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MIRANDA AND THE REHNQUIST COURT: HAS THE PENDULUM SWUNG TOO FAR?

INTRODUCTION

The arrest of Ernesto Miranda and his subsequent interrogation on Wednesday, March 13, 1963 triggered a groundbreaking and controversial United States Supreme Court decision, *Miranda v. Arizona*.[1] Arresting him on rape charges, the police brought Ernesto Miranda down to the station and began the interrogation.[2] The officers isolated Miranda throughout the entire interrogation process.[3] At no point in this process did the interrogators clearly inform Miranda of his constitutional right to be free from compelled self-incrimination and his right to have an attorney present during the interrogation.[4]

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[1] 384 U.S. 436, 491 (1966).

[2] *Id.* at 491–92.

[3] *See id.*; *see also* LIVA BAKER, MIRANDA: *CRIME, LAW, AND POLITICS* 11–13 (1983).

[4] *Miranda*, 384 U.S. at 492. In *Miranda*, the Court did not discuss the facts in extensive detail. *See id.* at 491–92. At least one commentator notes that when the police placed Ernesto Miranda in the line-up, the victim failed to positively identify him as her attacker. *See* BAKER, *supra* note 3, at 12. This commentator further indicates that, when Miranda asked the police how he did in the line-up, the police said that he "flunked." *See id.*

In addition to Ernesto Miranda's case, the Court also ruled on the admissibility of confessions obtained in three companion cases: *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*. *Miranda*, 384 U.S. at 456–57, 493–99. In *Vignera v. New York*, the police picked up Michael Vignera, brought him to the station and questioned him. After they formally placed him under arrest, the assistant district attorney then proceeded to question Vignera. The trial record reflected that at no time during the interrogation did the police warn Vignera of his rights to remain silent or to have an attorney present during the questioning. *Id.* at 493–94.

In *Westover v. United States*, the police arrested Carl Calvin Westover in connection with two robberies in Kansas City. The authorities brought him to the station, placed him in a line-up, and booked him. The officers then interrogated him on the same evening and, after he denied the crimes, interrogated him the following day. According to the record, the local authorities never read Westover his rights. The Federal Bureau of Investigation then interceded because Westover was wanted on a felony charge in California. Three special agents of the F.B.I. interrogated Westover for over two hours and obtained a signed confession from the suspect. The agents claimed at trial that they read him his rights before interrogating him. Westover had been in custody and interrogated at length by both federal and local authorities during that time period. *Id.* at 495–96.

In *California v. Stewart*, the police arrested Roy Allen Stewart at his home and searched the premises. Finding evidence linking Stewart with five robberies, the police brought Stewart to the station along with his wife and three others who had been visiting with the Stewarts. Stewart and the others were both jailed and interrogated. The police held Stewart in custody for five days and interrogated him nine times. The interrogating officers isolated Stewart

In its landmark *Miranda* decision, the United States Supreme Court held that police could no longer use confessions obtained from criminal suspects as evidence in the criminal's prosecution unless the suspect confessed after the police warned him or her of the constitutional rights to remain silent and to speak to an attorney.[5] The *Miranda* Court reasoned that the in-house interrogation of criminal suspects is an inherently coercive procedure.[6] In order to combat the compelling pressures associated with an interrogation, police officers must warn suspects of their rights prior to an interrogation to provide them with the opportunity to exercise the privilege against self-incrimination.[7] If the suspect invoked the right to remain silent, the Court mandated that "the interrogation must cease."[8] In addition, the Court stressed that, if a suspect requested an attorney, "the interrogation must cease until an attorney is present."[9] Thus, the *Miranda* Court established new procedures that law enforcement officers must follow when interrogating criminal suspects.[10]

In creating new rules for interrogating criminal suspects, the *Miranda* Court emphasized that the admissibility of a defendant's confession given during a period of custodial interrogation depends not only on whether the police "issued a warning," but in addition, on whether the defendant has expressly waived his or her rights to remain silent and to speak with an attorney.[11] According to the *Miranda* Court, if a suspect has waived his or her rights and confessed, courts, in determining the confession's admissibility, must look to the circumstances surrounding the waiver to determine if the suspect waived these rights knowingly, intelligently and voluntarily.[12] In determining whether a suspect waived his or her rights, the Court cautioned that an individual's silence following the interrogators' reading of the rights or the fact that the police eventually obtained a confession could not support the presumption of

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during each period of questioning, except for the first interrogation in which Stewart was confronted by an accusing witness. The record lacked reference to any warnings given to Stewart by the police during the interrogations. *Id.* at 497–99.

[5] *Id.* at 478–79.

[6] *Id.* at 467.

[7] *Id.*

[8] *Id.* at 473–74.

[9] *Id.* at 474.

[10] *Id.* at 479.

[11] *Id.* at 475–76.

[12] *Id.* at 475.

waiver.[13] Because the Court hinged the admissibility of confessions following a period of custodial interrogation on the defendant's waiver of his or her right to remain silent,[14] it is this particular aspect of its decision that has undergone significant change in the last twenty-two years.

In a number of cases decided after *Miranda*, the Court has interpreted broadly the requirement that the defendant waive his or her rights knowingly, intelligently, and voluntarily.[15] For example, the Court has held that a confession obtained during a second interrogation that followed after a suspect exercised his right to remain silent is admissible so long as the police "scrupulously honored" the suspect's initial request to remain silent.[16] The Court also has upheld the validity of an implied waiver of the right to have an attorney present during interrogation based on inferences drawn

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[13] *Id.* In listing the criteria for an acceptable waiver, the *Miranda* Court observed that

> [A]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.

Id. at 475. The Court further cited an earlier precedent that held that "[p]resuming waiver from a silent record is impermissible . . . .The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. . . .Anything less is not waiver." *Id.* (citing Carnley v. Cochran, 369 U.S. 506, 516 (1962)). The Court also provided examples of unacceptable waivers:

> [W]hatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege[against self-incrimination]. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.

Id. at 476.

[14] *Id.*

[15] *See* Colorado v. Spring, 107 S. Ct. 851 (1987); Connecticut v. Barrett, 107 S. Ct. 828, *on remand* 205 Conn. 437, 534 A.2d 219 (1987); Colorado v. Connelly, 107 S. Ct. 515 (1986); Moran v. Burbine, 475 U.S. 412 (1986); Fare v. Michael C., 442 U.S. 707, *reh'g denied*, 444 U.S. 887 (1979); North Carolina v. Butler, 441 U.S. 369 (1979); Michigan v. Mosley, 423 U.S. 96 (1975), *on remand*, People v. Mosley, 72 Mich. App. 289, 249 N.W.2d 393 (1976), *aff'd*, 400 Mich. 181, 254 N.W.2d 29, *cert. denied*, Michigan v. Mosley, 434 U.S. 861 (1977).

For an excellent discussion of the limitations placed on *Miranda* by the Burger Court, see Sonenshein, Miranda *and the Burger Court: Trends and Countertrends*, 13 Loy. U. Chi. L.J. 405–34 (1982).

[16] Michigan v. Mosley, 423 U.S. 96, 103–04 (1975).

from a suspect's actions and words.[17] Furthermore, the Court has held that a suspect's request to speak with an individual other than an attorney may effectuate an implied waiver of the right to have an attorney present during interrogation if such request is followed by a voluntary confession.[18] Finally, the Court has refused to interpret *Miranda* to require police officers to inform suspects, prior to their decision whether to waive the right to an attorney, that an attorney has already been provided for them.[19] Thus, the Court has limited *Miranda's* scope by defining broadly what constitutes a defendant's waiver of his or her fifth amendment rights.

In three recent cases, the Court has expanded further its definition of what constitutes a knowing, intelligent, and voluntary waiver. In the 1986 decision of *Colorado v. Connelly*, the Court upheld the voluntariness of a mentally incompetent individual's waiver of his rights to remain silent and to speak to an attorney, and noted that only coercive governmental activity can support a finding of involuntariness.[20] Similarly, in the 1987 decision of *Connecticut v. Barrett*, the Court held that, although a criminal suspect had requested an attorney prior to signing a written confession, the suspect's request did not reflect an incomplete understanding of the consequences of the limited invocation of the right to counsel so as to bar the prosecution from introducing oral statements that the suspect voluntarily made during the interrogation.[21] Finally, again in 1987, the Court in *Colorado v. Spring* held that a suspect's waiver of his rights to remain silent and to speak to an attorney applied to all of the criminal charges that the police wished to discuss during an interrogation, not merely the criminal charges that the suspect considered to be the interrogation's focus.[22] Thus, these recent Supreme Court cases demonstrate a trend towards limiting the *Miranda* decision's application by defining broadly what constitutes a valid waiver.

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[17] *See* North Carolina v. Butler, 441 U.S. 369, 373 (1979).

[18] Fare v. Michael C., 442 U.S. 707, 727–28 (1979). In upholding the suspect's waiver of his fifth amendment rights, the *Fare* Court held that the suspect's request for a probation officer, in conjunction with a failure to request an attorney, was a factor that could be considered in determining whether the suspect's confession was voluntary. *Id.* at 727–28. Essentially, the Court held that a suspect's request for a probation officer is not necessarily sufficient to invoke the suspect's fifth amendment rights. *Id.* Thus, the Court concluded that the suspect's subsequent confession was sufficient to effectuate an implied waiver of the right to have an attorney present during the interrogation. *Id.*

[19] Moran v. Burbine, 475 U.S. 412, 427 (1986).

[20] Colorado v. Connelly, 107 S. Ct. 515, 523–24 (1986).

[21] Connecticut v. Barrett, 107 S. Ct. 828, 832 (1987).

[22] Colorado v. Spring, 107 S. Ct 851, 859 (1987).

The trend evidenced by the post-*Miranda* cases is predictable in light of the changes in the Court's membership over the last twenty-two years.[23] These membership changes resulted in a strong conservative bloc that possesses a judicial philosophy hostile to *Miranda's* logic.[24] In particular, the recent appointment of William Rehnquist as Chief Justice, and the appointments of conservatives Antonin Scalia and Anthony Kennedy as Associate Justices, suggests that it is likely that the Court will continue to narrow the *Miranda* decision. Further narrowing of *Miranda*, however, may not be in society's best interests. Although the *Miranda* Court went too far in providing criminals with a means for escaping convictions by exploiting technical violations of its bright-line prophylactic rules, analysis of the recent cases decided by the Rehnquist Court demonstrates that, in the *Connelly* case, the Court has undercut the *Miranda* decision's viability as a constitutional safeguard by creating rigid rules hinging the involuntariness of a confession on the existence of police coercion.

This note analyzes the effect of the Court's redefinition of what constitutes a valid waiver of the constitutional safeguards set forth in the *Miranda* decision. Section I traces the history of *Miranda* from its origins to recent cases in which a largely conservative Court has narrowed significantly the decision's mandates.[25] Specifically, subsection A discusses the pre-*Miranda* standard of determining a confession's admissibility.[26] Subsection B reviews the *Miranda* decision.[27] Subsection C examines Supreme Court cases decided subsequent to *Miranda*.[28] In particular, subsection D discusses the three most recent cases that narrowed further the *Miranda* decision's effect through broad interpretations of the knowing, intelligent, and voluntary components of the waiver requirement.[29] Section II analyzes the *Miranda* decision and the subsequent cases decided by the Burger and Rehnquist Courts that have substantially expanded the category of acceptable waivers.[30] Next, this section examines the

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[23] *See* Sonenshein, *supra* note 15, at 405–06; Crossley, Miranda *and the State Constitution: State Courts Take a Stand*, 39 VAND. L. REV. 1693, 1695 (1986); BAKER, *supra* note 4, at 347–48.

[24] *See* Sonenshein, *supra* note 15, at 405–06; Crossley, *supra* note 23, at 1695; BAKER, *supra* note 3, at 347–48.

[25] *See infra* text accompanying notes 32–196.

[26] *See infra* text accompanying notes 32–58.

[27] *See infra* text accompanying notes 59–99.

[28] *See infra* text accompanying notes 100–136.

[29] *See infra* text accompanying notes 137–196.

[30] *See infra* text accompanying notes 197–297.

post-*Miranda* decisions against the backdrop of a Court which has shifted from a once liberal majority, led by Chief Justice Earl Warren, to a dominant conservative bloc under Chief Justice William Rehnquist.[31] The note concludes that *Miranda's* original dictates were overbroad in limiting the discretion of trial judges and shielding criminals from effective prosecution, and thus properly limited by the Rehnquist Court's decisions in *Connecticut v. Barrett* and *Colorado v. Spring*. In *Colorado v. Connelly*, however, the Court has gone too far in undermining the *Miranda* decision's constitutional safeguards by creating a rigid approach excluding mental capacity from the relevant factors in the totality of the circumstances analysis and treating waivers as voluntary unless police overreaching exists.

I. The Evolution of *Miranda v. Arizona*

Although the *Miranda* decision broke new ground by creating rules governing the interrogation process, the Supreme Court actually began paving the way for *Miranda* many years earlier. Prior to *Miranda*, the Court used a totality of the circumstances test that focused on the circumstances surrounding a confession to determine whether a suspect confessed voluntarily. In *Miranda*, the Court created new rules for dispelling the coercion inherent in the interrogation process. These rules hinged the confession's admissibility on the reading of a suspect's rights, and on whether the suspect had expressly waived these rights. The *Miranda* Court, therefore, shifted the analysis from a case-by-case approach to bright-line rules. Following *Miranda*, the Burger Court began to narrow *Miranda* by expanding broadly the category of acceptable waivers through a totality of the circumstances analysis, thus upholding confessions that would have been inadmissible under a strict reading of *Miranda*. Furthermore, the Rehnquist Court has followed the Burger Court's lead in using the defendant's waiver of his or her rights to limit the *Miranda* decision's effects.

