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Miranda v. Arizona: History, Memories, and Perspectives

By Paul G. Ulrich*

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* B.A. 1961, University of Montana (with high honors); J.D. 1964, Stanford University. This article is dedicated to Ernesto Miranda, John J. Flynn, John P. Frank and Robert A. Jensen. I appreciate having had opportunities to speak with Lewis and Roca lawyers and at a Maricopa County Bar Association seminar concerning *Miranda* as this article began to develop. I also appreciate Profs. Michael Jones' and Francine Banner's invitations to speak with their criminal procedure classes at Arizona Summit School of Law concerning *Miranda*, their suggestion that I expand the materials prepared for those classes into this article and the *Arizona Summit Law Review* editors' assistance in preparing the article for publication. I also acknowledge with appreciation my wife Kathleen's encouragement in finally telling *Miranda's* story from my perspective.

I. INTRODUCTION

A. Miranda's *Holdings*

Miranda v. Arizona[1] and three other consolidated cases[2] (collectively "*Miranda*") were decided 5-4 for the defendants by the United States Supreme Court on June 13, 1966. Chief Justice Earl Warren's majority opinion there reversed Ernesto Miranda's kidnap-rape conviction, which had been based primarily on his written and oral confessions, and remanded his case for a new trial.

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

[2] *Id.* at 437-38, 499 (Vignera v. New York, No. 760, October Term 1965, and Westover v. United States, No. 761, October Term 1965 were reversed; California v. Stewart, No. 584, October Term 1965 was affirmed).

Miranda required police to warn suspects prior to any custodial interrogations concerning their Fifth and Sixth Amendment rights to remain silent and to have counsel. It also required suspects to waive those rights before any confessions based on such interrogations occurring without counsel might be used against them. Miranda prevailed because he was not given the kkwrequired warnings or otherwise made aware of his constitutional rights prior to his confessions in 1963, even though no such specific requirements then existed.

B. Constitutional Issues Presented

The constitutional issues presented by *Miranda* include finding the proper balance between law enforcement's and suspects' interests as to custodial interrogations. They also concern whether and under what circumstances any confessions resulting from suspects' interrogations, obtained without having counsel present, can be used against them. Those issues are broader than simply whether truly coerced confessions are being prevented. For example, although Miranda's confessions resulted from police interrogation and deception in a custodial environment, they were not physically coerced.

Deciding those issues also requires considering policy implications resulting from the possibility that if the Sixth Amendment were interpreted to require counsel be present before custodial interrogations could occur, as a "critical stage" in criminal proceedings, counsel generally would advise suspects to remain silent. Accordingly, they would give very few confessions. Most criminal convictions are now obtained through confessions and guilty pleas, rather than jury trials.

Requiring that suspects be provided counsel prior to any custodial interrogations also would require more courtrooms, judges, court staff, prosecutors and public defenders, and therefore greater taxpayer expense, if more criminal cases were tried. Prosecutors might not be able to prove as many cases without confessions. Such failures would result in fewer convictions, more unsolved crimes and more possibly guilty suspects going free. They in turn might commit other crimes in the future.

The fundamental underlying constitutional issue *Miranda* presents is thus whether to permit convicting suspects based primarily on their confessions, regardless of how such confessions were obtained, because they may in fact be guilty. The alternative would be to honor suspects' presumption of innocence and the full extent of their other constitutional rights, including the rights to remain silent and to have counsel present, prior to any custodial interrogations. Suspects then would have to be proven guilty beyond a reasonable doubt following a jury trial based solely on other constitutionally obtained, legally admissible evidence before they could be convicted.

How those issues should be resolved goes squarely to the core of how the American criminal justice system operates. They therefore are as timely and important today as they were fifty years ago when Miranda was arrested, interrogated and confessed, without having counsel present to advise him that he had a constitutionally-protected right to remain silent.[3] A recent series of front-page newspaper articles illustrates continuing concern about whether prosecutors sometimes improperly cross legal and ethical lines in their zeal to obtain convictions, and what, if anything, the legal system can do about it.[4] A number of recent, high profile cases have involved *Miranda* issues, including:

Dzhokhar Tsarnaev: In late April 2013, federal investigators captured, arrested, and then interrogated Dzhokhar Tsarnaev, one of two alleged Boston Marathon bombers, in the hospital room where he was being treated for gunshot wounds suffered in his capture.[5] That interrogation occurred without first providing Tsarnaev *Miranda* warnings concerning his rights to remain silent and to have an attorney present, relying on the so-called "public safety" exception to *Miranda*.[6] However, after the Justice Department filed a criminal com-

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[3] The Phoenix Police Museum opened a new exhibit describing *Miranda's* history on March 13, 2013, the fiftieth anniversary of Miranda's arrest and confessions. Cassandra Strauss, *Police Museum Opens Exhibit on Miranda Case*, ARIZ. REPUBLIC, Mar. 14, 2013, at B1.

[4] Michael Kiefer, *When Prosecutors Get Too Close to the Line*, ARIZ. REPUBLIC, Oct. 27, 2013, at A1; Michael Kiefer, *Prosecutors Under Scrutiny Are Seldom Disciplined*, ARIZ. REPUBLIC, Oct. 28, 2013, at A1; Michael Kiefer, *A Star Prosecutor's Trial Conduct Challenged*, ARIZ. REPUBLIC, Oct. 29, 2013, at A1; Michael Kiefer, *Can the System Curb Prosecutorial Abuses?*, ARIZ. REPUBLIC, Oct. 30, 2013.

[5] Mark Sherman, *Death Penalty Possible: Miranda Issue Debated*, ARIZ. REPUBLIC, Apr. 21, 2013, at A7; The most serious gunshot wound to Tsarnev entered through the left side inside of Tsarnev's mouth and exited his left lower face, resulting in a skull-base fracture, with injuries to his middle ear, the skull base, the lateral portion of his C1 verterbrae, as well as injury to his pharynx, mouth and a small vascular injury. *See* Doug Stanlin, *Declassified Documents Detail Boston Bomb Suspect's Injuries*, ARIZ. REPUBLIC, Aug. 21, 2013, at A6. Given the nature and extent of those injuries, as well as the likelihood he would have been given pain-killing medications, Tsarnev's ability to resist interrogation, and to communicate consciously and willingly with his interrogators presumably would have been substantially impaired.

[6] Sherman, *supra* note 5, at A7. The "public safety" exception to *Miranda* was created in Justice Rehnquist's majority opinion in *New York v. Quarles*. New York v. Quarles, 467 U.S. 649 (1984) (discussed further *infra* notes 649-67). Some Republican senators argued Tsarnaev instead should have been considered an "enemy combatant" before being released to the criminal justice system, so he could be interrogated for an extended period without being advised concerning his rights to counsel and to remain silent. Sherman, *supra* note 5. However, the Supreme Court has never resolved whether U.S. citizens or foreign nationals arrested on U.S. soil can be held by the military, as opposed to civilian authorities. *Id. Cf.* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (U.S. citizen held as an alleged enemy combatant when captured in Afghanistan has right to due process determination concerning that status. The Court did not address right to counsel under those circumstances, since counsel would be provided). *See generally* David T. Hartman, Comment, *The Public Safety Exception to Miranda and the War on Terror: Desperate Times Do Not Always Call for Desperate Measures*, 22 GEO. MASON U. C.R. L.J. 219 (2012). It also was suggested that

plaint, a federal magistrate judge convened a "brief, makeshift hearing" in Tsarnaev's hospital room, during which she advised him of his *Miranda* rights.[7] A court ultimately will have to decide which, if any, statements Tsarnaev made before those warnings were given might be admissible in evidence against him.[8]

Casey Anthony: The Florida Court of Appeals recently affirmed two of Casey Anthony's four convictions of providing false information to law enforcement officers concerning her daughter's disappearance and alleged murder.[9] In doing so, the court rejected Anthony's arguments that her statements should have been suppressed because they were made when she was allegedly under arrest and she had not been read her *Miranda* rights.[10] It instead found Anthony was not technically in custody when those interviews occurred.[11] Accordingly, *Miranda* did not apply.[12]

Debra Milke: The Ninth Circuit recently ordered Debra Milke's conviction and death sentence for murdering her four-year-old son be set aside because the State did not disclose to her defense lawyer that Armando Saldate, the detective to whom she allegedly confessed, had a long history of lying under oath and other misconduct.[13] At her trial, Milke denied she had ever confessed.[14] The only evidence she had done so was the detective's uncorroborated testimony.[15] The detective's contemporaneous interrogation notes were destroyed before the trial.[16] Milke's interrogation and alleged confession were

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if the FBI had chosen to have its High Value Interrogation Group interrogate Tsarnaev solely for informational, and not criminal, purposes, he would not have had constitutional rights to remain silent, to counsel, and to be brought before a magistrate without delay. *See* Michael B. Mukasey, *Defining Rights in a Terror Case*, WALL ST. J., May 2, 2013, at A15. Those conclusions are debatable.

[7] Devlin Barrett et al., *Judge Made Call to Advise Suspect of Rights*, WALL ST. J., Apr. 26, 2013, at A6.

[8] *Id.* For a discussion concerning whether and to what extent accused terrorists should have *Miranda* rights see Gary L. Stuart, *Miranda and the Boston bombing*, ARIZ. REPUBLIC, May 5, 2013, at B10.

[9] Anthony v. State, 108 So. 3d 1111 (Fla. Dist. Ct. App. 2013).

[10] *Id.* at 1117-19.

[11] *Id.*

[12] *Id.* at 1117. However, the court vacated convictions on two other counts on double jeopardy grounds because the allegedly false statements were made in only two interviews. *Id.* at 1119-20.

[13] Milke v. Ryan, 711 F.3d. 998, 1000-01 (9th Cir. 2013). Chief Judge Kozinski, also concurring, would have reversed Milke's conviction on the separate ground that her "confession," if it was obtained at all, was extracted illegally. He therefore would have barred use of the "so-called confession" during any retrial. *Id.* at 1025 (Kozinski, C.J., concurring).

[14] *Id.* at 1000.

[15] *Id.*

[16] *Id.* at 1002.

not recorded.[17] She did not sign a *Miranda* waiver.[18] The two men actually involved in the boy's murder would not testify against her.[19] No witnesses or direct evidence connected Milke with the crime.[20]

Trial court proceedings following the Ninth Circuit's decision illustrate the tangled web that can result from improperly obtained confessions, including a possible final dismissal. The court initially set a September 30, 2013 trial date.[21] However, on September 5, 2013, it ruled Milke could be released from custody pending that retrial by posting a secured $250,000 bond.[22] She posted that bond and was released the next day.[23] Saldate, through counsel, then stated he intended to invoke the Fifth Amendment when he was called to testify in that trial.[24]

On September 24, 2013, the court rescheduled Milke's trial for January 2015, since there no longer was any urgency justifying an immediate trial setting.[25] It also set hearings to determine whether Saldate could claim the Fifth Amendment and, if he testifies, whether the alleged confession is admissible.[26] If he does not testify, the court has ruled prosecutors cannot introduce the disputed confession into evidence.[27]

Milke's attorneys then moved to dismiss her case, arguing that because the prosecutor failed to turn over evidence about Saldate's past, a retrial would violate her Fifth Amendment right against being tried twice for the same offense.[28] On December 19, 2013, the court ruled Saldate could claim his Fifth Amendment privilege and not testify against Milke.[29] On January 21, 2014, the court denied both Milke's double jeopardy motion and the State's motion for

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1000.

[21] Michael Kiefer, *Wild Card May Sway Milke's Retrial*, ARIZ. REPUBLIC, July 12, 2013, at A1, A10.

[22] Michael Kiefer, *Judge Grants Milke's Release*, ARIZ. REPUBLIC, Sept. 6, 2013, at B1.

[23] Michael Kiefer, *Milke Leaves Jail, Is In Unknown Location Till Retrial*, ARIZ. REPUBLIC, Sept. 7, 2013, at B1.

[24] Michael Kiefer and JJ Hensley, *Judge May Toss Disputed Confession*, ARIZ. REPUBLIC, Sept. 13, 2013, at A1.

[25] Michael Kiefer, *Milke's Retrial Set for 2015*, ARIZ. REPUBLIC, Sept. 24, 2013, at B1, B10.

[26] *Id.*

[27] Michael Kiefer, *Detective In Milke Case Due In Court*, ARIZ. REPUBLIC, Dec. 13, 2013, at B1.

[28] , Brian Skoloff, *Milke Attorneys: Retrial Would Be a Case of Double Jeopardy*, ARIZ. REPUBLIC, Nov. 2, 2013, at B5.

[29] Michael Kiefer, *Detective in Milke Case Can Take 5th, Judge Rules*, ARIZ. REPUBLIC, Dec. 19, 2013, at B1.

reconsideration as to Saldate.[30] The State intends to appeal the latter ruling.[31] Accordingly, Milke's case will not finally be resolved until at least 2015.

The Central Park Five: A recent Public Broadcasting System "Frontline" program[32] and related book[33] describe the cases of the so-called "Central Park Five," five Black and Latino teenagers convicted of sexually assaulting, raping and attempting to murder a White woman jogger in New York's Central Park in 1989. After serving between seven and 13 years in prison, their convictions were finally vacated and their indictments dismissed in 2002 after an unrelated prisoner, a convicted serial rapist, confessed to committing the crime alone, and his DNA matched that found on the victim.[34]

Police detectives there had obtained the teenagers' false confessions after they waived their *Miranda* rights.[35] They each were then subjected to lengthy, psychologically coercive, custodial interrogations, during which the detectives "implied, suggested, or stated that they could be witnesses or that if they 'told the truth,' then they could go home."[36] Each of the teenagers cited the simple desire to go home as a motivating factor in giving their confessions.[37]

A prosecutor thereafter interviewed the suspects, gave them *Miranda* warnings and videotaped their confessions, without disclosing their prior lengthy interrogations in that record.[38] Jurors eventually convicted the teenagers in two separate trials, based primarily on those confessions,[39] even though no other

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[30] , Michael Kiefer, *Judge: Murder Charge vs. Milke, Decision on Detective Will Stand*, ARIZ. REPUBLIC, Jan. 23, 2014 at B2.

[31] *Id.*

[32] THE CENTRAL PARK FIVE (Florentine Films 2013).

[33] SARAH BURNS, THE CENTRAL PARK FIVE 188-89 (2012).

[34] *Id.* at 188-95.

[35] *Id.* at 61.

[36] *Id.* at 62.

[37] *Id.* at 61-62. *Miranda* does not restrict what can be said in an interrogation after those rights have been waived. However, *Bram v. United States*, 168 U.S. 532, 542-43 (1897), holds a confession is not admissible if it comes from threats or "direct or implied promises," such as assurance that a suspect would be treated more leniently if he confessed. Despite such restrictions, courts have tended to reject confessions only where there was evidence of an explicit threat or promise. BURNS, *supra* note 33, at 61.

[38] BURNS, *supra* note 33, at 49-56.

[39] *Id.* at 159, 175-76 (The court denied defense motions to suppress those confessions, believing the police detectives and prosecutors rather than the defendants and their lawyers. Everyone, including the court, was aware that granting the motions would gut the prosecution's cases.) Given the lack of physical evidence, the charges might have to be dismissed, with tabloid headlines blaming the court for allowing the defendants to walk free. *See id.* at 110. This scenario was similar to Ernesto Miranda's kidnap-rape retrial, discussed at Part VIII. At the core of the case was racial hysteria, institutional pride, and the inability to admit an error. *See* Timothy Egan, Op-Ed., *Good Cops, Bad Cops*, N.Y. TIMES (Apr. 25, 2013, 8:30 PM), http://opinionator.blogs.nytimes.com/2013/04/25/good-cops-bad-cops/?_r=0.

substantial evidence connected them with the crime.[40] The evidence instead showed they were in another part of Central Park when the crime occurred, none of the victim's blood was found on any of the teenagers' clothes, and the prosecution then knew their DNA did not match DNA found on the victim.[41]

In 2003, the former teenagers filed civil rights lawsuits against New York City, the New York Police Department, the District Attorney's Office and many individuals involved in their cases.[42] Although those civil rights cases have survived motions to dismiss, they have not yet gone to trial.[43]

Johnathon Doody: On August 10, 1991, six Buddhist monks, a Buddhist nun and two of their helpers were found murdered inside the Wat Promkunarem Temple at Waddell, Arizona. Sheriff's investigators initially arrested five men in Tucson and obtained confessions from four of them (the "Tucson Four"), resulting in murder charges against them.[44] Those confessions were found to be false about a month later, when investigators tied a .22 caliber gun to the murders that none of the "Tucson Four" owned.[45] That weapon instead was linked to, two high school students—Alessandro Garcia, then sixteen, and Johnathon Doody, then seventeen.[46]

Garcia later admitted his statements implicating the Tucson Four in the murders were false.[47] He initially stated they were involved because he was exhausted from more than ten hours of interrogation, and because of pressure from his father and Maricopa County sheriff's investigators.[48] He also later testified, "I said they (the Tucson Four) were involved. They (the investigators) kept hounding me. I just started telling them whatever."[49] He also has testified that the investigators did not believe him when he claimed that he and Doody acted alone in committing the robbery and murders.[50]

Doody was subjected to a 12-hour interrogation by officers using the same techniques on him that they used on the "Tucson Four."[51] He eventually confessed to ransacking the temple but stated he was outside when the murders occurred.[52] Garcia also confessed, claiming Doody had shot each of the vic-

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[40] BURNS, *supra* note 33, at 103.
[41] *Id.* at 96-97.
[42] *Id.* at 211.
[43] *Id.*
[44] *See* Doody v. Schriro, 596 F.3d 620, 623 (9th Cir. 2010) (en banc).
[45] *See* Laurie Merrill, *Confession at Center of Doody Retrial*, ARIZ. REPUBLIC, Aug. 13, 2013; B1, B3.
[46] Laurie Merrill, *Mistrial in Temple Killings*, ARIZ. REPUBLIC, Oct. 25, 2013, at B1, B5.
[47] Merrill, *supra* note 45, at B3.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *See Schriro*, 596 F.3d, at 631.

tims.[53] Garcia later pleaded guilty in a plea bargain that allowed him to avoid the death penalty if he testified against Doody, and was sentenced to 271 years in prison.[54]

After the initial jury trial at which Doody's motion to suppress his confession was denied, Garcia testified against Doody and Doody's confession was admitted in evidence, Doody was convicted of first degree murder and sentenced to 281 years.[55] However, the jury's verdict forms stated that each juror premised Doody's conviction on felony murder rather than premeditated murder,[56] suggesting they believed Doody's confession that he was outside the temple when the murders occurred,[57] not Garcia's statement that Doody personally shot each victim in the head.[58]

The Arizona Court of Appeals affirmed Doody's conviction, finding the investigators had provided Doody with the required "clear and understandable" *Miranda* warnings, and that he had been "read each warning from a standard juvenile form and provided additional explanations as appropriate."[59] The Arizona district court then denied federal habeas corpus relief. A Ninth Circuit panel reversed that denial.[60] An en banc court reaffirmed the initial panel's decision.[61]

Specifically, based on the interrogation transcripts, the en banc court found Doody had not been given "clear and understandable" *Miranda* warnings,[62] that his confession was involuntary under the totality of the circumstances,[63] and that it therefore was inadmissible.[64] The court therefore reversed and remanded the case to the district court to grant Doody's habeas petition unless the State of Arizona elected to retry him within a reasonable time.[65]

The State elected to proceed with a retrial based primarily on Garcia's testimony, which began August 21, 2013.[66] That trial resulted in a mistrial on October 15, 2013, because the jury reached an impasse after voting 11-1 for

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[53] *Id.* at 632.

[54] Years later, the U.S. Supreme Court held the Eighth and Fourteenth Amendments prohibit states from using the death penalty on offenders under 18 when their crimes were committed. Roper v. Simmons, 543 U.S. 551 (2005).

[55] Merrill, *supra* note 45, at B1.

[56] *See Schriro*, 596 F.3d, at 633.

[57] *Id.* at 632.

[58] *Id.*

[59] State v. Doody, 187 Ariz. 363, 372, 930 P.2d 440, 449 (App. 1996).

[60] Doody v. Schriro, 548 F.3d 847 (9th Cir. 2008).

[61] *Schriro*, 596 F.3d, at 620.

[62] *Id.* at 635.

[63] *Id.* at 645.

[64] *Id.* at 653.

[65] *Id.* at 653-54.

[66] Merrill, *supra* note 45, at B1.

conviction.[67] The State again chose to try Doody for a third time beginning December 4, 2013, also based primarily on Garcia's testimony.[68] That trial went to a jury on January 13, 2014.[69] This time, the jury convicted Doody on all nine murder counts.[70] Whether there will be another appeal and its possible outcome remain to be determined.

John Grisham: A recent best-selling John Grisham novel shows how a false confession obtained through lengthy custodial interrogation, deception and lies; without giving *Miranda* warnings, and despite the suspect's request for counsel; and thereafter supported by interrogators' false affidavits in response to a defense motion to suppress, can backfire on the prosecution[71].

C. Miranda's *Compromise*

Miranda changed the prior constitutional balance between the prosecution's interests in convicting presumably guilty suspects and suspects' interests in protecting their constitutional rights. Courts no longer can admit confessions obtained through custodial interrogations simply because they were "voluntarily given" under the totality of the circumstances. Instead, proper warnings by the police and waivers by suspects concerning their constitutional rights must first be given. If suspects assert their rights, interrogations must cease and counsel must be provided. As will be discussed later in this article, whether *Miranda* and its subsequent cases have created the proper balance between those interests remains open to question.

Miranda created intensely hostile, long-lasting, social, political and legal reactions. Those reactions generally assumed *Miranda* favored guilty suspects' rights in preventing their confessions from being used against them over society's interests in promoting law enforcement's ability to convict such suspects through easily obtaining and using such confessions. Based on such reactions, Professor Lucas A. Powe, Jr. has stated *Miranda* "is the [Warren Court's] most controversial criminal procedure decision hands down."[72]

Those negative reactions were not justified by *Miranda* decision itself. *Miranda*'s required warnings and waivers instead created a judicial compromise between the prior rule that confessions were admissible if voluntarily

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[67] Laurie Merrill, *Mistrial in Temple Killings*, ARIZ. REPUBLIC, Oct. 25, 2013, at B1.

[68] Michael Kiefer, *Defendant in '91 Slaying of 9 at Temple Back on Trial*, ARIZ. REPUBLIC, Jan. 7, 2014, at B1.

[69] Michael Kiefer, *Jurors to Deliberate Today in Doody Case*, ARIZ. REPUBLIC, Jan. 14, 2014, at B1.

[70] Michael Kiefer, *In 3rd Trial, Doody Found Guilty in Temple Massacre*, ARIZ. REPUBLIC, Jan. 24, 2014, at A1.

[71] *See* JOHN GRISHAM, THE RACKETEER (2012).

[72] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 394 (2000) (Powe is a law school and department of government professor at the University of Texas).

given based on the "totality of circumstances," and the arguments made on Miranda's behalf, based on the Sixth Amendment right to counsel, that counsel must in fact be present before any custodial interrogations can occur to advise suspects concerning their constitutional rights. That argument's rationale was that interrogations are a "critical stage" in the criminal process at which such rights otherwise might be lost.[73] Requiring that counsel be present later in the criminal process when confessions have already been given without counsel being present thus "is too late to matter."[74] If Miranda's arguments had been accepted, confessions would have become "extinct," except as part of plea bargains.[75] That result was both politically and judicially unacceptable, for the reasons previously stated favoring law enforcement over suspects' rights.

Miranda's compromise instead provided clear procedures for law enforcement to follow to continue to pursue custodial interrogations resulting in confessions that would both support valid guilty pleas and be admissible in evidence if a suspect chose to go to trial, without actually requiring that counsel then be present.[76] However, as discussed later in this article, its dissenting justices never gave the majority credit for not going further. Thoughtful commentators suggesting such a compromise had occurred also were "not taken seriously in the public debate."[77]

Confirming this compromise had occurred, in 2000 *Dickerson v. United States* held 7-2 that Congress could not overrule *Miranda* by enacting a federal statute[78] making the admissibility of criminal suspects' confessions turn solely on whether they were made voluntarily under all the circumstances.[79] *Dickerson*'s rationale was based both on *stare decisis* and because *Miranda* was a "constitutional decision."[80]

Chief Justice Rehnquist's majority opinion there stated *Miranda* "has become embedded in routine police practice to the point where the warnings have become part of our national culture."[81] It confirmed *Miranda* had been narrowed in more recent years because "our subsequent cases *have reduced the impact of the Miranda rule on legitimate law enforcement* while reaffirming the decision's core ruling that unwarned statements may not be used in evidence *in*

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[73] *Id.* at 398.

[74] Brief for Petitioner at 49, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 759, Oct. Term 1965).

[75] POWE, *supra* note 72,at 398.

[76] *Id.* at 396-97.

[77] *Id.*

[78] 18 U.S.C. § 3501 (2012).

[79] Dickerson v. United States, 530 U.S. 428 (2000).

[80] *Id.* at 443.

[81] *Id.*

the prosecution's case in chief."[82] Finally, it stated a totality-of-circumstances test would be more difficult than *Miranda* for law enforcement officers to conform to and for courts to apply in a consistent manner.[83] Rehnquist's opinion "surprised the legal world" because "few justices did more to undermine important criminal procedure protections like those provided by *Miranda*."[84]

When *Dickerson* was decided, U.S. Attorney General Janet Reno recognized *Miranda* had resulted in a compromise favoring law enforcement. She then stated,

> Today's decision recognizes *Miranda* rights has [sic] been good for law enforcement. For decades, the Miranda ruling set out clear standards for police officers, helped get confessions admitted into evidence, and ensured the credibility of confessions in the eyes of jurors. Most importantly, it will continue to provide a public sense of fairness in our criminal justice system.[85]

However, that façade of "credibility" and "public sense of fairness" permitting custodial confessions to be admitted obscures the fact that police can continue to obtain admissible confessions simply by giving "lip service" to suspects' constitutional rights by reciting *Miranda* warnings, without requiring that counsel be present to advise suspects they have the right to remain silent and thus prevent any confessions from being given as an original matter.

D. Miranda's *Effect*

Despite *Miranda*'s compromise, the Court has consistently refused to extend its scope, limited whether and how the decision should be applied, and narrowed the consequences of failing to follow its requirements. The Court also has created exceptions to the decision's applicability. This article will discuss numerous such cases.

E. How and Why Did Miranda *Occur?*

Miranda occurred because the case's underlying events and Miranda's confessions happened to occur in the right place and at the right time, in relation to the state of then-developing case law, numerous similar pending cases,

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[82] *Id.* at 443-44 (emphasis added). How this "narrowing" occurred will be discussed in more detail later in this article.

[83] *Id.* at 444.

[84] Michael O'Donnell, *Raw Judicial Power*, THE NATION, Oct. 22, 2012, at 35, 37.

[85] Press Release, U.S. Dep't of Justice, *Statement by Attorney General Janet Reno on Today's Decision Upholding the* Miranda *Ruling* (June 26, 2000), *available at* http://www.justice.gov/opa/pr/2000/June/364ag.htm.

and the then-majority justices' views. However, given those latter circumstances, a U.S. Supreme Court *Miranda* type decision might have occurred in 1966, regardless of whether Ernesto Miranda himself was then before the Court.

Assessing *Miranda*'s importance and legacy requires considering how the case reached the U.S. Supreme Court, what was briefed and argued there, and how and why the case was decided as it was. Consideration also must be given to what occurred thereafter, both in Miranda's own case and in later Supreme Court decisions. *Miranda* also needs to be related both to a larger range of social, political, and historical issues and events, and to everyone involved as Miranda's cases progressed. Those stories provide the background for this article.

F. My Involvement

My involvement in Ernesto Miranda's representation was wholly fortuitous. I joined Lewis, Roca, Scoville, Beauchamp & Linton (now Lewis and Roca, Rothgerber, LLP ("LRR")) in September 1965.[86] I graduated from Stanford Law School in June, 1964 and clerked for Honorable Ben C. Duniway at the Ninth Circuit Court of Appeals in San Francisco during 1964-65. I was admitted to practice in California in January 1965 and in Arizona in April 1966. I later became a partner at LRRin June 1970, where my practice emphasized civil appeals. I then started my own civil appeals firm in June 1985, retiring in May 2012.

At L&R, I initially worked as a law clerk under partner John P. Frank's supervision while waiting to take the Arizona bar examination. I was admitted to practice in Arizona in April 1966. I worked on Miranda's kidnap-rape repre-

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[86] JOHN P. FRANK, LEWIS AND ROCA: A FIRM HISTORY 1950-1984, at 83 (1984). LRR was founded by three partners, Orme Lewis, Paul M. Roca and Harold Scoville, together with two associate lawyers, Charles Stanecker and Dow Ben Roush, on June 1, 1950, as Lewis Roca & Scoville. That partnership was preceded by a "Declaration of Nonpartnership" among Lewis, Roca and Scoville effective January 1, 1949. FRANK, *supra*, at 3. The firm rapidly grew into a general, litigation-oriented practice as Phoenix also continued to grow. Its practice included appeals and criminal defense, as lawyers such as John P. Frank and John J. Flynn later joined the firm. The firm employed about 35 lawyers when I joined it in September 1965 and over 100 lawyers when I left in May 1985 to start my own firm. By July 2013, it employed 180 lawyers in its Phoenix, Tucson, Las Vegas, Reno, Albuquerque and Silicon Valley offices. Effective September 1, 2013, it merged with a Denver law firm, Rothgerber Johnson & Lyons, LLP, to create a 250-lawyer firm known as Lewis Roca Rothgerber LLP. Accordingly, the firm will be referred to as "LRR" throughout this article. The newspaper announcement of that merger listed only *Miranda v. Arizona* by name as one of the "high-profile" cases the firm has handled throughout its history. *See* Saba Hamedy, *Valley law firm unveils merger*, ARIZ. REPUBLIC, July 25, 2013, at D1, D2. However, none of the lawyers with the firm between 1965 and 1970, when it represented Miranda, are now here.

sentation from November 1965, after the U.S. Supreme Court granted his initial certiorari petition, until October 1969, when the Court denied a second such petition following a later retrial and appeal. Accordingly, *Miranda* was for me, a personal, lengthy, intense, continuing process, not simply a one-time, abstract decision. It was the most significant case in my career.

II. Background Facts

Ernesto Arturo Miranda was born in Mesa, Arizona, on March 9, 1941.[87] He had an eighth-grade education and a prison record based primarily on car thefts, burglaries, and armed robberies.[88] That record also included an attempted rape and assault.[89] Miranda joined the Army in 1958.[90] He received an undesirable discharge in July 1959, after spending six of his fifteen months in the post stockade.[91]

In January 1961, Miranda was released from a federal prison at Lompoc, California, where he had been confined following an interstate car theft conviction.[92] He then met and moved in with Twila Hoffman, who was separated from her husband, and her two children.[93] Miranda and Hoffman also had a daughter of their own.[94] They moved to Mesa in 1962.[95] Hoffman began working in a local nursery school.[96] Miranda held a series of motel and restaurant jobs, and then began working for United Produce in Phoenix in August 1962.[97]

Eighteen-year-old Patricia Weir was kidnapped and raped shortly after midnight on March 3, 1963, while walking to her home from a bus stop in

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[87] *Ernesto A. Miranda*, Citizendium n.1, http://en.citizendium.org/wiki/Ernesto_A. Miranda (last visited Jan. 15, 2014). Despite some writers having stated Miranda was born in 1940, the tombstone at the Mesa Cemetery placed by his relatives provides a 1941 birth year. *Id.*; *Ernesto Miranda (1941-1976)*, Find A Grave, http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=10165 (last visited Jan. 15, 2014).

[88] Liva Baker, Miranda: Crime, Law and Politics 9-11 (1983). "Baker was a freelance writer and author of numerous books [on] legal history . . . includ[ing] biographies of Supreme Court Justices Felix Frankfurter and Oliver Wendell Holmes, as well as [books on] women's education . . . and the desegregation of public schools in New Orleans, Louisiana." She died in 2007. *See Baker, Liva (1930-2007)*, Amistad Res.Center, http://www.amistadresearchcenter.org/archon/index.php?p=creators/creator&id=186 (last visited Jan. 15, 2014).

[89] Baker, *supra* note 88, at 9-11.

[90] *Id.* at 10.

[91] *Id.*

[92] *Id.* at 11.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

northeast Phoenix after working at a downtown movie theater.[98] The Phoenix police suspected Miranda based on Weir's general description of her attacker and a partial license plate number the police traced to an old Packard registered to Hoffman that Miranda drove.[99]

Acting on those suspicions, Phoenix Police Officers Carroll Cooley and Wilfred Young went to Miranda's Mesa home on March 13, 1963.[100] They asked him to come to the police station to discuss a case they were investigating and stated they did not want to discuss it in front of his common-law wife.[101] Miranda agreed to do so.[102] Miranda later said that he did not know whether he had a choice not to go with them.[103] Based on the limited information Cooley and Young then had, Cooley was doubtful Miranda was the man they were looking for.[104]

At the police station, Miranda was immediately taken to Interrogation Room 2, and interrogated about the alleged kidnap-rape, an unrelated robbery, and an attempted robbery, beginning at about 10:30 a.m.[105] Miranda initially denied committing all three crimes.[106] He was then placed in a lineup, so both the kidnap-rape and robbery victims might see and attempt to identify him.[107] Neither victim could be positive of whether Miranda was her attacker.[108] However, Cooley told Miranda that both victims had identified him[109].

Miranda therefore wrote and signed a confession to the kidnap-rape at 1:30 p.m.[110] Although the written confession form Miranda signed stated that any

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98 *See id.* at 3-5 for a detailed description of the circumstances involved.

99 *Id.* at 9.

100 *Id.* at 12.

101 *Id.*

102 GARY L. STUART, MIRANDA: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT 5 (2004). Stuart practiced law at Jennings, Strouss & Salmon, PLC, in Phoenix from 1967 through 1998. He since has written and lectured concerning trial advocacy, ethics and professional responsibility. His *Miranda* book is dedicated "[t]o the memory of John P. Frank." *Id.* at xi.

103 BAKER, *supra* note 88, at 12.

104 STUART, *supra* note 102, at 5.

105 *Id.* at 6.

106 *Id.*

107 Petition for Writ of Certiorari at 3, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 759, Oct. Term 1965); The lineup photograph is included in STAN WATTS, A LEGAL HISTORY OF MARICOPA COUNTY 77 (2007). .

108 STUART, *supra* note 102, at 6.

109 *Id.*

110 *Id.* at 6-7; Petition for Writ of Certiorari, *supra* note 107. However, John Flynn's later U.S. Supreme Court oral argument stated that Miranda orally confessed to the kidnap-rape after two hours of interrogation, without mentioning his prior written confession. PETER IRONS & STEPHANIE GUITTON, MAY IT PLEASE THE COURT 215 (1993); A copy of Miranda's written confession appears in Barry G. Silverman, *Remembering Miranda*, PHOENIX MAGAZINE 109, 111 (June 2006). Silverman first met Miranda in December 1969, when Silverman was a college freshman. Silverman thereafter wrote a 300-page unpublished biography of Miranda. *Id.* at 110. Silverman

statement he made could be used against him,[111] he was not warned concerning his constitutional rights to counsel and to remain silent.[112] Miranda also then verbally confessed to the robbery and the attempted robbery.[113] However, Cooley did not ask for written confessions in those cases because he did not want to risk jeopardizing Miranda's prosecution in the kidnap-rape case.[114]

Cooley then brought Weir and the robbery victim, separately, into the interrogation room to see if they could identify Miranda after hearing his voice.[115] However, before they could say anything, Miranda spontaneously identified each of them as the victims he was talking about.[116] Based on those statements, both victims in turn identified Miranda as their attacker. They both later testified they were "sure" Miranda was the man who had accosted them.[117]

Cooley and Young then formally arrested Miranda and booked him into jail. Until that time, he merely had been "in custody."[118] The police also "cleared" their files in both the robbery, and attempted robbery cases, based on Miranda's confessions to those crimes.[119] However, only the kidnap-rape and the robbery cases went to trial.

III. Prior Legal Developments

Placing *Miranda* in historical perspective requires considering prior cases concerning criminal suspects' right to counsel and privilege against self-incrimination. Whether and under what circumstances suspects' Sixth Amendment right to counsel should apply in state court criminal cases had developed in numerous U.S. Supreme Court decisions over many years.

A. Early Cases–1932 to 1963

In 1932, Justice George Sutherland's majority opinion in *Powell v. Alabama* first applied the right to counsel to state court capital trials as a "fundamental right" under the Fourteenth Amendment's Due Process Clause.[120] In

later became a superior court judge and a United States magistrate. He is now a Ninth Circuit Court of Appeals judge. *Id.* at 115.

111 *Id.* at 109, 111.

112 Brief for Petitioner, *supra* note 74, at 4.

113 Stuart, *supra* note 102, at 7.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.* at 8.

120 Powell v. Alabama, 287 U.S. 45 (1932). The Supreme Court reviewed the retried convictions of two of those defendants in November 1935. Their counsel had argued that black people

1938, Justice Hugo Black's majority opinion in *Johnson v. Zerbst,* applied the Sixth Amendment's right to counsel to all federal court criminal trials as a necessary ingredient of a fair trial.[121] *Johnson* held that if the accused was not represented by counsel and had not competently and intelligently waived his constitutional right, the Sixth Amendment "stands as a jurisdictional bar depriving him of his life or his liberty."[122]

However, in 1942, *Betts v. Brady* refused to apply the Sixth Amendment right to counsel in all state court noncapital criminal trials.[123] Justice Owen Roberts' majority opinion instead stated that whether counsel should be required was generally a matter of legislative policy within each state. Accordingly, states should not be "strait-jacketed" by a construction of the Fourteenth Amendment.[124] Instead, given the then-existing variations in state court practice, cases involving alleged denials of the right to counsel should turn on whether the defendant was denied "fundamental fairness" under the Fourteenth Amendment's Due Process Clause because of the "special circumstances" involved in each particular case.[125]

Justice Black's dissent, in which Justices Douglas and Murphy concurred, disputed the majority's assertion concerning then-existing state practice. The dissent attached an appendix showing most states required counsel to be provided for indigent defendants on request.[126] It would have applied the Sixth Amendment to the states through the Fourteenth Amendment to require counsel for indigents in all serious non-capital cases as a "fundamental" right.[127] To do otherwise would "defeat the promise of our democratic society to provide equal justice under law."[128]

Betts was immediately criticized as a denial of fundamental rights.[129] However, in *Foster v. Illinois*, Justice Frankfurter made clear the Court was

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had been excluded from being able to serve as grand jurors, and that Alabama officials later forged the names of black people on grand jury rolls to cover their tracks. At oral argument, the Justices one by one examined those rolls "with expressions of outrage." Six weeks later, the Court unanimously reversed the convictions. Mark Curriden, *The Saga of the Scottsboro Boys Begins*, A.B.A. J., Mar. 1, 2013, at 72. Alabama's parole board finally approved posthumous pardons for all of the "Scottsboro Boys" defendants on November 21, 2013, more than 80 years after their arrests. *Board Oks pardons of 'Scottsboro Boys,'* ARIZ. REPUBLIC, Nov. 22, 2013.

121 Johnson v. Zerbst, 304 U.S. 458 (1938).

122 *Id.* at 468.

123 Betts v. Brady, 316 U.S. 455, 473 (1942), *overruled by* Gideon v. Wainright, 372 U.S. 335 (1963).

124 *Id.* at 472.

125 *Id.* at 473.

126 *Id.* at 477-80 (Black, J., dissenting).

127 *Id.* at 475 (Black, J., dissenting).

128 *Id.* at 477 (Black, J., dissenting).

129 *See* ANTHONY LEWIS, GIDEON'S TRUMPET 8, 112 (1964).

sticking to *Betts'* "flexible" rule, since the "abrupt innovation" of a universal counsel requirement "would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land."[130] Several cases thereafter found special circumstances lacking and therefore affirmed those defendants' convictions.[131]

Betts, *Adamson v. California*,[132] and *Wolf v. Colorado*[133] generated a "remarkable jurisprudential battle" between Justices Black and Frankfurter concerning whether the Constitution's framers intended to apply the Bill of Rights to the states.[134] Justice Frankfurter, who won that battle, argued that federalism principles required states be free to develop their own systems of criminal justice rather than be forced into a "potentially outmoded eighteenth-century straitjacket instantiated in the Bill of Rights."[135]

Justice Black's position, wrongly derided at the time as "historically fallacious," eventually peaked at four votes, those of Justices Black, Douglas, Murphy and Rutledge, while Justice Frankfurter also was a member of the Court.[136] As a result of Justice Frankfurter's victory, "states could convict an indigent defendant at a trial where he had no legal assistance, allow prosecutors to argue to the jury about a defendant's failure to take the witness stand, and admit evidence that police illegally seized."[137]

Even using the "fundamental fairness" and "special circumstances" formulations, the Court's last decision affirming a state court criminal conviction involving a denial of counsel claim occurred in 1950.[138] However, because of Justice Frankfurter's continued insistence that the Sixth Amendment was not binding on the states, the Court's rationale for its reversals remained that each defendant's Fourteenth Amendment right to due process of law had been violated based on "special circumstances" in that particular case, even where the legal questions presented "were often of only routine difficulty,"[139] not that the defendant had any general Sixth Amendment right to counsel as such.[140]

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130 Foster v. Illinois, 332 U.S. 134, 139 (1947).

131 *See* Gideon v Wainwright, 372 U.S. 335, 351 (1963) (Harlan, J., concurring).

132 Adamson v. California, 332 U.S. 46 (1947) (Fifth Amendment self-incrimination clause does not apply to the states), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

133 Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth Amendment rule excluding evidence illegally seized by police from trial does not apply to the states), *overruled by* Mapp v. Ohio, 338 U.S. 25 (1961).

134 POWE, *supra* note 72, at 10.

135 *Id.* at 11.

136 *Id.*

137 *Id.*

138 *See* Quicksall v. Michigan, 339 U.S. 660, 665-66 (1950).

139 Gideon v. Wainwright, 372 U.S. 335, 351 (1963) (Harlan, J., concurring).

140 BAKER, *supra* note 88, at 79.

In 1961, *Hamilton v. Alabama* held 9-0 that counsel was required at arraignments in all state court capital cases, regardless of the circumstances and without determining whether any prejudice resulted since arraignment is a "critical stage" in a criminal proceeding.[141] Justice Douglas's opinion was based on an extension of the statement in *Powell v. Alabama* that an accused in a capital case "requires the guiding hand of counsel at every step in the proceedings against him."[142] In April 1963, *White v. Maryland* summarily extended that rule to preliminary hearings, based on *Hamilton*, as similarly being a "critical" stage requiring counsel, since the defendant there had pled guilty without counsel, and without requiring any showing the defendant was prejudiced by not then having counsel present.[143]

B. The Warren Court

President Dwight Eisenhower appointed Earl Warren as Chief Justice in October 1953 to replace Chief Justice Fred Vinson, who had died from a heart attack on September 8, 1953.[144] However, the later generally recognized "Warren Court" was an "accident of history."[145] It did not obtain a reliable liberal "fifth vote" until 1962.[146] That "swing" occurred because Justice Charles Whittaker, who had become emotionally exhausted by the Court's work, announced his retirement in March 1962.[147] Less than two weeks later, Justice Frankfurter suffered disabling strokes requiring him to leave the Court in August 1962.[148]

President John F. Kennedy appointed Byron "Whizzer" White to replace Justice Whittaker and Arthur Goldberg to replace Justice Frankfurter.[149] Jus-

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141 Hamilton v. Alabama, 368 U.S. 52, 53-54 (1961).

142 *Id.* at 54 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

143 White v. Maryland, 373 U.S. 59 (1963) (per curiam).

144 POWE, *supra* note 72, at 24. "Warren was one of the century's most successful politicians." *Id.* He had previously won election as a California district attorney and Attorney General, and to three terms as California Governor. *Id.* He had been Thomas Dewey's vice-presidential candidate in 1948. *Id.* He also campaigned for Dwight Eisenhower to be elected president in 1952 after his own presidential ambitions proved unsuccessful. *Id.* Just prior to his election, Eisenhower promised Warren the "first opening" on the Supreme Court, although there appears never to have been an explicit quid pro quo or agreement to that effect. *Id.* Eisenhower honored that agreement after Attorney General Herbert Brownell failed to persuade Warren in a secret meeting after Vinson had died that the "first seat" did not mean the chief justiceship. *Id.* Powe states, "No one praised Warren for his strong intellect, but almost everyone recognized a warm and gregarious man with a rugged sincerity. He was hardworking, principled, and honest. People liked him." *Id.*

145 *Id.* at 209.

146 *Id.*

147 *Id.*

148 *Id.* at 209-10.

149 Kennedy was free to appoint Goldberg in September 1962 because Frankfurter, before his stroke in March 1962, had refused Kennedy's offer made through Max Freedman, Frankfurter's

tice White's "tough on crime, tough on communism" conservative vote "did not matter" in the Court's liberal-conservative balance.[150] However, Justice Goldberg's appointment "transformed the outcomes" of later decisions.[151] Justice Goldberg had an 89 percent liberal voting record.[152]

That liberal fifth vote continued with President Lyndon Johnson's appointment of Abe Fortas, Johnson's "most trusted friend and adviser," to replace Justice Goldberg during the summer of 1965.[153] Fortas's appointment occurred after Johnson persuaded Justice Goldberg to become United Nations ambassador following Adlai Stevenson's sudden death in July 1965.[154] Both, Justices Goldberg and Fortas, agreed with Chief Justice Warren more than 80 percent of the time, and their percentage of agreement with the Court generally was in the high 80s.[155]

C. Gideon v. Wainwright *and its Consequences*

After adding its new justices, the Court finally overruled *Betts v. Brady* in March 1963.[156] *Gideon v. Wainwright* held states must provide counsel for indigent defendants at trials in non-capital felony cases.[157] In reversing

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biographer, to retire in exchange for Frankfurter's agreement to a suitable replacement. *Id.* at 209-11. Had Frankfurter accepted Kennedy's offer, Kennedy would have chosen conservative Harvard law professor Paul Freund as Frankfurter's replacement. Accordingly, if Goldberg had not been appointed then, the critical "fifth vote" would have waited until at least 1967, when Justice Tom Clark retired, after the Court would have decided the *Miranda* cases. *See id.* at 211.

150 *Id.* at 210.

151 *Id.* at 211.

152 *Id.*

153 *Id.* at 212.

154 *See generally id.* at 209-16 for a summary of the history and politics leading to the Goldberg and Fortas nominations.

155 *Id.* at 212.

156 After Justice White replaced Justice Whittaker in April 1962, the Court finally had the five votes required to overrule *Betts.* By mid-June 1962, five justices had joined in Justice Douglas's draft opinion necessarily doing so in *Douglas v. California*, 372 U.S. 353 (1963). *Id.* at 380. However, because the Court had granted certiorari in *Gideon* on June 4, 1962, and had just appointed Abe Fortas to represent Gideon in that case, it put *Douglas* over for reargument during the Court's next Term at Justice White's suggestion so that Fortas "should have the privilege of arguing the case that interred *Betts*, rather than arguing a pro forma case after *Douglas*. *Id.* at 384. *Douglas* therefore was put over so Fortas could win *Gideon. Id.* at 380.

Fortas was a "high-powered" lawyer and "outstanding appellate advocate." He was a member of a committee appointed by Chief Justice Warren to recommend changes in the Federal Rules of Criminal Procedure. He also was a friend of Justices Black, Brennan and Douglas. LEWIS, *supra* note 129, at 48-52.

157 Gideon v. Wainwright, 372 U.S. 335 (1963). For a description of the timing of the Court's internal decision-making through which *Gideon* became the case to overrule *Betts v. Brady*, see POWE, *supra* note 72, at 379-86. *See also* Paul G. Ulrich, Gideon *50 Years Later*, MARICOPA LAWYER, Mar. 2013, at 1.

Gideon's conviction, Justice Black's majority opinion held *Betts* had "departed from the sound wisdom on which the Court's holding in *Powell v. Alabama* rested."[158] *Gideon* instead held the Sixth Amendment right to counsel was a "fundamental right" applicable to the states through the Fourteenth Amendment, at least with respect to state court felony trials.[159] It also re-emphasized that a layman "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[160]

Commentators called the *Gideon* decision "Black Monday" for states' rights.[161] *Gideon* ended the possibility that an indigent could be tried without counsel (unless he so desired). It also was the last important purely southern criminal procedure case.[162] However, the public still often perceived criminal procedure cases after *Gideon* as overtly race cases. For example, in 1967, African-Americans in urban areas were seventeen times more likely than whites to be arrested for robbery.[163] They also were disproportionately affected by whatever abuses or inequities existed in the criminal justice system.[164] Accordingly, the Supreme Court's credibility in espousing equality of opportunities for African-Americans in such areas as voting and attending school with whites required that they and other disadvantaged individuals had to be able to possess and exercise the same rights as affluent whites when they were suspected of crime.[165]

Despite substantial general public unhappiness with the Warren Court, *Gideon* has been considered "the Warren Court's only popular criminal procedure decision," based on the *Gideon*'s *Trumpet* book[166] and movie,[167] and since Clarence Gideon himself was acquitted in his retrial.[168] In response to *Gideon*, steps were taken to provide and pay for lawyers for poor defendants, including the creation of public defenders offices, paying for court-appointed counsel, and preparing rosters of lawyers available for court appointments.[169]

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158 *Gideon*, 372 U.S. at 345.

159 *Id.* at 342-345.

160 *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

161 BAKER, *supra* note 88, at 81.

162 POWE, *supra* note 72, at 386.

163 *Id.*

164 *Id.*

165 *Id.*

166 LEWIS, *supra* note 129. Lewis died in March 2013, just more than 50 years after the *Gideon* decision. Denise Lavoie, *Pulitzer Prize-winner Anthony Lewis, 85, Dies*, ARIZ. REPUBLIC, Mar. 26, 2013, at B2.

167 GIDEON'S TRUMPET (Hallmark Hall of Fame 1979).

168 POWE, *supra* note 72, at 379-80 LEWIS, *supra* note 129, at 237.

169 BAKER, *supra* note 88, at 82.

Criminal defendants nonetheless continue to remain at a severe disadvantage because of expanded criminal liability, overcharging by prosecutors, inadequately financed indigent defense, and the fact that some public defenders are ineffective.[170] Unrealistic workloads, lack of resources, and budget cuts tie the hands of public defenders at all levels.[171] For example, Arizona Governor Jan Brewer's latest budget proposal permanently ends state aid to indigent defendants under the "Fill the Gap" program and reallocates those funds to the Department of Public Safety's equipment fund, while keeping the prosecutors' portion of the program in place.[172]

Although the issue was briefed, *Gideon* did not decide whether the Sixth Amendment right to counsel in state court felony trials should be applied retroactively. However, during the remainder of its 1962 Term, the Court set aside thirty-one lower court judgments from ten states and returned those cases for reconsideration based on *Gideon.*[173] It also remanded ten habeas corpus cases involving Florida prisoners convicted without counsel prior to *Gideon* for further consideration in light of that decision.[174] Florida decided to apply *Gideon* retroactively. By January 1, 1964, 976 Florida prisoners were released because they could not be retried, 500 were back in the courts, and petitions from hundreds more were awaiting reconsideration.[175]

Gideon also did not decide whether the Sixth Amendment right to appointed counsel applied in misdemeanor cases. *Argersinger v. Hamlin* did so in a case where the defendant was sentenced to ninety days in jail.[176] It held, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by [appointed or retained] counsel at his trial."[177] The Court later clarified that defendants charged with misdemeanors where imprisonment was not actually imposed did not have that right.[178] However, they could not be

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170 Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES, Mar. 18, 2013, at A21, *available at* http://www.nytimes.com/2013/03/18/opinion/gideons-muted-trumpet.html?_r=0.

171 JJ Hensley, *Experts: Right to Attorney Is at Risk as Cuts Hit*, ARIZ. REPUBLIC, Mar. 27, 2013, at B1, 4.

172 JJ Hensley, *Brewer's Budget Axes Public-defense Funds*, ARIZ. REPUBLIC, Mar. 26, 2013, at B1. The Arizona federal public defenders' office has lost 20 percent of its budget during the past two years and 25 staff positions, including 11 attorneys, since February 2013. Public Defenders' across the country have been warned to expect 23 percent less funding in fiscal 2014, which began October 1, 2013. Lindsey Collum, *Public Defenders in Lurch*, ARIZ. REPUBLIC, July 18, 2013.

173 LEWIS, *supra* note 129, at 204.

174 Pickelsimer v. Wainwright, 375 U.S. 2, 2 (1963).

175 LEWIS, *supra* note 129, at 205.

176 Argersinger v. Hamlin, 407 U.S. 25, 26 (1972).

177 *Id.* at 37.

178 Scott v. Illinois, 440 U.S. 367, 369 (1979).

sentenced to imprisonment unless the State had afforded them the right to appointed counsel.[179]

D. Escobedo *and Its Consequences*

By requiring the state to provide lawyers, the justices came to understand the Court could create a frontline agency for supervising police practices that would be more effective than the exclusionary rule in achieving its objectives.[180] Accordingly, after *Gideon*, the question became how soon the right to counsel attached prior to trial. *Gideon* did not address that issue. It instead only involved the right to counsel during trial. However, soon after *Gideon* was decided, *Haynes v. Washington* held failure to tell a defendant under interrogation that he was entitled to be represented by counsel was one of the factors relevant in determining whether his confession was voluntary.[181]

In 1964, *Escobedo v. Illinois* held 5-4 that, where a preliminary criminal investigation had focused on a suspect, he had been taken into custody, he had requested and been denied an opportunity to consult with a lawyer, and the police had not effectively warned him of his absolute constitutional right to remain silent, he was denied his Sixth Amendment right to assistance of counsel "'made obligatory upon the States by the Fourteenth Amendment.'"[182] Accordingly, no statement obtained by the police during Escobedo's interrogation could be used against him at his criminal trial. Justice Goldberg's majority opinion concluded, "[W]hen the process shifts from investigatory to accusatory—and its purpose is to elicit a confession–our adversary system begins to operate, and, *under the circumstances here*, the accused *must* be permitted to consult with his lawyer."[183]

The majority's rationale was that interrogation under those circumstances was a stage "surely as critical as was the arraignment in *Hamilton v. Alabama*. . . and the preliminary hearing in *White v. Maryland*," since "[w]hat happened at this interrogation could certainly 'affect the whole trial.'"[184] That was because "rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.'"[185] Accordingly, it made no difference whether the authorities had

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[179] *Id.* at 373.

[180] POWE, *supra* note 72, at 386-87.

[181] Haynes v. Washington, 373 U.S. 503, 516-17 (1963).

[182] Escobedo v. Illinois, 378 U.S. 478, 491 (1964) (quoting Gideon v. Wainwright, 372 U.S. 335, 342 (1963)).

[183] *Id.* at 492 (emphasis added).

[184] *Id.* at 486 (quoting Hamilton v. Alabama, 386 U.S. 52, 54 (1961)).

[185] *Id.*

as of yet obtained a formal indictment, as had occurred in *Massiah v. United States.*[186]

Escobedo turned in part on the facts that Escobedo's lawyer was at the station house trying to see him while he was being interrogated and the police had denied Escobedo's request to see his lawyer.[187] Later, numerous federal and state court decisions would disagree concerning whether the accused specifically had to request a lawyer before the police had to warn him of his rights, or instead whether counsel had to be provided although not requested.[188] There also was a significant disagreement on this issue between factions within the District of Columbia Circuit led by Judges Warren Burger and David Bazelon.[189] Adding to the general uncertainty, the U.S. Supreme Court simply held the confession cases reaching it, neither granting nor denying certiorari.[190]

The American Law Institute also had begun to draft a model code of pre-arraignment procedures, which stated police should be given four hours to question a suspect without his lawyer (although the session would have to be taped).[191] The proposed code approached the issue as legislation that state legislatures throughout the country could adopt. The American Bar Association also stated it would support the ALI's position.[192]

The proposed model code was discussed at the ALI annual meeting in May 1966.[193] However, in light of Chief Justice Warren's "sphinxlike" attendance during that discussion,[194] because *Miranda* and its companion cases had been argued and were under advisement, and because of the "impassioned speeches" given at that meeting, the proposed code was not then voted upon.[195] It was not adopted until 1975.[196] Frank was among those who argued at the 1966 meeting that the Institute should not adopt the model code while the *Miranda* cases were being considered by the Supreme Court. Doing so, he argued, would be "unlawyer-like in the extreme."[197]

How *Escobedo* should be interpreted and applied thus presented timely, important issues for the U.S. Supreme Court to resolve. Should courts emphasize the importance of law enforcement and society's interests in easily

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186 *Id.* at 486 (citing Massiah v. United States, 377 U.S. 201, 204 (1964)).
187 *Id.* at 480-81, 490-91.
188 BAKER, *supra* note 88, at 50, 56.
189 *Id.* at 52-56.
190 POWE, *supra* note 72, at 392.
191 *Id.* at 392-93.
192 *Id.*
193 *Id.* at 394.
194 BAKER, *supra* note 88, at 160.
195 POWE, *supra* note 72, at 394.
196 *Id.*
197 BAKER, *supra* note 88, at 161.

obtaining "voluntary" convictions, or should they instead uphold suspects' constitutional rights to counsel and to remain silent, which might eliminate confessions and thereby result in guilty criminals going free?

In 1964, *Malloy v. Hogan* also applied the Fifth Amendment privilege against self-incrimination against abridgement by the states, based on the Fourteenth Amendment's due process clause.[198] However, *Malloy* had not yet been decided by the Supreme Court when Miranda was initially tried in June 1963. Whether confessions were admissible instead depended simply on whether they were voluntarily given based on the "totality of circumstances" under the Fourteenth Amendment. If a defendant claimed his confession was involuntary and requested a hearing on the issue, the trial court would decide that issue initially outside the jury's presence. The jury also then could consider that issue as well.[199]

IV. Miranda's Initial Arizona Court Proceedings

Miranda had two separate jury trials, and was convicted separately in his kidnap-rape and robbery cases. Both convictions were affirmed separately by the Arizona Supreme Court.[200] However, only the kidnap-rape conviction was brought to the U.S. Supreme Court.[201]

A. The Kidnap-Rape Case

Miranda was convicted in his kidnap-rape case on June 20, 1963, after a one-day jury trial in the Maricopa County Superior Court before Judge Yale McFate.[202] Judge McFate then had been a judge for twelve years. He was a "kindly, courteous man," who was known as a "fair and able arbiter of justice."[203] He retired in 1979 and died in 2006.[204]

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198 Malloy v. Hogan, 378 U.S. 1, 8 (1964). In doing so, the Court overruled Twining v. New Jersey, 211 U.S. 78 (1908), and Adamson v. California, 332 U.S. 46 (1947). *Id.* at 6-10. The Court also supported its decision by noting that Mapp v. Ohio, 367 U.S. 643, 655 (1961) (Fourth Amendment right of privacy enforceable against the State through the Fourteenth Amendment's due process clause), had overruled Wolf v. Colorado, 338 U.S. 25 (1949). *Id.* at 8.

199 State v. Owen, 394 P.2d 206, 208 (Ariz. 1964).

200 State v. Miranda, 401 P.2d 721 (Ariz. 1965) (kidnap-rape conviction affirmed); State v. Miranda, 401 P.2d 716 (Ariz. 1965) (robbery conviction affirmed).

201 *See* discussion *infra* notes 464-68 and related text.

202 Stuart, *supra* note 102, at 8.

203 *Id.*

204 *'Miranda' Judge McFate, 96, dies*, Ariz. Republic, Feb. 1, 2006, at B3. Judge McFate had been in private law practice, a prosecutor, a legislator, and a corporation commissioner before becoming a Superior Court Judge in 1957. He also heard cases at the Arizona Court of Appeals after his retirement as such. However, he never went to law school. According to a newspaper interview with Stuart after McFate's death, McFate "was never a fan of the Miranda decision. . . . He believed the Constitution did not require police officers to remind defendants of anything." *Id.*

Judge McFate had appointed Alvin Moore to represent Miranda in his initial kidnap-rape trial.[205] Moore was a 73-year-old solo practitioner who volunteered to accept judicial assignments in indigent-criminal cases, although he possessed little experience in criminal law, having spent most of his career in civil court.[206] Deputy County Attorney Lawrence Turoff was lead counsel for the State.[207] Turoff, a "young but skilled" lawyer, had tried scores of such "one-day" confession cases and had a long string of convictions under his belt.[208]

Cooley acknowledged on cross-examination during Miranda's initial kidnap-rape trial that he had not advised Miranda he was entitled to an attorney's services before Miranda made a statement.[209] Moore therefore objected to admitting Miranda's confession into evidence because "the Supreme Court of the United States says a man is entitled to an attorney at the time of his arrest."[210] Moore's objection was inaccurate, based on the law as it then stood.[211] *Escobedo* and the later cases extending the right to counsel to situations where counsel was not specifically requested had not yet been decided. Judge McFate overruled the objection.[212]

Moore did not object to Miranda's confession in the kidnap-rape case because it was involuntarily given or request a hearing on that issue outside the jury's presence.[213] He also did not dispute the confession itself or present any defense case. The only issues he raised on Miranda's behalf instead concerned penetration and resistance.[214] Accordingly, no Fifth Amendment argument was made or preserved for the record and for later appellate review based on Miranda's confession allegedly having been involuntarily given.

The Arizona Supreme Court unanimously affirmed Miranda's kidnap-rape conviction on April 22, 1965,[215] in an opinion by Justice Ernest McFarland.[216]

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205 STUART, *supra* note 102, at 15.

206 *Id.* at 8.

207 *Id.*

208 *Id.* After practicing for many years at the Maricopa County Attorney's Office, Turoff recently retired.

209 BAKER, *supra* note 88, at 23.

210 *Id.*

211 *Id.*

212 *Id.*

213 State v. Miranda, 401 P.2d 721, 728 (Ariz. 1965).

214 STUART, *supra* note 102, at 15-22.

215 *Miranda*, 401 P.2d at 721.

216 Justice McFarland was elected to the Arizona Supreme Court in 1964 and served as its Chief Justice during 1968. He retired from the court in 1970. He had formerly served as Arizona Governor (1955-59) and United States Senator (1941-53), and had been Senate Majority leader during the Truman administration (1951-53). BAKER, *supra* note 88, at 49; *Ernest McFarland*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ernest_McFarland (last visited Jan. 17, 2014). He was

Moore represented Miranda in that appeal. The Arizona Attorney General's office represented the State. The court held Miranda's confession was voluntary, noting that no request had been made to determine its voluntariness.[217] It also found no threats, promises or coercion had occurred.[218]

The court distinguished *Massiah v. United States*[219] because the agents there overheard conversations between the defendants using a hidden radio microphone, after an indictment had been returned and counsel had been retained.[220] It held *Escobedo* was controlling only where all of the factors present in that case existed.[221] It therefore distinguished *Escobedo* because Escobedo had requested a lawyer, following other cases that had made that distinction. It instead stated Miranda "had not requested counsel, and had not been denied assistance of counsel."[222] It also refused to follow *State v. Dorado*, where the California Supreme Court had extended *Escobedo* to a situation where the defendant was not effectively warned concerning his constitutional rights and did not request an attorney.[223] It therefore held Miranda's confession was properly admitted in evidence because it was voluntarily given, even though he did not then have an attorney and the police investigation was beginning to focus on him.[224]

B. The Robbery Case

Miranda was convicted in his initial robbery trial on June 19, 1963, also after a one-day jury trial before Judge McFate.[225] Although that case initially had been consolidated for trial with the kidnap-rape case, the two cases were tried separately.[226] Judge McFate also appointed Moore to represent Miranda in that case. Turoff also was lead counsel for the State.[227]

During that trial, Moore objected to admission of Miranda's confession in the robbery case because it was not "voluntarily given," since Miranda had not been warned that anything he said might be used against him and that he had

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defeated for re-election to the Senate by Barry Goldwater in 1952. After retiring from the Arizona Supreme Court, he served as Director of the Federal Home Loan Bank in San Francisco and as President of the Arizona Television Company. He also managed his farm. He died in 1984. *Id.*; *Memorial for the Honorable Ernest William McFarland*, 145 Ariz. xxxv (1984).

217 *Miranda*, 401 P.2d at 729.

218 *Id.* at 728-33.

219 Massiah v. United States, 377 U.S. 201 (1964).

220 *Miranda*, 401 P.2d at 730-31.

221 *Id.* at 733.

222 *Id.* at 731.

223 People v. Dorado, 394 P.2d 952 (1964).

224 *Miranda*, 401 P.2d at 733.

225 BAKER, *supra* note 88, at 21.

226 *Miranda*, 401 P.2d at 718.

227 STUART, *supra* note 102, at 8.

the right to an attorney.[228] Judge McFate also overruled that objection, stating, "I don't believe that is necessary."[229]

Moore also opened the door to a discussion about rape in Miranda's robbery case by asking Cooley, "You discussed rape during this particular case?"[230] In response, Cooley testified Miranda had told him that Miranda initially intended to rape that victim.[231] However, Miranda was not charged with rape.[232] The victim testified Miranda got into her car, drove it for two blocks, parked in an alley, struggled with her, and pressed a knife against her.[233] She initially testified she gave him $8 voluntarily, but later said she gave him the money because she was afraid.[234] Miranda then left the scene. Miranda also testified to his version of what occurred.[235]

The Arizona Supreme Court also unanimously affirmed Miranda's conviction in the robbery case on April 22, 1965,[236] in an opinion by Vice Chief Justice Fred C. Struckmeyer, Jr.[237] Moore also represented Miranda in that appeal. The Arizona Attorney General's office also represented the State. The Arizona Supreme Court's opinion in that case simply noted in passing that Miranda had "confessed to the robbery."[238] It did not address that confession's legality or admissibility. Moore did not contend on appeal that admission of Miranda's confession was error.[239] The court also stated there was no evidence whatsoever to indicate Miranda's statements were involuntary.[240]

V. MIRANDA'S U.S. SUPREME COURT REPRESENTATION

A. Referral of Miranda's Representation to LRR

LRR's representation of Miranda in the U.S. Supreme Court in his kidnap-rape case, and thereafter in both his kidnap-rape and robbery cases, was also

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228 Brief for Petitioner, *supra* note 74, app. at 52.

229 *Id.*

230 STUART, *supra* note 102, at 11.

231 *Id.* at 8-14.

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 State v. Miranda, 401 P.2d 716 (Ariz. 1965).

237 Justice Struckmeyer was a Maricopa County Superior Court Judge from 1950 to 1955. He served on the Arizona Supreme Court from 1955 to 1982. After his mandatory retirement from the court, he served as a member and Chair of the Arizona Racing Commission, and also went back to private law practice. He died in 1992. *In Memoriam, Honorable Fred C. Struckmeyer, Jr.*, 171 Ariz. lxxvii (1992).

238 *Miranda*, 401 P.2d at 718.

239 *Id.* at 720.

240 *Id.*

wholly fortuitous. It was based on actions taken and a referral made by Robert Corcoran, then a Phoenix lawyer who screened cases for the Arizona Civil Liberties Union.[241]

Corcoran saw the Arizona Supreme Court *Miranda* decisions on June 15, 1965, while reading advance sheets.[242] He recognized the conflict between the Arizona Supreme Court's decision in Miranda's kidnap-rape case and the California Supreme Court's decision in *People v. Dorado*[243] in applying *Escobedo*.[244] Presuming Moore might not be up to the task of writing a certiorari petition, Corcoran wrote to him offering the assistance of one or more of ACLU's "abler" cooperating attorneys in seeking U.S. Supreme Court review.[245] After meeting with Corcoran, Moore declined to represent Miranda any further and gave Corcoran his files,[246] citing lack of funds and physical stamina to continue.[247]

Corcoran first asked Rex Lee, a former Justice White law clerk and then a young lawyer at the Jennings, Strouss, Salmon & Trask law firm in Phoenix, to represent Miranda.[248] However, Lee declined because as a former U.S. Supreme Court law clerk he had a two-year conflict of interest prohibition against appearing there.[249] Lee also told Corcoran he was "unenthusiastic" about the proposed rules-of-law approach because he did not believe it made sound constitutional law.[250]

Corcoran then telephoned James Moeller, a young appellate partner at LRR.[251] Moeller had been Corcoran's friend since they both joined that firm in

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241 STUART, *supra* note 102, at 42. Corcoran had been an associate lawyer at LRR from September 1, 1959, until May 15, 1962. FRANK, *supra* note 86, at 82. He joined the County Attorney's Office, and then went back into private practice with another firm. BAKER, *supra* note 88, at 61. He later became an Arizona Superior Court and Court of Appeals Judge, and served as an Arizona Supreme Court Justice from 1987 until 1996. He died in 2010. *Fordham Law Mourns Passing of Hon. Robert J. Corcoran '57*, FORDHAM UNIV., August 17, 2010, http://law.fordham.edu/19220.htm (last visited Oct. 24, 2013); *Judicial History*, ARIZ. SUP. CT., http://www.azcourts.gov/meetthejustices/JudicialHistory.aspx (last visited Jan. 17, 2014).

242 BAKER, *supra* note 88, at 61.

243 People v. Dorado, 398 P.2d 361 (1965).

244 STUART, *supra* note 102, at 43.

245 *Id.* at 44.

246 *Id.*

247 BAKER, supra note 88, at 62.

248 *Id.*

249 *Id.*

250 STUART, *supra* note 102, at 44. Lee later became founding Dean of Brigham Young University Law School, President of that university, and a Solicitor General of the United States. He died in 1996. David Binder, *Rex Lee, Former Solicitor General, Dies at 61*, N.Y. TIMES (Mar. 13, 1996), http://www.nytimes.com/1996/03/13/us/rex-lee-former-solicitor-general-dies-at-61.html.

251 FRANK, *supra* note 86, at 82

1959.[252] Corcoran asked Moeller during that conversation whether he had seen the Arizona Supreme Court's *Miranda* decisions.[253] Corcoran said they were cases in which another LRR partner, John Flynn, might be interested and asked Moeller how best to approach Flynn to take them.[254] Flynn and Moeller also were friends. Moeller responded that Flynn was a "fact man," Corcoran needed to get him "pissed off," and Corcoran should ask Flynn to read the trial transcripts.[255]

John J. Flynn had joined LRR as a partner in July, 1961.[256] Flynn was born in Tortilla Flat, Arizona in 1925.[257] He was a boxer "of considerable repute,"[258] fought as a combat Marine in the Edson's Raiders unit, and was wounded in the Pacific during World War II.[259] He graduated from the University of Arizona Law School in 1949 after telescoping undergraduate and law school into three and one-half years, compiling a straight-C average while working three jobs to support his young family.[260] Before joining LRR, he had been a deputy county attorney and a member of several smaller firms.[261]

In 1965, Flynn was the Southwest's preeminent criminal defense lawyer.[262] He defended 125 first-degree murder cases during his career, most of them successfully.[263] He was hard-working, intense, and very successful. As Baker has stated, "He prepared each case with utter dedication . . . . When he took a case, nothing else mattered . . . . His mastery of the facts and circumstances of a case was spectacular, but it always was the facts he was after."[264]

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[252] *Id.* Moeller left LRR in May 1970 with Robert Jensen and two other LRR lawyers to form their own firm. *Id.* He later served as a Superior Court Judge for ten years and as an Arizona Supreme Court Justice from 1987 until 1998. *James Moeller*, WIKIPEDIA, http://en.wikipedia.org/wiki/James_Moeller (last visited Jan. 17, 2014); *Judicial History*, *supra* note 257.

[253] PRESENTATION BY HON. JAMES MOELLER TO LRR LAWYERS (LRR 2011) [hereinafter LRR DVD] (DVD on file with author).

[254] *Id.*

[255] *Id.*

[256] FRANK, *supra* note 86, at 82. Flynn's photograph is included in Tom Galbraith, *Remembering John Flynn*, ARIZ. ATT'Y, Sept. 2005, at 12, 25. Galbraith's article provides excellent portrayals of both Flynn's legal career and his personal life.

[257] *John J. Flynn Dies, Lawyer in Landmark Miranda Case*, ARIZ. REPUBLIC, Jan. 27, 1980, at A1.

[258] Dennis Farrell, *John J. Flynn: Legal Giant, Man of Action*, PHOENIX GAZETTE, Jan. 28, 1980, at B1-2; BAKER, *supra* note 88, at 63; Galbraith, *supra* note 257, at 24

[259] Farrell, *supra* note 258 at 24.

[260] BAKER, *supra* note 88, at 63; Galbraith, *supra* note 257, at 21.

[261] BAKER, *supra* note 88, at 63.

[262] Biographical sketch supporting John J. Flynn's induction into Maricopa County Bar Hall of Fame, Oct. 2011.

[263] Galbraith, *supra* note 257, at 24; John P. Frank, *John Flynn in Cheerful Retrospect* (Jan. 30, 1980) (unpublished) (on file with author).

[264] BAKER, *supra* note 88, at 64.

Flynn had a charismatic personality that created great rapport with witnesses, judges, and juries. He was an excellent trial strategist and advocate.[265] Although he always managed to make a perfect record to preserve important issues for appeal, he was not a scholar.[266] Flynn left LRR in July 1970 with two other LRR lawyers to form their own firm.[267] He died of a sudden heart attack in the Snow Bowl parking lot near Flagstaff while going to ski for the first time in January 1980.[268]

After his conversation with Moeller, Corcoran telephoned Flynn to ask him to take Miranda's case as one of the two ACLU cases LRR agreed to take each year, and Flynn accepted.[269] Moeller has stated he had no contact with the *Miranda* case thereafter.[270] Stuart's statement that Flynn, Frank, and Moeller "eventually form[ed] the Miranda Team"[271] is therefore incorrect.

According to Stuart, Corcoran wrote to Miranda on June 24, 1965, suggesting that Miranda retain LRR, and sending Miranda a typed retention letter for him to use.[272] Corcoran also then delivered Miranda's file to LRR, with a transmittal letter stating the firm should expect to receive a retention letter from Miranda.[273] Stuart stated Corcoran's referral was based on the assumption both Frank and Flynn would represent Miranda.[274] He also stated Corcoran recommended LRR generally to Miranda and Miranda retained LRR generally.[275] Moore also wrote to Miranda on June 27, 1965, encouraging him to retain LRR.[276] Miranda officially did so in early July 1965.[277]

John P. Frank had joined LRR as a partner in July 1954,[278] to obtain the benefit of Arizona's hot, dry climate for his asthma condition.[279] Frank was born in Appleton, Wisconsin in 1917.[280] He had earned BA, MA and LLB degrees from the University of Wisconsin and a JSD from Yale Law School.[281]

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265 GORDON CAMPBELL, MISSING WITNESS (2008), is a novel based on two related murder cases Flynn defended successfully.

