Although Eben argued that the officers' testimony violated his sixth amendment right to counsel, the court stressed that his claim was more properly brought under the fifth amendment.[73] In a footnote, the court similarly dismissed defendant's article I, section 11, argument: "We find no convincing reasons for extending the right to counsel guaranteed in article I, section 11 of the Alaska Constitution to the factual context presented here. The *Miranda* protections are specifically tailored to the custodial interrogation context."[74] Quoting from a California Supreme Court case, the court concluded that there were also "compelling policy considerations" against extending Alaska's right to counsel to include this case, such as unduly hampering police investigations.[75]

Just as was the case in *Eben,* the alleged violations of Burbine's right to counsel took place after his arrest and while he was in police custody, but "*before* the initiation of adversary judicial proceedings."[76] The same rationale articulated by Chief Justice Rabinowitz in *Eben* to preclude the extension of article I, section 11, to the "custodial interrogation context" would also seem to preclude a violation of

72. *Id.* at 706 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

73. *Id.* at 705-07.

74. *Id.* at 707 n.18.

75. *Id.* (quoting People v. Wong, 18 Cal. 3d 178, 187, 555 P.2d 297, 301, 133 Cal. Rptr. 511, 515 (1976)). California, however, has since decided that curtailing the type of police deception exhibited in *Moran* is an acceptable hindrance on police investigations. The California Supreme Court rejected *Moran* for the purposes of interpreting the California Constitution. People v. Houston, 2 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986). *See supra* note 6.

Also, the court in *Eben* was not deterred by the Alaska Supreme Court's expansive holding in Blue v. State, 558 P.2d 636 (Alaska 1977), which was cited as a comparison case after People v. Wong, 18 Cal. 3d 178, 555 P.2d 297, 133 Cal. Rptr. 511 (1976), and a Maine case, State v. Stone, 397 A.2d 989, 996-97 (Me. 1979), which was also concerned with the scope of a defendant's right to counsel. *Eben,* 599 P.2d at 707 n.18.

76. Moran v. Burbine, 475 U.S. 412, 428 (1986) (quoting United States v. Gouveia, 467 U.S. 180, 192 (1984)).

a *Moran*-type defendant's right to counsel under the Alaska Constitution.[77]

In *Moran,* Burbine sought to salvage his sixth amendment claim by arguing that the right to counsel should be broadened to include a "right to non-interference with an attorney's dealings with a criminal suspect. . . ."[78] This right would accrue "[from] the moment the relationship is formed, or, at the very least, once the defendant is placed in custodial interrogation."[79] The Court rejected this contention as both "practically and theoretically unsound."[80] The Court felt it was practically unsound because this sixth amendment right should not attach at "different times depending on the fortuity" of when counsel is retained; it was theoretically unsound because the express language of the amendment limits its applicability to "criminal prosecutions."[81] Thus, the government's role must shift from investigation to accusation to trigger the amendment.[82]

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77. *See Eben,* 599 P.2d at 707 n.18. Other cases narrowly construing Alaska's right to counsel are Merrill v. State, 423 P.2d 686 (Alaska), *cert. denied,* 316 U.S. 1040 (1967), and Svedlund v. Municipality of Anchorage, 671 P.2d 378 (Alaska Ct. App. 1983). In *Merrill,* a preliminary hearing at which witnesses identified the defendants was held before counsel was appointed for them. The defendants argued that this procedure violated their sixth amendment and article I, section 11, rights to counsel. Noting that under federal law the sixth amendment attaches only at preliminary hearings that constitute a "critical stage" of the proceeding, the court adopted this approach for Alaska's constitution. *Merrill,* 423 P.2d at 690. The court held that the above hearing was not a critical stage, as the defendants could not be called upon to plead and in fact had made no statement. *Id.* at 691.

In *Svedlund,* the court concluded that "the breathalyzer exam is not a 'critical stage' at which the constitution requires counsel's presence." 671 P.2d at 382. Although the court cited Blue v. State, 558 P.2d 636 (Alaska 1977), it is not clear whether it was construing article I, section 11, the sixth amendment, or both. Regardless, the court held that a suspect has no right to contact an attorney prior to deciding whether to submit to a breathalyzer test. Both cases thus represent instances in which the courts of Alaska did not expand the article I, section 11, right to counsel to protect a suspect from possible prejudice. The cases therefore indicate that Alaska courts might accept the *Moran* Court's sixth amendment analysis.

78. 475 U.S. at 429.

79. *Id.*

80. *Id.* The Court also dismissed Burbine's argument as a matter of precedent. Burbine supported his "right to non-interference" by raising a *Miranda* footnote which states: "The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the [s]ixth [a]mendment right to the assistance of counsel and excludes any statement obtained in its wake." Miranda v. Arizona, 384 U.S. 436, 465-66 n.35 (1966). Justice O'Connor, however, proclaimed that subsequent decisions precluded the reliance on *Miranda* for articulating any sixth amendment right to counsel attaching prior to the initiation of adversary judicial proceedings. *Moran,* 475 U.S. at 429-30.

81. *Id.* at 430.