A. *Precursors to* Miranda: *Voluntariness and the Totality of the Circumstances Test.*

In creating a framework for effective government while not unduly hampering individuals' freedoms, the founding fathers in-

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[31] *See infra* text accompanying notes 236–255.

corporated the Bill of Rights into the Constitution of the United States.[32] The Bill contained amendments enumerating many of the freedoms enjoyed by the American people and limited the federal government's power to encroach upon these freedoms.[33] One important freedom, recognized by the founding fathers in the fifth amendment, is each individual's right to be free from compelled self-incrimination in criminal trials.[34] Until 1964, however, this constitutional right applied only to defendant's charged in *federal* criminal actions.[35] The only means a defendant had to reverse a conviction due to illegal actions by state officials lay in the due process clause of the fourteenth amendment.[36] Thus, courts analyzed state law claims based on the fourteenth amendment and federal law claims based on the fifth amendment.

The historical approach to confession cases revolved around the Court's use of a voluntariness test which focused attention on the circumstances surrounding the confession in order to determine if the accused did in fact confess voluntarily. In the 1884 decision of *Hopt v. Utah*, the U.S. Supreme Court first noted that a statement would be involuntary and thus inadmissible if the suspect confessed on the basis of promises or inducements made by those individuals who conducted the interrogation.[37] The Court's focus in confession cases revolved primarily around the common law doctrine of trustworthiness of the confession, rejecting as inadmissible and untrustworthy confessions that did not arise from the voluntary choice of

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[32] *See* Crossley, *supra* note 23, at 1696.

[33] *Id.*

[34] The fifth amendment provides in pertinent part: "No person. . .shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

[35] *See* Crossley, *supra* note 23, at 1694; *see also* BAKER, *supra* note 3, at 69–72. During the first half of the twentieth century, an ongoing debate took place within the United States Supreme Court concerning whether to extend the Bill of Rights and make those provisions applicable to the states by total incorporation of the provisions of the Bill of Rights into the fourteenth amendment. *See* BAKER, *supra* note 3, at 69–72. It was not until 1964 that the Supreme Court held that the fifth amendment was binding on the states. *See* Malloy v. Hogan, 378 U.S. 1 (1964) and *infra* text accompanying notes 49–52.

[36] *See* Crossley, *supra* note 23, at 1697.

[37] Hopt v. Utah, 110 U.S. 574, 585 (1884). The *Hopt* Court stated:

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

Id.

the suspect.[38] The Court analyzed the "special circumstances" surrounding the confession in order to determine its trustworthiness.[39]

The Supreme Court later recognized, in *Bram v. United States*, that police interrogations encompassing the use of threats or promises to induce a suspect's confession also rendered that confession inadmissible as involuntary.[40] In reaching this result, however, the *Bram* Court referred to the fifth amendment as a basis for rejecting compelled confessions.[41] Thus, the Court applied the totality of the circumstances test as a filter to prevent untrustworthy, involuntary confessions, in violation of the fifth amendment privilege against self-incrimination, from tainting the fact-finding process in federal criminal trials.

Illegal actions by state officials posed a different problem for the Court. Because the fifth amendment did not reach actions by state officials, the Court focused on the shocking actions of the interrogators in ruling that a fourteenth amendment due process violation occurred.[42] In *Brown v. Mississippi*, the Court applied the due process clause of the fourteenth amendment to overturn the convictions of three poor, illiterate black men because the police extracted their confessions through physical torture.[43] One of the suspects had been hung from the limb of a tree and whipped until he confessed. The others were taken to jail, forced to strip and lay over chairs, and were then beaten with a buckle-studded strap in order to induce their confessions.[44] The Supreme Court held that these actions by state officials constituted a violation of the due

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[38] D. NISSMAN, E. HAGEN & P. BROOKS, LAW OF CONFESSIONS, 4–5 (1985) [hereinafter cited as NISSMAN].

[39] *Hopt*, 110 U.S. at 583, 585–86.

[40] Bram v. United States, 168 U.S. 532, 542–43 (1897).

[41] *Id.* The *Bram* Court stated:

> [I]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution [sic] of the United States, commanding that no person 'shall be compelled in any criminal case, to be a witness against himself.'

Id. at 542–43.

The *Bram* Court also cited a criminal law treatise, noting that:

> [A] confession, in order to be admissible, must be free and voluntary; that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

Id. at 542–43 (citing 3 RUSSELL ON CRIMES, 478 (6th ed.)).

[42] NISSMAN, *supra* note 38, at 7–8.

[43] 297 U.S. 278, 281, 285–86 (1936)

[44] *Id.* at 281–82.

process clause of the fourteenth amendment.[45] Thus, *Brown* introduced the use of the due process clause to check the barbarous acts of state officials during periods of custodial interrogation.

In shaping its standards for determining the admissibility of confessions, the Court began to develop its totality of the circum-

[45] *Id.* at 286. Because *Brown* involved coercion by state officials, as opposed to officials of the federal government, the Court relied on fourteenth amendment due process grounds to render the confessions inadmissible. *Id.* at 285–86. Applying the due process clause of the fourteenth amendment to the states, the Court noted that: "The State[s are] free to regulate the procedures of [their] courts in accordance with [their] own conceptions of policy, unless in doing so it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 285 (quoting language from Snyder v. Massachusetts, 291 U.S. 105 (1934) and Rogers v. Peck, 199 U.S. 425, 434 (1905)). The Court further held that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.* at 286. Although *Brown* involved physical coercion, a clear violation of due process, the Court, in subsequent cases, indicated that physical brutality is not the only form of police overreaching.

In many instances, the police used psychological overbearing to induce criminal suspects to render incriminating statements. In *Blackburn v. Alabama*, 361 U.S. 199 (1960), the appellant confessed to robbery during a lengthy interrogation. *Id.* at 204. Following the confession, the appellant was examined by physicians and declared to be insane. *Id.* at 201. The Court held that given the appellant's mental incompetence, the lengthy interrogation and atmosphere of compulsion sufficiently undermined the appellant's ability to make a voluntary statement. *Id.* at 207–08. In a number of cases following *Blackburn*, the Court applied the voluntariness test through the fourteenth amendment due process clause to combat various forms of police coercion. *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963) (police officers' threats that suspect would be deprived of state financial aid and that her children would be taken away from her unless she cooperated constituted coercion); Lynumn v. Illinois, 372 U.S. 528 (1963) (keeping suspect incommunicado for 16 hours and refusing to allow him to call his wife constituted police coercion); Rogers v. Richmond, 365 U.S. 534 (1961) (threatening suspect that his ailing wife would be brought down to the station unless he cooperated constituted coercion).

In *Rogers v. Richmond*, the Court modified the due process analysis by rejecting the common law trustworthiness doctrine as a basis for admitting a suspect's confession. *Rogers*, 365 U.S. at 540–41. Writing for the majority of the Court, Justice Frankfurter noted that:

> . . . To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of the law which the Fourteenth Amendment guarantees.

Id. As a result, the *Rogers* decision placed a premium on the defendant's due process rights at the expense of the probative value of the confession obtained during the interrogation.

stances analysis. In *Culombe v. Connecticut*, the Court listed a number of factors that fall within the totality of the circumstances analysis.[46] When applying the totality of the circumstances analysis, courts must look to factors such as the atmosphere of the interrogation, the conditions of detention, the attitudes of the interrogating officers, the refusal to allow a suspect to see an attorney, the length of the interrogation, and the physical and mental state of the defendant.[47] These factors, according to the Court, facilitate the determination of the voluntariness of a suspect's confession.[48] Thus, the totality of the circumstances approach provided the foundation for the Court's analysis of confession cases in the years preceding the *Miranda* decision.

In 1964, the U.S. Supreme Court, in *Malloy v. Hogan*, held that the fifth amendment privilege against self-incrimination, first addressed in *Bram v. United States*, applied to the states through the fourteenth amendment.[49] In extending the fifth amendment to the states through the due process clause of the fourteenth amendment, the Court noted the difficulty in applying separate federal standards to determine the confessions' voluntariness based solely on the nature of the forum.[50] In state proceedings, the Court applied the due process approach that looked to the surrounding circumstances and focused on the brutality of the tactics and procedures employed by the interrogators to extract a confession.[51] Federal proceedings,

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[46] 367 U.S. 568, 601–02 (1961).

[47] *Id.* In addressing the factors included in a totality of the circumstances analysis, the Court, through Justice Frankfurter, stated:

> No single litmus-paper test for constitutionally-impermissible interrogation has been evolved: neither extensive cross questioning . . . nor undue delay in arraignment . . . nor failure to caution a prisoner . . . nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect . . . .
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> Each of these factors, in company with all of the surrounding circumstances — the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police towards him, *his physical and mental state*, the diverse pressures which sap or sustain his powers of resistance and self-control — is relevant. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of a free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Id. (emphasis added).

[48] *Id.*

[49] 378 U.S. 1, 6 (1964).

[50] *Id.* at 11.

[51] NISSMAN, *supra* note 38, at 7–9.

however, focused the Court's attention on the suspect and the circumstances surrounding the confession to determine its voluntariness in light of the fifth amendment privilege against self-incrimination.[52] Thus, after *Malloy*, courts applied the federal standard in both federal and state criminal trials to determine whether the suspect confessed voluntarily in accordance with the fifth amendment.

In the same year that the Court decided *Malloy*, the Court, in *Escobedo v. Illinois*, recognized a criminal suspect's sixth amendment right to consult with an attorney prior to the interrogation process.[53] In *Escobedo*, the police brought the suspect to the station for questioning about the murder of the defendant's brother in law, and falsely informed him that his friend, a co-defendant, already had given them a statement as to the suspect's guilt.[54] In addition, the police refused to let the suspect see his attorney who was waiting for him, down the hall, throughout the interrogation process.[55] In reversing Escobedo's conviction, the Court noted that the police had not conducted routine questioning, but instead, focused their efforts on the suspect to obtain a confession.[56] Thus, the *Escobedo* Court concluded that the interrogators' failure to allow the suspect to consult his lawyer before the interrogation constituted a violation of the suspect's sixth amendment right to assistance of counsel.[57]

The *Escobedo* decision, however, received varying interpretations at the hands of state and federal judges. Some judges limited *Escobedo* to its specific facts, refusing to extend its holding to cases with fact patterns not congruent with the *Escobedo* circumstances. Others applied a broad interpretation notwithstanding the absence of the specific circumstances supporting the *Escobedo* decision.[58]

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[52] *Malloy*, 378 U.S. at 6–7. In applying the fifth amendment to the states, Justice Brennan, writing for the majority, noted that:

> Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . ." In other words the person must have been compelled to incriminate himself . . . .

Id. at 7 (citing Bram v. United States, 168 U.S. 532, 542–43 (1897)).

[53] 378 U.S. 478, 492 (1964).

[54] *Id.* at 479.

[55] *Id.* at 481–82.

[56] *Id.* at 485.

[57] *Id.* at 490–91.

[58] Israel, *Police Interrogation and the Supreme Court — The Latest Round*, in A NEW LOOK AT CONFESSIONS: *ESCOBEDO* — THE SECOND ROUND 22 (J. George ed. 1967). Although the

Thus, the *Escobedo* decision failed to effectively resolve many of the issues arising from the application of the privilege against self-incrimination to custodial interrogations.

In sum, the Court in cases prior to *Miranda* recognized the dangers of police overreaching in the interrogation process and created the totality of the circumstances test as a means of determining the voluntariness of a suspect's confession in federal actions. On the state level, the Court's due process analysis invalidated many forms of police coercion such as physical brutality and psychological overbearing. In applying the fifth amendment to the states through the fourteenth amendment, *Malloy* enabled criminal suspects to apply the suspect-oriented voluntariness test and raise fifth amendment issues in a state forum. Finally, with *Escobedo*, the Court recognized a suspect's sixth amendment right to have assistance of counsel before participating in the interrogation process. In recognizing this right, the Court noted the inherent compulsion in custodial interrogations and stated that the assistance of counsel could protect a suspect from potential police coercion. *Escobedo*, however, failed to effectively resolve many of the issues surrounding custodial interrogations and thus, the Court needed to address these issues at least one more time.

B. *The* Miranda *Decision*

Prior to *Miranda*, police cloaked suspects' interrogations in secrecy.[59] Although earlier cases established the totality of the circumstances test, prior to *Miranda* no bright-line rules existed to combat police overreaching. Police officers continued to isolate suspects in interrogation rooms and conduct interrogations with only officers and suspects present.[60] The isolated nature of these interrogations, often referred to as "incommunicado" interrogations, reflected standard police practice.[61] Criminal suspects enjoyed little protection

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Escobedo v. Illinois decision recognized a suspect's right to have an attorney present during the interrogation, 378 U.S. at 490–91, many courts debated about the scope of its meaning. *See* Miranda v. Arizona, 384 U.S. 436, 440 (1966). Some lower courts applied the *Escobedo* holding broadly to reverse convictions resulting from statements made in the absence of an attorney during interrogation. *See* BAKER, *supra* note 3, at 50. Others restricted the *Escobedo* decision on its facts and only applied it if the suspect specifically requested an attorney and the police refused to accommodate him or her. *See id.* Recognizing the controversy of the *Escobedo* decision, the Warren Court granted certiorari to Ernesto Miranda in order to resolve some of the issues that remained unclear after *Escobedo*. *See Miranda*, 384 U.S. at 440–42.

[59] *Miranda*, 384 U.S. at 445.

[60] *See id.*

[61] *See* BAKER, *supra* note 3, at 16–17.

from police overreaching and were often subjected to physical brutality or psychological coercion.[62] *Miranda*, however, put an end to such practices by redefining the procedures that police must follow when conducting interrogations.

In its 1966 landmark decision, *Miranda v. Arizona*, the United States Supreme Court addressed the problems inherent in the confession cases.[63] The *Miranda* Court held that the interrogators' failure to read a suspect his or her rights prior to the interrogation would render that confession inadmissible as involuntary given the presumptively coercive setting of the custodial interrogation.[64] Specifically, the Court stated that all criminal suspects have the right to remain silent, the right to know that anything they say may be used in a court of law, the right to have an attorney present during the interrogation, and if they are indigent, the right to have an attorney provided by the court.[65] In reaching its decision, the Court described a variety of incidents of police abuse ranging from severe beatings to subtle forms of psychological deception.[66] In recognizing the occurrence of these undesirable practices, the Court indicated that custodial interrogation creates a presumption of coercion, thereby affecting the admissibility of any statement made by the suspect.[67] The Court reasoned that apprising a suspect of his or her

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[62] *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960) (Court found that psychological overbearing, like physical brutality, could also render a confession involuntary); Spano v. New York, 360 U.S 315 (1959) (police violated due process by interrogating a foreign born defendant for eight hours and denying him the right to contact his attorney); Chambers v. Florida, 309 U.S. 227 (1940) (Court found psychological coercion where police arrested twenty-five to forty black men without warrants, interrogated them throughout the night without giving them food or rest, and four of the suspects confessed); Brown v. Mississippi, 297 U.S. 278 (1936) (physical brutality used by the police rendered suspects' confessions involuntary because the police activity constituted conduct "offensive" to a sense of justice).