266 Galbraith, *supra* note 257, at 29.

267 *Id.*

268 Farrell, *supra* note 259; Galbraith, *supra* note 257, at 32.

269 BAKER, *supra* note 88, at 62-63.

270 LRR DVD, *supra* note 253.

271 STUART, *supra* note 102, at 42.

272 *Id.*

273 *Id.* at 45.

274 *Id.* at 44-45.

275 *Id.* at 45.

276 *Id.*

277 *Id.*

278 FRANK, *supra* note 86, at 82.

279 BAKER, *supra* note 88, at 65.

280 *Id.*

281 *Id.* at 64.

Frank had clerked for Justice Black during the U.S. Supreme Court's October 1942 Term, immediately following the Court's decision in *Betts v. Brady* earlier that year.[282] He had taught American legal history, emphasizing the U.S. Supreme Court, at the University of Indiana and Yale law schools.[283] He also had written a constitutional law casebook, several books on the Supreme Court and its justices, including Justice Black, and a book on Abraham Lincoln as a lawyer.[284] By 1965, Frank was an established constitutional and historical scholar, and an experienced appellate advocate.[285] He remained in active practice at LRR until his death in September 2002.[286]

Wikipedia's article on Ernesto Miranda states Corcoran asked Flynn, Frank, and an associate, Peter D. Baird, to represent Miranda.[287] Watts also states, "The ACLU convinced a team of Lewis and Roca lawyers, including John Flynn, John Frank, Paul Ulrich, and Peter Baird, to handle [Miranda's representation]."[288] Both statements are incorrect.

By the time I joined LRR in September 1965, the firm had accepted Miranda's representation. His certiorari petition was pending before the U.S. Supreme Court. Baird had just completed his second year in law school. He did not join LRR until July 9, 1966,[289] and was not admitted to practice in Arizona until April 7, 1967.[290] Accordingly, neither Baird nor I were involved in agreeing to undertake Miranda's representation in July, 1965. Baird continued to practice with LRR as a commercial litigator until his death in August, 2009.[291]

Stuart's, Wikipedia's, and Watts' assertions also are inconsistent with Moeller's oral statements, author Liva Baker's more specific reporting, and Flynn's own written statement. Baker reported Corcoran first called Flynn to ask LRR to take Miranda's case (without mentioning Corcoran's prior tele-

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282 *Id.* at 64-65.

283 *Id.*

284 *Id.*

285 *Id.*

286 Robbie Sherwood & Chip Scutari, *Noted Valley attorney John P. Frank. 84, dies*, ARIZ. REPUBLIC, Sept. 8, 2002, at B1.

287 *Ernesto Miranda*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ernesto_Miranda (last visited Jan. 17, 2014).

288 WATTS, *supra* note 107.

289 FRANK, *supra* note 86, at 83.

290 *Attorneys Admitted to the State Bar of Arizona*, 102 Ariz. xi (1967).

291 *P. Baird, Phoenix Attorney Who Argued Miranda Case*, ARIZ. REPUBLIC (Sept. 1, 2009, 12:00 AM), http://www.azcentral.com/news/articles/2009/09/01/20090901baird0901.html. This headline's additional error will be discussed *infra* notes 355-60 and related text.

phone call to Moeller).[292] Flynn agreed, then "in turn enlisted the aid of John P. Frank, a nationally respected authority on constitutional law."[293]

Baker also reported Corcoran then wrote to Miranda that "one of Arizona's leading criminal lawyers had agreed to take his case to the United States Supreme Court."[294] Miranda's letter in response confirms that Corcoran's letter was referring to Flynn. Miranda wrote:

> Your letter . . . has made me very happy. To know that someone has taken an interest in my case, has increased my moral [*sic*] enormously. . . . I would appreciate if you or either Mr. Flynn keep me informed of any and all results. I also want to thank you and Mr. Flynn for all that you are doing for me.[295]

Stuart quotes the first two sentences of that paragraph of Miranda's letter.[296] However, he does not quote its last two sentences.[297] Those latter sentences clearly confirm Corcoran initially recommended Flynn as Miranda's U.S. Supreme Court counsel, not Frank, Baird or LRR generally.

Flynn later confirmed in a short *Arizona Magazine* article published sometime in the late 1960s that Corcoran had asked him to represent Miranda. He stated, "I agreed on behalf of the law firm of Lewis, Roca, Beauchamp and Linton to present his petition."[298] Flynn also named John Frank, Robert A. Jensen, and me as those associated "in the preparation and presentation of this matter before the United States Supreme Court."[299] Baker also reported that, from the beginning, preparation of the case divided "naturally" on the basis that "Flynn, the trial attorney, a man of great personal charm and mental quickness, was to argue it before the Supreme Court. Frank, the scholar, articulate and thoughtful, was to assume the major burden of preparing the brief."[300]

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[292] BAKER, supra note 88, at 62-63.

[293] *Id.* at 63.

[294] *Id.*

[295] *Id.*

[296] STUART, *supra* note 102, at 45.

[297] *Id.*

[298] ARIZ. MAG. (on file with author).

[299] *Id.*

[300] BAKER, *supra* note 88, at 63. Under all the circumstances previously stated, the scenario underlying Judge Mary M. Schroeder's quoted statement that Frank "asked" Flynn to argue the case because the case will "make your reputation" and Frank had "already argued before the Supreme Court" appears unlikely. *See* Adam Liptak, *J.P. Frank, 84, a Lawyer in Landmark Cases, Dies*, N.Y. TIMES (Sept. 10, 2002), http://www.nytimes.com/2002/09/10/us/j-p-frank-84-a-lawyer-in-landmark-cases-dies.html. The *Miranda* case instead was Flynn's to argue, since it initially had been referred to him. Judge Schroeder was an associate and partner at LRR before being appointed to the Arizona Court of Appeals in 1975, and was Frank's a close friend. However, she did not join the firm until January 4, 1971, after Flynn had left in 1970. FRANK, *supra*

Flynn always handled *Miranda* as "his" case. He initially agreed to accept Miranda's representation, argued Miranda's kidnap-rape case before the U.S. Supreme Court and was responsible for Miranda's representation generally. He also took Miranda's representation with him when he left LRR in July 1970.[301]

B. The Certiorari Petition

Wikipedia states Flynn, Frank, and Baird wrote Miranda's certiorari petition in July 1965.[302] Baker states Flynn and Frank "produced the petition," supported by "the research by several colleagues at Lewis & Roca."[303] Watts states Flynn, Frank, Baird and I drafted the petition.[304] Peter Irons and Stephanie Guitton state Miranda himself wrote the petition from his prison cell.[305] All these statements are also incorrect.

In July, 1965, Baird had just completed his second year in law school. I was clerking at the Ninth Circuit. There also was no involvement by "several colleagues" in drafting the petition. Instead, Robert Jensen did so essentially on his own, under Flynn's and Frank's general supervision.[306]

Jensen has stated he was called into a meeting with Flynn and Frank in Flynn's office, and then asked to draft the *Miranda* certiorari petition.[307] He was not given any particular direction concerning how the petition should be prepared or argued.[308] Jensen had not previously written such a petition or practiced criminal law.[309] He therefore wrote the *Miranda* petition essentially on his own by reviewing other such petitions and arguing what he believed to be the issues presented: (1) numerous prior decisions had interpreted *Escobedo* inconsistently and (2) the Arizona Supreme Court had interpreted *Escobedo* too narrowly.[310]

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note 86, at 82, 84. Accordingly, she was not there when Miranda's representation was accepted in 1965, and the case was briefed, argued and decided in the U.S. Supreme Court in 1966.

301 FRANK, *supra* note 86, at 83.

302 *Ernesto Miranda*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ernesto_Miranda (last visited Jan. 17, 2014).

303 BAKER, *supra* note 88, at 83.

304 WATTS, *supra* note 107, at 78.

305 IRONS & GUITTON, *supra* note 110, at 213.

306 Jensen is now a senior family trial lawyer practicing in Phoenix. He had practiced in Minnesota for about two years before joining LRR on May 15, 1965. *See* FRANK, *supra* note 86, at 83. In July 1965, he was working as a law clerk under Flynn's supervision while waiting to take the Arizona bar examination. LRR DVD, *supra* note 253. He left LRR with Moeller and two other LRR lawyers in May 1970 to form their own firm. *See* FRANK, *supra* note 86, at 83.

307 LRR DVD, *supra* note 253.

308 *Id.*

309 *Id.*

310 *Id.*

Jensen also stated that, although Flynn and Frank reviewed his draft petition, it was filed essentially as he wrote it.[311] No one else was involved.[312] Accordingly, Baker's statements that Flynn and Frank initially disagreed as to how the petition should be argued, and that Frank's Sixth Amendment view was "also supported by two of their three assistants,"[313] also are incorrect, in light of Jensen's statement that he prepared the petition essentially on his own.

Miranda's first certiorari petition was filed on July 16, 1965. Watts incorrectly includes the cover of a second certiorari petition filed on Miranda's behalf in 1969 as the first petition's cover.[314] The first petition stated the question presented as follows:

> Whether the written or oral confession of a poorly educated, mentally abnormal, indigent defendant, taken while he is in police custody and without the assistance of counsel, which was not requested, can be admitted into evidence over specific objection based on the absence of counsel?[315]

Based on this issue statement, the petition then made a basic Sixth Amendment right to counsel argument: Miranda clearly had been subjected to an accusatory investigation. He therefore had a right to have counsel during his interrogation following the line-up. Although Miranda did not request counsel, the police did not advise him that he had that right. Since no counsel was present, his confessions should not have been admitted. The right to counsel cannot be made to turn upon request.[316]

The petition also argued Miranda was "relatively inexperienced and incompetent."[317] The "implicit contention" Miranda waived known rights thus "openly conflicts with a realistic appraisal of the facts."[318] As previously discussed, the underlying record did not support possible independent Fifth Amendment arguments that Miranda also should have been warned concerning his privilege against self-incrimination and he did not validly waive that right. Moore had not made any Fifth Amendment objections to Miranda's confessions. No such arguments were therefore made.

The petition also did not address whether or how, based on the facts presented, Miranda's right to counsel might have been validly waived. That

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311 *Id.*

312 *Id.*

313 *See* BAKER, *supra* note 88, at 83.

314 *See* WATTS, *supra* note 107, at 78. The second petition is discussed in more detail below. *See infra* notes 457-63 and related text.

315 Petition for Writ of Certiorari, *supra* note 107, at 2.

316 *Id.* at 7.

317 *Id.* at 6.

318 *Id.*

failure was understandable. There was no evidence the police ever discussed Miranda's right to counsel with him prior to his in-custody interrogation, that Miranda was aware he had that right, or that he ever affirmatively waived it. Accordingly, no evidence supported a waiver issue or argument.

The petition instead argued the Arizona Supreme Court had read *Escobedo* too narrowly.[319] It also argued lower courts had interpreted *Escobedo* inconsistently, and that the "widely conflicting" opinions by lower courts since *Escobedo* had been decided needed to be resolved.[320]

The petition's Sixth Amendment arguments were appropriate, given Moore's trial court objection to Miranda's confession on that basis, the Arizona Supreme Court's opinion, and the then-developing state of Sixth Amendment law generally. It concluded, "This petition, therefore, squarely raises the question of whether the right to counsel turns upon request; whether, in other words, the knowledgeable suspect will be given a constitutional preference over those members of society most in need of assistance."[321]

Meanwhile, during the summer of 1965, Chief Justice Warren had told his law clerks that, after a year of not deciding any confession cases, "I think we are going to end up taking an *Escobedo* case this year."[322] In September 1965, his chambers began compiling lists and distributing memos to the other justices concerning pending cases involving *Escobedo* issues.[323]

The Court considered 101 of about 150 such cases filed during the prior eighteen months at a conference held on November 22, 1965.[324] It then granted certiorari in four cases involving five indigent defendants who had been convicted based on their confessions, including *Miranda.*[325] One such case, *Johnson v. New Jersey*,[326] also raised retroactivity issues.[327] Two weeks later, the Court granted certiorari in a fifth case, *California v. Stewart*,[328] where the record was silent on whether the accused had been advised of his rights before confessing but the confession had been suppressed.[329] Those five cases

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319 *Id.*

320 *Id.* at 5-8.

321 *Id.* at 8.

322 *See* POWE, *supra* note 72, at 393.

323 *See* BAKER, *supra* note 88, at 102.

324 *Id.* at 103.

325 *Id.*

326 Johnson v. New Jersey, 384 U.S. 719 (1966). *See* discussion *infra* notes 469-73 and related text.

327 *See* BAKER, *supra* note 88, at 105.

328 California v. Stewart (decided within Miranda v. Arizona, 384 U.S. 436 (1966).

329 *See* BAKER, *supra* note 88, at 105.

were samples of those in which confessions were being taken following custodial interrogations.[330]

The Court also chose *Miranda* to be the lead case, although it did not have the lowest case number.[331] However, Miranda was the first defendant listed in alphabetical order.

C. Miranda's Merits Brief

From November 1965 until January 1966, Jensen and I assisted Frank by completing research assignments and in participating in drafts of Miranda's merits brief. Flynn also reviewed drafts of the brief as it evolved and participated in conferences to discuss it. However, Frank was the brief's primary author.

While the merits brief was being prepared, Frank and Flynn disagreed on whether it should make arguments based on the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to counsel. Frank strongly believed the brief's argument should be based on the Sixth Amendment. Flynn equally strongly believed its argument should be based on the Fifth Amendment. I recall attending at least one conference with Frank, Flynn and Jensen where that issue was debated intensely and at length. Frank eventually won that argument, primarily because he was the constitutional scholar and controlled preparation of the brief.

Frank's position also was supported by record. Moore's objection to Miranda's confession in the kidnap-rape case had been based on Miranda's alleged right to counsel, not whether he had been warned concerning his privilege against self-incrimination or whether his confession was voluntarily given. Moore had not requested a hearing concerning whether the confession was voluntary. The Arizona Supreme Court also had affirmed Miranda's conviction based on the lack of any right to counsel when his confession was given. The "Question Presented" in the merits brief therefore ultimately stated the same Sixth Amendment right to counsel question presented in the certiorari petition.[332]

The merits brief then flatly argued arrested suspects have the same Sixth Amendment right to counsel when interrogated as they have at arraignment,[333] that where the right to counsel exists, it does not depend upon request,[334] and that the Sixth Amendment should be given its "full meaning."[335] It also argued

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[330] *See id.* at 104.
[331] California v. Stewart (No. 584, October Term 1965) had the lowest case number.
[332] Brief for Petitioner, *supra* note 74, at 2-3.
[333] *Id.* at 33 (citing Hamilton v. Alabama, 368 U.S. 52 (1961)).
[334] *Id.* at 31-32 (citing Carnley v. Cochran, 369 U.S. 506 (1962)).
[335] *Id.* at 49.

Escobedo "necessarily transcends its facts because it recognizes the interrogation as one of the sequence of proceedings covered by the Sixth Amendment" and that the principle of barring unwitting waiver under *Carnley v. Cochran*[336] "necessarily applies to the totality of that to which the Sixth Amendment applies, and this must necessarily run, as it does, from the interrogation after arrest through the appeal."[337]

The argument thus implicitly recognized that custodial interrogation was a "critical stage" in criminal proceedings to which the Sixth Amendment right to counsel applied, based on the then rapidly developing case law on that issue. In response to the State's anticipated counterargument that providing counsel prior to custodial interrogations would require additional cost, the brief simply argued, "respect for constitutional rights will inescapably cost money. Let it."[338]

If accepted, this argument required counsel be provided for all suspects before any custodial interrogations could occur. Police therefore could no longer obtain convictions based on suspects' confessions obtained without counsel being present. In response to that concern, the brief acknowledged that the number of crimes solved by confessions is "clearly extremely large" and that the practical effect of having a lawyer at the interrogation stage tell his client to stand mute "will be to eliminate large numbers of confessions."[339] However, even assuming there might be some "unpredictable decline in the efficiency of the conviction machinery, there are some distinctly practical pluses to be balanced against this."[340] Some of that additional cost and efficiency "comes from giving American citizens exactly what they are entitled to under the Constitution."[341]

The brief did not make a separate Fifth Amendment argument. It did not discuss whether or how a suspect's Sixth Amendment right to counsel might be waived, whether the right to counsel extended to pre-arrest situations, or what specific warnings law enforcement might have to provide. It expressly declined to address the first two issues, since they were not involved in the case.[342]

Moreover, if counsel was required for suspects prior to any custodial interrogations, they, not law enforcement, would necessarily advise suspects con-

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336 Carnley v. Cochran, 369 U.S. 506 (1962) (presuming waiver of the right to counsel from a silent record in a state court trial for noncapital offenses is impermissible).

337 Brief for Petitioner, *supra* note 74, at 34.

338 *Id.* at 38-39.

339 *Id.* at 39.

340 *Id.* at 45-46.

341 *Id.* at 47.

342 *Id.* at 34 n.15.

cerning their constitutional rights, including their right to remain silent and its consequences. The issue of whether law enforcement must provide advice concerning such rights thus would never arise. The brief therefore did not consider it. Accordingly, Stuart's statement that Frank was "ultimately, more than any individual, responsible for the line of reasoning that was to become known as the *Miranda* doctrine"[343] is also incorrect.

The brief also cited the famous statement by Justice Robert Jackson concerning the basic conflict between individual freedom and effective law enforcement caused by having counsel present during custodial interrogations:

> To bring in a lawyer means a real peril to solution of crime . . . . [A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no such statement to police under any circumstances.[344]

The brief did not elaborate upon the social cost if numerous criminal cases either had to be tried based on independently obtained evidence because there was no confession or dismissed because no such evidence existed. It instead concluded, "there is not the faintest sense in deliberately establishing an elaborate and costly system of counsel—to take effect after it is too late to matter. Yet that is precisely the *Miranda* case."[345]

The brief also referred to Miranda's interrogation and confession in the robbery case.[346] It attached "with the consent of opposing counsel"[347] the portion of the robbery case trial transcript where Moore objected to Miranda's confession as "not voluntarily given" because Miranda was not warned anything he said would be held against him or concerning his rights to an attorney.[348] However, the robbery case had been tried and appealed separately, and was not presented to the U.S. Supreme Court for review.

In hindsight, the Fifth Amendment privilege against self-incrimination also necessarily was involved both in *Miranda* and in every other case in which the Supreme Court had granted certiorari, since all defendants had confessed without being fully advised concerning their constitutional rights to counsel and to remain silent. Miranda's merits brief briefly mentioned *Malloy v. Hogan*[349] in several places.[350] However, it did so only in making its Sixth Amendment arguments.

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343 STUART, *supra* note 102, at 45-46.
344 Watts v. Indiana, 338 U.S. 49, 57 (1949) (Jackson, J., concurring).
345 *See* Brief for Petitioner, *supra* note 74, at 49.
346 *See* Brief for Petitioner, *supra* note 74, at 3-5.
347 *Id.* at 4.
348 *Id.* at Appendix.
349 Malloy v. Hogan, 378 U.S. 1 (1964).
350 *See* Brief for Petitioner, *supra* note 74, at 7, 29, 34.

The only brief arguing a "marriage of the Fifth Amendment and the Sixth Amendment right to counsel" was an American Civil Liberties Union amicus brief largely written by Prof. Anthony G. Amsterdam.[351] That brief argued that an inherent atmosphere of compulsion existed in obtaining confessions and statements from suspects by the police, based on extensive references to leading writers on police interrogation techniques and police interrogation manuals.[352] The other defendants' briefs all argued Sixth Amendment issues similar to those argued in Miranda's brief.[353]

Miranda's merits brief was filed with the U.S. Supreme Court in January 1966. It lists Frank and Flynn as his counsel, and includes a footnote expressing appreciation to Jensen and me for our research assistance.[354] No one else was involved in preparing it.

D. Oral Argument

The U.S. Supreme Court oral argument in *Miranda* and the three other cases involving similar confession issues occurred on February 28 and March 1, 1966. The Court's official report of that decision states, "John J. Flynn argued the cause for petitioner in No. 759 (*Miranda*). With him on the brief was John P. Frank."[355] Although Frank sat at counsel table,[356] he did not argue *Miranda*. The statements in the *Arizona Business Gazette*[357] and *Wikipedia*[358] that he did so are incorrect. Contrary to the headline and statement in his obituary article,[359] Baird also did not argue *Miranda*. He was still in law school.[360]

Flynn also was not Frank's "choice," as stated by Stuart,[361] to make Miranda's oral argument. Frank normally would have made any U.S. Supreme Court argument LRR had because of the case's importance, his knowledge concerning the Supreme Court and its justices, and his extensive appellate experience. Baker states Frank instead "deferred" to Flynn to do so, based on Flynn's "superior firsthand experience with police and knowledge of their ways."[362]

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[351] *See* BAKER, *supra* note 88, at 108.

[352] *Id.*

[353] *Id.*

[354] *See* Brief for Petitioner, *supra* note 74, at Appendix 6.

[355] *See* Miranda v. Arizona, 384 U.S. 436, 438 (1966).

[356] *See* BAKER, *supra* note 88, at 132.

[357] Mike Fimea, *Frank Leaves Legacy*, ARIZ. BUS. GAZETTE, Sept. 19, 2002, at BG32.

[358] *See Ernesto Miranda*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ernesto_Miranda (last visited Jan. 17, 2014).

[359] *See P. Baird, Phoenix Attorney Who Argued Miranda Case*, *supra* note 291.Whatever Baird's "legacy" might have been as stated in that article, it therefore did not "include the Miranda warning to notify suspects of their legal rights." *Id.*

[360] See *supra* notes 269-98 and related text.

[361] *See* STUART, *supra* note 102, at 53.

[362] BAKER, *supra* note 88, at 132.

As previously stated, *Miranda* also was Flynn's case as an original matter.[363] I therefore believe Flynn and Frank always understood Flynn would make the argument, with Frank's assistance.

An edited transcript of Flynn's oral argument confirms he initially argued Miranda's personal situation, the unfairness of the circumstances of Miranda's confession on their facts, that Miranda had a Fifth Amendment right against self-incrimination, "and if he recognizes that he has a Fifth Amendment right, to request counsel."[364] However, Flynn did not make the independent argument that Miranda had a wholly separate Sixth Amendment right to have counsel in fact present before his interrogation could proceed, as had been argued throughout Miranda's certiorari petition and merits brief.[365]

Instead, in response to a question by Justice Potter Stewart, one of the Court's eventual dissenters, concerning the results of focusing a criminal investigation on a suspect, Flynn made a blended Fifth and Sixth Amendment argument, quite different from what had been argued in Miranda's certiorari petition and merits brief:

> I think that the man at that time has the right to exercise, if he knows, and under the present state of the law in Arizona, if he is rich enough and educated enough to assert his Fifth Amendment right, to request counsel, I simply say that at that stage of the proceeding, under the facts and circumstances in *Miranda* of a man of limited education, of a man who certainly is mentally abnormal, and who is, certainly, an indigent, that when that adversary process came into being, that the police at the very least had an obligation to extend to this man, not only his clear Fifth Amendment right, but to afford him the right of counsel.[366]

Justice Stewart then asked Flynn, "what would the lawyer advise him his rights then were?"[367] Flynn's extemporaneous response gave essentially, what became the *Miranda* warnings:

> That he had the right not to incriminate himself; that he had a right not to make any statement; that he had the right to be free from further questioning by the police department; that he had the right, at an ultimate time, to be represented adequately

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363 *See supra* notes 258-83 and related text.

364 IRONS & GUITTON, *supra* note 110, at 213-17.

365 *See supra* notes 326-67 and related text.

366 IRONS & GUITTON, *supra* note 110, at 216 (quoting the oral argument of John J. Flynn).

367 IRONS & GUITTON, *supra* note 110, at 217.

> by counsel in court; and that if he was too indigent, too poor to employ counsel, that the state would furnish him counsel.[368]

Flynn also argued, "the only person that can adequately advise Ernest Miranda is a lawyer."[369] However, Chief Justice Warren's eventual majority opinion rejected that argument.[370]

Assistant Attorney General Gary Nelson made the State's responsive argument.[371] Nelson acknowledged that if any warning was required, it must be given before Miranda made any statement, and that it was "arguable" Miranda was entitled to a warning.[372] However, Nelson also argued that if an "extreme position" were adopted that a suspect must have access to counsel during interrogation or intelligently waive counsel, "a serious problem in the enforcement of our criminal law will occur. . . . When counsel is introduced at interrogation, interrogation ceases."[373]

Nelson thus implicitly argued that the negative practical result of requiring that counsel be present to advise suspects concerning their right to remain silent, and thereby preventing confessions from being given, must be given priority over a suspect's theoretical Sixth Amendment right to have counsel present prior to custodial interrogations because they were a "critical stage" in criminal proceedings. Chief Justice Warren's eventual majority opinion clearly was influenced by those concerns.

VI. THE U.S. SUPREME COURT'S OPINIONS

The U.S. Supreme Court decided *Miranda* primarily based on the Fifth Amendment.[374] Justice Fortas, who had replaced Justice Goldberg the previous summer, provided the decisive fifth vote. However, Fortas later stated the *Miranda* decision was "entirely" Warren's.[375]

Chief Justice Warren's majority opinion began by holding that the admissibility of statements obtained from a defendant questioned while in custody or

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368 *Id.*

369 *Id.*

370 *See* discussion at *infra* note 385 and related text.

371 Nelson had clerked for Justice Struckmeyer during 1962-63. After a short time in private practice, he became an assistant Arizona Attorney General (1964-68) and Arizona Attorney General (1968-74). He later became an Arizona Court of Appeals Judge (1974-78) and Chief Staff Attorney for the Arizona Supreme Court (1979-1997). *See Gary K. Nelson*, ARIZ. CT. APPEALS, DIVISION I, http://azcourts.gov/coa1/formerJudges/GARYKNELSON.aspx (last visited Jan. 17, 2014). He died in May 2013. *Obituary, Gary Kent Nelson*, ARIZ. REPUBLIC, May 31, 2013, at B5.

372 IRONS & GUITTON, *supra* note 110, at 219.

373 *Id*. at 219-20.

374 Miranda v. Arizona, 384 U.S. 436 (1966).

375 *See* Powe, *supra* note 72, at 397.

otherwise deprived of his freedom of action in any significant way was a "constitutional issue."[376] It acknowledged, "we might not find the defendants' statements to have been involuntary in traditional terms."[377] Its starting point was instead, "Even without employing brutality, the 'third degree' or [other police interrogation techniques], the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[378] Accordingly, before criminal suspects could be subjected to in-custody interrogation, law enforcement must warn them clearly and unequivocally that they have a Fifth Amendment right to remain silent, and that anything they say can be used against them.[379]

The opinion also stated it "reaffirmed" *Escobedo* and the principles it announced.[380] However, in doing so, it recharacterized the Sixth Amendment right to counsel required by *Escobedo* merely as being necessary to protect suspects' Fifth Amendment privilege against self-incrimination, not because they had any independent right to counsel as such while being interrogated.[381] As the result, the Court's later conservative majority ultimately limited *Escobedo* to its facts,[382] thereby also destroying any value it might have had as a Sixth Amendment precedent. That later majority also held the Sixth Amendment right to counsel as such is "offense specific" and does not attach until after adversary judicial criminal proceedings have been filed.[383]

Miranda's majority also held suspects' Sixth Amendment right to counsel while being interrogated does not depend upon their request. Failure to make such a pre-interrogation request for counsel also does not constitute a waiver of that right.[384] However, although counsel are required to protect suspects' Fifth Amendment privilege against self-incrimination in the face of interrogation, the majority specifically rejected the "suggestion" that each police station must have a "station house lawyer" present at all times to advise prisoners concerning their rights.[385] Contrary to the majority's statement, that argument was not simply a "suggestion." It instead was at the core of Miranda's merits brief and an important part of Flynn's oral argument on his behalf.

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376 *Miranda*, 384 U.S. at 445.

377 *Id.* at 457.

378 *Id.* at 455.

379 *Id.* at 469.

380 *Id.* at 442.

381 *Id.* at 442-66.

382 Michigan v. Tucker, 417 U.S. 433, 438 (1974), and cases cited

383 Texas v. Cobb, 532 U.S. 162 (2001). See the discussion at *infra* notes 607-11 and related text.

384 *Miranda*, 384 U.S. at 470.

385 *Id.* at 474.

The majority instead held the *police* also must clearly inform suspects held for interrogation that they have the right to consult with a lawyer, to have the lawyer with them during interrogation and that, if they cannot afford a lawyer, one will be appointed to represent them.[386] It did not explain how such warnings would instantly neutralize the prior coercive interrogation atmosphere it generally presumed to exist, or substitute for the fact that if counsel were present, they would advise their clients to remain silent, regardless of whether any confessions that otherwise might be given might later technically be considered "voluntary." It also did not require that counsel in fact be present prior to any in-custody interrogations or discuss whether interrogations were a "critical stage" in criminal proceedings to require counsel be provided, regardless of whether the suspect had made any such request, as developed in the then-recent prior cases previously discussed.

Once the required warnings were given, the majority held that if suspects indicate at any time prior to or during questioning that they want to remain silent, the interrogation must cease.[387] There also must be a showing that suspects knowingly and intelligently waived their rights before any statements obtained as the result of in-custody interrogation can be admitted in evidence against them.[388] Moreover, if the interrogation continues without the presence of an attorney and a statement is taken,

> [A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel . . . . [A] valid waiver will not be presumed simply from the silence of the accused after the warnings are given or simply from the fact that a confession was in fact eventually obtained . . . . 'Presuming waiver from a silent record is impermissible.[389]

The majority thus also assumed trial courts would actively and independently review confessions given following custodial interrogations to determine whether intelligent, voluntary waivers had occurred, and hold the prosecution to a "heavy burden" in that regard.[390] However, it could provide no assurance courts would in fact do so, rather than summarily admitting confessions after pro forma reviews where the required warnings and waivers had been given, and there was no evidence of any physical coercion. *Miranda* thus limited

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386 *Id.* at 473.
387 *Id.* at 474.
388 *Id.* at 475.
389 *Id.*
390 *Id.*

custodial interrogations of criminal suspects only to the extent of requiring that "lip service" warnings concerning constitutional rights be provided, and preventing the admission of custodial confessions that had been obtained during interrogations occurring without such warnings and waivers.

The majority opinion's philosophic underpinning was based on the ACLU amicus brief.[391] Instead of relying on the Court's own subjective views concerning whether the individual interrogations immediately involved violated due process of law, based on the factual records presented, it instead was based primarily on the Fifth Amendment itself. It began with a specific statement concerning the newly required warnings about rights for persons in custody, followed by a statement providing the reasons for that rule. Its logic was based on police interrogation manuals establishing police dominance in that setting demonstrating a general need for such rules, not evidence concerning the methods actually used in the cases before the Court.[392]

The majority opinion expressly refused to prohibit freely and voluntarily given statements. To the contrary, it stated, "Voluntary statements 'remain a proper element in law enforcement,'"[393] and that "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."[394] However, based on the police manuals it cited, the majority found the general custodial interrogation atmosphere resulted in "inherent pressures."[395]

Baker states that the majority opinion therefore took the "unprecedented step of imposing stringent rules on law enforcement officers that put restraints on their instincts and restrictions on their zeal."[396] A more pragmatic view is that, despite those "restraints" and "restrictions," the majority opinion instead provided a clear path for police to obtain admissible confessions following custodial interrogations. It did not require counsel to be present to advise suspects that they had the right to remain silent before those interrogations occurred and thereby prevent any confessions from being given as an original matter.

The dissenting justices did not credit the majority for the benefits this compromise provided law enforcement or acknowledge that the majority opinion might have gone further in establishing a Sixth Amendment right to have counsel present prior to custodial interrogations. Justice Harlan instead denounced the decision from the bench as "'dangerous experimentation' at a time of a

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391 *See* BAKER, *supra* note 88, at 168.

392 POWE, *supra* note 72, at 395-96.

393 *Miranda*, 384 U.S. at 478.

394 *Id.*

395 *Id.* at 468.

396 BAKER, *supra* note 88, at 167.

'high crime rate that is a matter of growing concern.'"[397] He also stated emphatically, "This doctrine has no sanction, no sanction."[398]

Justice Clark's dissent objected to the new "constitutional rule" prohibiting custodial interrogations without providing required additional warnings concerning the rights to remain silent and to assistance of counsel as being unsupported by the Court's prior cases and because of the lack of "empirical knowledge" concerning their practical operation.[399] It argued custodial interrogation was "undoubtedly an essential tool in effective law enforcement."[400] Requiring an express waiver of the right to remain silent would "heavily handicap questioning."[401] To suggest or provide counsel for the suspect "simply invites the end of the interrogation."[402] Accordingly, rather than applying the majority's "arbitrary Fifth Amendment rule," Justice Clark instead would have followed "the more pliable dictates of the Due Process Clauses of the Fifth and Fourteen Amendments which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody."[403]

Justice White's dissent also argued the Court's required warnings reflected "a deep-seated distrust of confessions."[404] However, in Justice White's view, the Fifth Amendment was "not the sole desideratum" because society has an "interest in the general security," which was of equal weight.[405] There was nothing immoral about asking a suspect whether he committed the crime. Instead, "The most basic function of any government is to provide for the security of the individual and his property."[406] Justice White also expressed the concern that many criminal defendants either would not be tried at all or would be acquitted "if the State's evidence, minus the confession, is put to the test of litigation."[407]

Miranda's compromise between the old "totality of the circumstances" rule and *Escobedo*'s implication that there could be no custodial interrogation whatsoever unless counsel was present rejected any requirement that a lawyer must be present prior to custodial interrogations, as had been argued both in Miranda's merits brief and in Flynn's oral argument. The Opinion instead

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397 POWE, *supra* note 72, at 397.
398 *Id*.
399 *Miranda*, 384 U.S. at 500-01 (Clark, J., dissenting).
400 *Id.* at 501.
401 *Id.* at 516-17.
402 *Id.* at 517.
403 *Id.* at 503 (Clark, J., dissenting).
404 *Id.* at 537 (White, J., dissenting).
405 *Id.*
406 *Id.*
407 *Id.* at 541.

focused on the suspect's own waivable rights to remain silent and to counsel based on warnings given by the police.[408] The ACLU stated soon after *Miranda* was decided that it viewed the absence of any requirement that counsel be present prior to interrogations with "regret."[409]

VII. The Decision's Results

Because Miranda's confession was held to have been obtained in violation of his Fifth and Sixth Amendment rights, his kidnap-rape conviction was vacated and that case was remanded for a new trial. Miranda thereby won his immediate battle by having that conviction reversed and obtaining a new trial. However, the Court's decision lost the war for criminal suspects generally by not requiring counsel to be present before custodial interrogations could occur, leading to admissible confessions. It also was not retroactive. Miranda himself also ultimately did not benefit personally from the decision, since he again was convicted following a second trial.

Baird's later statement that "we joyfully reveled, bathed, and splashed in the [decision's] limelight"[410] is also incorrect. Miranda's high-profile, successful, continuing representation instead created substantial disagreements within LRR. Many LRR lawyers undoubtedly were pleased that Miranda's representation had been successful. Others were unhappy either because the 1) representation resulted in a substantial financial burden on the firm, thereby reducing its partners' income; 2) they disagreed with Miranda's position on the merits; or 3) they and their civil clients simply were unhappy with the firm representing a high-profile, and obviously guilty criminal defendant, whose success appeared to have a highly negative effect on law enforcement.

Nationally, *Escobedo* "raised the storm against the Court to gale force" during the 1964 presidential election year, providing Barry Goldwater an argument with which to attack the justices as contributing to the "breakdown of law and order" in the cities.[411] Cars previously sporting "Impeach Earl Warren" bumper stickers gained a new companion, "Support Your Local Police."[412]

Although police could "rather easily" live within *Miranda*'s compromise once they understood it, they and many politicians instead "reacted to *Miranda*

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[408] Powe, *supra* note 72, at 398.

[409] *Id.* at 398 (internal quotation marks omitted) (quoting Nan Robertson, *Ervin Protests Curbs on Police: Proposes an Amendment to Upset High Court Decision*, N.Y. Times, July 23, 1966, at 54.

[410] Peter D. Baird, *Legal Lore:* Miranda *Memories*, Litigation, Winter 1990, at 43, 45. Again, Baird was not there. He did not join LRR until July 1966. Frank, *supra* note 86, at 83.

[411] Powe, *supra* note 72, at 391, 392-93 (internal quotation marks omitted) (quoting John Morton Blum, Years of Discord: American Politics and Society, 1961-1974, at 210 (1991)).

[412] *Id.* at 391.

as if the Court had given the criminal the trump card . . . The police, still angry with *Escobedo*, were aghast at *Miranda.*[413] *Miranda* "transformed *Escobedo*'s gale into a Force-5 hurricane."[414] For the public, already anxious about issues including abolishing prayer in schools, school desegregation, and a general fear for the future caused by increasing crime rates and decisions supporting criminal defendants' rights, *Miranda* was simply the last straw.[415] However, many years later, an *Arizona Business Gazette* editorial acknowledged, "The police can live with Miranda, as they have for more than two decades. They can depend on good and thorough police work to suppress crime and protect the public."[416]

Miranda also "galvanized opposition to the Warren Court into a potent political force."[417] That opposition was among the factors leading to major defeats for Democrats in the 1966 elections, and a foreshadowing of the Republican "law and order" 1968 presidential campaign.[418] *Miranda* set the Court on a "collision course" with the 1968 presidential election.[419] For example, an overwhelming sixty-three percent of respondents told a 1968 Gallup Poll that the Court was "too lenient on crime."[420]

Throughout the 1968 campaign, Richard Nixon ran against the Warren Court as much as he ran against his Democratic rival, Hubert Humphrey.[421] "Playing on prejudice and rage, particularly in the South,"[422] and promising that his Supreme Court appointees would be "different"[423] contributed to Nixon's election as President in 1968. Nixon and George Wallace, (who went even further than Nixon in attacking the Court), together overwhelmed Humphrey in that election by a 57-43 margin.[424] True to his campaign prom-

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413 *Id.* at 398-99.

414 *Id.* at 399.

415 BAKER, *supra* note 88 at 224-25.

416 Editorial, *Miranda/Police can live with rule*, ARIZ. BUS. GAZETTE, Feb. 2, 1987, at A9.

417 POWE, *supra* note 72, at 399 (internal quotation marks omitted) (quoting Yale Kamisar, *The Warren Court and Criminal Justice*, *in* THE WARREN COURT: A RETROSPECTIVE 116, 119 (1996)).

418 POWE, *supra* note 72, at 400.

419 *Id.*

420 *Id.* at 410.

421 DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: *In re Gault* and Juvenile Justice 105 (2011).

422 *Id.*

423 *Id.*

424 POWE, *supra* note 72, at 410.

ise, Nixon's Supreme Court appointments during the next several years led to a new conservative majority, thus ending the Warren Court era.[425]

As Miranda's counsel, LRR was at the center of that controversy. However, it was both immaterial to our representation and beyond our control. Since Miranda had won a new trial in his kidnap-rape case based on the U.S. Supreme Court's decision, his representation had to continue in any event, to attempt to obtain the best possible results on his behalf.

VIII. MIRANDA'S KIDNAP-RAPE RETRIAL AND LATER APPEAL

A. The Kidnap-Rape Retrial

Miranda's kidnap-rape case was retried in the Maricopa County Superior Court on February 15-24, 1967.[426] I assisted Flynn in representing Miranda during that eight-day trial.[427] Maricopa County Attorney Robert Corbin[428] and his chief assistant, Moise Berger,[429] represented the State. Because of Miranda's high-profile notoriety and the resulting intense local pretrial publicity, all Maricopa County Superior Court Judges (who were then subject to possible contested election campaigns) recused themselves from handling that retrial. Coconino County Judge Laurance Wren therefore was assigned to do so.[430]

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425 Nixon appointed Chief Justice Warren E. Burger (1969), and Justices Harry A. Blackmun (1970), Lewis F. Powell, Jr. (1972) and William H. Rehnquist (1972). *See* IRONS & GUITTON, *supra* note 110, at 376.

426 Appellant's Opening Brief at 1-2, *State v. Miranda*, Arizona Supreme Court No. 1802 (filed October 1967).

427 Frank, Moeller, Jensen, and Baird were not involved in that trial.

428 Corbin later served as a Maricopa County Supervisor, three terms as Arizona Attorney General, and President of the National Rifle Association. *See About Us*, MARICOPA COUNTY ATT'Y'S OFF., http://www.maricopacountyattorney.org/about-us/ (last visited Jan. 17, 2014); *Robert K. Corbin's Legacy*, TOM KOLLENBORN CHRONS. (Aug. 3, 2009), http://superstitionmountain tomkollenborn.blogspot.com/2009/08/robert-k-corbins-legacy.html.

429 Berger succeeded Corbin as Maricopa County Attorney, then resigned to become a professor at Western State College of Law (now Thomas Jefferson School of Law). *See About Us*, *supra* note 428.

430 Judge Wren had been a Deputy Coconino County Attorney (1955-57) and Coconino County Attorney (1957-61). He served as a Coconino County Superior Court Judge (1961-74) and later on the Arizona Court of Appeals (1974-82). He died in 1982. *Judge Wren Dies; Tied to Miranda Case*, ARIZ. REPUBLIC, Sept. 2, 1982, at A10; *Laurance T. Wren*, ARIZ. CT. APPEALS, DIVISION I, http://azcourts.gov/coa1/formerJudges/LAURANCETWREN.aspx (last visited Jan. 17, 2014). The *Arizona Republic* article mistakenly states Judge Wren's decision in Miranda's kidnap-rape case "was overturned by the U.S. Supreme Court in June 1966." *Judge Wren Dies; Tied to Miranda Case*, *supra.* Instead, as previously stated, Judge McFate's ruling admitting Miranda's confession was reversed. The article also states Judge Wren claimed in articles written for legal periodicals "that he was correct in allowing Miranda's confession to be admitted at trial even though it was obtained without obtaining Miranda having had prior opportunity to consult

Miranda's kidnap-rape retrial clearly illustrated what might occur generally in criminal trials if illegally obtained custodial confessions and other evidence gathered as there result were suppressed. By far the majority of that retrial involved non-jury evidentiary hearings and motions argued to the court, while the jury was sequestered at the downtown Adams Hotel. Those hearings and motions primarily concerned whether each piece of the State's proposed evidence was tainted by having been obtained as the result of Miranda's initial illegally obtained confessions and therefore "fruit of the poisonous tree" that must be suppressed, based on *Wong Sun v. United States*.[431]

The defense's efforts to suppress as much evidence as possible on that basis were largely successful. For a time, it seemed possible there might not be sufficient admissible evidence for the case to go to the jury. It then would have to be dismissed, even though that result might be politically and judicially distasteful, given the temper of the times.

According to Baker, Judge Wren thought Miranda would go "bone free."[432] Corbin also stated he initially "didn't think he had a case either."[433] However, an unexpected new development during that retrial was a second confession allegedly given by Miranda to his common-law wife, Twila Hoffman.[434] Whether Hoffman's testimony concerning it should be admitted into evidence became that trial's major issue.

Hoffman did not testify in Miranda's first trial. However, according to Baker, while Miranda was expecting to be released following his acquittal at a second trial, he had written to welfare authorities questioning Hoffman's fitness to have custody of their daughter because she had a child by another man while Miranda was in prison.[435] Accordingly, Hoffman therefore was "angry" and "scared" as to what Miranda might do if he were freed.[436]

Hoffman therefore brought her story to Corbin.[437] She visited Miranda after he was in jail for several days, having confessed repeatedly to the police, and without having had any access to counsel or advice concerning his rights. Hoffman's testimony was to be that Miranda then asked her if the police had

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with an attorney." *Id.* However, Judge Wren did not admit Miranda's initial written and oral confessions in evidence before the jury in the second kidnap-rape trial. Instead, Judge McFate had done so in Miranda's first trials. The article further quotes Judge Wren as having stated, "In my opinion, the Miranda doctrine of exclusion should be emasculated." *Id.*

431 Wong Sun v. United States, 371 U.S. 471 (1963).

432 BAKER *supra* note 88, at 192.

433 *Id.*

434 Appellant's Opening Brief at 1-2, *State v. Miranda*, Arizona Supreme Court No. 1802 (filed October 1967).

435 BAKER, *supra* note 88, at 192.

436 *Id.*

437 *Id.*

told her he had confessed to them concerning the kidnap-rape.[438] She said "yes."[439] Miranda then allegedly reaffirmed that earlier kidnap-rape confession to her.[440]

There had been a trial stipulation that Miranda might testify to the court in a non-jury evidentiary hearing concerning whether his confession to Hoffman was voluntary and whether it was tainted by his first confessions, without waiving his self-incrimination privilege. On direct examination during that hearing, Miranda therefore described the circumstances leading to the first confessions, and the continuous later course of interrogation and court appearances, without having received any advice concerning his right to counsel or privilege against self-incrimination.

However, on cross-examination, Judge Wren ordered Miranda to answer whether he had done the things he had told the police he had done at the time of his initial confession, over a defense objection that this testimony was outside the hearing's scope and outside the prior stipulation. Miranda responded, "Yes," thereby re-confessing the same confession the U.S. Supreme Court had held was illegally obtained and therefore inadmissible. At the hearing's conclusion, Judge Wren therefore ruled Miranda's first confession to the police was prima facie voluntary and admitted it into evidence for the purpose of considering whether Miranda's second confession to Hoffman should be admitted before the jury.[441]

Judge Wren also denied a defense motion to suppress Hoffman's testimony concerning that confession. The motion argued the State had failed to prove beyond a reasonable doubt that the positive link between the two confessions was broken and the second confession therefore was truly voluntary.[442] Judge Wren also ruled there was no marital privilege as to the confession, since Hoffman had testified she was never married to Miranda.[443]

Hoffman's testimony obviously was of great importance both to the jury and to the case generally, since little if any other evidence had been admitted supporting Miranda's guilt. However, despite the importance of Hoffman's marital status and the fact that her credibility was highly at issue, Judge Wren also allowed her to refuse to answer questions on cross-examination as to inconsistent prior statements she had made concerning that status, sustaining her claimed privilege against self-incrimination.[444] Doing so under those cir-

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438 *Id.*

439 *Id.*

440 *Id.*

441 Opening Brief at 14, State v. Miranda (No. 1802, Ariz.).

442 That burden of proof was required by *Chapman v. California*, 386 U.S. 18 (1967).

443 Appellant's Opening Brief at 25, State v. Miranda, (No. 1802, Arizona Supreme Court)

444 *Id.*

cumstances arguably violated Miranda's Sixth Amendment rights to confront and cross-examine the witnesses called against him.

B. Miranda's Second Appeal

Miranda was convicted and sentenced on March 1, 1967, exactly one year after the four consolidated confession cases were argued in the U.S. Supreme Court. LRR appealed that conviction to the Arizona Supreme Court. Frank, Flynn, and I represented Miranda in that appeal.[445] Gary Nelson again represented the State.[446]

On February 6, 1969, the Arizona Supreme Court again affirmed Miranda's conviction[447] in a unanimous opinion by Court of Appeals Judge John Molloy.[448] In doing so, the court rejected Miranda's argument that his second confession to Hoffman was "fruit of the poisonous tree" and that there was no break in the ongoing chain of circumstances, starting with Miranda's initial illegally obtained confessions and leading to the Hoffman confession. It instead held Miranda's confession to Hoffman was sufficiently "attenuated" from the initial confession because the initial violation was a failure to warn of constitutional rights that did not exist until sometime subsequent to the conduct.[449] That argument was an obvious *non sequitur*. It ignored the fact that the U.S. Supreme Court had held Miranda's initial confessions were illegally obtained. The opinion did not cite any specific evidence concerning how any true "attenuation" had in fact occurred.

The court also held there was a sufficient "break in the stream of events" leading to Miranda's confession to Hoffman, without stating what specific facts caused that "break."[450] There was in fact no such evidence. It further held that, since Miranda had testified he was never married to Hoffman, that fact was not an issue.[451] Refusing to permit Hoffman to be cross-examined concerning prior instances of misconduct in which she claimed in writing and

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445 *See* Opening and Reply Briefs, State v. Miranda (No. 1802, Arizona Supreme Court). Moeller, Jensen, and Baird were not involved in that appeal.

446 State v. Miranda, 450 P.2d 364, 366 (Ariz. 1969).

447 *Id.* at 364.

448 Judge Molloy served as a Pima County Superior Court Judge (1957-61) and as a Judge on the Arizona Court of Appeals, Division Two (1961-67). He was the latter court's Chief Judge (1967-69) when he participated in the Arizona Supreme Court's decision. He later returned to private law practice with the Molloy, Jones, Donahue firm in Tucson (1969-91). He died in 2008. *Obituary, John Fitzgerald Molloy*, ARIZ. DAILY STAR (July 16, 2008), http://www.legacy.com/obituaries/tucson/obituary.aspx?n=john-fitzgerald-molloy&pid=113487068.

449 *Miranda*, 450 P.2d 364 at 373.

450 *Id.*

451 *Id.* at 376.

under oath while applying for benefits that she was married to Miranda therefore was held not to be reversible error.[452]

Finally, the court held it was not improper for the State to ask Miranda during a hearing outside the jury's presence whether his initial confessions to the police were true.[453] Its rationale was that an accused's own concept of his guilt at the time of his initial confession was relevant in deciding whether the later confession was voluntary.[454] In so holding, the court did not address Miranda's argument, also based on *Wong Sun v. United States*,[455] that his initial confessions the U.S. Supreme Court had held were illegally obtained could not be used against him at all.[456]

Frank, Flynn, and I filed a petition for certiorari with the U.S. Supreme Court from the Arizona Supreme Court's decision in May 1969.[457] That petition made two principal arguments: (1) Miranda should not have been required to testify that the confessions he gave the police were true; and (2) his later confession to Hoffman was "fruit of the poisonous tree" and therefore should not have been admitted into evidence.[458] The petition was denied in October 1969.

Since the justices did not explain their votes and the Court's conference process is confidential, no one outside the court knows exactly why.[459] However, in all likelihood, four justices' votes required to grant the petition simply were no longer there. Chief Justice Warren had retired and was replaced by Chief Justice Warren Burger in June 1969.[460] After withdrawing his nomination by President Lyndon Johnson as Chief Justice in October 1968 in the face of a Senate filibuster,[461] Justice Fortas had resigned from the Court in May 1969 because of issues caused by "retainer" payments he had received from the Wolfson Family Foundation.[462] Justice Marshall, who had argued *Westover v. United States*, one of the *Miranda* consolidated cases as Solicitor General in

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452 *Id.* at 373.

453 *Id.*

454 *Id.* at 373-74.

455 Wong Sun v. United States, 371 U.S. 471, 485 (1963).

456 Appellant's Opening Brief at 15-16, State v. Miranda (No. 1802 Ariz.) (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), quoted in Wong Sun v. United States, 371 U.S. 471, 485 (1963)).

457 Petition for Certiorari to the Supreme Court of Arizona, Miranda v. Arizona (No. 2176, Oct. Term 1968).

458 *Id.*

459 BAKER, *supra* note 88, at 292.

460 For a description of the events leading to Chief Justice Warren's retirement and Chief Justice Burger's swearing-in ceremonies (in which President Nixon participated) on June 23, 1969, the last day of the Court's October 1968 Term, see POWE, *supra* note 72, at 482-84.

461 BAKER *supra* note 88, at 254-55.

462 BAKER, *supra* note 88, at 276-80; POWE, *supra* note 72, at 477-81.

1966, and had been appointed to the Court in 1967, disqualified himself.[463] Miranda's representation in the kidnap-rape case therefore ended unsuccessfully.

IX. The Robbery Case

A. No Certiorari Petition Was Filed in the Robbery Case

LRR certainly was aware Miranda's robbery case existed. Miranda's initial kidnap-rape certiorari petition referred to the robbery case as a "companion case."[464] His U.S. Supreme Court merits brief also referred to the kidnap-rape and robbery cases as "companions," but stated, "Only the kidnapping-rape case has been brought here."[465] That brief also attached a trial transcript concerning his confessions in the robbery case as an appendix, with the State's permission.[466]

Baird later stated LRR made a conscious decision not to take the robbery case to the U.S. Supreme Court because the kidnap-rape case presented a better record, both in the trial court and in the Arizona Supreme Court's opinion.[467] The reasoning supporting that decision apparently was based on the assumption that in the event Miranda's kidnap-rape conviction was reversed, surely his robbery conviction, based on essentially the same underlying facts leading to his confession in that case, would be reversed as well.[468] That assumption proved to be incorrect.

B. Miranda's Federal Habeas Corpus Petition

One week after deciding *Miranda*, the U.S. Supreme Court held in *Johnson v. New Jersey* that *Miranda* and *Escobedo* could not be applied retroactively because of the disruptive effect on law enforcement that would occur as the result.[469] Contrary to the approach taken in *Pickelsimer v. Wainwright*, which had left *Gideon*'s retroactivity to individual states,[470] *Johnson* held *Miranda* and *Escobedo* applied only where trials had occurred subsequent to those deci-

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463 Baker, *supra* note 88, at 291.

464 Petition for Writ of Certiorari, *supra* note 107, at 1.

465 Brief for Petitioner, *supra* note 74, at 4.

466 *Id.* at app. at 51-54.

467 Peter D. Baird, *The Confessions of Arturo Ernesto Miranda*, Ariz. Att'y, Oct. 1991, at 20, 23.

468 *Id.* Baird also states "everyone reasoned" that decision. However, as previously noted, neither Baird nor I were at LRR when that decision was made. *See supra* notes 267-69 and related text.

469 Johnson v. New Jersey, 384 U.S. 719, 719, 731, 733 (1966).

470 Pickelsimer v. Wainwright, 375 U.S. 2 (1963).

sions, even though such cases might still be on direct appeal.[471] The Court also later held *Miranda* did not apply to subsequent retrials where the defendant's first trial commenced before the date it was decided.[472] However, it also held that whether the *Miranda* principles were satisfied was nonetheless a "pertinent factor" in assessing whether the defendant's confession had been voluntary.[473]

Whatever possible general merit might have existed in not "opening the floodgates" by retrying or releasing numerous criminal defendants previously convicted based on confessions given without prior *Miranda* warnings, *Johnson* meant that Miranda's own robbery conviction could not automatically be vacated and retried, even though the underlying facts leading to his confession in that case were essentially identical to those leading to his kidnap-rape conviction.

Accordingly, Flynn filed a federal habeas corpus petition to vacate Miranda's robbery conviction. That petition was granted, based both on a "law of the case" argument and because allowing Miranda's robbery conviction to stand while his kidnap-rape conviction had been reversed under essentially identical factual circumstances simply was not fair.[474] Baird was involved in that part of the case as a law clerk and associate lawyer.[475] I was not involved. Instead, as previously stated, I was involved in Miranda's kidnap-rape retrial and later appeal.

C. Miranda's Retrial and Later Appeal in the Robbery Case

Miranda's robbery case was retried on September 20, 1971 before Hon. Philip Marquardt.[476] Flynn and Tom Thinnes represented Miranda in that trial, after Flynn left LRR.[477] Accordingly, no one from LRR was involved in it. Thinnes stated that he handled most of the trial.[478] Although Flynn made the opening argument, Thinnes handled the witness examinations and made the closing argument.[479] Because of the "extreme possibility of jury familiarity

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471 *Johnson*, 384 U.S. at 719, 733.

472 Jenkins v. Delaware, 395 U.S. 213 (1969).

473 Darwin v. Connecticut, 391 U.S. 346 (1968); Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966).

474 *See* Baird, *supra* note 410, at 3, 7.

475 *Id.*

476 State v. Miranda, 509 P.2d 607 (Ariz. 1973). Judge Marquardt resigned in 1991 after pleading guilty to a charge of conspiracy to possess marijuana. Laura Laughlin, *Arizona Judge Resigns After Plea of Guilty to Felony Drug Charge*, L.A. TIMES (June 7, 1991), http://articles.latimes.com/1991-06-07/news/mn-118_1_judges-drug-charge.

477 Galbraith, *supra* note 257, at 18.

478 STUART, *supra* note 102, at 186.

479 *Id.*

with his name," Miranda was tried anonymously as "Jose Gomez."[480] However, despite that effort to provide him a fair trial, he again was convicted.

The Maricopa County Public Defender's Office represented Miranda in an appeal from that conviction to the Arizona Supreme Court.[481] Again, LRR was not involved. The Attorney General's office represented the State.[482] Nelson was then Attorney General. The Arizona Supreme Court affirmed Miranda's conviction on May 2, 1973,[483] in a brief opinion by Chief Justice Jack Hays.[484] Miranda's robbery representation therefore also was ultimately unsuccessful.

X. What Happened to Miranda?

Miranda was released from prison on parole in December 1972, six months before the Arizona Supreme Court affirmed his robbery conviction for the second time.[485] He again worked at menial jobs such as warehouseman, produceman and delivery-truck driver.[486] He also began selling autographed *Miranda* cards, like those the police had become accustomed to carrying, for $1.50 apiece.[487] He was charged with illegal possession of a firearm and dangerous drugs in July 1974, and sent back to prison in January 1975 for violating his parole based on those charges.[488]

Miranda was released again in December 1975, after completing the mandatory one-third of his original sentence.[489] He was stabbed to death in a barroom fight just over a month later at the La Amapola bar, located in the former "Deuce" area in downtown Phoenix.[490] Although homicide complaints and arrest warrants were issued against two suspects, there were no confessions or convictions. Instead, both suspects, who had previously been released pending further investigation, simply disappeared and were never seen again.[491] Miranda is buried in the Mesa Cemetery.[492]

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480 State v. Miranda, 509 P.2d 607, 608 (Ariz. 1973).

481 *Id.*

482 *Id.*

483 *Id.*

484 Justice Hays had been an Assistant Phoenix City Attorney (1949-52), U.S. Attorney (1953-60), and a Maricopa County Superior Court Judge (1960-68). He served as an Arizona Supreme Court Justice from 1969 until 1987 and as Chief Justice from 1972 until 1974. He died in 1995. *In Memoriam: Honorable Jack D.H. Hayes*, 183 Ariz. lv (1995).

485 Baker, *supra* note 88, at 381.

486 *Id.*

487 *Id.* at 383.

488 *Id.*

489 Stuart, *supra* note 102, at 95.

490 *Id.* at 95-99.

491 *Id.* at 99.

492 Amy B Wang, *Finding Burial Room*, Ariz. Republic, Sept. 27, 2012, at A1, A7.

XI. *MIRANDA*'S LEGACY

Miranda's holdings have survived as a statement of constitutional principles, based on the facts and holdings presented in the case itself. However, later cases limiting the decision's interpretation and application have created major disagreements through the years, both within the U.S. Supreme Court and in lower courts. The extent to which *Miranda* provides any continuing, meaningful deterrent to police techniques for obtaining confessions based on interrogations occurring without counsel present to advise suspects on their constitutional rights also has been limited by later decisions as well.

Detailed discussions concerning how *Miranda* interpretations and police interrogation procedures have evolved through the years are beyond this article's scope.[493] However, reviewing the Court's numerous decisions interpreting and applying *Miranda* shows how some major issues have been resolved. There have been numerous twists and turns as the Court has struggled to find consistency in a wide variety of specific factual situations.

A. Misdemeanor and Juvenile Commitment Cases

Berkemer v. McCarty held that a person subjected to custodial interrogation is entitled to the benefit of *Miranda*'s procedural safeguards, regardless of the nature or degree of the investigated offense.[494] The Court held that creating an exception to the *Miranda* rule in arrests for misdemeanor traffic offenses would substantially undermine the rule's simplicity and clarity, particularly where the police, in conducting custodial interrogations, did not know whether the person has committed a misdemeanor or a felony.[495]

In re Gault also held the right to counsel and the privilege against self-incrimination apply equally in juvenile commitment cases, as part of the due process to which juveniles are entitled.[496] In doing so, it rejected the generally prevailing *parens patriae* approach in which juvenile courts had substantially unlimited discretion. Justice Fortas's majority opinion there stated, "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone . . . . Under our Constitution, the condition of being a boy does not justify a kangaroo court."[497]

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[493] For a summary of the Supreme Court's cases interpreting *Miranda*, see James L. Buchwalter, *Construction and Application of Constitutional Rule of* Miranda*–Supreme Court Cases*, 17 A.L.R. FED. 2d 465 (2007).

[494] Berkemer v. McCarty, 468 U.S. 420,433-34 (1984).

[495] *Id.*

[496] *In re* Gault, 387 U.S. 1 (1967).

[497] *Id.* at 13, 28. For discussion concerning *Gault*'s history within the context of juvenile justice generally, see generally TANENHAUS, *supra* note 421.

The Court therefore found the assistance of counsel essential for the determination of delinquency.[498] It also applied *Miranda* to preclude admissions allegedly made in Gault's 1964 commitment hearings, holding that the privilege against self-incrimination only can be waived when counsel is present or the right to counsel has been waived.[499] It did so even though *Johnson v. New Jersey* had previously held *Miranda* was not applicable to trials occurring before the date of its decision,[500] without citing *Johnson.*

In the Matter of Winship narrowly extended *Gault*'s due process requirements to hold that juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when charged with criminal law violations.[501] However, Justice Blackmun's plurality opinion in *McKeiver v. Pennsylvania* restored *parens patriae* to juvenile court jurisprudence in holding juveniles had no right to a jury trial, using a "fundamental fairness" standard.[502] Justice Rehnquist's 6-3 majority opinion in *Schall v. Martin* then applied that standard to uphold the constitutionality of a New York statute permitting seventeen-day pretrial detentions of accused juvenile delinquents if there was a "serious risk" they would commit another crime before their hearing.[503] Those decisions ended the Warren Court's due process revolution with respect to juvenile court proceedings.

B. Sufficiency of Miranda *Warnings*

In *California v. Prysock*, the Court held the content of *Miranda* warnings was not required to be a "virtual incantation of the precise language contained in the *Miranda* opinion."[504] It therefore summarily reversed a California Court of Appeal opinion that laid down that flat rule. In doing so, it noted that *Miranda* itself permitted a "fully effective equivalent" to its required warnings.[505] More specifically, nothing in the warnings given in *Prysock* suggested any limitation on the right to the presence of appointed counsel different from the right to a lawyer in general, including the right "to a lawyer before you are questioned . . . while you are being questioned, and all during the questioning."[506] Since the warnings conveyed the right to have a lawyer appointed at no cost if he could not afford one prior to and during interrogation, the Court of

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498 *Gault*, 387 U.S. at 36.
499 *Id.* at 44-55.
500 Johnson v. New Jersey, 384 U.S. 719, 732 (1966).
501 *In re* Winship, 397 U.S. 358 (1970).
502 McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
503 Schall v. Martin, 467 U.S. 253 (1984).
504 California v. Prysock, 453 U.S. 355, 355 (1981) (per curiam).
505 *Id.* at 360 (quoting Miranda v. Arizona, 384 U.S. 436, 476 (1966)).
506 *Id.* at 361.

Appeal erred in holding the warnings were inadequate simply because of the order in which they were given.[507]

However, *Duckworth v. Eagan* later held a warning advising the suspect that he would have a lawyer appointed "if and when you go to court," in conjunction with warnings that "[y]ou have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning" was sufficient to comply with *Miranda.*[508] Chief Justice Rehnquist's majority opinion stated, "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one."[509] Accordingly, if the police cannot provide appointed counsel, "*Miranda* requires only that the police not question a suspect unless he waives his right to counsel."[510]

C. Voluntary Statements Taken in Violation of Miranda *Can Be Used for Impeachment*

Chief Justice Burger's 5-4 majority opinion in *Harris v. New York* held that, although voluntary statements taken in violation of *Miranda* must be excluded from the prosecution's case in chief, the resulting presumption of coercion does not bar their use for impeachment purposes on cross-examination if the defendant takes the stand.[511] Instead, "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[512]

Justice Brennan's dissent countered that the majority opinion "tells the police that they may freely interrogate an accused incommunicado and without counsel and know that, although any statement they may obtain in violation of *Miranda* cannot be used in the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution."[513]

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[507] *Id.*

[508] Duckworth v. Eagan, 492 U.S. 195, 198-200 (1989).

[509] *Id.* at 204.

[510] *Id.*

[511] Harris v. New York, 401 U.S. 222 (1971).

[512] *Id.* at 226. *See also* Oregon v. Hass, 420 U.S. 714 (1975) (ruling inculpatory statements admissible solely for impeachment purposes after those statements were ruled inadmissible during the prosecution's case in chief and defendant then testified to the contrary, knowing that information had been ruled inadmissible).

[513] *Harris,* 401 U.S. at 232 (Brennan, J., dissenting).

Doyle v. Ohio held that the Fourteenth Amendment's Due Process Clause prohibits impeachment based on a defendant's silence following *Miranda* warnings since those warnings implicitly assure him that his silence will not be used against him.[514] *Brecht v. Abrahamson* followed *Doyle* with respect to silence after *Miranda* warnings.[515] However, it held the prosecution could refer to the defendant's silence before his *Miranda* warning was given since such silence was "probative" and did not rest on any assurances by law enforcement authorities that it would carry no penalty.[516] *Fletcher v. Weir* also summarily held that where a suspect has not received the kind of affirmative assurances the *Miranda* warnings embody, a state does not deny due process by allowing cross-examination concerning his post-arrest silence when he chooses to take the stand.[517]

Wainwright v. Greenfield also followed *Doyle*, holding using a suspect's silence after he was arrested and given Miranda warnings, as evidence of his sanity, violated due process.[518] The implicit assurance contained in *Miranda* warnings that silence will carry no penalty applied equally to proof of sanity as well as to proof of commission of the underlying offense.[519]

Anderson v. Charles held cross-examination merely inquiring into prior inconsistent statements did not violate the defendant's constitutional right to remain silent after being given *Miranda* warnings established in *Doyle* because the suspect had then voluntarily spoken.[520] However, *Mincey v. Arizona* held statements made in circumstances violating *Miranda* were involuntary and could not be used against the defendant for any purpose where the defendant was then in a hospital room, comatose, in great pain, and encumbered by tubes, needles, and a breathing apparatus.[521]

When a person is in custody, even if police have not given *Miranda* warnings or begun interrogation, the prosecution's subsequent comment on the defendant's exercise of his right to silence in its case-in-chief violates the Fifth Amendment. The right to remain silent would mean little if the consequence of

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[514] Doyle v. Ohio, 426 U.S. 610, 618-19 (1976). *See also* United States v. Hale, 422 U.S. 171, 177 (1975) (in exercise of its supervisory authority over lower federal courts, trial court erred in permitting cross-examination concerning defendant's silence during a police interrogation after *Miranda* warnings had been given).

[515] Brecht v. Abrahamson, 507 U.S. 619 (1993).

[516] *Id.* at 628.

[517] Fletcher v. Weir, 455 U.S. 603, 607 (1982).

[518] Wainwright v. Greenfield, 474 U.S. 284 (1986).

[519] *Id.* at 292.

[520] Anderson v. Charles, 447 U.S. 404, 408 (1980) (per curiam).

[521] Mincey v. Arizona, 437 U.S. 385, 491-92 (1978).

its exercise is evidence of guilt.[522] Accordingly, a defendant's pre-arrest, pre-*Miranda* silence cannot be used against him in the prosecution's case-in-chief.[523] However, either post-arrest or pre-arrest, pre-*Miranda* silence can be used for impeachment if the defendant testifies.[524]

D. Cases Involving Whether the Defendant Was "In Custody"

The Court has considered numerous cases involving the definition of "in custody" in deciding whether *Miranda* warnings were required. Whether a suspect is "in custody" and therefore entitled to *Miranda* warnings presents a mixed question of law and fact qualifying for independent review.[525]

For example, *Orozco v. Texas* held "in custody" includes not only interrogation at a police station, but also any other circumstance that deprives the suspect of freedom of action in any significant way.[526] Accordingly, use of statements the defendant made to police after questioning in his bedroom at 4:00 a.m. without first being given *Miranda* warnings violated his Fifth Amendment rights since he was then under arrest and not free to leave.[527]

Stansbury v. California also held that determining whether a suspect is "in custody" for *Miranda* purposes requires applying an objective standard, considering all the circumstances, in deciding whether there was a formal arrest or a restraint on his freedom of movement tantamount to a formal arrest.[528] Accordingly, the officer's subjective views on the nature of the interrogation or the suspect's guilt are relevant in making that determination only if revealed to the suspect.[529]

Chief Justice Burger's 6-2 majority opinion in *Beckwith v. United States* held *Miranda*'s requirements did not extend to questioning by an IRS special agent investigating potential criminal tax violations when the taxpayer was not actually in custodial interrogation.[530] It accordingly distinguished *Mathis v. United States*,[531] another taxpayer interrogation case, where the taxpayer was

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522 Griffin v. California, 380 U.S. 609, 615 (1965) (prosecution may not comment on a defendant's exercise of his right to remain silent).

523 *See* Wainwright v. Greenfield, 474 U.S. 284 (1986).

524 Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam) (post-arrest, pre-*Miranda* silence); *see also* Jenkins v. Anderson, 447 U.S. 231 (1980) (State may use defendant's pre-arrest, pre-*Miranda* silence for impeachment purposes).

525 Thompson v. Keohane, 516 U.S. 99, 116 (1995).

526 Orozco v. Texas, 394 U.S. 324, 327 (1969).

527 *Id.*

528 Stansbury v. California, 511 U.S. 318, 324 (1994) (per curiam).

529 *Id.*

530 Beckwith v. United States, 425 U.S. 341, 348 (1968).

531 Mathis v. United States, 391 U.S. 1 (1968).

in custody.[532] Justice Brennan's dissenting opinion would have required the taxpayer to be given *Miranda* warnings in situations where "the practical compulsion to respond to questions about his tax returns is comparable to the psychological pressures described in *Miranda*."[533]

Minnesota v. Murphy similarly held *Miranda*'s requirements did not extend to a probation officer interview, since the probationer was not then formally arrested, even though the investigation had focused on a suspect.[534] *Fare v. Michael C.* also held a sixteen and one-half year-old juvenile suspect's request to see a probation officer did not equate to a request to see a lawyer for *Miranda* purposes and that a juvenile could voluntarily and knowingly waive his Fifth Amendment rights.[535]

Moran v. Burbine held the police's failure to inform the suspect of a telephone call from his attorney did not deprive him of information essential to the ability to knowingly waive his Fifth Amendment rights to remain silent and to the presence of counsel.[536] Justice O'Connor's majority opinion there stated that requiring the police to inform the suspect of the attorney's efforts to reach him would muddy "*Miranda*'s otherwise relatively clear waters" and "would work a substantial and . . . inappropriate shift in the subtle balance" between effective law enforcement and "inherently coercive" interrogation.[537]

Moran also stated *Miranda* had declined "to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation," citing the ACLU's amicus brief in *Miranda*, and that "the suspect's Fifth Amendment rights could be adequately protected by less intrusive means."[538] Those statements neglected the facts, as previously stated, the position that Miranda was entitled to the actual presence of a lawyer was also argued in Miranda's petition for certiorari and merits brief, and *Miranda* was presented, accepted, and argued as a Sixth Amendment case.[539]

Chief Justice Burger's plurality opinion in *United States v. Mandujano* held *Miranda* warnings need not be given to a grand jury witness called to testify about criminal activities in which he might have been involved.[540] Accordingly, false statements made in the absence of such warnings could not be suppressed in a later prosecution of the witness for perjury based on those

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[532] *Beckwith*, 425 U.S. at 347.
[533] *Id.* at 350 (Brennan, J., dissenting).
[534] Minnesota v. Murphy, 465 U.S. 420, 430-31 (1984).
[535] Fare v. Michael C., 442 U.S. 707, 737-38 (1979).
[536] Moran v. Burbine, 475 U.S. 412, 432 (1986).
[537] *Id.* at 425-27.
[538] *Id.* at 426.
[539] *See supra* notes 314-69 and related text.
[540] United States v. Mandujano, 425 U.S. 564 (1976).

statements. Extending *Miranda* to questioning before a grand jury would be an "extravagant expansion" never remotely contemplated by that decision because grand jury questioning is "wholly different from custodial police interrogation.[541] A witness has no absolute right to silence before a grand jury. He or she instead has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim.

Garner v. United States also declined to extend *Miranda* to a situation where the defendant made incriminating disclosures on his tax returns instead of claiming the privilege against self-incrimination since nothing suggested he did so because his will was overborne.[542] Instead, the taxpayer could complete the return at leisure and with legal assistance.[543]

However, *Estelle v. Smith* held statements made to a psychiatrist without first giving *Miranda* warnings during an examination while the defendant was in custody violated his Fifth Amendment privilege against self-incrimination and therefore could not be admitted during the penalty phase of a capital murder trial.[544] That examination also violated the defendant's Sixth Amendment right to counsel because that right had already attached and defense counsel were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness.[545]

In *Yarborough v. Alvarado*, the Court held the *Miranda* "custody" test was objective, involving two discrete inquiries: (1) the circumstances surrounding the interrogation and (2) given those circumstances, whether a reasonable person would have felt free to terminate the interrogation and leave.[546] Accordingly, a state court reasonably concluded that a juvenile suspect who gave statements after a two-hour police-station interview was not "in custody" so as to trigger *Miranda* requirements where he was driven to the interview by his parents, the parents remained in the station's lobby during the interview, the police were not coercive and threatening but twice asked the suspect if he wanted to take a break, and the suspect went home after the interview.[547]

Similarly, *California v. Beheler* held *Miranda* warnings were not required where the defendant, although a suspect, was not placed under arrest, had voluntarily come to the police station, and was allowed to leave unhindered after a brief interview.[548] Accordingly, the Court held he was not taken into custody

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[541] *Id.* at 580.

[542] Garner v. United States, 424 U.S. 648, 665 (1976).

[543] *Id.* at 658.

[544] Estelle v. Smith, 451 U.S. 454, 466-69 (1981).

[545] *Id.* at 469-71.

[546] Yarborough v. Alvarado, 541 U.S. 652, 661 (2004) (quoting Thompson v. Kennedy, 516 U.S. 99, 112 (1995)).

[547] *Id.* at 654-55.