82. *Id.*

The Court also faulted Burbine for relying on precedent that has come to be viewed as articulating the fifth and not sixth amendment right to counsel.[83] The latter right to counsel is explicitly guaranteed by the sixth amendment, which declares that the accused has the right to the assistance of counsel for his defense in all criminal prosecutions. The fifth amendment privilege against self-incrimination, as interpreted in *Miranda,* also provides for a right to counsel in the custodial interrogation context in order to protect fully this privilege. Chief Justice Rabinowitz similarly faulted Eben for relying on fifth amendment precedent when claiming a violation of his sixth amendment rights, and he stated that Alaska cases have recognized this distinction.[84] Thus, by refusing to extend article I, section 11, into the custodial interrogation context, *Eben* implicitly rejects Burbine's argument that the sixth amendment should be extended.

Although Alaska has broadened its right to counsel to extend beyond the reaches of the sixth amendment, none of these extensions of article I, section 11, were in the context of police deception of a detained suspect's attorney. In *Baker v. City of Fairbanks* and *Alexander v. City of Anchorage,* the Alaska Supreme Court defined "criminal prosecution" in article I, section 11, more broadly than the United States Supreme Court has defined that term in the sixth amendment context,[85] but that broader definition would not directly assist a defendant such as Burbine. Alaska's definition of "criminal prosecution" as presented by *Baker* and *Alexander* enlarged an individual's right to a jury trial and an indigent's right to appointed counsel,[86] but does not call for an earlier attachment of the latter right in a criminal proceeding. *Blue,* on the other hand, clearly does call for earlier attachment of the right to counsel, and the concern for protecting the accused in an adversary context expressed in that case and *Roberts* probably would apply to a defendant such as Burbine. However, in accordance with federal precedent, the *Eben* opinion declares that it is the privilege against self-incrimination that should be invoked to protect the accused during the custodial interrogation context.[87] It thus appears that if a case similar to *Moran v. Burbine* were to arise in Alaska, article I, section 11, could not be relied upon by the defendant to suppress his confession.

83. *Id.* at 429-30.
84. Eben v. State, 599 P.2d 700, 707 n.18 (Alaska 1979).
85. *See supra* notes 36-42 and accompanying text.
86. *Id.*
87. 599 P.2d at 707.

IV. ANALYSIS OF *MORAN V. BURBINE* UNDER THE ALASKA CONSTITUTION'S PRIVILEGE AGAINST SELF-INCRIMINATION

After examining cases that interpret restrictively the scope of the *Miranda* guarantees and a case that permits police deception of a suspect, this Section first recognizes that Alaska courts might accept the *Moran* Court's fifth amendment analysis. However, after more thoroughly examining the Alaska court's construction of the article I, section 9, privilege against self-incrimination, this Section ultimately concludes that due to an expansive interpretation of the privilege, the Alaska courts will likely reject the *Moran* Court's fifth amendment conclusion.

A. Case Law Indicating That Alaska Will Likely Accept the *Moran* Court's Fifth Amendment Conclusion

The fifth amendment to the United States Constitution provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself."[88] Similarly, the second clause of article I, section 9, of the Alaska Constitution provides: "No person shall be compelled in any criminal proceeding to be a witness against himself."[89] Although Alaska courts have repeatedly confronted the issue of whether a suspect has properly waived his *Miranda* rights, their treatment of this issue has been balanced and has not demonstrated a clear predilection either to uphold or strike down a suspect's alleged waiver.[90] In accordance with federal precedent, the Alaska Supreme Court has stated that to uphold a suspect's waiver of his *Miranda* rights the state must carry a heavy burden in demonstrating

88. U.S. CONST. amend. V.

89. ALASKA CONST. art. I, § 9. Use of the word "proceeding" in the Alaska provision, potentially a broader term than "case," has not been construed more broadly by the courts.

90. *See, e.g.,* Hampton v. State, 569 P.2d 138, 144 (Alaska 1977) (although acknowledging that a suspect could be intoxicated enough to be incapable of properly waiving his *Miranda* rights, the court held that a close examination of the record indicates an adequate evidentiary basis to uphold the lower court's conclusion that the defendant possessed the requisite mental capacity); Hampel v. State, 706 P.2d 1173, 1182 (Alaska Ct. App. 1985) (in which defendant made an ambiguous request for counsel, and trooper, instead of inquiring into defendant's intention, attempted to elicit a statement from defendant, the court held that the state did not meet its " 'heavy burden' of showing that Hampel made a knowing and intelligent waiver of his right to have counsel present during questioning"); Williamson v. State, 692 P.2d 965, 968 n.1 (Alaska Ct. App. 1984) (in which defendant suggested "he might need an attorney" while turning himself in for murder, but after being read his *Miranda* rights, signed a written waiver, the court determined "given the totality of the circumstances, Williamson knowingly, intelligently and voluntarily waived his *Miranda* rights.").

that such waiver was voluntary, knowing, and intelligently given by examining the totality of the circumstances.[91]

Addressing Burbine's fifth amendment claim, the Supreme Court stated that the voluntariness of Burbine's waiver was not at issue and that the facts demonstrated he acted knowingly and intelligently.[92] The Court declared that once it is determined that a suspect understood his rights and the state's intention of using his statements to gain a conviction, the waiver is conclusively valid as a matter of law as long as the suspect's decision to forego his rights was uncoerced.[93] Justice O'Connor dismissed the belief of the United States Court of Appeals for the First Circuit that the conduct of the Cranston police invalidated the waiver by highlighting the fact that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[94] As discussed earlier in this note, the *Moran* Court, by narrowly reading *Miranda* and focusing on practical concerns and society's interest in obtaining confessions,[95] rejected Burbine's argument that sanctioning behavior like that exhibited by the Cranston police was repugnant to fifth amendment values.