In *Miranda v. Arizona*, the Court noted that police often use mental trickery such as the Mutt-and-Jeff act to elicit confessions from suspects. *Miranda*, 384 U.S. at 452. The Mutt-and-Jeff act involves one officer who plays the "heavy" and threatens the suspect in order to scare a confession out of him while another friendly officer gains the suspect's confidence by telling him that he will try to keep the "heavy" officer under control. *Id.* This friendly treatment, following a harsh treatment by the other officer, often triggers a favorable response from a suspect and facilitates the process of obtaining confessions. *Id.*

[63] 384 U.S. at 455–56 & n.24. The *Miranda* decision, a product of the Warren Court, follows from a line of cases decided by that Court which have recognized the rights of criminal defendants. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, *on remand*, 153 So. 2d 299 (1963) (Warren Court allowed indigent defendants the right to assistance of counsel); Escobedo v. Illinois, 378 U.S. 478 (1964) (Warren Court granted right to assistance of counsel to defendants in custody).

[64] *Miranda*, 384 U.S. at 467.

[65] *Id.* at 467–69, 472–73.

[66] *Id.* at 445–46, 450–58.

[67] *Id.* at 457–58.

rights as outlined in the warnings would provide an appropriate check on potential police coercion.[68]

The *Miranda* Court addressed the admissibility of confessions in four cases: *Miranda v. Arizona*, *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*. In reaching a decision, the Court indicated that it would not focus on the specific facts of each case, but instead, on the recurring problems caused by the system's failure to protect the constitutional rights of the accused during custodial interrogations.[69] The Court first addressed the problems inherent in custodial interrogations and created its framework requiring the warnings and an explicit waiver for a confession's admissibility, and then applied this opinion to the facts of each case.[70] The Court held in *Miranda*, the lead case, that the interrogators' failure to inform the accused of his rights to remain silent and to have an attorney present during the interrogation rendered the subsequent confession inadmissible.[71] The Court further applied its opinion to the other cases, finding that the interrogating officers' failure to read suspects their rights prior to the interrogation invalidated the confessions subsequently obtained.[72]

The *Miranda* Court focused primarily on the inherent coercion of custodial interrogations.[73] The Court noted that police officers often isolated criminal suspects from the public when conducting interrogations, and therefore, the Court reasoned, the suspect received virtually no protection from police overreaching.[74] The Court stated that a number of variables enhanced the coercion inherent in custodial interrogations, such as isolation, the police dominated atmosphere, and the conduct of the officers controlling

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[68] *Id.* at 467.

[69] *Id.* at 491.

[70] *Id.* at 491–99.

[71] *Id.* at 491–93.

[72] *Id.* at 491–99. The Court held in *Vignera v. New York* that the interrogators' failure to read the defendant his rights rendered his subsequent confession invalid because he had no opportunity to exercise his fifth amendment privilege against compelled self-incrimination. *Id.* at 494. In *Westover v. United States*, the Court reversed the defendant's conviction because the local police never read the defendant his rights before interrogating him. *Id.* at 496. The F.B.I. agents did read the suspect his rights, but the Court noted that, for all intents and purposes, the suspect had not known his rights at the beginning of the interrogation process, and therefore, he could not possibly have waived his rights intelligently. *Id.* Finally, in *California v. Stewart*, the Court affirmed the lower court's reversal of the defendant's conviction due to the interrogators' failure to properly apprise the defendant of his rights before conducting the questioning. *Id.* at 498–99.

[73] *See id.* at 444–45.

[74] *Id.* at 455–58.

the interrogations.[75] In light of these variables, the Court stressed the need to protect the accused's right to be free from compelled self-incrimination.[76]

In order to protect a suspect's fifth amendment rights, the *Miranda* Court outlined a framework which police officers should follow prior to conducting an interrogation.[77] The Court noted that these guidelines require that a suspect be advised of his or her rights prior to the questioning.[78] In advocating the need to protect the constitutional rights of an accused, while not unduly hampering the abilities of law enforcement officers to effectively combat crime, the Court claimed that it had created a framework that could serve the former interests while not completely interfering with the latter.[79]

Because of the isolated setting of the interrogation, the *Miranda* Court ruled that a criminal defendant's fifth amendment right could be protected best if the defendant were entitled to have an attorney present during the questioning.[80] In the Court's opinion, the attorney's presence would vitiate the inherently coercive nature of the interrogation by destroying the element of isolation, effectively utilized by law enforcement officers prior to *Miranda*, and enhancing the trustworthiness of the interrogators' actions.[81] The Court indicated that a suspect's attorney would serve as an important check on the interrogators' coercive power by counselling his client on the legal implications of rendering a statement.[82] Additionally, the *Miranda* Court noted that the suspect's attorney would be a witness to potential police overreaching throughout the interrogation process.[83]

To further this policy, the Court, in *Miranda*, ruled that criminal suspects must be advised of their rights prior to an interrogation.[84]

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[75] *Id.* at 449–56.

[76] *See id.* at 460–61.

[77] *See id.* at 467–73.

[78] *Id.* at 467.

[79] *Id.* at 481.

[80] *Id.* at 470.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 467–74. These rules involve the reading of the famous *Miranda* warnings by the police which advise a suspect of:

(a)The right to remain silent.

(b)Anything the suspect may say can be used against him in a court of law.

(c)The right to have an attorney present during interrogation.

The Court outlined warnings that police would be required to give suspects, including the right to remain silent, and the subsequent instruction that anything that is said can and will be used against the suspect in a court of law.[85] The Court stated that the suspect also must be advised that he or she has the right to an attorney and, if he or she cannot afford an attorney, the right to have an attorney appointed by the court.[86] Under this framework, the Court observed, a suspect would receive valuable information concerning his or her rights, thus facilitating a choice whether to exercise them prior to a custodial interrogation to protect the fifth amendment right to be free from compelled self-incrimination.[87]

The Court then addressed the appropriate procedures if suspects exercise their rights to remain silent and to speak to an attorney. According to the Court, the "interrogation must cease" if the suspect has exercised the right to remain silent.[88] If the suspect has invoked the right to have an attorney present, the Court mandated that "the interrogation must cease until an attorney is present."[89] In the Court's opinion, these procedures provide the appropriate safeguards to protect a suspect's fifth amendment rights.[90]

The Court's ruling in *Miranda*, however, did not completely undercut the police officers' use of confessions. In recognizing the utility of confessions and society's interest in effective law enforcement, the Court indicated that the criminal suspect could waive his or her rights and thus, police could obtain an admissible confession.[91] In order for a confession to be admissible against a criminal defendant, the Court stated, the fifth amendment required that the suspect's express waiver of either or both the rights to remain silent and to have an attorney present during the interrogation precede the suspect's statement or confession. The Court, however, indicated that such a waiver would be subject to very stringent stan-

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(d)The right to have an attorney appointed by the court if the suspect can not afford one.

Id.

In addition, the Court, in *Miranda*, required that police must terminate an interrogation if a suspect wishes to remain silent. If the police fail to terminate the interrogation, the Court stated that any statement obtained in the interrogation will be presumed to have been the product of compulsion. *Id.* at 473–74.

[85] *Id.* at 468–69.

[86] *Id.* at 471–72.

[87] *Id.* at 473–74.

[88] *Id.*

[89] *Id.* at 474.

[90] *Id.* at 477.

[91] *Id.* at 478.

dards.[92] The Court held that an interrogation conducted in the absence of an attorney saddled the government with a "heavy burden" of demonstrating that the suspect made the waiver knowingly, intelligently and voluntarily. Because the suspect's *Miranda* rights safeguard his or her fifth amendment guarantees, the Court emphasized that the suspect's waiver of those rights must be clear.[93] The Court indicated that a waiver, implied from a suspect's silence following the issuance of the *Miranda* warnings, would not be sufficient to withstand constitutional scrutiny.[94] Thus, the *Miranda* Court did not discard completely the use of interrogations by police to elicit confessions. Instead, it held that such confessions were admissible if they were preceded by both warnings of the suspect's constitutional rights and the suspect's express, knowing, intelligent, and voluntary waiver of such rights.[95]

In dissenting opinions, Justices Clark, Stewart, Harlan, and White objected to the sweeping changes the majority imposed on the police. Justice Clark argued that the totality of the circumstances test, which courts had applied prior to *Miranda*, provided the best alternative for judicial analysis, given its flexibility.[96] Justice White indicated that the majority's bright-line rules created a less flexible framework that would interfere unduly with the ability of the police to engage effectively in the investigative process.[97] Justice Harlan, advocating for the totality of the circumstances approach, stressed that this approach appropriately weighed the competing interests between society's need for effective law enforcement and the rights of the accused in the interrogation process.[98] Despite these objections, the *Miranda* majority concluded that, rather than a flexible standard, bright-line rules were needed to combat police overreaching.[99]

In sum, the *Miranda* decision laid down bright-line rules affecting the admissibility of confessions obtained during the interrogation process. The Court based the admissibility of confessions on police officers reading a suspect his or her rights prior to the interrogation, and the suspect's express waiver of the right to re-

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[92] *Id.* at 475–76.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 476–78.
[96] *Id.* at 503 (Clark, J., dissenting).
[97] *Id.* at 545 (White, J., dissenting).
[98] *Id.* at 516–17 (Harlan, J., dissenting).
[99] *Id.* at 468–69.

main silent and/or the right to an attorney prior to the making of a statement. In the event that the interrogating officers failed to issue the required warnings, or the suspect failed to knowingly, intelligently, and voluntarily waive his or her rights, the Court held that confessions would be inadmissible given the presumptively coercive nature of the police interrogation. By imposing the waiver requirement, the Court did not totally reject the pre-*Miranda* totality of the circumstances test that had been used previously in confession cases. Instead, the Court restricted the test's applicability to a determination of the knowing, intelligent, and voluntary nature of a suspect's waiver. Although several dissenting Justices objected to the sweeping changes imposed by the Court, favoring the continued use of the totality of the circumstances test, the Court concluded that bright-line rules were needed to prevent police coercion.

C. *Subsequent Developments Relating to the Waiver Requirement*

Following the *Miranda* decision, the Supreme Court began to limit the application of its ruling in a series of cases dealing with the waiver requirement. These cases involved both a suspect's waiver of the right to remain silent,[100] and the waiver of the right to an attorney.[101] In addition, the Court addressed the differences between express and implied waivers, recognizing the validity of the latter despite *Miranda's* holding.[102] The Court also examined whether the requirement that a suspect knowingly, intelligently, and voluntarily waive these rights burdened the police to fully disclose information that was not readily available to that suspect at the time of the waiver.[103] In addressing the waiver requirement, the Court subsequently recognized the validity of many waivers that did not accommodate *Miranda's* heightened standards.

The Court first began to expand its definition of waiver, thereby restricting *Miranda's* scope, in the 1975 decision of *Michigan v. Mosley*.[104] The *Mosley* Court held that a second interrogation, resulting

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[100] *See* Michigan v. Mosley, 423 U.S. 96 (1975) (Court upheld confession resulting from a second interrogation following the suspect's request to remain silent).

[101] *See* Fare v. Michael C., 442 U.S. 707 (1979) (juvenile suspect's request for a probation officer held to be a waiver of the right to have an attorney present during his interrogation).

[102] *See* North Carolina v. Butler, 441 U.S. 369 (1979) (Court recognized the validity of implied waivers of the *Miranda* rights based on the suspect's actions preceding the interrogation).

[103] *See* Moran v. Burbine, 475 U.S. 412 (1986) (Court held that a suspect's decision to waive his or her rights does not hinge on the suspect's knowledge that an attorney already has been provided).

[104] 423 U.S. 96 (1975).

in a confession, which followed a suspect's initial choice to remain silent is not per se invalid as a violation of the fifth amendment.[105] The *Mosley* Court hinged the admissibility of the suspect's confession on the fact that the police "scrupulously honored" the suspect's right to terminate the initial questioning.[106] In addition, the Court focused on the length of time between the interrogations, the use of different officers in each interrogation, and the different focus of the questions throughout the second interrogation.[107] Thus, the *Mosley* Court, moving away from a bright-line rule, took the particular facts of the case into account in finding that the second interrogation did not violate the *Miranda* waiver requirements.

The Court further restricted *Miranda* in its 1979 decision of *North Carolina v. Butler*, holding that the suspect may impliedly waive his or her right to an attorney.[108] In *Butler*, the police provided the defendant with an "Advice of Rights" form which, in accordance with *Miranda*, informed him of his constitutional rights prior to interrogation.[109] The defendant acknowledged to the police that he understood his rights but refused to sign the waiver at the bottom of the form.[110] The defendant indicated, however, that he would

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[105] *Id.* at 102–03. In dissent, Justices Brennan and Marshall objected to the majority's departure from *Miranda*. *Id.* at 112 (Brennan, J., dissenting). They argued that *Miranda* established rules to prevent a suspect's will from being overborne by the compelling atmosphere during the interrogation. *Id.* They noted that the second interrogation conducted by the police, following a suspect's lengthy period of detention, sufficiently compelled the suspect to make a statement. *Id.* at 115 (Brennan, J., dissenting). Although noting that *Miranda* should not be construed to impose a restriction on the resumption of questioning, Brennan and Marshall contend that the questioning should be resumed only if the suspect has an attorney present in order to dissipate the compelling atmosphere and protect the suspect's constitutional rights. *Id.* at 115–16 (Brennan, J., dissenting). Thus, according to Brennan and Marshall, the presumption of compulsion created by the *Miranda* rules rendered the suspect's statements during the second interrogation inadmissible as a product of the interrogation's compelling atmosphere.