[548] California v. Beheler, 463 U.S. 1121 (1983) (per curiam).

and his freedom was not restricted in any way whatsoever.[549] *Miranda* does not apply to noncustodial situations where, in the absence of any formal arrest or restraint on freedom of movement, questioning merely occurs in a coercive environment.[550]

The Court also has held initial traffic stops by themselves do not cause motorists to be "in custody" for *Miranda* purposes. Accordingly, in *Berkemer v. McCarty*, statements made by a motorist in response to roadside questioning prior to a formal arrest were held admissible against him.[551] In *Pennsylvania v. Bruder*, the Court applied *Berkemer* to hold the defendant was not "in custody" following a traffic stop where the police officer also asked a few questions and asked that the motorist to perform a simple balancing test at a location visible to passing motorists.[552]

E. Cases Involving the Definition of "Interrogation"

The Court has defined "interrogation" under an objective standard that examines whether the police should have known the questioning was reasonably likely to elicit an incriminating response. For example, in *Rhode Island v. Innis*, the Court held the *Miranda* safeguards come into play only when a person in custody is subjected either to express questioning or to its functional equivalent.[553]

The suspect there had been advised concerning his *Miranda* rights and stated he understood those rights and wanted to speak with a lawyer.[554] However, after being placed in a police car and on the way to the station, in response to statements made between the officers in the car expressing concern as to where a missing shotgun was located because of a nearby school for handicapped children, he volunteered they should turn the car around so he could show them where it was located.[555] After returning to the scene of the arrest and again being advised concerning his *Miranda* rights, he pointed out where the gun was hidden.[556] Under those circumstances, the Court refused to suppress the suspect's statements since there was no showing the officers should have known that it was reasonably likely he would respond as he did.[557] Simply being in custody was not enough.[558]

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549 *Id.* at 1123.
550 Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam).
551 Berkemer v. McCarty, 468 U.S. 420, 434-35 (1984).
552 Pennsylvania v. Bruder, 488 U.S. 9, 11 (1988) (per curiam).
553 Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).
554 *Id.* at 294.
555 *Id.* at 295.
556 *Id.*
557 *Id.* at 299-302.
558 *Id*. at 291, 303.

In *Pennsylvania v. Muniz*, Muniz was arrested for DUI, then taken to a booking station where he was told his actions and voice would be recorded but without advice concerning his *Miranda* rights.[559] He answered questions concerning his name, address, height, weight, eye-color, date of birth and current age, stumbling over his address and age.[560] He also was asked but could not give the date of his sixth birthday.[561]

Under those circumstances, the Court held only the "sixth birthday" question constituted a testimonial response to custodial interrogation for Fifth Amendment purposes.[562] Physical inability to articulate words in a clear manner was not "testimonial," but instead "real or physical evidence."[563] However, the "sixth birthday" question was incriminating because of the answer's content: the trier of fact could infer from Muniz's inability to answer that his mental state was confused.[564] The Court also held the first seven questions fell within a "routine booking question" exception to *Miranda* permitting questions to secure biographical data necessary to complete booking or pretrial services.[565]

Statements Muniz volunteered while taking field sobriety tests also were held admissible as "voluntary" because they were not made in response to custodial interrogation.[566] A defendant's refusal to take a blood-alcohol test after a police officer has requested it and told him he could lose his license if he refused, but not that the refusal could be admitted against him, is not an act coerced by the officer and thus not protected by the right against self-incrimination. Accordingly, admission into evidence of a defendant's refusal to submit to such a test does not offend that right.[567]

In *Illinois v. Perkins*, the Court held conversations between incarcerated suspects and undercover agents posing as fellow inmates did not necessarily implicate the concerns underlying *Miranda* because the essential elements of a "police-dominated atmosphere" and compulsion are not present when the incarcerated person speaks freely to someone he believes to be a fellow inmate.[568]

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559 Pennsylvania v. Muniz, 496 U.S. 582 (1990).

560 *Id.* at 586.

561 *Id.*

562 *Id.* at 599-600.

563 *Id.* at 591 (following Schmerber v. California, 384 U.S. 757 (1966)).

564 *Id.* at 592.

565 *Id.* at 601. That "exception" came from a quotation in the United States amicus brief in United States v. Horton, 873 F.2d 180, 181 n.2 (8th Cir. 1989), not from any prior Supreme Court decisions.

566 *Id.* at 603-04.

567 South Dakota v. Neville, 459 U.S. 553, 554 (1983).

568 Illinois v. Perkins, 496 U.S. 292 (1990).

Where the suspect does not know he is speaking to a government agent, there is no reason to assume the possibility of coercion.[569]

F. Cases Involving Alleged Waivers of Miranda *Rights*

Tague v. Louisiana followed *Miranda* in recognizing that the State, not the defendant, has the "heavy burden" to establish that he knowingly and intelligently waived his *Miranda* rights.[570] It also rejected the presumption a defendant understands his constitutional rights.[571] The Court's rationale was that the burden of establishing waiver is properly placed on the State because it creates the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation.[572]

However, *North Carolina v. Butler* rejected a *per se* rule that no statement of a person under custodial interrogation may be admitted in evidence against him unless, at the time the statement was made, he explicitly waived the right to the presence of a lawyer.[573] *Butler* instead held *Miranda*'s statement that "An express statement that the individual is willing to make a statement and does not want an attorney followed by a statement could constitute a waiver"[574] did not hold such an express statement was "indispensable to finding a waiver."[575] Although courts must presume that a defendant did not waive his rights and the prosecution's burden is "great," at least in some cases "waiver can be clearly inferred from the actions and words of the person interrogated."[576] Accordingly, since the North Carolina Supreme Court, in creating an inflexible rule that no implicit waiver can ever suffice, went "beyond the requirements of federal organic law," its judgment was vacated and the case was remanded for further proceedings.[577]

More recently, *Berghuis v. Thompkins* recognized the State's showing that a *Miranda* warning was given and the accused made an uncoerced statement is

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[569] *Id.* at 298 (The Court distinguished Mathis v. United States, 391 U.S. 1 (1968), because the defendant there knew he was being interviewed by an IRS agent, and Massiah v. United States, 377 U.S. 201 (1964), because the government there used an undercover agent to circumvent Massiah's Sixth Amendment right to counsel after he had been charged with a crime.).

[570] Tague v. Louisiana, 444 U.S. 469 (1980) (per curiam).

[571] *Id.* at 470 (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)).

[572] *Id.*

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

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

[575] *Butler*, 441 U.S. at 373.

[576] *Id.*

[577] *Id.* at 376.

insufficient standing alone to demonstrate a valid waiver of *Miranda* rights.[578] The State also must show the accused understood those rights.[579]

Edwards v. Arizona held that where an accused has invoked his right to have counsel present during custodial interrogation, a waiver of that right can not be established by showing only that the accused voluntarily responded to police-initiated interrogation after again being advised of his rights.[580] Instead, an accused who invokes his right to counsel cannot be subjected to further interrogation until counsel has been made available to him, or unless the accused himself initiates further communication, exchanges or conversations with the police.[581]

Minnick v. Mississippi followed *Edwards* in holding the Fifth Amendment right to counsel during interrogation is not terminated or suspended by mere consultation with counsel.[582] Officers may not reinstate interrogation unless the suspect's attorney is present and a valid waiver is obtained, or the suspect initiates further communication and a proper waiver is obtained.[583]

However, *Connecticut v. Barrett* held a suspect could claim his *Miranda* rights with respect to written statements but still be willing to make a voluntary oral statement that later could be used against him.[584] Invoking his right to counsel with respect to written statements thus did not invoke that right for all purposes.[585] *Davis v. United States* held *Edwards* did not require officers to stop questioning a suspect where he merely stated, "Maybe I should talk to a lawyer."[586] *Davis* reasoned that the clarity and ease of applying the *Edwards* rule would be lost if officers were required to cease questioning based on an ambiguous or equivocal reference to an attorney.[587] Accordingly, although it might be good practice to do so, they are not required to ask clarifying questions.[588]

Justice Rehnquist's plurality opinion in *Oregon v. Bradshaw* stated that a defendant who had previously invoked his *Miranda* rights "initiated" further conversation for purposes of the *Edwards* rule since his question, "what is going to happen to me now?," indicated willingness and a desire for a generalized discussion about the investigation, and further conversation occurred only

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578 Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010).
579 *Id.* at 2260.
580 Edwards v. Arizona, 451 U.S. 477 (1981).
581 *Id.* at 484-87.
582 Minnick v. Mississippi, 498 U.S. 146, 150 (1990).
583 *Id.* at 156.
584 Connecticut v. Barrett, 479 U.S. 523 (1987).
585 *Id.* at 529-30.
586 Davis v. United States, 512 U.S. 452, 455, 459-60 (1994).
587 *Id.*
588 *Id.* at 461-62.

after the officer reminded the defendant he did not have to "talk to me" and the defendant stated he "understood."[589] More recently, *Berghuis v. Thompkins* also held that a suspect's response to an officer's question about whether he prayed to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver of his *Miranda* rights.[590]

Michigan v. Mosley held that a suspect's statement he did not want to discuss robberies following *Miranda* warnings did not preclude officers from giving additional *Miranda* warnings two hours later, then questioning the suspect about an unrelated murder.[591] The Court held that the police honored the suspect's statement with respect to the robbery, and that admitting the suspect's statement concerning the murder into evidence "did not violate the principles of Miranda."[592]

Colorado v. Spring held mere silence by law enforcement officials concerning the subject matter of the interrogation was not "trickery" sufficient to invalidate a suspect's waiver of his *Miranda* rights.[593] Accordingly, "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege."[594] Deception is also a permitted tactic. For example, "Trickery, deceit, even impersonation do not render a confession inadmissible, certainly in noncustodial situations and usually in custodial ones as well, unless government agents make threats or promises."[595] Moreover, "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion are not within *Miranda*'s concerns."[596] The Court also has held a confession was voluntary even though the officer falsely told the suspect that his co-conspirator had confessed to the crime.[597]

Colorado v. Connelly held the State must prove a *Miranda* waiver only by a preponderance of the evidence, not by clear and convincing evidence.[598] It followed *Lego v. Twomey*, which rejected an argument that the importance of

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589 Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983). Justice Powell's concurring opinion joined in the judgment because he believed there was a knowing and intelligent waiver of the right to counsel. However, he declined to provide a fifth vote which supported the plurality's rationale. *Id.* at 1047-51 (Powell, J., concurring).

590 Berghuis v. Thompkins, 130 S.Ct. 2250, 2263 (2010).

591 Michigan v. Mosley, 423 U.S. 96 (1975).

592 *Id.* at 107.

593 Colorado v. Spring, 479 U.S. 564, 576 (1987).

594 *Id.* at 577.

595 United States v. Kontny, 238 F.3d 815, 817 (7th Cir. 2001), citing Frazier v. Cupp, 394 U.S. 731, 739 (1969).

596 Illinois v. Perkins, 496 U.S. 292, 297 (1990).

597 *Cupp*, 394 U.S. at 739.

598 Colorado v. Connelly, 479 U.S. 157 (1986).

the values served by exclusionary rules was sufficient in itself to show that the Constitution requires admissibility to be proved beyond a reasonable doubt.[599] *Lego* instead held it was "very doubtful" that escalating the prosecution's burden of proof in suppression hearings "would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence."[600] This statement illustrates the continued conflict in values inherent in *Miranda*.

Whether police complied with *Miranda* in obtaining statements admitted at trial over a defendant's objection may be raised in a federal habeas corpus proceeding.[601] However, the issue whether a defendant understood *Miranda* warnings read to him must be contemporaneously raised at trial pursuant to a state's "contemporaneous objection" rule.[602] If no such objection is made, a defendant is not entitled to federal habeas corpus review of that issue pursuant to 28 U.S.C. § 2254(d).[603]

G. Relationship of Sixth Amendment and Miranda *Rights to Counsel*

The Court has rejected the argument that standards for waiving the Sixth Amendment right to counsel as such should be "more difficult" than the waiver of Fifth Amendment rights permitted by *Miranda*. In *Patterson v. Illinois*, the Court held 5-4 that a defendant could be interrogated, waive his *Miranda* rights, and then give inculpatory statements after he had been indicted for murder.[604] In doing so, it held that even though a Sixth Amendment right to counsel attached when defendant was indicted, the standards for thereafter waiving that right were no greater than those waiving *Miranda* rights generally.[605] Since the defendant there never requested counsel, the police were not automatically barred from interrogating him unless he initiated further contact. There was no additional burden of proving that the defendant "knowingly and intentionally" waived his Sixth Amendment right since the *Miranda* warnings sufficiently advised him concerning it.[606]

In *Texas v. Cobb*, the Court held 5-4 the Sixth Amendment right to counsel is "offense specific" and does not attach until after adversary judicial criminal

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599 Lego v. Twomey, 404 U.S. 477 (1972).

600 *Id.* at 489.

601 Withrow v. Williams, 507 U.S. 680 (1993).

602 Wainwright v. Sykes, 433 U.S. 72 (1977).

603 *Id.* at 90.

604 Patterson v. Illinois, 487 U.S. 285 (1988).

605 *Id.* at 297.

606 *Id.* at 291-94.

proceedings have been initiated.[607] Accordingly, even though the defendant there was indicted and appointed counsel for a burglary charge, his Sixth Amendment right did not extend to two related murders with which he had not yet been charged since they were not the same offense. Statements concerning the murders made without counsel following *Miranda* warnings thus were admissible.[608]

This limitation of the Sixth Amendment right to counsel is arguably inconsistent with *Escobedo v. Illinois*, which applied that right to a suspect against whom criminal proceedings had not yet begun.[609] However, later Supreme Court decisions have limited *Escobedo* to its facts.[610] *Escobedo*'s rationale also has been seen as resting on the Fifth Amendment privilege against self-incrimination, rather than the Sixth Amendment right to counsel as such.[611]

H. Miranda *Warnings as a Factor in Admitting Statements Derived from Fourth Amendment Violations*

In *Brown v. Illinois*, the suspect was arrested without probable cause and without a warrant.[612] He made two in-custody inculpatory statements after being given *Miranda* warnings.[613] The Illinois courts applied a *per se* rule that the *Miranda* warnings broke the causal chain between the illegal arrest and the giving of the statements, so they might be used in evidence.[614]

The Supreme Court instead held that even if those statements were voluntary under the Fifth Amendment, *Wong Sun*[615] required that they be "sufficiently an act of free will to purge the primary taint" under the Fourth Amendment.[616] That question must be answered on the facts of each case. Although giving *Miranda* warnings was an important factor in resolving that issue, other factors must be considered as well. Since the State had failed to

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607 Texas v. Cobb, 532 U.S. 162, 167 (2001) (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)). *McNeil* also held the Sixth Amendment right to counsel is offense-specific, so that invoking that right during a judicial proceeding did not constitute an invocation of the right to counsel derived from *Miranda* and the Fifth Amendment's guarantee against compelled self-incrimination. McNeil v. Wisconsin, 501 U.S. 171, 175-82 (1991).

608 *Cobb*, 532 U.S. at 168. Accordingly, the Court there also declined to create an exception to *McNeil's* offense-specific limitations on the right to counsel for crimes "factually related to the charged offense." *Id.*

609 Escobedo v. Illinois, 378 U.S. 478 (1964). For discussion of *Escobedo*, see *supra* notes 182,199, 380-83 and related text.

610 *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 438 (1974) (and cited cases).

611 Buchwalter, *supra* note 493, § 10 (2007).

612 Brown v. Illinois, 422 U.S. 590 (1975).

613 *Id.* at 591.

614 *Id.* at 603-04.

615 Wong Sun v. United States, 371 U.S. 471 (1963).

616 *Brown*, 422 U.S. at 602.

sustain its burden of showing the suspect's statements were admissible under *Wong Sun*, his conviction was reversed.[617]

In *Dunaway v. New York*, the suspect was detained for custodial interrogation without probable cause for a full-fledged formal arrest, and therefore "seized" in violation of the Fourth Amendment.[618] He was given *Miranda* warnings, waived counsel, and eventually made incriminating statements.[619] Under those circumstances, Justice Brennan's majority opinion held that although appropriate *Miranda* warnings may have been provided and the suspect's statements may have been voluntary for Fifth Amendment purposes, voluntariness was merely a "threshold" requirement for Fourth Amendment analysis.[620] Beyond that requirement, the opinion applied the *Brown* standards, focusing on the causal connection between the illegality and the confession.[621] Since no intervening events broke the connection between the suspect's illegal detention and his confession, the confession was held inadmissible.[622]

Taylor v. Alabama is another instance where the Court applied the *Brown* factors to hold that a suspect's confession, given six hours after an arrest without a warrant or probable cause and after *Miranda* warnings, should not have been admitted.[623] Justice Marshall's majority opinion there stated that giving and understanding *Miranda* warnings was "not by itself sufficient to purge the taint of the illegal arrest . . . If *Miranda* warnings were viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere 'form of words.'"[624]

Lanier v. South Carolina also summarily reversed a conviction given after *Miranda* warnings but following an assumed illegal arrest.[625] The Court reaffirmed that the fact a confession may be "voluntary" for Fifth Amendment purposes in the sense that *Miranda* warnings were given and understood is not by itself sufficient to purge the taint of the illegal arrest. Instead, it is "merely a threshold requirement for Fourth Amendment analysis."[626]

In *Rawlings v. Kentucky*, the Court, in citing *Brown*, reaffirmed that giving *Miranda* warnings was not the only factor to be considered in deciding whether

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617 *Id.* at 605.

618 Dunaway v. New York, 442 U.S. 200 (1979).

619 *Id.* at 203.

620 *Id.* at 217.

621 *Id.* at 217-18.

622 *Id.* at 219.

623 Taylor v. Alabama, 457 U.S. 687 (1982).

624 *Id.* at 690.

625 Lanier v. South Carolina, 474 U.S. 25 (1985) (per curiam).

626 *Id.* at 26.

a confession was obtained by exploiting an illegal arrest.[627] However, even assuming the police there violated the Fourth and Fourteenth Amendments by illegally detaining the suspect while they obtained a search warrant, Justice Rehnquist's majority opinion applying the *Brown* factors held the suspect's "spontaneous" admission of ownership of drugs found in a purse owned by another person after they were detained was admissible.[628] It stated that even though the officer's belief about the scope of the warrant they obtained might have been erroneous, "The conduct of the police here does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's statements."[629]

Most recently, *Kaupp v. Texas* summarily reversed a defendant's conviction where he made statements after being given *Miranda* warnings, but also after he was arrested without probable cause and there was no showing he had consented to questioning.[630] The Court again reaffirmed that under *Brown*, "*Miranda* warnings, *alone* and *per se*, cannot always . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession."[631]

I. Limitations on Remedies for Miranda *Violations*

As the cases previously cited indicate, for many years the U.S. Supreme Court has excluded evidence obtained as the result of searches violating the Fourth Amendment as "fruit of the poisonous tree."[632] That prohibition also extends to the indirect products of such invasions.[633] "Fruit of the poisonous

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627 Rawlings v. Kentucky, 448 U.S. 98 (1980).

628 *Id.* at 108.

629 *Id.* at 110.

630 Kaupp v. Texas, 538 U.S. 626 (2003).

631 *Id.* at 633.

632 *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 484 (1963) (citing Weeks v. United States, 232 U.S. 383 (1920)). An excellent article concerning development and applications of the "fruit of the poisonous tree" doctrine as of its publication date is Yale Kamisar, Response, *On the 'Fruits' of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995).

633 *See, e.g.*, *Wong Sun*, 371 U.S. at 484 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)). *See also* Nardone v. United States, 308 U.S. 338, 340 (1939) (government cannot avoid inquiry into its use of illegal wiretapping, since to forbid direct use of methods prohibited by the federal wiretap statute "but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty'"). However, *Nardone* also recognized that the connection between the illicit wiretapping and the government's proof "may have become so attenuated as to dissipate the taint." *Id.* at 340.

tree" analysis also has been applied to Fifth and Sixth Amendment violations.[634]

For example, near the end of the Warren Court era, *Harrison v. United States* held 6-3 that the defendant's trial testimony impelled by introduction of three wrongfully obtained confessions was prohibited as "fruit of the poisonous tree."[635] That testimony was tainted by the same primary illegality that caused the confessions themselves to be inadmissible.[636] *Harrison* also cited *Silverthorne Lumber Co. v. United States*,[637] *Nardone v. United States*,[638] and *Wong Sun* for the proposition that "the essence of a provision the acquisition of evidence in a certain way is that . . . it shall not be used at all."[639]

The Court also has recognized the "cat out of the bag" principle that "after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good."[640]

However, for a number of years, the Court's majority also held *Miranda* warning requirements merely created "prophylactic rules" to protect constitutional rights and that a *Miranda* violation did not necessarily mean the Fifth Amendment itself had been violated. Accordingly, doctrines such as "fruit of the poisonous tree" and "cat out of the bag" which were intended to protect constitutional rights were held not to apply because suppression of confessions based on failure to provide *Miranda* warnings in situations where those confessions were otherwise voluntary went beyond the Fifth Amendment's prohibition of truly coerced confessions.

Michigan v. Tucker provides an early example on its facts.[641] The suspect, who was arrested before *Miranda* was decided but tried thereafter, was not advised that he had the right to appointed counsel if he was indigent.[642] During interrogation, he gave an alibi that he was with a friend at the time of the crime.[643] The police obtained information from the friend tending to incrimi-

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634 *See* United States v. Wade, 388 U.S. 218 (1967) (fruit of the poisonous tree doctrine applied to Sixth Amendment violations); Nix v. Williams, 467 U.S. 431, 442 (1984) (fruit of the poisonous tree doctrine applied to Fifth Amendment violations).

635 Harrison v. United States, 392 U.S. 219 (1968).

636 *Id.* at 222-23.

637 *Silverthorne Lumber Co.*, 251 U.S. at 392.

638 *Nardone*, 308 U.S. at 341.

639 *Harrison*, 392 U.S. at 222-23 & n.7.

640 United States v. Bayer, 331 U.S. 532, 540 (1947).

641 Michigan v. Tucker, 417 U.S. 433 (1974).

642 *Id.* at 435.

643 *Id.* at 436.

nate the suspect.[644] Justice Rehnquist's majority opinion held the police were not guilty of bad faith and their failure to fully advise the suspect concerning his right to counsel had no bearing upon the reliability of the friend's testimony.[645] Accordingly, although it applied *Miranda* to bar the suspect's statements under the specific circumstances presented, it held the friend's testimony was not precluded by the Fifth, Sixth, or Fourteenth Amendments.[646] It also refused to apply a Fourth Amendment exclusionary rule to preclude that testimony.[647] It did not address the argument made in Justice Douglas's dissenting opinion that the friend's testimony should have been suppressed as "fruit of the poisonous tree."[648]

In *New York v. Quarles*, Justice Rehnquist's 5-4 majority opinion created an overriding "public safety" exception that must "be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[649] The Court therefore held officers could ask reasonable questions of an in-custody suspect reasonably prompted by a concern for public safety (in that case, possible danger to the public caused by a gun concealed somewhere in a supermarket), and thereby obtain admissible statements and leads to other evidence without first providing *Miranda* warnings.[650]

Since those warnings were not required under those circumstances, subsequent statements given after *Miranda* warnings were provided therefore were not tainted as "illegal fruits of a *Miranda* violation."[651] However, that latter holding necessarily assumed "fruit of the poisonous tree" or "cat out of the bag" arguments otherwise might have been made to suppress later statements made and other evidence obtained as the result of the initial statements if a *Miranda* violation had previously occurred.

The *Quarles* majority reached its conclusion by stating *Miranda* warnings were merely "prophylactic rules"[652] and "judicially imposed strictures" that might be "inapplicable" in "limited circumstances."[653] The "prophylactic *Miranda* warnings" therefore were "not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination is protected."[654] Accordingly, under the circumstances

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644 *Id.*
645 *Id.* at 449-50.
646 *Id.*
647 *Id.*
648 *Id.* at 463 (Douglas, J., dissenting).
649 See New York v. Quarles, 467 U.S. 649, 653 (1984).
650 *Id.* at 654-56.
651 *Id.* at 660.
652 *Id.* at 653.
653 *Id.* at 653 n.3.
654 *Id.* at 654 (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

presented, and even though to some degree the "desirable clarity" of the *Miranda* holding was lessened as the result,[655] "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[656]

Justice O'Connor's concurring and dissenting opinion in *Quarles* would have held *Miranda* required the suspect's initial statements to be suppressed because "the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures."[657] However, she then stated, "nothing in *Miranda* or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation."[658] She also stated, "the Court has been sensitive to the substantial burden the *Miranda* rules place on local law enforcement efforts, and consequently has refused to extend the decision or to increase its strictures on law enforcement agencies in almost any way."[659] That statement clearly confirmed the conservative majority's unwillingness either to expand *Miranda* or to overrule it.

Justice O'Connor also would have limited exclusion of nontestimonial evidence obtained as the result of confessions obtained without first providing *Miranda* warnings to situations where "the *Miranda* violation consists of a deliberate and flagrant abuse of the accused's constitutional rights, amounting to a denial of due process."[660] Based on the "values underlying the privilege against self-incrimination," she distinguished a "statement taken in the absence of *Miranda* warnings" from evidence derived from "actual compulsion."[661] Finally, citing *Michigan v. Tucker*,[662] she stated that *Wong Sun* and its "fruit of the poisonous tree" analysis "lead to exclusion of derivative evidence only where the underlying police misconduct infringes a 'core' constitutional right . . . Failure to administer *Miranda* warnings instead violates only a nonconstitutional prophylactic."[663]

Justice Marshall's dissenting opinion, in which Justices Brennan and Stevens joined, argued the investigating officers had no legitimate reason to interrogate the suspect without advising him of his rights to remain silent and to obtain assistance of counsel. Doing so violated the "clear guidelines" enunci-

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655 *Id.* at 658.

656 *Id.* at 657.

657 *Id.* at 660 (O'Connor, J., concurring and dissenting).

658 *Id.*

659 *Id.* at 662-63.

660 *Id.* at 672.

661 *Id.* at 671.

662 Michigan v. Tucker, 417 U.S. 433, 445-46 (1974).

663 *Quarles*, 467 U.S. at 671 n.4 (O'Connor, J., concurring and dissenting).

ated in *Miranda*.[664] This was particularly true since the New York Court of Appeals had found as facts that none of the interrogating officers were concerned with their own physical safety and there was no evidence the interrogation was prompted by the arresting officers' concern for the public's safety.[665]

Justice Marshall instead would have held the suspect's gun inadmissible as "fruit of the poisonous tree" based on *Silverthorne* and *Wong Sun* because that doctrine also had been applied where there were Fifth and Sixth Amendment violations.[666] He also criticized Justice O'Connor's opinion concerning the "derivative evidence" issue both because it "represents a much more radical departure from precedent than that opinion acknowledges" and because the State had never raised that "novel theory" before any New York court.[667]

In *Oregon v. Elstad*, Justice O'Connor's concurrence in *Quarles* became the Court's majority opinion.[668] *Elstad* held 6-3 that the Fifth Amendment also did not require suppression of a confession made after proper *Miranda* warnings and a valid waiver of rights had occurred, solely because the police had obtained an earlier, unwarned admission from the suspect at his mother's home.[669] Although the earlier statement was inadmissible, it was voluntarily given. Accordingly, later *Miranda* warnings were held to cure the earlier conditions causing the initial unwarned statement to be inadmissible.

In so holding, the majority rejected a "fruit of the poisonous tree" argument based on the suspect having given the earlier, inadmissible statement because doing so would prevent police from ever obtaining a valid confession, even after giving later *Miranda* warnings. It instead distinguished Fourth Amendment violations, where the "fruit of the poisonous tree" argument originated based on *Wong Sun v. United States*, because "the *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."[670]

Accordingly, the *Elstad* majority held the Fifth Amendment only prohibits use of "compelled" testimony.[671] It then held failure to provide *Miranda* warnings only creates a "presumption of compulsion" requiring any resulting statements to be suppressed even though unwarned statements "otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded

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664 *Id.* at 674 (Marshall, J., dissenting).

665 *Id.* at 675-76.

666 *Id.* at 688 (citing United States v. Wade, 388 U.S. 218 (1967), and Nix v. Williams, 467 U.S. 431, 442 (1984).

667 *Id.* at 688-89 n.11.

668 Oregon v. Elstad, 470 U.S. 298 (1985).

669 *Id.* at 314-18.

670 *Id.* at 306.

671 *Id.* at 306-07

from evidence under *Miranda*."[672] That "prophylactic" rule therefore would not require other resulting evidence to be suppressed in the absence of a "true" Fifth Amendment violation.[673] By creating a constitutional distinction between "mere" *Miranda* violations and "true" Fifth Amendment violations that was later disavowed in *Dickerson v. United States*,[674] the Court necessarily rejected the primary argument made throughout Miranda's kidnap-rape retrial that all the evidence police had obtained based on his initial, illegally-obtained confession must be suppressed as "fruit of the poisonous tree."[675]

The basis for the *Elstad* Court's holding was that unwarned statements otherwise voluntary within the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Accordingly, "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."[676] The Court therefore refused to hold later statements obtained pursuant to a voluntarily given and knowing waiver to have been tainted by the earlier, unwarned statement because no prior constitutional violation had occurred.[677]

The *Elstad* majority also held that simply giving *Miranda* warnings cured the condition that had caused the prior unwarned statement to be inadmissible. The suspect's choice whether thereafter to exercise his privilege to remain silent "should ordinarily be viewed as an 'act of free will.'"[678] It therefore summarily rejected the defendant's "cat out of the bag" argument based on having given initial unwarned statements that had been adopted by the Oregon Court of Appeals[679] based on *United States v. Bayer*[680] that the psychological impact of the suspect's earlier unwarned confession created a "subtle form of lingering compulsion."[681]

It instead held, "endowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in obtaining either his warned or unwarned confessions," since those conditions had been removed.[682] However, that statement assumes simply giving

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672 *Id.*
673 *Id.* at 308-09.
674 Dickerson v. United States, 530 U.S. 428 (2000).
675 See *supra* note 431 and related text.
676 *Elstad*, 470 U.S. at 307.
677 *Id.* at 318.
678 *Id.* at 311.
679 State v. Elstad, 658 P.2d 552 (Or. Ct. App. 1983).
680 United States v. Bayer, 331 U.S. 532, 540-41 (1947).
681 *Elstad*, 470 U.S. at 311.
682 *Id.*

Miranda warnings would somehow automatically undo the psychological effect on the suspect of previously having confessed, even though those warnings do not include a statement that any previously given unwarned confessions cannot be used against him.

Justice Brennan's dissent strongly disagreed with the majority's holding that simply providing later *Miranda* warnings could dissipate the initial taint of improperly obtained confessions, and permit subsequent confessions and other evidence as the result without considering whether that taint in fact had been dissipated based on a number of objective factors.[683] He argued the majority opinion was inconsistent with the Court's own precedents, "demonstrates a startling unawareness of the realities of police interrogation," and was "completely out of tune" with the experience of federal and state courts over the preceding twenty years.[684] He further argued that simply giving *Miranda* warnings does not advise a suspect that any prior statements might not be admissible, and that therefore he need not speak out of any feeling that "he has already sealed his fate."[685] He also argued that "warnings and an informed waiver are essential to the Fifth Amendment privilege itself," and that "the use of [any] admissions obtained in the absence of the required warnings [is] a flat violation of the Self-Incrimination Clause of the Fifth Amendment."[686]

Justice Stevens' dissent also argued that the Court's power to exclude statements obtained when there had been *Miranda* violations must be based on the premise that use of such evidence violates the federal Constitution. If the Court did not accept that premise, the *Miranda* holding, as well as all of the federal jurisprudence evolving from that decision, was "nothing more than an illegitimate exercise of raw judicial power."[687]

J. Miranda *Becomes a "Constitutional Decision"*

In 2000, *Dickerson v. United States* held 7-2 that *Miranda* was a "constitutional decision."[688] In doing so, Chief Justice Rehnquist's majority opinion simply brushed aside the previously cited statements in the Court's prior decisions that the *Miranda* warnings were merely "prophylactic."[689] Accordingly, *Miranda* could not be overruled by a federal statute,[690] which in essence made

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683 *Id.* at 336 (Brennan, J., dissenting).

684 *Id.* at 324.

685 *Id.* at 337.

686 *Id.* at 349 (quoting Orozco v. Texas, 394 U.S. 324, 326 (1969)).

687 *Id.* at 371 (Stevens, J., dissenting).

688 Dickerson v. United States, 530 U.S. 428, 431 (2000).

689 *Id.* at 440.

690 18 U.S.C. § 3501 (2012). For discussion concerning the history of this statute and the events leading to *Dickerson*, see Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175 (1999).

the admissibility of in-custody statements turn solely on whether they were made voluntarily under all the circumstances.

Dickerson instead held Congress could not set aside constitutionally based rules of evidence and procedure prescribed for federal courts. It further held the Court had announced a constitutional rule in applying *Miranda* to state courts based on the U.S. Constitution and a number of references to *Miranda* itself concerning the constitutional issues then being decided.[691]

Dickerson acknowledged the previously discussed exceptions and limitations to *Miranda* stated in cases such as *Quarles* and *Elstad*. However, it did not overrule those decisions. It instead characterized them simply as "refinements" and endorsed them as being "as much a normal part of constitutional law as the original decision."[692] The opinion instead asserted *Miranda* was necessarily a constitutional decision simply because both *Miranda* itself and later cases had applied its ruling to state court prosecutions where the Supreme Court has no supervisory authority.[693]

Dickerson's statement that *Miranda* is a "constitutional decision" clearly conflicts with *Elstad*'s holding that *Miranda* warnings go beyond what the Fifth Amendment requires so that the "fruit of the poisonous tree" doctrine does not apply to *Miranda* violations.[694] *Dickerson* states *Elstad*'s refusal to apply the traditional "fruit of the poisonous tree" doctrine developed in Fourth Amendment cases "does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."[695] However, *Dickerson* does not explain why that alleged difference exists. Justice Scalia's scathing dissent in *Dickerson* (in which Justice Thomas joined) concluded, "[t]oday's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."[696]

K. Continued Limitations on Remedies for Miranda *Violations*

Even after declaring in *Dickerson* that *Miranda* warnings were constitutionally required, the U.S. Supreme Court has continued to limit remedies for *Miranda* violations. For example, in *Chavez v. Martinez*, Martinez was "relentlessly" questioned while he was being treated for life-threatening injuries in a

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691 *Dickerson*, 530 U.S. at 439 n.4.

692 *Id.* at 441.

693 *Id.* at 438.

694 Oregon v. Elstad, 470 U.S. 298, 306 (1985).

695 *Dickerson*, 530 U.S. at 438.

696 *Id.* at 465 (Scalia, J., dissenting).

hospital emergency room after being shot five times by the police.[697] Although some of his answers were incriminating, they were never introduced against him in a criminal proceeding.[698] Martinez later filed a 42 U.S.C. §1983 action against the interrogating officer, alleging his constitutional rights were violated by subjecting him to coercive interrogation after he had been shot.[699]

The U.S. Supreme Court reversed the summary judgment for Martinez that the Ninth Circuit had affirmed. In doing so, Justice Thomas's plurality opinion held that a suspect's Fifth Amendment constitutional rights are not violated by police conduct during a coercive interrogation, but only in the event an incriminating statement is taken and introduced against him in a trial or other criminal proceeding.[700] Accordingly, police officers who simply fail to provide *Miranda* warnings could not be held liable in §1983 actions for violating a suspect's constitutional rights. However, the Court nevertheless was willing to permit a suspect to pursue a more general Fourteenth Amendment due process claim where its interpretation of the Fifth Amendment did not apply when there was police torture or other abuse resulting in a confession.[701]

Despite these limitations, the Court has remained unwilling to overrule *Miranda*'s core principles. For example, in *Missouri v. Siebert*, the Court held in 2004 that a "two-step" approach to in-custody interrogation was impermissible.[702] The police there had interrogated the suspect for about forty minutes at a police station concerning the circumstances of a fire, without providing him *Miranda* warnings.[703] After obtaining a confession, they gave those warnings, and obtained further statements.[704]

Under those circumstances, the Court limited *Elstad* to good-faith circumstances where the police might not believe the suspect was in custody or where truly voluntary initial statements were given.[705] It also refused to permit the *Miranda* rule to be frustrated where the police were permitted to undermine its meaning and effect through a "two-step" interrogation process.[706] A reasonable person in the suspect's shoes could not have understood the later warnings to convey a message that she retained a choice about continuing to talk.[707] Since the "question-first" tactic "effectively threatens to thwart *Miranda*'s pur-

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697 Chavez v. Martinez, 538 U.S. 760, 764 (2003).
698 *Id.*
699 *Id.* 764-65.
700 *Id.* at 770-79.
701 *Id.* at 773.
702 Missouri v. Siebert, 542 U.S. 600 (2004).
703 *Id.* at 604-05.
704 *Id.*
705 *Id.* at 614-17.
706 *Id.* at 609-17.
707 *Id.* at 616-17.

pose of reducing the risk that a coerced confession would be admitted," the post-warning statements were held inadmissible.[708]

Despite *Dickerson*'s holding that the *Miranda* warnings are based on constitutional principles, on the same day the Court decided *Missouri v. Siebert*, it held 5-4 in *United States v. Patane* that the "fruit of the poisonous tree" doctrine did not apply so as to exclude a pistol from evidence about which the police had learned as the result of an unwarned statement in violation of *Miranda*.[709] Justice Thomas's plurality opinion there distinguished between not admitting an unwarned confession against the defendant and admitting other evidence obtained as the result. It instead stated that *Miranda* rights are not violated when unwarned statements are taken, even if doing so is deliberate, but only when such statements are admitted into evidence.[710]

The Court therefore held exclusion of unwarned statements at trial based on failure to give *Miranda* warnings provided a "complete and sufficient" remedy for that violation.[711] However, it acknowledged that the Court nevertheless requires "exclusion of the physical fruit of actually coerced statements."[712] That holding clearly makes *Miranda* warnings a second-class constitutional principle. It also greatly reduces any deterrent effect on interrogations of requiring that *Miranda* warnings be given by refusing to suppress any evidence obtained when they have not.

Justice Souter's dissenting opinion, with which Justices Stevens and Ginsburg joined, stated, "[t]here is no way to read this case except as an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained."[713] Justice Breyer also would have extended the "fruit of the poisonous tree" approach to exclude physical evidence resulting from *Miranda* violations unless failure to provide *Miranda* warnings was in good faith.[714]

Three recent Supreme Court cases confirm substantial disagreements still exist within the U.S. Supreme Court concerning *Miranda*'s interpretation and effect. For example, the required specificity of *Miranda* warnings was arguably diluted in *Florida v. Powell*.[715] Justice Ginsburg's majority opinion there held that the warnings given in that case, that the suspect has "the right to talk to a lawyer before answering any of the [officers'] questions and that he can

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[708] *Id.* at 617.
[709] United States v. Patane, 542 U.S. 630 (2004).
[710] *Id.* at 641.
[711] *Id.* at 643.
[712] *Id.* at 644.
[713] *Id.* at 647 (Souter, J., dissenting).
[714] *Id.* at 647-48 (Breyer, J., dissenting).
[715] Florida v. Powell, 130 S.Ct. 1195 (2010).

invoke this right "at any time . . . during the interview," satisfied *Miranda*'s requirements. In doing so, the Court held that no precise formulation of *Miranda* warnings is required. The inquiry instead is simply whether the warnings reasonably conveyed to a suspect his rights as required by *Miranda.*[716] The Court therefore held the suspect did not have to be warned expressly that he had the right to a lawyer during questioning.

In *Maryland v. Shatzer*, Justice Scalia's majority opinion held that the presumption of involuntariness with respect to subsequent confessions established in *Edwards v. Arizona* ended where there was a "break in the chain of circumstances" caused by the suspect being returned to a general prison population for at least fourteen days after he initially had declined to speak without an attorney.[717] Such a "break" was held to end any coercive effect of prior in-custody interrogation. Accordingly, the police were later able to reinitiate interrogation, read the suspect his *Miranda* rights and obtain confessions that would be admissible in evidence. In so holding, the Court stated that the previously discussed prohibition on police reopening interrogations provided by *Edwards* was not a constitutional mandate; it was instead merely a judicially prescribed "prophylaxis" that had to be justified by its purpose.[718]

Finally, Justice Kennedy's 5-4 majority opinion in *Berghuis v. Thompkins* held that a suspect's mere silence during a three-hour in-custody interrogation, after he was initially warned of his *Miranda* rights, did not invoke his right to remain silent.[719] Instead, the suspect would have to invoke that right "unambiguously" by affirmatively stating that he wanted to do so to prevent use of statements he later made as the police continued their interrogation.[720] That opinion also stated that a later waiver of *Miranda* rights could be made "implicitly,"[721] following *North Carolina v. Butler*.[722] Although *Miranda* warnings must be formally given, waivers of *Miranda* rights need not be formally given. Instead, they may be inferred under all the circumstances based on the accused's actions and words.[723]

Justice Sotomayor's dissenting opinion argued forcefully that the State had not sustained its substantial burden of showing that the suspect's implied waiver was voluntary, that a suspect should not be required to speak to guard

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716 *Id.* at 1204. Both *California v. Prysock*, 453 U.S. 355 (1981), and *Duckworth v. Eagan*, 492 U.S. 195 (1989), also had previously held *Miranda* warnings may be adequate even if they are not given in the exact form described in that decision.

717 Maryland v. Shatzer, 130 S.Ct. 1213 (2010).

718 *Id.* at 1220.

719 Berghuis v. Thompkins, 130 S.Ct. 2250 (2010).

720 *Id.* at 2259.

721 *Id.* at 2261.

722 North Carolina v. Butler, 441 U.S. 369 (1979).

723 *Berghuis*, 130 S.Ct. at 2263.

his right to remain silent, and that a valid waiver cannot be presumed simply because a confession was in fact obtained. She concluded, "[t]oday's decision turns *Miranda* upside down."[724]

XII. WHERE DOES *Miranda* NOW STAND?

A recent computer search found more than 5000 articles in legal publications somehow involving or referring to *Miranda*. Sampling those articles leads to various conclusions concerning whether or to what extent *Miranda* has had any continuing effect.

For example, a 1996 *Northwestern University Law Review* article by Prof. Stephen J. Schulhofer found that in the immediate post-*Miranda* period the best evidence of lost convictions was only 0.78 percent, and its impact on then-current conviction rates for practical purposes was "essentially nil."[725] Accordingly, he concludes:

> For those concerned with the "bottom line," Miranda may appear to be a mere symbol. But the symbolic effects of criminal procedure safeguards are important. Those guarantees help shape the self-conception and define the role of conscientious police professionals; they underscore our constitutional commitment to restraint in an area in which emotions easily run uncontrolled . . . . Miranda is—and deserves to be—here to stay.[726]

Professor Yale Kamisar, whose articles were cited in the *Miranda* opinion and who has written extensively concerning constitutional criminal procedure issues, is less optimistic. He concludes in a 2006 article, "*Dickerson* spared *Miranda* the death penalty. But four years later, when *Patane* was decided, *Miranda* took a bullet to the body."[727]

Based on current police practices and court decisions, a 2008 *California Law Review* article by Professor Charles D. Weisselberg argues, "there never was evidence to show that a system of warnings and waivers could actually protect Fifth Amendment rights as the justices expected. . . . [S]ince *Miranda* was decided, the Supreme Court has effectively encouraged police practices that have gutted Miranda's safeguards, to the extent those safeguards ever truly existed. The best evidence now shows that, as a protective device, Miranda is

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[724] *Id.* at 2278 (Sotomayor, J., dissenting).

[725] Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L .REV. 500, 506 (1996).

[726] *Id.* at 562-63.

[727] Yale Kamisar, *Miranda's Reprieve*: *How Rehnquist Spared the Landmark Confession Case, but Weakened Its Impact*, A.B.A. J., June 2006, at 48, 51.

largely dead."[728] Professor Weisselberg concludes, "Miranda's protections are more mythic than real. At some point, myth must yield to reality . . . . We now know that a set of bright-line rules is not a panacea for issues endemic in police interrogation."[729]

A 2010 *American Bar Association Journal* article by Liane L. Jackson discussing *Powell*, *Schatzer*, and *Berghuis* concludes the Supreme Court is "continuing to slice off pieces of the famous 1966 criminal rights case, *Miranda v. Arizona*."[730] That article also quotes Giovanna Shay of Western New England College School of Law as stating, "*Miranda* is culturally significant . . . . But whether it keeps people from talking—that's an empirical question that still raises doubt."[731]

A 2010 *Wall Street Journal* article by Steven R. Shapiro, ACLU's legal director, states that while Chief Justice Rehnquist stated in *Dickerson* that *Miranda* "has become embedded in routine police practice to the point where the warnings have become part of our national culture," based on the *Berghuis* decision, "[u]nfortunately, it appears that the current Supreme Court no longer holds *Miranda* in such high regard."[732]

A newspaper article reporting on *Berghuis* also states that it "shifted the balance in favor of the police and against the suspect [by requiring that the suspect speak up and say he does not want to talk] . . . . Some experts on police questioning said the court's subtle shift on *Miranda vs. Arizona* will be felt in station houses across the country."[733]

Finally, with respect to *Miranda*'s practical effect, a 2006 *Arizona Attorney* article by retired Maricopa County Superior Court Judge Robert L. Gottsfield concludes:

> It is noted in the literature that the police obtain waivers of *Miranda* rights in the "overwhelming majority" of cases. Once they do, "*Miranda* offers very little, if any, meaningful protection." As a practical matter, if a suspect waives his *Miranda* rights, all his resulting answers are admissible at trial. Moreover, those in the trenches can attest to the fact that while suspects who talk to police may cut off questioning or

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728 Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L.REV. 1519, 1521 (2008).

729 *Id.* at 1599.

730 Liane J. Jackson, *Turning* Miranda *'Upside Down'?*, A.B.A. J., Sept. 2010, at 20.

731 *Id.* at 21.

732 Steven R. Shapiro, *The* Thompkins *Decision: A Threat to Civil Liberties*, WALL ST. J. (June 8, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748704764404575286931630242298.

733 David G. Savage, *Supreme Court Loosens* Miranda *Ruling*, ARIZ. REPUBLIC (June 2, 2010, 12:00 AM), http://www.azcentral.com/news/articles/20100602scotus-miranda0602.html.

> ask for a lawyer at any time, they "almost never do." Once police comply with *Miranda* and there is a valid waiver, "It is extremely difficult to establish that any resulting confession was 'involuntary.'" It also "has the effect of minimizing the scrutiny courts give police officer interrogation practices following the waiver."[734]

XIII. CONCLUSION

Miranda provided a judicial high-water mark for recognizing and protecting criminal suspects' Fifth and Sixth Amendment constitutional rights in state court cases. In retrospect, requiring warnings but not requiring that counsel be present prior to any custodial interrogations, may appear formalistic, altruistic, or naive in light of actual police interrogation practices and real-world custodial situations involving suspects having limited education and knowledge concerning their rights. Alternatively, it might be considered a deliberate policy choice to preserve the use of confessions in the criminal justice process.

The *Miranda* warnings' stated purpose was not necessarily to preclude all custodial confessions. Instead, such confessions could be admitted into evidence only after the police made suspects affirmatively aware of their constitutional rights and sustained a "heavy burden" of obtaining voluntary waivers before obtaining any confessions. That compromise provided a a path for the police to follow in obtaining admissible confessions following custodial interrogations, without requiring lawyers to be present in all instances to advise suspects to remain silent.

The more recent cases discussed in this article confirm that neither the police nor the conservative Supreme Court justices who succeeded the Warren Court majority in *Miranda* have ever fully accepted the spirit of its requirements, or extended its requirements and remedies beyond what was absolutely required by its core holdings. The Court's liberal vs. conservative philosophical disagreements have continued down to the present, as new justices are appointed to replace those who die or retire. Later conservative majorities have successfully limited *Miranda*'s application without being able or willing to overrule the decision itself. *Dickerson* can be seen as ratifying the compromise *Miranda* established as a constitutional principle. However, as shown in more recent cases, disagreements have continued concerning *Miranda*'s requirements and limitations.

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[734] Robert L. Gottsfield, *Is* Miranda *Still With Us?*, ARIZ. ATT'Y, Dec. 2006, at 12, 18 (footnotes omitted).

Later Supreme Court decisions confirm police interrogations have continued to attempt to evade *Miranda*'s requirements. Those decisions also have limited applications of *Miranda's* principles and thereby encouraged such practices. Those limitations include: limiting definitions of in-custody interrogation, allowing later confessions in evidence made after initial illegally obtained confessions were obtained, permitting in-custody interrogations to be interrupted by other circumstances so they can resume with a clean slate, limiting the remedy for illegally obtained confessions to prohibiting use of the confessions themselves as evidence, holding that the "fruit of the poisonous tree" and "cat out of the bag" doctrines do not apply to evidence obtained because of illegally obtained confessions, and holding there is no Civil Rights Act remedy for coercive interrogations.

It may well be that *Miranda* has not resulted in having many confessions being excluded. Giving *Miranda* warnings also may simply legitimize later confessions without any further inquiry based on courts' willingness to find suspects' constitutional rights were validly waived by giving the required warnings. However, *Miranda* remains at least a symbolic victory of great general importance for recognizing criminal suspects' constitutional rights. To the extent police interrogation practices have improved and become more professional, suspects are warned concerning their constitutional rights, and they voluntarily and knowledgeably waive those rights before confessing, *Miranda* has continuing value. In light of all the resulting history discussed throughout this article, one cannot help but speculate about what might have occurred had Robert Cocoran not telephoned John Flynn in June 1965 to ask that he take Ernesto Miranda's case.[735]

[735] See *supra* note 269 and related text.

POST-CONVICTION AND PREJUDICE: THE NINTH CIRCUIT'S APPLICATION OF *MARTINEZ* IN PENDING CAPITAL CASES

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> "[H]abeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights."[1]

I. INTRODUCTION

An accused's Sixth Amendment right to counsel is "a truth universally acknowledged."[2] In 1984, the Supreme Court's decision in *Strickland v. Washington* created a legal standard, which explained that the right to counsel has to mean the "'right to the *effective* assistance of counsel.'"[3] The *Strickland* Court focused on a desire to ensure that the outcome of a defendant's trial and, in capital cases, sentencing is reliable.[4] In the decades following *Strickland*, due to the strict procedural rules governing federal habeas corpus proceedings,[5] state prisoners were often unable to obtain relief on their meritorious claims of ineffective assistance of counsel.[6] This was due, in part, to the concept of pro-

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[1] Bounds v. Smith, 430 U.S. 817, 827 (1977) (alteration in original) (citing Wolff v. McDonnell, 418 U.S. 539, 579 (1974)).

[2] JANE AUSTEN, PRIDE AND PREJUDICE 1 (Barnes & Noble, Inc. 1993) (1813). U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"); Strickland v. Washington, 466 U.S. 668, 684 (1984) ("In a long line of cases that includes *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), and *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."); *see also* Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2484 (2013) ("The right to counsel has been described as critical to our 'universal sense of justice'; an 'obvious truth'; the 'foundation for our adversary system'; a weapon of antidiscrimination; and the 'gateway right through which other rights are made real.'") (footnotes omitted).

[3] *Strickland*, 466 U.S. at 686 (1984) (emphasis added) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

[4] *Id.* at 696 ("In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.").

[5] The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 101-08, 110 Stat. 1217-26 (1996), severely limit the scope of federal review. *See generally* Lynn Adelman, *The Great Writ Diminished*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 15-20 (2009) (discussing AEDPA's general restrictions on habeas corpus); Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 93-94 (2012) (discussing AEDPA's limitations on relief in federal court).

[6] *See* Marceau, *supra* note 5, at 96 (noting that "this Article conclusively demonstrates that AEDPA has now developed into a major barrier to relief for state prisoners"); *see also id.* at 101 ("the Supreme Court has issued 91 opinions in cases for which AEDPA applies since the legislation was enacted in 1996, and the rate of relief in those cases is only 27.4%"); Elisabeth Semel, *Reflections on Justice Paul Stevens's Concurring Opinion in* Baze v. Rees*: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 806 (2010) (reviewing cases and noting that "Chief Justice Roberts and Justice Alito confirmed that they share Justices Scalia's and

cedural default.[7] A claim will be procedurally defaulted where the claim was raised in state court but found barred under state procedural rules,[8] or where the claim was not raised in state court but would be barred if it were raised now.[9] Thus, unless a federal court found one of the few exceptions to overcome the default, that court would be precluded from reviewing even meritorious claims.

In 2012, however, the Supreme Court changed the landscape of federal habeas corpus. *Martinez v. Ryan*[10] created a new equitable rule permitting federal courts to consider the merits of otherwise unreviewable claims of ineffective assistance of trial counsel. For the first time, state post-conviction counsel's failure to raise claims of ineffective assistance of trial counsel no longer automatically foreclosed prisoners from federal review of those claims. In announcing this new rule, the majority in *Martinez* stressed the importance of the Sixth Amendment's "bedrock principle" of a criminal defendant's right to counsel.[11] In that same vein, the Court recognized that "[t]o present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney."[12]

In the wake of *Martinez*, federal courts have been grappling with the rule, and commentators have been quick to provide introspection and guidance.[13] Rather than tackle the various questions arising from the *Martinez* decision, this

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Thomas's ambition to deploy provisions of the AEDPA to shield virtually all state court judgments from federal scrutiny"); Eve Brensike Primus, *Effective Trial Counsel after* Martinez v. Ryan: *Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2609 (2013) (commenting that "[f]ederal courts have an arsenal of procedural barriers that they use to deny almost all habeas petitions without ever addressing the merits of the underlying claims").

[7] *See* Murray v. Carrier, 477 U.S. 478, 517 (1986) (Brennan, J., dissenting) (commenting even before the AEDPA was passed that "statutory habeas relief has become more difficult to obtain as a result of certain procedural limitations created to reflect the unique character of our federal system").

[8] Coleman v. Thompson, 501 U.S. 722, 729-30 (1991) (explaining that federal courts will not review claims "when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement[ ]").

[9] *Id.* at 735, n.1 (noting that procedural default applies "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred").

[10] Martinez v. Ryan, 132 S. Ct. 1309 (2012).

[11] *Id.* at 1317.

[12] *Id.*

[13] *See, e.g.*, Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 841-42 (2013) (footnote omitted) (noting that *Martinez* "spawned voluminous commentary and extensive litigation") (citing articles and cases); *see also* Primus, *supra* note 6, at 2622-24 (emphasizing the need for adequate procedures in state courts to ensure that defendants have meaningful opportunity to vindicate their Sixth Amendment right to counsel); Mary Dewey, Comment, Martinez v. Ryan*: A Shift Toward Broadening Access to Federal Habeas Corpus*, 90 DENV. U. L. REV. 269 (2012); Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. 473 (2013) (discussing the role of state court proceedings after *Martinez*).

article discusses cases that were pending on appeal when the opinion came down. In that regard, I focus on the Ninth Circuit's treatment of *Martinez* in cases where a capital appellant seeks to return to district court for further development and consideration of his claims of ineffective assistance of trial counsel. The Ninth Circuit, sitting en banc, recently decided two cases—*Detrich v. Ryan*[14] and *Dickens v. Ryan*[15]—which discuss application of *Martinez*. *Detrich* resulted in several opinions and lacked a majority in its reasoning. *Dickens*, however, resulted in a majority, and follows an analysis similar to *Detrich*. The *Detrich* four-judge plurality and the *Dickens* majority are mostly correct in their analysis as to how *Martinez* should be applied. However, the opinions made no distinction between capital and non-capital cases; I suggest that more latitude should be given in those cases where a state prisoner has been sentenced to death. This is consistent with basic principles of Eighth Amendment jurisprudence[16] and is also consistent with the law that federal

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[14] Detrich v. Ryan, No. 08-99001, __ F.3d __, 2013 WL 4712729 (9th Cir. Sept. 3, 2013) (en banc). As of this publication, a petition for writ of certiorari is pending. *See* Petition of Writ of Certiorari, Ryan v. Detrich, No. 13-868, (U.S. filed Nov. 26, 2013). Detrich's response to the petition is due April 10, 2014.

[15] Dickens v. Ryan, No. 08-99017, __ F.3d __, 2014 WL 241871 (9th Cir. Jan. 23, 2014) (en banc). Five days after the Court issued its opinion, Mr. Dickens passed away. *See* Michael Kiefer, *Arizona Death-Row Inmate Found Dead in Apparent Suicide*, ARIZ. REPUBLIC (Jan. 28, 2014, 9:52 AM), http://www.azcentral.com/community/pinal/articles/20140127arizona-death-row-inmate-found-dead-suicide.html. Two days after Mr. Dickens died, the State moved to vacate the en banc opinion. *See* Respondents-Appellees' Motion to Stay Mandate in Order to Vacate this Court's Opinion and Dismiss the Petition for Writ of Habeas Corpus as Moot, Dickens v. Ryan, No. 08-99017,__ F.3d __, 2014 WL 241871 (9th Cir. filed Jan. 29, 2014), ECF No. 96. The motion was denied on March 11, 2014. Order, Dickens v. Ryan, No. 08-99017, __ F.3d __, 2014 WL 241871 (9th Cir. filed Mar. 11, 2014), ECF No. 99.

[16] *See* California v. Ramos, 463 U.S. 992, 998-99 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *see also* Ring v. Arizona, 536 U.S. 584, 605-06 (2002) (alteration in original) (noting that "Arizona's counsel maintained at oral argument, there is no doubt that '[d]eath is different'"); Simmons v. South Carolina, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting) (critiquing the Court's "death-is-different" jurisprudence and noting that the rules are "more demanding than what the Due Process Clause normally requires."); Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality) (citations omitted) (commenting that at least five Justices "recognized that death is a different kind of punishment from any other which may be imposed in this country").

In the past, the Supreme Court has also recognized that capital proceedings generally require a "heightened standard of reliability." Ford v. Wainwright, 477 U.S. 399, 411 (1986) (Marshall, J., plurality opinion). More recently, Justice Stevens opined that the "heightened reliability" that had once been afforded in capital cases—either on paper or in practice—has all but dwindled. *See, e.g.*, Baze v. Rees, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) ("Ironically, however, more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders."); Kelly v. California, 129 S. Ct. 564, 566 (2008) (mem.) (Stevens, J., state-

appellate courts should apply when determining whether a prisoner should be entitled, under *Martinez*, to have merits review of an ineffective-assistance-of-trial-counsel claim that would otherwise be unreviewable.[17]

This article focuses on Arizona capital cases with procedurally defaulted claims of ineffective assistance of trial counsel that were pending on appeal in the Ninth Circuit when *Martinez* was decided. Part II of this article presents a brief overview of *Martinez* and its application to capital cases. Part III reviews how the Ninth Circuit has handled cases brought in light of *Martinez*, emphasizing cases involving Arizona capital prisoners. Part III also discusses the Ninth Circuit's recent en banc opinions in *Detrich v. Ryan* and *Dickens v. Ryan*. Part IV attempts to provide a straight-forward application of *Martinez*. In particular, I suggest a workable solution consistent with Supreme Court precedent in determining prejudice when evaluating cases under *Martinez*. I also propose that the appellate courts must allow capital prisoners the opportunity to return to the federal district court to develop substantial claims that were never raised in state court; otherwise, *Martinez* will be a "dead letter."[18] I conclude the article by emphasizing the necessity of remanding capital cases with procedurally defaulted claims of ineffective assistance of trial counsel that were on appeal when *Martinez* came down. While federal courts wade through the claims brought by petitioners, they must not overlook the purpose of the Supreme Court's *Martinez* decision: to protect the right to counsel—"the foundation for our adversary system"[19]—by ensuring that defendants have an opportunity for a court to review allegations that a prisoner's Sixth Amendment right to counsel was violated.

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ment respecting the denial of petitions for writs of certiorari) (noting that Justice Blackmun observed that "'death is different' was fast becoming a justification for applying 'a *lesser* standard of scrutiny' in capital cases") (citation omitted). While Justice Stevens may be accurate in his observation, the justification behind the need for that heightened reliability has not changed. *See Ford*, 477 U.S. at 411 (noting that "execution is the most irremediable and unfathomable of penalties").

[17] As explained in Part II.B, *infra*, the *Martinez* decision requires a court to review whether a procedurally defaulted ineffective-assistance-of-trial-counsel claim is "substantial," which in turn requires application of the standard for issuing a certificate of appealability. "In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of [appealability]. . . ." Barefoot v. Estelle, 463 U.S. 880, 893 (1983). Thus, in making a determination under *Martinez* as to the substantiality of a claim, a death sentence is an appropriate fact to consider.

[18] *Detrich*, 2013 WL 4712729, at *8.

[19] Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).

II. Procedural Default and *Martinez*: Application In Capital Cases

Under the procedural rules governing federal habeas corpus, a state prisoner must first permit state courts the opportunity to resolve his[20] allegations of constitutional violations before he may bring his claims to federal court.[21] "In habeas, the sanction for failing to exhaust properly (preclusion of review in federal court) is given the separate name of procedural default, although the habeas doctrines of exhaustion and procedural default 'are similar in purpose and design and implicate similar concerns.' "[22] The purpose of exhaustion, and its related rule of procedural default, is to ensure that the federal courts adhere to the principles of comity and federalism and "to protect the state courts' role in the enforcement of federal law."[23] If a claim is defaulted "in state court pursuant to an independent and adequate state procedural rule," then federal courts generally will not review the claim.[24] Similarly, where a prisoner has not exhausted a federal claim because he failed to present it to the state courts and no state court remedy now exists, a state may assert a procedural defense, and the claim will be procedurally defaulted.[25] Federal courts typically will not

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[20] This article uses the male gender when discussing prisoners because it focuses on capital prisoners, 98% of whom are male. *See Time on Death Row*, Death Penalty Info. Center, http://www.deathpenaltyinfo.org/time-death-row#chara (last visited Jan. 12, 2014).

[21] *See* 28 U.S.C. § 2254(b)(1) (2006) (restricting federal courts from granting writ of habeas corpus to prisoners who have not "exhausted the remedies available in the courts of the State" unless there is reason why claim could not be presented in state court); *see also* Coleman v. Thompson, 501 U.S. 722, 731 (1991) (noting that the "Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"); Vasquez v. Hillery, 474 U.S. 254, 257 (1986) ("The exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary.").

[22] Woodford v. Ngo, 548 U.S. 81, 92 (2006) (quoting Keeney v. Tamayo-Reyes, 504 U.S. 1, 7 (1992)).

[23] Rose v. Lundy, 455 U.S. 509, 518 (1982); *see also* Murray v. Carrier, 477 U.S. 478, 489 (1986) ("The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal district court 'to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation. . ..' " (quoting Darr v. Burford, 339 U.S. 200, 204 (1950))); O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999) ("Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.").

[24] *Coleman*, 501 U.S. at 750.

[25] *Woodford*, 548 U.S. at 93. The state must generally raise procedural default as a defense, and show that the state procedural rule is adequate and independent before a federal court will find a default. *See* Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice & Procedure § 26.2[a], at 1475 (6th ed. 2011).

review the merits of a procedurally defaulted claim unless the prisoner can demonstrate an exception—the most common being cause-and-prejudice.[26]

Cause-and-prejudice is a legal concept that requires a prisoner to show some type of "cause" as explanation why the default occurred, and also show that "prejudice" resulted from the default. A showing of cause-and-prejudice does not in and of itself entitle a prisoner to habeas corpus relief.[27] Rather, the showing must be made for federal courts to consider the merits of the claim for relief. However, as discussed *infra* Part IV.B, a showing of actual prejudice generally demonstrates that a prisoner has a meritorious claim and will be entitled to relief.

Nearly three decades ago, the Supreme Court recognized that "[t]he cause and prejudice test may lack a perfect historical pedigree."[28] Since then, the Court has prescribed rules that guide lower courts in applying the cause-and-prejudice doctrine to procedurally defaulted claims.[29] Relevant to the issue here, the Supreme Court in *Coleman v. Thompson* held that state post-conviction counsel's ineffectiveness could not constitute cause to overcome a defaulted claim.[30] In other words, if a claim was defaulted due to counsel's failure to properly raise or exhaust it during the state post-conviction proceedings, then a federal court would not be able to consider the merits of that claim. The *Coleman* holding hinged on the fact that a defendant has no constitutional

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[26] Edwards v. Carpenter, 529 U.S. 446, 451 (2000); *see also* Smith v. Murray, 477 U.S. 527, 533 (1986) ("[A]lthough federal courts at all times retain the power to look beyond state procedural forfeitures, the exercise of that power ordinarily is inappropriate unless the defendant succeeds in showing both 'cause' for noncompliance with the state rule and 'actual prejudice resulting from the alleged constitutional violation.'") (citing Wainwright v. Sykes, 433 U.S. 72, 84 (1977)); *Sykes*, 433 U.S. at 87 (applying cause-and-prejudice requirement to a claim that was waived at trial); *Carrier*, 477 U.S. at 491 (applying cause-and-prejudice requirement to claims waived on appeal). The Supreme Court has also carved out another limited exception to allow the federal courts to review a procedurally defaulted claim. Where the failure to review a defaulted claim will result in a "fundamental miscarriage of justice," a federal court may review the claim and grant a writ of habeas corpus even without a showing of cause and prejudice. *Carrier*, 477 U.S. at 496. The concept of "fundamental miscarriage of justice" will not be discussed in this article.

[27] Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012) ("A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted.").

[28] *Carrier*, 477 U.S. at 496.

[29] *See, e.g.*, *id.* at 488 (noting that attorney error will not be cause where counsel's performance is not constitutionally ineffective under *Strickland*); Amadeo v. Zant, 486 U.S. 214, 222 (1988) (finding cause where State concealed information that prevented petitioner from raising jury challenge in state court); *Coleman*, 501 U.S. at 753 (noting that the post-conviction attorney's inadvertence or ignorance cannot constitute cause); Banks v. Dretke, 540 U.S. 668, 698 (2004) (finding that prosecutor's failure to provide *Brady* evidence constituted cause).

[30] *Coleman*, 501 U.S. at 752-53.

right to an attorney—let alone an effective one—during the state post-conviction process.[31]

But in 2012, in a case out of Arizona, the Supreme Court changed course. After years of hearing many prisoners argue the unfairness of a system that makes them responsible for their post-conviction attorney's failures, the Court in *Martinez v. Ryan* created an exception to the rule in *Coleman*.[32] Writing for a seven-Justice majority,[33] Justice Kennedy announced a new legal principle that had previously been rejected for years: prisoners may now be able to demonstrate cause for a procedurally defaulted, ineffective-assistance-of-trial-counsel claim if their state post-conviction counsel was ineffective.[34]

In creating an exception to the strict rule in *Coleman*, the Supreme Court in *Martinez* emphasized that the right to effective trial counsel is not only "a bedrock principle in our justice system," but also that it is "the foundation for our adversary system."[35] And claims alleging a violation of that right are typically first developed and presented in collateral state-court proceedings rather than on direct appeal, where factual development is normally unavailable.[36] The Court was troubled by the fact that a state prisoner could have been denied his constitutional right to effective trial counsel, and yet, because of the rule in *Coleman*, the possibility existed that no court "at any level will hear the prisoner's claim."[37] It is because of these concerns the Court created an equitable exception to *Coleman*.[38]

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[31] *Id.* at 752. The *Coleman* Court relied upon its previous decisions in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *Murray v. Giarratano*, 492 U.S. 1 (1989), in support of its holding. *Id.* In reaching its decision in *Coleman*, the Court specifically rejected counsel's argument that "it is enough that a petitioner demonstrate that his [post-conviction] attorney's conduct would meet the *Strickland* standard, even though no independent Sixth Amendment claim is possible." *Coleman*, 501 U.S. at 753.

[32] *Martinez*, 132 S. Ct. at 1315.

[33] Justices Scalia and Thomas dissented. *Id.* at 1321-27 (Scalia, J., dissenting).

[34] The defaulted claims in *Martinez* were a result of post-conviction counsel's failure to raise them in the first proceeding. When Martinez's federal habeas counsel attempted to later present the claims in state court, counsel was barred from having merits review of those claims under state procedural grounds. *Id.* at 1314.

[35] *Id.* at 1317.

[36] *Id.* at 1317-18.

[37] *Id.* at 1316.

[38] The *Martinez* rule came on the heels of the Court's decision from the previous term in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). *Pinholster* interpreted 28 U.S.C. § 2254(d)(1), one of the primary provisions of the AEDPA, which imposes a stringent limitation on a prisoner's ability to obtain federal habeas relief. Specifically, under § 2254(d)(1), the federal courts are unable to grant relief on a claim that was adjudicated on the merits in state court *unless* the state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1) (2006). *Pinholster* held that a prisoner could not introduce evidence in federal court to demonstrate that a state court's decision was unreasonable under § 2254(d)(1). *Pinholster*, 131 S. Ct. at

The equitable rule set forth by the *Martinez* Court is as follows: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."[39] In other words, *Martinez* provides the potential for federal courts to hear substantial claims alleging a Sixth Amendment violation if post-conviction counsel was ineffective or non-existent. When announcing the rule, the Court explicitly stated that the rule is one of equity and does not create a constitutional right to effective post-conviction counsel.[40] Moreover, the new equitable rule was only created as an exception to *Coleman* for establishing cause to overcome a default; it did not expressly create a new rule regarding prejudice.[41]

Martinez set forth three key provisions necessary to establish cause sufficient to overcome a default: (A) a state court must require a prisoner to bring an ineffective-assistance-of-trial-counsel claim in the initial post-conviction proceeding; (B) a prisoner must have a substantial ineffective-assistance-of-trial-counsel claim that was not raised during that first post-conviction proceeding; and (C) post-conviction counsel must have been either ineffective or non-existent.[42] The first part of the rule has already been slightly modified by the

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1398. *Pinholster*, however, only applies to claims that were adjudicated on the merits in state court. *Id.* at 1401 (noting that "not all federal habeas claims by state prisoners fall within the scope of § 2254(d), which applies only to claims adjudicated on the merits in State court proceedings") (internal quotation marks omitted). Generally, when a claim is procedurally defaulted, it has not been adjudicated on the merits in state court. *See* Gentry v. Sinclair, 705 F.3d 884, 897 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 102 (2013) ("Where a claim is procedurally defaulted, it has not been adjudicated on the merits and is not subject to AEDPA deference."). And as discussed in Part II.C, *infra*, a claim of ineffective assistance of trial counsel requires factual development that, if post-conviction counsel was ineffective, likely was not done in state court. *See* Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings after* Martinez *and* Pinholster, 41 HOFSTRA L. REV. 591, 595-96 (2013) (explaining that it is logical for courts to consider post-conviction counsel's ineffectiveness if the factual basis of a claim was not developed in state court).

39 *Martinez*, 132 S. Ct. at 1320.

40 *Id.* at 1319-20.

41 Although using the terms "cause" and "prejudice" together is commonplace when discussing procedural default, the Court was careful to only use "cause" in announcing the new equitable rule. *See, e.g.*, *Martinez*, 132 S. Ct. at 1315 ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.").

42 Because this article focuses on capital prisoners in Arizona who are appointed counsel under state statute, I do not discuss *Martinez*'s application to prisoners who have no post-conviction counsel. *See* ARIZ. REV. STAT. ANN. § 13-4041(B) (2010). I also recognize that *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013), describes *Martinez* as having four key provisions. In that case, the Court separated out the requirement that state collateral review was the "initial" review

Supreme Court.[43] The second and third parts are the focal points of this article and are the critical terms in analyzing capital prisoners' motions to remand in light of *Martinez*. What appears to remain a debated issue among jurists is the showing of "prejudice" that is required for demonstrating either post-conviction counsel's ineffectiveness or cause-and-prejudice.

A. State Requirement That Claims of Ineffective Assistance of Trial Counsel be Raised in Initial-Review Collateral Proceedings

Martinez, a non-capital case, made clear that the ruling would only apply in jurisdictions where a prisoner was required to raise an ineffective-assistance-of-trial-counsel claim in an initial post-conviction proceeding.[44] Yet seven months after the Supreme Court issued its opinion in *Martinez*, it granted certiorari in a capital case out of Texas, *Trevino v. Thaler*, to determine what that unequivocal language actually meant.[45] In his petition for writ of certiorari, Petitioner Carlos Trevino argued that while Texas's system in theory permits a death-sentenced prisoner to raise ineffective-assistance-of-trial-counsel claims on appeal, in practice the claims are raised in the initial post-conviction proceedings.[46] At oral argument, several justices—including Justice Breyer, who authored the majority opinion in the case—were more concerned with function over form. Their questions focused on insuring that a prisoner had a "full and fair opportunity" to bring a claim of ineffective assistance of trial counsel.[47] Despite the clear language in *Martinez* explaining that the "holding here addresses only the constitutional claims presented in this case, where the State

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for ineffective-assistance-of-trial-counsel claims and the requirement that such claims be raised those initial review collateral proceedings. *Id.* For purposes of this article, there is no reason to separately discuss those two factors. *See, e.g.*, Dickens v. Ryan, No. 08-99017, __ F.3d __, 2014 WL 241871, at *13 (9th Cir. Jan. 23, 2014) (en banc) (noting that there is no dispute with these two factors because "Arizona law requires a petitioner to bring such a claim in a collateral review proceeding[ ]").

[43] *See* Trevino v. Thaler, 133 S. Ct. 1911, 1916-21 (2013), and discussion *infra* Part II.A.

[44] *Martinez*, 132 S. Ct. at 1320 (stating that rule applies "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding").

[45] Trevino v. Thaler, 133 S. Ct. 524 (2012) (Mem.).

[46] Petition for Writ of Certiorari at 12, Trevino v. Thaler, 133 S. Ct. 1911 (2013) (No. 11-10189), 2012 WL 5353864, at *13-14.