Several Alaska cases indicate possible agreement with the Supreme Court's disposal of Burbine's arguments. In *Nicholi v. State,*[96] decided only three years after *Miranda,* the Alaska Supreme Court upheld the admissibility of incriminating statements made by the suspect at a coroner's inquest and police interview. In reaching this decision, the Alaska Supreme Court quoted a two page excerpt from *State v. McKnight,*[97] a New Jersey Supreme Court case that similarly upheld the admissibility of statements made by a defendant.

In both cases the defendants argued that they did not fully comprehend their rights. The New Jersey Supreme Court offered an exceedingly narrow interpretation of *Miranda.* In the part of the opinion quoted in *Nicholi,* the New Jersey court wrote that it would be "thoughtless" to transfer the same right to counsel that exists at the trial stage "to the detectional scene," as that would thwart the state's effort to convict the guilty.[98] "It is consonant with good morals, and the Constitution, to exploit a criminal's ignorance or stupidity in the

91. Stephan v. State, 711 P.2d 1156, 1160-61 (Alaska 1985); Hampton v. State, 569 P.2d 138, 141 n.6 (Alaska 1977).

92. Moran v. Burbine, 475 U.S. 412, 421-24 (1986).

93. *Id.* at 422-23.

94. *Id.* at 422.

95. *Id.* at 424-28. *See supra* notes 17-19 and accompanying text.

96. 451 P.2d 351 (Alaska 1969).

97. 52 N.J. 35, 52-55, 243 A.2d 240, 250-52 (1968).

98. *Id.* at 52-53, 243 A.2d at 250.

detectional process," stated the court.[99] This focus on the benefits of granting the state broad investigatory powers without stressing the need to afford criminal suspects a broad right to procedural fairness strongly resembles the Supreme Court's concern in *Moran* not to infringe upon society's "legitimate and substantial interest in securing admissions of guilt."[100]

The New Jersey court also declared that the focus of *Miranda,* "was upon the right not to be 'compelled' to incriminate one's self and upon nothing else."[101] In dismissing Burbine's claim that the Cranston police's behavior was so inimical to the values *Miranda* sought to protect that it violated his fifth amendment rights, Justice O'Connor similarly stated that "[t]he purpose of the *Miranda* warnings . . . is to dissipate the compulsion inherent in custodial interrogation . . . ."[102] The *Nicholi* court also appears to agree with the *Moran* Court's belief that once it is shown the suspect's waiver was voluntary and that he understood his rights, the waiver analysis is concluded. Quoted from *McKnight* is the statement that if these waiver criteria are met, the fact that the defendant "could well have used a lawyer" is irrelevant.[103] Although the facts of the *Nicholi* case did not involve any police deception, the Alaska Supreme Court expressed agreement with a view of *Miranda* that resembles the *Moran* Court's restrictive interpretation of that case.

In *Sovalik v. State,*[104] the Alaska Supreme Court also demonstrated a possible willingness to accept *Moran,* as it upheld the admissibility of a suspect's statements despite purposeful police deception of that suspect. In the course of a murder investigation Alaska police officers interviewed thirty persons.[105] Because these interviews proved fruitless, a second round of interrogation was scheduled, beginning with those living closest to the area where the bodies were discovered.[106] During the course of questioning suspect Thomas Sovalik, one officer took a sample fingerprint from a bulletin board and fraudulently told him that it was taken from one of the victim's water bottles and that it belonged to the suspect.[107] Sovalik responded that all he

99. *Id.* at 53, 243 A.2d at 250-51.
100. Moran v. Burbine, 475 U.S. 412, 427 (1986).
101. *McKnight,* 52 N.J. at 54, 243 A.2d at 250.
102. *Moran,* 475 U.S. at 425.
103. Nicholi v. State, 451 P.2d 351, 356 (Alaska 1969) (quoting *McKnight,* 52 N.J. at 55, 243 A.2d at 251).
104. 612 P.2d 1003 (Alaska 1980).
105. *Id.* at 1004.
106. *Id.*
107. *Id.* at 1005.

took from the campsite where the bodies were found was a flashlight.[108]

This admission led to a search of Sovalik's residence and ultimately his being charged with murder. The Alaska Supreme Court held that such deception was not coercive and did not tend to produce an untruthful confession and thus could not block the admission into evidence of his statements.[109] Although this decision was in accord with federal precedent,[110] the Alaska Supreme Court's conclusory disposal of the issue indicates an apparent lack of interest in independently addressing the problem of police deception of a suspect in order to obtain a confession.