[106] *Id.* at 104.

[107] *Id.*

[108] 441 U.S. 369, 373 (1979). In dissent, Justices Brennan, Marshall and Stevens objected to the majority's willingness to imply a waiver from the circumstances surrounding the interrogation. *Id.* at 377–78 (Brennan, J., dissenting). Relying on the *Miranda* decision, the dissent argued that the suspect's waiver of the right to an attorney must be specifically made. *Id.* at 377 (Brennan, J., dissenting). By using a totality approach that draws on inferences to imply a waiver, the dissent argued that the Court had departed from the *Miranda* requirement that an ambiguous waiver be interpreted against the prosecution. *Id.* at 377–78 (Brennan, J., dissenting). Thus, the dissent asserted that only an affirmative waiver of the right to an attorney could adequately satisfy the *Miranda* waiver requirement and protect a suspect's fifth amendment rights. *Id.* at 379 (Brennan, J., dissenting).

[109] *Id.* at 370–71.

[110] *Id.* at 371.

speak to the police.[111] At no time did the defendant either request an attorney or explicitly waive his right to have an attorney present during the interrogation.[112]

Although acknowledging *Miranda's* requirement that the waiver be explicit, the *Butler* Court refused to interpret *Miranda's* language as a bar to all confessions obtained in the absence of explicit waivers.[113] The Court recognized the need for an explicit waiver as "strong proof" of the confession's validity, but further indicated that valid waivers can be implied under circumstances where the suspect's actions and words clearly support that conclusion.[114] As a result, the Court remanded the case, suggesting that the lower court determine whether the defendant in fact understood his rights and impliedly waived them when he participated in the interrogation.[115]

Similarly, the Court has held that a suspect's request for an individual other than an attorney, followed by a confession, may be sufficient to constitute an implied waiver of the right to have an attorney present during interrogation.[116] In the 1979 decision of *Fare v. Michael C.*, the Court held that a juvenile's request for his probation officer constituted an implied waiver of his right to have an attorney present.[117] In so holding, the Court rejected the notion that the request invoked the fifth amendment right to be free from compelled self-incrimination.[118] Because the juvenile failed to exercise his *Miranda* rights by requesting a probation officer rather than an attorney, the Court reasoned that he had failed to invoke his fifth amendment right to be free from compelled self-incrimi-

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[111] *Id.*

[112] *Id.*

[113] *Id.* at 373.

[114] *Id.*

[115] *Id.* at 374–76.

[116] *See* Fare v. Michael C., 442 U.S. 707 (1979).

[117] *Id.* at 726. In dissent, Justices Marshall, Brennan and Stevens rejected the majority's limitation of *Miranda* to the right to have an attorney present during the interrogation. *Id.* at 731–32 (Brennan, J., dissenting). The dissent construed *Miranda* as requiring a juvenile's request to see a probation officer as an assertion of his fifth amendment right to counsel. *Id.* at 730 (Brennan, J., dissenting). Given the fact that the suspect was a youth, the dissent recognized the relationship between juveniles and probation officers and argued that the latter were "well-suited" to assist juveniles in matters relating to the right to have an attorney present. *Id.* at 730–31 (Brennan, J., dissenting). Thus, recognizing the importance of a probation officer to a juvenile, the dissent held that the suspect's request for his probation officer was a *per se* invocation of his fifth amendment right to be free from compelled self-incrimination. *Id.*

[118] *Id.* at 727–28.

nation, and therefore, his subsequent statement could be used against him.[119]

In contrast with the trend towards narrowing *Miranda*, the Court, in the 1981 decision of *Edwards v. Arizona*, adhered to *Miranda* in holding that a suspect's request for an attorney during an initial interrogation invalidated a waiver rendered in a subsequent interrogation because the suspect did not initiate further communications with the police following the termination of the first interrogation.[120] In *Edwards*, the suspect gave a taped statement to the police, asserting an alibi defense.[121] The suspect then informed the interrogators that he wanted to make a deal, but requested that his attorney be present before conducting negotiations with them.[122] The next morning, the detectives told Edwards that he had to talk to them, despite his desire to remain silent.[123] Edwards cooperated, but stated that he didn't want any of his statements on tape.[124]

The *Edwards* Court held that the officers' actions violated the *Miranda* requirements because the interrogators continued the interrogation after the defendant clearly invoked his right to counsel.[125] In so ruling, the Court cited *Miranda's* clear language prohibiting interrogators from continuing an interrogation if the suspect has requested an attorney.[126] The Court emphasized that, once the suspect requested an attorney, any statement obtained by the police from the suspect would be inadmissible unless the subsequent communication satisfied two standards.[127] First, the Court held that the statement must have been the product of a knowing, intelligent, and voluntary waiver.[128] Second, the communication with the police must have been initiated by the suspect.[129] Otherwise, the Court held, any statement that the suspect made would be inadmissible.[130]

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[119] *Id.*

[120] Edwards v. Arizona, 451 U.S. 477, 484–85, *reh'g denied*, 452 U.S. 973 (1981).

[121] *Id.* at 479.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 485.

[126] *Id.* at 482 (citing Miranda v. Arizona, 384 U.S. 436, 474 (1966)). The *Miranda* Court clearly expressed the procedures that interrogators must follow when a suspect requests an attorney. The Court held that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474.

[127] *See Edwards*, 451 U.S. at 482.

[128] *Id.*

[129] *Id.* at 484–85.

[130] *Id.*

Other post-*Miranda* cases involve the Court's determination of the kind of information that the suspect needs before he or she waives his or her *Miranda* rights. For example, in the 1986 Supreme Court decision of *Moran v. Burbine*, the Court held that the interrogating officer's failure to inform a suspect that his sister had obtained an attorney for him did not invalidate the suspect's waiver of his right to have an attorney present during interrogation.[131] The Court found that the police's failure to inform the defendant that he had an attorney waiting did not relate to his ability to waive his rights and make a statement.[132] Although this information may have affected the defendant's decision, the Court stated that the Constitution does not require interrogating officers to apprise suspects of all relevant information that may be useful in the suspect's decision to waive his or her rights and make statements.[133] The Court recognized, however, that a rule requiring officers to apprise defendants of all the facts relevant to their waiver decision might add "marginally to *Miranda's* goal of dispelling the compulsion inherent in custodial interrogation."[134] But, the Court stated that such an approach would only cloud *Miranda's* application by straying from its initial mandate to protect suspects from coercion to requiring officers to know whether a particular defendant has an attorney.[135] Thus, the Court held that a suspect's knowledge that an attorney has been provided for him or her is not essential to the suspect's knowing, intelligent, and voluntary waiver of the right to an attorney.[136]

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[131] Moran v. Burbine, 475 U.S. 412, 423–24 (1986). In a strongly worded dissent, Justices Stevens, Marshall and Brennan objected to the majority's decision that the police need not inform a suspect that an attorney actually has been provided prior to the suspect's decision to waive that right to an attorney. *Id.* at 450–52 (Stevens, J., dissenting). The dissenting Justices noted that the officers' failure to inform the suspect that an attorney was present constituted deception that vitiated the knowing, intelligent, and voluntary waiver rendered by the suspect. *Id.* at 453–54 (Stevens, J., dissenting). In addition, the dissent rejected the majority's analysis that requiring police to inform suspects that attorneys had been provided would undermine the clarity of *Miranda*. *Id.* at 460–62 (Stevens, J., dissenting). Instead, the dissent noted that *Miranda* required that a suspect's waiver be knowingly, intelligently, and voluntarily given, and because knowledge that an attorney has been provided provides the suspect with full information in order to decide whether to waive his or her fifth amendment rights, such knowledge is essential to the validity of a suspect's waiver. *See id.* at 454–56 (Stevens, J., dissenting). Thus, the dissent argued that the suspect's waiver of the right to an attorney was invalid, and his subsequent statements were inadmissible.

[132] *Id.* at 422–23.

[133] *Id.* at 422.

[134] *Id.* at 425.

[135] *Id.* at 425–26.

[136] *Id.* at 423–24.

In sum, the Supreme Court has narrowed *Miranda's* scope by analyzing the circumstances surrounding the particular defendant's actions when determining whether the defendant waived his or her rights. A suspect's request for individuals other than attorneys, followed by a voluntary statement, sufficiently creates the inference that the suspect has knowingly and voluntarily waived his or her right to an attorney. In addition, confessions obtained during a second interrogation following the suspect's request to remain silent will be admissible as long as the police "scrupulously honored" the suspect's right to terminate the first interrogation. When a suspect invokes the right to have an attorney present during the interrogation, the Court has held that a waiver of these rights will be upheld only if the suspect initiates subsequent communications with the police, and that the waiver has been knowingly, intelligently, and voluntarily rendered. Finally, the Court has held that a suspect's knowledge that an attorney has been provided for him or her is not a necessary prerequisite for a suspect's knowing, intelligent, and voluntary waiver of the right to an attorney. Thus, subsequent to *Miranda*, the Supreme Court limited the decision's scope by broadly interpreting a defendant's actions as waiving his or her *Miranda* rights.

D. *New Cases Under the Rehnquist Court*

During 1986 and 1987, the United States Supreme Court decided three cases that concentrated on the knowing, intelligent, and voluntary components of *Miranda's* waiver requirement in further limiting *Miranda's* scope. In the 1986 decision of *Colorado v. Connelly*, the Court recognized as voluntary a mentally incompetent individual's waiver of his *Miranda* rights because the Court found no evidence of police coercion, notwithstanding evidence supporting a finding that the suspect's mental illness compelled his confession.[137] In addition, the Court decided *Connecticut v. Barrett*, in which it held that a suspect's request for an attorney solely for the purpose of making a written statement did not demonstrate that the suspect failed to comprehend the consequences of the limited invocation of the right to counsel so as to bar the prosecution from introducing into evidence the oral statements voluntarily made by the suspect during the interrogation.[138] Finally, in *Colorado v. Spring*, the Court

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[137] Colorado v. Connelly, 107 S. Ct. 515, 523–24 (1986).

[138] Connecticut v. Barrett, 107 S.Ct. 828, 832 (1987).

held that the police need not inform a suspect of the specific charges that he or she is being questioned about in order to support a knowing, intelligent, and voluntary waiver of the suspect's fifth amendment rights.[139] These cases, decided under Chief Justice Rehnquist's leadership, further limit *Miranda's* bright-line approach to the admissibility of confessions.

In *Colorado v. Connelly*, the Court held that police coercion is a necessary prerequisite for finding that a suspect has not voluntarily waived the *Miranda* rights.[140] In *Connelly*, the defendant approached a police officer and told him that he wanted to confess to a murder.[141] After the officer carefully read him his rights a number of times, the defendant waived these rights. The police officer then placed the defendant in custody and brought him to the station for interrogation.[142] Following a period of interrogation, the police discovered that the defendant was mentally incompetent.[143] The defendant claimed that he confessed because God's voice told him to confess.[144]

The defendant moved to suppress his statements at a preliminary hearing.[145] At this hearing, the examining psychiatrist testified, in his expert opinion, that the defendant suffered from chronic schizophrenia and had been in this state when he waived his rights and confessed.[146] In addition, the psychiatrist testified that the nature of the defendant's hallucinations significantly impaired his ability to act voluntarily.[147] The trial court, relying on this evidence, suppressed the defendant's statements because they were not the product of a voluntary decision.[148]

On appeal, the Colorado Supreme Court affirmed the lower court's decision.[149] In so ruling, the Colorado Supreme Court held that the proper test for the admissibility of a defendant's confession is whether the statements were "the product of a rational intellect

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[139] Colorado v. Spring, 107 S. Ct. 851, 859 (1987).
[140] *Connelly*, 107 S. Ct. at 523–24.
[141] *Id.* at 518.
[142] *Id.*
[143] *Id.* at 519.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* (citing People v. Connelly, 702 P.2d 722 (Colo. 1985)).

and a free will."[150] The Colorado Supreme Court determined that the defendant's mental instability invalidated his waiver of rights.[151]

In *Connelly*, the United States Supreme Court reversed the Colorado Supreme Court, holding that the defendant's waiver was valid as a voluntary waiver. Furthermore, the Court held that *Miranda* did not require the suppression of the defendant's statements.[152] The *Connelly* Court interpreted the *Miranda* decision as requiring governmental coercion in order for a confession to be considered involuntary and rendered inadmissible.[153] Because the police in *Connelly* did not coerce the defendant into making a statement or waiving his rights, the Court held that the defendant voluntarily waived his rights.[154]

The Court, in *Connelly*, rejected the defendant's claim that his mental incompetence rendered his waiver invalid.[155] Notions of "free will," the Court stated, are irrelevant to a judicial determination of the voluntariness of the suspect's statements.[156] The Court instead focused on governmental coercion as a necessary prereq-

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[150] *See Connelly*, 702 P.2d at 728.

[151] *Id.* at 729.

[152] *Connelly*, 107 S. Ct. at 524. Dissenting in part, Justice Stevens stated that the police officers had no duty to read the defendant his rights when he initially approached them to confess. *Id.* at 525 (Stevens, J., dissenting). According to Justice Stevens, once the police decided to bring the suspect to the station, they assumed a different relationship with him and then were required to read him his rights. *See id.* Justice Stevens reasoned that given the defendant's mental condition, his waiver was invalid and involuntary. *Id.* Thus, Justice Stevens concluded that, absent the defendant's valid waiver of the right to remain silent and the right to an attorney, his statements were inadmissible. *Id.*

In addition, Justices Brennan and Marshall vigorously dissented. They claimed that governmental coercion is not the only factor sufficient to render a confession inadmissible when dealing with a mentally ill individual. *Id.* at 526 (Brennan, J., dissenting). Justices Brennan and Marshall cited a line of cases dealing with "voluntary" confessions and argued that the Court's rejection of "free will" is inconsistent with the Court's analysis of confessions in its earlier decisions. *Id.* at 529 (Brennan, J., dissenting). Because the defendant suffered from a mental disorder, Brennan and Marshall reasoned, the reliability of his confession was in serious doubt. *See id.* at 530–31 (Brennan, J., dissenting).