[47] The Justices used the phrase "full and fair opportunity" when questioning counsel about the procedures in Texas and the application of *Martinez* in that case. *See generally* Transcript of Oral Argument, Trevino v. Thaler, 133 S. Ct. 1911 (2013) (No. 11-10189), 2013 WL 3132214. *See id.* at 10 (Justice Ginsburg asking counsel, "is your point that he has to have one full and fair opportunity to make the *Wiggins* claim?"); *id.* at 30 (Justice Breyer stating, "I would have thought that the standard's fairly easy, that this individual must always have one full and fair opportunity to present his claim of inadequate assistance at trial"); *id.* at 38 (Justice Sotomayor questioning counsel on the application of *Martinez* where petitioners did not get "a full and fair opportunity because they've presented their case, but Texas has said, we don't want to do it here, do it there").

barred the defendant from raising the claims on direct appeal,"[48] *Trevino* held otherwise.[49]

Two essential concepts guided the Court in slightly modifying the previous term's holding in *Martinez*: (1) whether the state system provided an opportunity for "meaningful review"[50] of the claim; and (2) whether "significant unfairness"[51] would result if the *Martinez* rule did not apply. Relying upon these concepts, the Court held that the rule in *Martinez* will apply where "a state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal. . . ."[52] Even though Texas did not bar a prisoner from raising a claim of ineffective assistance of trial counsel on direct appeal, the *Trevino* Court found that the only practical avenue to present the claim was in post-conviction proceedings.[53]

The rejection of *Martinez*'s strict language regarding the state procedural rules (terms such as "must" or "barred") reinforces the conclusion that at least a majority of the justices[54] are committed to protecting a criminal defendant's Sixth Amendment right to counsel. The *Trevino* opinion demonstrates that *Martinez* will not be read quite as narrowly as *Martinez* indicated, and that the Court is concerned with ensuring that the fundamental right to counsel is not dismissed based on hyper-technical rules. What is more, the Court's expression that a prisoner should have a meaningful opportunity to present a claim of ineffective assistance of trial counsel signals a message to lower courts: if a prisoner was denied that opportunity in state court due to post-conviction counsel's failures, then he should be given the opportunity to develop and present a substantial claim of ineffective assistance of counsel in federal court.

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[48] *Martinez*, 132 S. Ct. at 1320 (emphasis added).

[49] *Trevino*, 133 S. Ct. at 1921.

[50] *Id.* at 1919.

[51] *Id.*

[52] *Id.* at 1921.

[53] *Id.* at 1920. Among the practical aspects considered were "the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim." *Id.* at 1921.

[54] Unlike the majority in *Martinez*, which was joined by seven Justices, *Trevino* was a 5-4 split. Chief Justice Roberts and Justice Alito, who had signed onto the majority in *Martinez*, expressed great disdain in their dissent from the *Trevino* majority. *Id.* at 1923 (Roberts, C.J., dissenting) (noting that "the majority throws over the crisp limit we made so explicit just last Term").

B. A Prisoner Must Have a Substantial Claim of Ineffective Assistance of Trial Counsel That Was Not Raised by Post-Conviction Counsel

Once a prisoner has shown that counsel should have raised an ineffective-assistance-of-trial-counsel claim during the initial post-conviction proceedings (but did not), he must still show that the claim is "substantial."[55] *Martinez* defined "substantial" by saying the claim must have "some merit" and relied upon the standard used by courts when determining whether to issue a certificate of appealability ("COA").[56] A COA is a requirement unique to federal habeas proceedings; there is not an automatic right to appeal in habeas.[57] Instead, a court must deem a denied claim "substantial" before a prisoner can appeal the district court's decision. The COA substantial-claim standard does not impose a high burden on the prisoner. He must show only that "reasonable jurists" could debate resolution of the claim.[58] The inquiry "does not require full consideration of the factual or legal bases adduced in support of the claims."[59] In fact, a court "should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief."[60] This is consistent with the concept that courts should allow review of claims that are "adequate to deserve encouragement to proceed further."[61]

By choosing to use the COA standard, the Court set the bar lower than it could have by, for example, requiring a prisoner to show that the claim warranted relief. A claim will fail to satisfy the substantial-claim standard only if it "does not have any merit or . . . is wholly without factual support."[62] This low threshold functions as a safety valve to ensure that at least one court considers whether a criminal defendant was denied his Sixth Amendment right to effective trial counsel.

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55 Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012).

56 *Id.* at 1318-19 (citing Miller–El v. Cockrell, 537 U.S. 322 (2003)).

57 *See* 28 U.S.C. § 2253(b) (2006).

58 Slack v. McDaniel, 529 U.S. 473, 484 (2000); Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983).

59 *Miller-El*, 537 U.S. at 337.

60 *Id.*; *Barefoot*, 463 U.S. at 893 n.4 ("In requiring a . . . 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits." (internal quotation marks omitted) (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980), quoting United States *ex rel.* Jones v. Richmond, 245 F.2d 234 (2d Cir.), *cert. denied*, 355 U.S. 846, (1957))). Although *Barefoot* discussed a certificate of probable cause, which was the term used prior to the enactment of the AEDPA, the standard has remained the same. *See Slack*, 529 U.S. at 483 (noting that Congress codified the *Barefoot* standard when it passed the AEDPA).

61 *Barefoot*, 463 U.S. at 893 n.4 (internal quotation marks omitted) (quoting *Gordon*, 516 F. Supp. at 913, quoting *Richmond*, 245 F.2d 234).

62 Martinez v. Ryan, 132 S. Ct. 1309, 1319 (2012).

Moreover, capital cases deserve additional consideration in determining whether a defaulted claim is, in fact, substantial. The Supreme Court has specifically indicated that when determining whether to issue a COA, it is proper for courts to consider the nature of the penalty where a prisoner has been sentenced to death.[63] Consistent with the consideration of a prisoner facing a death sentence, it is appropriate to apply the principle that "death is different" and afford death-penalty cases heightened review.[64]

Along those lines, consideration must also be given to the fact that attorneys who represent capital defendants have professional obligations beyond that of a typical criminal defense attorney.[65] "[T]he responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills she must master."[66] In addition to investigating and preparing for the guilt/innocence phase of a trial, counsel must also prepare for the penalty or sentencing phase. This requires counsel to investigate the defendant's life history, which often involves retaining experts in mental health, and to present mitigating factors in support of a life sentence.[67] As a result of the complexities unique to capital defense, claims of

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[63] *Barefoot*, 463 U.S. at 893.

[64] *See supra* note 16; *see also* Schiro v. Farley, 510 U.S. 222, 238 (1994) (Blackmun, J., dissenting) ("The 'unique' nature of modern capital sentencing proceedings . . . derives from the fundamental principle that death is 'different.'"); Monge v. California, 524 U.S. 721, 732 (1998) ("[B]ecause the death penalty is unique 'in both its severity and its finality' . . . we have recognized an acute need for reliability in capital sentencing proceedings." (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977))).

[65] *See, e.g.*, *American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003) [hereinafter *ABA Guidelines*]. The ABA Guidelines exist to provide guidance to attorneys defending clients facing a death sentence. Because of the "extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case." *Id.* at 921.

[66] *ABA Guidelines*, *supra* note 65, at 923. *See also id.* at 999-1000 (discussing need for a defense team, which includes lead counsel and at least one co-counsel, a mitigation specialist, and an investigator); *id.* at 1015 (discussing obligation to investigate despite typical obstacles); Murray v. Giarratano, 492 U.S. 1, 28 (1989) (Stevens, J., dissenting) (observing that "this Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master").

[67] *See generally ABA Guidelines*, *supra* note 65, at 926-27 (discussing capital defense counsel's responsibility); *id.* at 956 ("mental health experts are essential to defending capital cases"); *see also* Porter v. McCollum, 558 U.S. 30, 40 (2009) (finding capital defense counsel's performance deficient and noting that defendant "may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation"); Rompilla v. Beard, 545 U.S. 374, 385-86 (2005) (finding that capital defense counsel "had a duty to make all reasonable efforts to learn what they could about the offense" and that included, inter alia, "discover[ing] any mitigating evidence the Commonwealth would downplay, and to anticipate the details of the aggravating evidence the Commonwealth would emphasize"); Wiggins v. Smith, 539 U.S. 510, 536 (2003) (noting that capital defense counsel could not make reasonable strategic choice because they failed to discover the "sordid details of [their client's] life history").

ineffective assistance of trial counsel will be highly fact-intensive and will require more fact development than may be the case for a claim brought by a non-capital prisoner. Courts should err on the side of finding a claim substantial in capital cases unless the claim is obviously frivolous.[68]

C. Post-Conviction Counsel was Ineffective

The ability to demonstrate cause to overcome default does not simply rest on whether the prisoner's defaulted claim satisfies the COA standard; that ability also requires a showing that post-conviction counsel was ineffective. Therefore, contrary to Justice Scalia's concern in his dissent, not every capital prisoner will raise issues under, or even benefit from, *Martinez*.[69] As the *Martinez* Court explained, "[I]f counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims."[70] Thus, a prisoner must demonstrate that his post-conviction counsel was ineffective under *Strickland v. Washington*[71] before a default can be excused.[72]

Martinez, however, failed to provide guidance regarding application of the *Strickland* standard to a prisoner's assertion that post-conviction counsel was ineffective. The *Strickland* standard is a two-prong test that requires a showing not only that counsel's performance was deficient, but also that the deficient performance resulted in prejudice to the defendant.[73] *Strickland* prejudice is

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[68] *See Barefoot*, 463 U.S. at 892 (explaining that one purpose for a certificate of probable cause is to "prevent frivolous appeals"); *cf.* HERTZ & LIEBMAN, *supra* note 25, § 26.3 (noting that "courts have struggled over the question of whether the 'cause' requirement applies as stringently in capital cases").

[69] *See* Martinez v. Ryan, 132 S. Ct. 1309, 1323-24 (2012) (Scalia, J., dissenting) ("I *guarantee* that an assertion of ineffective assistance of trial counsel will be made in *all* capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system."). But even if *all* capital prisoners did raise a claim alleging that their trial counsel was ineffective, why should that matter? One of the roles played by the federal courts is to ensure that the constitutional rights of state prisoners are not violated. And while that role has been seriously limited by the AEDPA, it has not actually been removed from our legal system. *See* Delgado v. Lewis, 223 F.3d 976, 979 (9th Cir. 2000) (emphasizing that "nothing in AEDPA requires federal courts to turn a blind eye to state proceedings or to rubberstamp them"). The need to protect a defendant's constitutional rights, particularly in capital cases, overrides any concern of Justice Scalia's that death-sentenced prisoners will now raise procedurally defaulted claims because of the holding in *Martinez*.

[70] *Martinez*, 132 S. Ct. at 1316.

[71] Strickland v. Washington, 466 U.S. 668 (1984).

[72] *See Martinez*, 132 S. Ct. at 1318. *Martinez* also included an exception for prisoners who have no counsel during their post-conviction proceedings. *Id.* at 1317. Because Arizona prisoners under a sentence of death are appointed counsel, this article does not discuss this exception.

[73] *Strickland*, 466 U.S. at 694-95.

generally measured by demonstrating "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[74] The Court gave no instruction on how one would satisfy either the *Strickland* prejudice standard or the procedural default "cause-and-prejudice" standard.[75] But *Martinez* was clear that the ineffectiveness of post-conviction counsel went to demonstrate only *cause*, as opposed to prejudice, to overcome a defaulted claim.[76]

Setting aside for the moment prejudice for purposes of showing cause-and-prejudice to overcome default, measuring *Strickland* prejudice becomes the complicated part of the equation in determining whether post-conviction counsel's actions or omissions can satisfy the cause standard, particularly in capital cases. Because capital sentencing requires juries to weigh aggravating evidence presented by the government in support of a death sentence against mitigating evidence presented by the defendant in support of a sentence other than death, the Supreme Court has held that *Strickland* prejudice is met when "there is a reasonable probability that at least one juror would have struck a different balance."[77] In this regard, reviewing courts must "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in

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[74] *Id.* at 694.

[75] *Martinez*, 132 S. Ct. at 1321 (remanding case and noting that "the court did not address the question of prejudice" and it "remain[s] open for a decision on remand").

[76] Notably, the *Martinez* Court only references "cause" when discussing post-conviction counsel's ineffectiveness and does not discuss "prejudice." The paragraph in which the Court announced its new rule begins: "The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion." *Martinez*, 132 S. Ct. at 1318. Within that paragraph, the Court only speaks of cause—"a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances," *id.*—the first of which is not relevant here (where no post-conviction counsel is appointed). *See also id.* at 1314-15 (Martinez argued that "he had cause for the default," which was post-conviction counsel's ineffectiveness); *id.* at 1315 ("The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding."); *id.* ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."); *id.* at 1316 ("a federal court can hear Martinez's ineffective-assistance claim only if he can establish cause to excuse the procedural default"); *id.* at 1318 ("It is within the context of this state procedural framework that counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default"); *id.* at 1320 (noting that the AEDPA prevents Martinez from obtaining habeas relief on the ineffectiveness of his post-conviction counsel, but "it does not stop Martinez from using it to establish 'cause' ").

[77] Wiggins v. Smith, 539 U.S. 510, 513 (2003).

aggravation."[78] Deciding whether the new evidence might have influenced the sentencer in choosing life or death is a fact-specific inquiry.[79]

Thus, if courts apply the typical *Strickland* prejudice standard applicable in capital cases, then a prisoner must conduct the investigation that his original trial counsel, and in turn his post-conviction counsel, did not do. As *Martinez* explained, claims of ineffective assistance of trial counsel "often require investigative work" and "turn[ ] on evidence outside the trial record."[80] In capital cases, where counsel has the additional obligation to present evidence of, inter alia, the defendant's background and character to mitigate a potential death sentence,[81] the investigative time and resources are great. *Trevino* astutely recognized that it would be "difficult, perhaps impossible" for counsel to conduct a thorough mitigation background investigation in a very limited amount of time.[82] In short, to show the typical *Strickland* prejudice resulting from post-conviction counsel's deficiencies, a prisoner would necessarily have to also show that he would likely succeed on the merits of his underlying ineffective-assistance-of-trial-counsel claim. But this appears contrary to the plain language in *Martinez*.[83] As such, the determination of cause under *Martinez*

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[78] (Terry) Williams v. Taylor, 529 U.S. 362, 397-98 (2000).

[79] Rompilla v. Beard, 545 U.S. 374, 393 (2005) ("[T]he undiscovered 'mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins*, 539 U.S. at 538 (quoting *Williams v. Taylor*, 529 U.S., at 398, 120 S. Ct. 1495), and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing, *Strickland,* 466 U.S., at 694, 104 S. Ct. 2052.") (alterations in original).

[80] *Martinez*, 132 S. Ct. at 1317-18.

[81] *See* sources cited *supra* note 65 and accompanying text; *see also* Penry v. Lynaugh, 492 U.S. 302, 319 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002) (internal quotation marks and citation omitted) ("If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality) (footnote omitted) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality) ("[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999) ("It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.").

[82] Trevino v. Thaler, 133 S. Ct. 1911, 1919 (2013).

[83] *Martinez*, 132 S. Ct. at 1320 ("'Cause,' however, is not synonymous with 'a ground for relief.'").

leaves room for courts to entertain claims that have some merit without deciding the prejudice prong—i.e., whether the underlying claim will, in fact, entitle the prisoner to relief. As discussed below, making this fact-specific inquiry is not an appropriate task for appellate courts to undertake in the first instance and will likely require evidentiary development in the district court.

III. THE NINTH CIRCUIT: ARIZONA CAPITAL PRISONERS' REQUESTS FOR REMAND UNDER *MARTINEZ*

The application of the rule in *Martinez* has been the subject of litigation for many petitioners. In particular, many death-sentenced prisoners in Arizona whose cases were pending on appeal at the time of the Supreme Court's decision sought remands to return to the district court to demonstrate cause for their procedurally defaulted claims of ineffective assistance of trial counsel.[84] What

[84] *See* Motion for Partial Remand in Light of *Martinez v. Ryan*, Poyson v. Ryan, No. 10-99005, ___ F.3d ___, 2013 WL 5943403 (9th Cir. filed Apr. 3, 2012), ECF No. 48; Motion for Partial Remand in Light of *Martinez v. Ryan*, Scott v. Ryan, 11-99002 (9th Cir. filed Apr. 5, 2012), ECF No. 29-1; Motion to Stay Appeal and Remand to the District Court for Briefing on the Applicability of *Martinez v. Ryan*, Smith v. Ryan, No. 10-99002 (9th Cir. filed Apr. 10, 2012), ECF No. 35; Motion to Stay Appeal and for Remand to the District Court for Consideration of the Application of *Martinez v. Ryan*, Lopez v. Ryan, 09-99028 (9th Cir. filed Apr. 11, 2012), ECF No. 51; Motion for Partial Remand in Light of *Martinez v. Ryan*, Lee v. Ryan, No. 09-99002 (9th Cir. filed Apr. 11, 2012), ECF No. 47; Motion to Stay Appeal and Remand to the District Court for Application of *Martinez v. Ryan*, Martinez v. Ryan, No. 08-99009 (9th Cir. filed Apr. 17, 2012), ECF No. 73-1; Motion for Partial Remand in light of *Martinez v. Ryan*, Spears v. Ryan, No. 99-99025 (9th Cir. filed Apr. 16, 2012), ECF No. 44-1; Motion for Partial Remand in Light of *Martinez v. Ryan*, Djerf v. Ryan, No. 08-99027 (9th Cir. filed Apr. 19, 2012), ECF No. 54; Motion for Partial Remand in Light of *Martinez v. Ryan*, Dickens v. Ryan, No. 08-99017,__ F.3d __, 2014 WL 241871 (9th Cir. filed Apr. 19. 2012), ECF No. 54; Motion for Partial Remand in Light of *Martinez v. Ryan*, Kayer v. Ryan, No. 09-99027 (9th Cir. filed Apr. 23, 2012), ECF No. 19; Motion for Remand Re: *Martinez v. Ryan*, Greene v. Ryan, No. 10-99008 (9th Cir. filed Apr. 24, 2012), ECF No. 29; Motion to Stay Appeal and for Partial Remand re: *Martinez v. Ryan*, Runningeagle v. Ryan, No. 07-99026 (9th Cir. filed Apr. 26, 2012), ECF No. 54; Motion to Stay Appeal and Remand to the District Court for Briefing on the Applicability of *Martinez v. Ryan*, Ramirez v. Ryan, No. 10-99023 (9th Cir. filed May 8, 2012), ECF No. 10-1; Motion for Remand, Rienhardt v. Ryan, No. 10-99000 (9th Cir. filed May 9, 2012), ECF No. 43; Motion for Remand to the District Court for Reconsideration of Its Procedural Rulings in Light of *Martinez v. Ryan*, Jones v. Ryan, No. 08-99033 (9th Cir. filed May 25, 2012), ECF No. 58; Motion to Stay Appeal, Vacate Judgment, and Remand in Light of *Martinez v. Ryan*, Hooper v. Ryan, No. 08-99024 (9th Cir. filed May 31, 2012), ECF No. 61; Motion for Stay and Partial Remand for Reconsideration in Light of *Martinez v. Ryan*, Gallegos v. Ryan, No. 08-99029 (9th Cir. filed June 27, 2012), ECF No. 46-1; Motion to Stay Briefing Schedule and for Remand to the District Court for Application of *Martinez v. Ryan*, Lee v. Ryan, No. 10-99022 (9th Cir. filed July 20, 2012), ECF No. 25-1; Motion to Remand Pursuant to *Martinez v. Ryan*, Detrich v. Ryan, No. 08-99001,__ F.3d __, 2013 WL 4712729 (9th Cir. filed Aug. 2, 2012), ECF No. 128; Motion for Remand in Light of *Martinez v. Ryan*, Doerr v. Ryan, No. 10-99007 (9th Cir. filed Aug. 31, 2012), ECF No. 40; Motion to Stay Appeal and Remand for District Court Determination of *Martinez v. Ryan* Claim, Schackart v.

has happened in Arizona capital cases has varied, but the majority of the motions remain pending as of this publication.[85] The Ninth Circuit issued one published opinion in a non-capital case shortly after *Martinez* was decided that addressed an appellant's request for remand to allow the district court to reconsider a procedurally defaulted claim—*Sexton v. Cozner*.[86] More than one year after *Sexton* was decided, two of the Arizona capital cases with pending *Martinez* remand motions were resolved by the court en banc—*Detrich v. Ryan*[87] and *Dickens v. Ryan*.[88] The en banc decisions give guidance to the district courts in applying *Martinez*, and contrary to *Sexton*, appear to reject the notion that the determination of cause-and-prejudice should be made for the first time on appeal.

A. Sexton v. Cozner

Less than two months after *Martinez* was decided, a three-judge panel of the Ninth Circuit issued the first published opinion, in a non-capital case, on how the Court of Appeals should review a prisoner's motion to remand for consideration of procedurally defaulted trial counsel ineffectiveness claims.[89] This issue came about when petitioner-appellant Matthew Sexton filed a motion seeking a limited remand under *Martinez* to permit the district court to consider the merits of his claims that trial counsel was ineffective—claims

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Ryan, No. 09-99009 (9th Cir. filed Dec. 21, 2012), ECF No. 71-1; Motion to Remand Pursuant to *Martinez v. Ryan*, Hurles v. Ryan, No. 08-99032 (9th Cir. filed Feb. 11, 2013), ECF No. 66-1; Motion to Stay Appeal and Remand to the District Court for Briefing on the Applicability of *Martinez v. Ryan*, Salazar v. Ryan, No. 08-99023 (9th Cir. filed Mar. 1, 2013), ECF No. 69-1; Motion to Stay the Appeal and Remand for Application of *Martinez v. Ryan*, Spreitz v. Ryan, No. 09-99006 (9th Cir. filed Mar. 20, 2013), ECF No. 49-1.

[85] There have been six cases decided by the Ninth Circuit in an atypical procedural posture—the prisoners were at the end of their federal habeas review when *Martinez* was decided and execution dates either had been set or were going to be set. In those six cases, the claim(s) of ineffective assistance of trial counsel were brought through one of two types of motions: either a motion to reopen the case under Rule 60(b), *see* Lopez v. Ryan, 678 F.3d 1131 (9th Cir. 2012); Cook v. Ryan, 688 F.3d 598 (9th Cir. 2012); Schad v. Ryan, 732 F.3d 963 (9th Cir. 2013); Jones v. Ryan, 733 F.3d 825 (9th Cir. 2013), or a motion to stay the mandate, *see* Stokley v. Ryan, 705 F.3d 401 (9th Cir. 2012); Schad v. Ryan, No. 07-99005, 2013 WL 791610 (9th Cir. 2013), *reversed*, 133 S. Ct. 2548 (2013). With one exception, the cases that were brought in unique procedural circumstances have been unsuccessful in the Ninth Circuit. The only case in which a panel of the Ninth Circuit remanded for further review was later reversed by the United States Supreme Court. Ryan v. Schad, 133 S. Ct. 2548 (2013). These cases, however, are inapposite to this author's discussion of the cases that are pending before the Ninth Circuit in a normal procedural posture.

[86] Sexton v. Cozner, 679 F.3d 1150 (9th Cir. 2012).

[87] Detrich v. Ryan, No. 08-99001, __ F.3d __, 2013 WL 4712729 (9th Cir. 2013) (en banc).

[88] Dickens v. Ryan, No. 08-99017, __ F.3d __, 2014 WL 241871 (9th Cir. 2014) (en banc).

[89] *Sexton*, 679 F.3d at 1153.

which the district court previously found procedurally defaulted.[90] The Court denied the motion, but directed the parties to address the *Martinez* issue at the upcoming argument.[91]

Judge Richard Tallman, "one of the most conservative judges on the . . . court,"[92] was the presiding judge at oral argument. Judge Tallman expressed his concerns about opening the floodgates with motions to remand in light of *Martinez*. He stated candidly: "If the Supreme Court meant what it said that this is a narrow exception to the *Coleman* rule, it surely cannot mean that every time there is a claim that a ground for ineffective assistance of counsel was not raised below that you are entitled to a remand. Because otherwise we are going to get these arguments in every case and the exception will swallow the *Coleman* rule."[93]

The judges during argument were focused on determining whether a remand was necessary and, in particular, what factual development would be necessary on remand. Sexton's counsel explained that the primary issues to be developed were post-conviction counsel's failure to raise the ineffective-assistance-of-counsel claims in state court and whether there was a strategic reason for this failure.[94] The State's attorney, on the other hand, argued that the record was sufficient to find that the underlying claim of ineffective assistance of trial was not substantial.[95]

At the end of the oral argument, Judge Tallman said that the Court would "puzzle [their] way through it."[96] The panel, however, apparently determined that case did not present a very difficult puzzle. Only five days after argument, the opinion in *Sexton v. Cozner* was published—on a Sunday.[97] The opinion,

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[90] *Id.* at 1155. At that point, oral argument had already been scheduled for May 8, 2012, so Sexton also asked the Court to vacate argument. *Id.* In the alternative, Sexton asked the Court to "address the *Martinez* issue in the first instance." *Id.*

[91] *Id.*

[92] *See Death, Medicine and States' Rights*, SEATTLE POST-INTELLIGENCER (May 31, 2004, 10:00 PM), http://www.seattlepi.com/default/article/Death-medicine-and-states-rights-1146086.php.

[92] Oral Argument at 1:30-1:57, Sexton v. Cozner, 679 F.3d 1150 (No. 10-35055), *available at* http://www.ca9.uscourts.gov/media/view.php?pk_id=0000009104.

[93] *Id.* at 29:25-30:30.

[94] *Id.* at 27:30-28:45.

[95] *Id.*

[96] *Id.* at 30:50-55.

[97] Sexton v. Cozner, 679 F.3d 1150 (9th Cir. 2012). Of note, there was an Arizona capital case with a *Martinez* issue pending at the same time as *Sexton*. *See* Lopez v. Ryan, 678 F.3d 1131, 1133 (9th Cir. 2012). The appellant in *Lopez* was facing an execution date on May 16, 2012, and he had filed a post-judgment motion in the district court seeking relief under *Martinez*, which had been denied. *Id.* at 1133. Due to his imminent execution date, Lopez's appeal was handled in an expedited manner, with his opening brief being filed on May 4, 2012, and oral argument set for May 14, 2012, only two days before his scheduled execution. Opening Brief, Lopez v. Ryan, 678

authored by Judge Tallman, held that an appellant would be entitled to a remand under *Martinez* only if he could show that "PCR [post-conviction relief] counsel was ineffective under *Strickand* for not raising a claim of ineffective assistance of trial counsel, and also 'that the underlying ineffective-assistance-of-counsel claim is a substantial one . . . .'"[98] While this test is consistent with the language in *Martinez*, it falls short of recognizing the potential need to develop the post-conviction counsel claim. Instead, the opinion instructed that the court of appeals should "look to the record to verify if the ineffective assistance of PCR counsel claim is sufficiently worthy to merit further consideration."[99] But the problem with this instruction—i.e., looking to the record—is that there will often need to be development of the record particularly in cases pending on appeal when *Martinez* was decided. The court explained that the record in that case was "sufficiently complete" such that it found "without hesitation" that Sexton's trial counsel was effective.[100] But it only did so by concluding that the ineffective-assistance-of-trial-counsel claim was meritless and therefore post-conviction counsel could not be ineffective for failing to raise a meritless claim.[101] By finding the underlying claim meritless in the first instance, the opinion appears contrary to *Martinez*, which instructed that the COA standard governs when considering whether the defaulted trial-counsel claim is substantial.

B. Remands of Arizona Capital Prisoners in the Ninth Circuit After Sexton

Although the prisoner in *Sexton* was not under a sentence of death, that case's reasoning has been subsequently applied to capital cases, albeit inconsistently. The Arizona capital cases that involve the typical procedural posture—i.e., cases that were pending on appeal when *Martinez* was decided—have had varying results. In several cases where capital prisoners sought a remand for further briefing and development in light of *Martinez*, the court granted the motion without detailed analysis and remanded the case.[102] Even though two

F.3d 1131 (9th Cir. filed May 4, 2012) (No. 12-99001), ECF No. 6; Order, Lopez v. Ryan, 678 F.3d 1131 (9th Cir. filed May 2, 2012) (No. 12-99001), ECF No. 3-1. The *Sexton* opinion was published conveniently on May 13—the day before Lopez's argument.

98 *Sexton*, 679 F.3d at 1157 (quoting Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012)).

99 *Id.* at 1159.

100 *Id.* at 1161.

101 *Id.* at 1159.

102 *See* Order, Runningeagle v. Ryan, No. 07-99026 (9th Cir. filed July 18, 2012), ECF No. 59-1; Order, Creech v. Hardison, No. 10-99015 (9th Cir. filed June 20, 2012), ECF No. 75; Order, Lopez v. Ryan, No. 09-99028 (9th Cir. filed Apr. 26, 2012), ECF No. 56. Creech is not an Arizona prisoner, but the case is mentioned because it is one of only three orders issued without an opinion remanding a capital case post-*Martinez*. There has been one other Arizona capital case

of those cases were remanded after *Sexton* was decided, the court did not apply *Sexton*. Instead, the court simply remanded the cases, in unpublished orders, and instructed the district court to determine whether petitioner could show

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in which the Court issued an order remanding for further consideration under *Martinez*. Order, Gonzales v. Schriro, No. 08-72188 (9th Cir. filed June 6, 2013), ECF No. 34. That case, however, involved issues related to the prisoner's competency and the appeal resulted from the prisoner seeking a writ of mandamus on competency issues. *See* Ryan v. Gonzales, 133 S. Ct. 696, 700-01 (2013) (describing procedural background of the case).

Shortly before this article was scheduled for publication, the Ninth Circuit issued an opinion remanding another Arizona capital case in light of *Martinez*. *See* Clabourne v. Ryan, No. 09-99022, __ F.3d __, 2014 WL 866382 (9th Cir. Mar. 5, 2014). That opinion adopts the reasoning of what it deemed to be several important conclusions joined by a majority of judges in *Detrich*. *Clabourne*, 2014 WL 866382, at *9-*12. In *Clabourne*, the court first held that where a district court had previously found a claim to be procedurally defaulted pre-*Martinez* and the result is uncertain, then the Ninth Circuit should remand to the district court. *Id.* at *10. While the court provided no explanation of what "result" it was considering or what would make that result "uncertain," presumably the court was referring to the merits of the defaulted claim. Here, the court remanded the case because it could not determine whether the trial-counsel claim was substantial. *See id.* at *15-*16 (noting that whether trial counsel was ineffective was "not obvious" on appeal and the court was "not sure" whether there would be a reasonable probability that counsel's alleged error "would have made a difference at resentencing").

The *Clabourne* court also discussed what it considered the majority view from *Detrich* when determining cause-and-prejudice under *Martinez*. As the court explained, the petitioner will be able to demonstrate cause if he can show that post-conviction counsel was ineffective under *Strickland*—meaning that post-conviction counsel's performance was deficient and that there is a reasonable likelihood the result of the state-court proceeding would have been different. *Id.* at *10. Practically speaking, the court's holding requires the defaulted trial-counsel claim to be meritorious, such that a petitioner must show a reasonable probability that the result of petitioner's *sentencing* would have been different. *Id.* at *16.

If a petitioner can demonstrate cause, then, as *Clabourne* explained, the district court should determine whether he can show prejudice—that is, whether the trial-counsel claim is substantial. *Id.* at *11, *16. But even as the court itself recognizes, if the petitioner has established cause (*i.e.*, shown that he has a meritorious trial-counsel claim), then the prejudice "answer would be obvious." *Id.* at *16. The court went on and further stated that once a petitioner has shown cause and prejudice under *Martinez*, a district court should then "adjudicate that [defaulted] claim on the merits." *Id.*

Although this opinion provides guidance to district courts, its analysis leaves courts with an impractical application of *Martinez*. Following *Clabourne*, a prisoner would need to first prove that he would succeed on his defaulted trial-counsel claim in order to demonstrate cause. If that were necessary, then there would be no need to demonstrate prejudice as defined by *Clabourne*. Why must a prisoner show that the defaulted trial-counsel claim is "substantial" when he has already demonstrated that he would have likely won relief on his claim in state court? Moreover, there would be no need to take the final step that the *Clabourne* court requires—adjudicating the trial-counsel claim on the merits. The prisoner would have already demonstrated in his showing of cause that he is entitled to relief on the trial-counsel claim. *Clabourne*'s complicated framework for applying *Martinez* provides another example as to why my suggested application of *Martinez* in Part IV is both logical and practical.

cause to overcome the defaulted claims.[103] In several other Arizona capital cases, the Court has specifically indicated that it is holding the case pending the en banc decisions in either *Detrich* or *Dickens*.[104] Additionally, in other Arizona capital cases where the prisoner sought a remand, the Court denied relief.[105] Much like the cases with orders granting remands, the cases where remands have been denied have provided little guidance to the lower courts in reviewing *Martinez* arguments.

In August 2012, a three-judge panel issued the first published opinion granting a remand in an Arizona capital prisoner's case in *Dickens v. Ryan*.[106] In that case, the district court found Dickens's ineffective-assistance-of-trial-counsel claim procedurally defaulted and rejected Dickens's argument that his post-conviction counsel's failures constituted cause to overcome that default.[107] The *Dickens* panel opinion addressed *Martinez* and unanimously remanded the case to the district court for reconsideration of the previously defaulted claim in light of *Martinez*.[108] The opinion made no mention of whether it determined if

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[103] Order, *Creech*, *supra* note 102 (unpublished order remanding in light of *Martinez* for the limited purpose of reconsidering procedural default rulings on ineffective-assistance-of-counsel claims); Order, *Runningeagle*, *supra* note 102 (same).

[104] *See* Hurles v. Schriro, 709 F.3d 1317 (9th Cir. 2013) (order) (deferring ruling on remand issue pending resolution in *Detrich*); Order, Gallegos v. Ryan, No. 08-99029 (9th Cir. filed Jan. 8, 2013), ECF No. 56 (vacating submission of case pending resolution by en banc court in *Dickens*); Order, Jones v. Ryan, No. 07-99000 (9th Cir. filed Sept. 5, 2013), ECF No. 136 (vacating submission of the case pending issuance of the en banc opinion in *Dickens*). As of this publication, the cases have not been decided.

[105] Murray v. Schriro, No. 08-99008, __ F.3d __, 2014 WL 997716, at *27 (9th Cir. Mar. 17, 2014) (citing *Sexton* when denying motion to remand because Murray failed to demonstrate a "substantial claim" of trial counsel's ineffectiveness); Order, Poyson v. Ryan, No. 10-99005, ___ F.3d ___, 2013 WL 5943403 (9th Cir. filed Mar. 22, 2013), ECF No. 65 (denying motion remand in separate unpublished order from opinion denying habeas relief and relying upon *Sexton* to reject claims on the record because Poyson could not show prejudice); Miles v. Ryan, 713 F.3d 477, 494-95 (9th Cir. 2013) (finding that even if *Martinez* applied, case would not be remanded because trial counsel was not ineffective); Scott v. Ryan, 686 F.3d 1130, 1135 n.1 (9th Cir. 2012) (denying motion to remand under *Martinez* because the case was previously remanded and appellant had "opportunity to present all the new evidence" to the district court). The Court's opinion in *Scott* is peculiar because the case was remanded only for a limited purpose. *See* Scott v. Schriro, 567 F.3d 573, 586 (9th Cir. 2009) (remanding only to decide three specific claims). Additionally, it was decided by the district court before *Martinez* came out. Scott v. Ryan, No. 97-CV-1554, 2011 WL 240746 (D. Ariz. Jan. 24, 2011). *Scott* was published two days before the panel opinion was filed in *Dickens*, and *Poyson* and *Miles* were both published after en banc was granted and the panel opinion vacated in *Dickens*.

[106] Dickens v. Ryan, 688 F.3d 1054, 1067-70 (9th Cir. 2012), *rehearing en banc granted*, 704 F.3d 816 (9th Cir. 2013).

[107] *Id.* at 1070-71.

[108] *Id.* at 1072. The three-judge panel consisted of Judge N. Randy Smith (who authored the majority opinion), Judge Johnnie B. Rawlinson, and Judge Stephen Reinhardt. While all three judges agreed that a remand was appropriate in light of *Martinez*, Judge Reinhardt dissented on an

the procedurally defaulted claim was "substantial," but instructed the district court to "consider the issue anew in light of *Martinez*."[109] In January 2013, the Ninth Circuit granted en banc review in *Dickens*.[110]

After a few capital cases were remanded in light of *Martinez*, Judge Tallman (who authored the opinion in *Sexton*) cautioned, "If these continuing *Martinez* remands are routinely permitted, our circuit will have failed to faithfully apply the heightened standard of reviewed mandated by AEDPA [the Antiterrorism and Effective Death Penalty Act of 1996] by permitting . . . capital defendants to pursue bolstered versions of their previously exhausted *Strickland* claims."[111] Much like the justices on the Supreme Court, the judges on the Ninth Circuit are sharply divided on politicized issues such as capital punishment and federal habeas review.[112] It comes as no surprise that the *Martinez* issue arose in another en banc case, which was decided before *Dickens*.

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issue unrelated to *Martinez*. *See id.* at 1073 (Reinhardt, J., dissenting) (finding unconstitutional Dickens's death sentence under Enmund v. Florida, 458 U.S. 782 (1982)).

[109] *Id.* at 1072.

[110] Dickens v. Ryan, 704 F.3d 816 (9th Cir. 2013) (granting rehearing en banc). Both parties filed petitions for rehearing en banc. *See* Petition for Panel Rehearing and Rehearing En Banc, Dickens v. Ryan, No. 08-99017, __ F.3d __, 2014 WL 241871 (9th Cir. filed Aug. 17, 2012), ECF No. 68-1 (Dickens arguing for rehearing under Edmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987)); Respondents-Appellees' Motion for Rehearing and Rehearing En Banc Dickens v. Ryan, No. 08-99017, __ F.3d __, 2014 WL 241871 (filed 9th Cir. Aug. 17, 2012), ECF No. 69 (Ryan arguing for rehearing under *Martinez*). Argument was held in June 2013. Order, Dickens v. Ryan, No. 08-99017, __ F.3d __, 2014 WL 241871 (9th Cir. May 17, 2013), ECF No. 84 (setting oral argument for June 24, 2013).

[111] Schad v. Ryan, 709 F.3d 855, 858-59 (9th Cir. 2013) (Tallman, J., dissenting from denial of en banc). Judge Tallman's premise is mistaken. *Martinez* only applies to trial-counsel claims that are defaulted, which means that the claim was not properly presented to the state courts (if it was presented at all).

[112] *See generally* Joseph N. Akrotirianakis, Paul Garo Arshagouni & Zareh A. Jalotorssian, *Jerry-Building the Road to the Future: An Evaluation of the White Commission Report on Structural Alternatives for the Federal Courts of Appeals*, 36 SAN DIEGO L. REV. 355, 356-57 (1999) ("In recent years, conservative congressmen in the Pacific Northwest have criticized the San Francisco-based circuit for its 'liberal' rulings on everything from the environment to the death penalty."); Jeff Bleich, *The Reversed Circuit: The Supreme Court Versus the Ninth Circuit*, OR. ST. B. BULL., May 1997, at 17, 22 ("[B]ecause liberals and conservatives are equally divided in the Ninth Circuit, it is more common for Ninth Circuit decisions to carry dissents than other circuits, which may attract the attention of the [J]ustices."); Corey Rayburn Yung, *Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts*, 80 GEO. WASH. L. REV. 505, 535 (2012) ("The Ninth Circuit has a reputation of ideological division and conflict." (citing John Schwartz, *Long Shot for Court Has Reputation for Compassion and Persuasion*, N.Y. TIMES, May 6, 2010, at A17 ("The Ninth Circuit is an ideologically divided court, with strong factions of liberals and conservatives . . . ."))); *see also* Padraic Foran, Note, *Unreasonably Wrong: The Supreme Court's Supremacy, the AEDPA Standard, and* Carey v. Musladin, 81 S. CAL. L. REV. 571, 590-91, 590 n.124 (2008) (discussing conservative and liberal dichotomy on the Ninth Circuit).

C. Detrich v. Ryan

In September 2013, the Ninth Circuit, sitting en banc, decided *Detrich v. Ryan*, which addressed the issue of *Martinez* remands even though the original panel opinion did not.[113] In *Detrich*, eleven judges issued four separate opinions. Judge William A. Fletcher wrote the majority opinion in which he determined a remand under *Martinez* was appropriate, but went on to provide guidance to the district court because this was the first instance for an en banc court to "deal with" a "*Martinez* motion."[114] Judges Harry Pregerson and Stephen Reinhardt concurred in the entirety of Judge Fletcher's opinion and Judge Morgan Christen concurred in the result, as well as the how to handle *Martinez* remands.[115]

1. Plurality Opinion

The four-judge plurality attempted to create a standard by which district courts could evaluate prejudice in light of *Martinez*. The rule presented by the plurality is such: so long as a prisoner demonstrates that his post-conviction counsel performed deficiently and counsel failed to raise a "substantial" claim of ineffective assistance of trial counsel, then the cause-and-prejudice standard under *Martinez* is satisfied.[116] In other words, cause is met by showing that

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[113] The panel opinion in *Detrich*, which was published only six weeks after *Martinez*, granted habeas relief to the prisoner on grounds unrelated to *Martinez*. Detrich v. Ryan, 677 F.3d 958, *rehearing en banc granted*, 696 F.3d 1265 (9th Cir. 2012). After relief was granted by the panel and while the case was pending on the State's motion for rehearing en banc, Detrich filed a motion for a partial remand in light of *Martinez*. Motion to Remand Pursuant to *Martinez v. Ryan*, Detrich v. Ryan, No. 08-99001, __ F.3d __, 2013 WL 4712729 (9th Cir. filed Aug. 2, 2012), ECF No. 128. At issue in the motion to remand were claims that the district court found procedurally defaulted and that Detrich did not raise on appeal. *Id.* at 3 n.2. The Court ordered the parties to be prepared to discuss *Martinez* during the en banc argument. Order, Detrich v. Ryan, No. 08-99001, __ F.3d __, 2013 WL 4712729 (9th Cir. filed Dec. 17, 2012), ECF No. 159. At argument, the judges were attempting to ascertain how the Court of Appeals should proceed in its consideration of claims of ineffective assistance of trial counsel. Judge Mary H. Murgia asked whether the Court should determine whether the claim is substantial or whether it should remand to the district court for that determination. See Oral Argument at 13:25-13:40, Detrich v. Ryan, No. 08-99001, __ F.3d __, 2013 WL 4712729 (9th Cir. filed Dec. 10. 2012) (en banc), *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006204. At least two other judges indicated that the Court of Appeals may need to determine whether the procedurally defaulted ineffective-assistance-of-trial-counsel claim was substantial. *Id.* at 15:15-15:40 (Judge Carlos T. Bea suggesting that appellant would need to show that the claim is substantial); *id.* at 18:20-18:40 (Judge William A. Fletcher opining that the Court's role is to determine how important the defaulted claims might have been and whether they are substantial).

[114] Detrich v. Ryan, No. 08-99001, __ F.3d __, 2013 WL 4712729, at *4 (9th Cir. 2013) (en banc) (plurality).

[115] *Id.* at *1 (plurality).

[116] *Id.*

post-conviction counsel was deficient (the first prong of *Strickland*) and prejudice is met by showing that the trial-counsel claim is substantial.[117] At that point, a prisoner would then be permitted federal merits review of his defaulted trial-counsel claim. Judge Fletcher explained that for the "narrow purposes" of showing cause under *Martinez*, a "prisoner need not show actual prejudice resulting from his [post-conviction] counsel's deficient performance, over and above his required showing that the trial-counsel [ineffectiveness] claim be 'substantial[.]'"[118] The reasoning behind this conclusion is that "if a prisoner were required to show that the defaulted trial-counsel IAC [ineffective assistance of counsel] claims fully satisfied *Strickland*. . . this would render superfluous the first *Martinez* requirement of showing that the underlying *Strickland* claims were 'substantial[.]'"[119] The plurality did not determine whether the defaulted claims were substantial, but left that for the district court on remand.[120]

What the plurality also recognized was the potential need for evidentiary development, including a hearing, to determine whether a petitioner could satisfy cause under *Martinez* and ultimately assess whether the defaulted claim of trial counsel's ineffectiveness was meritorious.[121] It concluded that neither the AEDPA nor the Supreme Court's decision in *Cullen v. Pinholster* barred a federal court's ability to hear new evidence.[122] Specifically, 28 U.S.C.

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[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at *16 ("[W]e do not decide whether Detrich's procedurally defaulted trial-counsel IAC claims are 'substantial.' We remand for the district court to decide that question in the first instance.").

[121] *Id.* at *7.

[122] *Id.* at *7-*8. *See supra* note 38. While the interplay between *Pinholster* and *Martinez* is beyond the scope of this article, it is worth noting that other courts have grappled with the issue. *See* Gallow v. Cooper, 133 S. Ct. 2730, 2731 (2013) (Breyer, J., statement respecting the denial of petition for cert.) (stating that a "claim without any evidence to support it might as well be no claim at all" and suggesting that *Pinholster* would not have prevented court from considering new evidence in federal court); Lopez v. Ryan, 678 F.3d 1131, 1137 (9th Cir. 2012) (noting tension between appellant's argument that failing to develop factual basis claim falls under *Martinez* and "the Supreme Court's jurisprudence in this area" (citing *Pinholster*, 131 S. Ct. 1388)); Schad v. Ryan, 709 F.3d 855, 856 (9th Cir. 2013) (Tallman, J., dissenting from denial of en banc) (criticizing the majority for "stretch[ing] *Martinez* beyond its limited scope, and permit[ing] Schad to bolster a previously exhausted *Strickland* claim with new federal habeas evidence in clear violation of *Pinholster*"); Moore v. Mitchell, 708 F.3d 760, 785 (6th Cir. 2013) (describing appellant's argument as a request to "turn *Martinez* into a route to circumvent *Pinholster*"); Ross v. Thaler, No. 12-70001, 2013 WL 586772, at *11 (5th Cir. Feb. 5, 2013) (declining to decide whether "*Martinez* created a routine *Pinholster* exception—thus allowing a federal habeas court to consider evidence that was not presented in state court—for cases in which a petitioner is denied a full and fair hearing in the state habeas courts because of the ineffectiveness of his state habeas counsel"). Indeed, as Professor Marceau recognizes, "*Martinez* serves to substantially undermine

§ 2254(d) was inapplicable because the claim was defaulted and therefore had not been "adjudicated on the merits" in state court as required by that provision of the statute.[123] Moreover, the plurality found that 28 U.S.C. § 2254(e)(2) was also inapplicable in determining whether to allow factual development because that provision only applies to claims for relief.[124] Because "cause" to overcome a defaulted claim was not in and of itself a claim for relief, there was no requirement that the courts apply § 2254(e)(2) in considering cause.[125] Notably, however, if a court determines that a prisoner has overcome a default, it must consider evidence in support of the defaulted claim. The *Detrich* plurality did not discuss whether § 2254(e)(2) would apply in that instance.[126]

Finally, the plurality determined that ineffective assistance of post-conviction counsel could still constitute cause even if post-conviction counsel raised *some* claims of ineffective assistance of trial counsel.[127] In other words, even though in *Martinez* post-conviction counsel failed to raise any claims, the plurality did not find that a necessary requirement. As Judge Fletcher succinctly stated, "It is no less a denial of fair procedure if the ineffective PCR counsel happened to raise other, less viable, claims of trial-counsel [ineffectiveness]."[128]

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and defuse what threatened to be the two greatest limitations on federal habeas relief in decades: the AEDPA and *Cullen v. Pinholster*." Marceau, *supra* note 2, at 2502; *see also* Freedman, *supra* note 38, at 600 (noting that *Pinholster* does not offer shelter to states in the wake of *Martinez* and suggesting that "[p]roviding competent counsel in state post-conviction proceedings, in capital cases first of all, is an easy way for the states to push back on both fronts").

123 *Detrich*, 2013 WL 4712729, at *7 (plurality).

124 *Id.* at *8.

125 *Id.*

126 Under the AEDPA, a federal court will not hold a hearing if a prisoner has failed to develop the factual basis unless one of only a few limited exceptions is met. 28 U.S.C. § 2254(e)(2) (2006). In 2000, the Supreme Court explained that a prisoner will only have failed to develop the factual basis of his claim where "there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *See* (Michael) Williams v. Taylor, 529 U.S. 420, 432 (2000). "For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error." *Id.* at 437. But *Williams* was decided over a decade before *Martinez*, and at the time, there was no exception allowing state post-conviction counsel's actions to excuse any failure to raise a claim in state court. Here, if *Martinez* cause excuses a default, then it follows that the circumstances supporting a finding of cause would also excuse any failure to develop the claim. If a prisoner needed to demonstrate that he was diligent in attempting to develop the factual basis of his trial-counsel claim, despite demonstrating that his post-conviction counsel was ineffective, then there would be no reason for the exception in *Martinez*; a prisoner would not be able to prove the merits of the defaulted claim.

127 *Detrich*, 2013 WL 4712729, at *8.

128 *Id.* at *9. This conclusion is consistent with *Trevino*, which remanded the case for further consideration of cause under *Martinez* where an ineffective-assistance-of-trial-counsel claim—

2. Concurring Opinions

While Judges Paul J. Watford and Jacqueline H. Nguyen both concurred in the holding,[129] and thus created a majority, neither concurred in the rationale. Judge Watford wrote a short concurrence, explaining that assessing whether a claim of ineffective assistance of trial counsel is substantial "requires a highly fact- and record-intensive analysis."[130] He stressed that the circuit courts are courts of review, and because of this, he would have simply remanded without further discussion.[131]

Judge Nguyen had a different viewpoint. Although she agreed that remand was appropriate, she took issue with the premise asserted by both the plurality and dissent that *Martinez* modified either the prejudice to be shown under *Strickland* or the prejudice necessary to overcome a default.[132] Instead, she posited that to show cause under *Martinez*, a prisoner must not only show that post-conviction counsel failed to raise a substantial claim, but also that there would have been a reasonable probability of a different result in the state post-conviction proceedings had such a claim been presented.[133] In her view, "the *Strickland*/*Coleman* prejudice requirement in the *Martinez* context . . . focuses on whether there is a reasonable probability that the result would have been different if *post-conviction counsel* had highlighted trial counsel's deficient performance."[134] Once that is shown, a federal court can then review the merits of the defaulted ineffective assistance of counsel claim.[135]

3. Dissenting Opinion

In dissent, Judge Susan P. Graber, joined by four other judges, criticized the majority for remanding the case, complaining that it will extend the delay "beyond what is either necessary or equitable."[136] Although the dissent recognized the "potential overlap of analysis" between the merits of the underlying trial ineffective-assistance-of-counsel claim and the post-conviction ineffective-assistance-of-counsel claim, the dissent took issue with the plurality's position that *Strickland* prejudice is not required where a prisoner can demonstrate

albeit a different claim than was defaulted—had been raised by post-conviction counsel. Trevino v. Thaler, 133 S. Ct. 1911, 1915 (2013).

[129] *Id.* at *1 (plurality).

[130] *Id.* at *23 (Watford, J., concurring).

[131] *Id.*

[132] *Id.* at *21 (Nguyen, J., concurring).

[133] *Id.* at *23.

[134] *Id.*

[135] *Id.* at *21 (noting that a court does "not necessarily reach [the] merits" of a defaulted ineffective-assistance-of-counsel claim).

[136] *Id.* at *26, n.3 (Graber, J., dissenting). Judge Graber points out that the Circuit has "many capital cases" on appeal with pending requests for remand under *Martinez*. *Id.* at *27.

his post-conviction counsel failed to raise a substantial claim of trial counsel ineffective.[137] The dissent argued that the Supreme Court "never suggested" that prejudice would have a "unique meaning" when considering whether prisoner has met a showing to overcome default under *Martinez*.[138]

Despite criticizing the plurality, the dissent falls short of providing a workable solution to what it recognized as "potential overlap of analysis" between the merits of an underlying trial ineffective-assistance-of-counsel claim and the post-conviction ineffective-assistance-of-counsel claim.[139] Instead, the dissent rejected petitioner's trial ineffective-assistance-of-counsel claims by finding that none were "potentially successful."[140] By rejecting the claims on the merits, without allowing any further briefing or development,[141] the dissent provides a clear example of why capital cases in this posture should be remanded.

D. Dickens v. Ryan

The en banc opinion in *Dickens v. Ryan* was issued only a few months after the *Detrich* opinion. Unlike in *Detrich*, the *Dickens* court's analysis of *Martinez* gained an eight-judge majority.[142] The majority's analysis is parallel in large part to the plurality in *Detrich*. And the three judges who dissented in *Dickens* reviewed the record, much like the dissent in *Detrich*, and found that the defaulted claim was not substantial.[143]

1. Majority Opinion

Considering the effect of *Martinez* on the defaulted ineffective-assistance-of-counsel claim, the *Dickens* court determined that the case should be remanded.[144] The court instructed that Dickens may be able to show cause for the default "if he can show the first two *Martinez* elements: (1) the [defaulted] claim is substantial and (2) that his PCR counsel was ineffective under *Strickland*."[145] The court chose to give guidance to the lower courts regarding: *Pinholster*; post-conviction counsel who raises other ineffective-assistance-of-trial-counsel claims (just not the one that was defaulted); and evidentiary devel-

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137 *Id.* at *26, n.3.

138 *Id.* In seeming contrast to the assertion that *Martinez* did not alter the meaning of prejudice when overcoming a default, the dissent accepts that prejudice (as part of the cause-and-prejudice analysis) is satisfied when a defaulted claim is "substantial." *Id.* at *26.

139 *Id.* at *26, n.3.

140 *Id.* at *33.

141 *Id.* at 27-29, 33.

142 Dickens v. Ryan, No. 08-99017, __ F.3d __, 2014 WL 241871 (9th Cir. Jan. 23, 2014) (en banc).

143 *Id.*

144 *Id.* at *10.

145 *Id.* at *13.

opment.[146] In its discussion of these topics, the court reached conclusions nearly identical to those of the plurality in *Detrich*.[147]

Dickens, like the *Detrich* plurality, rejected "any argument that *Pinholster* bars the federal district court's ability to consider" the defaulted claim.[148] The rationale is straight forward and neither *Pinholster* nor the AEDPA suggest a different conclusion: the defaulted claim "was not 'adjudicated on the merits' by the Arizona courts"; therefore, neither *Pinholster* nor § 2254(d)(1) applies.[149] Also like the *Detrich* plurality, *Dickens* determined that the cause standard under *Martinez* could be applicable even if post-conviction counsel raised other ineffective-assistance-of-trial-counsel claims that were adjudicated on the merits by the state courts.[150]

Finally, and perhaps most importantly, *Dickens* held that a petitioner will not be barred from presenting evidence in the district court to demonstrate cause-and-prejudice under *Martinez*.[151] Following in line with the *Detrich* plurality, the court concluded that § 2254(e)(2) only applies to factual development of claims for relief. Because a demonstration of cause-and-prejudice is not a constitutional claim for relief, the district courts are not restricted under the AEDPA from considering evidence.[152] In providing guidance to the district court, the court held that a petitioner is entitled to present evidence showing that "PCR counsel's ineffective assistance constituted 'cause'" and showing "'prejudice,' that is that petitioner's claim is 'substantial' under *Martinez*."[153] Contrary to the court's earlier language in its opinion indicating that whether the defaulted claim was substantial is part of the *Martinez* cause analysis,[154] it appears the court later equates the "substantial claim" standard with the neces-

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146 *Id.*

147 Five of the eleven judges on the *Dickens* en banc panel were also on the *Detrich* en banc panel—Chief Judge Kozinski, and Judges Pregerson, Murgia, Christen, and Watford. With one exception, the opinions of the judges were generally consistent between the two decisions. Of note, Judge Murgia joined the dissent in *Detrich*, which rejected the plurality's analysis of *Martinez*, but joined the majority in *Dickens*. Also, Judge Ikuta was on the panel that decided *Sexton*, but she joined the majority in *Dickens*. *See generally* Detrich v. Ryan, No. 08-99001, __ F.3d __, 2013 WL 4712729 (9th Cir. 2013) (en banc); Dickens v. Ryan, No. 08-99017, __ F.3d __, 2014 WL 241871 (9th Cir. Jan. 23, 2014) (en banc); Sexton v. Cozner, 679 F.3d 1150 (9th Cir. 2012).

148 *Dickens*, 2014 WL 241871, at *13.

149 *Id.* at *14.

150 *Id.* Even the three judges who dissented from the majority opinion in *Dickens* agree that "the *Martinez* exception may apply where PCR counsel raised some issues of trial counsel [ineffectiveness.]" *See id.* at 21 n.5 (Callahan, J., dissenting).

151 *Id.* at *14-*15.

152 *Id.* at *14.

153 *Id.* at *14.

154 *Id.* at *13.

sary showing for default prejudice.[155] What both of the en banc decisions signal is lack of clarity on how to apply the rule in *Martinez* as it relates to prejudice.

2. Dissenting Opinion

The dissenting opinion in *Dickens* was authored by Judge Consuelo M. Callahan and joined by Chief Judge Alex Kozinski and Judge Jay S. Bybee.[156] The dissent complained that Dickens was not entitled to benefit from *Martinez*'s rule because his ineffective-assistance-of-sentencing-counsel claim was already presented in state court and denied on the merits, but his new claim raised in federal court was never presented to, nor found procedurally barred by, the state courts.[157] The dissent points out that both of the prisoners in *Martinez* and *Trevino* attempted to raise their claims in state court, and the state courts found the claims barred.[158] But the dissent ignores two critical facts. First, Dickens, like Trevino, asked the federal district court to stay the proceedings and allow him to present his claim.[159] The district court denied his request.[160] Second, the assistant attorney general stated during oral argument that Dickens would now be precluded from raising his claim in state court.[161] Thus, there is no reason that Dickens should have been required to spend the

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[155] *Id.* at *15 (noting that district court is not precluded from holding a "cause[-]and[-]prejudice hearing on Dickens's claim of PCR counsel's ineffectiveness, which requires a showing that Dickens's underlying trial-counsel [ineffectiveness] claim is substantial[ ]").

[156] *Id.* at *17 (Callahan, J., dissenting). The majority found that the trial-counsel claim that Dickens presented in federal court had been fundamentally altered from the one presented in state court. *Id.* at *12. Because the new federal claim would now be procedurally barred if he attempted to exhaust it in state court, the claim was procedurally defaulted. *Id.*

[157] *Id.* at *19 (Callahan, J., dissenting).

[158] *Id.* at *20.

[159] *See* Petitioner's Traverse to Answer Regarding Procedural Status of Claims, Dickens v. Ryan, No. 01-cv-757 (D. Ariz. Aug. 4, 2003), Doc. No. 108 at 29-34; *see also* Oral Argument at 1:04:05-1:04:35, Dickens v. Ryan, No. 08-99017, __ F.3d __, 2014 WL 241871 (9th Cir. filed June 24, 2013) (en banc), *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006212 (explaining that Dickens asked the district court to exhaust his claim but was denied).

[160] *Compare Dickens*, 2014 WL 241871, at *20 (explaining that Trevino raised a claim of ineffective assistance of trial counsel for the first time in federal district court and that court stayed the proceedings and allowed him to return to state court to exhaust the claim) *with* Order Re: Motions for Expansion of the Record, Discovery and Evidentiary Hearing, Doc. No. 160 at 10, Dickens v. Ryan, No. 01-cv-757 (D. Ariz. Jan. 3, 2005) ("If Petitioner were to return to state court to present these additional factual allegations, the claim would be precluded pursuant to Arizona Rule of Criminal Procedure 32.2(a)(3). Therefore, these additional factual allegations are technically exhausted and procedurally defaulted.").

[161] *See* Oral Argument, *Dickens*, *supra* note 159 at 40:33- 41:15 (Chief Judge Kozinski asking if the claim could be presented in state court now and the assistant attorney general answering that the claim would be defaulted and the state court would not hear the claim).

additional time and resources to go back to state court when the state's attorney asserted, consistent with the state procedural rules, that Dickens would be procedurally barred from now raising this claim.

The dissent also determined that even if *Martinez* did apply, then Dickens still is not entitled to relief.[162] Following what appears to be the *Sexton*-approach, the dissent found that the record does not support a finding that the ineffective-assistance-of-trial-counsel claim had "some merit"; in other words, Dickens's claim was not substantial.[163]

IV. UN-COMPLICATING *MARTINEZ*: A WORKABLE SOLUTION FOR APPLYING PREJUDICE

Neither *Martinez* nor *Trevino* reached the underlying merits of the defaulted claims nor applied the cause standard to the facts of those cases.[164] Instead, the Court remanded for the lower courts to properly make these determinations. The complication that has arisen when applying *Martinez* lies with determining prejudice—both for purposes of an ineffective assistance of post-conviction counsel claim (herein after referred to as "PCR prejudice") and for purposes of determining prejudice when deciding if a prisoner can overcome a default (herein after referred to as "default prejudice").[165] While these layers

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[162] *Dickens*, 2014 WL 241871, at *24.

[163] *Id.*

[164] Martinez v. Ryan, 132 S. Ct. 1309, 1321 (2012) (noting that because the lower court "did not determine whether Martinez's attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of counsel is substantial," these are to be decided on remand); Trevino v. Thaler, 133 S. Ct. 1921 (2013) (declining to decide "whether Trevino's claim of ineffective assistance of trial counsel is substantial or whether Trevino's initial state habeas attorney was ineffective").

[165] In his *Martinez* dissent, Justice Scalia criticized the majority for failing to explain how the "substantiality standard . . . differs from the normal rule that a prisoner must demonstrate actual prejudice to avoid the enforcement of a procedural default." *Martinez*, 132 S. Ct. at 1322 n.2 (Scalia, J., dissenting). Scalia's comment signals that the dissent considered the *Martinez* Court to be imposing the substantial-claim standard in determining whether default prejudice exists. Both the four-judge plurality and the dissent in *Detrich* agreed with this concept. *See Detrich*, 2013 WL 4712729, at *5 (plurality) ("The first requirement, that the prisoner show a 'substantial' underlying trial-counsel [ineffective assistance] claim, may be seen as the *Martinez* equivalent of the 'prejudice' requirement under the ordinary 'cause' and 'prejudice' rule from *Wainwright*."); *id.* at *26 (Graber, J., dissenting) (interpreting *Martinez* to mean that prejudice for purposes of default is met "by showing that the underlying claim of trial counsel's ineffectiveness is 'substantial' "). Judge Nguyen, however, disagreed with this interpretation of *Martinez*. *Id.* at *22 (Nguyen, J., concurring) (disagreeing with dissent "to the extent it wrongly reads *Martinez* as modifying *Coleman*'s prejudice prong").

If *Detrich*'s plurality opinion is an accurate reading of *Martinez*, then a prisoner may overcome a defaulted trial-counsel claim by showing, as *cause*, that post-conviction counsel's performance was deficient and, as *default prejudice*, that the trial-counsel claim is substantial. Once that showing has been made, the federal courts may then review the merits of his defaulted trial-

of prejudice seem confusing, there is a workable and straightforward solution consistent with *Martinez* and the Supreme Court's cause-and-prejudice jurisprudence. To demonstrate PCR prejudice, a prisoner need only show that post-conviction counsel failed to present a "substantial" claim of trial counsel's ineffectiveness. To demonstrate default prejudice, the standard remains as it always has—a showing of actual prejudice from the constitutional violation. In other words, a prisoner must show that his defaulted trial-counsel claim has merit.

Practically speaking, this means that federal courts must first determine cause as defined by *Martinez*; that is, whether post-conviction counsel was inadequate and whether a substantial trial-counsel claim went un-reviewed in state court. If cause is satisfied, then courts must determine default prejudice; that is, whether there is a reasonable probability that trial counsel's performance undermined confidence in the outcome of the trial or capital sentencing. In undertaking this analysis, district courts must keep in mind that *Martinez* provided an equitable avenue for federal courts to review the merits of non-frivolous Sixth Amendment violations, and that evidentiary development is necessary in establishing cause-and-prejudice. As such, this section ends with a discussion of how the Ninth Circuit should liberally remand capital cases for further consideration under *Martinez*.

A. Cause under Martinez

A prisoner who was represented by post-conviction counsel can show cause under *Martinez* by demonstrating that his post-conviction counsel was inadequate, and that as a result of counsel's inadequacy, a substantial claim of ineffective assistance of trial counsel was not properly presented to the state courts. *Strickland*'s two-prong analysis of deficient performance and prejudice[166] is applied to post-conviction counsel and the post-conviction proceedings. Post-conviction counsel is inadequate where counsel performs deficiently—*i.e.*, below "prevailing professional norms."[167] Counsel's deficient performance will result in prejudice where a substantial claim of ineffective assistance of trial counsel was not presented to the state courts. Therefore, a prisoner need not demonstrate PCR prejudice beyond alleging a defaulted sub-

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counsel claim. While this analysis seems consistent with the spirit of *Martinez*, it unnecessarily alters the showing for default prejudice. I suggest another way to read *Martinez* that is consistent with the Supreme Court's cause-and-prejudice jurisprudence. And the result—having merits review of the underlying trial-counsel claim—will ultimately be the same.

166 Strickland v. Washington, 466 U.S. 668, 694-95 (1984).

167 *Id.* at 690 ("[C]ounsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.").

stantial trial-counsel claim.[168] Reading *Martinez* to create an adaptation of PCR prejudice *only* for purposes of demonstrating cause is not only consistent with the equitable principles,[169] but it is also practical.

Martinez was concerned with claims that were not "properly presented" in state court.[170] It makes sense that *Martinez* would permit PCR prejudice to be shown where a potentially meritorious trial-counsel claim was not presented in state court due to post-conviction counsel's deficient performance. If post-conviction counsel failed to raise a substantial claim, there would be little if no reliability in the state-court post-conviction proceedings. As the Supreme Court has instructed, the prejudice prong of *Strickland* is not an outcome-determinative standard.[171] Rather, a court must take into account "whether the result of the proceeding was fair and reliable."[172] It follows, then, that in cases where post-conviction counsel was deficient in developing and presenting substantial claims of trial counsel's ineffectiveness, the result cannot be said to be either fair or reliable.[173]

This view of PCR prejudice is also consistent with the language in *Martinez*. As the Court explained, "When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, *or* that the attorney in the initial-review collateral proceeding did not perform below constitutional standards."[174] Nowhere does the Court mention that a state could answer by arguing that post-conviction counsel's substandard performance did not prejudice petitioner. That is so because the substantial-claim standard becomes the PCR prejudice that a prisoner must demonstrate.

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168 This seems to be what the *Detrich* plurality and the *Dickens* majority were attempting to convey, but those opinions conflated PCR prejudice with default prejudice.

169 Implicit in the *Martinez* Court's decision is the understanding that the prejudice resulting from post-conviction counsel's performance is that a non-frivolous trial-counsel claim will never be reviewed on its merits: "Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors . . . caused a procedural default in an initial-review collateral proceeding acknowledges, *as an equitable matter*, that the initial-review collateral proceeding, if undertaken . . .with ineffective counsel, may not have been sufficient to ensure that *proper consideration was given to a substantial claim*." *Martinez*, 132 S. Ct. at 1318 (emphasis added).

170 *Id.* at 1313.

171 *Strickland*, 466 U.S. at 694 (finding that a reasonably probability is "sufficient to undermine confidence in the outcome").

172 Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

173 *See Martinez*, 132 S. Ct. at 1318 (noting that the state post-conviction proceeding "may not have been sufficient to ensure that proper consideration was given to a substantial claim" of ineffective assistance of trial counsel).

174 *Martinez*, 132 S. Ct. at 1319 (emphasis added).

This reading of *Martinez*, which creates a slightly less burdensome standard in demonstrating *Strickland* prejudice, is not far-fetched, given that the Supreme Court recently announced an adaptation of the *Strickland* prejudice requirement in two companion cases related to plea negotiations—*Missouri v. Frye* and *Lafler v. Cooper*.[175] In *Missouri v. Frye*, the Court recognized the critical importance of having effective counsel during plea negotiations and decided the question of "what, if any, prejudice resulted from" counsel's failure to present plea offers to a defendant.[176] In constructing a prejudice analysis somewhat different than what is typical under *Strickland*, the Court held that where a defendant did not take advantage of a plea bargain because of counsel's deficient performance, then the defendant need only show that he would have accepted the plea and would have gotten a more favorable result by pleading to a lesser charge or by being sentenced to less time.[177] This is so regardless of whether, as the dissent points out, both defendants received a fair conviction—Frye pleading guilty and Lafler having had a jury trial.[178]

In addition to the legal basis for applying the substantial-claim standard to determine PCR prejudice in evaluating *Martinez* cause, there is also the practical reason. If a prisoner were required to show that his post-conviction counsel's failure to raise a substantial trial-counsel claim would have resulted in relief in his post-conviction proceedings,[179] then he would also have to show that his underlying trial-counsel claim would have probably resulted in relief. As Judge Fletcher explained in *Detrich*, that could not have been what *Martinez* meant as it would render the substantial-claim standard "superfluous."[180] A prisoner cannot show prejudice for the underlying trial-counsel claim that was never developed and presented in state court until he is provided the opportunity to develop facts in support of that claim in federal court.[181]

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[175] *See* Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012).

[176] *Frye*, 132 S. Ct. at 1409.

[177] *Id.* Justice Scalia criticizes the majority for its unclear explanation of prejudice in its "new version of *Strickland*." *Id.* at 1413 (Scalia, J., dissenting).

[178] *Id.* at 1412 (Scalia, J., dissenting) ("In Lafler all that could be said (and as I discuss there it was quite enough) is that the *fairness* of the conviction was clear, though a unanimous jury finding beyond a reasonable doubt can sometimes be wrong. Here it can be said not only that the process was fair, but that the defendant acknowledged the correctness of his conviction."); *see also Lafler*, 132 S. Ct. at 1385 (rejecting government's argument that a fair trial cures any error resulting from the plea bargaining process because the Sixth Amendment "is not so narrow in its reach").

[179] Judge Nguyen's concurrence suggests that this is the applicable standard. Detrich v. Ryan, No. 08-99001, __ F.3d __, 2013 WL 4712729, at *23 (9th Cir. 2013) (Nguyen, J., concurring).

[180] *Id.* at *6 (plurality).

[181] *See supra* Part II.C.

B. Default Prejudice

Martinez indicated that the only aspect of procedural-default law that was modified by its holding is that post-conviction attorney error can now constitute cause.[182] Reading *Martinez* to allow for the substantial-claim standard to suffice for PCR prejudice means that the default prejudice would remain consistent with precedent that a prisoner must show "actual prejudice as a result of the alleged violation of the law. . . ."[183] In other words, to show a default resulted in prejudice, a prisoner would need to show that he has a meritorious trial-counsel claim.

This application is consistent with how courts have interpreted default prejudice. Generally, once cause has been shown, a federal court will consider whether there is prejudice based on the underlying defaulted constitutional claim.[184] As Justice John Paul Stevens aptly commented, "the prejudice inquiry, of course, required some inquiry into the nature of the defaulted claim and its effect on the trial."[185] By way of example, the Court has held that a prisoner can overcome procedural default in cases where the state has suppressed exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In *Strickler v. Greene* and *Banks v. Dretke*, the Court found that a prisoner will show default prejudice by demonstrating the necessary *Brady*

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[182] Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012) ("The rule of *Coleman* governs in all but the limited circumstances recognized here."). *See* Coleman v. Thompson, 501 U.S. 722, 757 (1991) (emphasis added) ("Because Coleman had no right to counsel to pursue his state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute *cause* to excuse the default in federal habeas."); Murray v. Carrier, 477 U.S. 478, 488 (1986) (emphasis added) (noting that "the question of *cause* for a procedural default does not turn on whether counsel erred or the kind of error counsel may have made") (emphasis added).

[183] *Coleman*, 501 U.S. at 750.

[184] *See id. See also* Walker v. Martin, 131 S. Ct. 1120, 1127 (2011) (describing cause-and-prejudice as "cause for the delay in asserting his claims and actual *prejudice resulting from* the State's alleged *violation of his constitutional rights*") (emphasis added); Smith v. Murray, 477 U.S. 527, 533 (1986) ("actual prejudice resulting from the alleged constitutional violation" (quoting Wainwright v. Sykes, 433 U.S. 72, 84 (1997)); *Carrier*, 477 U.S. at 493-94 (critiquing the concurring opinion and indicating that "actual prejudice" is required when applying the cause-and-prejudice test); *Engle v. Isaac*, 456 U.S. 107, 129 (1982) (reaffirming that "any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief"); *Sykes*, 433 U.S. at 84-85, 87 (discussing Francis v. Henderson, 425 U.S. 536 (1976), which held that defaulted claims would be barred absent cause and "some showing of *actual prejudice resulting from the alleged constitutional violation*" and applying standard to counsel's waiver of admission of confession) (emphasis added). In *Detrich*, Judge Nguyen criticized the dissent for "wrongly read[ing] *Martinez* as modifying *Coleman*'s prejudice prong." *Detrich*, 2013 WL 4712729, at *22 (Nguyen, J., concurring).

[185] *Carrier*, 477 U.S. at 504 (Stevens, J., concurring).

prejudice.[186] In other instances, the Court has determined that a prisoner can demonstrate cause by showing a denial of a constitutional right to counsel.[187] Where the defaulted claim "violate[s] the Federal Constitution,"[188] in the instance of a *constitutional* right to counsel, the prejudice will be measured by deciding whether *that claim* would have resulted in relief.[189] By using post-conviction counsel's failures as cause, however, it makes little sense to evaluate *default* prejudice based on those failures because there is no constitutional right to effective post-conviction counsel. Instead, courts should do as they always have and consider the prejudice arising from the alleged constitutional violation—*i.e.*, ineffective assistance of trial counsel.

Applying the "actual prejudice" standard to *Martinez* should not, however, prevent a prisoner from developing the factual basis for his trial-counsel claim. In both *Strickler* and *Banks*, the courts allowed the prisoners discovery and, in *Banks*, the courts held an evidentiary hearing.[190] Thus, in practice, once a prisoner has demonstrated *Martinez* cause—that post-conviction counsel performed deficiently and prejudiced the prisoner by failing to raise a substantial trial-counsel claim—then courts should allow the prisoner the opportunity to develop that substantial claim through, *inter alia*, investigation, retention of experts, expansion of the record, and discovery.[191] If the prisoner is able to

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[186] *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 282 (1999) (equating prejudice standard for proving *Brady* violation with the prejudice standard for showing cause-and-prejudice to overcome default); Banks v. Dretke, 540 U.S. 668, 691 (2004) (same).

[187] *See* Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (stating that "ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim").

[188] *Id.*

[189] *Cf. Smith*, 477 U.S. at 533. In *Smith*, the prisoner raised a claim that the improper admission of an expert's testimony at trial violated his constitutional rights. *Id.* at 531. Because appellate counsel failed to raise this claim on direct appeal, the federal court reviewing the habeas petition found that the claim had been waived. *Id.* In reviewing whether the appellate counsel's alleged ineffectiveness could constitute cause-and-prejudice, the Supreme Court declined to decide whether the prisoner "carried his burden of showing actual prejudice from the allegedly improper admission of [the expert's] testimony." *Id.* at 533.