In *Ladd v. State,*[111] the Alaska Supreme Court demonstrated a willingness to construe narrowly the breadth of the *Miranda* guarantees by taking a restrictive stance on a fifth amendment issue. The *Ladd* court stated: "We recognize that courts are not in agreement as to whether a defendant validly waives his *Miranda* rights where he asks to see an attorney but when faced with incriminating evidence or renewed interrogation by the police makes a confession."[112] Confronting this issue in *Ladd,* the supreme court rejected a California rule mandating that any confession elicited in any fashion by the police after the suspect requests an attorney is inadmissible under *Miranda.*[113] In deciding to reject such a sweeping rule and instead "carefully scrutinize the particular facts" of each case, the court declared that the California position "circumscribes too narrowly the permissible scope of interrogations."[114] When the United States Supreme Court subsequently addressed the issue in *Edwards v. Arizona,*[115] however, it felt otherwise, and adopted the more protective rule that had been promulgated in California.[116]

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108. *Id.*

109. *Id.* at 1007.

110. *Id.* at 1007 n.4.

111. 568 P.2d 960 (Alaska 1977), *cert. denied,* 435 U.S. 928 (1978).

112. *Id.* at 966 n.8.

113. *Id.* Cases illustrating the California position include People v. Enriquez, 19 Cal. 3d 221, 238, 561 P.2d 261, 272, 137 Cal. Rptr. 171, 182 (1977) ("We conclude that just as *Miranda* prohibits continued police interrogation into the substantive crime after a clear indication that a suspect wants an attorney present, it also prohibits continued police efforts to extract from a suspect a waiver of his rights to have an attorney present after a clear indication that the suspect desires such an attorney."); People v. Randall, 1 Cal. 3d 948, 958, 464 P.2d 114, 120, 83 Cal. Rptr. 658, 664 (1970) ("After the initial assertion of the privilege, the defendant is entitled to be free of police-initiated attempts to interrogate him.").

114. 568 P.2d at 966 n.8.

115. 451 U.S. 477 (1981).

116. *Id.* at 484. In a subsequent case, the Alaska Supreme Court acknowledged that "[t]he high court's holding in *Edwards* requires us to alter our previously stated position" articulated in *Ladd.* Giacomazzi v. State, 633 P.2d 218, 221 n.3 (Alaska

Ladd, like the other cases mentioned above, is far from dispositive on the issue of whether the *Moran* court's construction of the fifth amendment privilege against self-incrimination will be accepted in Alaska. These cases do, however, represent instances of the Alaska court's narrowly construing the *Miranda* guarantees, and favoring the interests of the state in the interrogation process. A narrow interpretation of *Miranda* and favoring the interests of the state in the interrogation process both played a strong role in the Supreme Court's upholding of Burbine's waiver.[117] Thus, these cases do point toward a possible acceptance of the *Moran* Court's fifth amendment holding.

B. Case Law Indicating That Alaska Will Likely Reject the *Moran* Court's Fifth Amendment Conclusion

A broader look at the Alaska cases that have applied the article I, section 9, privilege against self-incrimination reveals that the Alaska Supreme Court has, in fact, favored an expansive reading of that provision. This expansive reading in turn reveals a stronger concern for the rights of criminal suspects than demonstrated in *Moran.* In an *Alaska Law Review* article examining in part "the level of immunity necessary to compel testimony over the invocation of the privilege against self-incrimination,"[118] the authors concluded that it was "the

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1981). The court in *Giacomazzi* also indicated that if a suspect makes an equivocal request for counsel, police may seek to clarify the suspect's desires. *Id.* at 222. In Hampel v. State, 706 P.2d 1173, 1180 (Alaska Ct. App. 1985), this rule was affirmed despite a split of authority on whether this type of inquiry is appropriate. The court in *Hampel* acknowledged that several states hold that regardless of the ambiguity of the subject's request for counsel, after such a request, all questioning must cease. *Id.*

After the Supreme Court's ruling in *Edwards,* Ladd commenced a proceeding for post-conviction relief pursuant to Alaska Rules of Criminal Procedure 35(c)(1) and (7); he argued that *Edwards* should be applied retroactively to his case. Ladd v. State, 664 P.2d 178 (Alaska Ct. App. 1983). After examining "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards," the court decided not to apply *Edwards* retroactively and denied Ladd's petition. *Id.* at 180-81 (quoting Stovall v. Denno, 388 U.S. 293, 297 (1967)).

117. *See* Moran v. Burbine, 475 U.S. 412, 424-28 (1986). *See also* Note, *Decline of Defense Counsel's "Vital" Role, supra* note 5, at 286 (the Court's conclusion in *Moran* "was based on the premise that society's interest in utilizing interrogation to secure confessions outweighs its interest in the protection of individual liberties"); Note, *Waiver of Fifth Amendment Rights, supra* note 5, at 421 (the *Moran* decision "evidences the court's insensitivity to the fundamental protections guaranteed a suspect through the *Miranda* decision"); *Leading Cases, supra* note 5, at 131 ("The court's narrow construction of the fifth amendment's knowledge requirement for waivers incorrectly employed a restrictive application of *Miranda* rather than a broader inquiry into the deprivation caused by interference with an attorney's access to her client.").

118. Feldman & Ollanik, *Compelling Testimony in Alaska: The Coming Rejection of Use and Derivative Use Immunity,* 3 ALASKA L. REV. 229, 242 (1986).