Brennan and Marshall also objected to the Court's standard for determining waiver. *Id.* at 531 (Brennan, J., dissenting). Citing *Miranda*, they claimed that the standard required by that decision placed a "heavy burden" on the prosecutor to demonstrate that a suspect waived his or her rights. *Id.* (Brennan, J., dissenting) (citing Miranda v. Arizona, 384 U.S. 436, 475 (1966)). Thus, Brennan and Marshall disagreed with the Court's use of a preponderance of evidence standard because, by reducing the prosecution's burden of proof, it contravened *Miranda* by making it easier to prove that a waiver had been given by the suspect. *Id.*

[153] *Id.* at 522.

[154] *Id.* at 524.

[155] *Id.*

[156] *Id.* at 523.

uisite for a determination of involuntariness.[157] The Court thus remanded the case to the Colorado Supreme Court for proceedings consistent with its interpretation of voluntary.[158]

In addition to addressing the voluntariness issue, the Court also examined the appropriate evidentiary standards for proving a waiver in accordance with *Miranda*. The *Connelly* Court held that the prosecutor need only demonstrate by a preponderance of the evidence that the defendant waived his rights under *Miranda*.[159] In applying this standard, the Court noted the interests of society in effective law enforcement and observed that a more stringent standard for prosecutors may result in the suppression of probative evidence that goes directly to the truth of the matter. Thus, by applying the least restrictive standard, the *Connelly* Court sought to facilitate the admissibility of confessions based on knowing, intelligent, and voluntary waivers.[160]

Similarly, one month later in *Connecticut v. Barrett*, the Court held that a suspect's request to have an attorney present while making a written statement did not render inadmissible oral statements that the defendant made in the attorney's absence, because the request failed to reflect the suspect's lack of understanding regarding the consequences of the limited invocation of the right to counsel.[161] In *Barrett*, the police arrested the defendant for sexual crimes.[162] The defendant agreed to talk to the police, admitting his guilt in the crimes, but he refused to make a written statement without having an attorney present.[163] At trial, the prosecutor used the oral statements against the defendant as evidence of his guilt.[164] In admitting the statements, the trial court concluded that the defendant understood his *Miranda* rights and that his request to have an attorney present for the written statements constituted a waiver of the defendant's right to an attorney during the oral admissions.[165]

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[157] *Id.*

[158] *Id.* at 524. In remanding the case, the Court acknowledged that the Colorado Supreme Court may have invalidated the defendant's waiver on grounds other than voluntariness. *Id.* at 524 n.4. As a result, the Court noted that the Colorado Supreme Court was free to reconsider other issues (such as the knowing or intelligent requirements) if it chose to nonetheless exclude the defendant's confession. *Id.*

[159] *Id.* at 523.

[160] *Id.* at 522–23.

[161] Connecticut v. Barrett, 107 S. Ct. 828, 832 (1987).

[162] *Id.* at 830.

[163] *Id.*

[164] *Id.* at 830–31.

[165] *Id.*

On appeal, the Connecticut Supreme Court reversed the defendant's conviction.[166] The Connecticut Supreme Court held that the defendant's request to have an attorney present before making a written statement was sufficient to invoke the right to counsel.[167] As a result, the Connecticut Supreme Court reasoned, the defendant's waiver could only be valid if he initiated further discussions with the police, and he knowingly, intelligently, and voluntarily waived the right to counsel in accordance with *Edwards v. Arizona*.[168] Because the defendant failed to initiate further communication with the police, the Connecticut Supreme Court concluded that the defendant's statements were improperly admitted as evidence.[169]

The United States Supreme Court reversed, admitting the oral confession into evidence.[170] The *Barrett* Court distinguished *Edwards* in concluding that the defendant waived his right to have an attorney present for his oral admissions when he qualified that right by stating that he would not make a written statement in his attorney's absence.[171] The Court noted that the defendant's statements were clear and that the police acted on the defendant's wishes.[172] The Court further observed that the defendant's limited invocation of the right to counsel failed to reflect an incomplete understanding of the consequences so as to "vitiate" the voluntariness of his confession.[173] As a result, the *Barrett* Court concluded that the defendant's oral statements were admissible because he waived the right to have his attorney present when he made them to the police.[174] Thus, the

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[166] *See* State v. Barrett, 197 Conn. 50, 495 A.2d 1044 (1985).

[167] *Id.* at 57, 495 A.2d at 1049 (citing Edwards v. Arizona, 451 U.S. 477, 479, 484–85 (1981)).

[168] *Id.* at 58.

[169] *Id.* at 58–60.

[170] Connecticut v. Barrett, 107 S. Ct. 828, 833 (1987).

[171] *Id.* at 832.

[172] *Id.*

[173] *Id.* at 832–33.

[174] *Id.* at 832. In a concurring opinion, Justice Brennan agreed with the result but not the majority's legal reasoning. Brennan, applying *Miranda*, claimed that the state satisfied *Miranda*'s heavy burden of demonstrating that the defendant waived his right to remain silent during his oral admissions. *Id.* at 834–35 (Brennan, J., concurring). The defendant, in Brennan's opinion, understood his rights and clearly limited his exercise of these rights to the making of a written statement. *Id.* at 835 (Brennan, J., concurring). Brennan argued, however, that an affirmative waiver still served as the best means of determining whether a particular suspect has knowingly, intelligently, and voluntarily waived his or her rights. *Id.* at 833 (Brennan, J., concurring). Brennan reasoned that, given the specific facts and circumstances, the defendant's actions and statements requesting an attorney prior to making a written statement effectuated an affirmative waiver of the right to have an attorney present for the oral communications. *Id.* at 833–34 (Brennan, J., concurring). Thus, Brennan agreed, the defendant's oral statements were properly admitted into evidence at trial.

Court remanded the case to the Connecticut Supreme Court in light of its ruling on the validity of the defendant's limited waiver.[175]

In 1987, the Court further restricted *Miranda's* application in *Colorado v. Spring*.[176] The *Spring* Court held that a suspect's knowledge of the specific charges that he or she is being interrogated on is not relevant to determine whether that suspect rendered a valid waiver of his or her fifth amendment privilege against self-incrimination.[177] In *Spring*, agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) arrested the defendant for his involvement in the interstate shipment of stolen firearms.[178] Prior to questioning, they informed him of his *Miranda* rights.[179] The defendant claimed that he understood his rights and was willing to make a statement and to answer questions.[180]

During the interrogation, the ATF agents questioned the defendant about his involvement in an unrelated murder.[181] The defendant indicated that he had "shot another guy once," but denied involvement in the murder.[182] Two months later, Colorado officials questioned the defendant about the murder.[183] The defendant cooperated with the officials and rendered a confession that was later used against him in court.[184]

On appeal, the defendant contended that his statements regarding the second crime were inadmissible because he never received *Miranda* warnings prior to his interrogation about the second crime.[185] The Colorado Court of Appeals agreed, holding that the officers should have read the defendant his rights before each interrogation, rather than read the defendant his rights once, before asking the defendant questions about both incidents.[186] The Colorado Court of Appeals thus held that all of the defendant's statements relating to the murder were inadmissible.[187]

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[175] *Id.* at 833.
[176] 107 S. Ct. 851 (1987).
[177] *Id.* at 859.
[178] *Id.* at 853.
[179] *Id.* at 853–54.
[180] *Id.* at 854.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.* at 855.
[186] *See* People v. Spring, 671 P.2d 965, 966 (Colo. Ct. App. 1983).
[187] *Id.* at 967.

The Colorado Supreme Court affirmed the Court of Appeals decision but on different grounds.[188] Applying a totality of the circumstances approach, the Colorado Supreme Court held that a suspect's knowledge of the charges that he or she is being questioned about can be a determinative factor in evaluating the suspect's waiver.[189] As a result, the Colorado Supreme Court concluded that, under the circumstances, the defendant could not possibly have knowingly, intelligently, and voluntarily waived his right to remain silent and his right to have an attorney present during the interrogation because he did not realize that the police were going to question him about a second crime.[190]

The United States Supreme Court, in *Colorado v. Spring*, reversed the Colorado Supreme Court, holding that when the police properly read the defendant his *Miranda* rights, he was on notice that anything that he might say could be used against him in court.[191] The Court further stated that the police need not inform a suspect of all relevant circumstances prior to a suspect's decision to waive his or her fifth amendment rights.[192] Therefore, the Court concluded that the interrogators' failure to inform a suspect that the interrogation would encompass additional criminal matters did not invalidate the suspect's waiver of the fifth amendment privilege against self-incrimination.[193]

The *Spring* Court applied a totality of the circumstances approach, and found that the defendant understood and knowingly, intelligently, and voluntarily waived his *Miranda* rights.[194] Because

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[188] *See* People v. Spring, 713 P.2d 865 (Colo. 1985).

[189] *Id.* at 872–73.

[190] *Id.* at 874.

[191] Colorado v. Spring, 107 S. Ct. 851, 859 (1987). In dissent, Justices Brennan and Marshall stated that information relating to the particular crimes that a suspect is being interrogated about is relevant to his or her decision to waive fifth amendment rights. *Id.* at 860 (Marshall, J., dissenting). In addition, the dissent argued that a requirement that police inform suspects of the subjects that will be discussed in interrogation would not interfere unduly with legitimate interrogation techniques. *Id.* In fact, the dissent noted that such a requirement may ensure that an arrest was lawfully made and that the suspect's statement was not the product of compulsion. *Id.* The dissent contended that the absence of such relevant information undermined the validity of defendant's waiver. *Id.* at 861–62 (Marshall, J., dissenting). Thus, according to Brennan and Marshall, the defendant's waiver of his rights to remain silent and to have an attorney present during the interrogation relating to the murder charge was involuntary and, as a result, defendant's statements relating to the second charge were inadmissible. *Id.*

[192] *Id.* (citing Moran v. Burbine, 475 U.S. 412, 422 (1986)).

[193] *Id.*

[194] *Id.* at 857.

the defendant understood his rights and could have realized the consequences of speaking freely with the interrogating officers, the Court held that the defendant's waiver was valid.[195] Thus, the Court concluded that the defendant's statements relating to his involvement in the murder were admissible against him. The Court, therefore, remanded the case for a proper determination consistent with its opinion.[196]

In sum, the Rehnquist Court further limited *Miranda's* scope through its analysis of the defendant's waiver of his or her *Miranda* rights. Recently, the Court held that a mentally incompetent individual's waiver of his fifth amendment rights was voluntary because there was no evidence that governmental coercion influenced the suspect's decision to waive his rights. In addition, the Court held that the prosecution need only demonstrate the defendant's waiver of his or her rights by a preponderance of the evidence. In other decisions, the Court ruled that the defendant's request to have an attorney present when making a written statement, resulting in a waiver of the defendant's right to have an attorney present during oral communications, did not manifest an insufficient understanding of the consequences of the limited invocation of the right to counsel so as to invalidate the waiver. Finally, the Court ruled that a suspect did not need to know the charges that he was being questioned about in order to render a knowing, intelligent, and voluntary waiver of his fifth amendment rights.

II. EROSION OF *MIRANDA*: A RETURN TO THE VOLUNTARINESS STANDARD

Over the years, *Miranda v. Arizona* has been the subject of much debate,[197] and has been attacked recently by prominent conservatives as impeding the efficacy of the criminal justice system.[198] In

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[195] *Id.* at 857–58.

[196] *Id.* at 859.

[197] *See* Sonenshein, *supra* note 15, at 405–06. John C. Bell, former Chief Judge of the Pennsylvania Supreme Court, often criticized United States Supreme Court decisions, such as *Miranda*, as decisions that would "shackle the police and virtually tie the hands of district attorneys and trial judges and appellate court judges." BAKER, *supra* note 3, at 183 (quoting Bell). At a time when crime rates seem staggering, *Miranda* stands out as one of the key obstacles to the effective administration of criminal justice in the eyes of certain politicians, judges, lawyers, and members of the public. *See* Sonenshein, *supra* note 15, at 405–06, 406 n.7; *see also* BAKER, *supra* note 3, at 182–86, 204–05.

[198] *See* Agronsky, *Meese v.* Miranda*: The Final Countdown*, 73 A.B.A. J. 86–92 (November 1, 1987). In recent years, one of *Miranda*'s harshest critics has been Reagan's Attorney General Edwin Meese who views *Miranda* as a decision that shields criminals from effective prose-

tracing *Miranda's* developments, however, it is clear that the Supreme Court has already embarked on a course to restrict the decision's scope.[199] This narrowing trend is best explained by the shift in the composition of the Supreme Court from its once liberal majority led by Chief Justice Earl Warren, to an increasingly conservative bloc under Chief Justice Warren Burger, and more recently, Chief Justice William Rehnquist.[200]

An analysis of *Miranda's* treatment in the Warren, Burger, and Rehnquist Courts requires an understanding of the judicial philosophies that influenced the Court's decisions. The Warren Court played an active role in protecting individuals' constitutional rights.[201] As a protector of individual rights, the Warren Court rejected the Court's balancing of society's needs and interests against individual rights.[202] Instead, the Warren Court subscribed to a philosophy that individual rights under the Constitution were absolute and could not be abridged by society's interests.[203] The Warren Court's shift away from the totality of the circumstances test, which accorded significant discretion to trial judges, and adoption of an objective set of rules to protect the constitutional rights of criminal suspects during periods of custodial interrogation, was both predictable and understandable.[204]

The *Miranda* Court did not completely abolish the totality of the circumstances test. Instead, the Court limited the test to a determination of the voluntariness of a suspect's waiver.[205] The Court,

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cution. *Id.* at 87. As Attorney General, Meese has directed the Justice Department to launch an attack on the decision. *See id.*

Other noted critics, such as Philadelphia Police Commissioner Edward J. Bell, claimed that "the present rules and interpretations, whether or not so intended — in fact protect the guilty. I do not believe the Constitution was designed as a shield for criminals." BAKER, *supra* note 3, at 176.