[190] *See Strickler*, 527 U.S. at 278 (district court permitted prisoner to "examine and to copy all of the police and prosecution files in the case"); *Banks*, 540 U.S. at 675 (noting that "through discovery and an evidentiary hearing authorized in a federal habeas corpus proceeding, the long-suppressed evidence came to light").

[191] The Rules Governing Section 2254 Cases in the United States District Courts allow for expansion of the record and discovery. *See* RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS R. 7 (2009) (permitting expansion of the record); *id.* R. 6 (permitting discovery for good cause shown with leave of court). *See also* HERTZ & LIEBMAN, *supra* note 25, § 19.4[e], at 993-94 ("Because habeas corpus discovery is designed to aid courts in determining the validity of the petitioner's claims, it often can add—and may in fact be indispensable—to the reliability of habeas corpus proceedings in capital cases. For this reason, liberal use of discovery is appropriate in such cases."); Bracy v. Gramley, 520 U.S. 899, 904, 908-09 (1997)

show that the allegations related to his trial-counsel claim, if true, would warrant relief, he should be entitled to a hearing.[192] Because of the necessary fact development for these claims, the appellate courts should not in the first instance be reviewing the merits of *Martinez* motions.

C. Requests for Remand under Martinez *in the Ninth Circuit*

Consider this hypothetical situation: a defendant facing the death penalty for beating someone to death has trial counsel who fails to adequately investigate, develop, and present evidence that the defendant suffers from organic brain damage, which affects his impulse control. Instead, trial counsel's presentation in support of her client's life at the penalty phase consists of a few lay witnesses who testify that the defendant was a nice person, and a good kid, and that the witnesses will be sad if he is executed. The defendant is sentenced to death.

During his state post-conviction proceedings, the defendant is appointed counsel who does nothing beyond reviewing the transcripts. After completing that task, state post-conviction counsel determines that trial counsel did a fine job presenting mitigating evidence. So, post-conviction counsel raises no claims alleging that trial counsel was ineffective at sentencing. The defendant loses in his state post-conviction proceedings.

Subsequently, the defendant is appointed federal habeas counsel. In federal court, the defendant's habeas counsel pleads a claim of ineffective assistance of trial counsel at sentencing and asks the federal court to allow defendant to return to state court to exhaust the claim. His habeas counsel also requests funding to conduct a mitigation investigation and retain experts. The state asserts the defense of procedural default, arguing that the claim would be barred if the defendant returned to state court. The claim is therefore technically exhausted but procedurally defaulted, and absent an exception, the federal court will not review its merits. At the time the district court hears the case, *Martinez* had not yet been decided. The district court denies the claim as

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(noting that "good cause" for discovery exists when (1) the petitioner makes credible allegations of a constitutional violation, and (2) the requested discovery will enable the petitioner to investigate and prove his claims); Wilson v. Butler, 825 F.2d 879, 883 (5th Cir. 1987) (noting that "if death is involved, the petitioner should be presented every opportunity possible . . . to present facts relevant to his constitutional claims").

[192] RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS R. 8(a) (2009) (noting that judge must determine whether to hold hearing); *see also* Scott v. Schriro, 567 F.3d 573, 583 (9th Cir. 2009) (alteration in original) ("Where a petitioner raises a colorable claim [to relief], and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing."); Townsend v. Sain, 372 U.S. 293, 312-13 (1963), *partially overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) (listing circumstances under which hearing should be granted in habeas proceedings).

defaulted, the merits of the claim are not considered, and no evidentiary development is allowed.

The defendant raises the issue on appeal, and while his case is pending, *Martinez* is decided. He seeks a remand in light of *Martinez*. At that point, the court of appeals has an incomplete record before it. Under *Martinez*, a federal district court should allow evidentiary development to determine whether the defendant can, in fact, demonstrate cause by his post-conviction counsel's failure to raise the substantial claim of trial counsel's ineffectiveness. If he can show cause for the default, the defendant should be permitted to present evidence to also show that actual prejudice resulted from the default—namely that under *Strickland*, he received ineffective assistance of trial counsel and is entitled to a new sentencing hearing.

The decisions in *Detrich* and *Dickens* recognize that the district court is the proper place to review whether a petitioner can demonstrate cause to overcome a defaulted claim. Both the *Detrich* plurality and the *Dickens* majority also suggest the appropriateness of a hearing. Therefore, upon remand, district courts reviewing defaulted trial-counsel claims to determine whether they are substantial should not substitute COA review with merits review. As explained in Part II.B, application of the COA standard is even more critical in capital cases. Accordingly, district courts should follow the COA standard as set forth by the Supreme Court[193] and in the Ninth Circuit. Rather than review the underlying claim of ineffective assistance of trial counsel on the merits, district courts should "simply take a 'quick look' at the face of the complaint to determine whether the petitioner has 'facially allege[d] the denial of a constitutional right.'"[194]

In capital cases, district courts should also refrain from merely looking at what was done at trial or sentencing to decide whether the claim is substantial. Counsel may have presented *some* mitigating evidence at sentencing. But that is not the test.[195] A court that reviews a fully developed claim of ineffective assistance of counsel takes into account new evidence that should have been presented at trial or sentencing but was not.[196] And as *Martinez* and *Trevino*

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[193] *See supra* notes 58-61 and accompanying text.

[194] Lambright v. Stewart, 220 F.3d 1022, 1026 (9th Cir. 2000) (alteration in original) (quoting Jefferson v. Welborn, 222 F.3d 286, 289 (7th Cir. 2000)).

[195] Sears v. Upton, 130 S. Ct. 3259, 3266 (2010) ("We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.").

[196] *See id.* at 3267 (noting that "[a] proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence . . . to assess whether there is a reasonable

both recognized, trial counsel claims require investigation.[197] For this reason, it is likely that the factual support for post-conviction counsel's ineffectiveness was not part of the record for cases denied by the district court before *Martinez* was decided.[198] "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state [post-conviction] counsel's ineffectiveness had been in state [post-conviction] proceedings, where the same ineffective counsel represented him."[199]

An appellate court has the "duty to search for constitutional error with painstaking care . . . in a capital case."[200] Appellate courts, however, cannot search for error in a record that has yet to be adequately developed. As Judge Watford suggested, allowing the district court to assess whether a petitioner can demonstrate cause under *Martinez* in the first instance will "improve the quality of [the appellate court's] review process."[201] Similarly, Justice David Souter noted that "[a] judicial process that renders constitutional error invisible is, after all, itself an affront to the Constitution."[202] For these reasons, an appellate court should not be in the first instance reviewing requests for remand under *Martinez* on the merits, otherwise potential Sixth Amendment violations may be rendered invisible. Instead, the Ninth Circuit should remand capital cases where the district court found a claim of ineffective assistance of trial counsel defaulted.

V. CONCLUSION

"The Sixth Amendment right to counsel, of course, guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings. . . ."[203] *Martinez* created a mechanism to provide the opportunity for at least one court to hear substantial claims alleging that a defendant's right to trial counsel was violated. For *Martinez* to have meaning, a prisoner must necessarily develop facts and present evidence in federal proceedings that was

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probability that [a defendant] would have received a different sentence after a constitutionally sufficient mitigation investigation").

197 *See supra* notes 80 & 82 and accompanying text.

198 *See* Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012) (emphasis added) ("To present a claim of ineffective assistance of trial counsel *in accordance with the State's procedures*, then, a prisoner likely needs an effective attorney.").

199 Detrich v. Ryan, No. 08-99001, __ F.3d __, 2013 WL 4712729, at *8 (9th Cir. 2013) (en banc).

200 Burger v. Kemp, 483 U.S. 776, 785 (1987).

201 *Detrich*, 2013 WL 4712729, at *23 (Watford, J., concurring). *See also id.* (Nguyen, J., concurring) (agreeing "with the plurality and Judge Watford that the district court is best situated to apply *Martinez* in the first instance").

202 Smith v. Robbins, 528 U.S. 259, 295 (2000) (Souter, J., dissenting).

203 United States *ex rel.* Thomas v. O'Leary, 856 F.2d 1011, 1015 (7th Cir.1988).

not presented to the state courts. Otherwise, a prisoner would never be able to demonstrate that he suffered prejudice from post-conviction counsel's failure to raise a substantial claim of trial counsel's ineffectiveness. That cannot and should not be done in the appellate courts. Contrary to Judge Tallman's concerns, the *Martinez* exception will not swallow the *Coleman* rule if the Ninth Circuit remands capital cases where the district court found a claim of ineffective assistance of trial counsel procedurally defaulted. Instead, the rationale underlying the *Martinez* exception—to protect the universal truth that those facing criminal charges are entitled to effective counsel—will be upheld.

RETHINKING THE POINT OF ACCUSATION: HOW THE ARIZONA COURT OF APPEALS ERRED IN *STATE V. MEDINA*

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I. INTRODUCTION

The Sixth Amendment guarantees all persons "accused" of a crime a speedy trial, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[1] The United States Supreme Court has held that the right to speedy trial must begin at least at the point of indictment, information, "or other formal charge."[2] The Court has not explicitly offered an opinion regarding what other documents would qualify as an accusation. Specifically, the Court has not discussed whether criminal complaints constitute an accusation.

In *State v. Medina*, the Arizona Court of Appeals concluded that a complaint is not an accusation, and that a defendant becomes an accused only after he has been held to answer and a probable cause determination has been made.[3] The Arizona Court of Appeals erred when reaching its conclusion. In Part II, this Article will review what a direct complaint is and how it is used. In Part III, this Article evaluates the different tests that are used to analyze post-accusation delay and pre-accusation delay to demonstrate the importance of reliably identifying a point of accusation. Part IV looks to when a person becomes an accused under *State v. Medina* and evaluates the weaknesses in *Medina*'s conclusion. Specifically, the case authority relied upon by the court of appeals in *Medina* does not stand for the proposition for which *Medina* used the authority.

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[1] U.S. CONST. amend. VI (emphasis added).

[2] Doggett v. United States, 505 U.S. 647, 654 (1992) ("We have observed in prior cases that unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm . . . ."); United States v. Marion, 404 U.S. 307, 321 (1971) ("Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge.").

[3] State v. Medina, 949 P.2d 507, 509-10 (Ariz. Ct. App. 1997).

Medina further failed to appropriately consider guidance from the United States Supreme Court and other jurisdictions when reaching its decision. Finally, *Medina* failed to assess the importance of Arizona's statute of limitations.

Part V proposes two tests that can be used to determine whether a person is an accused. The first test evaluates whether conduct satisfies the applicable statute of limitations. If an act satisfies the applicable statute of limitations, the act is an accusation. If there is no applicable statute of limitations, the second test is whether the prosecution has been involved and indicated a willingness to prosecute the case and whether the defendant has then been labeled as an accused in some way. In Part VI, this article evaluates these tests by applying it to decisions from a number of federal and state jurisdictions. The test produces results that are consistent with the decisions of most other jurisdictions. Part VII looks to related Sixth Amendment jurisprudence, specifically, the right to counsel jurisprudence, to find further support for the tests. In Part VIII, this Article applies the tests proposed herein to criminal complaints in Arizona. Part VIII concludes that a criminal complaint filed in Arizona should be considered an accusation. First, a criminal complaint satisfies Arizona's statute of limitations. Regardless of the first test, a criminal complaint in Arizona is often an official act by the prosecution and designates defendants as an accused. In light of the conclusion that Arizona has misconstrued the point when an accusation occurs, Part IX encourages Arizona courts to rethink the present paradigm and replace it with a more logically sound interpretation of accusation.

II. Direct Complaints in Arizona

In Arizona, a criminal complaint is a method for initiating prosecution. The Arizona Rules of Criminal Procedure authorize the use of a criminal complaint as a means to initiate misdemeanors[4] or felonies.[5] Criminal charges may also be initiated by indictment.[6] "A complaint is a written statement of the essential facts constituting a public offense, that is either signed by a prosecutor, or made upon oath before a magistrate . . . ."[7] Upon a complaint made on oath, a magistrate must determine if probable cause exists to believe that a charged defendant has committed the offense and must issue a warrant or summons.[8] Alternatively, if a prosecutor signs the complaint, the magistrate issues a warrant or summons without making the probable cause determination.[9] The

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[4] Ariz. R. Crim. P. 2.1(b).

[5] Ariz. R. Crim. P. 2.2.

[6] Ariz. R. Crim. P. 2.2(a).

[7] Ariz. R. Crim. P. 2.3.

[8] Ariz. R. Crim. P. 2.4(a).

[9] Ariz. R. Crim. P. 2.4(b), 3.1.

filing of a criminal complaint satisfies Arizona's general statute of limitations.[10]

The criminal complaint confers jurisdiction in the courts to conduct an initial appearance.[11] At this initial appearance, the court must appoint counsel to qualifying defendants.[12] When charges are initiated by criminal complaint, a defendant is entitled to a preliminary hearing.[13] At this preliminary hearing, a magistrate determines if probable cause exists to support the charges alleged in the complaint.[14] If probable cause exists, the magistrate must hold the defendant to answer.[15]

Direct complaints are often filed by prosecuting agencies as the first charging document.[16] The prevalence of using direct complaints to initiate prosecutions led the Maricopa County Superior Court to institute the Regional Court

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[10] ARIZ. REV. STAT. ANN. § 13-107(C) (West, Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature) ("For the purposes of subsection B of this section [setting forth the limitation periods], a prosecution is commenced when an indictment, information or complaint is filed.").

[11] ARIZ. R. CRIM. P. 4.1.

[12] ARIZ. R. CRIM. P. 4.2(a)(5).

[13] ARIZ. R. CRIM. P. 5.1.

[14] ARIZ. R. CRIM. P. 5.3.

[15] ARIZ. R. CRIM. P. 5.4.

[16] *E.g.*, State v. Kurtley, No. 1 CA-CR 11-0411, 2013 WL 1500044, at *7 (Ariz. Ct. App. Apr. 11, 2013) ("The Maricopa County Attorney's Office filed a direct complaint on March 25, 2010 charging Appellant with two counts of driving while intoxicated [felony offenses]."); State v. Roberts, No. 1 CA-CR 11-0101, 2011 WL 6034762, at *1 (Ariz. Ct. App. Dec. 1, 2011) ("After an initial appearance on September 26, 2009, the Apache County Attorney's Office filed a complaint charging Defendant [several felony offenses]."); State v. Shaps, No. 1 CA-CR 10-0533, 2011 WL 2161908, at *1 (Ariz. Ct. App. May 24, 2011) ("In October 2009, the Maricopa County Attorney's Office filed a direct complaint against Appellant, and on November 24, 2009, a grand jury issued an indictment, charging Appellant with [two felonies]."); State v. Gomez, No. 1 CA-CR 08-0318, 2009 WL 3526649, at *2 (Ariz. Ct. App. Oct. 29, 2009) ("On October 25, 2006, the prosecutor filed a complaint charging Gomez with [several felony offenses]."); State v. Lejero, No. 1 CA-CR 08-0914, 2009 WL 1879724, at *1 (Ariz. Ct. App. June 30, 2009) ("On July 10, 2008, pursuant to Arizona Rule of Criminal Procedure 2.4(b), a prosecutor filed a direct complaint against Valerie D. Lejero, alleging two counts of . . . class four felonies."); State v. Morales-Diaz, No. 1 CA-CR 08-0604, 2009 WL 690594, at *1 (Ariz. Ct. App. Mar. 17, 2009) ("On May 19, 2008, the State filed a direct complaint, signed by a prosecutor, charging Morales-Diaz with two . . . class 6 felonies . . . ."); State v. Barrera, No. 1 CA-CR 07-0704, 2008 WL 4368150, at *1 (Ariz. Ct. App. Sept. 23, 2008) ("The State filed a direct complaint in the Superior Court of Maricopa County on September 19, 2006, charging Barrera with [two felony counts and a misdemeanor count]."); State v. Medina, 949 P.2d 507, 509 (Ariz. Ct. App. 1997) ("On March 31, 1994, the county attorney filed a complaint against the Defendant in the Tolleson Justice Court, charging him with two counts of aggravated DUI [felonies]."); State v. Dunlap, 930 P.2d 518, 525 (Ariz. Ct. App. 1996) ("On December 19, 1990, the state filed a criminal complaint against defendant and Robinson for [several felonies]."). Anecdotally, during this author's tenure as an attorney with the Maricopa County Public Defender's Office, handling hundreds of felony cases, this author has never had a case in which a complaint was filed by a person other than a prosecutor.

Center and Early Disposition Court; programs designed to promote prompt dispositions in cases where a complaint has been filed but the preliminary hearing has not yet occurred.[17] Similar models are also used in Yavapai County (the Early Disposition Court) and Cochise County (the Early Resolution Court).[18]

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[17] The Maricopa County Superior Court website describes the Regional Court Center as follows:

> The Regional Court Center for early Felony Processing (RCC) was designed to speed resolution of lower level criminal cases. The Direct Complaint Program handles all felony complaints (typically Class 4, 5 and 6 felonies) from inception, eliminating complaint paperwork being transferred between the Justice Court system and Superior Court, with judicial officers able to preside over the full range of case complexities. Preliminary hearings and arraignments are consolidated to the same day at the RCC [location in the Downtown Phoenix Superior Court complex], which saves ten days of potential jail time for in-custody defendants, eliminates duplication of efforts, and reduces Sheriff Office transport of inmates to the various Justice Courts. Status Conferences are scheduled a few days in advance of the preliminary hearing to encourage early communication between the parties and possible case resolution.
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> The four Calendars in the RCC (Three in Downtown Phoenix and one at the Southeast Regional Complex in Mesa) are larger in size to those found in EDC. In FY12, there were 18,047 cases filed, averaging 1,504 cases filed per month. The RCC resolved more than 7,500 cases in FY12 for a resolution rate of 42%. However, many of the cases filed into RCC are diverted to a Grand Jury by the County Attorney's office before being seen in RCC. If those cases are not included in the determination of a RCC resolution rate, the percentage of cases that actually appear in RCC that are resolved in RCC increases significantly.

Superior Court: Criminal Department Information, JUD. BRANCH ARIZ. MARICOPA CNTY., http://www.superiorcourt.maricopa.gov/SuperiorCourt/CriminalDepartment/innovation.asp (last visited Dec. 27, 2013). The website describes the Early Disposition Court as:

> Early Disposition Court, formerly called Expedited Drug Court, was developed in 1997 as an innovative approach in processing cases to alleviate the backlog of trials in the Criminal Division and to respond to the community's desire to offer treatment to drug offenders. Cases filed in EDC involve victimless charges of possession of illegal drugs for personal use and/or paraphernalia. EDC also has a special component that includes welfare fraud cases filed by the Office of the Arizona Attorney General.
>
> There are three EDC calendars (Two in the downtown Phoenix complex and one at the Southeast Regional Complex in Mesa) are generally large, averaging between 90 and 120 matters each day. In FY12, there were 11,500 cases filed averaging more than 960 Direct Complaints filed each month, with a resolution rate above 90%. Most of the cases resolved in EDC are diverted into a drug treatment program administered by a private drug treatment company under contract with the Maricopa County Attorney's Office. If the defendant successfully completes the treatment, their case is no longer prosecuted.

Id.

[18] *See* Marc Miller & Samantha Caplinger, *Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions*, 41 CRIME & JUST. 265, 300-02 (2012).

III. Post-Accusation versus Pre-Accusation: What is at Stake?

When a defendant raises a claim that the State has improperly delayed in bringing him to trial, there are a number of key questions that must be answered by the evaluating court. Included among these questions are whether or not there was a delay, the duration of the delay, and whether the delay was pre-accusation delay or post-accusation delay. Defendants are protected from improper post-accusation delay as a result of the Sixth Amendment's guarantee of a speedy trial.[19] Alternatively, a defendant's protection against pre-accusation delay is grounded in the Due Process clauses of the Fifth and Fourteenth Amendments.[20] The guarantees protect different situations and interests. Accordingly, there are different methods for evaluating claims of post-accusation delay and pre-accusation delay. To determine which method to use, a court must determine when a defendant was accused of a crime. This part discusses the different methods used for evaluating post-accusation delay and pre-accusation delay.

A. Post-Accusation Delay Standard

In *Barker v. Wingo*, the United States Supreme Court set forth four factors that courts must analyze and balance when considering a post-accusation delay claim; "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[21] No single factor is dispositive.

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. . . . In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.[22]

The four factors are evaluated separately.

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[19] United States v. Marion, 404 U.S. 307, 313 (1971).

[20] *Id.* at 324.

[21] Barker v. Wingo, 407 U.S. 514, 530 (1972); *accord* State v. Henry, 863 P.2d 861, 870-71 (Ariz. 1993); State v. Brooks, 618 P.2d 624, 634 (Ariz. Ct. App. 1980).

[22] *Barker*, 407 U.S. at 533 (footnote omitted); *see also* Moore v. Arizona, 414 U.S. 25, 25, 28 (1973) (vacating decision of the Arizona Supreme Court that required a defendant to present evidence of actual prejudice to his defense).

1. Length of Delay

The first step of the *Barker* analysis is to evaluate the length of delay. The length of delay is a double inquiry.[23] In order to "trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay . . . ."[24] If a defendant successfully shows this delay, "the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim."[25] The United States Supreme Court has held, and Arizona courts have reiterated, delays approaching one year are "presumptively prejudicial."[26] Thus, if a defendant can show approximately a one-year delay between accusation and trial, the defendant has justified evaluation of the next three factors.

2. Reason for Delay

A court next looks at the reasons for delay. The burden of providing the reason for delay is assigned to the State.[27] *Barker* indicates that three different levels of weight can be assigned to delay.[28] Courts weigh an improper reason, such as a government's bad faith in locating a defendant or intentional delay of a case to obtain a tactical advantage, heavily against the State.[29] A neutral reason, such as negligence, is still weighed against the State, but with less force.[30] A valid reason, such as delays requested by a defendant, serves as a justification for delay.[31] A neutral reason weighs against the State because it is the State's responsibility to bring a Defendant to trial.[32] The State has a duty to make diligent, good faith efforts to locate and notify the Defendant of the proceedings.[33] In evaluating whether the State has been diligent, the primary

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[23] Doggett v. United States, 505 U.S. 647, 651 (1992).

[24] *Id.* at 651-52.

[25] *Id.* at 652.

[26] *Id.* at 652 n.1; State v. Spreitz, 945 P.2d 1260, 1269 (Ariz. 1997); Humble v. Superior Court Maricopa Cnty., 880 P.2d 629, 636 (Ariz. Ct. App. 1993).

[27] *Barker*, 407 U.S. at 531 ("Closely related to the length of delay is the reason the government assigns to justify the delay.").

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Doggett v. U.S., 505 U.S. 647, 656 (1992); Snow v. Superior Court Maricopa Cnty., 903 P.2d 628, 632-33 (Ariz. Ct. App. 1995).

question in Arizona is, "whether the state took reasonable steps to locate the accused based upon all of the information that it possessed."[34]

3. A Defendant's Assertion of Right

Barker next calls for courts to evaluate whether a defendant has asserted his right to a trial. The United States Supreme Court has held, however, that a defendant cannot be burdened with the duty of asserting a right if the defendant does not even know he is charged with a crime.[35] In Arizona, a defendant need not demand or assert his right to a speedy trial to ensure that he receive a speedy trial.[36] This is because procedural rules have been put in place to guarantee a trial occurs within a certain period of time.[37]

4. Prejudice to the Defendant

Finally, courts will determine the prejudice a defendant suffers as a result of delay. Per *Barker*, "[p]rejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect."[38] The Court defined three interests related to prejudice, "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."[39] The possibility that a defendant's defense will be impaired is the most important of the three interests "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."[40] Prejudice to a defendant may be satisfied by either presumed prejudice or actual prejudice.

a. Presumed Prejudice

Presumed prejudices are those prejudices which a defendant is not required to prove but which the reviewing court will presume exist. This concept arises from the notion that trials are less reliable as more time passes. Thus, the severity of prejudice is partially a product of the length of delay. As the United States Supreme Court noted:

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[34] *Snow*, 903 P.2d at 632 (quoting Humble v. Superior Court Maricopa Cnty., 880 P.2d 629, 633 (Ariz. Ct. App. 1993)).

[35] *See Doggett*, 505 U.S. at 653-54 (holding that the defendant "is not to be taxed for invoking his speedy trial right only after his arrest" when defendant was not aware of pending charges).

[36] State v. Pruett, 415 P.2d 888, 891 (Ariz. 1966); State v. Maldonado, 373 P.2d 583, 586 (Ariz. 1962) (referenced in *Barker*, 407 U.S. at 524 n.21).

[37] *See generally* ARIZ. R. CRIM. P. 8.

[38] *Barker*, 407 U.S. at 532.

[39] *Id.*

[40] *Id.*

> [S]uch is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial.[41]

When all factors are considered, presumed prejudice alone may be sufficient to support dismissal.[42]

b. Actual Prejudice

A defendant may also prevail in a post-accusation delay claim by demonstrating he suffered actual prejudice. Actual prejudices are those prejudices that can be proved by a defendant. Two examples are the loss of a witness through death or unavailability[43] and a lost opportunity to have sentences run at least partially concurrent with one another.[44]

B. Pre-Accusation Delay Standard

While the Sixth Amendment guarantees a speedy trial once an individual has been accused of a crime, the United States Supreme Court set forth in *United States v. Marion* that the Due Process Clauses protect defendants from intolerable pre-accusation delay.[45] The primary protection against pre-accusation delay, however, is a jurisdiction's statute of limitations.[46] In Arizona, a defendant must meet a two-pronged test in order to prevail on a pre-accusation delay claim. "[t]o establish that pre-indictment delay has denied a defendant due process, there must be a showing that [1] the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant or to harass him, *and* [2] that the defendant has actually been prejudiced by the delay."[47]

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[41] Doggett v. U.S., 505 U.S. 647, 657 (1992) (internal citation omitted); *accord* United States v. Taylor, 487 U.S. 326, 340 (1988); Humble v. Superior Court Maricopa Cnty., 880 P.2d 629, 636 (Ariz. Ct. App. 1993).

[42] *E.g.*, *Doggett*, 505 U.S. 655-58; Moore v. Arizona, 414 U.S. 25, 26-27 (1973); *Humble*, 880 P.2d at 636-37.

[43] *Moore*, 414 U.S. at 27.

[44] Smith v. Hooey, 393 U.S. 374, 378 (1969) (finding prejudicial "the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be lost forever"); *accord* State v. Adler, 942 P.2d 439, 443 (Ariz. 1997) ("[P]rejudice has clearly been shown: the loss of an opportunity to have the prison sentence imposed for probation violation run concurrently with the federal prison sentence.").

[45] United States v. Marion, 404 U.S. 307, 324 (1971).

[46] *Id.* at 322-23.

[47] State v. Broughton, 752 P.2d 483, 486 (Ariz. 1988); *accord* State v. Torres, 569 P.2d 807, 808 (Ariz. 1977) ("[T]here must be a showing that the prosecution intentionally delayed the pro-

Under this standard, a defendant who fails to prove either prong fails in their claim. We will evaluate each of the two prongs of the test in order.

1. The Prosecution Intentionally Delayed Proceedings to Obtain a Tactical Advantage

When a defendant raises a pre-accusation delay claim, he must first prove that the State intentionally delayed initiation of the accusation.[48] An unintentional delay, or a negligent delay, is insufficient.[49] Second, the delay must be for an improper purpose; the State's delay must be for the purpose of harassing a defendant or obtaining a tactical advantage.[50] If a defendant is unable to prove that the State intentionally delayed bringing charges and did so for improper purposes, the defendant's claim fails.

This element has been criticized in a minority of jurisdictions and in scholarly work.[51] Many have argued that it is unfair to force a defendant to prove a state's intentions when the State is the party in possession of that information.[52] Additionally, mandating intentional conduct overlooks circumstances where negligent conduct results in tremendous delay and prejudice.[53]

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ceedings to gain a tactical advantage over the defendant or to harass such defendant and that the defendant has been actually prejudiced by such delay.").

[48] *See Broughton*, 752 P.2d at 486.

[49] *See* State v. Lacy, 929 P.2d 1288, 1293-94 (Ariz. 1996) (finding defendant failed to meet claim where defendant did not prove delay was intentional).

[50] *See* State v. Dunlap, 930 P.2d 518, 527 (Ariz. Ct. App. 1996) (rejecting delay claim where "there [was] no evidence the delay was intended to gain a tactical advantage over defendant or to harass him").

[51] *E.g.*, Howell v. Barker, 904 F.2d 889, 894-96 (4th Cir. 1990); Michael Cleary, *Pre-Indictment Delay: Establishing a Fairer Approach Based on* United States v. Marion *and* United States v. Lovasco, 78 TEMPLE L. REV. 1049, 1051-53, 1069 (2005); Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607, 622-28 (1990).

[52] Cleary, *supra* note 51, at 1069 ("[P]lacing the burden on the defendant to prove both prongs of a pre-indictment delay claim is unreasonable considering the practical difficulties faced by defendants in showing improper motive by the prosecution."); Goldfarb, *supra* note 51, at 624 (noting that prosecutors have "exclusive access to the information necessary" to show improper reasons for a delay).

[53] *Howell*, 904 F.2d at 895 ("Taking [a two pronged test similar to Arizona's test] to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play.").

2. Actual Prejudice

A defendant must also prove that he suffered actual prejudice.[54] Actual prejudice in a pre-accusation delay context is prejudice to a defendant's case. The prejudice cannot be speculative.[55] As an example, the loss of a witness does not adequately demonstrate prejudice. A defendant claiming pre-accusation delay must also prove "that the witness would have testified, the jury would have found the witness credible, and the testimony of the witness would have affected the outcome of the trial."[56]

C. Comparison of the Standards

If we compare these two standards, we find two primary differences between them. First, there is a difference in what each test requires the defendant to prove as it relates to the reason for delay. Whereas the post-accusation delay standard imposes the burden upon the prosecution to provide the reason for delay, the pre-accusation standard requires a defendant to prove that the State delayed a case for improper reasons.[57] A defendant who fails to prove that the prosecution intentionally delayed in bringing a case for tactical purposes fails regardless of the prejudice or duration of delay.[58]

The second difference relates to the degree of burden a defendant must bear when proving prejudice. A defendant claiming post-accusation delay may rely upon the presumption of prejudice caused by the delay.[59] A defendant claiming pre-accusation delay does not get the benefit of such a presumption. Instead, this defendant must come forward with non-speculative actual prejudice.[60]

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[54] State v. Broughton, 752 P.2d 483, 486-87 (Ariz. 1988).

[55] *Id.* at 487.

[56] State v. Dunlap, 930 P.2d 518, 528 (Ariz. Ct. App. 1996).

[57] *Compare* Barker v. Wingo, 407 U.S. 514, 531 (1972) ("Closely related to the length of delay is the reason the government assigns to justify the delay."), *with* State v. Lacy, 929 P.2d 1288, 1294 (Ariz. 1996) ("Absent proof of an intentional delay for strategic or harassment purposes, therefore, this claim must fail."), *Broughton*, 752 P.2d at 486, *and* State v. Torres, 569 P.2d 807, 808 (Ariz. 1977).

[58] *See Lacy*, 929 P.2d at 1294. *See also* Wyman v. State, 217 P.3d 572, 578-79 (Nev. 2009) (upholding trial court's denial of motion to dismiss on pre-accusation delay of thirty-two years in part because the defendant failed to prove the State intentionally delayed to obtain a tactical advantage); State v. Droegemeier, No. 2 CA-CR 2010-0308, 2011 WL 3759683, at *1, 3 (Ariz. Ct. App. Aug. 19, 2011) (reinstating dismissed case where there was a delay of approximately thirty years because the defendant could not prove the prosecution intentionally delayed to gain a tactical advantage).

[59] Doggett v. United States, 505 U.S. 647, 655-58 (1992); Moore v. Arizona, 414 U.S. 25, 26-27 (1973); Humble v. Superior Court Maricopa Cnty., 880 P.2d 629, 636-37 (Ariz. Ct. App. 1993).

[60] *Broughton*, 752 P.2d at 486-87.

Determining whether and when a defendant has been accused of a crime is of substantial import to parties litigating delay claims and to courts evaluating delay claims. The differences between these tests can mean the difference between dismissal and reinstatement of a prosecution. With so much at stake, it is important to make sure that defendants are only tasked to meet the appropriate test.

IV. Arizona's Analysis of Whether a Complaint is an Accusation

Arizona addressed the question of whether a complaint is an accusation in *State v. Medina*.[61] In *Medina*, the Arizona Court of Appeals concluded that a complaint is not an accusation for speedy trial purposes.[62] We will first review the *Medina* decision. Second, we will evaluate the errors in the conclusion reached in *Medina*.

A. State v. Medina*: A Complaint is Not an Accusation*

In *State v. Medina*, the Arizona Court of Appeals was faced with the question of when a person becomes an accused for speedy trial purposes.[63] Medina was arrested for driving under the influence on November 13, 1993, but no charges were filed at that time.[64] On March 31, 1994, the prosecutor filed a direct complaint charging Medina with two counts of driving under the influence.[65] A summons was sent to Medina, but by the time the State had charged Medina, he no longer lived at the address he had previously provided.[66] The State, however, had failed to check with the Motor Vehicles Division, which had a valid home address and mailing address, and no further attempts to serve Medina were made.[67] A warrant was issued for Medina's arrest on in July of 1994.[68]

The warrant was executed in January of 1996 and Medina appeared for his initial appearance on the bench warrant on January 19, 1996.[69] The justice court held Medina to answer before the superior court on February 7, 1996, after Medina waived his right to a preliminary hearing.[70] The State filed infor-

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[61] State v. Medina, 949 P.2d 507 (Ariz. Ct. App. 1997).
[62] *Id.* at 510.
[63] *Id.* at 509-10.
[64] *Id.* at 509.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

mation in the Superior Court on February 15, 1996, and Medina was arraigned on February 21, 1996.[71]

Medina later moved to dismiss the case on the grounds that the delay violated his right to a speedy trial.[72] The trial court granted the motion to dismiss and the State appealed.[73] Upon review, the Arizona Court of Appeals reversed the decision of the trial court, determining that "the Defendant's right to a speedy trial did not attach until February 7, 1996, which is the date the Defendant was held to answer on the charge."[74] The court of appeals concluded that the trial court should have evaluated the delay as "a case of *preindictment delay*."[75]

The initial legal premise relied upon by the court of appeals was stated as:

> A person's Sixth Amendment right to a speedy trial does not attach until an indictment has been returned or a complaint has been filed and a magistrate has found that probable cause exists to hold the person to answer before the Superior Court. This is well established law in Arizona.[76]

To support this premise, the court cited to *State v. Lee*,[77] *State v. Enriquez*,[78] *State v. Burrell*,[79] *State v. Maldonado*,[80] *State v. Jackson*,[81] and *Favors v. Eyman*.[82] The court of appeals distinguished two cases that suggested an alternate conclusion.[83] The court concluded that neither *State v. Roberson*[84] nor *State v. Myers*[85] had reason to be concerned with the point of accusation and thus, the language in these cases concluded that the complaint was the point of accusation "was simply a broad expression that served to resolve that case."[86] The court of appeals found that its conclusion was in accord with the dicta of *McCutcheon v. Superior Court*,[87] and the Arizona Supreme Court's statement

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71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.* (footnote omitted).
77 State v. Lee, 519 P.2d 56 (Ariz. 1974).
78 State v. Enriquez, 430 P.2d 422 (Ariz. 1967).
79 State v. Burrell, 426 P.2d 633 (Ariz. 1967).
80 State v. Maldonado, 373 P.2d 583 (Ariz. 1962).
81 State v. Jackson, 499 P.2d 111 (Ariz. Ct. App. 1972).
82 Favors v. Eyman, 466 F.2d 1325 (9th Cir. 1972).
83 State v. Medina, 949 P.2d 507, 510 (Ariz. Ct. App. 1997).
84 State v. Roberson, 576 P.2d 531 (Ariz. Ct. App. 1978).
85 State v. Myers, 569 P.2d 1351 (Ariz. 1977).
86 *Medina*, 949 P.2d at 510.
87 McCutcheon v. Superior Court Pima Cnty., 723 P.2d 661 (Ariz. 1986).

that an accusation "occurs 'by either formal indictment, information, or actual restrain imposed by arrest or holding to answer.' "[88]

Having concluded that a post-accusation analysis was not warranted, the court of appeals turned to a pre-accusation analysis.[89] Because Medina "failed to allege or demonstrate that the State intentionally delayed to gain a tactical advantage" and failed to demonstrate sufficient prejudice, Medina was not entitled to dismissal on pre-accusation delay grounds.[90] Thus, the trial court's dismissal order was reversed and the case was remanded to the trial court.[91]

B. How State v. Medina *Got it Wrong*

The error of the *Medina* conclusion originates in the assumption that the right to a speedy trial attaches to a defendant only when "an indictment has been returned or a complaint has been filed and a magistrate has found that probable cause exists to hold the person to answer before the superior court."[92] Because this premise, and the notion that the premise is "well established law in Arizona"[93] is the foundation for the syllogism used by the court of appeals, an error in this assumption is fatal to the conclusion reached by the court of appeals.

The citations to Arizona authority provide a roadmap for evaluating how the court of appeals erred. The origin for the claim made by the court of appeals comes from a single case; *State v. Maldonado*.[94] Each of the Arizona cases relied upon by the court of appeals—*State v. Lee*, *State v. Enriquez*, *State v. Burrell*, and *State v. Jackson*—ultimately relied upon the conclusion reached in *Maldonado*. *Maldonado* did not hold that the constitutional right to a speedy trial attached only upon a finding of probable cause. *Maldonado* engaged only in a procedural analysis; evaluating comportment with the applicable rules of criminal procedure, as opposed to a constitutional analysis.

State v. Lee[95] relied upon the United States Supreme Court decision in *United States v. Marion*,[96] and the Arizona cases *Maldonado*, *State v. Brannin*[97] and *Boccelli v. State*.[98] *Marion* will be discussed in more detail below.

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[88] *Medina*, 949 P.2d at 510 (quoting *McCutcheon*, 723 P.2d at 665).
[89] *Id.* at 510.
[90] *Id.* at 511.
[91] *Id.*
[92] *See id.* at 509.
[93] *See id.*
[94] State v. Maldonado, 373 P.2d 583 (Ariz. 1962).
[95] State v. Lee, 519 P.2d 56, 60 (Ariz. 1974).
[96] United States v. Marion, 404 U.S. 307 (1971).
[97] State v. Brannin, 514 P.2d 446 (Ariz. 1973).
[98] Boccelli v. State, 508 P.2d 1149 (Ariz. 1973).

Brannin relied only upon *Maldonado* and *Boccelli*.[99] *Boccelli* engaged in only a procedural analysis.[100] Aside from *Marion*, all cases from *Lee* lead back to *Maldonado*.

State v. Enriquez relied only upon *Maldonado* and *State v. Burrell*.[101] The Arizona cases relied upon in *State v. Burrell*[102] were *Maldonado*, *Palmer v. State*,[103] and *State v. Pruett*.[104] *Palmer* cited only to *Maldonado*.[105] Similarly, *Pruett* relied only upon *Maldonado* for the premise relied upon in *Medina*.[106] *Burrell* also relied upon two federal cases; *Foley v. United States*[107] and *D'Aquino v. United States.*[108] The court noted, however, that cases from two other states—*People v. Jordan*[109] and *People v. Hildebrant*[110]—differed from its conclusion. *Enriquez*, *Burrell*, *Foley*, *D'Aquino*, *Jordan*, and *Hildebrant* all predated *Marion*. Thus, the analysis of these cases, while useful, is not dispositive in light of the guidance that is provided in *Marion*, which will be discussed further below.[111]

State v. Jackson[112] relied upon *State v. Tafoya*,[113] *State v. French*,[114] *State v. Saiz*,[115] and *State v. Tuggle*,[116] *Tafoya* relied only upon *Palmer* and *Maldonado*.[117] *French* relied only upon *Burrell*.[118] *Saiz* relied solely on *Maldonado*.[119] Finally, *Tuggle* relied upon *Palmer* and *Maldonado*.[120]

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99 *Brannin*, 514 P.2d at 448.

100 *Boccelli*, 508 P.2d at 1150.

101 State v. Enriquez, 430 P.2d 422, 424 (1967).

102 State v. Burrell, 426 P.2d 633, 634 (Ariz. 1967).

103 Palmer v. State, 407 P.2d 64 (Ariz. 1965).

104 State v. Pruett, 415 P.2d 888 (Ariz. 1966). *Burrell* incorrectly cites to the case by the name *Pruitt. Burrell*, 426 P.2d at 634).

105 *Palmer*, 407 P.2d at 67.

106 *Pruett*, 415 P.2d at 891. *Pruett* cited to additional authority to support the conclusion that "[w]e have consistently and frequently upheld an accused's right to a speedy trial in this jurisdiction." *Id.* at 890-91. However, *Maldonado* was the only case cited for the proposition relied upon by *Medina*, that "[t]he right of an accused to a speedy trial runs from the time he is held to answer by a magistrate." *Id.* at 891.

107 Foley v. United States, 290 F.2d 562 (8th Cir. 1981).

108 D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951).

109 People v. Jordan, 290 P.2d 484 (Cal. 1955).

110 People v. Hildebrandt, 129 N.Y.S.2d 48 (N.Y. Cnty. Ct.1954).

111 *See infra* Part V.

112 State v. Jackson, 499 P.2d 111, 114 (Ariz. Ct. App. 1972).

113 State v. Tafoya, 454 P.2d 569 (Ariz. 1969).

114 State v. French, 453 P.2d 505 (Ariz. 1969).

115 State v. Saiz, 447 P.2d 541 (Ariz. 1968).

116 State v. Tuggle, 418 P.2d 372 (Ariz. 1966).

117 *Tafoya*, 454 P.2d at 573.

118 *French*, 453 P.2d at 507.

119 *Saiz*, 447 P.2d at 543.

120 *Tuggle*, 418 P.2d at 374.

As this history makes clear, when each of the citation paths is followed to their end, each path ends at a single origin point, *Maldonado*. However, *Maldonado* does not set the precedent that *Medina* attributed to it.

In *Maldonado*, the Arizona Supreme Court analyzed only the boundaries of the procedural protection provided for speedy trial.[121] The court analyzed the applicable rule of criminal procedure and determined, "[b]ut Rule 236 on its face applies only 'when a person has been held to answer for an offense' and/or 'when a person has been indicted or informed against for an offense . . . .' "[122] Drawing its conclusion, the supreme court articulated that its determination was restricted to the interpretation of the procedural rule, "[a]ccordingly, we hold that in Arizona the right to a speedy trial *as that term is legislatively defined in Rule 236* commences at the time an accused has been 'held to answer' by a magistrate."[123]

The cases that followed *Maldonado* were not as careful with word selection. In *Palmer* the Arizona Supreme Court cited to *Maldonado* to support the proposition, "[w]e have held the right to speedy trial attaches at the time the accused is held to answer."[124] Similarly, the supreme court stated in *Pruett*, "[t]he right of an accused to a speedy trial runs from the time he is held to answer by a magistrate."[125] In *Tuggle*, the supreme court ruled that *Palmer* "reaffirmed our holding in [*Maldonado*], that the right to a speedy trial attaches at the time the accused is held to answer . . . ."[126] None of these cases discussed the fact that *Maldonado* was merely a procedural analysis.

A year later both *Enriquez* and *Burrell* applied *Maldonado* in a fashion that made it of constitutional import:

> The rule is firmly established that the protection afforded by Art. 2, § 24 of the Arizona Constitution and by the Sixth Amendment right under the United States Constitution to a speedy trial, has no application until after a prosecution is commenced or an accused is held to answer.[127]

Thus, by the time that *Enriquez* and *Burrell* had been decided, in 1967, the Arizona Supreme Court had, through a series of small misstatements, expanded

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[121] State v. Maldonado, 373 P.2d 583, 585-86 (Ariz. 1962). The procedural protection is presently codified in Rule 8 of the Arizona Rules of Criminal Procedure.

[122] *Id.* at 586.

[123] *Id.* (emphasis added).

[124] Palmer v. State, 407 P.2d 64, 67 (Ariz. 1965) (citing *Maldonado*, 373 P.2d at 586).

[125] State v. Pruett, 415 P.2d 888, 891 (Ariz. 1966) (citing *Maldonado*, 373 P.2d at 586).

[126] State v. Tuggle, 418 P.2d 372, 374 (Ariz. 1966) (internal citation omitted).

[127] State v. Enriquez, 430 P.2d 422, 424 (Ariz. 1967) (quoting State v. Burrell, 426 P.2d 633, 634 (Ariz. 1967)) (citing *Maldonado*, 373 P.2d at 586); *Burrell*, 426 P.2d at 634 (citing *Maldonado*, *Palmer*, and *Pruett* as Arizona authority).

Maldonado beyond the very carefully chosen language within the text. What had been only an interpretation of a procedural protection had developed into an authoritative limitation of a constitutional right.

However, the misinterpretation of *Maldonado* had become so prevalent that by the time the *Medina* court analyzed the question of whether a complaint was an accusation, the actual holding of *Maldonado* had been lost. Over time, a procedural interpretation had become an interpretation of a constitutional right. This misinterpretation was never revisited in the wake of *Marion*.

The *Medina* court had identified one case, *State v. Roberson*,[128] which needed to be distinguished.[129] In *Roberson* Division 2 ruled:

> It is abundantly clear . . . that under both rules the 150-day period does not commence until the defendant has become an "accused," by virtue of the presentment of an indictment or the filing of a complaint. We believe that appellant's reliance on *State v. Branin* . . . is misplaced. Although the court in *Brannin* did hold that the Sixth Amendment right to a speedy trial commences when a person is arrested, it is clear that the court arrived at this conclusion through an erroneous reading of *United States v. Marion*. We note that the Arizona Supreme Court has impliedly corrected the error in Brannin in two later cases, *State v. Lee*, and *State v. Myers*. As *United States v. Marion*, *supra*, states, the right to a speedy trial does not commence until a person in some way becomes an "accused." This does not occur in the federal system until an indictment or information has been filed, or until he has been arrested and held to answer on a criminal charge. Of course, in Arizona the filing of a complaint is an "accusation" and triggers the Sixth Amendment speedy trial requirements.[130]

State v. Myers, relied upon by the *Roberson* court, had held quite simply, "[t]he defendant did not become an 'accused' until 15 November 1975, when the prosecution was initiated by complaint filed in the Superior Court."[131]

The *Medina* court distinguished *Roberson* and *Myers* by arguing that *Myers* "simply had no reason to draw a distinction between the time the complaint was filed and the time the defendant was held to answer."[132] *Medina*

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[128] State v. Roberson, 576 P.2d 531 (Ariz. Ct. App. 1978).

[129] State v. Medina, 949 P.2d 507, 510 (Ariz. Ct. App. 1997).

[130] *Roberson*, 576 P.2d at 532-33 (internal citations omitted).

[131] State v. Myers, 569 P.2d 1351, 1353 (Ariz. 1977).

[132] *Medina*, 949 P.2d at 510.

noted that its conclusion was consistent with more recent dicta in *McCutcheon v. Superior Court*.[133]

The criticism lodged towards *Myers* is fair. In *Myers*, the complaint was filed on November 15, 1975.[134] The arraignment occurred on December 3, 1975, and trial began on August 10, 1976.[135] The delay between the complaint and trial was due to a competency hearing and other unchallenged continuances.[136] Because the arraignment occurred soon after the complaint, and because the trial occurred in a timely fashion as well, there was no need to differentiate between the complaint and any other occurrence. However, the *Medina* court's reliance upon *McCutcheon* suffers from the exact same criticism directed towards *Roberson* and *Myers*; *McCutcheon* had no reason to address any distinction between the complaint and indictment.

In *McCutcheon*, the defendant was in custody for a different offense when the Tucson Police Department developed sufficient evidence to believe the defendant had committed a robbery.[137] A criminal complaint was filed in justice court on May 21, 1984, and a warrant was issued, but McCutcheon was not served with the warrant.[138] Approximately one month later, on June 28, 1984, McCutcheon was charged by indictment with the same offense and another warrant was issued.[139] The Supreme Court's recitation of the language relied upon by *Medina* was simply in the recitation of background authority before it began its analysis.[140] Nothing indicates that the *McCutcheon* court had "reason to draw a distinction between the time the complaint was filed and the time the defendant was held to answer."[141] There is nothing in *McCutcheon* to indicate the defendant argued that the complaint constituted the point of accusation or that the Arizona Supreme Court intended to answer the question.[142] Moreover, as the court analyzed the delay under the *Barker v. Wingo*[143] framework, there is nothing to indicate that a one-month difference between the complaint and indictment would have made any difference in the evaluation of a post-accusa-

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133 *Id.*; *see also* McCutcheon v. Superior Court Pima Cnty., 723 P.2d 661 (Ariz. 1986).

134 *Myers*, 569 P.2d at 1352.

135 *Id.*

136 *Id.*

137 *McCutcheon*, 723 P.2d at 663.

138 *Id.*

139 *Id.*

140 *See id.* at 665.

141 *See* State v. Medina, 949 P.2d 507, 510 (Ariz. Ct. App. 1997).

142 *See McCutcheon*, 723 P.2d at 665.

143 Barker v. Wingo, 407 U.S. 514(1972).

tion delay analysis.[144] Finally, *McCutcheon* is silent as to who obtained the complaint.[145]

The decision in *Medina* relied almost exclusively upon *Maldonado*. However, *Medina* applied *Maldonado* and its progeny improperly. *Maldonado* never limited a constitutional right; rather, *Maldonado* clarified the procedural protections in place at the time. However, *Maldonado* was then gradually misinterpreted in a series of cases predating *Marion*. The conclusions drawn from *Maldonado* and its progeny are unfounded.

The decision of the court of appeals to selectively apply criticism to differing views is also improper. While the court's criticism of *Roberson* and *Myers* may have been fair, the court failed to realize that its own reliance upon *McCutcheon* suffered from the same logical flaw. The logical underpinnings of *Medina* are flawed. Thus, it is necessary to start anew and determine if the complaint, as presently used, constitutes an accusation for purposes of the Sixth Amendment's speedy trial provision.

V. Finding an Appropriate Test: What Does it Mean to be an Accused?

By evaluating the reasoning used in United States Supreme Court cases, we can uncover a method that can be used to assess when a defendant has been accused of an offense. This method involves the use of two tests. First, if an action satisfies an applicable statute of limitations, the action is an accusation. Second, where there is no applicable statute of limitations, a person has been accused when the prosecutor engages in an official act that designates the person as an accused.

In *United States v. Marion*, the United States Supreme Court confronted the issue of whether the Sixth Amendment's guarantee of a speedy trial extended to circumstances where the person had not yet been accused of an offense.[146] In 1970, the two appellees were charged by indictment with offenses committed between 1965 and 1966.[147] The appellees moved to dismiss the case due to the delay in bringing the indictment.[148] The district court dismissed the indictment in light of the delay and the United States appealed.[149] Reviewing the dismissal, the Supreme Court concluded that the Sixth Amendment did not apply to pre-accusation delays.[150] Rather, pre-accusation delays

144 *See McCutcheon*, 723 P.2d at 665.
145 *See id.* at 663.
146 United States v. Marion, 404 U.S. 307, 308-09 (1971).
147 *Id.*
148 *Id.* at 309-10.
149 *Id.* at 310-11.
150 *Id.* at 320.

are considered pursuant to the Due Process clause.[151] Because the appellees had not presented sufficient evidence of prejudice at the time of the appeal, the appellees had failed to adequately raise the Due Process claim.[152] Thus, the Supreme Court reversed the judgment of the district court.[153]

The Supreme Court noted that in light of the impact that arrest would have on an individual, "it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment."[154] However, the Court did not create a mandate, "[i]nvocation of the speedy trial provision thus need not await indictment, information, or other formal charge."[155] Instead, the Court relied upon statutes of limitations as "the primary guarantee against bringing overly stale criminal charges."[156] Concluding its analysis on the Sixth Amendment issue, the Court commented:

> Since appellees rely only on potential prejudice and the passage of time between the alleged crime and the indictment . . . we perhaps need go no further to dispose of this case, for the indictment was the first official act designating appellees as accused individuals and that event occurred within the statute of limitations.[157]

The Supreme Court again commented on the import of the statute of limitations in *United States v. Lovasco*:

> We went on to note that statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide "the primary guarantee, against bringing overly stale criminal charges." But we did acknowledge that the "statute of limitations does not fully define (defendants') rights with respect to the events occurring prior to indictment," and that the Due Process Clause has a limited role to play in protecting against oppressive delay.[158]

The language from these two cases can provide guidance for courts to determine when a person becomes an accused. *Marion* found the defendants were

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[151] *Id.* at 324.
[152] *Id.* at 325-26.
[153] *Id.* at 326.
[154] *Id.* at 320.
[155] *Id.* at 321.
[156] *Id.* at 322 (quoting United States v. Ewell, 383 U.S. 116, 122 (1966)).
[157] *Id.* at 323-24.
[158] United States v. Lovasco, 431 U.S. 783, 789 (1977) (internal citations omitted).

accused of a crime when the indictment occurred because the indictment was: (1) an official act by the prosecutor; (2) the indictment classified the defendants as accused individuals; and (3) the indictment satisfied the statute of limitations.[159] The repeated focus on the statute of limitations in *Lovasco* indicates that a statute of limitations carries particular import in the analysis. From these cases, two easy tests can be drawn. Where there is a statute of limitations that would protect a defendant, conduct that satisfies the statute of limitations, constitutes an accusation. Where there is no applicable statute of limitations,[160] a person has been accused if: (1) the prosecution has engaged in an official act; and (2) the act designates the person as an accused.[161] These tests, when taken together, provide a reliable and repeatable method for determining if and when a person has been accused of an offense.

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[159] Marion, 404 U.S. at 313-25. Who constitutes "the state" may be an area for further discussion. Law enforcement officers are considered a part of "the state" for a number of issues. *E.g.*, Kyles v. Whitley, 514 U.S. 419, 438 (1995) (disclosure context); State v. Meza, 50 P.3d 407, 416 (Ariz. Ct. App. 2002) (restitution context); *see also* discussion *infra* part VI. This article, however, interprets "the state" as a reference to "the prosecution." This is done in consideration of right to counsel jurisprudence, as addressed in part VI, *infra*. Thus, it will be argued that complaints filed by prosecutors are fundamentally different from complaints filed by law enforcement officers. This is because prosecutors very clearly meet the notion of "the state" whereas law enforcement officers constitute a closer question. However, whether a complaint filed by law enforcement officers would also constitute an "official act of the state" is a question open for further discussion.

[160] *See Lovasco*, 431 U.S. at 789; *see also, e.g.*, Kentucky, KY. REV. STAT. ANN. § 500.050(1) (West 2006) (no statute of limitations for felony offenses); Maryland, Clark v. State, 774 A.2d 1136, 1144 n.8 (Md. 2001) ("Maryland has no statute of limitations on felonies or penitentiary misdemeanors beyond that imposed by the life of the offender."); North Carolina, State v. Taylor, 713 S.E.2d 82, 90 (N.C. Ct. App. 2011) (internal citation and quotation marks omitted) ("In this State no statute of limitations bars the prosecution of a felony."); South Carolina, *see* State v. Gregory, 4 S.E.2d 1, 7 (S.C. 1939) (noting no statute of limitations for embezzlement); Pierce v. Pierce, 25 Va. Cir. 348, 2 n.1 (Va. Cir. Ct. 1991) (noting that at common law there was no statute of limitations and it appears South Carolina has not enacted a statute of limitations); West Virginia, State v. Parsons, 589 S.E.2d 226, 237 (W. Va. 2003) ("West Virginia has no statute of limitations affecting felony prosecutions.") (internal citations and quotation marks omitted); Wyoming, Story v. State, 721 P.2d 1020, 1027 (Wyo. 1986) ("Wyoming is one of the two states which has no statute of limitations for any criminal case."); *see also* Jodi Leibowitz, Note, *Criminal Statutes of Limitations: An Obstacle to the Prosecution and Punishment of Child Sexual Abuse*, 25 CARDOZO L. REV. 907, 912 n.25 (2003) (noting that "South Carolina and Wyoming have no statute of limitations for any crime" and "Kentucky and Maryland have no limitation period for felony offenses"); Gerald D. Robin & Richard H. Anson, *Is Time Running Out on Criminal Statutes of Limitations?*, 47 CRIM. L. BULL. 1 (2011) (listing Kentucky, North Carolina, South Carolina, Virginia, West Virginia and Wyoming as six states without a statute of limitations and noting Maryland has a limitations statute on only one felony offense).

[161] *See Lovasco*, 431 U.S. at 788. It would also not be unreasonable to apply this test to scenarios where a statute of limitations exists but there is no limitations period for the type of offense charged. *E.g.*, ARIZ. REV. STAT. ANN. § 13-107(A) (West, Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature) (homicide in Arizona).

VI. When Related Rights Come into Play: Right to an Attorney

We can also look to precedents about non-speedy trial issues to help determine when a person becomes an accused. While federal courts have held that the interpretation of the Sixth Amendment right to counsel does not evaluate the same considerations as speedy trial considerations,[162] jurisprudence related to the right to an attorney is instructive, if not binding, as to how the point of accusation should be determined. Moreover, right to counsel cases offer more definitive guidance regarding the second test proposed by this article.

In *Rothgery v. Gillespie County, Texas*, the United States Supreme Court evaluated whether the right to counsel attached only after a prosecutor was aware of initial proceedings against a defendant.[163] The Supreme Court ruled that there was no requirement that prosecutors be aware of proceedings for the right to counsel to attach.[164] In *Rothgery*, police officers arrested the defendant for being a felon in possession of a firearm and the officers subsequently took the defendant to an initial hearing where an initial determination of probable cause was made and bail was set.[165] However, Rothgery had never been convicted of a felony.[166] The criminal background check that had been performed by the police officers had erroneously stated that Rothgery had a prior felony conviction.[167] At the first hearing, Rothgery made several requests for a lawyer, which he did not receive.[168] Several months later, the prosecutor obtained an indictment and the bail amount was increased.[169] When Rothgery could not afford the increased bail, he was placed in jail, where he stayed for three weeks before he finally received a lawyer.[170] The lawyer quickly got Rothgery released from jail and obtained a dismissal of the case in light of the fact that Rothgery was not a felon.[171] Rothgery then sued the county, arguing that if he had been given an attorney at the time of the initial hearing he never would have been indicted, arrested upon the indictment, or placed in custody for three weeks.[172]

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[162] *See* United States v. Gouveia, 467 U.S. 180, 190 (1984) (holding that speedy trial jurisprudence "is not relevant to a proper determination of when the right to counsel attaches").

[163] Rothgery v. Gillespie Cnty., Tex., 554 U.S. 191,194-95 (2008).

[164] *Id.* at 195.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.* at 196.

[169] *Id.*

[170] *Id.* at 196-97.

[171] *Id.*

[172] *Id.* at 197.

The Supreme Court noted that the right to counsel, a Sixth Amendment right, attached when a person became an "accused" and thus "it does not attach until a prosecution is commenced."[173] A prosecution is commenced at "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment . . . ."[174] The Court stated:

> The rule is not "mere formalism," but a recognition of the point at which "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[175]

The Court ruled that when an accusation is filed before a judicial officer and an initial arraignment is held which could place restrictions on a person's liberty, "the government's commitment to prosecute is sufficiently concrete . . . ."[176] This conclusion "is equally true whether the machinery of prosecution was turned on by the local police or the state attorney general."[177] Thus, the United States Supreme Court concluded that Rothgery should have been assigned an attorney at the very first appearance, months before the indictment.[178]

In *United States v. Boskic*, the First Circuit reviewed whether the Sixth Amendment right to counsel applied in the federal system, when law enforcement officers filed a criminal complaint against a defendant.[179] The First Circuit Court of Appeals recognized that it is "well settled that the Sixth Amendment right may attach before a defendant first faces a judicial officer."[180] Specifically noted were "the return of an indictment or the filing of an information" as points when the right to counsel was triggered even though a defendant was not before a judicial officer.[181] The court stated in footnote that an indictment and information "must be signed by an attorney for the government" and thus required prosecutorial involvement.[182] Because the fed-

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[173] *Id.* at 198. (internal quotation marks omitted) (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)).

[174] *Id.* at 198 (internal quotation marks omitted) (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984)).

[175] *Id.* (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

[176] *Id.* at 207.

[177] *Id.* at 208.

[178] *Id.* at 213.

[179] United States v. Boskic, 545 F.3d 69, 81-84 (1st Cir. 2008).

[180] *Id.* at 82.

[181] *Id.*

[182] *Id.* at 82 n.13.

eral criminal complaint process did not require the participation of a prosecutor, "[i]t is therefore unlike the procedures for securing an indictment or information, which require the participation of a prosecutor and, in that sense, manifest the 'commitment to prosecute' that is critical to the Supreme Court's Sixth Amendment jurisprudence."[183] Thus, the First Circuit found that the criminal complaint in the federal system did not trigger the right to counsel.[184]

The right to counsel jurisprudence demonstrates how the second test proposed herein would operate. The argument used by the Supreme Court and First Circuit relies on the premise that when the prosecutor helps bring an action, through indictment or information, the right to counsel initiates at the point the indictment or information is returned, regardless of whether the defendant is brought before a judicial officer. This premise is also reflected in speedy trial jurisprudence.[185] Applying this rationale to the second test proposed herein, where there is no statutory limitation on the initiation of prosecution, a person would still be accused of a crime when the prosecution has designated its commitment to prosecution. This commitment to prosecution is akin to what *Marion* referenced as an "official act" by the prosecution. Where the prosecution has been involved in accusing a person of an offense, the prosecution has committed itself to prosecution for right to counsel purposes. Thus, where the prosecution has been involved in accusing a person of an offense, the prosecution has engaged in an official act for speedy trial purposes.

VII. Other Jurisdictions

Several jurisdictions have confronted the question of whether or not a complaint is an accusation. Some jurisdictions have reached the same conclusion as Arizona and some have held differently. However, evaluation of these jurisdictions demonstrates the reliability of the method proposed herein.

A. Federal Courts: Different Role of a Complaint

Medina relied upon *Marion* for the proposition that the right to a speedy trial does not attach in Arizona until an indictment has been returned or a defendant has been held to answer on a criminal complaint.[186] This reliance was misplaced, however, because complaints operate differently in the federal system. Specifically, complaints do not satisfy the statute of limitations and are not typically filed by prosecutors.

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[183] *Id.* at 83 (citing *Rothgery*, 554 U.S. at 211).

[184] *Id.* at 84.

[185] *See e.g.*, Doggett v. United States, 505 U.S. 647, 652 (1992) (contemplating delay between indictment and arrest as post-accusation delay).

[186] State v. Medina, 949 P.2d 507, 509 (Ariz. Ct. App. 1997).

Under the first test, conduct that satisfies an applicable statute of limitations is an accusation. The general statute of limitations in the federal system provides, "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."[187]

Thus, under the federal system, the filing of a complaint has no impact on the statute of limitations; the state satisfies the statute of limitations only when it files an indictment or information.[188] A complaint filed in the federal system would not be an accusation under the first test proposed by this article.

Even if the second test proposed herein was applied to the federal system, the conclusion would be the same; complaints do not operate as accusations because complaints are not prepared and filed with prosecutorial involvement. Regarding the nature of a complaint in the federal system, the Federal Rules of Criminal Procedure provide, "[t]he complaint is a written statement of the essential facts constituting the offense charged. Except as provided in Rule 4.1, it must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer."[189]

Fundamental to the federal criminal complaint is the notion of who prepares a criminal complaint. In the federal system, a law enforcement officer prepares and submits a criminal complaint.[190] Law enforcement officers are responsible for the preparation and submission of complaints because the primary purpose of a complaint in the federal system is to permit the issuance of an arrest warrant.[191] Thus, under the second test proposed herein, a complaint

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[187] 18 U.S.C. § 3282(a) (2012); *see also* 18 U.S.C. § 3286(a) (2012) (imposing eight year limitation for certain terrorism offenses "unless the indictment is found or the information is instituted within 8 years after the offense was committed").

[188] *Cf.* Jaben v. United States, 381 U.S. 214, 215-21 (1965) (evaluating tax case where the statute of limitations expressly authorized the government to toll the six year statute of limitations if a complaint was timely filed).

[189] FED. R. CRIM. P. 3.

[190] *E.g.*, Giordenello v. United States, 357 U.S. 480, 481 (1958) ("This warrant, issued under Rules 3 and 4 of the Federal Rules of Criminal Procedure, was based on a written complaint, sworn to by [Agent] Finley [of the Federal Bureau of Narcotics.]") (citation omitted); Gaither v. United States, 413 F.2d 1061, 1075 (D.C. Cir. 1969) ("After appellants were arrested, the arresting officer swore out a complaint against them before a deputy clerk of the district of the District of Columbia Court of General Sessions.").

[191] FED. R. CRIM. P. 4(a) ("If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it."); *Giordenello*, 357 U.S. at 486 ("The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant [for arrest] exists."); *Gaither*, 413 F.2d at 1076 ("The principal function of a complaint 'is

is still not an accusation because the complaint does not constitute an official act by the prosecutor.

B. State Jurisdictions

Of the states that have addressed the specific question of whether or not a complaint constitutes an accusation, there are two conclusions commonly reached. A number of states expressly hold that a complaint is an accusation for Sixth Amendment purposes. Conversely, a number of states expressly hold that a complaint is not an accusation for Sixth Amendment purposes. Aside from these two categories, a number of states have expressly avoided answering the constitutional question.[192] If we analyze those authorities that have addressed the issue, we see that the test articulated herein is consistent with the conclusions reached in most of these jurisdictions.

1. Jurisdictions Which Hold a Complaint is an Accusation

Jurisdictions that consider a complaint an accusation include: Alaska,[193] Colorado,[194] Idaho,[195] Massachusetts,[196] and Montana.[197] Other jurisdictions,

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as a basis for an application for an arrest warrant.'") (citation omitted); *accord* United States v. Duvall, 537 F.2d 15, 22 (2d Cir. 1976) (quoting *Gaither*, 413 F.2d at 1076).

[192] States that have avoided addressing the question include: Nebraska, State v. Blakeman, 744 N.W.2d 717, 720-22 (Neb. Ct. App. 2008) (holding that a complaint is not an accusation for the purposes of a statute which requires trials within six months of the indictment, but refusing to address the constitutional issue as it was not raised on appeal); Rhode Island, State v. McDonough, 347 A.2d 41, 44 (R.I. 1975) ("Assuming without deciding that defendant became an 'accused' upon the issuance of the complaint and warrant, our concern in reviewing defendant's sixth amendment claim would involve the period of delay . . . .").

[193] Yarbor v. State, 546 P.2d 564, 567 (Alaska 1976).

[194] People v. Velasquez, 641 P.2d 943, 951 (Colo. 1982).

[195] Estes v. State, 725 P.2d 135, 153 (Idaho 1986); Jacobson v. Winter, 415 P.2d 297, 300 (Idaho 1966).

[196] Commonwealth v. Butler, 985 N.E.2d 377, 379 (Mass. 2013).

[197] State v. Larson, 623 P.2d 954, 957-58 (Mont. 1981) ("The right to a speedy trial is guaranteed to an 'accused' by the Montana and United States constitutions. Consequently, the protection afforded by the guarantee is activated when a criminal prosecution has begun and extends to those persons who have been formally accused or charged in the course of that prosecution whether that accusation be by arrest, the filing of a complaint, or by indictment or information."); *accord* State v. Ariegwe, 2007 MT 204, ¶ 42, 338 Mont. 442, 458, 167 P.3d 815, 831 (quoting *Larson*, 623 P.2d at 957-58); State v. Stops, 2013 MT 131, ¶ 25, 370 Mont. 226, 231, 301 P.3d 811, 817 (citing *Ariegwe* and *Larson*).

including Minnesota,[198] Nevada,[199] Ohio,[200] Wisconsin,[201] and Wyoming[202] have not specifically addressed the question, but language in the decisions would seem to indicate that the jurisdiction would consider complaints as accusations. This article will review some of these jurisdictions to evaluate the reasoning used by the courts. Massachusetts was the most recent evaluation of when a person becomes accused, and thus will be discussed first. After discussing Massachusetts, we will evaluate the conclusions reached in Alaska, Colorado, Idaho, and Montana.

a. Massachusetts

Massachusetts recently engaged in a relatively complete analysis of the issue in *Commonwealth v. Butler*.[203] The Massachusetts Supreme Court began from the understanding that arrest or indictment clearly triggered the speedy trial clock, but whether a complaint triggered speedy trial protections was less clear.[204] The court recognized that "[t]his ambiguity stems from the 'interchangeable use of the terms "indictment" and "filing of charges."' "[205] The *Butler* court noted, however, that United States Supreme Court precedent had repeatedly noted that the speedy trial protections would be triggered by "formal accusation[s]" other than indictment or information.[206] After considering the lengthy history of disagreement on this topic, the Massachusetts Supreme Court ruled:

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198 State v. Knox, 250 N.W.2d 147, 156 (Minn. 1976) ("The Sixth Amendment guaranty of a speedy trial becomes operative upon the accusation of the defendant. Such accusation occurs not only by indictment or complaint, but also by arrest.").

199 Sheriff, Clark Cnty. v. Berman, 659 P.2d 298, 301 (Nev. 1983) ("The Sixth Amendment guarantee of a speedy trial attaches once a putative defendant is 'accused' by arrest, indictment, or the filing of a criminal complaint, whichever comes first.").

200 State v. Azbell, 112 Ohio St. 3d 300, 304, 2006-Ohio-6552, 859 N.E.2d 532, 536, at ¶ 21 ("Therefore, we hold that for purposes of calculating speedy-trial time pursuant to R.C. 2945.71(C), a charge is not pending until the accused has been formally charged by a criminal complaint or indictment, is held pending the filing of charges, or is released on bail or recognizance.").

201 State v. Lemay, 455 N.W.2d 233, 236 (Wis. 1990) ("[Defendant] became the accused when the complaint was filed and a warrant issued . . . ."); *accord* State v. Blanck, 2001 WI App 288, ¶ 19, 249 Wis. 2d 364, 375, 638 N.W.2d 910, 916 (relying on *Lemay*).

202 Sodergren v. State, 715 P.2d 170, 177-78 (Wyo. 1986) (evaluating delay between complaint and trial).

203 Commonwealth v. Butler, 985 N.E.2d 377 (Mass. 2013).

204 *Id.* at 381.

205 *Id.* at 382 (quoting Rashad v. Walsh, 300 F.3d 27, 36 (1st Cir. 2002) (in turn quoting United States v. MacDonald, 456 U.S. 1, 6–7 (1982))).

206 *Id.* at 381(citing Doggett v. United States, 505 U.S. 647, 655 (1992); United States v. Marion, 404 U.S. 307, 321, (1971)).

> We conclude that a defendant's right to a speedy trial, at least under art. 11, attaches when a criminal complaint issues. Therefore, arrest, indictment, or a criminal complaint issued pursuant to Massachusetts law, whichever comes first, will start the speedy trial clock. Any cases to the contrary are no longer good law.[207]

Notable to the court was the fact that in Massachusetts a criminal complaint was a formal charging document pursuant to the Massachusetts Rules of Criminal Procedure.[208] "The fact that a complaint may be followed by an indictment . . . does not render a complaint any less of a formal accusation."[209] The Massachusetts court gave the greatest weight to the fact that a person charged by complaint still faces many of the concerns that the right to a speedy trial is meant to guard against, "anxiety, concern, economic debilitation, public scorn and restraint on liberty . . . ."[210] Accordingly, the court found the only logical conclusion that could be reached was to trigger speedy trial protections upon the issuance of a complaint.[211] While the Massachusetts Supreme Court did not go so far as to articulate a test, the factors considered by the court reflect the two tests proposed herein.

b. Alaska

The Alaska Supreme Court ruled that a complaint is an accusation for Sixth Amendment purposes in *Yarbor v. State*.[212] In *Yarbor*, the defendant wanted the Alaska Supreme Court to attach the right to speedy trial at the point "when the state has acquired sufficient evidence to charge an individual with a crime."[213] The Alaska Supreme Court rejected this contention reasoning that such an interpretation could have adverse impacts on defendants and the state alike.[214] Specifically, the court noted that additional time allowed for prosecutorial reflection and could lead to exculpatory evidence, either of which might deter charges.[215] The court found important the protection provided by the statute of limitations in Alaska.[216] In light of the policy reasons and the

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207 *Id.* at 383.

208 *Id.* (citing MASS. R. CRIM. P. 3(a)).

209 *Id.*

210 *Id.* (internal quotation marks omitted) (quoting Commonwealth v. Gove, 320 N.E.2d 900, 907 (Mass. 1974)).

211 *Id.*

212 Yarbor v. State, 546 P.2d 564, 567 (Alaska 1976).

213 *Id.* at 566.

214 *Id.*

215 *Id.*

216 *Id.* at 567.

statutory protection, the Alaska Supreme Court concluded, "we now join our sister states in holding that the right to a speedy trial does not attach before the defendant becomes formally accused—that is, the subject of a filed complaint or an arrest."[217]

Alaska's focus on the protection provided by the applicable statute of limitations provides insight as to Alaska's decision. The statute of limitations first sets forth a list of offenses that may be prosecuted at any point, including murder, sexual abuse of a minor, and kidnapping.[218] The general statute of limitations provides:

> Except as otherwise provided by law or in (a) of this section, a person may not be prosecuted, tried, or punished for an offense unless the indictment is found or the information *or complaint is instituted* not later than
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> (1) 10 years after the commission of a felony offense in violation of [enumerated statutes]; or
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> (2) five years after the commission of any other offense.[219]

The Alaska statute of limitations is satisfied the moment a complaint is filed. Under the first test proposed in this article, a complaint is an accusation if it satisfies an applicable statute of limitations. Applying this test, a complaint in Alaska is an accusation because it satisfies the statute of limitations. Thus, while the Alaska Supreme Court did not articulate the test proposed herein, its decision is consistent with the test.

c. Colorado

In *People v. Velasquez*, the Colorado Supreme Court determined when a defendant was accused of a crime for Sixth Amendment purposes. Interestingly, there was little evaluation of why a complaint constituted a formal accusation.[220] Rather, the court simply noted, "[t]he constitutional right to a speedy trial attaches when a defendant is formally accused by a charging document, such as a criminal complaint, information or indictment . . . ."[221] Because there was less than ten months passed between the filing of the complaint and the trial date, the Colorado Supreme Court found the delay "was neither excessive

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[217] *Id.* (footnotes omitted); *accord* Adams v. State, 598 P.2d 503, 506 (Alaska 1979) (quoting *Yarbor*, 546 P.2d at 566-67); State v. Mouser, 806 P.2d 330, 339 (Alaska Ct. App. 1991) (quoting *Yarbor*, 546 P.2d at 567).