Alaska Supreme Court's view that the privilege . . . ought to be interpreted broadly."[119] The article also cites a list of cases that demonstrate the propensity of the Alaska Supreme Court to interpret the Alaska Constitution more broadly than the United States Supreme Court has construed corresponding provisions of the federal Constitution.[120] This tendency to construe expansively Alaska's privilege against self-incrimination in order to protect a suspect from prejudice indicates that Alaska will likely reject the *Moran* Court's construction of the fifth amendment and define article I, section 9, to invalidate a waiver such as Burbine's.

In *Scott v. State,*[121] the Alaska Supreme Court interpreted Alaska's privilege against self-incrimination more broadly than the United States Supreme Court construed the fifth amendment in *Williams v. Florida,*[122] which upheld a Florida statute calling for mandatory disclosure by the defendant of the names and addresses of his alibi witnesses. The Supreme Court ruled in *Williams* that the pretrial release of such information merely accelerated the timing of its disclosure and did not implicate the fifth amendment. In *Scott,* the Alaska Supreme Court felt that the United States Supreme Court's timing rationale violated the integrity of the fifth amendment.[123] Alaska's constitutional privilege against compelled self-incrimination forbids extreme pretrial prosecutorial discovery in criminal proceedings, the court concluded. The court also noted that "the fundamental

119. *Id.* at 255. Cited and discussed by the authors for this proposition are, among others, McCracken v. Corey, 612 P.2d 990, 998 (Alaska 1980) (parolee was subjected to a revocation hearing followed by a criminal trial; the Alaska Supreme Court, exercising its "inherent supervisory powers" over Alaska courts, held that "where a parolee is faced with both revocation and a criminal trial based on the same conduct, upon timely objection any evidence or testimony presented by the parolee at a revocation hearing is inadmissible by the state in subsequent criminal proceedings."); Surina v. Buckalew, 629 P.2d 969, 979 (Alaska 1981) (appellant Surina refused to testify for the state in a robbery trial after the state district attorney and United States District Attorney promised immunity; the court held that as a matter of state law, "the prosecutors in the instant case had the inherent authority, even in the absence of enabling legislation, to grant immunity and to use that grant to compel testimony which would otherwise be protected by the privilege against self-incrimination.").

120. Feldman & Ollanik, *supra* note 118, at 254 n.138. Listed are several cases in the criminal procedure area noting the stricter standards imposed by the Alaska Constitution on warrantless inspections and investigative stops by police officers. *Id. See* Woods & Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977) (warrantless administrative inspections); Coleman v. State, 553 P.2d 40 (Alaska 1976) (investigative stops).

121. 519 P.2d 774 (Alaska 1974).

122. 399 U.S. 78 (1970).

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

right not to incriminate one's self should apply at every stage of criminal inquiry or proceedings regardless of judge-made exclusionary or evidentiary rules."[124]

In support of its departure from Supreme Court fifth amendment analysis, the Alaska Supreme Court looked to *Baker v. City of Fairbanks.*[125] Citing *Baker,* the court declared that "the appropriate constitutional analysis is not the mere balancing of the state's interests in facilitating efficient law enforcement with the interest of the citizenry in maintaining maximum liberty."[126] An individual's rights vested by the Constitution must be given primacy. Quoted from *Baker* was language stating that any governmental interest in expediency must be of a compelling nature.[127] "To allow expediency to be the basic principle," the court stated, "would place the individual's constitutional right in a secondary position, to be effectuated only if it accorded with expediency."[128]

Similarly, strong concern for the rights of the individual suspect during criminal investigations was clearly expressed in Justice Stevens' dissent in *Moran.* Stevens declared that the majority's "balancing approach" that favored society's interest in securing admissions over the individual's benefit of being informed that an attorney was trying to reach him was "profoundly misguided."[129] "[I]t is the fear that an individual may exercise his rights [to silence and counsel]," proclaimed the dissenters, "that tips the scales of justice for the Court today."[130] The similarity in focus between the *Moran* dissent and Alaska case law further indicates that Alaska will reject Justice O'Connor's fifth amendment holding.

The Alaska Supreme Court recently reaffirmed its commitment to interpreting broadly a suspect's privilege against self-incrimination in *Resek v. State.*[131] Although the court held that an in rem forfeiture proceeding was not a "criminal proceeding" within the purview of article I, section 11, it declared that when such a proceeding precedes a criminal prosecution, "significant self-incrimination problems arise."[132] To illustrate two of those problems, the court looked to an earlier Alaska case, *McCracken v. Corey,*[133] which confronted the similar problem of holding a parole revocation hearing prior to a criminal

124. *Id.* at 786.
125. 471 P.2d 386 (Alaska 1970). *See supra* notes 36-39 and accompanying text.
126. *Scott,* 519 P.2d at 784 (citing *Baker,* 471 P.2d at 394).
127. *Id.* at 784 n.43.
128. *Id.* (quoting *Baker,* 471 P.2d at 394).
129. Moran v. Burbine, 475 U.S. 412, 457 (1986) (Stevens, J., dissenting).
130. *Id.* at 459.
131. 706 P.2d 288 (Alaska 1985). *See supra* note 62 and accompanying text.
132. *Id.* at 293.
133. 612 P.2d 990 (Alaska 1980).