[199] See *supra* notes 100–196 and accompanying text for a discussion of the limitations placed on *Miranda* through a broad interpretation of a defendant's waiver.

[200] *See supra* notes 23–24.

[201] *See* Crossley, *supra* note 23, at 1697–98. At a time when racism was widespread, especially in the South, the Warren Court forcefully instituted a program of desegregation and radically altered a school system. *See* Brown v. Board of Education, 347 U.S. 483 (1954). In *Brown*, the Warren Court held that segregated facilities were inherently unequal. This decision set the Supreme Court on a path which led to the desegregation of many school systems throughout the nation within a 20-year period.

[202] *See* Miranda v. Arizona, 384 U.S. 436, 479–81 (1966).

[203] *Id.* at 479.

[204] *See id.* at 468–69; and *see supra* text accompanying notes 77–95 for a discussion of the bright-line rules imposed by the Warren Court, and the Court's approach to a suspect's waiver of the rights protected by these rules.

[205] *Miranda*, 384 U.S. at 475–76.

however, sought to minimize the subjective nature of this test by listing criteria that would govern the determination of acceptable waivers.[206] Thus, although *Miranda* attempted to replace the factually based totality of the circumstances test, the Burger and Rehnquist Courts have renewed successfully its application through a broad analysis of the defendant's waiver of his or her rights.[207]

In limiting *Miranda*, the Burger Court considered the interests of society along with those of individuals.[208] Indeed, Chief Justice Burger never subscribed to a view that highly probative evidence should be excluded even if it was obtained illegally.[209] As one of *Miranda's* harshest critics, Justice Burger criticized the effect of exclusionary rules in commenting that it is wrong to "deter Peter by punishing Paul."[210] This philosophy provides the underlying theme of many Burger Court decisions and provides greater insight into the Court's actions in its continued restriction of *Miranda's* scope.

Similarly, the Rehnquist Court has continued to limit the *Miranda* decision's impact on criminal prosecutions. President Reagan's appointments of known conservatives Antonin Scalia and Anthony Kennedy perpetuates conservative control of the Supreme Court for some years to come. The Court's predominant conservative philosophy rejects *Miranda's* underlying rationale and harkens back to the earlier criticisms hurled at the *Miranda* decision.

The *Miranda* bright-line rules created a presumption of coercion that could only be defeated if the prosecutor successfully demonstrated that a suspect was read his or her rights and fully understood them, and that the suspect knowingly, intelligently, and

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[206] *Id.*; *see supra* note 13 and accompanying text for a discussion of the *Miranda* Court's criteria for acceptable waivers and the elements of an invalid waiver.

[207] *See infra* text accompanying notes 236–273 for a discussion of the Burger Court's trend toward narrowing *Miranda* through a broad reading of what constitutes a valid waiver.

[208] *See* Moran v. Burbine, 475 U.S. 412, 426 (1986) (Court upheld suspect's waiver of the right to an attorney despite the fact that the police failed to inform him that his sister already had provided an attorney for him); *see also* Michigan v. Tucker, 417 U.S. 433, 450–51 (1974). In *Michigan v. Tucker*, the Court held that the *Miranda* warnings are only prophylactic rules that safeguard constitutional rights and thus concluded that they are not constitutionally required. *Id.* at 443–44. The *Tucker* Court applied a balancing test to determine the extent of the police's violation of the defendant's rights and stated that "when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Id.* at 450.

[209] *See* BAKER, *supra* note 3, at 57.

[210] *See id.* (quoting Burger, *External Checks — The Views of a Jurist*, THE POLICE YEARBOOK 128 (1965)).

voluntarily waived those rights.[211] Although the central focus of the criticism lies in the fact that *Miranda* imposed bright-line rules for police behavior and moved away from a more flexible case-by-case analysis of confessions,[212] the subsequent Burger Court decisions demonstrate that the conservative block has returned to the pre-*Miranda* case-by-case analysis. Indeed, the Rehnquist Court has gone further, in *Colorado v. Connelly*, by creating the presumption of voluntariness of a suspect's waiver in the absence of governmental coercion.[213] Although the Rehnquist Court's limitations on *Miranda's* scope, in cases such as *Connecticut v. Barrett* and *Colorado v. Spring*, prevent criminal defendant's from escaping effective prosecution by exploiting technicalities in *Miranda's* application, the Rehnquist Court has gone too far in the *Connelly* case by creating presumptions that virtually emasculate *Miranda's* constitutional safeguards.

Section II analyzes the changing approach of the Supreme Court in its treatment of the defendant's waiver. Subsection A examines *Miranda's* impact on criminal procedure and discusses the importance of the decision given its timely relevance.[214] Subsection B focuses on the Burger Court's treatment of a defendant's waiver and demonstrates how the Court narrowed *Miranda* by interpreting broadly the elements of a valid waiver.[215] Subsection C examines the cases decided by the Rehnquist Court to determine the future course of *Miranda* in criminal procedural protections.[216]

A. *The Relevance of* Miranda *and its Effects on Police Behavior*

Miranda was an important decision because it brought the Constitution from the courtroom to police interrogation rooms.[217] The *Miranda* Court mandated that police recognize the limits that constitutional principles impose on the interrogation process.[218] The *Miranda* decision reaffirmed the Court's previous application of the fifth amendment to state criminal trials in *Malloy*, while rejecting its earlier case-by-case approach applying the totality of the circum-

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[211] Miranda v. Arizona, 384 U.S. 436, 475–76, 479 (1966).

[212] *See id.* at 499–549 (1966) (Clark, Stewart, Harlan and White, JJ., dissenting).

[213] *See* Colorado v. Spring, 107 S. Ct. 851 (1987); Connecticut v. Barrett, 107 S. Ct. 828 (1987); Colorado v. Connelly, 107 S. Ct. 515 (1986); and see *infra* text accompanying notes 274–297 for a discussion of the Rehnquist Court's treatment and limitation of *Miranda*.

[214] *See infra* text accompanying notes 217–235.

[215] *See infra* text accompanying notes 236–273.

[216] *See infra* text accompanying notes 274–297.

[217] *See* BAKER, *supra* note 3, at 170–71.

[218] *See id.* at 171.

stances analysis.[219] The *Miranda* Court created a framework that simplified judicial analysis of police interrogation to determine whether the interrogating officers violated a criminal suspect's fifth amendment right to be free from compelled self-incrimination.[220] Finally, the *Miranda* decision served to shape police procedure by defining clear rules that officers need to follow when interrogating a suspect.[221]

Miranda abolished the incommunicado setting of the interrogation rooms by mandating the presence of an attorney during police questioning if the suspect so desired.[222] The attorney's presence during interrogation, the Court held, provided the best safeguard[223] of a suspect's fifth amendment right to "[not] be compelled in any criminal case to be a witness against himself."[224] Counsel could then serve as a witness to police overreaching and, therefore, check the power of these officials as well as insure that the interrogation does not violate constitutional principles.[225] In bringing constitutional principles into the interrogation rooms, the *Miranda* rule became synonymous with the fifth amendment right to be free from self-incrimination.[226]

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[219] *See* Miranda v. Arizona, 384 U.S. 436, 464–65 (1966) (relying on Malloy v. Hogan, 378 U.S. 1 (1964)).

[220] Miranda v. Arizona, 384 U.S. 436, 463–65 (1966).

[221] *Id.* at 467–74. See *supra* note 84 for a discussion of *Miranda*'s bright-line requirements and the now famous *Miranda* warnings.

[222] *Miranda*, 384 U.S. at 469.

[223] *Id.*

[224] U.S. CONST. amend. V. See *supra* note 34 for a text of the fifth amendment.

[225] *Miranda*, 384 U.S. at 470.

[226] *See* Sonenshein, *supra* note 15, at 416. Earlier cases, such as *Escobedo v. Illinois*, 378 U.S. 478 (1964), dealt with a suspect's sixth amendment right "to have the assistance of counsel for his defense." U.S. CONST. amend. VI. *Miranda* did not rely on the sixth amendment right to counsel, but instead, recognized a suspect's right to have an attorney present during a custodial interrogation in order to protect the fifth amendment right to be free from compelled self-incrimination. *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966).

Although the *Miranda* decision was initially believed to have created a right in and of itself, i.e., the right to have rights read prior to an interrogation, the Court has subsequently held, in *Michigan v. Tucker*, that the rule only *safeguards* constitutional rights, but is not a right in itself, and therefore, it is not mandated by the Constitution. 417 U.S. 433, 44 (1973).

The Court has drawn a distinction between technical violations and substantive violations of a suspect's fifth amendment rights. In drawing this distinction, the Court has held that the *Miranda* rules sweep more broadly than the fifth amendment. Therefore, the Court has indicated that a violation of the *Miranda* rules may not always result in a violation of the fifth amendment. See *Oregon v. Elstad* for a more complete discussion of this distinction. 470 U.S. 298 (1985), *on remand*, State v. Elstad, 78 Or. App. 362, 717 P.2d 174, *rev. denied*, 302 Or. 36, 726 P.2d 935 (1986).

Miranda's impact stemmed from the bright-line rules that it created which became authoritative guidelines for the states.[227] With *Miranda*, a noteworthy shift occurred from the Court's previous acquiescence to state authority in criminal matters to close federal governmental supervision.[228] States shifted away from establishing their own standards for police procedure in accordance with their respective state constitutions, and instead, adopted the federal standards imposed by the Court.[229] In recent years, however, many states have begun to rely on their own constitutions in criminal matters, partially due to the emerging conservative bloc on the Supreme Court that has restricted *Miranda's* application, in order to provide greater protections for individual liberties than those recognized by the United States Supreme Court.[230]

Miranda further established a set of guidelines that have a beneficial impact on the conduct of law enforcement officers.[231] Despite the lambasting of *Miranda* from conservative circles,[232] few can disagree that *Miranda* has held police to a higher standard of conduct that serves to legitimize methods of law enforcement in the eyes of the public.[233] Although conservative critics have often likened these guidelines to chains that bind police behavior,[234] it is clear that *Miranda's* edicts have placed an important check on police power and have outlined the rules of the game that, if followed, will provide a conviction without the need for searching inquiry into the "voluntariness" case-by-case approach.[235]

In creating bright-line rules, however, the *Miranda* Court erred in removing judicial discretion from the trial courts and imposing a stringent standard from above. Despite the fact that bright-line rules simplify judicial analysis, these rules do not always take into account the possible exceptions and distinctions that reduce the application of the rule to an unjust exercise in legal formalism. The *Miranda* decision responded to the widespread police abuses asso-

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[227] *See* Sonenshein, *supra* note 15, at 413–14.

[228] *See* Crossley, *supra* note 23, at 1698–99.

[229] *Id.*

[230] *See id.* at 1699–1701.

[231] *See* BAKER, *supra* note 3, at 405–06.

[232] *See supra* note 197.

[233] See Edwards, *An Opportunity for Upgrading Police Standards*, in A NEW LOOK AT CONFESSIONS: *ESCOBEDO* — THE SECOND ROUND 47–63 (J. George ed. 1967) for a discussion of the beneficial impact of *Miranda* on the conduct of police officers interrogating criminal suspects.

[234] *See* BAKER, *supra* note 3, at 183; and *see also supra* note 197.

[235] *See* Sonenshein, *supra* note 15, at 413–14.

ciated with custodial interrogations. Pre-*Miranda* police practices, encompassing physical brutality and psychological abuse in order to get a suspect's confession, were inherently illegitimate. The *Miranda* decision was necessary, and thus proper within its context, because it attacked substantive violations of a suspect's fifth amendment right to be free from compelled self-incrimination.

In its attack on these substantive fifth amendment violations, *Miranda's* bright-line rules created per se violations in the event that police officers did not completely abide by *Miranda*. Such technical violations could be used to render evidentiary useful confessions inadmissible in criminal trials. Given the dangers of allowing guilty offenders to walk free, many predominantly conservative critics objected to the scope of *Miranda*. Although *Miranda* had a beneficial impact on law enforcement procedures, the Court went too far in establishing bright-line rules capable of overturning probative evidentiary statements due to a technical violation of the rules.

As a result, the Burger Court properly carved inroads in *Miranda* through its broad interpretation of the defendant's waiver. Although the Warren Court recognized the limited utility of a totality of the circumstances approach in determining the validity of a suspect's waiver of the *Miranda* rights, the Burger Court exploited this loophole as a means of cutting back the *Miranda* decision itself. By including implied waivers of the rights to remain silent and to speak to an attorney, the Burger Court effectively revitalized the use of the totality of the circumstances test that the Warren Court tried to remove in *Miranda*. Thus, through a broad interpretation of the knowing, intelligent, and voluntary requirements for a suspect's waiver, subsequent Courts have bypassed the application of the strict bright-line rules regarding the admissibility of a suspect's confession, in order to limit *Miranda's* scope.

B. *The Burger Court and the Trend Towards Narrowing* Miranda

The Warren Court's liberal majority began to change in 1969 when President Richard Nixon appointed Warren Burger, a noted conservative opposed to the use of exclusionary rules, to replace Chief Justice Earl Warren.[236] Warren Burger viewed cases like *Miranda* as impediments to the efficacy of the criminal justice system.[237] He criticized the Court's activism in usurping the legislature's role

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[236] *See id.* at 406 n.8.

[237] *See* BAKER, *supra* note 3, at 194.

and creating rules of criminal procedure based solely on the isolated events of individual cases.[238] Instead, Burger believed that these issues were better left to the state legislatures, which had sufficiently greater expertise in these matters than the Justices of the Supreme Court.[239] During his last three years as a federal judge on the United States Court of Appeals for the District of Columbia, Burger voted to affirm convictions in eighty-two of the ninety-four criminal cases in which he was involved.[240]

In that same year, Nixon appointed Harry Blackmun to replace Associate Justice Abe Fortas.[241] Blackmun, when dealing with matters of criminal procedure, approached the issues in a conservative manner, respecting the institutions of government by adopting a laissez-faire attitude.[242] Believing that the judiciary ought not involve itself in the formation of public policy, Blackmun possessed a philosophy of judicial restraint.[243] Although Blackmun had little exposure to *Miranda* cases as a federal judge, his general deference to government prompted him to decide in favor of the prosecution in at least eighty-one percent of the criminal cases that he heard in the years preceding his appointment to the United States Supreme Court.[244]

In 1971, Nixon appointed Lewis Powell to replace Associate Justice Hugo Black.[245] Prior to his appointment, Powell expressed fears that the Warren Court had limited the powers of the police by expanding the rights of the accused.[246] Disagreeing with this approach, Powell advocated "greater protection — not of criminals but of law-abiding citizens."[247] Consistent with this philosophy, Powell advocated a return to the voluntariness standard that *Miranda* had supplanted.[248]

Finally, in 1972, Nixon's fourth appointee, William Rehnquist, replaced Associate Justice John Marshall Harlan, who had dissented in *Miranda*.[249] Known as a staunch conservative, Rehnquist clerked

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[238] *Id.* at 195.