[218] ALASKA STAT. § 12.10.010(a) (2012).

[219] § 12.10.010(b) (emphasis added).

[220] People v. Velasquez, 641 P.2d 943, 951 (Colo. 1982).

[221] *Id.*

nor unjustified."[222] Accordingly, the court rejected Velasquez's speedy trial claims.[223] While there was limited discussion regarding why the court considered a complaint an accusation, the holding has been repeatedly relied upon in Colorado.[224]

Colorado's statute of limitations supports the conclusion reached in *Velasquez*. The statute provides:

> Except as otherwise provided by statute applicable to specific offenses, delinquent acts, or circumstances, no adult person or juvenile shall be prosecuted, tried, or punished for any offense or delinquent act unless the indictment, information, *complaint*, or petition in delinquency is filed in a court of competent jurisdiction or a summons and *complaint* or penalty assessment notice is served upon the defendant or juvenile within the period of time after the commission of the offense or delinquent act as specified [in remainder of statute].[225]

Thus, in Colorado, a complaint is an accusation. Accordingly, the conclusion reached by the Colorado Supreme Court is consistent with the test proposed herein.

d. Idaho

The Idaho Supreme Court came to an identical decision in *Jacobson v. Winter*.[226] In *Jacobson,* the court addressed "whether, when an accused is incarcerated in the state penitentiary, the time intervening between the filing of the criminal complaint to the time he is arrested, should be computed in determination of whether the accused was being afforded a speedy trial."[227] The trial court concluded that such time counted towards a speedy trial determination.[228] The Supreme Court noted that the majority rule was that a person who was incarcerated was still entitled to a speedy trial.[229] The Supreme Court, thus, needed to determine if a complaint was an accusation. The court concluded, "[a] party is accused when a criminal complaint is filed against

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[222] *Id.*

[223] *Id.*

[224] *See, e.g.*, People v. Chavez, 779 P.2d 375, 376, 378 (Colo. 1989) (affirming dismissal of case after two year delay after complaint filed); *see also, e.g.*, People v. Bost, 770 P.2d 1209, 1216 (Colo. 1989) (quoting *Velasquez*, 641 P.2d at 951).

[225] COLO. REV. STAT. § 16-5-401(1)(a) (2013) (emphasis added).

[226] Jacobson v. Winter, 415 P.2d 297 (Idaho 1966).

[227] *Id.* at 299.

[228] *Id.*

[229] *Id.* at 300.

him."[230] In fact, the court went so far as to decide that, "no logical conclusion can be reached other than that the time within which an accused is to be secured in his right to a speedy trial must be computed from the time the complaint is filed against him."[231] In light of the delay, and the lack of any justification for the delay, the Supreme Court affirmed the trial court's dismissal.[232] In *Estes v. State*, without citation to *Jacobson*, the Idaho Supreme Court again held, "[t]he time for computing delay, for purposes of determining whether an accused was denied the right to a speedy trial, begins on the date the criminal complaint against the accused was issued."[233]

The conclusion reached by the Idaho Supreme Court is bolstered by Idaho's statute of limitations. The general statute of limitations regarding felonies provides:

> A prosecution for any felony other than those specified in [the previous section providing exceptions] must be *commenced by the filing of the complaint* or the finding of an indictment within five (5) years after its commission provided however, a prosecution under [a specified statute] must be commenced within three (3) years after the date of initial disclosure by the victim.[234]

Similarly, a complaint satisfies the statute of limitations regarding misdemeanors.[235] Because a criminal complaint satisfies the Idaho statute of limitations, the complaint would constitute an accusation under the test proposed herein.

e. Montana

The Montana Supreme Court determined that a complaint was an accusation for speedy trial purposes in *State v. Larson*.[236] In *Larson*, the state charged the defendant with arson by complaint.[237] After the case toiled for more than a year, the defendant moved to dismiss the case, which the trial court granted.[238] Although the State argued that the speedy trial clock did not initiate until Larson was arrested, the Montana Supreme Court concluded that Larson was

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230 *Id.*

231 *Id.*

232 *Id.*

233 Estes v. State, 725 P.2d 135, 153 (Idaho 1986) ("The time for computing delay, for purposes of determining whether an accused was denied the right to a speedy trial, begins on the date the criminal complaint against the accused was issued.").

234 IDAHO CODE ANN. § 19-402 (2008).

235 IDAHO CODE ANN. § 19-403 (2008).

236 State v. Larson, 623 P.2d 954, 957-58 (Mont. 1981).

237 *Id.* at 956.

238 *Id.* at 957.

accused when the complaint was filed.[239] The court focused on the statutory scheme in place for the initiation of prosecutions:

> In this State a criminal prosecution may be commenced by a complaint, information or indictment. All three methods formally charge an individual with a particular crime and "accuses" that person with the commission of the offense. The State chose to institute its prosecution against defendant by filing a complaint on April 13, 1979, charging him with felony arson and criminal mischief. Having been charged with the particular crimes, defendant is recognized as an accused on this date whereupon the speedy trial clock begins to run.[240]

After evaluating the remaining factors of the *Barker* test, the court affirmed the dismissal.[241]

The reasoning of the Montana Supreme Court reflects the tests articulated herein. The court focused on the initiation of charges under Montana's statutory scheme and the involvement of the prosecution. Applying the first test proposed in this article, the same conclusion would be reached. The Montana statute of limitations sets forth time limitations by which certain charges must be "commenced."[242] The statute expressly defines how a prosecution is commenced, "[a] prosecution is commenced either when an indictment is found or an information *or complaint* is filed."[243] Because a complaint satisfies the applicable statute of limitations, a complaint constitutes an accusation.

2. Jurisdictions where a Complaint is Not an Accusation

As seen above, cases that hold a complaint is an accusation support the tests proposed herein. However, the method draws further support from jurisdictions that have concluded a complaint is not an accusation. These jurisdictions include: Delaware,[244] Georgia,[245] Illinois,[246] Maryland,[247] and

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239 *Id.* at 957-58.

240 *Id.* at 958 (internal citations omitted).

241 *Id.* at 959.

242 MONT. CODE ANN. § 45-1-205 (2013), *available at* http://leg.mt.gov/bills/mca/45/1/45-1-205.htm.

243 § 45-1-205(8) (emphasis added).

244 Preston v. State, 338 A.2d 562, 564-65 (Del. 1975).

245 Campbell v. State, 669 S.E.2d 190, 192 (Ga. Ct. App. 2008).

246 People v. Mitchell, 825 N.E.2d 1241, 1243-46 (Ill. App. Ct. 2005).

247 State v. Gee, 471 A.2d 712, 716 (Md. 1984).

Missouri.[248] In most of these, the state provides a statute of limitations and the complaints do not impact the statute of limitations in any way. Also notable is the fact that in many of these jurisdictions the complaint operates in a manner more consistent with the federal system, and thus is not an official act of the prosecutor. While we are often able to reach a definitive answer based solely on the first test, this article will often look to the second test either for illustrative purposes or because the reviewing court addressed the rationale of the second test.

a. Delaware

The Supreme Court of Delaware considered the question in *Preston v. State*.[249] Preston sold heroin to an undercover officer on February 9, 1972.[250] The officer filed a complaint and obtained a warrant on March 14, 1972.[251] The warrant was not served for eighteen months and trial was ultimately held on November 13, 1973.[252] Preston moved to dismiss the case on post-accusation delay grounds, which the trial court denied.[253] Preston raised the argument again on appeal.[254] The court expressly rejected Preston's claim that the right to a speedy trial attached when the complaint was filed and an arrest warrant was issued.[255] The court refused to extend the right to a speedy trial to a time prior to arrest.[256]

Applying Delaware's system to the tests proposed herein reaches the same conclusion reached by the Supreme Court of Delaware in *Preston*. Foremost, the filing of a complaint has no impact on Delaware's statute of limitations. Delaware's statute of limitations requires that for most felony offenses, a prosecution "must be commenced within 5 years after it is committed."[257] The statute of limitations further states, "[f]or purposes of this section, a prosecution is commenced when either an indictment is found or an information is filed."[258] In light of the statute of limitations scheme, a complaint in Delaware would not

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[248] State v. Black, 587 S.W.2d 865, 873 (Mo. Ct. App. 1979); *accord* State v. Williams, 120 S.W.3d 294, 299-300 (Mo. Ct. App. 2003) (citing Dillard v. State, 931 S.W.2d 157, 161-62 (Mo. Ct. App. 1996)); Dillard, 931 S.W.2d 157, 161-62 (Mo. Ct. App. 1996) (quoting *Black*); State v. Holmes, 643 S.W.2d 282, 285 (Mo. Ct. App. 1982) (quoting *Black*).

[249] *Preston*, 338 A.2d at 564-65.

[250] *Id.* at 564.

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.* at 565.

[256] *Id.*

[257] DEL. CODE ANN. tit. 11, § 205(b)(1) (West 2008).

[258] § 205(g).

be an accusation because it does not commence a prosecution for the purposes of the statute of limitations. Thus, the first test proposed herein would have led to the same result as the Delaware Supreme Court reached. Moreover, as *Preston* made clear, complaints are filed by law enforcement officers in Delaware.[259] Thus, under the second test, a complaint is not an official act of the prosecution. A criminal complaint in Delaware does not satisfy the statute of limitations and is therefore not an accusation. Even in the absence of statutory limitation protections, a complaint would not be an accusation because it is not an official act of the prosecution.

b. Illinois

Illinois is another example of a state where complaints are not an official act of the prosecution. Illinois considered the question in *People v. Mitchell*.[260] However, the language in *Mitchell* made clear that complaints operate differently in Illinois than they operate in Arizona:

> The logic of the rule that a mere felony complaint is not a formal accusation is particularly evident in the case at bar. Here, until the defendant was indicted, the State's Attorney was all but uninvolved in his case. The sole "accusation" against the defendant was a complaint filed by a police officer. Neither the common-law record nor the evidence from the hearing on the defendant's motion shows that the State's Attorney's office had the least involvement in filing the complaint or procuring the arrest warrant. Under such circumstances, it is not realistic to assert that, at any time before he was arrested or indicted in 2003, the defendant had been "accused" within the meaning of the sixth amendment.[261]

This reasoning accurately reflects the second test proposed by this article. In Illinois, a complaint is not an "official act" of the prosecutor; the indictment is the first official act by the prosecution.[262] The statute of limitations in Illinois further supports this conclusion. In Illinois, a complaint does not satisfy the statute of limitations.[263] Thus, a complaint in Illinois would not meet either

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[259] *Preston*, 338 A.2d at 564-65.

[260] People v. Mitchell, 825 N.E.2d 1241, 1243-46 (Ill. App. Ct. 2005).

[261] *Id.* at 1245.

[262] *Id.* at 1244.

[263] People v. Macon, 920 N.E.2d 1224, 1229 (Ill. App. Ct. 2009) ("A complaint alleging a felony does not commence a prosecution for statute of limitations purposes. The date the indictment is filed or the information is found is the commencement of a felony prosecution and only this stops the running of the statute of limitations." (citations omitted)).

test proposed herein; the complaint would not satisfy the statute of limitations and the complaint would not be an "official act" of the prosecutor. Thus, the *Mitchell* decision is consistent with the test applied herein.

c. Missouri

The Missouri Court of Appeals confronted the question in 1979 in *State v. Black*.[264] The Missouri Court of Appeals noted that in Missouri, "[t]he principal and, perhaps, single function of a complaint is to serve as the basis for an application for an arrest warrant . . . ."[265] Thus, the court concluded:

> [A]lthough the complaint may be the first step in a criminal prosecution, the complaint does not "initiate a criminal prosecution" and it does not make the putative defendant an "accused" . . . for the complaint itself does not initiate any of the financial, social or psychological harm protected against by the right to a speedy trial.[266]

This implicitly reflects both of the tests proposed herein. Initiation of a prosecution is fundamentally what each test attempts to discover. While unclear in *Black*, the complaint in *Black* may have been obtained by a police officer.[267] This carries little weight as the Missouri Court of Appeals has extended *Black* in cases that clearly involved complaints issued by a prosecutor.[268] As a result, a complaint would have constituted a complaint under the second test proposed herein if Missouri had no statute of limitations. However, a review of the history of Missouri's statute of limitations reveals that *Black* was correct at the time it was decided.

Currently, the filing of a complaint in a felony case operates to satisfy the statute of limitations in Missouri.[269] However, this is a recent development

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[264] State v. Black, 587 S.W.2d 865, 873 (Mo. Ct. App. 1979).

[265] *Id.*

[266] *Id.* (citation omitted).

[267] *See e.g.*, State v. Rhodes, 591 S.W.2d 174, 175 (Mo. Ct. App. 1979) ("A complaint was then made by Police Sergeant Jerry Wild and filed with the First District Magistrate Court of St. Louis County."); State *ex rel.* Martin v. Berrey, 560 S.W.2d 54, 57 (Mo. Ct. App. 1977) ("It is evident that the initial complaint signed by a police officer was not an information within these essential terms. An information means a prosecution instituted by an officer with the duty to prosecute criminal offenses; the oath of a private person confers no jurisdiction to adjudicate an offense.").

[268] *See* Dillard v. State, 931 S.W.2d 157, 159, 161-62 (Mo. Ct. App. 1996); State v. Holmes, 643 S.W.2d 282, 284-86 (Mo. Ct. App. 1982).

[269] MO. ANN. STAT. § 556.036(5) (West 2012) ("A prosecution is commenced . . . for a felony when the complaint or indictment is filed."); State v. Mixon, 391 S.W.3d 881, 883-84 (Mo. 2012) (citing § 556.036(5)).

that did not apply at the time *Black* was decided.[270] In *State v. Mixon*, the Missouri Supreme Court noted that the Missouri statute of limitations was amended in 2006.[271] Before 2006, the statute of limitations was satisfied only "when an indictment is found or an information filed."[272] Thus, when *Black* was decided in 1979, the filing of a complaint also would not have satisfied the statute of limitations. Under the first test proposed herein, a complaint was not an accusation under *Black*.[273]

d. Georgia

The Court of Appeals of Georgia ruled that a complaint was not an accusation for procedural speedy trial purposes in *Campbell v. State*.[274] In *Campbell*, the district attorney signed a complaint that was filed after the defendant's

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[270] *See Mixon*, 391 S.W.3d at 883.

[271] *Id.*

[272] *Id.* (citing prior version of § 556.036(5)); *accord* State *ex rel.* Morton v. Anderson, 804 S.W.2d 25, 27 (Mo. 1991) ("Therefore it cannot be said that the filing of the complaint tolls the statute [of limitations]; the *prosecution* is 'pending' within the meaning of § 556.036, subsection 6, and the statute is thus tolled, only when the indictment has been found or information filed and the prosecution has thus been 'commenced' pursuant to § 556.036, subsection 5.").

[273] While the test presented herein would have led to the same result when *Black* was decided, Missouri may also be in a position to reconsider *Black*. Applying the first test, the complaint now satisfies the statute of limitations. MO. ANN. STAT. § 556.036(5) (West 2012) ("A prosecution is commenced . . . for a felony when the complaint or indictment is filed."); *Mixon*, 391 S.W.3d at 883-84. This statutory change constitutes a change in how an appellate court would look at a complaint. Whereas the *Black* court concluded that "[t]he principal and, perhaps, single function of a complaint is to serve as the basis for an application for an arrest warrant," *State v. Black*, 587 S.W.2d 865, 873 (Mo. Ct. App. 1979), a complaint is now used to "commence" a prosecution under the statute of limitations. Applying this system to the first test articulated herein, a criminal complaint filed by a prosecutor in Missouri should now be seen as an accusation for speedy trial purposes. Reviewing the second test, cases in Missouri are still charged by complaints filed by prosecutors. *E.g.* State v. Rogers, 396 S.W.3d 398, 399 (Mo. Ct. App. 2013) ("On August 13, 2011, the Boone County prosecutor filed a complaint against [defendant], alleging that [defendant] had committed unlawful use of a weapon . . . ."); State v. Starkey, 380 S.W.3d 636, 641 (Mo. Ct. App. 2012) ("On December 7, 2009, the Missouri Attorney General's Office . . . filed a complaint in the Circuit Court of Butler County, charging Appellant with four counts of aggravated stalking . . . ."); State v. Rowe, 363 S.W.3d 114, 116 (Mo. Ct. App. 2012) ("In August 2009, a Scott County prosecutor filed a criminal complaint alleging . . . that Defendant had committed the crime of first-degree sodomy . . . ."). *See also* MO. R. CRIM. P. 22.02 ("A complaint must be in writing and shall . . . (f) Be signed by the prosecuting attorney on information and belief that the offense was committed."). Thus, the complaints would constitute an official act. Procedurally, complaints must "State the name of the defendant" and "State the facts constituting the felony . . . ." MO. R. CRIM. P. 22.02(b), (c). Accordingly, the complaints would designate individuals as persons accused of a certain crime. If no statutory limitations period existed, the second test would be met because the complaint is an official act which designates a defendant as the accused.

[274] Campbell v. State, 669 S.E.2d 190, 192 (Ga. Ct. App. 2008).

arrest.[275] The defendant made a demand for speedy trial after the complaint had been filed, but "several months *before* his indictment."[276] This demand was predicated upon procedural rights available to defendants in the criminal code.[277] The court of appeals ruled that this procedural protection applied only after an indictment had been returned.[278] Also, notable to the court of appeals was the fact that complaints were used primarily to trigger bond hearings and contained a unique number that was not associated with the actual prosecution of the case.[279]

Three separate issues come to bear with Georgia's analysis. First, the operation of a complaint in Georgia is more akin to the operation of a Form 4 in Arizona.[280] Form 4 is a Release Questionnaire upon which a police officer (or prosecutor) answers a number of questions including the charges, the circumstances of the offense, the circumstances of the arrest, and other information related to release issues.[281] These questionnaires play a different role in the prosecution of cases. Form 4 questionnaires serve to inform the court of certain facts necessary to make an initial release decision and this article does not argue that these questionnaires constitute accusations. Second, the fact that *Campbell* engaged in a statutory analysis is important. The Georgia Court of Appeals did not attempt to interpret the concept of an accusation within the scope of the constitution, as *Medina* had. Rather, the scope of *Campbell* was limited to a procedural interpretation as in *Maldonado*. Finally, Georgia's decision would also be supported by the first test proposed herein. While *Campbell* demonstrates that a prosecutor can sign off on a complaint, and thus the complaint may become an official act,[282] Georgia's statute of limitations scheme is not impacted by a complaint. Georgia's statute of limitations generally requires

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[275] *Id.*

[276] *Id.*

[277] *Id.* at 191. *See* GA. CODE ANN. § 17-7-170 (2013).

[278] Campbell, 669 S.E.2d at 191; *accord* State v. Bloodsworth, 528 S.E.2d 285, 286 (Ga. Ct. App. 2000) ("It is well settled in Georgia law that the protection conferred by [Official Code of Georgia Annotated] § 17-7-170 attaches with the formal indictment or accusation." (quoting Tyler v. State, 481 S.E.2d 228, 229 (Ga. Ct. App. 1997))).

[279] *Campbell*, 669 S.E.2d at 192.

[280] ARIZ. R. CRIM. P. form 4.

[281] ARIZ. R. CRIM. P. form 4; Brewer v. Rees *ex rel.* Cnty. of Maricopa, 265 P.3d 436, 439 n.4 (Ariz. Ct. App. 2011) ("The trial court will generally have significant information relevant to the defendant and the crime alleged as set forth in the Release Questionnaire, Forms 4(a) and 4(b), which are recommended by the Arizona Rules of Criminal Procedure."); Segura v. Cunanan, 196 P.3d 831, 833-834 (Ariz. Ct. App. 2008) (indicating that Initial Appearance commissioner for both appealing defendants likely had access to the Release Questionnaires). Also akin to complaints in Georgia, Form 4 questionnaires are often filed, at least in Maricopa County, with a "PF" (Pre-File) number that is later replaced by a "CR" (Criminal) number. The CR number is attached to complaints filed and follows through the remainder of the case.

[282] *See Campbell*, 669 S.E.2d at 192.

prosecutions be "commenced" within a period of years after the commission of offenses.[283] Georgia courts have repeatedly held that a prosecution is "commenced" for the purposes of the statute of limitations when the indictment is filed.[284] Because a complaint in Georgia does not satisfy the statute of limitations, it is not an accusation under the test proposed herein.

e. Maryland

Maryland reached a similar decision in *State v. Gee*.[285] In *Gee*, the Court of Appeals of Maryland analyzed a scenario where "a police officer applied for a statement of charges with respect to [the defendant]."[286] A commissioner issued the statement of charges, along with a warrant.[287] The defendant was later arrested and charged by indictment.[288] The defendant moved to dismiss the case, arguing that the delay of eleven months between the issuance of the warrant and the trial violated his speedy trial rights.[289] The trial court denied the motion and the defendant appealed.[290] The intermediate appellate court agreed with the defendant and reversed the trial court's decision.[291] The court of appeals ruled that the statement of charges that was the basis for the warrant was not an accusation for speedy trial purposes.[292] The court differentiated between the statement of charges and an indictment by noting:

> The State has not by the issuance of such a warrant-statement of charges committed itself to prosecute. Before it can proceed the grand jury must indict or the State's Attorney must file an information. Neither is obliged to do so. Until an indictment has been returned or an information filed the adverse positions of State and defendant have not solidified,

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283 *See generally* GA. CODE. ANN. § 17-3-1 (2013).

284 Hall v. Hopper, 216 S.E.2d 839, 840 (Ga. 1975) ("In criminal cases, the statute of limitations runs (subject to special circumstances) from the time of the criminal act to the time of the indictment . . . ."); Dandy v. State, 559 S.E.2d 150, 151 (Ga. Ct. App. 2002) ("We recognize that in criminal cases, the statute of limitation runs from the time of the crime to the time of the indictment."); Long v. State, 526 S.E.2d 875, 877 (Ga. Ct. App. 1999) ("In criminal cases, the statute of limitation runs from the time of the criminal act to the time of the indictment . . . ."); Freeman v. State, 392 S.E.2d 330, 332 (Ga. Ct. App. 1990) ("[T]he period of limitation runs from the commission of the offense to the date of filing of the indictment or accusation.").

285 State v. Gee, 471 A.2d 712, 716 (Md. 1984).

286 *Id.* at 714.

287 *Id.*

288 *Id.*

289 *Id.*

290 *Id.*

291 *Id.* at 715.

292 *Id.* at 716.

> nor is the defendant at that point faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural law.[293]

While *Gee* does not specifically reference "complaints," the statement of charges operates similar to how a complaint operates in the federal system, Delaware, and Illinois. The statement of charges is obtained by a police officer, not by the prosecution. The purpose is primarily to obtain a warrant and not to initiate a prosecution. As such, the test proposed herein would have led to the same result in Maryland because the statement of charges is not an official act.[294]

VIII. REEVALUATING ARIZONA

Having discussed the flaws of *Medina*, proposed a method for determining if a defendant has been accused of an offense, and found support for this method in right to counsel jurisprudence and the conclusions of several other jurisdictions, we return to Arizona. Applying the tests proposed herein, a criminal complaint in Arizona should be considered an accusation.

The *Medina* court relied upon one additional case not yet discussed, *Favors v. Eyman*.[295] *Medina* did not discuss *Favors* in depth,[296] but the reliance raises an issue that *Medina* failed to adequately address; the functional difference between how a complaint previously operated in Arizona and how it presently functions. As addressed above, complaints in the federal system are usually filed by law enforcement officers and are for the purpose of obtaining an arrest warrant.[297] This was how Arizona complaints were primarily used when analyzed in *Favors*.[298] Thus, when *Favors* concluded that a complaint was not an

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[293] *Id.*

[294] The statement of charges also does nothing to a statute of limitations in Maryland in light of the fact that Maryland has no statute of limitations for felony offenses. Clark v. State, 774 A.2d 1136, 1144 n.8 (Md. 2001) ("Maryland has no statute of limitations on felonies or penitentiary misdemeanors beyond that imposed by the life of the offender."); *accord* Bozman v. Office of Finance of Balt. Cnty., 445 A.2d 1073, 1078 (Md. Ct. Spec. App. 1982) ("We observe, however, that there is no statute of limitations on felony criminal offenses nor on 'penitentiary misdemeanors.' "). To address possible due process concerns the Court of Special Appeals of Maryland has proposed that it may be necessary to "assess the length of the pre-accusation delay to determine whether, under particular circumstances, it is so overly stale by due process considerations as to give rise to an irrebuttable assumption that a defendant's right to a fair trial would be prejudiced." State v. Hamilton, 287 A.2d 791, 795 n.13 (Md. Ct. Spec. App. 1972).

[295] Favors v. Eyman, 466 F.2d 1325 (9th Cir. 1972).

[296] *See* State v. Medina, 949 P.2d 507, 509-10 (Ariz. Ct. App. 1997).

[297] *See supra* notes 190-91 and accompanying text.

[298] *See Favors*, 466 F.2d at 1328 ("The primary function of the complaint under both the federal and Arizona rules is that it is the basis upon which, if probable cause is shown, a warrant of arrest may issue.").

accusation in Arizona, the conclusion was reasonable.[299] However, *Favors* noted that its analysis was restricted to an older scheme under which complaints did not impact the statute of limitations, "[t]he Arizona complaint now serves one additional purpose. It tolls the statute of limitations. But at the times involved in this case, it did not have that effect; only the finding of an indictment or the filing of an information did so."[300] Thus, *Favors* dealt with a scenario functionally different from how complaints are presently used in Arizona.

Applying the test drawn from *United States v. Marion*, Arizona complaints are an accusation for speedy trial purposes. Looking to the first step of the test, if an act satisfies an applicable statute of limitations the act is an accusation. A complaint satisfies Arizona's statute of limitations. This statute provides, in pertinent part, "[f]or the purposes of subsection B of this section [providing time limitations for the filing of most offenses], *a prosecution is commenced when* an indictment, information *or complaint is filed*."[301] Thus, when a complaint is filed, a person no longer has the protection of Arizona's statute of limitations. Under the first test articulated herein, a complaint is an accusation.

Under the second test, where there is no statute of limitations which protects an offense a complaint may still be an accusation if it is an official act of the prosecution and it designates a person as an accused. First, when a prosecutor files a complaint, the complaint is an official act of the State. The Arizona Rules of Criminal Procedure specifically authorize the use of criminal complaints to commence felony actions.[302] The Rules provide for the content of a complaint, "[a] complaint is a written statement of the essential facts constituting a public offense, that is either signed by a prosecutor, or made upon oath before a magistrate, or made in accordance with A.R.S. § 13-3903."[303] Arizona cases have long held that the purpose of a complaint is, in part, to confer jurisdiction in the courts.[304] The reference to a prosecutor's signature reflects an understanding that prosecutors will be involved in filing complaints. When

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299 *See id.*

300 *Id.* (internal citation omitted).

301 ARIZ. REV. STAT. ANN. § 13-107(C) (West, Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature) (emphasis added); *accord* State v. Caruthers, 519 P.2d 44, 46 (Ariz. 1974) ("In Arizona, the criminal prosecution may be commenced by complaint in writing, under oath, brought before a magistrate and setting forth the offense charged.").

302 ARIZ. R. CRIM. P. 2.2.

303 ARIZ. R. CRIM. P. 2.3(a).

304 State *ex rel.* Purcell v. Superior Court Maricopa Cnty., 511 P.2d 642, 644 (Ariz. 1973) ("But the complaint . . . has another function. It is often issued *after* an arrest, in which case its function is to give jurisdiction to the traffic court or justice of the peace . . . ."); State v. Laguna, 602 P.2d 847, 848 (Ariz. Ct. App. 1979) ("The function of a post-arrest complaint is to give jurisdiction to a justice court . . . .").

the prosecution has filed the complaint the prosecutor has communicated an involvement sufficient to warrant protection.[305]

Second, the standard complaint designates an individual as a "Defendant," and thus an accused. The complaint goes further by specifically accusing a particular individual, the individual labeled as a "Defendant" in the caption, of certain offenses committed at a certain point in time. Arizona's long-held construction regarding the purpose of a complaint is again instructive, as the purpose of a complaint is to put a defendant on notice of the charges they face.[306] Accordingly, even if a court were to use the second test articulated herein, the court would reach the same conclusion; a complaint filed by a prosecutor is an accusation for speedy trial purposes.

IX. CONCLUSION

The test articulated herein provides a repeatable and predictable method for determining when a person becomes an accused for speedy trial purposes. The lack of such guidance before *Medina* led the Arizona Court of Appeals to reach a conclusion that was inapposite to the conclusions reached in most all other jurisdictions. Moreover, because there are still a number of states that have not yet decided whether or not a complaint is an accusation, clearly expressing a method for evaluation will ensure well reasoned decisions that avoid the need for intervention by the United States Supreme Court.

As demonstrated above, this method accounts for most decisions reached in federal and state courts around the country. One decision that cannot be accounted for, however, is the Arizona Court of Appeals decision in *State v. Medina*. In Arizona, a complaint should be considered an accusation for speedy trial purposes. Most importantly, a complaint satisfies the statute of limitations. However, even if there were no limitations period to evaluate, a criminal complaint filed by a prosecutor would constitute an "official act" of the prosecutor that designates an individual as an accused. The criminal complaint triggers the panoply of concerns that are raised in speedy trial cases. For the reasons stated within this article, Arizona courts should take the opportunity to correct the error of *Medina*.

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[305] There is a mechanism by which police officers can swear out a complaint, ARIZ. REV. STAT. ANN. § 13-3898 (2010), and by which a person who makes a citizens arrest can swear out a complaint, ARIZ. REV. STAT. ANN. § 13-3900 (2010). However, neither of these circumstances would carry the commitment to prosecute that accompanies a complaint filed by the prosecutor.

[306] *Purcell*, 511 P.2d at 644 ("[A complaint] is often issued *after* an arrest, in which case its function is to . . . give the defendant an explanation of the charges against him."); Erdman v. Superior Court Maricopa Cnty., 433 P.2d 972, 975 (Ariz. 1967) ("The object of a complaint is to inform a defendant in language definite and specific of the essential elements of the crime for which he is charged."); *Laguna*, 602 P.2d at 848 ("The function of a post-arrest complaint is . . . to give a defendant notice of the charges against him.").

HAVE UNITED STATES SUPREME COURT DECISIONS CURTAILED THE *MIRANDA* RULE TOO MUCH OR IS THE BALANCE JUST RIGHT?

John Pressley Todd*

Echoes of the 1960s disputes over the Warren Court's[1] revolution[2] in criminal procedure resounded in the public debate following the capture of one

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[1] The "Warren Court" refers to the period between October 1953 and June 1969 when Earl Warren served as the 14th Chief Justice of the United States Supreme Court. During that period 16 different Associate Justices served with him. During the 1960s when the Court's decisions significantly impacted the State's criminal justice systems, the Associate Justices included; William Orville Douglas, Felix Frankfurter, John Marshall Harlan, Tom Campbell Clark, Charles Evans Whittaker, William J. Brennan Jr., Stewart Potter, Byron Raymond White, Arthur Joseph Goldberg, Abe Fortas, and Thurgood Marshall.

[2] Prior to Earl Warren becoming Chief Justice of the United States Supreme Court police matters and the operation of the State's criminal justice system were almost exclusively matters for the States, except for the exclusion of involuntary statements. Then in a series of cases grounded in the Privileges and Immunities, Due Process or Equal Protection Clauses of the Fourteenth Amendment or by incorporating certain provisions of the Bill of Rights through the Fourteenth Amendment, the Court found various federal constitutional rights for defendants that had previously been unavailable to defendants despite the nation's long history. *E.g.*, Griffin v. California, 380 U.S. 609 (1965) (prosecution cannot comment on defendant's decision not to testify); Jackson v. Denno, 378 U.S. 368 (1964) (the voluntariness of a confession must be determined pre-trial); Massiah v. United States, 377 U.S. 201 (1964) (police cannot contact a defendant represented by counsel); Brady v. Maryland, 373 U.S. 83 (1963) (exculpatory evidence must be disclosed to the defense);Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendant has a right to be represented by an attorney); Wong Sun v. United States, 371 U.S. 471 (1963) (fruit of the poisonous tree doctrine constitutional); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applied to the states in Fourth Amendment cases); Napue v. Illinois, 360 U.S. 264 (1959) (State can not knowingly use false evidence to obtain a tainted conviction). Given the

of the suspects in the Boston Marathon bombing. Should Dzhokhar "Jahar" Tsarnaev be advised of his *Miranda* rights prior to any interrogation? If so advised, however, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."[3] After more than the passage of two generations, the *Miranda* decision,[4] now an accepted part of the fabric of American justice, still can invoke heated discourse, undoubtedly because it significantly impacts the criminal justice system of the States.[5] While the *Miranda* Rule can be viewed as necessary to protect a suspect from overreaching law enforcement by creating a deterrent, it is not without costs.

The Rule can be an impediment to discovering the truth. The central purpose of a criminal trial is to assure that the innocent person is not convicted and the guilty person does not escape conviction, which is accomplished by resolving the factual question of the defendant's innocence or guilt.[6] Yet under the *Miranda* Rule a legally voluntary reliable confession is kept from the trier of fact if a law enforcement officer fails to properly advise an in custody suspect of his *Miranda* rights. Such an exclusion of reliable evidence perverts the fact finding process of a criminal trial.

The *Miranda* decision is also fundamentally at odds with our federal system of government. "The United States is an indivisible 'Union of sovereign States.'"[7] The Framers of the Constitution left to the States the primary authority for defining and enforcing the criminal law through their general police powers.[8] In writing the *Miranda* decision, Chief Justice Warren supplemented the text books of police practice with a particular procedure that must be employed prior to interrogating a suspect in custody.

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scope and breath of these decisions in less than a decade was a "revolution." This revolution occurred while the Supreme Court was led by a man who had more experience in prosecution than any other Justice to serve on the Supreme Court. *See generally* Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11 (2005).

[3] Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in result in part and dissenting in part).

[4] Miranda v. Arizona, 384 U.S. 436 (1966) (creating the *Miranda* Rule)

[5] *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

[6] Neder v. United States, 527 U.S. 1, 18 (1999); *see also* Berger v. United States, 295 U.S. 78, 88 (1935).

[7] Arizona v. United States, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., concurring in part and dissenting in part) (citing Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104 (1938)).

[8] United States v. Kebodeaux, 133 S. Ct. 2496, 2513 (2013) (Thomas, J.,dissenting); *see* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

The narrow focus of this article is for persons who have only a passing familiarity with the *Miranda* Rule Part I explores the salient legal landscape leading to *Miranda*. Part II briefly discusses the decision itself. Part III concerns certain relevant Supreme Court decisions in the wake of *Miranda*. Part IV discusses the current state of the law as it relates to enforcing the *Miranda* rule. This article does not present solutions, but attempts to identify practical implications of enforcing the Rule.

I. THE BACKGROUND LEADING TO *MIRANDA*[9]

Originally, the first eight Amendments to the United States Constitution enumerate rights recognized by the federal government, but not secured against action by the States.[10] In *Barron*, Chief Justice Marshall wrote:

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.
>
> If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which

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[9] Mr. Paul Ulrich explores in much greater depth the history of the *Miranda* warnings in a separate article. *See generally* Paul G. Ulrich, Miranda v. Arizona: *History, Memories and Perspectives*, 7 PHOENIX L. REV. ___ (2014).

[10] *See* Barron v. City of Baltimore, 32 U.S. 243, 248-51 (1833) (holding that a provision of the Fifth Amendment was intended "solely as a limitation on the exercise of power by the government of the United States;" and is not applicable to restrain the legislative power of the States).

> they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.[11]

The *Barron* Court having concluded that the Fifth Amendment prohibition against taking private property for public use without just compensation was "intended solely as a limitation on the exercise of power by the government of the United States," the Court dismissed the case for lack of jurisdiction.[12] Federal courts are without jurisdiction to decide questions of state law.[13] Thus, unless a case presents a question of federal law decided by a state court, federal courts are without power to review a state-court judgment.[14]

This original view of the limited beneficiaries of the rights found in the first eight amendments began to change following the adoption in 1868 of the Fourteenth Amendment. Section 1 of the Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[15]

In *Scott v. McNeal*,[16] the Supreme Court held that the prohibitions of Section 1 of the Fourteenth Amendment extended "to all acts of the state, whether through its legislative, its executive, or its judicial authorities."[17] In *Chicago, B & Q.R. Co. v. City of Chicago*,[18] the Supreme Court held that the Due Process Clause of the Fourteenth Amendment is violated when a judgment of state court takes private property for state public use, without compensation to the owner.[19] By 1964, the Supreme Court had incorporated the protections of the

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[11] *Id.* at 247-48; *see also Ex parte* Spies, 123 U.S. 131, 166 (1887) (The amendments "were not intended to limit the powers of the state governments in respect to their own people, but to operate on the national government alone . . . .").

[12] *Barron*, 32 U.S. at 250-51.

[13] Coleman v. Thompson, 501 U.S. 722, 729 (1991).

[14] *Id.*

[15] U.S. CONST. amend. XIV, § 1.

[16] Scott v. McNeal, 154 U.S. 34 (1894).

[17] *Id.* at 45.

[18] Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

[19] *Id.* at 241.

First, Fourth, and the Sixth Amendment's right to counsel against state-action.[20]

In 1964, the Warren Court in a 5-4 decision decided *Malloy v. Hogan*.[21] Justice Brennan, writing for the majority, noted at the outset that the case was about reconsidering the Court's prior decisions that had held that the Fifth Amendment's privilege against self-incrimination was "not safeguarded against state action by the Fourteenth Amendment."[22] Malloy had been arrested in 1959 by Hartford, Connecticut police during a gambling raid.[23] He pled guilty to a misdemeanor and was eventually placed on probation.[24] While on probation, he was ordered to testify before a Superior Court inquiry into alleged gambling and other criminal activities.[25] When he refused to testify on the grounds that his answers might tend to incriminate him, he was adjudged in contempt and committed to prison until he was willing to answer the questions.[26] The State courts denied his efforts to be released, the Connecticut Supreme Court holding that "the Fifth Amendment's privilege against self-incrimination was not available to a witness in a state proceeding."[27] In reversing, the Supreme Court held that "the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination."[28] In other words, that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."[29]

Prior to *Malloy*, starting with *Brown v. Mississippi*,[30] the Supreme Court in a series of cases[31] held that the Due Process Clause of the Fourteenth Amend-

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[20] *See*, *e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (right against unreasonable searches and seizures); Lovell v. City of Griffin, Ga., 303 U.S. 444 (1938) (freedom of speech and the press). Some rights protected by the first eight amendments are still not applicable to the States. *E.g.*, Hurtado v. California, 110 U.S. 516 (1884) (States need not charge a felony by indictment as required by the Fifth Amendment.).

[21] Malloy v. Hogan, 378 U.S. 1 (1964).

[22] *Id.* at 2.

[23] *Id.* at 3.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 6.

[30] Brown v. Mississippi, 297 U.S. 278 (1936).

[31] *See*, *e.g.*, Haynes v. Washington, 373 U.S. 503, 509-14 (1963) (holding the defendant's confession was not voluntary after held incommunicado and told he could not speak with his wife via telephone until he provided a written confession); Lynumn v. Illinois, 372 U.S. 528, 535 (1963) (finding confession was coerced after police told the defendant her state aid would be cut off and her children taken away if she did not cooperate); Blackburn v. Alabama, 361 U.S. 199, 208-09 (1960) (noting the defendant was probably insane and incompetent at time of confession

ment prohibited States from using an accused's coerced confession against him in a trial. In deciding *Brown*, the Supreme Court expressly stated that the Fifth Amendment's privilege against self-incrimination "is not here involved."[32] "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."[33] "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. . . . Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt."[34] Thus, a conviction gained by use of an involuntary confession, either obtained through physical or psychological inducements, cannot stand.[35] It matters not whether the confession is untrustworthy or able to be independently corroborated—whether it is false or true.[36]

The *Malloy* Court held that henceforth the admissibility of confessions in a state criminal prosecution is controlled by the Fifth Amendment's prohibition that no person "shall be compelled in any criminal case to be a witness against himself."[37] Under this test the confession must be "free and voluntary" not extracted by threats or violence nor gained through "any direct or implied promises, however slight, nor by the exertion of any improper influence."[38] Whether a statement is taken in violation of the *Miranda* warnings or is involuntary are separate, but often related issues. The enforcement issues discussed in this article concern only statements taken in violation of the *Miranda* Rule.

In the term preceding the *Miranda* decision, the Court decided in a 5-4 decision *Escobedo v. Illinois*,[39] under the Sixth Amendment's right to assistance of counsel.[40] Danny Escobedo, 22, was suspected of fatally shooting his

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and that sheriff, rather than the defendant, composed the confession); Spano v. New York, 360 U.S. 315, 323 (1959) (finding the young foreign-born defendant's will was overcome after eight hours of interrogation and after police officer's friend falsely told the defendant his job was in jeopardy because the defendant confessed to him over the telephone); Malinski v. New York, 324 U.S. 401, 403-04 (1945) (finding confession was coerced because the defendant was stripped and kept naked for many hours and held in a hotel room for three days); Ashcraft v. Tennessee, 322 U.S. 143, 153-54 (1944) (concluding confession was compelled after the defendant was held incommunicado and questioned without rest or sleep for thirty-six hours).; Lisenba v. California, 314 U.S. 219 (1941).

[32] *Brown*, 297 U.S. at 285.

[33] *Lisenba*, 314 U.S. at 236.

[34] *Id.* at 236-37.

[35] Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

[36] *Id.* at 541.

[37] Malloy v. Hogan, 378 U.S. 1, 7 (1964).

[38] *Id.* (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)).

[39] Escobedo v. Illinois, 378 U.S. 478 (1964).

[40] In relevant part the Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. *See* Massiah v. United States, 377 U.S. 201, 205-06 (1964) (Sixth Amendment guarantee of

brother-in-law.[41] He had a retained attorney at the time of his arrest.[42] Benedict DiGerlando, who was in police custody at the time and later indicted with Escobedo for the murder, had told police that Escobedo had fired the fatal shots.[43] Initially Escobedo told the police he did not want to speak without the advice of his attorney.[44] It was clear that although he was not formally charged, he was in custody and could not "walk out the door."[45]

While in custody Escobedo repeatedly asked to speak with his lawyer and his lawyer repeatedly asked the police that he be allowed to meet with his client.[46] The police told Escobedo that his attorney did not want to see him.[47] Notwithstanding these repeated requests, neither Escobedo nor his attorney was afforded an opportunity to consult with the other during the course of the interrogation.[48]

Writing for the majority, Justice Goldberg concluded that "no meaningful distinction can be drawn between interrogation of an accused before and after formal indictment."[49] "[F]or all practical purposes," Escobedo had "already been charged with murder."[50] "[T]he period between arrest and indictment," when most confessions are obtained, indicates this period's "critical nature as a 'stage when legal aid and advice' are surely needed."[51] The absence of an attorney at this stage would make the trial "no more than an appeal from the interrogation."[52] "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[53]

The Court held that when the investigation is no longer "a general inquiry" but focuses on a particular suspect that had been taken into police custody and the police had not warned him of his constitutional rights and denied his request to consult with his attorney, then any statement elicited by the police

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counsel applies after indictment); White v. Maryland, 373 U.S. 59, 60 (1963) (a preliminary hearing is a critical stage for Sixth Amendment purposes requiring the presence of counsel); Hamilton v. Alabama, 368 U.S. 52, 53-55 (1961) (arraignment so critical a stage that denial of counsel at arraignment required reversal without a showing of prejudice).

41 *Escobedo*, 378 U.S.at 479-82.

42 *Id.* at 479.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 478, 480-81.

47 *Id.* at 481.

48 *Id.*

49 *Id.* at 486.

50 *Id.*

51 *Id.* at 488 (citing Massiah v. United States, 377 U.S. 201, 204 (1964)).

52 *Id.* at 487.

53 *Id.* at 490.

during the interrogation may not be used against the suspect in a criminal trial.[54] In other words, when the investigation *focuses* on the accused with the purpose to elicit a confession the accused must be permitted to consult with his lawyer.[55]

The dissent by Justice Stewart noted that the confession that was found to be inadmissible was a voluntary one; furthermore the case did not involve the "deliberate interrogation of a defendant after the initiation of judicial proceedings against him," and the Court "had never held that the Constitution requires the police to give any 'advice' under circumstances such as these."[56] The dissent by Justice White noted how potentially expansive the case could be interpreted, and how unworkable the standard of the right to counsel when the investigation focuses on the accused compared with requirement of counsel at proceedings "in which definable rights could be won or lost, not with stages where probative evidence might be obtained."[57] Justice White further noted "[i]t is incongruous to assume that the provision for counsel in the Sixth Amendment was meant to amend or supersede the self-incrimination provision of the Fifth Amendment, which is now applicable to the States."[58]

II. THE *MIRANDA* DECISION[59]

The *Miranda* decision, decided the following term, appeared to address some of the issues raised by the dissent in *Escobedo* although the same four Justices dissented in *Miranda*: Justices Clark, Harlan, Stewart, and White. The majority held:

> Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the

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[54] *Id.* at 490-91.

[55] *Id.* at 492.

[56] *Id.* at 493-94 (Stewart, J., dissenting).

[57] *Id.* at 495-97 (White, J., dissenting).

[58] *Id.* at 497.

[59] The decision concerns four separate cases that were consolidated in order to undertake a "thorough re-examination of the *Escobedo* decision." Miranda v. Arizona, 384 U.S. 436, 442 (1966). In No. 759 *Miranda v. Arizona*, he was not warned of his right to counsel and after two hours of interrogation signed a written confession. *Id.* at 491-92. In No. 760 *Vignera v. New York*, Vignera was interrogated without being warned of his rights. *Id.* at 493-94. In No. 761 *Westover v. United States*, state authorities questioned Westover for over fourteen hours before turning him over to the FBI who administered warnings but immediately began their interrogation. *Id.* at 495-97. In No. 584 *California v. Stewart*, the record was silent whether Stewart was warned, and because of that, the California appellate court reversed based on *Escobedo*, and the Supreme Court affirmed. *Id.* at 497-99.

> defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[60]

Regarding the custody requirement, the Court stated "[t]his is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused."[61]

The Court relied on the Fifth Amendment, rather than the Sixth, and thus avoided the issue of when does a person's trial right to counsel under the Sixth Amendment arises.[62] It made the point at which a suspect must be warned more objective—when in custody. The Court defined "custody," for purposes of interrogation, as when the person is deprived of his freedom in any signifi-

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[60] *Id.* at 444-45 (footnote omitted).

[61] *Id.* at 444 n.4.

[62] "In *Malloy*, we squarely held the privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings." *Id.* at 463-64. "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Id.* at 467.

cant way.[63] The Court expressly stated what warnings must be given prior to any questioning: the person has "the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[64] The person may "knowingly and intelligently" waive these rights.[65] The prosecution has the burden of demonstrating that such warnings and waivers occurred prior to obtaining any evidence as a result of interrogation.[66] However, the Court also stated "[i]t is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities."[67]

> Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.[68]

Thus, the Court was clear that its decision was not intended to create a "constitutional straitjacket."[69] Congress and the States were "free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."[70]

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[63] "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*

[64] *Id.* at 479.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 467.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 490; *see* Florida v. Powell, 559 U.S. 50, 61-64 (2010) (allowing for some reasonable variation in the wording of the warnings).

III. THE RELEVANT AFTERMATH OF *MIRANDA*[71]

Because a violation of the *Miranda* warnings requirement potentially subverted the truth-finding process by denying highly probative and reliable evidence from the fact-finders, it is not surprising that the Supreme Court in subsequent cases began to curtail these drastic consequences. Thus, in *Michigan v. Mosley*,[72] Justice Stewart, writing for the Supreme Court, found no violation of *Miranda* when an in-custody suspect exercised his right to silence when detectives questioned him about a robbery, but after a two-hour hiatus and after again being advised of his *Miranda* rights by a different detective, the suspect made an inculpatory statement concerning an unrelated murder.[73] At no point had the suspect requested an attorney, and the police had promptly ceased questioning when the suspect stated he did not want to answer any questions about the robbery.[74]

The Supreme Court in *Rhode Island v. Innis*[75] defined, for *Miranda* purposes, the term "interrogation" as any words or action on the part of law enforcement, other than those normally used during the arrest and custody processing, that the officers should know are reasonably likely to elicit an incriminating response from the suspect.[76] The Supreme Court held that under the facts of this case, the suspect was not "interrogated" within the meaning of *Miranda*, because the conversation was nothing more than a dialogue between two officers "to which no response from the respondent was invited."[77] Nor, based on the record, that the officers should have known their conversation was "reasonably likely to elicit an incriminating response" from Innis.[78]

In *Oregon v. Bradshaw*,[79] the suspect invoked his right to have counsel present.[80] Sometime later, while being transported from the police station to the jail, the suspect *initiated* a conversation with the transport officer and continued speaking after being re-advised that he did not have to speak with the officer and after he had requested an attorney.[81] A plurality of the Court found

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[71] As of the end of the 2012 Term, the Supreme Court has cited *Miranda* in 277 of their cases and other courts have cited *Miranda* in well over 100,000 cases. This Article is not intended to review even a significant number of the Supreme Court cases, but rather focus on the few cases that are most relevant to the purpose of this Article.

[72] Michigan v. Mosley, 423 U.S. 96 (1975).

[73] *Id.* at 97-99, 107.

[74] *Id.* at 97.

[75] Rhode Island v. Innis, 446 U.S. 291 (1980).

[76] *Id.* at 301.

[77] *Id.* at 302.

[78] *Id.*

[79] Oregon v. Bradshaw, 462 U.S. 1039 (1983).

[80] *Id.* at 1041-42.

[81] *Id.* at 1042.

that the suspect had initiated the subsequent conversation; thus there was no violation of the rule in *Edwards v. Arizona*,[82] which requires that once a suspect invokes his right to *an attorney*, a suspect can not waive his *Miranda* rights during *police*-initiated conversations.[83] Thus, the Court found the suspect's subsequent waiver of his *Miranda* rights was valid.[84] Justice Powell, the fifth vote, simply found that it was enough that the record demonstrated that the suspect had waived his right to counsel.[85]

The Supreme Court created a "public safety" exception to the *Miranda* warning requirement in *New York v. Quarles*.[86] Shortly after midnight, a woman approached a patrol car and told the officers that she had just been raped by a black male, approximately six feet tall, wearing a black jacket with the name "Big Ben" on the back in yellow letters.[87] She reported that the man had just entered a nearby supermarket and that he was carrying a gun.[88] When the officers entered the supermarket, Officer Frank Kratt spotted a man at the checkout counter matching the victim's description.[89] Upon seeing the officer, the man turned and ran.[90] When Officer Kraft finally caught Quarles and frisked him, he discovered Quarles was wearing an empty shoulder holster,.[91] "After handcuffing him, Officer Kraft asked him where the gun was. Respondent nodded in the direction of some empty cartons and responded, 'the gun is over there.'"[92] Officer Kraft found a loaded .38-caliber revolver in one of the cartons, placed Quarles under arrest, and read him his *Miranda* rights.[93] Quarles agreed to answer Officer Kraft's questions and admitted he owned the gun and had bought it in Florida.[94] Eventually, Quarles was charged with criminal possession of a weapon.[95] In the subsequent weapons prosecution, a state trial judge suppressed the statement, "the gun is over there," because the officer had not advised Quarles of his *Miranda* rights.[96]

In reversing the New York courts, the Supreme Court stated, "we believe that this case presents a situation where concern for public safety must be para-

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[82] Edwards v. Arizona, 451 U.S. 477 (1981).
[83] *Bradshaw*, 462 U.S. at 1046.
[84] *Id.* at 1046-47.
[85] *Id.* at 1051.
[86] New York v. Quarles, 467 U.S. 649, 657-59 (1984).
[87] *Id.* at 651.
[88] *Id.* at 651-52.
[89] *Id.* at 652.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*

mount to adherence to the literal language of the *prophylactic rules* enunciated in *Miranda*."[97] The Court had long recognized an exigent circumstance exception to the warrant requirement of the Fourth Amendment.[98] "Although 'the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness,' we conclude today that there are limited circumstances where the judicially imposed strictures of *Miranda* are inapplicable."[99] The Supreme Court observed that absent officially coerced self-accusation, the Fifth Amendment guarantee against self-incrimination does not prohibit all incriminating admissions.[100] "The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'"[101]

Noting that the missing gun "obviously posed more than one danger to the public safety," the majority observed "[i]n such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding."[102]

The Supreme Court held in *Oregon v. Elstad*,[103] that although a suspect's initial inculpatory voluntary statement was given in violation of *Miranda*, failure to give the *Miranda* admonitions did not bar the admissibility of a subsequent confession made shortly afterwards at the police station after the police had informed the suspect of his *Miranda* rights and he had waived them.[104] The Court expressly rejected extending the Fourth Amendment's "fruit of the poisonous tree" doctrine to analyze the admissibility of a subsequent confession.[105]

In *Moran v. Burbine*,[106] the Supreme Court clarified that the "Sixth Amendment right to counsel does not attach until after the initiation of formal charges."[107] The Court expressly rejected the contention that an attorney-client relationship triggers the Sixth Amendment right to counsel.[108] The Court also

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[97] *Id.* at 653 (emphasis added).
[98] *Id.* at 653 n.3.
[99] *Id.* (citation omitted) (quoting Fisher v. United States, 425 U.S. 391, 499 (1976)).
[100] *Id.* at 654.
[101] *Id.* (alteration in original) (quoting Michigan v. Tucker, 417 U.S. 433, 44 (1974)).
[102] *Id.* at 657.
[103] Oregon v. Elstad, 470 U.S. 298 (1985).
[104] *Id.* at 314-15.
[105] *Id.* at 305-06. *But see* Missouri v. Seibert, 542 U.S. 600, 614-16 (2004) (plurality opinion) (reaching the opposite result by distinguishing the facts in *Elstad*). However, the Supreme Court has repeatedly rejected applying the traditional "fruits" doctrine to *Miranda* cases. United States v. Patane, 542 U.S. 630, 641-42 (2004); Dickerson v. United States, 530 U.S. 428, 441 (2000).
[106] Moran v. Burbine, 475 U.S. 412 (1986).
[107] *Id.* at 431.
[108] *Id.* at 429 n.3.

held that the fact the police kept the suspect's attorney from meeting with him did not vitiate the suspect's waiver of his *Miranda* rights.[109] The Court stated:

> As is now well established, "[t]he . . . *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory self-incrimination [is] protected.'[110]

The Supreme Court held in *United States v. Patane*,[111] that failure to give to a suspect the *Miranda* warnings does not require suppression of the *physical fruits* of the suspect's voluntary statements.[112] Patane, a felon, was arrested for violation of a restraining order.[113] During the arrest one of the officers got no further than advising Patane of his right to silence when Patane interrupted and said he knew his *Miranda* rights.[114] When questioned about a Glock he was suspected of possessing, he eventually told the detective where it was.[115] Patane was subsequently arrested for unlawful possession of a firearm by a convicted felon.[116] The five Justices in the majority, however, did not agree on a single rationale on why the lower courts were wrong to suppress the gun.[117]

In *Davis v. United States*,[118] and *Berghuis v. Thompkins*,[119] the Supreme Court required that after waiving one's *Miranda* rights a suspect's subsequent invocation of his right to meet with counsel (*Davis*) or to cease questioning (*Berghuis*) must be unambiguous.[120]

For purposes of this article, the most significant post-*Miranda* case was decided two years after Chief Justice Warren left the Court. In *Harris v. New York*,[121] the new Chief Justice, Warren Burger, wrote on behalf of the 5-4 majority and held that a statement taken in violation of *Miranda* while not admissible in the State's case-in-chief could be used to impeach a defendant

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109 *Id.* at 424.

110 *Id.* at 424-25 (alteration in original); New York v. Quarles, 467 U.S. 649, 654 (1984)(quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

111 United States v. Patane, 542 U.S. 630 (2004).

112 *Id.* at 636-37.

113 *Id.* at 634.

114 *Id.* at 635.

115 *Id.*

116 *Id.*

117 Compare Justice Thomas's opinion, *id.* at 633-44 (with Chief Justices Rehnquist and Justice Scalia concluding that *Miranda* Rule is not constitutional and potential violations only occur with the admission of the statements into evidence), with Justice Kennedy's opinion, *id.* at 644-45 (with whom Justice O'Connor joined concluding that the admission of nontestimonial physical fruits (a pistol) is different from admitting into trial a suspects' coerced incriminating statements).

118 Davis v. United States, 512 U.S. 452 (1994).

119 Berghuis v. Thompkins, 560 U.S. 370 (2010).

120 *Davis*, 512 U.S. at 460-62; *Berghuis*, 560 U.S. at 381-82.

121 Harris v. New York, 401 U.S. 222 (1971).

should he testify.[122] "[T]he trustworthiness of the evidence satisfies legal standards."[123] Thus, in neither *Harris* nor *Oregon v. Hass* was there a claim that the impeaching statements made to the police were coerced or involuntary.[124] In contrast, in *New Jersey v. Portash*,[125] the prosecution threatened to use an immunized statement compelled at a grand jury proceeding for impeachment.[126] That type of compelled statement could not be put to any testimonial use in a criminal trial, whether in the prosecution's case-in- chief or for impeachment.[127]

Additionally, in both *Harris* and *Hass* the jury was instructed that it could consider the impeachment evidence only to determine the defendant's credibility, but not as evidence of guilt.[128] The majority concluded that to an extent, the exclusionary rule has a deterrent effect on proscribed police conduct; making the evidence unavailable to prove guilt was sufficient deterrence.[129] The linchpin of the Court's decision appeared to be the truth-seeking function of a trial.

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.[130]

"The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[131]

The dissent saw the case differently. "The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system."[132] Essential to the adversary system was the privilege against self-incrimination.[133]

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[122] *Id.* at 224-26.

[123] *Id.* at 224; *see also* Oregon v. Hass, 420 U.S. 714, 722-23 (1975) (applying the reasoning to post-arrest statements after Hass had requested counsel).

[124] *Harris*, 401 U.S. at 224; *Hass*, 420 U.S. at 722-23.

[125] New Jersey v. Portash, 440 U.S. 450 (1979).

[126] *Id.* at 452-53.

[127] *Id.* at 458.

[128] *Harris*, 401 U.S. at 223; *Hass*, 420 U.S. at 717.

[129] *Harris*, 401 U.S. at 225.

[130] *Id.* at 225-26 (citations omitted).

[131] *Id.* at 226.

[132] *Id.* at 231 (Brennan, J., dissenting).

[133] *Id.* at 231-32.

> [I]t is monstrous that courts should aid or abet the law-breaking police officer. It is abiding truth that '[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.' Thus even to the extent that *Miranda* was aimed at deterring police practices in disregard of the Constitution, I fear that today's holding will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of Miranda cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution.[134]

IV. THE PROBLEM

Some forty years ago, the Court in *Harris* identified the tension in the *Miranda* Rule. The tension of not impeding the truth-finding function of the criminal justice system while maintaining the integrity of the adversary system. The evil that was the focus of the *Miranda* Court's decision was the possibility of inherent coercion in custodial interrogations.[135] The Court viewed custodial interrogations as unacceptably raising the risk that the suspect's privilege against self-incrimination might be violated. "To protect against this danger, the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief."[136]

In the decades since *Miranda* was decided, law enforcement has advanced. In many jurisdictions, custodial interrogations are video or audio recorded.[137] The advent of forensic DNA analysis has made confessions less essential in

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[134] *Id.* at 232 (second alteration in original) (citation omitted) (quoting Mapp v. Ohio, 367 U.S. 643, 659 (1961)).

[135] Miranda v. Arizona, 384 U.S. 436, 533 (1966). *See also* United States v. Patane, 542 U.S. 630, 639 (2004); Dickerson v. United States, 530 U.S. 428, 434-35 (2000).

[136] *Patane*, 542 U.S. at 639.

[137] For example, in the author's appellate practice it has been years when a custodial interrogation of a capital suspect was not video-recorded. The Arizona Supreme Court has repeatedly observed that videotaping the entire interrogation process is "good police practice and a profound aid to courts." *See, e.g.*, State v. Ellison, 140 P.3d 899, 910 n.3 (Ariz. 2006). There has been a movement in many jurisdictions to require such video or audio recordings. *See* Joëlle Anne Moreno, *Faith-Based* Miranda*?: Why the New* Missouri v. Seibert *Police "Bad Faith" Test Is a Terrible Idea*, 47 ARIZ. L. REV. 395, 418 (2005).

certain types of cases. As in the Boston Marathon case, the availability of surveillance video and digital evidence provide a heightened reliability to criminal investigations. On the other hand, DNA has also identified legal procedures that were previously thought to ensure reliability, do not ensure reliability. For example, DNA has shown, even in cases of voluntary confessions that innocent suspects falsely confess.[138] Nevertheless, the need for law enforcement to speak with a suspect is still necessary in many cases, and the Court's concern about how a suspect is treated while in custody is still evident.

Particularly when resources are limited, as they virtually always are in State criminal justice systems, there are many valid reasons to speak with a suspect. First and foremost, it is a relatively quick way to eliminate the person as a suspect. Second, it is a way to understand the suspect's position so it can be investigated. Third, it locks the suspect into a position. Fourth, it is a way to gather intelligence or information important to law enforcement, but not necessarily pertinent to a given case. Fifth, if the suspect makes admissions or confessions, it forces a defendant into the difficult choice of deciding whether to testify in his own defense. Sixth, the suspect might say something that leads to other admissible evidence.

Despite these rationale reasons to speak with a suspect, the strong admonition from the Supreme Court is for law enforcement to "scrupulously honor" a suspect's right to be informed of the warnings and for the officers to abide by the suspect's decision to invoke.[139] And the Supreme Court has created a strong incentive to adhere to *Miranda*: any statement taken after a valid waiver of *Miranda* is rarely ever found to be involuntary.[140] Moreover, commentators report on how law enforcement has adapted to the *Miranda* rule.[141] Although some would argue that some of the adaption is little more than an "end-run" around *Miranda.*[142]

How might this dilemma between a desire to speak with a suspect and to scrupulously honor the *Miranda* Rule be applied in the Boston Marathon bombing case? Law enforcement arrested nineteen year old Jahar Tsarnaev on

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[138] *See False Confessions*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Nov. 29, 2013); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 947-48 (2004).

[139] *See*, *e.g.*, Arizona v. Roberson, 486 U.S. 675, 682-83 (1988); Michigan v. Mosley, 423 U.S. 96, 103-04 (1975); *Miranda*, 384 U.S. at 500.

[140] *See* Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984).

[141] *See* Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1016-24 (2001).

[142] *Id.*; Robert L. Gottsfield, *Is* Miranda *Still with Us? Are the Police Duty-Bound to Comply?*, ARIZ. ATT'Y, Dec. 2006, at 18 (discussing the Inbau Manual, FRED E. INBAU, JOHN E. REID & JOSPEH P. BUCKLEY, CRIMINAL INTERROGATION AND INVESTIGATION (7th ed. 2003).

April 19, 2013.[143] Thereafter, he was confined to a hospital bed.[144] On April 22nd, Federal Magistrate Marianne B. Bowler advised him of his *Miranda* rights as part of his initial appearance.[145] Between these dates, it is alleged that the Government's High Value Detainee Interrogation Group interrogated the suspected Boston Marathon bomber for sixteen hours without advising him of his *Miranda* rights.[146] It is reported that after Magistrate Bowler advised him of his rights, Tsarnaev made no more statements.[147] While the Magistrate Bowler found at the conclusion of the Initial Appearance that Tsarnaev was "alert, mentally competent, and lucid" and he was "aware of the nature of the proceedings," the record of the proceedings reflected that he merely nodded in response to questions and only once actually spoke and said "no."[148] Prior to his initial appearance, Tsarnaev had only briefly spoken with his court-appointed Federal Public Defender.[149]

Assuming the allegation is accurate that law enforcement interrogated Tsarnaev for sixteen hours without first advising him of his *Miranda* rights, was that interrogation a deliberate violation of Tsarnaev's *Miranda* rights? While there could be an argument that it was necessary as a "public safety" exception to *Miranda*, the public record to date is devoid of exigent circumstances that would support a sixteen hour interrogation.[150]

For some thirty years after the *Miranda* decision, there was some question whether the warnings were required by the Constitution. Thus, in the wake of the *Miranda* decision, Congress enacted 18 U.S.C. § 3501 in 1968, "which in essence laid down a rule that the admissibility of such statements should turn

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143 Mark Arsenault, *Second Marathon Bombing Suspect Captured: All-Day Hunt Brought Boston Area to Standstill; Alleged Accomplice Dead*, BOS. GLOBE, Apr. 20, 2013, at A1, *available at* http://www.bostonglobe.com/metro/2013/04/20/second-marathon-suspect-captured-manhunt-ends/4ICVhfRArrGjgsiJnzJ2mM/story.html.

144 Mark Arsenault & Milton Valencia, *Suspect Charged with Using Weapon of Mass Destruction: The Legal Process Begins*, BOS. GLOBE, Apr. 23, 2013, at A1, *available at* http://www.boston.com/news/local/massachusetts/2013/04/22/suspect-charged-with-using-weapon-mass-destruction/J5WyNx7LklRxsAHfk8hMqK/story.html.

145 Ethan Bronner & Michael Schmidt, *In Questions at First, No* Miranda *For Suspect*, N.Y. TIMES, Apr. 23, 2013, at A13, *available at* http://www.nytimes.com/2013/04/23/us/miranda-rights-withheld-for-marathon-suspect-official-says.html?_r=0.

146 Richard A. Serrano, Ken Dilanian & Brian Bennett, Miranda *Reading Silences Boston Suspect*, L.A. TIMES, Apr. 27, 2013, at A4, *available at* http://articles.latimes.com/2013/apr/26/nation/la-na-boston-bombing-20130426.

147 *Id.*

148 Transcript of Record at 7, United States v. Dzhokhar Tsarnaev, No. 13-MJ-02016-MBB (D. Mass Apr. 22, 2013) (Redacted Version).

149 *Id.* at 2.

150 Even if the interrogation came within the *Quarles* exception, there could be serious voluntariness issues. *See* Mincey v. Arizona, 437 U.S. 385, 401-02 (1978) (hospital statement involuntary).

only on whether or not they were voluntarily made."[151] If the Constitution did not mandate the exclusion of voluntary statements by in-custody suspects, then in federal criminal cases, the admissibility of such statements would be governed by § 3501.

As noted previously, the Supreme Court itself had spoken of the *Miranda* warnings as "not themselves rights protected by the Constitution," by stating *"Miranda*'s safeguards are not constitutional in character," and the warnings being merely a "prophylactic" rule.[152] Nevertheless, the Supreme Court held in *Dickerson* that *Miranda* was a constitutional decision that could not in effect be overruled by an Act of Congress and applied in both state and federal courts.[153] The majority in *Dickerson* stated "first and foremost" that both *Miranda* and two of its companion cases applied the new rule to state courts, as did subsequent decisions.[154] While the United States Supreme Court "has supervisory authority over the federal courts" and "may prescribe rules of evidence and procedure that are binding" on those courts, "Congress retains the ultimate authority to modify or set aside any judicially created rules."[155] And it is "beyond dispute" that the Supreme Court has no supervisory power over the courts of the several States.[156]

Additionally, the *Dickerson* Court observed that the *Miranda* opinion began by stating it was to provide "*concrete constitutional guidelines*" for law enforcement and the courts to follow.[157] Furthermore, while the *Miranda* Court invited the States and Congress to devise alternatives for protecting the privilege against self-incrimination in custody circumstances, such alternatives had to be at least as effective as the *Miranda* warnings.[158] The *Dickerson* Court ended the argument that *Miranda* was not a constitutional rule that could be enforced on the States as well as the federal government.

Given that the *Miranda* warnings are constitutionally mandated in every case of in-custody interrogation, is the High-Value Interrogation Group subject to civil suit? Another case, where law enforcement officers believed that interrogations were imperative given the nature of the crime and continual risk to the public, illustrates the dilemma underlying the *Miranda* Rule. Members of

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151 Dickerson v. United States, 530 U.S. 428, 432 (2000).

152 *Id.* at 437-38, 438 n.2 (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974) and Withrow v. Williams, 507 U.S. 680, 690-91 (1993)) (internal quotation marks omitted).

153 *Id.* at 437-38. Interestingly the dissent noted "that Justices whose votes are needed to compose today's majority are on record as believing that a violation of *Miranda* is *not* a violation of the Constitution." *Id.* at 445 (Scalia, J. dissenting).

154 *Id.* at 438.

155 *Id.* at 437.

156 *Id.* at 438.

157 *Id.* at 439.

158 *Id.* at 440.

the Tucson Police Department and the Pima County Sheriff's Department developed a preexisting interrogation plan to extract a confession from suspect Michael Cooper, who they thought to be "the Prime Time Rapist" responsible for a series of rapes, robberies, and kidnappings over a two year period.[159] Pursuant to the plan, they "ignored Cooper's repeated requests to speak with an attorney, deliberately infringed on his Constitutional right to remain silent, and relentlessly interrogated him in an attempt to extract a confession."[160]

> Although the officers knew any confession thus generated would not be admissible in evidence in a prosecutor's case in chief, they hoped it would be admissible for purposes of impeachment if the suspect ever went to trial. They expected that the confession would prevent the suspect from testifying he was innocent, and that it would hinder any possible insanity defense.[161]

Some of the officers justified the plan because they had little evidence the rapes were continuing, and the best way to eliminate a suspect was through the interrogation process.[162] One officer justified using the plan, that flouted the requirements announced in *Miranda*, in cases where the evidence of guilt is overwhelming.[163]

However, eventually the interrogators concluded Cooper was *not* guilty and further investigation *fully exonerated* Cooper.[164] Cooper sued employees of the two departments alleging a violation of 42 U.S.C. § 1983, among other allegations.[165]

An *en banc* Ninth Circuit Court found the Task Force's plan to be "as purposefully unlawful as it was clever."[166] The law enforcement officers "made a calculated decision to take the law into their own hands," to trample on the suspect's civil and *Miranda* rights "because in the 'big picture,' it was 'worth it, yeah.'"[167]

"Section 1983 imposes civil liability on any person who, acting under color of state law, deprives a United States citizen of his federal constitutional or

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159 Cooper v. Dupnik, 963 F.2d 1220, 1223-24 (9th Cir. 1992) (en banc) *overruled on other grounds by* Chavez v. Martinez, 538 U.S. 760 (2003).

160 *Id.* at 1223.

161 *Id.* at 1224.

162 *Id.* at 1225-27.

163 *Id.* at 1224.

164 *Id.* at 1223.

165 *Id.*

166 *Id.* at 1227.

167 *Id.*

statutory rights."[168] The law enforcement officers argued that because "*Miranda* requirements are not a constitutional prerequisite, their violation cannot form the basis of a section 1983 suit."[169] The en banc court disagreed.

> [T]o characterize the Task Force's conduct as a mere violation of *Miranda's* prophylactic advisement requirements is to see a hurricane as but a movement of air. The appellants in this case engaged in the premeditated elimination of Mr. Cooper's substantive Fifth Amendment rights, not merely the disposal of the procedural safeguards designed to protect those rights. Thus, Cooper's statements were "compelled" and "coerced."[170]

The Court also found both a Fifth Amendment violation and a substantive due process violation and that the officers were not entitled to qualified immunity.[171]

If the *Miranda* holding of *Cooper* was still the law today, the officers who conducted Tsarnaev's interrogation might be subject to a civil suit under § 1983.[172] Of course, given the apparent overwhelming evidence in the bombing case, even if the officers were legally liable, the practical chance for a successful lawsuit from a convicted murderer is not probable.[173] Nevertheless, in a much fractured opinion, the Supreme Court in *Chavez* resolved somewhat the question at what point the constitutional violation occurs when law enforcement fails to honor the requirements of the *Miranda* decision.[174] Is it when the police officers fail to honor *Miranda* by either not giving the warnings or by not abiding by the warnings or when the statement obtained in violation of *Miranda* is offered into evidence?

The Section 1983 case arose out of Sergeant Ben Chavez's allegedly coercive interrogation of Oliverio Martinez.[175] While officers were investigating suspected narcotics activity near a vacant lot, Martinez arrived on a bicycle and was ordered by the officers to dismount.[176] After a knife was discovered on

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[168] *Id.* at 1236.

[169] *Id.* (citation omitted) (internal quotation marks omitted).

[170] *Id.* at 1237.

[171] *Id. See also* Cal. Attorneys for Criminal Justice v. Butts, 195 F.3d 1039, 1045-47 (9th Cir. 1999) (a §1983 suit lies for alleged interrogation in violation of *Miranda*).

[172] *See* Doody v. Ryan, 649 F.3d 986, 1041 (9th Cir. 2011) (en banc) (recognizing *Chavez v. Martinez*, 538 U.S. 760 (2003) overruled *Cooper* in part).

[173] This of course is another aspect of the problem of ensuring that the *Miranda* rights are scrupulously honored.

[174] Chavez v. Martinez, 538 U.S. 760, 763 (2003).

[175] *Id.*

[176] *Id.*

Martinez during a pat-down frisk, an altercation ensued that resulted in Martinez being shot several times, causing severe injuries leaving him permanently blinded and paralyzed from the waist down.[177]

Chavez, a patrol supervisor, accompanied Martinez to the hospital where he questioned him without advising him of the *Miranda* warnings.[178] Presumably, in anticipation of some sort of litigation, Chavez wanted to obtain Martinez's version of the events. Martinez was never charged and his answers were never used against him in any criminal prosecution. His subsequent civil suit alleged violations of his Fifth Amendment right to self-incrimination as well as a Fourteenth Amendment "substantive due process right to be free from coercive questioning."[179]

In resolving the case, four of the Justices were able to agree on Part II(A) of the opinion.[180] Based on the Fifth Amendment, the Justices determined that the officer's alleged conduct did not violate any constitutional right.[181]

> The Fifth Amendment, made applicable to the States by the Fourteenth Amendment, *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), requires that "[n]o person . . . shall be compelled *in any criminal case* to be a *witness* against himself." U.S. Const., Amdt. 5 (emphasis added). We fail to see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case.[182]

In their view, a "criminal case" requires, at the very least, the initiation of legal proceedings.[183]

> We need not decide today the precise moment when a "criminal case" commences; it is enough to say that police questioning does not constitute a "case" any more than a private investigator's precomplaint activities constitute a "civil case."[184]

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[177] *Id.* at 764.