trial. First, noted the court the state could use the lower standard of proof present in the revocation hearing to gain evidence for the criminal trial, thereby alleviating the burden on the prosecution to prove the defendant's guilt.[134] "Second, forcing a parolee or probationer to choose between his right to remain silent and his opportunity to be heard, while possibly not rising to the level of 'compulsion' prohibited by the fifth amendment, poses an unfair dilemma which 'runs counter to our historic aversion to cruelty reflected in the privilege against self-incrimination.' "[135]

Finding these self-incrimination problems to be even greater in the context of a forfeiture proceeding than in a parole revocation hearing, the Alaska Supreme Court held that absent exigent circumstances trial courts should stay such a proceeding until the conclusion of the criminal trial. Once again, this emphasis on the protection of the suspect's right not to incriminate himself runs counter to the majority's approach in *Moran,* which instead stressed the benefit of securing admissions of guilt from the defendant.[136]

Overriding concern for the rights of a defendant also manifested itself in *Stephan v. State,*[137] in which the Alaska Supreme Court went beyond federal due process requirements and held that custodial interrogations, which were given in a place of detention, including the reading of *Miranda* rights, must be electronically recorded.[138] Despite the fact that the court based this ruling solely on the Alaska Constitution's due process clause, the court also stated that recording was essential to the adequate protection of the accused's privilege against self-incrimination.[139]

Although the Alaska Supreme Court's interpretations of the privilege against self-incrimination do not positively delineate how they would respond to the factual setting presented in *Moran,* the cases canvassed above indicate a tendency to construe very broadly the privilege against self-incrimination. In rejecting Burbine's contention that he should have been told that counsel was trying to reach him, the Supreme Court focused on society's interest in securing convictions.[140] The Court defended its reading of *Miranda* by reiterating "[o]ne of

134. *Resek,* 706 P.2d at 293-94.

135. *Id.* at 294 (quoting McCracken v. Corey, 612 P.2d at 995).

136. 475 U.S. at 427. *See supra* note 117.

137. 711 P.2d 1156 (Alaska 1985).

138. *Id.* at 1162. The police argued this rule would have a "chilling effect on a suspect's willingness to talk." *Id.* Given the accused's *Miranda* right to silence, however, and the necessity of giving him that warning prior to any custodial interrogation, the court found the argument not to be persuasive. *Id.*

139. *Id.* at 1159-60. The court also stated such recording was necessary to protect the accused's rights to counsel and a fair trial.

140. *Moran,* 475 U.S. at 427.

[its] principle advantages . . . is the ease and clarity of its application."[141] As indicated above, the Alaska Supreme Court has instead focused on the criminal justice system's great interest in guarding the rights of the accused. "[W]e are not prepared to exchange a fundamental constitutional right for expediency," proclaimed the Alaska Supreme Court in *Scott v. State.*[142] This emphasis supports the conclusion that in interpreting article I, section 9, Alaska courts will reject *Moran* and hold that police deception, such as that exhibited by the Cranston police, vitiates any otherwise knowing and intelligent waiver on the part of a suspect. Thus, the admission into evidence of a confession such as Burbine's would violate a suspect's privilege against self-incrimination guaranteed by the Alaska Constitution.

V. ANALYSIS OF *MORAN V. BURBINE* UNDER THE DUE PROCESS CLAUSE OF THE ALASKA CONSTITUTION

Article I, section 7, of the Alaska Constitution mimics the language of the due process clauses of the United States Constitution in providing that "[n]o person shall be deprived of life, liberty, or property, without due process of law."[143] The interpretation and application of the due process clause by the Alaska courts indicate that behavior such as that of the Cranston police would violate this provision.

The *Moran* Court summarily concluded that "on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States."[144] The Court did acknowledge, however, that on facts "more egregious than those presented" in *Moran,* police deception might rise to the level of a due process violation.[145] The *Moran* Court's terse treatment of Burbine's due process argument contrasts with Alaska's more generous construction of article I, section 7, leading to the conclusion that Justice O'Connor's reasoning would not be accepted in Alaska.

Criticizing the Court for devoting just "five sentences to its conclusion that the police interference in the attorney's representation of

141. *Id.* at 425 (quoting Berkemer v. McCarty, 468 U.S. 420, 430 (1984)).

142. 519 P.2d 774, 787 (Alaska 1974).

143. ALASKA CONST. art. I, § 7. The fifth amendment to the United State Constitution provides in relevant part: no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Similarly, the fourteenth amendment states in relevant part: "nor shall any state deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

144. 475 U.S. at 433-34.

145. *Id.* at 432.

Burbine did not violate the due process clause," Justice Stevens challenged the majority's simplistic "shock the conscience" test.[146] Emerging from a more thoughtful consideration of the Supreme Court's due process clause case law, stated the dissenters, is "the principle that due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections."[147] Justice Stevens concluded, therefore, that "[p]olice interference with communications between an attorney and his client violates the due process requirement of fundamental fairness."[148]

The Alaska courts' articulations of the requirements of article I, section 7, more closely resemble the language and approach of the *Moran* dissent than the majority opinion. In *Shagloak v. State,*[149] for example, the Alaska Supreme Court broadened the reach of Alaska's due process clause beyond the United States Supreme Court's interpretation of the fourteenth amendment by holding that a more severe sentence than was originally imposed on a defendant may not be imposed on retrial. The court declared that article I, section 7, demands a "fundamental standard of procedural fairness."[150] This language closely parallels "the requirement of fundamental fairness," articulated by Justice Stevens.[151] In *Shagloak,* the Alaska Supreme Court reasoned that exposing a defendant to greater liability on retrial violated article I, section 7's mandate of procedural fairness as it forced "a defendant to barter with freedom for the opportunity of exercising it."[152]

Stephan v. State[153] recently reaffirmed the Alaska Supreme Court's willingness to expand the reach of article I, section 7, beyond minimum federal due process standards. As previously mentioned, *Stephan* demands the electronic recording of custodial interrogation in

146. *Id.* at 466 (Stevens, J., dissenting).