[239] *Id.*

[240] *Id.* at 194.

[241] *See* Sonenshein, *supra* note 15, at 406 n.8.

[242] *See* BAKER, *supra* note 3, at 305.

[243] *Id.* at 304.

[244] *Id.* at 305.

[245] *Id.* at 320.

[246] *See id.*

[247] *Id.* at 322 (quoting Powell, *Richmond Times-Dispatch*, Aug. 1, 1971, in N. Y. Times, Nov. 1, 1971, p.47).

[248] *Id.* at 322.

[249] *Id.* at 323.

for Supreme Court Justice Robert Jackson upon graduating from Stanford Law School.[250] In one of his early political speeches, Rehnquist openly criticized the "left wing of the Supreme Court — Earl Warren, William O. Douglas, and Hugo Black — who, he charged, were making the Constitution say what they wanted it to say."[251] Following the Republican victory in the White House in 1968, Rehnquist received an appointment to the Justice Department's Office of Legal Counsel. While working for the Justice Department, Rehnquist advocated the D.C. crime bill, which contained a provision relating to preventive detention, which passed in 1970.[252] With Rehnquist's appointment to the United States Supreme Court, Richard Nixon had succeeded in placing four conservatives on the Court, many of whom had expressed concern over *Miranda's* scope.

In 1975, President Gerald Ford appointed John Paul Stevens to replace Associate Justice William O. Douglas, leaving Justice William Brennan as the sole "survivor" from the *Miranda* majority.[253] While serving as a federal appellate judge for five years, Stevens voted to allow the admission of confessions in nine of the eleven cases addressing *Miranda* issues that appeared before the court.[254] Although it appeared that this appointment would leave only two *Miranda* supporters, Justices Brennan and Marshall, Justice Stevens proved himself to be unpredictable. Rather than join the emerging conservative bloc of the Court on *Miranda* issues, he became one of *Miranda's* leading advocates on the Court.[255]

In the years following *Miranda*, a marked trend towards narrowing the decision began to develop under the Burger Court. In dealing with the waiver issue, the Burger Court loosened the stricter standards imposed by the *Miranda* decision, and recognized the validity of waivers in certain circumstances.[256] Although the Court created the bright-line rules in *Miranda* to check police power, the

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[250] *Id.* at 322–23.

[251] *Id.* at 323.

[252] *Id.*

[253] *Id.* at 387.

[254] *Id.* at 388.

[255] *Id.* at 389.

[256] *See, e.g.*, Moran v. Burbine, 475 U.S. 412 (1986) (Court upheld suspect's waiver despite the fact that the police failed to inform him that his sister had already provided him with an attorney); Fare v. Michael C., 442 U.S. 707 (1979) (Court deemed juvenile suspect's request for a probation officer to be an implicit waiver of his right to have an attorney present during interrogation); North Carolina v. Butler, 441 U.S. 369 (1979) (suspect's actions prior to his interrogation were sufficient to imply a waiver of his rights to remain silent and to have an attorney present during the interrogation).

Burger Court rejected the rigid application of these rules and instead, actively used the earlier case-by-case totality of the circumstances approach. Because bright-line rules often reduce judicial discretion, the *Miranda* decision went too far in allowing criminal suspects, after making incriminating statements, the opportunity to exploit the interrogators' technical violations of *Miranda* to reverse convictions resting on the strength of those statements.[257] The Burger Court, through a totality of the circumstances approach, restored judicial discretion in this area.

One of the first inroads carved by the Burger Court concerned the validity of a second interrogation following a suspect's request to remain silent. In *Michigan v. Mosley* for example, the Court sidestepped the *Miranda* requirement that interrogation must cease if the suspect wishes to remain silent.[258] By treating the suspect's statement as waiving the right to remain silent, the Court effectively created an avenue for admitting the statement which resulted from the second interrogation. Rather than apply *Miranda's* rules blindly, the *Mosley* Court demonstrated that courts should look to the totality of the circumstances to determine if the suspect waived his or her right to remain silent.[259] As a result, the Court prevented *Miranda* from becoming a set of rules that create per se violations of the fifth amendment.

The Court's clearest departure from *Miranda* revolves around express and implied waivers of a suspect's rights. In *Miranda*, the Court stated that only an express waiver could constitute a valid waiver.[260] The Supreme Court, however, in *North Carolina v. But-*

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[257] *See* Agronsky, *Meese v.* Miranda*: The Final Countdown*, 73 A.B.A. J. 86–92 (November 1, 1987). This commentator focuses on the efforts of Attorney General Edwin Meese III to have courts overturn the *Miranda* decision. In describing Meese's attack on the seminal decision that created stringent bright-line rules governing the admissibility of confessions obtained after custodial interrogations, Agronsky recalls the story of gang member Ronnie Gaspard who successfully exploited a *Miranda* bright-line rule to win his freedom. The police arrested Gaspard for the murder of Denise Hubbard Sanders after she had testified against him in a drug-trafficking case. The officers informed Gaspard of his *Miranda* rights before conducting the interrogation. Gaspard requested to have an attorney present and shortly thereafter, volunteered a statement to the police confessing his murder of Ms. Sanders. The district court, noting that Gaspard's attorney was not present when the statement was made, reversed the conviction. Lacking other evidence linking Gaspard with the crime, the police were forced to set him free. *Id.* at 86.

[258] *See* Michigan v. Mosley, 423 U.S. 96, 102–03 (1975).

[259] *Id.* at 104–05. The *Mosley* Court considered the following variables: first, the 2 hour interval between the first and second interrogations; second, different officers conducted the second interrogation; and, third, the questions in the second interrogation had a different focus. *Id.*

[260] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

ler,[261] recognized the validity of an implied waiver and thus departed from *Miranda's* express waiver requirement. By recognizing implied waivers, the Court began to move away from *Miranda's* bright-line rules and increase the category of acceptable waivers necessary for admitting a suspect's confession. As a result, the Court resurrected the totality of the circumstances test to determine the admissibility of a suspect's statement absent an express waiver.[262] The *Butler* Court's approach properly recognizes that circumstances exist in which the suspect's actions and words clearly demonstrate an effective waiver of his or her constitutional rights, although the suspect has not done so expressly. For the Court to require an express waiver would negate the validity of confessions obtained from suspects whose actions clearly demonstrated that they understood and waived their rights.

Although the Burger Court has limited the *Miranda* decision, it did not completely reject the framework that the Warren Court established. For example, *Edwards v. Arizona*,[263] which dealt with the defendant's right to request an attorney in a second, uninitiated interrogation, signals a temporary victory for criminal suspects. Despite the Court's apparent reluctance to extend and apply the *Miranda* decision, *Edwards* seems to reflect the seriousness that the Court places on a suspect's right to an attorney, by protecting the sanctity of the fifth amendment once the suspect has requested an attorney. Unlike the *Mosley* decision, *Edwards* focused on the importance of the right to an attorney and the Court's reluctance to imply a waiver of that right in a second interrogation where the defendant did not initiate the subsequent communications.[264] Moreover, because *Mosley* involved a confession during a second interrogation but did not involve the right to an attorney, the Court seemed willing to imply a waiver of the right to remain silent.[265] Thus, the Court apparently recognized the validity of the framework established in the *Miranda* decision insofar as a suspect's *Miranda* right to an attorney is concerned.

Although *Edwards* stands in clear contrast to the decisions that limit *Miranda* and bypass its bright-line rules, a closer analysis of *Miranda's* language explains the Court's actions. Unlike other cases

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[261] North Carolina v. Butler, 441 U.S. 369 (1979).

[262] *Id.* at 374–76.

[263] Edwards v. Arizona, 451 U.S. 477 (1981).

[264] *See* Sonenshein, *supra* note 15, at 449 n.261.

[265] *See id.* at 449 n.261.

in which the Court exploited the ambiguities in *Miranda's* waiver requirement, the Burger Court in *Edwards* enjoyed little flexibility to depart from the clear dictates of *Miranda* regarding the procedure to be followed after a suspect has requested an attorney. The *Miranda* Court specifically stated that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[266] In light of this clear language, the Burger Court could not depart from *Miranda* without specifically overruling the *Miranda* Court's requirement. Thus, *Edwards* exemplifies the Burger Court's reluctance to overrule *Miranda's* clear language where no leeway exists to allow the Court to bypass the application of *Miranda's* bright-line rules.

In fact, *Edwards* actually places a further limitation on *Miranda* by recognizing an exception to *Miranda's* clear language regarding the procedures to be followed after the suspect requests an attorney. *Miranda* clearly prohibited interrogators from continuing an interrogation, after the suspect invoked the right to counsel, until the attorney arrived. The *Edwards* Court qualified *Miranda's* clear language by allowing the police to interrogate a suspect following that suspect's request for an attorney if he or she initiated further communications with the police. The Court has, in effect, neutralized *Miranda's* bright-line requirement with this "initiation" exception by creating yet another ambiguous standard which accords trial courts much discretion in determining which statements and actions of a suspect constitute "initiation."[267] Although *Edwards* outwardly pays homage to *Miranda*, the Court's recognition of the "initiation" exception places additional limits on the seminal decision, demonstrating that this "pro-*Miranda*" decision actually maintains the trend towards narrowing *Miranda's* scope.

Notwithstanding the Burger Court's recognition of the importance of the *Miranda* right to an attorney, *Moran v. Burbine*[268] demonstrates that the suspect, and not a third party, must request the attorney in order for the fifth amendment privilege to be invoked.[269] If the suspect has no reason to know that someone has obtained an attorney for him or her, this lack of knowledge will not impair the

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[266] *Miranda*, 384 U.S. at 474.

[267] *See* Oregon v. Bradshaw, 462 U.S. 1039, *on remand*, 66 Or. App. 585, 674 P.2d 1190, *rev. denied*, 296 Or. 712 (1983) (Court upheld defendant's waiver by ruling that the defendant's inquiry of "What will happen to me now?" constituted initiation of communication within the meaning of *Edwards v. Arizona*, 455 U.S. 477 (1981)).

[268] Moran v. Burbine, 475 U.S. 412 (1986).

[269] *Id.* at 421–23.

suspect's subsequent waiver of his or her *Miranda* rights.[270] The *Moran* decision also reflects the Court's position that the police need not supply the suspect with all necessary information prior to the waiver, even if that information would be likely to have affected the suspect's decision to waive his or her rights.[271]

The *Moran* decision properly avoided placing an affirmative duty on the police to apprise the suspect of all relevant information prior to the suspect's decision to waive his or her rights. Although the burden on the police would have been minimal in the *Moran* case, the *Miranda* decision serves to restrict police overreaching, but not to create affirmative duties of disclosing information to criminal suspects. The *Miranda* decision merely requires that the police must inform a suspect of his or her right to have an attorney present during interrogation.[272] The police cannot interfere with the suspect's decision to exercise that right, but they also should not have to facilitate the suspect's exercise of that right. The convenience of having an attorney waiting down the hall might have influenced the *Moran* suspect to exercise his right to an attorney, but the police in no way interfered with the suspect's decision to waive that right. Using the totality of circumstances approach, the Court correctly held that the appellant's confession was admissible despite the failure of the police to inform the suspect that his attorney was located nearby.[273]

The Burger Court has, in effect restored judicial discretion in this area of criminal procedure by resurrecting the totality of the

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[270] *Id.* at 423–24. *Moran v. Burbine* also demonstrates conflicting approaches to the *Miranda* decision. The conservative bloc focuses on the actions of the police in *Miranda* cases, *id.*, while the liberal dissenters (Brennan, Marshall and Stevens) look to the knowledge and awareness of the suspect. *Id.* at 450–56 (Stevens, J., dissenting). The majority rejects the defendant's contention that failure to inform him of the presence of an attorney violated his fifth amendment rights since such a contention would place a burden on police behavior. *Id.* at 423–28. Otherwise, asserted the majority, police would have the burden of informing suspects of all relevant information necessary to a waiver decision, and the police would bear the consequences if they failed to convey such information. *Id.* The dissent, on the other hand, stressed the need to inform all suspects of all information relevant to the waiver decision, despite the additional burdens placed on the shoulders of the police. *Id.* at 450–56 (Stevens, J., dissenting). The conflict between the police-oriented approach of the conservatives and the defendant-oriented approach of the liberals is reflected in the cases under the Rehnquist Court, whose results are predictable given the predominance of conservative justices in that Court.

[271] *Id.* at 422, 427.

[272] Miranda v. Arizona, 384 U.S. 436, 471 (1966).

[273] *See Moran*, 475 U.S. at 421, 423–24.

circumstances test through its analysis of the waiver issue. The totality approach is a more effective tool of judicial analysis than the bright-line rules created by the Warren Court in *Miranda*. Although the Court in its early confession cases looked to the surrounding circumstances of a confession solely to determine its trustworthiness, the Burger Court's application of the totality approach balances the individual's rights in a particular case with the interests of society in effective law enforcement. Trial judges once again may look to the circumstances surrounding the suspect's confession to determine if he or she rendered an implied waiver by his or her actions during the interrogation. As a result, these courts enjoy discretion to rule that an alleged *Miranda* violation was relatively minor and ought not affect the admissibility of an evidentiary useful confession. The Court's totality approach provides the best means of sifting out those cases where the appellant seeks a reversal of a conviction due to a technical violation, as opposed to a substantive violation, of the *Miranda* rights.