[178] *Id.*

[179] *Id.* at 765.

[180] Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia joined this part of Justice Thomas' opinion. *Id.* at 763.

[181] *Id.* at 766.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 766-67.

Thus, there is not a violation of the Self-Incrimination Clause until the statements are *used* in a criminal case.[185]

The plurality also agreed that "Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights and cannot be grounds for a § 1983 action."[186] Justice Kennedy, with whom Justice Stevens joined, did not join Part II(A).[187] He did, however, agree with Justice Thomas "that failure to give a *Miranda* warning does not, *without more*, establish a completed violation when the unwarned interrogation ensues."[188] He disagreed with Justice Souter and Justice Thomas, however, that "a violation of the Self-Incrimination Clause does not arise until a privileged statement is introduced at some later criminal proceeding."[189] In Justices Kennedy's and Stevens's[190] opinion the "exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy."[191]

Thus, the question whether a violation of *Miranda* can ever support a § 1983 action is still a somewhat open question.[192] Nor did the Court resolve the substantive due process claim. Unauthorized police behavior that is so offensive to human dignity to "shock the conscience" violates the Due Process Clause of the Fourteenth Amendment.[193] A majority of the Court remanded this claim of liability to the Ninth Circuit.[194]

As part of law enforcement adapting to the *Miranda* Rule, some law enforcement agencies adopted a police protocol for custodial interrogations that provides for giving no *Miranda* warnings until after the interrogation has produced a confession.[195] After a short break, then the interrogating officer gives the *Miranda* warnings and then questions the suspect with the knowledge

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185 *Id.* at 767. That ambiguous holding initiated a disagreement among the lower courts. *See* Paulo C. Alves, *"Taking the Fifth" Beyond Trial: § 1983 Claims for Pre-Trial Use of Coerced Statements Affirms One's Right Against Self-Incrimination*, 26 J. CIV. RTS & ECON. DEV. 253, 255 (2012).

186 *Chavez*, 538 U.S. at 772.

187 *Id.* at 789.

188 *Id.* at 789 (emphasis added).

189 *Id.*

190 Justice Stevens found the interrogation the "functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods." *Id.* at 783. Thus, in his view, such "brutal police conduct" is a deprivation of the prisoner's "constitutionally protected interest in liberty." *Id.* at 784.

191 *Id.* at 790.

192 Justice Souter and Breyer were of the opinion that the "question whether the absence of *Miranda* warnings may be a basis for a § 1983 action under any circumstances is not before the Court." *Id.* at 779 n.*.

193 *Id.* at 774.

194 *Id.* at 779-80.

195 Missouri v. Seibert, 542 U.S. 600, 604, 609-11 (2004) (plurality opinion).

gained from the first unwarned interrogation.[196] In his concurrence Justice Kennedy labeled this protocol as a "two-step" interrogation technique.[197] In the plurality opinion, the Court held that such a protocol did not "effectively comply with *Miranda*'s constitutional requirement."[198] Justice Kennedy concurred in judgment finding the interrogation technique was designed to circumvent and undermine the *Miranda* warnings, thus obscuring their meaning.[199] It was a "deliberate" violation of *Miranda*.[200] Rejecting Justice Kennedy's view that exclusion should depend on the subjective intent of the interrogating officer, the four Justices in dissent agreed with the four Justices in the plurality that subjective intent of the law enforcement officers should not be a factor in deciding whether a *Miranda* violation occurred.[201]

V. CONCLUSION

Nearly half a century has elapsed since the *Miranda* decision and still the Supreme Court struggles with a proper balanced and a pragmatic application of the *Miranda* Rule to assure its enforcement is not too robust to severely hamper the truth finding process. Since its decision the Supreme Court developed two main enforcement mechanisms: 1) exclusion of the statement made in violation of *Miranda*; and 2) a 1983 action for civil liability for some type of violation. *Missouri v. Seibert*[202] was an exclusion case. In such a case, there is clear deterrence in suppression. In those cases, however, where the law enforcement officers are not concerned with the admissibility of the statement, suppression is not a deterrent. Additionally, there is not deterrence through a 1983 action for a mere failure to warn or a failure to honor the *Miranda* Rule. For those cases where the officer's behavior shocks the conscious there is deterrence, but is that enough? If the *Miranda* Rule is of constitutional dimension, is it appropriate to allow law enforcement to violate it without consequences? Perhaps the *Tsarnaev* case will provide some answers to these questions. Or, perhaps there are no bright-line answers to these difficult questions, but rather the only avenue is the case-by-case approach the Court has followed since its decision.

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196 *Id.* at 604.

197 *Id.* at 620 (Kennedy, J., concurring).

198 *Id.* at 604. In Bobby v. Dixon, 132 S. Ct. 26, 31 (2011) (per curiam), the Court distinguished *Seibert* in this habeas case because the defendant *contradicted* his prior unwarned statements in the second statement that was admitted.

199 *Seibert*, 542 U.S. at 618 (Kennedy, J., concurring).

200 *Id.* at 620.

201 *Id.* at 623-25 (O'Connor, J., dissenting).

202 *See supra* notes 196-202 and accompanying text.

PRE-ARREST, PRE-*MIRANDA* SILENCE: QUESTIONS LEFT UNANSWERED BY *SALINAS V. TEXAS*

Peg Green

"[A] suspect who wishes to guard his right to remain silent . . . must, counterintuitively, speak . . . ."[1]

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."[2]

I. CASES LEADING UP TO *SALINAS*

"The privilege against self-incrimination is a right that was hard-earned by our forefathers."[3] The recent United States Supreme Court opinion, *Salinas v. Texas,* significantly narrows the application of the Fifth Amendment; requiring that in order for the privilege to apply, a person must expressly invoke its protection.[4] In order to remain silent, one must now speak up! But before delving into the recent opinion, it is helpful to review pertinent cases leading up to this new approach taken by the Supreme Court.

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[1] Berghuis v. Thompkins, 560 U.S. 370, 391 (2010) (Sotomayor, J., dissenting).
[2] U.S. CONST., amend. V, XIV; ARIZ. CONST., art. 2, §§ 4, 10.
[3] Quinn v. United States, 349 U.S. 155, 161 (1955).
[4] Salinas v. Texas, 133 S. Ct. 2174 (2013).

A. United States Supreme Court

For the purposes of this Article, the discussion regarding the invocation of Fifth Amendment rights can properly begin with the 1955 opinion, *Quinn v. United States*.[5] Quinn was a union member called to testify in front of a congressional committee investigating Communism.[6] Several other witnesses who testified before him expressly invoked the Fifth Amendment.[7] Quinn somewhat clumsily adopted the invocations of the prior witnesses.[8] The Supreme Court addressed whether Quinn sufficiently invoked his Fifth Amendment right to remain silent.[9]

The Supreme Court held that a claim of the Fifth Amendment right "does not require any special combination of words."[10] The Fifth Amendment was to be construed liberally, and no ritualistic formula was necessary to invoke the privilege.[11]

In *Griffin v. California*, the defendant was charged with murder and did not testify at trial.[12] The state law allowed a prosecutor to comment on defendant's failure to testify.[13] The trial court also instructed the jury that they could consider the defendant's silence as evidence of guilt.[14] The Supreme Court held that comment by the prosecution on defendant's silence or instruction by the court that such silence is evidence of guilt was forbidden by the Fifth Amendment.[15] Lurking in the background was the question of whether the defendant was "compelled" to be a witness against himself. The majority did not address compulsion. The dissent maintained that compulsion was the focus of the inquiry.[16]

The Supreme Court issued the landmark opinion, *Miranda v. Arizona,* in 1966.[17] In that case, Miranda was subjected to custodial interrogation.[18] He gave a statement without full warning of his constitutional right to counsel and right to remain silent.[19] The Court addressed the issue of whether the state-

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5 Quinn v. United States, 394 U.S. 155 (1955).
6 *Id.* at 157.
7 *Id.* at 157-58.
8 *Id.* at 158, 158 n.8.
9 *Id.* at 160.
10 *Id.* at 162.
11 *Id.* at 162, 164.
12 Griffin v. California, 380 U.S. 609, 609 (1965).
13 *Id.* at 610.
14 *Id.*
15 *Id.* at 615.
16 *Id.* at 620 (Stewart, J., dissenting).
17 Miranda v. Arizona, 384 U.S. 436 (1966).
18 *Id.* at 439.
19 *Id.* at 439-40.

ments taken from Miranda during the in-custody interrogation were admissible against him at trial if officers did not advise Miranda of his constitutional rights.[20] The Court ruled that the statements were not admissible, holding, "if [any] individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not interrogate him."[21] Further, the Court ruled, "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[22]

Ten years later, the Court ruled in *Doyle v. Ohio* that the state could not use a defendant's post-arrest, post-*Miranda* silence for impeachment purposes.[23] In *Doyle*, the state charged the defendants with sale of marijuana.[24] The defendants remained silent after the police arrested them and advised them of their *Miranda* warnings.[25] Both defendants testified at trial.[26]

The prosecutor cross-examined the defendants about why they did not speak up when the police arrested them and instead waited until trial to tell their version of the events.[27] The Court ruled that the prosecutor violated the defendants' due process rights by doing so, reasoning that the *Miranda* warning implied that a defendant's invocation of his right to remain silent would not be used against him.[28]

In *Jenkins v. Anderson*, four years later, the Court addressed whether the prosecution could use defendant's pre-arrest silence for purposes of impeaching a testifying defendant.[29] In *Jenkins*, the defendant was charged with murder and surrendered to police two weeks after the incident.[30] The defendant claimed self-defense at trial and testified on his own behalf.[31] The prosecutor referred to defendant's pre-arrest silence.[32] The Supreme Court reasoned that the prosecutor's reference did not violate the Fifth Amendment because no government action induced the defendant to remain silent before his arrest, and impeachment upon cross-examination is a risk that any defendant takes if he decides to testify at trial.[33]

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[20] *Id.* at 439.
[21] *Id.* at 444-45.
[22] *Id.* at 458.
[23] Doyle v. Ohio, 426 U.S. 610, 619 (1976).
[24] *Id.* at 612.
[25] *Id.* at 612-14.
[26] *Id.*
[27] *Id.* at 613-14, 613-14 nn.4-5.
[28] *Id.* at 619.
[29] Jenkins v. Anderson, 447 U.S. 231, 232 (1980).
[30] *Id.*
[31] *Id.*
[32] *Id.* at 233-34.
[33] *Id.* at 238, 240.

In 1986, the Supreme Court addressed whether a prosecutor violated the Due Process Clause of the Fourteenth Amendment when he commented on the defendant's post-arrest, post-*Miranda* silence as evidence of sanity.[34] In *Wainwright v. Greenfield*, the Court ruled that the *Doyle* rationale applied in a case where a defendant's post-arrest, post-*Miranda* invocation of his right to remain silent was evidence of sanity.[35] The Court maintained that a defendant is given the *Miranda* warnings which promise that his silence will not be used against him.[36] While it was permissible to use silence to impeach a testifying defendant, it was fundamentally unfair for the prosecutor to use evidence of defendant's silence as evidence of sanity.[37] The Court admonished, "silence will carry no penalty."[38]

Finally, in 2010 the Court addressed the issue of exactly how one goes about invoking the right to remain silent.[39] In *Berghuis v. Thompkins*, the state charged the defendant with murder.[40] He underwent post-arrest, post-*Miranda* interrogation for about three hours, saying very little and remaining silent for the majority of the time.[41] After continuous questioning by police, defendant finally made incriminating statements, which the state used against him at trial.[42] The Court considered the issue of whether defendant's silence sufficiently invoked his right to remain silent.[43] Likening the invocation of the right to remain silent with the invocation of the right to counsel, the Court held that a defendant who wishes to invoke the right to remain silent must do so "unambiguously."[44]

A persuasive dissent reasoned this ruling required a person to speak in order to invoke the right to remain silent.[45] This counterintuitive approach strays from a "faithful application" of prior decisions.[46] This approach also construed ambiguity in favor of the police.[47]

The dissent further described the majority opinion as a substantial retreat from the protection provided by *Miranda*.[48] Instead of requiring the defendant

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[34] Wainwright v. Greenfield, 474 U.S. 284, 285 (1986).
[35] *Id.* at 295.
[36] *Id.* at 292.
[37] *Id.* at 295.
[38] *Id.* (quoting Doyle v. Ohio, 426 U.S. 610, 618 (1976)) (internal quotation marks omitted).
[39] Berghuis v. Thompkins, 560 U.S. 370 (2010).
[40] *Id.* at 372-73.
[41] *Id.* at 375-76.
[42] *Id.* at 376-79.
[43] *Id.* at 378-81.
[44] *Id.* at 381.
[45] *Id.* at 406-12 (Sotomayor, J., dissenting).
[46] *Id.*
[47] *Id.*
[48] *Id.* at 412.

to utter magic words, the police could merely ask a simple question: "Do you want to talk to us?"[49] A suspect may answer this question with a simple yes or no. Yes means he will talk and no means he will remain silent. The Court chose to overlook this easy solution and instead left the matter open to concerns that the police would be unable to discern when a person invoked a constitutional right.[50] As a result, *Salinas v. Texas* held that in order to invoke the Fifth Amendment pre-arrest and pre-*Miranda*, a person must expressly and unambiguously invoke the privilege.[51]

B. Federal Circuit Courts of Appeals

Not surprisingly, the circuit courts of appeals interpreted these cases differently. Some courts applied a historical analysis of the Fifth Amendment, and some courts applied little analysis at all. As a result, the circuits split when it comes to deciding whether it is permissible to introduce evidence of pre-arrest, pre-*Miranda* silence as evidence of guilt.

Savory v. Lane, decided by the Seventh Circuit Court of Appeals in 1987, addressed whether pre-arrest, pre-*Miranda* silence could be used against a suspect as evidence of guilt.[52] The defendant was a fourteen-year-old boy being investigated for murder.[53] He told police that he did not want to talk about it and did not want to make any statements.[54] At trial, the prosecutor introduced the defendant's silence as evidence of guilt.[55] The Seventh Circuit found this was a violation of the Fifth Amendment, and noted that the right to remain silent attached before the institution of formal adversary proceedings.[56]

In 1989, the First Circuit found that a state violated a defendant's rights when it used his invocation of his right to remain silent in its case-in-chief.[57] In *Coppola v. Powell*, the state charged the defendant with burglary and sexual assault.[58] When approached by the police, pre-arrest and pre-*Miranda*, Powell told them that he was not going to confess.[59] The state introduced this statement as evidence of guilt.[60] Powell did not testify.[61]

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[49] *Id.* at 410.
[50] *Id.* at 409-12.
[51] Salinas v. Texas, 133 S. Ct. 2174, 2183-84 (2013).
[52] Savory v. Lane, 832 F.2d 1011, 1012 (7th Cir. 1987).
[53] *Id.*
[54] *Id.* at 1015.
[55] *Id.*
[56] *Id.* at 1017-18.
[57] Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989).
[58] *Id.* at 1563.
[59] *Id.*
[60] *Id.* at 1564.
[61] *Id.* at 1563.

To support its decision, the First Circuit reasoned that the defendant properly invoked the Fifth Amendment and a person can invoke the right to remain silent without using any particular or specific words.[62] As will become a familiar theme in the analysis of Fifth Amendment claims, the First Circuit noted: (1) the Fifth Amendment must be given liberal construction; (2) the Fifth Amendment does not turn on a person's choice of words; and (3) Fifth Amendment protection is not limited to persons in custody or formally charged with a crime.[63]

Therefore, the First Circuit held that pre-arrest, pre-*Miranda* statements were not admissible in the state's case-in-chief.[64] It was improper to comment on a defendant's silence where the defendant did not testify.[65] The First Circuit reasoned that Fifth Amendment protection was not limited to those in custody or charged with a crime.[66] The key question was whether the answer to the question posed by police would result in "harmful disclosure."[67]

A few years later, the Tenth Circuit also found that the government violated the defendant's Fifth Amendment rights by introducing his silence into evidence in its case-in-chief. In *United States v. Burson*, the state charged the defendant with failure to file tax returns.[68] When agents tried to talk to Burson about the charges, he produced a tape recorder and interrogated the agents.[69] The agents left, believing that Burson would not answer their questions.[70]

Burson was not under arrest and was not *Mirandized*.[71] The government used Burson's silence against him in its case-in-chief.[72] In reaching its decision, the Tenth Circuit used the same three factors as the First Circuit when it analyzed the invocation of the Fifth Amendment right to remain silent: (1) liberal construction; (2) no special words required; and (3) applies in any investigatory or adjudicatory proceeding.[73] The Tenth Circuit held that the admission of the evidence of Burson's silence was an error.[74]

The Sixth Circuit joined the First and Tenth Circuits when it determined the state violated the Fifth Amendment when the prosecutor used evidence of

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62 *Id.* at 1565.
63 *Id.* at 1564-65.
64 *Id.* at 1568.
65 *Id.* at 1567.
66 *Id.* at 1565.
67 *Id.* (citing Hoffman v. United States, 341 U.S. 479, 486-87 (1951)).
68 United States v. Burson, 952 F.2d 1196, 1198 (10th Cir. 1991).
69 *Id.* at 1200.
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.* at 1201.

defendant's pre-arrest, pre-*Miranda* silence in its case-in-chief.[75] In *Combs v. Coyle*, the state charged Combs with aggravated murder.[76] A police officer addressed Combs while still at the scene of the crime.[77] When asked what happened, Combs told the officer, "Talk to my lawyer."[78] Combs did not testify on his own behalf at trial.[79] The state used this pre-arrest, pre-*Miranda* silence as evidence of guilt.[80]

The Sixth Circuit engaged in an extensive discussion of this issue and reviewed applicable cases, pro and con.[81] The Sixth Circuit offered an interesting rationale for its decision, noting that "the only means of compelling a person to incriminate himself is to penalize him if he does not."[82] The Sixth Circuit also offered that the state's use of a defendant's silence as evidence of guilt lessens the state's burden of proving each element of the crime.[83] The court believed that using evidence of silence as proof of guilt was "not a legitimate governmental practice."[84] The court proposed that commenting on a defendant's silence undermined the policies behind the privilege against self incrimination and added nothing to the reliability of the criminal process.[85] Finally, the Sixth Circuit determined that the Fifth Amendment rights were not limited to persons in custody or charged with a crime.[86] However, the assertion of the right to remain silent must be confined to situations where the witness "had reasonable cause to apprehend danger from a direct answer."[87]

However, not every circuit court of appeals analyzed the issue in the same way as the Sixth Circuit. In 1996, the Fifth Circuit Court of Appeals limited Fifth Amendment protection to compelled self incrimination.[88] In that case, the state charged defendant with several counts of possession of cocaine for

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[75] Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000).

[76] *Id.* at 272.

[77] *Id.* at 278-79.

[78] *Id.* at 279.

[79] *Id.* at 286.

[80] *Id.* at 279.

[81] *Id.* at 279-83.

[82] *Id.* at 284 n.9.

[83] *Id.* at 285.

[84] *Id.*

[85] *Id.* at 285-86.

[86] *Id.* at 283.

[87] *Id.* (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)) (internal quotation mark omitted).

[88] United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996).

sale.[89] Zanabria offered a duress defense and did not take the stand at trial.[90] Instead, he presented witnesses at trial to establish his defense.[91]

When the police initially contacted Zanabria, he did not tell them that he acted under duress.[92] The prosecutor argued in closing that defendant's pre-arrest, pre-*Miranda* silence was evidence of guilt.[93] While this opinion is light in analysis, the court stated that the Fifth Amendment does not protect the defendant against the proper use of every communication, or lack thereof, which may be incriminating.[94]

Two years later, the Ninth Circuit addressed a case in which an employer investigated its employee, the defendant, for fraud.[95] In *United States v. Oplinger*, when questioned by his employer, the defendant decided to remain silent because he believed he was about to lose his job.[96] The federal government later charged Oplinger with bank fraud.[97] At trial, the prosecutor commented on the defendant's silence in the face of his employer's questioning.[98] Because a private party questioned Oplinger, and not the police, the Ninth Circuit held that the Fifth Amendment did not apply to pre-arrest, pre-*Miranda* silence in response to questioning by non-governmental agents.[99] The court reasoned that the government made no effort to compel the defendant to speak, and the Fifth Amendment is a "limitation on the investigative techniques of government, not as an individual right against the world."[100]

C. Arizona Cases

Recently, the Arizona Supreme Court addressed the use of a defendant's post-arrest, pre-*Miranda* silence in *State v. VanWinkle*.[101] The state charged VanWinkle with attempted murder.[102] When police arrived on the scene, VanWinkle was there with others.[103] When the police focused on a man

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[89] *Id.* at 591.
[90] *Id.* at 592.
[91] *Id.*
[92] *Id.* at 593.
[93] *Id.* at 592-93.
[94] *Id.* at 593.
[95] United States v. Oplinger, 150 F.3d 1061, 1064 (9th Cir. 1998).
[96] *Id.*
[97] *Id.*
[98] *Id.* at 1065-66.
[99] *Id.* at 1067.
[100] *Id.* (quoting United States v. Gecas, 120 F.3d 1419, 1456 (11th Cir. 1997)) (internal quotation marks omitted).
[101] State v. VanWinkle, 273 P.3d 1148 (Ariz. 2012).
[102] *Id.* at 1149.
[103] *Id.*

named Cory, Cory told them that VanWinkle was the shooter.[104] VanWinkle did not respond to Cory's accusation.[105] The state introduced evidence of his silence in the face of Cory's accusation and argued to the jury that VanWinkle's silence was a "tacit admission of guilt."[106] The Arizona Supreme Court noted that this was a question of first impression in Arizona.[107]

The court ruled that the prosecutor's comment on VanWinkle's post-arrest, pre-*Miranda* silence violated due process and was thus improper.[108] The court reasoned that the right to remain silent derived from the Constitution and not from *Miranda* warnings.[109] Further, "[a] defendant has the right to remain silent when it is 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'"[110] The court found that taking a person into custody is the triggering event for the assertion of the right against self-incrimination.[111] The Arizona Supreme Court reasoned that "[t]he right to remain silent would mean little if the consequence of its exercise is evidence of guilt."[112]

Division One of the Arizona Court of Appeals recently held that the trial court erred when it allowed the State to use a defendant's invocation of her Fourth Amendment rights as substantive evidence of guilt.[113] In that case, Stevens argued with her son over drug paraphernalia in the home.[114] When the police arrived at the home, Stevens did not want them to enter the home and yelled, "Search warrant."[115]

One officer stayed with Stevens while another officer entered the home to check the welfare of her son.[116] Stevens' son showed the drug paraphernalia to the officer.[117] The police eventually returned with a search warrant and seized not only paraphernalia but also methamphetamine.[118] Stevens was charged with possession of drug paraphernalia and dangerous drugs.[119] At trial, the

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104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* at 1150.
108 *Id.* at 1152.
109 *Id.* at 1151.
110 *Id.* (quoting Hoffman v. United States, 241 U.S. 479, 487-87 (1951)).
111 *Id.* at 1151-52.
112 *Id.* at 1152.
113 State v. Stevens, 267 P.3d 1203, 1209 (Ariz. Ct. App. 2012).
114 *Id.* at 1205.
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*

State elicited evidence about and commented on Stevens' assertion of her Fourth Amendment right.[120] In discussing the issue as presented in *Stevens*, the court noted that the use of pre-*Miranda* silence as direct evidence of guilt has not been decided by the United States Supreme Court or the Arizona Supreme Court.[121]

Division Two of the Court of Appeals also recently addressed the issue of whether it is proper for the state to elicit testimony regarding a defendant's pre-arrest, pre-*Miranda* silence.[122] Framed as a prosecutorial misconduct issue, the court ruled that it was not an error for the prosecutor to elicit testimony from a police officer that Lopez never came forward during the three-week period between the crimes and his arrest.[123] Division Two reasoned that when a defendant's silence is not the result of state action, the protections of the Fifth Amendment do not prohibit the State's comment on that defendant's pre-arrest, pre-*Miranda* silence.[124] During those three weeks, Lopez never came into contact with police officers.[125] Relying on *Oplinger*, the court found the Fifth Amendment did not apply.[126] "The [Fifth Amendment's] self-incrimination clause was intended as a 'limitation on the investigative techniques of government, not as an individual right against the world.'"[127]

II. *Salinas v. Texas*

A. Does the Use of Pre-Arrest, Pre-Miranda Silence as Evidence of Guilt Violate a Defendant's Fifth Amendment Right to Remain Silent?

The Court issued a ruling in *Salinas v. Texas* on June 17, 2013.[128] The United States Supreme Court granted certiorari to answer whether a state could use pre-arrest, pre-*Miranda* silence against a defendant as evidence of guilt.[129] The Court sidestepped the issue and instead addressed the manner in which one must invoke one's Fifth Amendment rights.[130]

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120 *Id.* at 1205-06.

121 *Id.* at 1207 n.4.

122 State v. Lopez, 279 P.3d 640 (Ariz. Ct. App. 2012).

123 *Id.* at 643-45.

124 *Id.* at 645.

125 *Id.*

126 *Id.*

127 *Id.* (alteration in original) (quoting United States v. Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998)) (internal quotation marks omitted).

128 Salinas v. Texas, 133 S. Ct. 2174 (2013).

129 *Id.* at 2179.

130 *Id.* at 2178-79.

Salinas involved an investigation into the shooting and killing of two brothers.[131] Although no one witnessed the murders, a neighbor heard gunshots and saw someone run out of the house and leave in a dark-colored car.[132] Six shotgun shell casings were recovered at the scene.[133] The police investigation focused on Salinas, who was at a party at the victims' home the night before they were killed.[134] Salinas owned a dark blue car.[135]

Salinas gave the police his shotgun for ballistics testing and went to the police department for questioning.[136] The interview lasted approximately one hour and was noncustodial.[137] Salinas answered most of the questions police asked him, but when asked whether the shells recovered at the scene of the murder would match his shotgun, Salinas "declined to answer."[138] The police asked additional questions, which Salinas answered.[139]

Salinas did not testify at trial.[140] The Court allowed the State to use Salinas' pre-arrest, pre-*Miranda* silence as evidence of guilt.[141] On appeal, Salinas argued that the prosecutor's use of his silence as evidence of guilt violated the Fifth Amendment.[142] The Houston Court of Appeals rejected that argument, finding his pre-arrest, pre-*Miranda* silence "was not 'compelled' within the meaning of the Fifth Amendment."[143] The Texas Court of Criminal Appeals affirmed.[144]

The United States Supreme Court granted certiorari on the issue of "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case-in-chief."[145] The United States Supreme Court never reached that issue, but determined instead that Salinas never properly invoked the protections of the Fifth Amendment.[146]

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131 *Id.* at 2178.
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.* at 2179.
145 *Id.*
146 *Id.* at 2184.

The Court held that a suspect must expressly invoke the privilege against self-incrimination in response to the officer's question.[147] The privilege is not self-executing and a witness who desires its protection must claim it.[148] The Court found that Salinas did not expressly invoke the privilege, and therefore, he could not claim the protection of the Fifth Amendment.[149] The decision was a close call, 5-4, with Justice Alito writing the majority opinion joined by Chief Justice Roberts and Justice Kennedy, with Justices Thomas and Scalia concurring.[150] Justice Breyer wrote the dissent joined by Justices Ginsburg, Sotomayor, and Kagan.[151]

The Court acknowledged two exceptions to the requirement that a witness must expressly invoke the Fifth Amendment in order to benefit from its protection: (1) A defendant at trial is not required to take the stand and invoke the privilege; and (2) a defendant's failure to invoke the privilege is excused when governmental coercion makes forfeiture of the privilege involuntary.[152] The court clarified that "a witness need not expressly invoke the privilege where some form of official compulsion denies him a free choice to admit, to deny, or to refuse to answer."[153]

As the dissent predicted in *Salinas*, a defendant may now find himself in an unenviable, disadvantaged position because he may incriminate himself by answering a question, or he may be considered guilty if he remains silent.[154] *Salinas* places a person subject to police investigation in the position where one is "damned if you do, and damned if you don't," (*i.e*., by answering questions, the answers may be incriminating and may be used as evidence. If the suspect expressly invokes the right to remain silent, silence may be used as evidence of guilt). The Court rejected Salinas' argument that the express invocation requirement need not apply where a witness is silent in the face of official suspicions.[155] The Court determined this approach would needlessly burden society's interest in admitting evidence that is probative of a defendant's guilt.[156]

Justice Breyer wrote for the dissent.[157] He pointed out that the majority opinion places an individual in the position of being punished both by his

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147 *Id.* at 2179.
148 *Id.*
149 *Id.* at 2179, 2184.
150 *Id.* at 2177-84.
151 *Id.* at 2185.
152 *Id.* at 2179-80.
153 *Id.* at 2180 (internal quotation marks omitted).
154 *Id.* at 2186 (Breyer, J., dissenting).
155 *Id.* at 2181-82.
156 *Id.* at 2182.
157 *Id.* at 2185.

silence and his spoken words.[158] "[T]o allow comment on silence directly or indirectly can compel an individual to act as 'a witness against himself'—very much what the Fifth Amendment forbids."[159] The dissent also acknowledged that historically, "no ritualistic formula is necessary in order to invoke the privilege," citing *Quinn v. United States*.[160]

B. Discussion

The *Salinas* court effectively sidestepped the issue when they granted certiorari in the first place: whether pre-arrest, pre-*Miranda* silence could be introduced by the state as evidence of guilt. By ruling that Salinas did not expressly invoke his Fifth Amendment privilege against self-incrimination, the Court ruled that he was not "silent." This is so even though he refused to answer pointed questions about whether the ballistics testing would identify his gun as the murder weapon. Standing mute, apparently, is no longer sufficient to convey that a person does not wish to answer a question. While not describing exactly what is sufficient, to expressly invoke one's right to remain silent, the Court noted that an individual must speak.

The rationale of *Salinas* does not lead with confidence to its conclusion. The Court did not address the three premises of Fifth Amendment jurisprudence that the First and Tenth Circuit Courts of Appeals addressed: (1) the Fifth Amendment must be given liberal construction; (2) the Fifth Amendment does not turn on a person's choice of words; and (3) Fifth Amendment protection is not limited to persons in custody or formally charged with a crime. Specifically, the Court ignores the mandate that the Fifth Amendment shall be given a liberal construction,[161] and that the Fifth Amendment does not turn on a person's choice of words.[162]

The Court gives a nod to *Quinn* in its decision that one must expressly invoke the right to remain silent. Arguably, one can construe *Quinn* to mean that invocation of the right must be made verbally, not by standing mute or displaying other types of demeanor. However, it is not hard to imagine that the next issue for courts to address is whether a person's choice of words, meant to invoke his right to remain silent, are sufficient to meet the Supreme Court's requirement of "express invocation." While a savvy individual may know enough to say, "I expressly invoke my right to remain silent," an individual who is less savvy may only say, "Don't talk to me." The suspects are left

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158 *Id.* at 2186 (Breyer, J., dissenting).

159 *Id.* (quoting Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990)).

160 *Id.* (quoting Quinn v. United States, 349 U.S. 155, 164 (1955)).

161 Miranda v. Arizona, 384 U.S. 436, 461 (1966).

162 Quinn v. Unites States, 349 U.S. 155, 162 (1955).

playing word games with the police in order to satisfy the *Salinas* court's ruling.

The Supreme Court relied on *Minnesota v. Murphy* for much of its rationale, and that case could not be more different from the underlying facts in *Salinas*.[163] *Murphy* involved a probationer who made incriminating statements to his probation officer.[164] He was out of custody.[165] The probationer's statements to his probation officer were used against him when he was eventually charged with first-degree murder.[166] He never remained silent, nor did he attempt to invoke his right to remain silent.

Salinas, on the other hand, was faced with the State's intent to use his silence against him when he refused to answer certain questions posed by the police. *Murphy* involved the question of whether the defendant's incriminating statements could be used against him,[167] while *Salinas* involved the question of whether his silence could be used against him. Somehow, the Court found this discrepancy to be of no consequence, used the *Murphy* analysis requiring a person to "claim" the right, and as a result, bolstered its ruling in *Salinas* that a person must expressly invoke his right to remain silent.[168]

Salinas also relied heavily on *Berghuis*, which was also factually distinguishable. *Salinas* relied on *Berghuis* for the premise that a person who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.[169] In *Berghuis*, the police interrogated the defendant for almost three hours with Thompkins not answering most of the questions.[170] He answered a few questions, and eventually broke down and made some incriminating statements.[171] His statements were post-arrest, post-*Miranda*. Again, the issue was whether he properly invoked his right to silence by not answering questions for almost two hours.

Likening the invocation of the right to remain silent with the invocation of the right to counsel, the Court held that a defendant who wished to invoke the right to remain silent must do so "unambiguously." This Court did not address the fact that the right to counsel is available only to the "accused," while the right to be free from compelled self-incrimination is available to anyone.[172]

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163 Minnesota v. Murphy, 465 U.S. 420 (1984).

164 *Id.* at 422.

165 *Id.* at 430.

166 *Id.* at 425.

167 *Id.*

168 Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013).

169 *Id.* at 2182.

170 Berghuis v. Thompkins, 560 U.S. 370 (2010), 374-76 (2010).

171 *Id.* at 376.

172 *Id.* at 381.

The *Salinas* Court again did not find it problematic that *Berghuis* involved post-arrest, post-*Miranda* silence and *Salinas* involved pre-arrest, pre-*Miranda* silence.[173] It might make more sense to require a person who is in custody and advised of his rights to expressly invoke those rights, and allow a person who is out of custody and has not been read his rights to merely refuse to answer to invoke his right to remain silent. A person who is not in custody and voluntarily speaks to the police must not be required to jump through hoops to exercise his right to remain silent. Citizens must not face the risk of punishment for choosing to exercise the right to remain silent.

A third criticism is the *Salinas* ruling's effect of reducing the state's burden of proof in a criminal case. A person who answers questions faces the reality that his answers could be used against him. A person who refuses to answer will have his silence introduced as evidence of guilt. In that way, the defendant becomes an instrument of his own demise, reducing the burden on the state to prove every element of a charge against a defendant with its own evidence, not evidence acquired through a defendant's words or silence.

How would the *Salinas* opinion affect a defendant who clearly invoked his right to remain silent in a pre-arrest, pre-*Miranda* situation? Suppose Salinas goes to talk to the police. He is out of custody and not *Mirandized*. When the police start asking questions that Salinas does not want to answer, he says, "I expressly invoke my Fifth Amendment rights." Under the *Salinas* opinion, this would sufficiently express the invocation of his rights. What happens if, down the road at trial, the prosecutor elicits testimony from the police that during this noncustodial visit, Salinas invoked his right to remain silent? That is exactly the question that the Supreme Court skirted and left to be decided another day. If the Court applied the rationale of the First, Sixth, and Tenth Circuits, it would declare a violation of Salinas's constitutional rights.

On the other hand, if a suspect did not expressly invoke his rights but instead stood mute, under *Salinas* he would be out of luck. The court would determine that he did not claim the protection of the Fifth Amendment, and the state could therefore argue to the jury that his silence could be considered as evidence of guilt.

The odd result of *Salinas* is that one must speak in order to remain silent; and if a person remains silent instead of speaking up, that silence can be used against him as evidence of guilt. As quoted by Chief Justice Warren in *Miranda v. Arizona* nearly fifty years ago,

> [T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-

[173] *Salinas*, 133 S. Ct. at 2182-84.

> individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[174]

And as stated earlier in *Quinn*:

> The privilege . . . was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions. . . . [T]he Self Incrimination Clause must be accorded liberal construction in favor of the right it was intended to secure. . . . To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose.[175]

III. Conclusion

Whether the state can use pre-arrest, pre-*Miranda* silence against a defendant as evidence of guilt has yet to be squarely determined. However, a fair reading of history and prior case law would lead one to believe that using a person's invocation of his constitutional right against him as evidence of guilt violates the Fifth Amendment.

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[174] Miranda v. Arizona, 384 U.S. 436, 460 (1966) (internal citation omitted).

[175] Quinn v. United States, 349 U.S. 155, 162 (1955) (internal quotation marks omitted).

Twenty-Hour Detention Based on Reasonable Suspicion is Not a "Minimal Intrusion": A Case for Amending Arizona's SB 1070

Scott C. Hodges*

> We noted the limited holdings of *Terry* [*v. Ohio*] and *Adams* [*v. Williams*] and while authorizing the police to "question the driver and passengers about their citizenship and immigration

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> status, and . . . ask them to explain suspicious circumstances," we expressly stated "any further detention or search must be based on consent or probable cause."[1]

I. INTRODUCTION

On June 25, 2012, the Supreme Court announced its decision in *Arizona v. United States*.[2] This decision was the culmination of an action brought by the United States challenging the constitutionality of Arizona's Support Our Law Enforcement and Safe Neighborhood Act ("SB 1070").[3] Ultimately, three sections of SB 1070 were preempted, while the preliminary injunction placed on section 2(B) was deemed improper.[4]

Soon after this decision, a Phoenix Police officer stopped Cesar Valdez, a college student from Phoenix, Arizona.[5] That morning, Cesar was driving his younger brother to school when an officer pulled him over and informed him that his tags were expired.[6] Cesar explained to the Arizona Civil Rights Advisory Board ("ACRAB") that the officer was quite rude during this encounter.[7] The officer pulled him out his car and asked for Cesar's identification.[8] The identification Cesar provided was not enough to prove that Cesar was legally present in the United States.[9]

As a result, the officer took Cesar to jail while an attempt was made to ascertain Cesar's immigration status.[10] Cesar was detained in the jail for over twenty hours.[11] Finally, he was taken to an Immigration and Customs Enforcement ("ICE") facility.[12] Once there, it took an ICE official less than five minutes to find that Cesar had deferred immigration status from the United States

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1 Florida v. Royer, 460 U.S. 491, 510 (1983) (Brennan, J., concurring) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)).

2 Arizona v. United States, 132 S. Ct. 2492 (2012).

3 S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) [hereinafter S.B. 1070].

4 *Arizona*, 132 S. Ct. at 2503, 2505, 2507, 2510.

5 The following events were recounted by Cesar Valdez at the Arizona Civil Rights Advisory Board's public meeting to discuss concerns regarding law enforcement post-SB 1070.

6 Minutes of Public Meeting, Ariz. Civil Rights Advisory Bd. 3 (Mar. 26, 2013), *available at* https://www.azag.gov/sites/default/files/sites/all/docs/acrab/2013-03-26_minutes.pdf (Cesar Valdez Flores, addressing Arizona Civil Rights Advisory Board).

7 *Id.*

8 *Id.*

9 *See* ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (A person is presumed to be lawfully present in the country if the person provides any of the following: (1) valid Arizona driver license; (2) valid Arizona nonoperating identification license; (3) valid tribal enrollment card or other tribal identification; or (4) any valid United States, state, or local government issued identification if the entity requires proof of legal presence before issuance.).

10 Minutes of Public Meeting, *supra* note 6.

11 *Id.*

12 *Id.*

Citizenship and Immigration Service.[13] Eventually, the police released Cesar without any citations for driving with expired tags, which turned out to not be expired.[14]

There is evidence that the above fact pattern is not an isolated incident. A representative of the Arizona Chapter of the American's Civil Liberties Union ("AZ-ACLU") attested to ACRAB that the AZ-ACLU had received over 500 calls in the past few months from people in Arizona complaining of being stopped and detained by police officers for several hours and even for as long as a few days.[15] Dozens of speakers from the community addressed ACRAB that night to vocalize their strong disfavor of SB 1070.[16] The community expressed how the enforcement of SB 1070 has had a negative effect on them directly and indirectly.[17] For example, Isabel Garcia, a Tucson attorney, contended that SB 1070 legalizes racial profiling and the law has caused a loss of trust in the police.[18] Maria Eugenia Carrasco, promoter of Derechos Humanos, recounted an incident where a woman was hit in a car accident but because she did not speak English, she was detained while the person who caused the accident was released.[19]

There is a fair likelihood that what happened to Cesar was legal; his constitutional rights may not have been violated when he was detained for over twenty hours without probable cause of any wrongdoing. After all, as will be discussed later,[20] an officer who develops reasonable suspicion that an individual is illegally present in the United States can constitutionally seize that individual for a reasonable amount of time to confirm or dispel his or her suspicion.[21] So long as the officers involved in making the inquiry into Cesar's immigration status were making active attempts to discover this information and were not purposefully delaying this action in order to detain him, it is unlikely a court would find that even a twenty-hour detention was unconstitutional.[22]

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[13] *Id.*

[14] *Id.*

[15] *Id.* (Many of these callers claimed to have been targeted because of their race.).

[16] *Id.*

[17] *Id.* at 2.

[18] *Id.* at 4 (Isabel Garcia, addressing Arizona Civil Rights Advisory Board).

[19] *Id.* (Maria Eugenia Carrasco, addressing Arizona Civil Rights Advisory Board)

[20] *See* discussion *infra* Parts III.A-C (discussing that officers may make reasonable inquiries to confirm or dispel their suspicion that a suspect has committed a crime so long as it is reasonably related in scope to the reason for this stop).

[21] *See* United States v. Urrieta, 520 F.3d 569, 583 (6th Cir. 2008); United States v. Valadez, 267 F.3d 395, 398 (5th Cir. 2001).

[22] *See* discussion *infra* Part III.D.2 (discussing *State v. Teagle*, holding that so long as officers acts diligently to investigate their reasonable suspicions and less intrusive measures were unavailable that could have been taken, a lengthy detention will likely not be unconstitutional).

The officer in Cesar's case may very well have developed reasonable suspicion that Cesar was unlawfully present in the country during the traffic stop. Regardless, for argument's sake, assume the officer had valid reasonable suspicion and did not unconstitutionally prolong Cesar's detention.[23] This Article will explain that even if the officer acted legally and constitutionally in Cesar's case, reasonable suspicion, as a standard, does not provide enough protection to justify the use of a lesser standard than probable cause to detain a suspect for such a lengthy period. Specifically, a stop based on reasonable suspicion is justified because it is an appropriate balance between the public's interest in investigating potential crimes and an individual's right to personal security.[24] What this justification boils down to is that most stops supported by reasonable suspicion are minimally intrusive to the suspect's daily life.[25] However, the way Cesar explained his twenty-hour detention, this was more than a minimal intrusion into his daily life.[26]

Officials and lawmakers in the United States have been debating proper immigration policy for decades.[27] In recent years, states have grown impatient with the perceived inaction of Congress to pass comprehensive immigration legislation.[28] As a result, states have begun to take matters into their own hands.[29] States have enacted a number of statutes with the purpose of curbing illegal immigration.[30]

One such statute was SB 1070.[31] The stated purpose of this law is to "discourage and deter" immigrants from entering or remaining in the state by placing restrictions on them, a policy known as "attrition through enforcement."[32] Section 2(B) of SB 1070 places a restriction on unlawfully present immigrants; it requires law enforcement officers to check the immigration status, in certain situations,[33] of individuals who have been lawfully detained or who are in cus-

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[23] *See* discussion *infra* Part III.D.2.

[24] United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

[25] Florida v. Royer, 460 U.S. 491, 510 (1983) (Brennan, J., concurring); *Brignoni-Ponce*, 422 U.S. at 881.

[26] Minutes of Public Meeting, *supra* note 6.

[27] *See infra* Part II.B.

[28] *See infra* Part II.B.

[29] *See infra* Part II.C.

[30] *See* discussion *infra* Part II.C (discussing states enacting legislation to curb illegal immigration).

[31] S.B. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010).

[32] *Id.*

[33] ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (When an officer who develops reasonable suspicion that an individual is illegally present in the United States "a reasonable attempt *shall* be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation." However, "[a]ny person who is arrested *shall*

tody.[34] In addition, Section 3 makes it a state crime to be present in Arizona without valid immigration papers.[35] Further, Section 5(C) criminalizes the act of applying for or holding a job without the required immigration papers.[36] Section 6 allows a law enforcement officer to arrest an individual if the officer believes the person has committed a deportable crime.[37] These are just some of the restrictions designed to encourage unlawfully present immigrants to self-deport.[38]

The stories recounted to ACRAB suggest that there is a trend to detain individuals suspected of being illegally present in the United States for several hours to a few days based solely on reasonable suspicion pursuant to section 2(B) of SB 1070.[39] This is contrary to the justification for investigatory detentions based on reasonable suspicion; they are supposed to be minimal intrusions. There is also emerging evidence that SB 1070 has had a detrimental effect on persons in Arizona since its passage.[40] Among the potential consequences of this measure is the grave potential for racial profiling, unconstitutional, or otherwise, prolonged detentions, and disharmony in immigrant communities.[41] In order to better avoid these issues, section 2(B) of SB 1070, codified as A.R.S. 11-1051, should be amended. Specifically, a heightened level of suspicion, probable cause, should be present before triggering officers' duty to determine an individual's immigration status.

II. BACKGROUND

Before exploring the argument as to why the level of suspicion does not provide enough protection, this part will investigate the conditions that led to

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have the person's immigration status determined *before* the person is released.") (emphasis added).

[34] ARIZ. REV. STAT. ANN. § 11-1051 (2012) (Section 2(B) of SB 1070 as amended by HB 2162 was codified as section 11-1051 of the Arizona Revised Statutes.).

[35] S.B. 1070, 49th Leg., 2d Reg. Sess. § 3 (Ariz. 2010); *see also* Amy Howe, *S.B. 1070: In Plain English*, SCOTUSBLOG (June 25, 2012, 5:53 PM), http://www.scotusblog.com/2012/06/s-b-1070-in-plain-english/.

[36] S.B. 1070 § 5(C).

[37] S.B. 1070 § 6; *see also* Howe, *supra* note 35.

[38] *See* S.B. 1070 (Section 4 allows a peace officers to stop any person whom the officer reasonably believes is in violation of any civil traffic law and engaged in human smuggling. Section 5 makes it unlawful for a driver to stop on a roadway to hire a worker if the vehicle impedes traffic. Section 8 requires employers to keep a record that they verified the employment eligibility of an employee for at least three years. Section 9 criminalizes the "transporting, moving, concealing, harboring or shielding" of an immigrant who the person knows or recklessly disregards the knowledge that the immigrant has entered or remains in the United States in violation of any law.).

[39] *See* Minutes of Public Meeting, *supra* note 6, at 2.

[40] *See infra* Part IV for a fuller discussion of each the detrimental effects.

[41] *See infra* Part IV for a fuller discussion of each of these potential consequences.

the enactment of SB 1070. In particular, in the years prior to SB 1070's passage, the national economy was contracting,[42] and for the past few decades Congress has failed to enact comprehensive immigration reform.[43] As a result, illegal immigration has placed fiscal strains on the federal budget[44] along with increased pressure on social services at the state and local level.[45] Amid growing frustrations, state legislatures have proposed and promulgated laws aimed at addressing what they see as inadequacies in the federal immigration policy in a piecemeal fashion.[46] Among this environment, SB 1070 took root and became a lightning rod attracting both copycat legislation and protestors alike.

A. Fiscal Challenges Caused by Unlawfully Present Aliens

The Center for Immigration Studies ("CIS") published a study in 2004 detailing the fiscal impact illegal immigration had on the federal budget at that time.[47] The study compared, at a federal level, the costs imposed by households headed by an illegally present alien with the tax payments they made.[48] The CIS study came to several conclusions. In particular, this study concluded that households headed by an illegally present alien produced a net benefit of $7 billion a year to Social Security and Medicare because these services are not available to non-legal residents, while employers still collect these taxes through pay roll deductions.[49] However, these same households combined to create a net deficit of $17.4 billion in the rest of the federal budget, primarily in healthcare, food assistance, prisons, and federal aid to schools.[50] Conse-

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[42] *See, e.g.*, JAMES M. HULL COLLEGE OF BUSINESS, AUGUSTA ECONOMIC COMMENTARY, 1 (Jan. 2008), https://www.hull.aug.edu/hcbWeb/news/augecon/archive/AEC%20Jan%202008.pdf; MARC LABONTE, CONG. RESEARCH SERV., R40198, THE 2007-2009 RECESSION: SIMILARITIES TO AND DIFFERENCES FROM THE PAST 2 (2010).

[43] Leslie Berestein Rojas, *Will It Happen This Time? The Outlook For Comprehensive Immigration Reform*, 89.3 KPCC S. CAL. PUB. RADIO (Feb. 4, 2013, 2:54 PM), http://www.scpr.org/blogs/multiamerican/2013/02/04/12368/prognosis-comprehensive-immigration-reform-today/.

[44] *See generally* Steven A. Camarota, *The High Cost of Cheap Labor: Illegal Immigration and the Federal Budget*, CTR. FOR IMMIGR. STUD. (Aug. 2004), http://www.cis.org/sites/cis.org/files/articles/2004/fiscal.pdf.

[45] *See generally* IMMIGRATIONWORKS USA, BOTTOM LINE: THE ECONOMIC CONSEQUENCES OF STATE IMMIGRATION LAW (Jan. 2012), http://www.immigrationworksusa.org/uploaded/file/IW%20bottom%20line.pdf.

[46] Jennifer Bailey, *2010 Immigration-Related Bills and Resolutions in the States (January-March 2010)*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/portals/1/documents/immig/immigration_report_april2010.pdf (revised May 6, 2010) (During the first half of 2011 1,592 bills were introduced in the fifty states dealing with immigration, 257 were enacted.).

[47] *See generally* Camarota, *supra* note 44.

[48] *Id.* at 9.

[49] *Id.* at 6.

[50] *Id.* at 5-6.

quently, these households produced a net federal deficit of $10.4 billion.[51] The author of the CIS study contended that low incomes and tax payments, rather than heavy use of social services, are the cause of this deficit.[52]

Another study, by the Federation for American Immigration Reform ("FAIR"), estimated the impact of illegal immigration at the federal level to be two-thirds higher in terms of the overall cost to U.S. taxpayers.[53] This study estimated the net federal tax collection from the illegal immigration community to be $9,456,600,000.[54] This would place the net fiscal costs of illegal aliens at over $19 billion.[55]

This study also concluded that illegal immigration adversely affects state and local governments to the tune of $79.885 billion.[56] In its study of fiscal costs at the state level, FAIR included the cost of educating U.S.-born children of illegally present aliens.[57] Additionally, when calculating state tax receipts, the FAIR study assumed that illegal immigrants with false documents are filing income tax returns.[58] FAIR's thinking is that because many of these workers have low earnings they will have no tax liability, and if they had any state income tax withheld, they would be able to receive a refund.[59] Also, in states that allow filers to claim child credits or low income credits, these workers would be able to receive these tax credit payments.[60] As a result, this assumption reduced the calculation of income tax payments from illegally present aliens that this study included. Whether one agrees with the methodology used

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[51] *Id.* at 6 (The study found that the average federal tax payment by households headed by an illegally present alien was $4,212 compared with an average federal fiscal cost of $6,949 for a net deficit of $2,737 per household in 2002.).

[52] *Id.* at 6 (The average household in the United States pays $15,099 in federal taxes compared with $4,212 for households headed by an illegally present alien. Also, the average household imposes $15,101 in federal costs compared to $6,949 by households headed by an illegally present alien.).

[53] JACK MARTIN & ERIC A. RUARK, FED'N FOR AM. IMMIGRATION REFORM, THE FISCAL BURDEN OF ILLEGAL IMMIGRATION ON UNITED STATES TAXPAYERS 1-3 (2011) (Illegal immigration annually costs U.S. taxpayers a total of $28,645,400,000. The categories with the greatest public expenditures include: law enforcement ($7.839 billion), medical ($5.950 billion), public assistance ($4.565 billion), and education ($2.108 billion).).

[54] *Id.* at 5.

[55] *Id.* at 42.

[56] *Id.* at 78.

[57] *Id.* at 45 (This study includes "the U.S.-born children of illegal aliens would not be in the country were it not for the [illegally present] parents" even though these children are U.S. citizens. This has the effect of skewing the state's cost of supporting illegally present immigrants by including costs associated with citizens.).

[58] *Id.* at 74-75.

[59] *Id.* at 75 (including this assumption, the numbers are further skewed upward).

[60] *Id.*

by FAIR or CIS, it is generally accepted that illegally present aliens have a net negative fiscal impact at both the federal and state level.[61]

B. Congress Gridlocked in Addressing Immigration Issues

The last time Congress made any sweeping updates to the nation's immigration policy was during the Reagan administration.[62] Since then, members of Congress and other policy makers have debated the best way to attract high-skilled workers in growing industries while at the same time securing the borders to prevent illegal immigration.[63] There was an unsuccessful push for comprehensive immigration reform by certain members of Congress and the George W. Bush administration to address these issues in 2006 and again in 2007.[64] However, more recently the national debate has focused on improving the visa process as well as addressing the millions of illegally present immigrants currently in the United States.[65] For example, Secretary for the Department of Homeland Security ("DHS") Janet Napolitano wrote a memo on June 15, 2012, setting forth how agencies within DHS should use its discretion in enforcing immigration laws against young people who meet certain qualifications.[66] Since then, many discussions have focused on the so-called "Dreamers," children under eighteen years old brought by their parents to the United States in violation of immigration laws.[67] Although there have been recent

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[61] *See, e.g.*, *id.* at 1-3; Camarota, *supra* note 44, at 5; *but see* JUDITH GANS, IMMIGRANTS IN ARIZONA: FISCAL AND ECONOMIC IMPACTS 58 (2008), *available at* http://www.udallcenter.arizona.edu/immigration/. . ./impactofimmigrants08.pdf (concluding that immigrants (both legally and illegally present) have a net positive impact to Arizona's economy of $941 million).

[62] *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered section of 8 U.S.C.). There were unsuccessful attempts to pass comprehensive immigration reform bills in 2006 and 2007. Currently, the Border Security, Economic Opportunity, and Immigration Modernization Act, a comprehensive immigration bill sponsored by Sen. Shumer, passed the Senate by a 68-32 vote on June 27, 2013. S. 744, 113th Cong. (2013), https://www.govtrack.us/congress/bills/113/s744. The House is now debating the bill.

[63] Brianna Lee, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN REL. (Apr. 19, 2013), http://www.cfr.org/immigration/us-immigration-debate/p11149.

[64] Robert Pear & Carl Hulse, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES (June 28, 2007), http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html?_r=0.

[65] Lee, *supra* note 63.

[66] Memorandum from Janet Napolitano to directors within Homeland Security (June 15, 2012) (on file with author).

[67] Lee, *supra* note 63.

talks of immigration reform by the "Gang of Eight" senators,[68] there has been no comprehensive immigration reform since 1986.[69]

C. States Taking Matters Into Their Own Hands

Because there has been little movement on the issue of immigration reform since 2007, many states have begun taking matters into their own hands.[70] Several statutes enacted at the state level have the stated purpose of deterring illegally present immigrants from staying in the state by cutting off relevant incentives to stay in the state.[71] Because states have begun enacting immigration enforcement laws, there are inconsistent standards across the country.[72] For example, the use of E-Verify, an internet-based system that compares information from an employee's I-9[73] with federal databases to confirm employment eligibility,[74] fluctuates widely.[75] More than fifteen states require the use of E-Verify for state agencies or state contractors,[76] yet two states limit the use

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[68] Rachel Weiner, *Immigration's Gang of 8: Who Are They?*, WASH. POST (Jan. 28, 2013, 1:00 PM), http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/28/immigrations-gang-of-8-who-are-they/ (The "Gang of Eight" Senators include Sen. Michael Bennet, D-Colo; Sen. Richard Durbin, D-Ill; Sen. Jeff Flake, R-Ariz; Sen. Lindsey Graham, R-S.C.; Sen. John McCain, R-Ariz; Sen. Robert Menendez, D-N.J.; Sen. Marco Rubio, R-Fla; and Sen. Chuck Schumer, D-NY. These senators are working on a bipartisan immigration reform plan.).

[69] *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered section of 8 U.S.C.).

[70] *See* IMMIGRATIONWORKS USA, *supra* note 45, at 1.

[71] *Id.*; *see, e.g.*, Illegal Immigration Reform and Enforcement Act of 2011, H.R. 87, 2011-2012 Leg., Reg. Sess. (Ga. 2011) (amending Official Code of Georgia Title 13, Chapter 10, Article 3); *see* GA. CODE ANN. §13-10-91 (2013) (includes tough worksite enforcement and policing laws). *See also* H.R. 656, 2012 Leg., Reg. Sess. (Ala. 2012) (omnibus immigration law that combines worksite enforcement, policing measures, requirement of public schools to collect data on immigration status of students and their parents); S. 20, 119th Leg., Reg. Sess. (S.C. 2011) (bill requires law enforcement officer who has reasonable suspicion that a person stopped is unlawfully present to determine his immigration status, makes it unlawful to transport an illegal alien, makes it unlawful for an unlawfully present alien to knowingly apply or solicit work, and prohibits and unlawfully present alien from receiving public benefits).

[72] Lee, *supra* note 63.

[73] *See I-9, Employment Eligibility Verification*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/i-9 (last updated May 8, 2013) (A form I-9 is used to verify the identity of individual and whether they are authorized to be hired for employment in the United States.).

[74] *What is E-Verify?*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=31b3ab0a43b5d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Apr. 21, 2013) (The federal government does not require employers to use E-Verify, however, some states such as Arizona and Mississippi, mandate its use.).

[75] Lee, *supra* note 63.

[76] *Map of States with Mandatory E-Verify Laws*, NUMBERSUSA, http://www.numbersusa.com/content/learn/illegal-immigration/map-states-mandatory-e-verify-laws.html (last visited Dec. 20,

of the system.[77] Evidence of states' reactions to Congress's lack of progress addressing illegal immigration is shown by the sheer number of state immigration laws passed between 2006 and the beginning of 2010: state legislatures enacted over 800 state immigration laws during the time period.[78]

During this time period, the majority of immigration laws enacted by state legislatures dealt with employment, identification, drivers' licenses, and law enforcement.[79] In Idaho for example, a newly enacted law denied resident student status to students who are not a citizen or who do not have permanent or temporary resident status.[80] Most of the employment laws dealt with the use of E-Verify,[81] while states also passed laws "addressing the eligibility of noncitizens for driver's licenses and commercial driver's licenses."[82] Yet, none of these laws are as strongly punitive as SB 1070.

D. SB 1070's Place in the Immigration Debate

On April 23, 2010, Arizona Governor, Jan Brewer, signed SB 1070 into law.[83] However, this law was not created in a vacuum. In 1996, Congress codified the Illegal Immigration Reform and Immigrant Responsibility Act ("the 287(g) program").[84] This Act allows local law enforcement agencies to work in conjunction with ICE to "investigate and detain individuals suspected of violating . . . federal immigration law, facilitating their transfer to ICE facili-

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2013) (Alabama, Arizona, Mississippi, and South Carolina each require all employers to use E-Verify.).

[77] *Id.* (California AB 1236 prohibits state municipalities from passing mandatory E-Verify ordinances; in Illinois, HB1774 bars Illinois companies from enrolling in E-Verify until accuracy and timeliness issues are resolved.).

[78] *Arizona Is Not the First State to Take Immigration Matters Into Their Own Hands*, IMMIGR. POL'Y CENTER (May 6, 2010), http://www.immigrationpolicy.org/just-facts/arizona-not-first-state-take-immigration-matters-their-own-hands (Eighty-four laws passed in 2006; 240 passed in 2007; 206 passed in 2008; 222 passed in 2009; 107 passed in first quarter of 2010.); *see also* Bailey, *supra* note 46, at 1 (contending that the large number of state level bills and resolutions is the fact "federal immigration reform is stalled in Congress").

[79] Bailey, *supra* note 46, at 1.

[80] IDAHO CODE ANN. § 33-3717A (West, Westlaw through the end of the 2013 First Regular Session of the 62nd Legislature).

[81] *See, e.g.*, S.B. 251, 2010 Utah Laws 2733 (requiring employers in the state to verify the legal status of employees using a federally approved system).

[82] Bailey, *supra* note 46, at 1, 7 (156 bills were introduced in 32 state legislatures, predominantly dealing with lawful immigration status).

[83] S.B. 1070, 2010 Ariz. Sess. Laws 450, amended by 2010 Ariz. Sess. Laws 1070 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010).

[84] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 100 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

ties and the initiation of removal proceedings."[85] However, in June 2009, Secretary Napolitano, with the blessing of newly elected President Obama, issued policy changes to the 287(g) program that had the effect of frustrating the congressional intent of local and federal cooperation for immigration enforcement.[86] It was this policy shift that provided the impetus for the drafting of SB 1070.[87]

Another law that influenced the creation of SB 1070 was section 1326(a) of Title 8 of the United States Code, which makes it a felony to reenter or be found in the United States without the consent of the United States attorney general after deportation.[88] In addition, section 1325(a) of Title 8 of the United States Code makes it a misdemeanor offense for any alien to illegally enter the United States at a time or place other than a place designated as a port of entry.[89] To some extent, SB 1070 borrowed from these federal laws and made it a state crime to be "unlawfully present" in the country.[90]

The result was a bill with the stated purpose of making it difficult for illegally present aliens to find work and live in the state so as to encourage them to leave of their own volition. Specifically, Section 1 of SB 1070 states, "the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona."[91] Moreover, the combined desired effect of the bill's provisions is "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[92] There is some circumstantial evidence that SB 1070 is having its desired effect.

Lydia Guzman, a migrant rights activist, stated that even before the bill's passage, illegally present immigrants began leaving Arizona for states thought

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[85] Nicholas D. Michaud, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083, 1085 (2010) (Removal proceedings, formerly known as "deportation," is the process by which ICE attempts to remove non-citizens from the United States for various offenses.).

[86] *Id.* at 1085, 1103 (The new policy announced by Secretary Napolitano affected two alterations: (1) "a priority scheme targeting 'dangerous criminal aliens' "; and (2) requiring that local enforcement agencies "pursue all charges that precipitated the arrest of any suspected illegal alien before ICE will initiate removal proceedings.").

[87] *Id.* at 1086 (Depriving communities that participated in the 287(g) program of a federal partnership to address "generalized illegal immigration in their communities," led states "to fill that void" with their own laws.).

[88] 8 U.S.C. 1326(a) (2102).

[89] 8 U.S.C. 1325(a) (2012).

[90] Juan Rocha, *Found in the USA*, FED. LAW., Nov.-Dec. 2010, at 30, 31 (internal quotation marks omitted).

[91] S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[92] *Id.*

to be friendlier to immigrants.[93] Russell Pearce, the sponsor of SB 1070, echoed the sentiment, saying, even before full implementation, that the law was having an impact.[94] While there are many stories of families leaving Arizona ahead of the law's enactment—fearful of the law's consequences for them—there was undoubtedly a negative impact as a result of the bill's enactment.[95] Soon after Governor Brewer signed the bill into law, there was backlash against the state from many organizations and individuals.[96] Accordingly, this backlash impacted Arizona's tourism industry to the sum of $253 million in lost economic output, $9.4 million in tax revenue, and 2,761 jobs during the first year after the bill's enactment.[97]

E. Section 2(B) of SB 1070

At the time of SB 1070's enactment, the bill's language allowed law enforcement, under certain circumstances, to inquire into the immigration status of a person following "any lawful contact."[98] However, this language was amended to allow immigration status inquiry after "any lawful stop, detention, or arrest" in order to assuage concerns that the original language could be found unconstitutional due to racial profiling.[99] Currently, section 2(B) of Arizona SB 1070 states that when a law enforcement official makes "any lawful stop, detention or arrest" of a person and then develops reasonable suspicion that the person is an unlawfully present alien the official shall, when practica-

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[93] Ted Robbins, *Ariz. Immigration Law Limbo Sees Mixed Results*, NPR (Apr. 19, 2012, 2:04 PM), http://www.npr.org/2012/04/19/150973925/post-immigration-law-ariz-sees-ambiguous-results.

[94] *Id.*

[95] *See, e.g.*, Daniel Gonzalez, *Undocumented Couple Leave SB 1070 Behind*, ARIZ. REPUBLIC (June 27, 2010, 12:00 AM), http://www.azcentral.com/news/articles/2010/06/27/20100627arizona-immigration-law-leaving-state.html.

[96] *See* Kristi Eaton, *Boycotts of Arizona Following SB 1070 Passage Could Have Lasting Impact*, GENERATION PROGRESS (July 12, 2010, 11:39 PM), http://genprogress.org/voices/2010/07/12/15394/boycotts-of-arizona-following-sb-1070-passage-could-have-lasting-impac/ (Musicians from Rage Against the Machine to Kanye West to Sonic Youth are avoiding Arizona after the passage of SB 1070. Cities such as Boston, Los Angeles, and Seattle have voted to boycott the state. In addition, the National Minority Suppliers Development Council, Inc. and Alpha Phi Alpha, Inc relocated convention meetings scheduled to take place in Arizona, taking their combined 12,000 attendees with them.).

[97] David Hudson, *The Top 5 Reasons Why S.B. 1070—and Laws Like It—Cause Economic Harm*, CTR. FOR AM. PROGRESS (June 25, 2012), http://www.americanprogress.org/issues/immigration/news/2012/06/25/11677/the-top-5-reasons-why-s-b-1070-and-laws-like-it-cause-economic-harm/.

[98] H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010); *see also* Rocha, *supra* note 90, at 31.

[99] H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (This amendment immediately following SB 1070's enactment could show that Arizona officials were concerned the enforcement of the law will lead to increased racial profiling.).

ble, make a reasonable attempt to determine the person's immigration status.[100] The section provides an exception to this duty, however, when "the determination may hinder or obstruct an investigation."[101] Further, in developing reasonable suspicion, an officer "may not consider race, color or national origin . . . except to the extent permitted by the United States or Arizona Constitution."[102] In addition, the section requires a law enforcement officer to determine the residence status of any person he or she arrests, prior to release, regardless of whether there is suspicion that the person is illegally present.[103]

On July 6, 2010, the United States Department of Justice ("DOJ") sued Arizona claiming federal law preempts SB 1070.[104] In its brief filed in the District Court, District of Arizona, the DOJ "requested a preliminary injunction to enjoin enforcement of the law . . . ."[105] Arizona District Court Judge Susan R. Bolton held that federal law preempted four sections of SB 1070: sections 2(B), 3, 5, and 6, in *United States v. Arizona*.[106]

Arizona appealed the decision; the Ninth Circuit Court of Appeals *en banc* later upheld Judge Bolton's ruling.[107] Arizona again appealed the decision; Justice Kennedy, writing for the majority of the Supreme Court, however, later overturned one part of Judge Bolton's ruling.[108] While the Court did rule that three of the sections of the law are preempted, section 2(B) survived, at least for now.[109] To support its ruling that section 2(B) is not preempted, the Court focused on the language in the law that requires law enforcement officers to contact ICE to verify an individual's immigration status.[110] The Court pointed

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100 ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

101 *Id.*

102 *Id.*

103 *Id.*

104 Press Release, U.S. Dep't of Justice, Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law (July 6, 2010) (on file with author).

105 *Id.*

106 United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in part and remanded*, 132 S. Ct. 2492 (2012), *aff'd in part, rev'd in part,* 689 F.3d 1132 (9th Cir. 2012) (preliminarily enjoining the State of Arizona and Governor Brewer from enforcing Sections 2(B), 3, 5(C) and 6 of SB 1070).

107 United States v. Arizona, 641 F.3d 339, 365 (9th Cir. 2011), *aff'd in part, rev'd in part and remanded,* 132 S. Ct. 2492 (2012), *aff'd in part, rev'd in part*, 689 F.3d 1132 (9th Cir. 2012) (affirming the preliminary injunction enjoining enforcement of SB 1070 sections 2(B), 3, 5(C), and 6).

108 *Arizona*, 132 S. Ct. at 2510 (holding it would be inappropriate at this stage to construe section 2(B) of SB 1070 as preempted).

109 *Id.* (stating that this ruling does not foreclose other preemption and constitutional challenges to this section after it goes into effect).

110 *Id.* at 2509.

out that Congress has encouraged states and local governments to do so.[111] While it left open the possibility that the section could be successfully challenged depending on how Arizona courts interpret the language, the Court, for now, has allowed section 2(B) to go into effect.[112] Whether the section survives in the future will depend on whether Arizona courts interpret the law in a way that does not offend Fourth Amendment rights by prolonging detentions of people the police stop.

III. A Better Solution

This Article focuses on three consequences of SB 1070: (1) the grave potential for racial profiling; (2) the potential for prolonged detentions of individuals that are more than minimally intrusive; and (3) the disharmony it creates in immigrant communities.[113] This part will lay the foundation for how these consequences may be a real possibility. Section 2(B) provides that during a lawful stop if an officer develops reasonable suspicion that an individual is not legally present in the United States, the officer shall make a reasonable attempt to determine the immigration status of the suspect.[114] However, it may take some time to check this immigration status.[115] As has already been demonstrated, while waiting for confirmation, police may detain a suspect for several hours or more; this is beyond minimally intrusive.[116] Further, this intrusion exceeds the justification of a lesser standard such as reasonable suspicion.[117] Because of the seriousness of these consequences, a heightened level of suspicion, probable cause, should be present before triggering an officer's duty to determine an individual's immigration status.

A. Reasonable Suspicion

To understand why reasonable suspicion is not a high enough standard to provide adequate protections in the context of SB 1070, it is useful to investigate this standard starting at its roots. This is because an investigation will

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111 *Id.* at 2510 (citing Gonzalez v. Peoria, 722 F.2d 468, 475-76 (9th Cir. 1983)) ("concluding that Arizona officers have authority to enforce the criminal provisions of federal immigration law").

112 *Id.*

113 *See infra* Part IV.

114 Ariz. Rev. Stat. Ann. § 11-1051(B) (2012).

115 *See infra* Part IV.B (discussing the lengthy process involved to determine an individual's immigration status).

116 *See supra* notes 6-8 and accompanying text (statements made by Cesar Valdez and others at the ACRAB public forum).

117 *See* Florida v. Royer, 460 U.S. 491, 510 (1983) (Brennan, J., concurring) (stating the justification for stops based solely on reasonable suspicion is that the stop is brief and only a minimal intrusion).

show that the justifications for allowing stops based upon reasonable suspicion are anomalous with the emerging data that stops based merely on reasonable suspicion are resulting in detentions of several hours to a few days. First of all, the Fourth Amendment provides people with protection against unreasonable searches and seizures.[118] A Fourth Amendment stop has occurred when an officer, by physical force or show of authority, has restrained an individual's liberty in such a manner that a reasonable person would not feel free to leave.[119] The Fourth Amendment does not protect against all seizures, only unreasonable ones.[120] The test for determining whether a seizure is reasonable is to balance the need to seize against the invasion which the seizure entails.[121] To justify a particular stop, an officer must "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that [seizure]."[122]

Reasonable suspicion is an objective standard where "the facts available to the officer at the moment of the seizure" would cause a reasonable person to believe the seizure was appropriate.[123] A Fourth Amendment violation has not occurred where an officer makes an investigatory stop of a person so long as this action is supported by reasonable suspicion that the person has committed a crime.[124] The justification for this is "[b]ecause the 'balance between the public interest and the individual's right to personal security,' tilts in favor of a standard less than probable cause in such cases . . . ."[125] The justification for allowing a seizure of a person based upon a lesser "reasonable suspicion" standard is because it is a *limited intrusion* and "supported by a special law enforcement need for greater flexibility . . . ."[126]

When determining whether reasonable suspicion exists in a particular instance, courts look to the totality of the circumstances.[127] Supreme Court jurisprudence recognizes "that the concept of reasonable suspicion is somewhat abstract" and has purposefully rejected reducing it to a *per se* rule.[128] Once an investigatory stop based on reasonable suspicion has occurred, it must be brief and last only as long as necessary to either confirm or dispel the officer's origi-

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118 U.S. CONST. amend. IV.

119 *See* Terry v. Ohio, 392 U.S. 1, 16 (1968).

120 U.S. CONST. amend. IV.

121 *Terry*, 392 U.S. at 21.

122 *Id.*

123 *Id.* at 21-22.

124 United States v. Arvizu, 534 U.S. 266, 273 (2002).

125 *Id.* (citation omitted) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

126 Florida v. Royer, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting) (citing Michigan v. Summers, 452 U.S. 692, 700 (1981).

127 *Arvizu*, 534 U.S. at 273.

128 *Id.* at 274.

nal suspicion.[129] The Court supported the totality of the circumstances principle within reasonable suspicion when it stated that facts in one circumstance could be construed as entirely innocent, yet could indicate criminal activity in another.[130] Moreover, it expressly held that officers are entitled to assess a situation in light of their "specialized training and familiarity with the customs of the area's inhabitants."[131] So what facts can an officer point to when developing reasonable suspicion that a person is unlawfully present in the United States?

B. Articulable Facts to Support Reasonable Suspicion of Unlawful Presence

Refusal to answer an officer's questions regarding immigration status following a lawful stop, without being evasive, does not rise to the level of reasonable suspicion.[132] For a detention based on evasive behavior to rise to reasonable suspicion, the evasion must be clear, significant and weighted with other pertinent facts.[133] Likewise, acting nervous when approached or stopped by a law enforcement officer, by itself, will not rise to the level of reasonable suspicion.[134] Otherwise, officers could stop and detain drivers who express apprehension whenever an officer pulls behind or alongside them, as it is a common reaction to stiffen, avert eye contact, slow down, or exhibit other nervous behavior when being followed by an officer on a highway.[135]

Likewise, the seizure of a person based solely on the ancestral appearance of the person is not sufficient to rise to reasonable suspicion that a person is not legally present in the country.[136] Even so, this factor can be used in combination with any number of other factors to amount to reasonable suspicion.[137]

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[129] *See* United States v. Urrieta, 520 F.3d 569, 578-79 (6th Cir. 2008); *see also* United States v. Valadez, 267 F.3d 395, 397 (5th Cir. 2001).

[130] *Arvizu*, 534 U.S. at 273.

[131] *Id.* at 276.

[132] Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 553 (9th Cir. 1986).

[133] *See* Sibron v. New York, 392 U.S. 40, 66-67 (1968).

[134] *See* United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978); United States v. Baptist, 556 F. Supp. 284, 289 (S.D.N.Y. 1982).