147. *Id.* at 467. Cited by Justice Stevens for this proposition are, among others, Wainright v. Greenfield, 474 U.S. 284, 295 (1986) (a suspect's silence after having been given his *Miranda* warnings may not be used against him, as this would violate the principle that " 'silence will carry no penalty' "), and Brady v. Maryland, 373 U.S. 83, 87 (1963) (evidence favorable to the accused and material to his guilt or innocence may not be suppressed by the prosecution consistent with the due process clause).

148. *Moran,* 475 U.S. at 468 (Stevens, J., dissenting).

149. 597 P.2d 142 (Alaska 1979). The federal rule rejected by the court allowed a more severe sentence to be imposed at a new trial if such new sentence was based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 144 (quoting North Carolina v. Pearce, 395 U.S. 711, 726 (1969)).

150. *Id.* at 145 (citation omitted).

151. 475 U.S. at 466 (Stevens, J., dissenting).

152. 597 P.2d at 145.

153. 711 P.2d 1156 (Alaska 1985).

a place of detention.[154] In basing its holding entirely on article I, section 7, the supreme court stressed that this requirement was necessary to protect an accused from "an infringement upon his right to remain silent and to have counsel present during the interrogation."[155] The court also noted that the concept of due process must continually evolve to keep pace with new technological developments.[156] By defining article I, section 7, in a fashion similar to the *Moran* dissent and expanding the scope of that provision beyond the reach of the fourteenth amendment's due process clause, both *Stephan* and *Shagloak* indicate that Alaska will not accept the position of the *Moran* Court.[157]

In the 1987 case of *Folsom v. State,*[158] Chief Judge Bryner of the Alaska Court of Appeals articulated two standards for police conduct that would appear to hold the deception of Burbine's attorney violative of Alaska's due process guarantee. Folsom was arrested after procuring heroin for two undercover police officers posing as users. He argued that the behavior of these policemen amounted to entrapment and violated his article I, section 7, right to due process. The court declared that under Alaska law a test for determining whether the police's conduct constituted entrapment is "whether the state's conduct falls below an *acceptable standard for the fair and honorable administration of justice.*"[159] Another appropriate inquiry in evaluating an entrapment charge is the extent to which "police conduct violates notions of *fundamental fairness* and is causally related to the offense

154. *See supra* notes 137-39 and accompanying text. It is important to note that this case alone would force a reversal of *Moran* and hold Burbine's statements inadmissable. Burbine was interrogated in a place of detention and his confession was not electronically recorded. *See supra* Section II.

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

156. *Id.*

157. The Alaska Constitution's due process clause also provides more generous protection for defendants than the fourteenth amendment by requiring "the state and the municipality to take reasonable steps . . . to preserve [a defendant's] breath sample . . . or to provide some other alternative check of the breathalyzer results." Anchorage v. Serrano, 649 P.2d 256, 259 (Alaska Ct. App. 1982). *Serrano* emphasized that the ability of a defendant to "cross-examine these tests is critical to his case and to the integrity of the criminal justice system." *Id.* In Best v. Anchorage, 712 P.2d 892, 894 (Alaska Ct. App. 1985), the Alaska Court of Appeals stood by its decision in *Serrano* despite an intervening United State Supreme Court opinion holding that the fourteenth amendment does not require the preservation of breath samples. California v. Trombetta, 467 U.S. 479 (1984). The Supreme Court concluded that such evidence did not meet the test of constitutional materiality. *Id.* at 488-89.

158. 734 P.2d 1015 (Alaska Ct. App. 1987).

159. *Id.* at 1017 (emphasis added) (quoting Pascu v. State, 577 P.2d 1064, 1067 (Alaska 1978)).

by the accused."[160] Although the court held that Folsom was not entrapped, it concluded that aside from the causality inquiry, these entrapment standards also serve as proper tests for whether a due process violation occurred.[161] Thus, for an Alaska court deciding a *Moran*-type case, a proper inquiry would be whether the behavior of the police meets these requirements. It appears beyond question that purposeful deception of a suspect's attorney both "falls below an acceptable standard for the fair and honorable administration of justice"[162] and "violates notions of fundamental fairness."[163]

Although none of the above cases directly addresses the factual scenario presented in *Moran,* their articulation of what standards police conduct must meet in order to satisfy the due process requirement of article I, section 7, goes beyond the relatively weak "shock the conscience" test employed by the *Moran* Court.[164] Language such as "fair and honorable administration of justice"[165] invites a certain degree of judicial subjectivity, and thus it is never *completely* clear what sort of police deception is constitutionally tolerable and what is not. The Alaska Supreme Court, however, with its willingness to go beyond federal due process standards in order to protect the interests of the accused, probably would not sanction the deceitful conduct of the Cranston police.[166]

VI. CONCLUSION

This note has concluded that the courts of Alaska would not uphold a *Miranda* waiver such as Burbine's in the face of similar police deception. Although article I, section 11, of the Alaska Constitution is unlikely to be stretched to protect defendants such as Burbine, the admission of a *Moran*-type defendant's confession would be found by the courts of Alaska to be violative of the privilege against self-incrimination guaranteed by article I, section 9, and right to due process of law guaranteed by article I, section 7. Given the Alaska Supreme Court's willingness to afford greater protection to criminal suspects by

160. *Id.* at 1018 (emphasis added).