In sum, *Miranda* properly sought to remedy abuses in the interrogation process. The rules created by the Warren Court, however, should not be used to create per se violations of the fifth amendment. Such a rigid approach would render many confessions inadmissible in circumstances where the police did not engage in physical or psychological overbearing, but instead failed to adhere strictly to the rules outlined in *Miranda*. Where the substantive violations do not occur during an interrogation, technical violations ought not be used to render confessions inadmissible unless those violations are so egregious that they significantly interfered with the appellant's ability to exercise his or her constitutional rights. The Burger Court managed to prevent such an application of *Miranda* by relying on the totality of the circumstances test to determine the nature of the "violation" and its subsequent impact on the appellant.

C. *Recent Erosion of* Miranda *Rights Under the Rehnquist Court*

In 1986, President Reagan appointed William Rehnquist as the Chief Justice of the Supreme Court following Burger's resignation. In addition, Reagan appointed Antonin Scalia, a noted conservative, to fill the resulting vacancy. Under Rehnquist, the Court has continued its trend towards narrowing the applicability of *Miranda* through a broad interpretation of what constitutes a valid waiver. The Rehnquist Court upheld as voluntary the waivers rendered by

mentally incompetent individuals due to the absence of police overreaching or coercion.[274] Furthermore, the Court found that a suspect's limited invocation of the right to counsel, requesting an attorney for the purpose of making a written statement, did not reflect a lack of understanding of the consequences of such decision to justify excluding the suspect's oral statements during the interrogation.[275] Finally, the Court held valid a suspect's waiver of *Miranda* rights, despite the failure of the police to inform the suspect of the charges that would be the subject of questioning.[276] Although the Rehnquist Court has continued the work of its predecessor, in some cases it has gone further to create per se rules presuming voluntary waivers where there is no affirmative evidence of police coercion.

Indeed, *Colorado v. Connelly*,[277] which held valid a mentally incompetent individual's waiver, signals a dramatic departure from *Miranda*. In *Connelly*, the Court shifted its analytical focus from the suspect's state of mind in determining whether a waiver is voluntary to the officers' actions by interpreting *Miranda* to protect the accused from governmental overreaching that violates their constitutional rights.[278] Finding no violation of the suspect's rights, the Court held that the suspect's waiver was voluntary because it was not the product of governmental interference or coercion.[279] Thus, the *Connelly* decision creates a new bright-line rule presuming the voluntariness of a suspect's waiver absent governmental coercion. Under this standard, unless the defendant can rebut this presumption of voluntariness with affirmative evidence of police coercion, the Court will not look to factors such as the suspect's mental capacities and illnesses to determine the voluntariness of the waiver. The Rehnquist Court, therefore, has limited the totality of the circumstances approach by excluding a suspect's mental capacities from the relevant inquiries into the voluntariness of the waiver, and basing voluntariness solely on the absence of police coercion.

In addition, the *Connelly* Court further departed from the *Miranda* decision by lowering the standard of proof for judging a suspect's waiver. Although the *Miranda* Court emphasized that the prosecution would bear a "heavy burden" of justification to dem-

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[274] Colorado v. Connelly, 107 S. Ct. 515 (1986).
[275] Connecticut v. Barrett, 107 S. Ct. 828 (1987).
[276] Colorado v. Spring, 107 S. Ct. 851 (1987).
[277] 107 S. Ct. 515 (1986).
[278] *Id.* at 523–24.
[279] *Id.*

onstrate that a waiver was voluntarily rendered,[280] the *Connelly* Court employed a preponderance of the evidence test to the suspect's waiver.[281] By lowering the threshold of proof for a voluntary waiver, the Rehnquist Court has increased the number of waivers that courts will hold valid.

At first glance, the *Connelly* case seems to be consistent with *Miranda* because the defendant, although mentally incompetent, waived his rights and confessed voluntarily. The decision's inconsistency, however, lies in the differing interpretations of the term "voluntary." The *Miranda* Court stressed the importance of the knowing, intelligent, and voluntary requirement for a suspect's waiver.[282] As a result, courts applied a totality of the circumstances analysis that examines the circumstances surrounding the confession, including the physical and mental state of the suspect, to determine the voluntariness of the suspect's waiver. In contrast, the *Connelly* Court demonstrated a willingness to uphold a statement as voluntary, regardless of the suspect's mental condition, as long as the police in no way contributed to the suspect's decision to render the statement.[283] *Connelly*'s exclusion of mental capabilities from the relevant inquiries in the totality of the circumstances approach shifts the focus of the analysis concerning voluntariness from the suspect to the interrogating officers.

The *Connelly* Court has gone too far in narrowing the *Miranda* decision. The *Connelly* holding suggests that new bright-line rules will be applied to presume the voluntariness of a suspect's waiver. If the Court upheld the defendant's waiver under the totality of the circumstances test, the results would be less disturbing. By laying the groundwork for a new bright-line rule, however, the Court may begin to move away from the totality of the circumstances. If the Court gradually departs from the totality test in favor of bright-line rules presuming the voluntariness of a suspect's waiver in the absence of governmental coercion, the Rehnquist Court will apply equally inflexible standards like those imposed by the Warren Court in *Miranda*.[284] Rather than lay the groundwork for new bright-line

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[280] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[281] *Connelly*, 107 S.Ct. at 523.

[282] *Miranda*, 384 U.S. at 475.

[283] *Connelly*, 107 S.Ct. at 523.

[284] *See* Smith v. Kemp, 664 F. Supp. 500 (M.D. Ga. 1987). In *Smith*, the district court addressed the validity of a mentally retarded defendant's waiver in light of the Court's holding in *Colorado v. Connelly*. The defendant, a mentally retarded individual with an I.Q.

rules that supposedly rectify the imbalances created by *Miranda*, the Rehnquist Court should respect the totality of the circumstances test that the Burger Court revitalized in the twenty-two years since the *Miranda* decision because that test does not bind trial judges to apply presumptions that overlook the factual nuances of each case.

In contrast, the Rehnquist Court in *Connecticut v. Barrett*[285] continued the trend towards narrowing, but not abrogating, the application of the *Miranda* decision by preventing the defendant from avoiding prosecution by claiming that he failed to realize the consequences of his limited invocation of the right to counsel. Like the Burger Court's decision in *Edwards v. Arizona*,[286] *Barrett* dealt with the suspect's right to have an attorney present throughout the interrogation. In *Barrett*, however, the accused stated that he would talk to the police, but he refused to sign a written statement without his attorney present.[287] In admitting the oral confessions, the Court's decision was consistent with *Edwards* because it recognized the importance of the accused's right to an attorney, although it limited this right to the suspect's written statements, and measured the voluntariness of the suspect's waiver in accordance with the totality of the circumstances.

The *Barrett* decision demonstrates the Rehnquist Court's reluctance to reverse convictions for minor, or technical violations of *Miranda*. *Barrett* suggests that the Court will not invalidate waivers in cases where a suspect clearly understands his or her rights and has been given the opportunity to fully exercise those rights, but seeks a reversal of the conviction by exploiting perceived technical violations of the *Miranda* decision. The Court's reluctance to reverse convictions based on technical violations becomes clearer when comparing *Barrett* to previous Supreme Court decisions such as *Edwards*.

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of 65, applied to the district court for habeas corpus relief after receiving the death penalty for a murder conviction. *Id.* at 501. The district court distinguished *Connelly* in noting that:

> . . . *Connelly* deals primarily with the voluntary requirement of *Miranda* as opposed to the knowing and intelligent portion of the *Miranda* requirement. The court does not doubt that Smith's confession was given under his own free will, but the court finds that Smith did not *knowingly* and *intelligently* confess and waive his right to counsel. Thus, the *Connelly* case does not mandate that this court deny petitioner's habeas.

Id. at 506 (emphasis added). The *Smith* case, therefore, demonstrates the stringency of the *Connelly* standards as applied to mentally deficient individuals. Only by relying on the other components of a *Miranda* waiver, the knowing and intelligent requirements, can a court effectively bypass the *Connelly* holding and look to the defendant's mental capabilities in determining the validity of the waiver.

[285] 107 S. Ct. 828 (1987).

[286] 451 U.S. 477 (1981).

[287] *Barrett*, 107 S. Ct. at 830.

In *Edwards*, the Court held that a suspect's request for an attorney during an initial interrogation invalidated a waiver rendered in a subsequent interrogation.[288] The *Barrett* Court, in holding that the defendant waived his rights where he requested that an attorney be present during a written statement, rejected the applicability of *Edwards*.[289] Given the facts of *Barrett*, the use of *Edwards* to invalidate the suspect's confession clearly would have contradicted the suspect's expressed desire to speak with the police as long as the police honored his right to have his attorney present before rendering a written statement. In not applying *Edwards*, furthermore, the *Barrett* Court properly avoided rendering the suspect's confession invalid by allowing him to exploit a *Miranda* technicality to escape prosecution.

After *Barrett*, the Rehnquist Court will not likely accord great weight to the intelligence requirement for the waiver decision. The Court rejected the defendant's claim that his limited invocation of the right to counsel reflected a lack of understanding of his rights so as to invalidate the oral statements subsequently obtained. In rejecting this claim, the Court observed that "[t]he fact that some might find Barrett's decision illogical is irrelevant, for we have never 'embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.'"[290] The *Barrett* decision, therefore, reflects the Court's refusal to second-guess the intelligence of a defendant's decision to waive his or her *Miranda* rights. Thus, the *Barrett* Court applied a liberal interpretation to the requirement that a waiver be the product of an intelligent decision by upholding the validity of the defendant's waiver despite the fact that it may not have been well-reasoned.

Finally, *Colorado v. Spring*[291] completes the analysis of the Rehnquist Court's erosion of *Miranda*. In *Spring*, the Court held that the knowing component of a valid waiver does not require the police to inform a suspect about the specific crimes for which he or she is being interrogated.[292] The *Spring* decision applied the Burger Court's earlier decision in *Moran v. Burbine*[293] which eroded the knowing component of the waiver requirement in holding that an accused need not be apprised of all information relevant to a waiver

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[288] *Edwards*, 451 U.S. at 485–87.
[289] *Barrett*, 107 S. Ct. at 832.
[290] *Id.* at 833.
[291] 107 S. Ct. 851 (1987).
[292] *Id.* at 859.
[293] 475 U.S. 412 (1986).

decision. Once the officers read the warnings, the suspect is on notice "that *anything* that he [she] says may be used against him [her]."[294] The Court's approach, therefore, encompasses all possible responses to the questions, not merely those responses relating to the charges that the suspect believes to be the interrogation's focus.

Similar to the Rehnquist Court's *Barrett* decision, the *Spring* decision suggests that the Court is reluctant to exclude probative confessions on the basis of a perceived technical violation of a suspect's *Miranda* rights. In *Spring*, the police had apprised the defendant fully of his rights and afforded him ample opportunity to exercise these rights. The Court correctly upheld the defendant's waiver because the defendant knowingly and willfully volunteered information about the murder he committed. It is illogical to assume that the suspect could have actually believed that his murder confession would not be used against him because he rendered the confession in an interrogation that had not been prefaced with a warning that the murder would be discussed during the interrogation. Recognizing that the suspect understood his constitutional rights, the Court, in *Spring*, again refused to reverse a conviction on the basis of a technicality.

In sum, *Colorado v. Connelly*,[295] *Connecticut v. Barrett*,[296] and *Colorado v. Spring*,[297] demonstrate that the Rehnquist Court has continued the trend towards narrowing *Miranda's* application to confession cases by interpreting broadly what constitutes a valid waiver. Given the trend begun by the Burger Court, and the dominant conservative bloc on the Rehnquist Court, the results in the recent cases are predictable. In *Barrett* and in *Spring*, the Rehnquist Court demonstrated a reluctance to reverse convictions based on technicalities, because the technical violations that the defendants asserted in no way deprived them of their fifth amendment right to be free from compelled self-incrimination. In *Connelly*, however, the Rehnquist Court moved from the totality of the circumstances test, resurrected by the Burger Court's broad interpretation of acceptable waivers, to a bright-line test that presumes the voluntariness of a suspect's waiver in the absence of governmental coercion. Such a shift to a more conservative approach results in the same inflexible standards that critics of the *Miranda* decision objected to and the Burger Court subsequently sought to correct.

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[294] *Spring*, 107 S. Ct. at 859.
[295] 107 S. Ct. 515 (1986).
[296] 107 S. Ct. 828 (1987).
[297] 107 S. Ct. 851 (1987).

CONCLUSION

In all, the Rehnquist Court's recent decisions of *Connecticut v. Barrett* and *Colorado v. Spring* do not depart radically from the Warren Court's *Miranda* decision, but instead, are a logical extension of the Burger Court's approach to the *Miranda* rule. Viewed against the backdrop of a conservative Court with a markedly different philosophy than the Warren Court, the Court's post-*Miranda* decisions move away from protecting an individual's constitutional rights towards balancing society's needs against those individual rights. Although *Miranda* served an important purpose in placing a check on the power of police in conducting interrogations, the recent trend in the Court reflects a philosophy that *Miranda* should not be applied in cases involving technical violations of a suspect's rights, as opposed to the substantive violations that *Miranda* sought to rectify.

In limiting the applicability of *Miranda*, however, the Rehnquist Court has gone further than its conservative predecessor, the Burger Court. The Rehnquist Court has articulated a standard governing the voluntariness of a suspect's waiver that creates a presumption of voluntariness absent coercive police activity. In doing so, the Court has excluded a suspect's mental capacities from the relevant inquiries in the totality of the circumstances analysis. By creating such standards, the Rehnquist Court shows that it may move much farther from *Miranda* than the Burger Court. In carrying on the task of limiting *Miranda* as it applies to waiver issues, the Rehnquist Court should not allow the pendulum to swing too far to the right, thereby destroying the valuable protections of *Miranda*. Additionally, if the Rehnquist Court cuts back on individual rights too radically, it may sow the seeds for a future liberal Court to swing back to solely protecting individual rights and, thus, create a sturdier shield for criminals and impede the effective administration of criminal justice.

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