161. *Id.* Thus, the court also concluded that "our finding that the challenged police conduct did not amount to entrapment is *a fortiori* dispositive of Folsom's separate due process argument." *Id.*

162. *See supra* note 159 and accompanying text.

163. *See supra* note 160 and accompanying text.

164. Moran v. Burbine, 475 U.S. 412, 466 (1986) (Stevens, J., dissenting).

165. *See supra* note 159 and accompanying text.

166. Finally, it is important to note that a barrier to the United States Supreme Court's finding a fourteenth amendment due process violation in *Moran* was its unwillingness to "intru[de] into the criminal process of the States." 475 U.S. at 434. Obviously, there would be no such constraint on an Alaska court assessing whether similar police conduct violated article I, section 7.

interpreting the Alaska Constitution more broadly than the United States Supreme Court has interpreted the federal Constitution, it appears unlikely that the court would tolerate the police deception exhibited in *Moran.*

Should a *Moran*-type case arise in Alaska the state would certainly argue that *Eben v. State* prevents an extension of Alaska's article I, section 11, right to counsel to protect the defendant. Regarding an alleged violation of the defendant's privilege argument against self-incrimination, the state would note the case law described in Section IV of this note that narrowly construed the *Miranda* guarantees. In addition, the state would have to rely on the policy arguments set forth by Justice O'Connor in *Moran,* the principal argument concerning the detrimental effect a rule requiring police to inform suspects that an attorney was attempting to contact them would have on *Miranda.* Finally, the state would be forced to counter a defendant's due process claim by stressing the *Moran* reasoning.

In contrast, a *Moran*-type defendant in Alaska would clearly stress his privilege against self-incrimination and his right to due process. He would argue that the Alaska Supreme Court's construction of each constitutional provision has afforded criminal defendants substantially broader rights than the corresponding federal guarantee. He would also argue that the Alaska cases interpreting article I, sections 7 and 9, have stressed the importance of safeguarding the rights of a criminal defendant, not the strengthening of the state's interrogation arsenal.

Interestingly, Justice Stevens implicitly recognized that it is not completely clear what position Alaska would take in a *Moran*-type case, as his list of "the many carefully reasoned state decisions that have come to precisely the opposite conclusion"[167] of the *Moran* Court did not include any reference to Alaska. Also significant is the fact that since *Moran* was decided, three states have rejected its reasoning and conclusions.[168] In a 1987 per curiam opinion, the Florida Supreme Court found the reasoning of Justice Stevens' dissent pursuasive in a case that presented a similar police deception scenario.[169] The court held that the conduct of the police violated the due process clause of the Florida Constitution. More recently, the Connecticut Supreme Court also rejected *Moran* by holding that the due process clause of the Connecticut Constitution requires that a suspect be informed of an attorney's timely effort to provide counsel.[170]

167. 475 U.S. at 439 (Stevens, J., dissenting).
168. One state has also expressly adopted *Moran. See supra* note 6.
169. Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).
170. State v. Stoddard, 206 Conn. 157, __ A.2d __ (1988).

In 1986, the Supreme Court of California also explicitly rejected *Moran,* proclaiming that "[f]or purposes of the California Constitution, we adhere in general to the reasoning adopted by the *Moran* dissent, the American Bar Association, and the overwhelming majority of state courts which have addressed the issue."[171] Justice Grodin also could have added the overwhelming majority of commentators to this list of *Moran* detractors.[172] One writer, in criticizing the *Moran* Court's conclusions, noted a passage from Macaulay's *The History of England,*: "the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent."[173]

Justice O'Connor recognized that some states might disagree with the Court's conclusions, as she proclaimed "[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."[174] The tenor and holdings of the pertinent Alaska cases indicate that the Alaska courts will likely act on this invitation and interpret the Alaska Constitution to invalidate waivers such as Burbine's.

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171. People v. Houston, 42 Cal. 3d 595, 610, 724 P.2d 1166, 1174, 230 Cal. Rptr. 141, 149 (1986). More specifically, the court concluded "[s]uch conduct constitutes a violation of a California suspect's *Miranda* rights to counsel, and his independent right to assistance of counsel . . . ." *Id.* at 610, 724 P.2d at 1175, 230 Cal. Rptr. at 149.

172. *See supra* note 5 and accompanying text.

173. *See Leading Cases, supra* note 3, at 135 (quoting 1 T. MACAULAY, THE HISTORY OF ENGLAND 482 (1968)). *See also* Moran v. Burbine, 475 U.S. 412, 437 (1986) (Stevens, J., dissenting).

174. *Moran,* 475 U.S. at 428.