[135] Henry G. Watkins, *The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 SAN DIEGO L. REV. 499, 527 (1991); *see also Ballard*, 573 F.2d at 916 (holding reasonable suspicion not present that a suspect was a drug courier based upon nervous appearance of a man carrying few bags after disembarking a plane from a known narcotic source city); *Baptist*, 556 F. Supp. at 289 ("[N]ervousness on the part of one stopped by a police officer is not at all unusual . . . .").

[136] United States v. Brignoni-Ponce, 422 U.S. 873, 885-86 (1975).

[137] *Id.* at 884.

For instance, the characteristics of the area, the usual traffic patterns of a particular road, the driver's behavior, and aspects of the vehicle itself may be combined with a person's ancestral appearance to justify an investigatory seizure.[138] However, the Ninth Circuit Court of Appeals explained, in reference to the *Brignoni-Ponce* decision, that an individual's apparent Hispanic appearance has little probative value in the reasonable suspicion calculus in areas with a heavy Hispanic population.[139] Nevertheless, in an earlier Supreme Court case, the Court suggested that a different conclusion might be appropriate if a stop is based on ancestral appearance farther from the U.S.-Mexico border.[140]

The Arizona Peace Officer Standards and Training Board published a list of articulable facts which officers may consider in developing reasonable suspicion that a person is unlawfully present in the United States.[141] Some of these articulable factors include: lack of identification; possession of foreign identification; being in the company of other unlawfully present aliens; the fact that a vehicle is overcrowded or rides low; a subject's inability to provide one's residence; whether the subject provides the officer with inconsistent or illogical information; and a subject's significant difficulty in communicating in English.[142] The training document stresses that these are just some of the articulable facts which an officer may use.[143]

C. Reasonable Suspicion in Context of Immigration Investigatory Stops

Reasonable suspicion is a considerably lower standard of suspicion than "the implicit requirement of probable cause that a fair probability that evidence of a crime will be found."[144] This Article is not arguing that the use of reasonable suspicion in section 2(B) of SB 1070 is not legal or even customary in the context of investigatory stops, but rather this level of suspicion does not pro-

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[138] *Id.* at 884-85.

[139] United States v. Montero-Camargo, 208 F.3d 1122, 1131 (9th Cir. 2000); *see also* Rocha, *supra* note 90, at 33.

[140] United States v. Martinez-Fuerte, 428 U.S. 543, 564 n.17 (1976) (noting "[d]ifferent considerations would arise if, for example, reliance were put on apparent Mexican ancestry at a checkpoint operated near the Canadian border.").

[141] *See* ARIZONA POST, IMPLEMENTATION OF THE 2010 ARIZONA IMMIGRATION LAWS STATUTORY PROVISIONS FOR PEACE OFFICERS 3-4 (2010).

[142] *Id.* (Other factors include: possession of foreign identification; flight or preparation for flight; engaging in evasive maneuvers; voluntary statements made by the person regarding his or her citizenship; foreign vehicle registration; counter-surveillance or lookout activity; being stopped in a place where unlawfully present aliens are known to congregate; traveling in tandem; passenger in a vehicle attempting to hide or avoid detection; an officer's prior information about the person; claim to not know other in the same vehicle; dress; and demeanor.).

[143] *Id.* at 3.

[144] United States v. Tapia, 912 F.2d 1367, 1370 (11th Cir. 1990).

vide enough safeguards considering all that is at stake. Indeed, reasonable suspicion has been used extensively in immigration prosecution.[145] For example, in *United States v. Brignoni-Ponce*, the Supreme Court synthesized the holdings of *Terry v. Ohio* and *Adams v. Williams* to establish that in certain circumstances, the Fourth Amendment allows an investigatory seizure of individuals suspected of an immigration offense even when the facts do not support probable cause.[146] Specifically, the Court held "that when an officer's observations lead him . . . to suspect that a particular vehicle may contain aliens who are illegally in the country, he may . . . investigate the circumstances that provoke suspicion."[147] However, the Court continued, "the stop and inquiry must be 'reasonably related in scope to the justification for their initiation."[148] In other words, an officer who develops reasonable suspicion that drivers of a car or their occupants are not legally present in the country may make inquiries into their immigration status and "ask them to explain [any] suspicious circumstances . . . ."[149] Nonetheless, the Court made clear that once suspicious circumstances are explained, any further seizure of the automobile's occupants may only occur with consent or probable cause.[150] Further, the justification for the holding that an officer may stop a car briefly to investigate the circumstances that provoked the officer's "reasonable suspicion" is based on the fact that the stop is brief and only a minimal intrusion into the lives of the driver and passengers.[151]

D. Probable Cause is a More Appropriate Standard than Reasonable Suspicion

1. Legal Standard

The essence of the probable cause standard is that there "is a reasonable ground for belief in guilt."[152] This standard does not require evidence suffi-

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[145] *See*, *e.g.*, Au Yi Lau v. U.S. Immigration & Naturalization Serv., 445 F.2d 217, 222 (D.C. Cir. 1971) (holding officer may temporarily detain an individual when the officer develops reasonable suspicion that the detainee is illegally present in the country).

[146] United States v. Brignoni-Ponce,422 U.S. 873, 880-81 (1975); Terry v. Ohio, 392 U.S. 1, 27 (1968) (approving a limited seizure of a person and pat-down for weapons when an investigating officer reasonably believes the person to be armed and dangerous); Adams v. Williams, 407 U.S. 143, 145-46 (1972) (holding the Fourth Amendment allows an officer to briefly stop suspicious individuals to investigate absent probable cause to arrest the individual).

[147] *Brignoni-Ponce*, 422 U.S. at 881.

[148] *Id.* (internal quotation marks omitted) (quoting *Terry*, 392 U.S. at 29).

[149] *Id.* at 881-82.

[150] *Id.* at 882.

[151] Florida v. Royer, 460 U.S. 491, 510 (1983) (Brennan, J., concurring).

[152] Brinegar v. United States, 338 U.S. 160, 175 (1949) (internal quotation marks omitted) (quoting Carroll v. United States, 267 U.S. 132, 161 (1925).

cient to convict a person, but does require more than mere suspicion.[153] Indeed, "[p]robable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[154] The purpose of the probable cause standard is to balance an individual's interest to be free from "rash and unreasonable interferences with privacy and from unfounded charges of crime," against the community's interest in the enforcement of the law.[155] In other words, this higher standard provides greater protection to an individual than will reasonable suspicion because an officer must actually have reasonable grounds to believe an offense has been committed. Ambiguous situations confront officers daily in the execution of their duties.[156] Probable cause, as a standard, leaves room for mistakes on the officers' part, but still requires officers to act only on facts "leading sensibly to their conclusions of probability."[157] In contrast, the reasonable suspicion standard may not be sufficient to protect individuals from "unfounded charges of crime."[158]

2. The Principle Underlying Reasonable Suspicion Does Not Justify Seizures Lasting Twenty-Four Hours or More – Probable Cause is a Better Fit

Reasonable suspicion is a lower standard than probable cause.[159] Police officers are justified in making investigatory stops based upon reasonable suspicion partly because reasonable suspicion allows for a "balance between the public interest and the individual's right to personal security."[160] However, in order to not violate an individual's Fourth Amendment right to be free from unreasonable seizures, an investigatory stop based on reasonable suspicion must be brief and last only as long as necessary to confirm or dispel the

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153 *Id.*

154 *Id.* at 175-76 (alteration in quote in original) (quoting *Carroll*, 267 U.S. at 162).

155 *Id.* at 176.

156 *See id.*

157 *Id.*

158 *See id.* (stating purpose of probable cause standard is to safeguard individuals against "unfounded charges of crime"); *see also* L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1154-55 (2012) ("The science of implicit social cognition provides compelling evidence that implicit racial bias can affect both who will capture an officer's attention and whether an officer will interpret the individual's behaviors as criminal." In addition, officers' implicit biases may cause them to "interpret identical acts differently based upon the race of the individual performing them," rather than "upon the ambiguous actions [the officers] observe.") (footnote omitted).

159 United States v. Tapia, 912 F.2d 1367, 1370 (11th Cir. 1990).

160 United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

officer's suspicion.[161] Yet, an attempt to verify one's immigration status through ICE "may involve multiple databases [because] the initial . . . inquiry does not always resolve the status issue . . . ."[162] Indeed, in 2009, nearly 10,000 inquires originating from Arizona law enforcement officers resulted in "an indeterminate answer," requiring ICE to search other databases "and even paper files in an effort to resolve the inquiry."[163] This potentially lengthy verification process flies in the face of the underlying justification for reasonable suspicion: a "balance between the public interest and the individual's right to personal security."[164] Yes, the public has an interest in seeing immigration laws enforced, but the required verification process tips too far away from the individual's right to be free from unreasonable seizures.[165] Emerging evidence shows that the enforcement of section 2(B) of SB 1070 is resulting in detentions of several hours to a few days while officers determine the immigration status of the suspect.[166] Supreme Court jurisprudence explains that an officer is justified in detaining a suspect under the lesser standard of reasonable suspicion because the stop is minimally intrusive.[167] However, a detention lasting twenty-four hours or more is not "minimally intrusive" nor reasonable.[168]

In *State v. Teagle*, an officer stopped the defendant for speeding on a highway.[169] When the officer approached the vehicle "he noticed two cellular phones mounted on the dashboard near the steering wheel, an open container of liquor," food wrappers and boxes, a map, and "luggage and clothing hung up in the backseat."[170] The officer informed the defendant that he had been speeding and asked the defendant to exit the vehicle where the officer conducted a field sobriety test, but determined that the defendant was not impaired.[171] During the encounter, the officer asked the defendant several questions.[172] The

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[161] United States v. Urrieta, 520 F.3d 569, 578-79 (6th Cir. 2008); United States v. Valadez, 267 F.3d 395, 397 (5th Cir. 2001).

[162] Brief for Appellee at 56, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645).

[163] *Id.*

[164] *See Brignoni-Ponce*, 422 U.S. at 878.

[165] *See* U.S. CONST. amend. IV.

[166] *See supra* Part I for circumstantial evidence that the "reasonable attempt" to ascertain a suspect's immigration status as required by section 2(B) of SB 1070 is detaining suspects for several hours to a few days.

[167] Florida v. Royer, 460 U.S. 491, 510 (1983) (Brennan, J., concurring); *Brignoni-Ponce*, 422 U.S. at 881.

[168] *See* Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981) (quoting Dunaway v. New York, 442 U.S. 200, 219 (1979) (White, J., concurring)) (stating "[t]he key principle of the Fourth Amendment is reasonableness—the balancing of competing interests.").

[169] State v. Teagle, 170 P.3d 266, 269 (Ariz. Ct. App. 2007).

[170] *Id.*

[171] *Id.*

[172] *Id.*

answers, while reasonable when taken individually, did not fully satisfy the officer's mounting suspicion that the defendant was involved in a crime beyond speeding.[173] Accordingly, after issuing the speeding citation, the officer asked the defendant for consent to search his car, to which the defendant answered that he "had nothing to hide" but did not consent to the search because he did not want to wait.[174] The officer returned to his patrol car to inquire whether a canine sniff unit was available.[175] However, before the officer could ask, the dispatcher informed the officer that his assistance was needed at a location a few miles away.[176] In order to respond to that situation, the officer informed the defendant that he was free to leave.[177]

Before the officer reached his destination, the dispatcher notified the officer that his assistance was no longer necessary and within a few minutes the officer spotted the defendant again driving at an excessive speed.[178] The officer initiated another stop, issued a warning to the defendant and told him he was free to leave.[179] Nevertheless, the officer turned back and asked again whether the defendant would consent to a search of his vehicle; the defendant once more said no.[180] Nevertheless, the officer contacted the dispatcher to inquire into the availability of a canine unit and after a five to ten minute inquiry the dispatcher informed the officer that the closest canine unit was approximately sixty miles and over an hour away.[181] When informed of the length of the wait for the canine unit, the defendant responded that he could wait because he was retired.[182] The officer requested the canine unit, which arrived one hour and six minutes after the canine officer received the request.[183] When the canine unit arrived on the scene, the dog alerted within ten seconds of sniffing the vehicle.[184] After the officer opened the trunk, he discovered 337 pounds of marijuana.[185] In all, the defendant was detained for one hour and forty minutes from the time of the officer's second request to search the vehicle to the time of the dog alerting to the presence of drugs.[186]

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173 *Id.* at 270.
174 *Id.*
175 *Id.*
176 *Id.*
177 *Id.*
178 *Id.*
179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.* at 274.

Even though the court expressed that the length of the defendant's detention deserved scrutiny, ultimately the court concluded that the officer acted reasonably in detaining the defendant for one hour and forty minutes in order to wait for the drug-detection dog.[187] To reach its conclusion, the court followed the reasoning in *United States v. Place*,[188] which "declin[ed] to 'adopt any outside time limitation for a permissible *Terry* stop' and instead focus[ed] the inquiry on whether the 'police diligently pursue[d] their investigation.'"[189] "In assessing whether the duration of the defendant's detention was reasonable under the circumstances," the court relied upon (1) the fact that societal interest in stopping the transportation and distribution of illegal drugs is substantial; (2) the circumstances of the stop: the officer was reacting to a "swiftly developing situation" in which it was not possible to arrange for a drug-sniffing dog ahead of time; and (3) the diligence the patrol officer and the dispatcher exhibited in obtaining a canine unit.[190]

Analogizing the facts as recounted by Cesar with the facts in *Teagle*, it can be argued that the twenty-plus hour detention of Cesar was constitutional. In *Teagle*, the officer was diligent in taking action to confirm or dispel his suspicions that the defendant was couriering drugs, the court reasoned that society has a substantial interest in stopping the transportation of illegal drugs, and it was not possible to arrange for a drug-sniffing dog ahead of time.[191] Likewise, the officer that pulled over Cesar assumedly was diligent in determining Cesar's immigration status,[192] The government has a substantial interest in enforcing its immigration laws and it is not possible for all patrol officers to arrange ahead of time to have an ICE agent with them. Given this, a court following *Teagle's* holding would likely find Cesar's detention to be reasonable. While the detention may be "reasonable" in the legal sense, it is not "reasonable" in the colloquial sense. If the snapshot of lengthy detentions the speakers at the ACRAB forum provided proves to be widespread, enforcement of section 2(B) is pushing the envelope of what a reasonable detention is based on what reasonable suspicion looks like. The one hour and forty minute detention of the defendant in *Teagle* deserved scrutiny.[193] This then begs the question: how much more scrutiny does a twenty hour or more detention deserve?

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187 *Id.* at 274, 276.

188 United States v. Place, 462 U.S. 696, 709-10 (1983).

189 *Teagle*, 170 P.3d at 274 (quoting *Place*, 462 U.S. at 709-10).

190 *Id.* at 275.

191 *Id.*

192 *See supra* notes 162-63 and accompanying text (discussing the often lengthy process involved in searching ICE's multiple databases for a particular person's status).

193 Again, this article is not contending that a lengthy detention (twenty plus hours) based on reasonable suspicion is legally unreasonable. *See* United States v. Diaz-Quintana, 596 F. Supp. 2d 1273, 1279-80 (D.N.D. 2009) (stating an officer has not placed a suspect under custodial arrest

Scrutiny should not depend on whether the length of the detention is reasonable under recent case law; rather scrutiny should depend on whether these lengthy detentions have any resemblance to the justifications for the reasonable suspicion exception that *Terry* created.[194] Stops based upon reasonable suspicion should last no longer than necessary and are justifiable because they are "minimally intrusive."[195] What we are seeing is a drift away from reasonable suspicion being used only for brief pat-downs to detentions based on reasonable suspicion lasting for more than twenty-four hours. By raising the standard of suspicion in section 2(B) to probable cause before triggering an officer's obligation to investigate a suspect's immigration status, individuals can be provided with protection from "rash and unreasonable" interferences in their daily lives.[196] Besides tipping too far away from an individual's right to be free from unreasonable seizure,[197] there are other reasons that reasonable suspicion as a standard in section 2(B) does not provide enough protection to individuals suspected of being unlawfully present in the United States.[198] By heightening the standard of suspicion to probable cause, an officer would be less likely to engage in racial profiling or conduct prolonged detentions.[199] This change would improve relations between peace officers and the immigrant communities resulting in improved public safety.[200]

IV. UNINTENDED CONSEQUENCES OF SB 1070

Opponents of SB 1070 claim that the law will have many adverse effects. Chief among these consequences are racial profiling and prolonged detentions.[201] Moreover, the law has and will continue to create disharmony in communities.[202] Section 2(B) of SB 1070 does provide procedural safeguards against these potential abuses. For example, after developing reasonable suspi-

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when transporting the suspect to a Border Patrol station and detaining him for twenty-four hours to determine the suspect's immigration status).

194 *See supra* part III.A (discussing rationale behind detentions based upon reasonable suspicion).

195 United States v. Urrieta, 520 F.3d 569, 578-79 (6th Cir. 2008); *see also* Florida v. Royer, 460 U.S. 491, 510 (1983) (Brennan, J., concurring).

196 *See* ARIZ. REV. STAT. ANN. § 11-1051(B) (2012); *see also* Brinegar v. United States, 338 U.S. 160, 176 (1949).

197 *See* United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (discussing the underlying justification of reasonable suspicion as the proper balance between the public interest and the individual's right to personal security).

198 *See infra* Part IV (discussing other consequences of SB 1070).

199 *See infra* Part IV.

200 *See infra* Part IV.

201 *See infra* Parts IV.A-B.

202 *See infra* Part IV.C (discussing how the law has caused disharmony in immigrant communities).

cion that an individual is not legally present in the country during a lawful stop, an officer need only make a "reasonable" inquiry into immigration status "when practicable."[203] According to John Kavanagh, one of the bill's co-sponsors, this safeguard allows officers to prioritize their time.[204] In other words, an officer in the field would not be required to call ICE when he or she reasonably believes that an individual is not legally present if an emergency requires his or her attention elsewhere.[205] Similarly, an inquiry would not be required if it would "hinder or obstruct an investigation."[206] So, according to Kavanagh, "[c]rime victims and witnesses would never be questioned because questioning is limited to those who have violated some law."[207] Even these procedural safeguards are not enough to prevent abuses. Therefore, the legislature should raise the level of suspicion required in section 2(B) before triggering officers' duty to inquire into an individual's immigration status to probable cause.

A. Potential for Racial Profiling

Some have expressed concern that section 2(B) of SB 1070 will lead to racial profiling by Arizona law enforcement officers.[208] This led to an amendment to SB 1070 via Arizona House Bill 2162 ("HB 2162").[209] HB 2162 added another purported safeguard, namely officers "may not consider race, color, or national origin of an individual when determining whether there is reasonable suspicion to believe" that the individual is unlawfully present, "except to the extent permitted by the United States or Arizona Constitution."[210] To address the concern that SB 1070 could lead to impermissible racial profiling, Governor Brewer issued an executive order immediately after

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203 ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

204 John Kavanagh, Op-Ed., *Let's Set the Record Straight on New Law*, ARIZ. REPUBLIC (May 8, 2010, 12:00 AM), http://www.azcentral.com/arizonarepublic/opinions/articles/20100508kavanagh08.html.

205 *See id.*

206 § 11-1051(B).

207 Kavanagh, *supra* note 204 (This is a misstatement of the law.). *See* § 11-1051(B) (stating that during "*any lawful stop*" where reasonable suspicion exists that a person is an unlawfully present alien an officer shall make a reasonable attempt to determine the person's immigration status) (emphasis added). The law does not state that this obligation will only apply to those who have violated a law.

208 KATE M. MANUEL ET AL., CONG. RESEARCH SERV., R41221, STATE EFFORTS TO DETER UNAUTHORIZED ALIENS: LEGAL ANALYSIS OF ARIZONA'S S.B. 1070, at 35 (2011); H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

209 H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

210 MANUEL ET AL., *supra* note 208 (internal quotation marks omitted); H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

signing the bill into law.[211] The Governor's order required law enforcement agencies across the state to provide training "regarding what constitutes reasonable suspicion" and to "make clear that an individual's race, color, or national origin alone cannot be grounds for reasonable suspicion to believe any law has been violated."[212] However, as discussed, court jurisprudence indicates that under the Constitution, law enforcement may still base their suspicions on race and ethnicity about whether an individual is legally present in this country on race and ethnicity.[213] Therefore, the safeguard provided by HB 2162 does nothing to diminish the potential for racial profiling.

Even well after the bill's enactment, there has been concern that racial profiling will occur because of SB 1070. On July 16, 2012, a group of 223 organizations representing a variety of faith, immigration and civil rights advocacy groups, and immigrant communities, wrote a letter to DHS Secretary Janet Napolitano.[214] In this letter, the groups proposed measures for DHS to take to minimize racial profiling through its enforcement operations.[215] On the day of the Supreme Court ruling regarding the constitutionality of SB 1070, the President of the United States issued a press release expressing similar concern.[216] The release stated, "[n]o American should ever live under a cloud of suspicion just because of what they look like. Going forward, we must ensure that Arizona law enforcement officials do not enforce this law in a manner that undermines the civil rights of Americans . . . ."[217]

Beyond the moral argument that racial profiling is ethically wrong, there is evidence from research psychologists that victims of racial profiling experience post-traumatic stress disorder, other stress-related disorders, and fail to use available community resources at a greater rate than the general population.[218] Racial profiling also has an effect on the broader community. Effects include

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211 Establishing Law Enforcement Training for Immigration Laws, Ariz. Exec. Order No. 2010-09 (Apr. 23, 2010), *available at* http://www.azgovernor.gov/dms/upload/EO_201009.pdf.

212 *Id.*

213 *See supra* Part III.B.

214 Letter from Rights Working Group to Janet Napolitano, Sec'y, Dep't of Homeland Sec. (July 16, 2012), *available at* http://www.rightsworkinggroup.org/sites/default/files/SB1070Letter.pdf.

215 *Id.*

216 Press Release, Office of the Press Sec'y, The White House, Statement By the President on the Supreme Court's Ruling on Arizona v. United States (June 25, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/06/25/statement-president-supreme-court-s-ruling-arizona-v-united-states.

217 *Id.*

218 *Paying the Price: The Human Cost of Racial Profiling*, ONTARIO HUMAN RIGHTS COMM'N, 17 (Oct. 21, 2003), http://www.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf (citing Letter from American Psychological Association to U.S. House in Support of the End Racial Profiling Act, H.R. 2074 (Aug. 9, 2001)).

"confirmation of feelings of racism, fear and financial costs."[219] Racial profiling can also lead to mistrust in society's institutions such as the criminal justice system, law enforcement, and education system.[220] The community's feelings of mistrust are exacerbated when societal institutions are unwilling to acknowledge concerns about racial profiling or address them in a constructive way.[221] By raising the level of suspicion from reasonable suspicion to probable cause, the community will receive an official acknowledgment that even the potential of racial profiling is not acceptable.

One study categorized the unintended consequences of racial profiling into four groups: anti-deterrence, alienation, stigmatization, and the promotion of structural inequality.[222] The author of the study contends that there is a causal link between racial profiling and racism in society.[223] Specifically, racial profiling has an effect on "housing, transport, employment, and entertainment."[224] Because of this effect, it is likely that racial profiling discourages minorities "from travelling and working in white neighbourhoods, especially at night, and so compounds residential and occupational segregation" as well as to continue "a perception of the police as hostile to [minorities]."[225] The evidence that racial profiling causes such challenges in communities where it occurs coupled with the emerging evidence that the enforcement of section 2(B) of SB 1070 is resulting in racial profiling[226] is reason to increase the level of suspicion from reasonable to probable cause.

B. Potential for Prolonged Detention

Section 2(B) of SB 1070 requires officers to make a reasonable inquiry into an individual's immigration status when officers legally stop, detain, or arrest the person if the officers develop reasonable suspicion that the person is not legally present in the United States.[227] The accepted way to perform these inquiries is to contact ICE, which will cross-reference the person in their immigration database.[228]

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[219] *Id.* at 17.

[220] *Id.* at 23 (finding that racial profiling, whether personally experienced, witnessed, or heard about, leads to an erosion of public confidences in these institutions).

[221] *Id.*

[222] Frej Klem Thomsen, *The Art of the Unseen: Three Challenges for Racial Profiling*, 15 J. ETHICS 89, 105-06 (2011).

[223] *Id.* at 106.

[224] *Id.* (quoting Annabelle Lever).

[225] *Id.* at 106, 107.

[226] *See supra* Part I discussing the character of the 500 calls received from AZ ACLU since the implementation of section 2(B) of SB 1070.

[227] ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

[228] Arizona v. United States, 132 S. Ct. 2492, 2507 (2012).

Even though certain forms of identification provide the presumption of legal status,[229] a lengthy detention may still occur.[230] Suppose an officer pulls over an individual driving on an Arizona highway for speeding and during the exchange with the individual the patrol officer develops reasonable suspicion that the individual is illegally present in the United States.[231] Now suppose further that the individual, who is a United States citizen, produces a New Mexico driver's license as identification, which is not one of the presumptive identifications.[232] According to section 2(B) of SB 1070, the officer has an obligation to make a reasonable attempt to contact ICE.[233] As stated *supra*, this call may not be a quick process.[234] The verification process involves multiple databases, plus in 2011 nearly 10,000 verification requests in Arizona alone "produced an indeterminate answer" which could require addition database searches "and even paper files . . . to resolve the inquiry."[235] As this example shows, the officer could detain this individual for several hours before receiving a conclusive answer to his or her immigration status. The risk of prolonged detention is heightened in light of the fact that SB 1070 allows a citizen to sue if the department is not enforcing the statute to its fullest.[236]

Justice Kennedy stated that SB 1070 might possibly be construed "to avoid these concerns."[237] In particular, he found that state courts may interpret the mandatory language that an officer shall make "a 'reasonable' attempt to verify" the immigration status of a suspect to mean that "unless the person continues to be suspected of some crime for which he may be detained by state

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229 ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (noting one limit built into the statute is a presumption that a suspect is legally present in the United States if he or she is able to provide certain identification which requires legal immigration status before issuing the identification). Local law enforcement agencies have been trained that most state-issued drivers licenses and identifications have such a requirement, with the exception of four states: Illinois, Utah, Washington, and New Mexico. Interview with Jennifer LaRoque, Assistant Phx. City Attorney & Lieutenant, Phx. Police Dep't ("PPD"), in Phoenix, Ariz. (Mar. 28, 2013).

230 A stop based on reasonable suspicion is justified because it is a minimal intrusion on the suspect. However, when a seizure takes several hours while an investigation is made, it is no longer a minimal intrusion.

231 *See* Brief for Appellee, *supra* note 162, at 55.

232 *See id.*

233 ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

234 Brief for Appellee, *supra* note 162, at 56.

235 *Id.*

236 Because § 11-1051(H) allows residents to sue officers or agencies for not enforcing the law to its fullest, officers have to make a "lesser of two evils" decision. ARIZ. REV. STAT. ANN. § 11-1051(H) (2012). Those evils are either (1) proceeding with determining a suspect's immigration status risking a violation of the suspect's constitutional rights if reasonable suspicion is lacking, or (2) forego an attempt to ascertain the person's immigration status risking a suit for failing to enforce the law to its fullest.

237 Arizona v. United States, 132 S. Ct. 2492, 2509 (2012).

officers, it would not be reasonable to prolong the stop for the immigration inquiry."[238] In other words, he indicated that a reasonable attempt does not necessarily require the officer to conduct the immigration inquiry during the stop.[239] Despite Kennedy's thoughts, police departments are training their officers to make an immigration status inquiry during the stop.[240] By detaining a subject while the immigration status investigation is ongoing, the length of that detention increases, making it less likely to be a "minimal intrusion."

C. Creating Disharmony in Communities and Compromising Public Safety

SB 1070 and other laws like it are making life difficult for immigrants without proper immigration documents. Interjecting these difficulties is of course the goal of SB 1070 proponents.[241] Nevertheless, for those affected by this law, it is not simply about whether one has proper documentation. Indeed, more than fifty percent of undocumented immigrants live in "mixed-status families."[242] Nearly five million children born in America live with at least one parent who is not legally present in the country and over sixteen million people total living in a household with at least one illegally present immigrant.[243] Immigrants in communities with restrictive immigration policies, whether they have proper immigration documents or not, are taking measures to minimize their interactions with law enforcement.

Of biggest concern to all in Arizona is that immigrants may be reluctant to call the police even when they themselves are victims or witnesses of crimes. For example, a woman in Escondido, California, a city with restrictive immigration policies, called the police after a domestic violence incident.[244] After going to the local jail, officers checked her immigration status.[245] The officers were more interested in her immigration status than her status as a domestic violence victim.[246] Because she did not have any immigration documentation,

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238 *Id.*

239 *See id.*

240 *See, e.g.*, Email from Jennifer LaRoque, Lieutenant PPD & Assistant Phx. City Attorney, to author (Mar. 22, 2013, 1:37 PM) (on file with author).

241 S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

242 ANGELA S. GARCIA & DAVID G. KEYES, LIFE AS AN UNDOCUMENTED IMMIGRANT: HOW RESTRICTIVE LOCAL IMMIGRATION POLICIES AFFECT DAILY LIFE 15 (2012) (citing Pew Hispanic Center statistics).

243 *Id.*

244 *Id.* at 13.

245 *Id.*

246 *Id.*

she spent five days in jail.[247] Ultimately, she was released.[248] Word of her situation spread throughout her neighborhood.[249] It is hearing situations like this that are likely to result in fewer victims of crimes, or even witnesses, coming forward for fear that they will be required to reveal their immigration status. Case in point, Lidia, a Mesa, Arizona resident, heard gunshots outside her home one night since the injunction on section 2(B) of SB 1070 was lifted.[250] When she went outside she saw bullet holes in the side of her home.[251] She was too afraid to call the police for fear she would have to reveal her immigration status.[252] Instead she called a hotline operated by the AZ-ACLU.[253] The hotline operator inquired of the local police department as to their policy in this type of situation.[254] The officer taking the call responded that their policy would require them to inquire into the status of the victim.[255] While these are only two instances, when aggregated with other instances, laws such as SB 1070 compromise public safety. In addition to concern about reporting crimes, restrictive immigration laws cause legal residents and even United States citizens to adversely alter their daily routines. In one instance, a Border Patrol car parked outside her daughter's school stopped a mother from walking her daughter to school because of fear of what would happen if the officer saw her.[256] This is yet another reason to raise the level of suspicion in section 2(B) to probable cause.

V. Conclusion

Because of the negative impact already caused by the passage of SB 1070 and the potential for abuse of section 2(B), a higher standard than reasonable suspicion is warranted before triggering a law enforcement officer's obligation to verify the immigration status of an individual who is lawfully stopped or arrested. Raising this level of suspicion to probable cause is the least that can be done to preserve the balance between the public's interest in seeing its immigration laws enforced and "the individual's right to personal security;"[257]

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247 *Id.*

248 *Id.*

249 *Id.*

250 Lidia, Remarks at the Arizona Civil Rights Advisory Board Public Forum: Law Enforcement Post-SB 1070 (Mar. 26, 2013) (on file with author).

251 *Id.*

252 *Id.*

253 *Id.*

254 *Id.*

255 *Id.*

256 Garcia & Keyes, *supra* note 242, at 18.

257 United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

reduce the potential for racial profiling and lengthy detentions; and improve harmony in immigrant communities. Therefore, A.R.S. 11-1051 should be amended to reflect this higher standard.

"Licensing Agreement": Oxymoron?

By Steven McGinley*

I. Introduction

For over a century, courts have recognized the first sale doctrine as a limitation on the exclusive rights of copyright holders;[1] however, new technology compels courts to reexamine the first sale doctrine's application to intangible works.[2]

Copyright owners argue the first sale doctrine does not apply to transfers involving intangible works or works distributed digitally and that these transactions are licenses rather than sales.[3] Recent cases show that license agreements with significant and notable restrictions are upheld even when a purchaser pays

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* The author would like to dedicate this Article to his father, Pat McGinley, whose example has always been more than enough.

[1] *See* Robert P. Merges et al., Intellectual Property in the New Technological Age 411 (5th ed. 2010).

[2] *See generally id*; *see also* Warner Bros. Entertainment Inc. v. WTV Systems, 824 F.Supp.2d 1003, 1009 US District Court (2011) (holding that a company that housed legally purchased physical copies of DVDs at its data center so that it could stream to customers' homes was a "transmission" and therefore not protected by the first sale doctrine)

[3] *See generally* Apple Inc. v. Psystar Corp., 658 F.3d 1150 (9th Cir. 2011); Vernor v. Autodesk, Inc., 621 F.3d 1102, 1113 (9th Cir. 2010) (holding customers of computer software was a licensee of its copy, rather than the owner, and therefore could not invoke the essential step defense or first sale doctrine).v

the full value ("full consideration") for a copyrighted work in exchange for possession of the work with no foreseeable obligation to return it ("indefinite possession").[4]

The purpose of copyright law is to serve the public good by promoting the progress of useful arts and science.[5] It does not benefit the public good to recognize a transaction as a license if that transaction involves indefinite possession of a copyrighted work. Instead, courts should interpret these transactions based on the structure of payment and terms of possession to which the parties agreed to. In other words, when a purchaser has paid in full for a copyrighted work and then receives possession of the work with no obligation to return it, courts should recognize this transaction as a sale.

Part II of this Article will briefly discuss copyright law, its underlying rationale, and the importance of the first sale doctrine as a limitation on the rights of copyright owners. Part III will discuss the creation of secondary markets and address distributors' opposition to digital resale. Part III will also address the rising popularity of digital transfers. Part IV will introduce recent cases to illustrate the use of license agreements as a means of circumventing the first sale doctrine. Part V proposes that courts interpret the transfer of a copyrighted work as a sale when a purchaser has paid the full value for a copyrighted work in exchange for possession of the work with no obligation of return. Finally, Part VI will apply the proposed solution from Part V to a recent case to highlight the different approach and conclusion.

II. Copyright Law

Copyright law is important because it encourages the creation of original works that are made available to the public, thereby promoting learning and creativity. The first sale doctrine, an exception to a copyright owner's exclusive right of distribution, benefits the public good by limiting the public's access to copyrighted works only to the extent necessary to stimulate creativity.[6]

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[4] *See, e.g.*, MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 939-42 (9th Cir. 2010); *Vernor*, 621 F.3d at 1113-14; Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 654-56 (S.D.N.Y. 2013).

[5] *See* U.S. Const. art. I, § 8, cl. 8; Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is . . . to stimulate artistic creativity for the general public good").

[6] *See* David W. Barnes, *Free-Riders and Trademark Law's First Sale Rule*, 27 Santa Clara Computer & High Tech. L.J. 457, 461 (2011).

A. Copyright and the First Sale Doctrine

Eligibility for copyright protection requires placing an original work in a "tangible medium of expression."[7] A valid copyright grants owners several exclusive rights, including the rights to reproduce and distribute their works.[8]

In 1908, the Supreme Court recognized the first sale doctrine as a limitation on a copyright holder's exclusive right of distribution.[9] In *Bobbs-Merrill Co. v. Straus*, a copyright owner sold its book with a printed notice stating that anyone who sold the book for less than one dollar would be liable for copyright infringement.[10] The Court held that a copyright owner's exclusive right of distribution only applies to first sales of copies of the work, thus preventing copyright owners from imposing limitations on the subsequent sales of copies already lawfully distributed.[11] "[B]y releasing a particular copy into the public channels, the copyright owner consents to the disposition of that copy and has no legitimate interest in controlling further distribution of that copy."[12]

In 1909, Congress codified the first sale doctrine.[13] Section 109 of Chapter 17 of the United States Code provides that, "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[14] Courts use a four-prong test to determine whether the first sale defense applies: "(i) The copy was lawfully produced with the permission of the copyright owner; (ii) that particular copy was transferred under the copyright owner's authority; (iii) the defendant is the lawful owner of that copy; and (iv) the defendant simply distributed that particular copy."[15] If the first sale doctrine is applicable, then a purchaser may transfer the copy of the work in their possession without seeking permission from the copyright holder.

It is important to note that the first sale doctrine only acts as a limitation on the right of distribution and has no effect on any of the other rights granted to a copyright owner.[16] "[C]opyright would be meaningless if the transfer of [an object] embodying the protected work were understood to transfer all the rights

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[7] 17 U.S.C. § 102 (2006).

[8] 17 U.S.C. § 106 (2006).

[9] *Vernor*, 621 F.3d at 1107.

[10] *Id.* (citing Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 341 (1908)).

[11] *Bobbs-Merrill*, 210 U.S. at 351.

[12] Matthias Glatthaar, Resale of Digital Music: *Capitol Records v. ReDigi* 8 (Apr. 30, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2172403.

[13] *Vernor*, 621 F.3d at 1107.

[14] 17 U.S.C. § 109 (2006).

[15] Glatthaar, *supra* note 12, at 9.

[16] *See* 17 U.S.C. § 109 (2006).

to it."[17] This means that while the lawful owner of a copy of a copyrighted work may dispose of *that particular copy*, he may not make any additional copies of that work.[18]

As such, the first sale doctrine is an affirmative defense to copyright infringement. In *U.S. v. Wise*, Woodrow Wise, Jr. was charged with several counts of copyright infringement for the selling of copyrighted feature-length motion pictures.[19] Wise argued, *inter alia*, that the first sale doctrine afforded him protection.[20] One of the films transferred included an agreement that provided:

> 1. You will pay us our cost for said print (i.e., the sum of $401.59).
>
> 2. Said print is furnished [to] you for your personal use and enjoyment and shall be retained in your possession at all times; said print shall not be sold, leased, licensed or loaned by you to any other person and shall not be reproduced in any size or type prints, or otherwise; and said print shall not be exhibited by you publicly for profit, paid admissions or otherwise, but the use of said print by you shall be confined to private home showings and library purposes.[21]

The Court held that the language, when taken in the agreement's entirety, revealed that the transaction resembled a "sale with restrictions on the use of the print."[22] Therefore, while the court upheld the agreement's use restrictions, it did not uphold restrictions on the transfer of that particular copy.

B. Underlying Rationale

While scholars have long debated the philosophical foundations of copyright law, the predominant rationale for U.S. copyright law is utilitarianism.[23] This means that copyright law must ultimately serve the public good. Restrictions on the alienation of personal property dictate the terms under which an individual may distribute his or her own property with the rest of society.

"The sole interest of the United States and primary object in conferring the monopoly [of copyright protection] lie in the general benefits derived by the

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[17] Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 917-18 (2008).

[18] Glatthaar, *supra* note 12, at 7.

[19] United States v. Wise, 550 F.2d 1180, 1183 (9th Cir. 1977).

[20] *See generally id.*

[21] *Id.* at 1192.

[22] *Id.*

[23] MERGES, *supra* note 1, at 418.

public from the labors of authors."[24] The Supreme Court has held that while "[c]reative work is to be encouraged and rewarded . . . private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[25] Any conflict between the stimulation of creative works and furthering public good must ultimately weigh in society's favor.[26] In other words, any changes to standing legal precedent that frustrate the stimulation of artistic creativity should nonetheless be accepted if they ultimately benefit the public.

Generally, public policy prohibits restrictions on the dissemination of personal property.[27] Freedom of alienation of personal property benefits the public good because it encourages society's access and exposure to different works. "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such thing's as pass from hand to hand."[28]

"The underlying policy of the first sale doctrine as adopted by the courts was to give effect to the common law rule against restraints on the alienation of tangible property."[29] The first sale doctrine acts to "balance[ ] the copyright owner's exclusive right to control the distribution of his work and the right of owners of personal property to dispose of their property as they wish."[30] "It also follows the specific intellectual property policy limiting rights to the extent necessary to produce incentives necessary to encourage creative activity."[31] This "balance" conforms with the law's aversion to restraints on the alienation of personal property, while still encouraging authors to contribute original works to society.

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[24] Grant Heilman Photography, Inc. v. John Wiley & Sons, Inc., 864 F. Supp. 2d 316, 334 (E.D. Pa. 2012) (alteration in original) (quoting Sony Corporation v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)) (internal quotation marks omitted).

[25] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[26] *See* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (stating "the primary object in conferring the monopoly lie in the general benefits derived by the public from the labor of authors"); *see also Aiken*, 422 U.S. at 156 (stating "the ultimate aim is . . . to stimulate artistic creativity for the general public good").

[27] John D. Park & Sons Co. v. Hartman, 153 F. 24, 39 (6th Cir. 1907) (holding that "[i]t is . . . a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice").

[28] *Id.*

[29] U.S. COPYRIGHT OFFICE, REGISTER OF COPYRIGHTS, DMCA SECTION 104 REPORT xix (2001) [hereinafter DMCA SECTION 104 REPORT], *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

[30] Glatthaar, *supra* note 12, at 8.

[31] Barnes, *supra* note 6, at 462.

III. Secondary Markets

The first sale doctrine is the legal basis for a secondary market—a market that allows redistribution of all types of copyrighted works.[32] Secondary marketplaces allow customers to recoup value on their unwanted digital merchandise.[33] Producers of copyrighted works generally oppose secondhand marketplaces because products on a secondary market compete with new products offered on the primary market.[34] "When used products are available for a cheaper price, consumers are less likely to spend more for a new product."[35] Yet a secondary market for used copyrighted works persists due to the first sale doctrine, but also in part to consumers voicing their displeasure when their right to resell used goods is restricted.[36]

Amazon.com ("Amazon"), the world's largest online retailer, began selling used books in 2000.[37] Authors and publishers were displeased because they did not receive profits from the resale of books. The Author's Guild, a trade group for writers, urged its members to stop helping Amazon's "notorious used-book service," claiming, "Amazon's practice does damage to the publishing industry, decreasing royalty payments to authors and profits to publishers."[38] Jeff Bezos, the chairman and CEO of Amazon, asked for support from individuals and stores who sold used books through Amazon.[39] In less than twenty-four hours, the Author's Guild reportedly received over 4000 emails.[40]

Book publishers are not the only ones worried about lost profits from the sale of used goods. Dan Ackerman, a senior editor for CNET, stated, "It's no secret that every major video game company would like used games to go away, largely because they don't get a cut of any of those resale dollars."[41]

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[32] Glatthaar, *supra* note 12, at 7.

[33] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 645 (S.D.N.Y. 2013); *see also* UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1181 n.5 (9th Cir. 2011) (labeling commodities or goods that experience a high volume of sales as "merchandise," whether authorized or not).

[34] Glatthaar, *supra* note 12, at 3.

[35] *Id.*

[36] *See e.g.*, Chris Kohler, *Xbox One Proves It: Don't Mess with Used Games*, Wired (June 19, 2013, 7:04 PM), www.wired.com/gamelife/2013/06/xbox-one-used-games-drm/; *Amazon Fires Back at Writers' Group*, USA Today (Apr. 17, 2002, 9:43 AM), http://usatoday30.usatoday.com/life/books/2002/2002-04-17-amazon-authors.htm (stating that over 4,000 letters were sent to the Author's Guild in support of Amazon's used book policies).

[37] *See generally* David D. Kirkpatrick, *Online Sales of Used Books Draw Protest*, N.Y. Times (Apr. 10, 2002), http://www.nytimes.com/2002/04/10/technology/10BOOK.html.

[38] *Id.*

[39] *Amazon Fires Back at Writers' Group*, *supra* note 36.

[40] *Id.*

[41] Dan Ackerman, *Five Unanswered Questions About the Xbox One*, CNET (May 21, 2013, 11:34 AM), http://reviews.cnet.com/8301-9020_7-57585390-222/five-unanswered-questions-about-the-xbox-one/.

Videogame-focused media outlets initially reported that Microsoft's next generation gaming console, "Xbox One," would require users to install all purchased games from the tangible disc to the console's memory and then link them to the user's account, allowing users to play games stored on the hard drive.[42] Game websites stated that Microsoft was "trying to kill discs[,] . . . stripping them of their value by using them only to install entire games on the Xbox One hard drive."[43] Consumers' inability to transfer digitally downloaded games to other consumers would effectively destroy the used game market for Xbox games, and Microsoft would have greater control over its own game market and pricing.[44]

Severe backlash from the gaming community forced Microsoft to backtrack.[45] Microsoft announced that it would not charge any fees for trading in used games, but selling used games, or even *gifting* used games to friends, could only occur at participating retailers.[46] In addition, an owner could only transfer his game to a person who is on his "friends list"[47] for at least thirty days, and an owner could transfer each game only once.[48]

Sony announced that its new console, the PS4, would impose no restrictions on used games, and "Sony stock significantly outperformed Microsoft stock partly due to the positive sentiment generated by an apparent win of PS4 over Xbox One."[49] Afterwards, Microsoft gave up defending its used game policies and announced that it would allow players to share, lend, and resell their used Xbox One disc games just as they could with the previous console.[50]

A. Opposition to Digital Resale

Similar to tangible used works, producers worry that a secondary market for used digital goods will undermine the primary market for their works; how-

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[42] David Carnoy, *Game Over for Used Games: How Xbox One and PS4 Could Gut Gamers' Wallets*, CNET (May 23, 2013, 4:48 PM), http://reviews.cnet.com/8301-18438_7-57585778-82/game-over-for-used-games-how-xbox-one-and-ps4-could-gut-gamers-wallets/.

[43] Jared Newman, *At E3, Sony Gives the People What They Want*, TIME (June 11, 2013), http://techland.time.com/2013/06/11/at-e3-sony-gives-the-people-what-they-want/.

[44] *Id.*

[45] *See* Andrew Goldfarb, *Microsoft Details Xbox One Used Games, Always Online*, IGN (June 6, 2013), www.ign.com/articles/2013/06/06/microsoft-details-xbox-one-used-games-always-online.

[46] *Id.*

[47] A list of friends and acquaintances set up by Microsoft to allow players to contact one another online.

[48] Goldfarb, *supra* note 45.

[49] Nigam Arora, *Microsoft Gives in to Gamers on Xbox One Used Games, Connection Requirement*, FORBES (June 19, 2013, 6:07 PM), www.forbes.com/sites/nigamarora/2013/06/19/microsoft-gives-in-to-gamers-on-xbox-one-used-games-connection-requirement/.

[50] *Id.*

ever, a secondary market for copyrighted works can still generate revenue for producers while upholding the purpose and spirit of the first sale doctrine.[51]

Although redistribution of tangible products is generally allowed, in 2001, the U.S. Copyright Office submitted a report to Congress suggesting that the first sale doctrine should not apply to digital copies because "[t]he tangible nature of a copy is a defining element of the first-sale doctrine and critical to its rationale."[52]

Producers opposed to the first sale doctrine's application point out that it is easier to reproduce and disseminate works in digital format.[53] Digital works are easier to distribute because the digital form can be compressed (as opposed to "waves" in analog form).[54]

Producers argue that physical copies degrade over time, whereas digital copies do not.[55] However, degradation occurs in many forms—even digital copies "degrade" in their own way. For example, software may become obsolete and out of date; certain products and graphics may fall out of style. While copyright "classics" such as *Of Mice and Men* (expires in 2033) or *The Great Gatsby* (expires in 2021) will likely always remain relevant, they will eventually be in the public domain just as *Tom Sawyer* and *Moby Dick* are today.[56]

A digital secondary market would allow more consumers to get involved.[57] The secondary market's respective pricing allows consumers with a lower willingness to pay for goods the opportunity to participate in the economy. The involvement of additional consumers benefits the public good because it helps disseminate knowledge more broadly, thereby furthering the first sale doctrine's underlying policy.

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[51] *See generally* David Streitfeld, *Imagining a Swap Meet for E-Books and Music*, N.Y. TIMES, Mar. 8, 2013, at B1, *available at* http://www.nytimes.com/2013/03/08/technology/revolution-in-the-resale-of-digital-books-and-music.html?pagewanted=all&_r=0.

[52] DMCA SECTION 104 REPORT, *supra* note 29, at xix.

[53] Id. at 82.

[54] *See* Jonathan Strickland, *Does Digital Sound Better Than Analog?*, HOW STUFF WORKS, http://electronics.howstuffworks.com/digital-versus-analog.htm (last visited Dec. 24, 2013); ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 667 (5th ed. 2010).

[55] Glatthaar, *supra* note 12, at 6.

[56] *See generally Books That Aren't in the Public Domain (and Why)*, LIBRIVOX FORUMS, https://forum.librivox.org/viewtopic.php?t=11406 (last visited Dec. 23, 2013); *Cinemoose's List of Famous Books in the Public Domain*, CINEMOOSE.COM, http://cinemoose.com/books-in-the-public-domain/ (last visited Dec. 23, 2013).

[57] Vernor v. Autodesk, Inc., 621 F.3d 1102, 1115 (9th Cir. 2010) ("eBay contends that a broad view of the first sale doctrine is necessary to facilitate the creation of secondary markets for copyrighted works, which contributes to the public good by . . . allowing the proliferation of businesses.").

To some degree, the involvement of additional purchasers introduces an entirely different consumer base to the creative works of authors. For example, Amazon claimed used book sales benefit authors because they encourage "customers to try authors and genres they may not have tried" by making books available at cheaper prices.[58] The increased exposure created by secondary markets also gives producers a larger target audience that may purchase subsequent merchandise such as book sequels or new albums. Retailers often sell popular copyrighted products at a substantial discount, or even a loss, as a way to bring in new customers.[59] Amazon touts its online marketplace for used books as "a great way for people to discover a new author or a new kind of literature."[60]

A secondary market would also allow consumers to purchase software after a copyright owner ceases distribution of a particular product.[61] The American Library Association ("ALA") argues that the first sale doctrine allows availability of copyrighted works after their commercial lifespan by "enabling the existence of libraries, used bookstores, and hand-to-hand exchanges of copyrighted materials."[62]

Producers of digital copyrighted works may still benefit from sources of revenue, even after the resale of a digital work. For a fee, producers could supply additional content such as extra tracks for music albums, special features for movies, or upgrades to existing computer software.

In 2010, Electronic Arts ("EA") launched a program that required the use of an "online pass" to unlock a video game's additional content.[63] New games included a one-time-use code for the original purchaser, but any secondhand

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[58] Kirkpatrick, *supra* note 37.

[59] Victoria Strauss, *Wholesale v. Agency: Sales Models in Conflict*, SCI. FICTION & FANTASY WRITERS AM. (Oct. 11, 2010), www.sfwa.org/2010/10/wholesale-vs-agency-sales-models-in-conflict/.

[60] David Streitfeld, *Authors, Publishers Protest Amazon's New Strategy for Selling Used Books*, L.A. TIMES (Nov. 24, 2000), http://articles.latimes.com/2000/nov/24/business/fi-56512.

[61] *Vernor*, 621 F.3d at 1115.

[62] *Id.*

[63] EA chose to discontinue its online pass program in May 2013. Rus McLaughlin, *EA's Ulterior Motive Behind Killing the Online Pass*, VENTUREBEAT (May 17, 2013, 1:15 PM), http://venturebeat.com/2013/05/17/eas-ulterior-motive-behind-killing-the-online-pass/. Although EA claims the decision is due to consumer feedback (three years after the program's launch), speculation suggests it was discontinued because the next generation of Microsoft and Sony gaming consoles will reportedly either require a fee to play any used games or not support used games altogether, making the addition of an online pass superfluous. *Id. See also* Neil Hughes, *EA Cancel Online Pass, but Xbox One has Pre-owned Game Fees*, THIS IS MY JOYSTICK (May 21, 2013), thisismyjoystick.com/editorial/ea-cancel-online-pass-but-xbox-one-has-pre-owned-game-fees/; Colin McIsaac, *IGN Confirms Several Durango Rumors: Used Games, Online and More*, GAMNESIA (Mar. 22, 2013), http://www.gamnesia.com/news/ign-confirms-several-durango-rumors-used-games-online-and-more.

purchasers of a copy would have to purchase a new pass to access the game's additional content.[64]

The online pass program generated ten to fifteen million dollars per year in revenue for EA.[65] While EA stated the revenue was "not dramatic," others called the program "a wild success", and several third-party publishers began subsequently using the same code system.[66] Although secondhand purchasers, understandably, did not prefer paying an additional fee, many perceived the online pass program as "a fairly smart way to cut in on the used-game market."[67]

Thus, while many digital producers oppose application of the first sale doctrine to digital works, applying the doctrine would advance the purpose of copyright law, while still allowing producers to receive profits from digital copyrighted works.

B. A Changing Method of Distribution

While one can reproduce or disseminate any copyrighted work, digital works receive special consideration because of the speed and ease with which they may be copied and distributed. Producers argue the ability to compress and disseminate digital content more effectively means that digital transfers, called "transmissions," affect the world market to a greater degree than physical copies.[68] These qualities only bolster the belief that digital content is the future, and that authors, producers, distributors, and the legal system must adapt to the changing market.

Consumers prefer digital works because they afford easier transportation and storage, transmissions are near-instantaneous, and retailers offer twenty-four-hour availability.[69] For publishers, digital versions of copyrighted works generate higher profit margins than their physical counterparts because they reduce manufacturing and distribution costs.[70] Consumer demand, coupled with ease of production and delivery, have led many content distributors toward adopting transmissions as their preferred method of distribution. The number

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64 *See* McLaughlin, *supra* note 63.

65 Wesley Yin-Poole, *Online Pass Nets EA $10-$15m*, EUROGAMER.NET (Sept. 8, 2011), http://www.eurogamer.net/articles/2011-09-08-online-pass-nets-ea-USD10-USD15m.

66 *See* McLaughlin, *supra* note 63; Yin-Poole, *supra* note 65.

67 McLaughlin, *supra* note 63.

68 *See* DMCA SECTION 104 REPORT, *supra* note 29, at xix.

69 Complaint at 2, United States v. Apple, Inc, No. 1:12-cv-02826-UA (S.D.N.Y. Oct. 2, 2012).

70 Bob Van Voris, *U.S. Files Antitrust Lawsuit Against Apple, Hachette*, BLOOMBERG (Apr. 11, 2012, 7:27 AM), http://www.bloomberg.com/news/2012-04-11/u-s-files-antitrust-lawsuit-against-apple-hachette.html.

of digital products Amazon offers rose from nineteen million to twenty-three million in the last year.[71]

The last decade has seen a dramatic shift in the form of sales for all copyrighted works. Consumers have begun shifting to online marketplaces to purchase books. According to Bookstats,[72] in 2012, there was a 7% decline in book sales from traditional brick-and-mortar bookstores, while sales from online marketplaces such as Amazon rose 21.3% overall.[73]

The increased use of online marketplaces has resulted in rising sales of e-books. From 2011 to 2012, Amazon's physical book sales went up only 5%, the company's lowest growth rate in their seventeen years as a bookseller, but their e-book sales went up approximately 70% during the same period.[74] Between 2011 and 2012, e-book sales increased 44%, while print sales increased around 1%.[75] In 2010, e-books accounted for only 2% of all book spending; in 2011, that figure rose to 7%; and in 2012, e-books captured 11% of all book spending.[76]

In 2004, digital album sales accounted for less than 1% of total album sales in the United States, but have since continued to increase.[77] In 2006, digital album sales formed 5.5% of total album sales, expanding to 20% in 2009 and 31% in 2011.[78] In 2012, 37% of all album purchases were digital.[79] Digital album sales rose 14% in 2012, while sales of physical copies dropped 12%.[80] Although physical goods have remained the dominant form of sales in the music industry, the market trend is growing in favor of digital content.

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[71] Jim Milliot, *Amazon: E-book Sales Soared, Print Crawled*, PUBLISHERS WKLY. (Jan. 29, 2013), http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/55721-amazon-e-book-sales-soared-print-crawled.html.

[72] Taylor Malmsheimer, *E-book Sales Almost Doubled and Online Book Sales Rose 21.3% in 2012*, N.Y. DAILY NEWS BOOKS BLOG (May 17, 2013, 10:00 AM), http://www.nydailynews.com/blogs/pageviews/2013/05/e-book-sales-almost-doubled-and-online-book-sales-rose-213-in-2012 (Bookstats used data from 1,500 publishers, including six major publishing houses to create its report).

[73] *Id.*

[74] Milliot, *supra* note 71.

[75] Malmsheimer, *supra* note 72.

[76] Jim Milliot, *Online Retailers, E-books Gained in 2012*, PUBLISHERS WKLY. (May 11, 2013), http://www.publishersweekly.com/pw/by-topic/digital/retailing/article/57201-online-retailers-e-books-gained-in-2012.html.

[77] *The Nielsen Co. & Billboard's 2012 Music Industry Report*, BUS. WIRE (Jan. 4, 2013, 7:12 AM), http://www.businesswire.com/news/home/20130104005149/en/Nielsen-Company-Billboard%E2%80%99s-2012-Music-Industry-Report#.Urns8-Ln9Ms.

[78] *Id.*

[79] *Id.*

[80] *Id.*

C. Vulnerability of Consumers

The Copyright Office states that if secondhand digital distribution is the sales model of the future, "it should be the choice of the market, not due to legislative fiat."[81] However, consumers are not offered the opportunity to make a choice because courts' enforcement of license agreements helps prevent the existence of a digital secondary market.[82] Even today, "legislative fiat" actively affects the sales model of digital copyrighted works, and unless the legislature takes steps to protect consumers, publishers will make use of every advantage available to them in an effort to increase profits.

The U.S. government has already taken legal action to regulate publishers trying to dictate the sales of digital copyrighted work while leaving consumers with few alternatives for competitive pricing.

In January 2010, five major book publishers ("Publisher Defendants") each entered into separate contracts with Apple whereby the Publisher Defendants agreed to collectively raise the price of their e-books.[83] In exchange, the Publisher Defendants guaranteed Apple a 30% commission from each e-book it sold.[84] All five agreements went into effect simultaneously and resulted in "an industry-wide price increase," which the Department of Justice estimates "caused e-book consumers to pay tens of millions of dollars more for e-books than they otherwise would have paid."[85]

The U.S. Department of Justice ("DOJ") filed a civil antitrust action against Apple and the Publisher Defendants for illegally colluding to raise the price of e-books by changing the method of e-book pricing from the traditional wholesale model, which allows retailers to set prices, to the agency model, which allows publishers to set the final prices.[86] All five Publisher Defendants eventually settled, allowing retailers to lower the prices for their e-books.[87] The last publisher, Penguin Books, agreed to pay $75 million to settle the

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[81] DMCA SECTION 104 REPORT, *supra* note 29, at xx, 92.

[82] Vernor v. Autodesk, Inc., 621 F.3d 1102, 1115 (9th Cir. 2010).

[83] Complaint, *supra* note 69, at 4.

[84] *Id.* at 16.

[85] *Id.* at 5.

[86] *Id.* at 12.

[87] Shara Tibken, *Penguin Settles State E-Book Pricing Suits for $75M*, CNET (May 22, 2013, 8:44 AM), http://news.cnet.com/8301-1023_3-57585671-93/penguin-settles-state-e-book-pricing-suits-for-$75m/#!.

suit.[88] In July 2013, the U.S. DOJ won its e-book price-fixing case against Apple.[89] Apple plans to appeal the ruling.[90]

Apple and the Publisher Defendants faced a similar investigation into their "price-fixing" agency agreements in Europe.[91] In December 2011, the European Commission accepted legally binding conditions from Apple and four of the five publishers in which the companies offered to terminate agency agreements and exclude similar clauses from future contracts for the next five years.[92] The remaining publisher, Penguin Books, submitted an offer to settle.[93]

Legislation should give consumers the opportunity to open a secondary market to allow for more competitive pricing. Without an alternative market, consumers have few options for purchasing digital works.

D. The Future of Digital First Sale

In order for a digital secondary market to maintain the integrity of the first sale doctrine, there must not be illegal reproductions of copyrighted works released into the market. Therefore, for a digital secondary market to exist, "it is *critical* . . . to ensure that the seller no longer has access to the file after it is sold."[94] A digital transmission is essentially the same as transferring a physical copy if the seller no longer has access to the copyrighted work once the transaction is complete.[95]

Companies are developing ways to participate in secondary digital markets by ensuring only one copy of a digital work exists at any one moment.[96] Offer-

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[88] *Id.*

[89] Jeremy GreenField, *DOJ Wins Ebook Antitrust Case: What's Next? Will Apple Appeal?*, FORBES (July 10, 2013), www.forbes.com/sites/jeremygreenfield/2013/07/10/doj-wins-ebook-antitrust-case-whats-next-will-apple-appeal/.

[90] Larry Neumeister, *Apple Will Appeal Ruling in E-book Antitrust Case*, YAHOO! NEWS (July 10, 2013, 10:07 AM), http://news.yahoo.com/apple-appeal-ruling-e-book-antitrust-case-140529299.html.

[91] Nathan Ingraham, *Apple and Four Publishers Agree to Terminate 'Agency' Sales Model in Europe*, VERGE (Sept. 19, 2012, 5:09 PM), http://www.theverge.com/2012/9/19/3359210/apple-publishers-terminate-agency-sales-model-europe.

[92] Vlad Savov*, European Commission Investigating Collusion Among Ebook Sellers, Apple's Involvement*, VERGE (Dec. 6, 2011, 6:48 AM), http://www.theverge.com/2011/12/6/2614954/european-commission-antitrust-investigation-ebooks/in/2384168.

[93] Matt Brian, *Penguin to Terminate Ebook Deal with Apple in Bid to End European Antitrust Investigation*, VERGE (Apr. 19, 2013, 10:09 AM), http://www.theverge.com/2013/4/19/4242238/penguin-offers-ebook-pricing-settlement-to-european-commission.

[94] Glatthaar, *supra* note 12, at 7.

[95] DMCA SECTION 104 REPORT, *supra* note 29, at xviii, 81.

[96] *See generally* Managing Access to Digital Content Items, U.S. Patent Application No. 20130060616 (filed June 22, 2012) (Apple's patent application); Secondary market for digital objects, U.S. Patent No. 8,364,595 (filed May 5, 2009) (issued Jan. 29, 2013) (Amazon's patent).

ing consumers a way to resell digital goods could influence consumers in choosing a distributor.[97]

Amazon users can currently "loan" their Kindle e-books to other users for up to fourteen days;[98] however, the U.S. Patent and Trademark Office recently approved a patent that may allow Amazon to participate in the reselling of digital goods.[99] In a technique Amazon refers to as "maintaining scarcity," users place digital content in their "personalized data store."[100] Users wishing to transfer rights to the digital content may move the now-used digital content into another user's personalized data store, thus deleting the digital content from the original user's data store.[101] Amazon would likely earn a commission for each transaction involving used digital works.[102]

A few months after Amazon filed its patent, Apple filed its own patent application, which provides:

> Techniques . . . for managing access to a digital content item (such as an ebook, music, movie, software application) to be transferred from one user to another. The transferor is prevented from accessing the digital content item after the transfer occurs. The entity that sold the digital content item to the transferor enforces the access rights to the digital content item by storing data that establishes which user currently has access to the digital content item. After the change in access rights, only the transferee is allowed to access the digital content item. As part of the change in access rights, the transferee may pay to obtain access to the digital content item.[103]

Unlike Amazon, Apple's method does not aim to "move" digital content from one user's library to another; rather, it manages which users can and cannot access a particular digital content item.[104] Once a transaction is complete, only the transferee would have access to the digital content transferred.[105]

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97 Streitfeld, *supra* note 51 (stating "What better value to give an Amazon customer than to say, 'Buy your book here and then later you can resell it'? You can't do that with Barnes & Noble's. . . .").

98 *Lend or Borrow Kindle Books*, AMAZON, www.amazon.com/gp/help/customer/display.html?nodeId=200549320 (last visited on Dec. 24, 2013).

99 Streitfeld, *supra* note 51.

100 Secondary market for digital objects, U.S. Patent No. 8,364,595, at [5] (filed May 5, 2009) (issued Jan. 29, 2013) (Amazon's patent).

101 '595 Patent, at [1].

102 Streitfeld, *supra* note 51.

103 Managing Access to Digital Content Items, U.S. Patent Application No. 20130060616 (filed June 22, 2012) (Apple's patent application).

104 '616 Patent Application.

105 *Id.*

ReDigi Inc. ("ReDigi") promotes itself as "the world's first and only online marketplace for digital used music."[106] ReDigi uses technology it calls "atomic transaction" to move digital content piece by piece from the transferor to the transferee.[107] ReDigi likens this transfer to a train and contends that the digital product never exists in two places simultaneously, and therefore is not reproduced.[108] ReDigi fully moves the file from the seller's device to digital "cloud" storage and then transfers it to the buyer's device.[109] In addition, ReDigi only works with legally acquired files.[110] ReDigi uses a "forensic Verification Engine" to analyze whether a music file was legally acquired.[111]

A new method created by ReDigi, labeled "ReDigi 2.0," uploads a file directly from iTunes to its "Cloud Locker."[112] The file then stays there, so even if access to the file transfers from user to user upon resale, the file is never moved—only accessed.

Producers are often concerned they will be "cut out" of resale revenue, but this does not appear to be true.[113] In addition to ensuring that only one user can have access to a particular copy of a copyrighted work, companies are also making efforts to involve producers of copyrighted works in the profits gained from a secondary market.[114] Apple's patent provides that "[a] portion of the proceeds of the 'resale' may be paid to the creator or publisher of the digital content item and/or the entity that originally sold the digital content item to the original owner."[115] Under ReDigi's sales model, 20% of the proceeds go to rights holders.[116]

Unlike ReDigi, Amazon has not indicated if, or when, it will use its patent.[117] Simply filing for a patent application does not necessarily signify an

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106 Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 645 (S.D.N.Y. 2013) (internal quotation marks omitted).

107 *ReDigi Frequently Asked Questions*, REDIGI NEWSROOM, http://newsroom.redigi.com/faq/ (last visited Dec. 24, 2013).

108 *ReDigi Inc.*, 934 F. Supp. 2d at 645.

109 *Id.*

110 *Id.*

111 *ReDigi Frequently Asked Questions*, *supra* note 107.

112 *ReDigi Inc.*, 934 F. Supp. 2d at 646 n.3.

113 Marcus Wohlsen, *Amazon Wants to Get Into the Used E-book Business—Or Bury It*, WIRED (Feb. 8, 2013, 6:30 AM), http://www.wired.com/business/2013/02/amazon-used-e-book-patent/all/.

114 Streitfeld, *supra* note 51 (stating ReDigi attempted to incorporate music companies in its secondhand sale approach); Managing Access to Digital Content Items, U.S. Patent Application No. 20130060616 (filed June 22, 2012) (stating that Apple's patent may pay copyright owners a portion of the resale price).

115 '616 Patent Application.

116 *ReDigi Inc.*, 934 F. Supp. 2d at 646.

117 Streitfeld, *supra* note 51.

intention to make these ideas into a reality.[118] "Both [Apple and Amazon] own deep patent portfolios for ideas that will never see the light of day."[119]

Regardless, these companies have shown there are a variety of methods and techniques readily available to permit the redistribution of digital copyrighted works without allowing the seller to maintain access after the sale. If the legislature is willing, the technology is able.

IV. Use of License Agreements as Contractual Avoidance

The first sale doctrine applies only to an "outright sale," and is unavailable to those who possess a copyrighted work without owning it, such as a licensee.[120] Recent rulings have given "significant validation" to the practice of using license agreements to restrict the use and transfer of copyrighted works.[121] The ability to circumvent the first sale doctrine has caused license agreements, rather than sales, to become the preferred form of transaction among copyright holders.[122]

A copyright owner who structures a transaction as a license rather than a sale may enjoy all of the exclusive rights afforded by copyright protection with none of the limitations imposed on the sale of a copyrighted work. Copyright holders use many forms of license agreements, such as Terms of Use ("TOU"), Software License Agreements ("SLA"), and End User License Agreements ("EULA") to create conditional transfers with consumers.[123]

In *Vernor v. Autodesk*, Timothy Vernor purchased a used copy of Autodesk's software at a garage sale and then posted it for sale on eBay.[124] Autodesk's software required customers to accept an SLA before installation.[125] The SLA stated that Autodesk retained title to all copies and that customers could not rent, lease, or transfer the software without Autodesk's prior consent.[126] Autodesk even prevented customers from physically transferring

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[118] Jacqui Cheng, *Apple Follows Amazon with Patent for Resale of E-books, Music*, ARS Technica (Mar. 8, 2013, 10:55 AM), http://arstechnica.com/apple/2013/03/apple-follows-amazon-with-patent-for-resale-of-e-books-music/.

[119] *Id.*

[120] Vernor v. Autodesk, Inc., 621 F.3d 1102, 1112 (9th Cir. 2010) (citing H.R. Rep. No 94-1476, at 79 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693).

[121] Apple Inc. v. Psystar Corp., 658 F.3d 1150, 1156 (2011).

[122] *Id.* at 1155-56.

[123] MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 935 (9th Cir. 2010).

[124] *Vernor*, 621 F.3d at 1105.

[125] *Id.* at 1104.

[126] *Id.*

its software out of the Western Hemisphere.[127] Any failure to comply with these restrictions effectively terminated the license.[128]

While Vernor knew the licensing agreement existed, he believed he was not bound by its terms because he never opened the sealed package, installed the software, or agreed to any terms of use.[129] Regardless, Autodesk filed a take-down notice with eBay, claiming copyright infringement, and eBay eventually suspended Vernor's account.[130] Vernor argued the first sale doctrine protected his resale of the software.[131] The primary issue the court considered was whether Autodesk's customer, from whom Vernor acquired the used copies, was a licensee or owner of those copies.[132] If the original purchaser were merely a licensee, then the resale of the software would infringe on Autodesk's exclusive right of distribution.[133]

The question of who bears the burden of proving a sale or absence thereof is unresolved.[134] However, the court developed a three-part test to determine whether a software user is considered a licensee or owner: "a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions."[135] The court held that the original purchasers were licensees and thus could not pass ownership on to others.[136] As a result, Vernor had not received title to the software copies when he purchased them, and any subsequent transfers of those particular copies were invalid.[137]

The decision in *Vernor* focused strongly on how "significant" and "notable" the SLA restrictions were on the use and transfer of Autodesk's product.[138] Although the original purchaser of Autodesk's software paid the full value of the product and received no instructions to return the product, he was nevertheless unable to sell his copy to another willing buyer; he was not even allowed to take it out of the Western Hemisphere.[139] A purchaser of

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127 *Id.*
128 *Id.* at 1112.
129 *Id.* at 1106.
130 *Id.*
131 *Id.*
132 *Id.* at 1111.
133 *Id.* at 1112.
134 *Id.* at 1107 n.7.
135 *Id.* at 1111.
136 *Id.* at 1112.
137 *Id.*
138 *Id.* at 1110.
139 *Id.* at 1104.

Autodesk's product had limited use of his own property simply because the purchased product could, by its nature, be downloaded into digital form.

Because *Vernor* held that the more significant and notable a license's restrictions, the more likely it would be upheld, companies began inserting more stringent requirements in their license agreements. In *Apple Inc. v. Psystar Corp.*, Apple's SLA required that users only install its operating software, Mac OS X, on Apple computers.[140] Psystar, a small computer manufacturer, purchased new, unopened copies of Mac OS X and included these copies when it sold its computers.[141]

Apple claimed Psystar infringed on Apple's copyrighted software.[142] Psystar challenged Apple's license agreement as unlawfully extending copyright protection to products that were not copyrightable.[143] Psystar argued that the Copyright Act afforded Apple protection against unauthorized copying and distribution of Apple's software, but did not restrict use of legitimately purchased copies.[144]

The court held that Apple's SLA "impose[d] significant use and transfer restrictions."[145] The court further held that the license's restrictions were not unlawful because Psystar was free to develop competing hardware and competing software.[146]

Apple includes similar restrictions in its terms and conditions for many of its products and services. For example, iTunes prohibits consumers from downloading purchased videos or music to more than ten devices, or from burning a purchased music playlist more than seven times.[147]

Decisions such as *Vernor* weaken the secondary market by allowing copyright owners to circumvent the first sale doctrine.[148] *Vernor's* support of license agreements has not only encouraged their use, but may prompt software distributors to include more "significant" and "notable" license restrictions on the transfer and use of software to meet the court's three-part test.[149] This will encourage the use of more restrictive licensing in other kinds of works.[150] It is

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[140] Apple Inc. v. Psystar Corp., 658 F.3d 1150, 1153 (2011).

[141] *Id.* at 1152.

[142] *Id.* at 1153.

[143] *Id.* at 1152.

[144] *Id.*

[145] *Id.* at 1159.

[146] *Id.* at 1152.

[147] *Terms and Conditions*, iTUNES, http://www.apple.com/legal/internet-services/itunes/us/terms.html (last visited Dec. 24, 2013).

[148] Marcelo Halpern et al., Vernor v. Autodesk*: Software and the First Sale Doctrine Under Copyright Law*, 3 INTELL. PROP. & TECH. L.J., at 7, 10 (2011).

[149] *Id.* at 8; *Psystar*, 658 F.3d at 1156.

[150] Halpern, *supra* note 148, at 10 ("It's not difficult to imagine software-style licensing terms being attached to other kinds of works.").

counterintuitive that the more rights a copyright owner reserves for himself, the less likely he will be subject to the Copyright Act's limitations. In addition, the ability for producers to dictate the terms under which a consumer may use, share, or sell a product the consumer should own, runs contrary to the underlying principles of the first sale doctrine.

V. SOLUTION

Courts should not permit copyright owners to use licenses as a means to circumvent the first sale doctrine. A uniform approach to the question of whether a transaction qualifies as a sale or a license is necessary. When deciding whether the transfer of a copyrighted work is a sale or license, courts should make their decisions based on the structure of payment and terms of possession. Specifically, when a copyrighted work is: (1) paid for in full; and (2) transferred with no obligation of return, courts should always find the sale valid. When in doubt, courts should favor recognition of a sale over a license. This approach would better support the copyright law's underlying principle of benefitting the public good by reducing restrictions on access to creative works.

VI. APPLICATION

In 2004, Blizzard Entertainment, Inc., ("Blizzard") developed an online game, World of Warcraft ("WoW").[151] "The WoW software has two components: (1) the game client software that a player installs on the computer; and (2) the game server software, which the player accesses on a subscription basis by connecting to WoW's online servers."[152] The EULA pertains to the game's software, and the ToU pertain to the online service.[153] In *MDY Industries v. Blizzard Entertainment*, the court considered whether users were owners or licensees of Blizzard's WoW software.[154]

To play WoW, a player's computer must create a copy of the game's software in the computer's random access memory ("RAM").[155] Normally, this type of reproduction of a copyrighted file would constitute direct infringement, but this particular type of copying is permitted if the user either: "(1) is a licensee whose use of the software is within the scope of the license or (2) owns the copy of the software."[156]

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[151] *Company Profile*, BLIZZARD ENTM'T, http://us.blizzard.com/en-us/company/about/profile.html (last visited Dec. 24, 2013).

[152] MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 935 (9th Cir. 2010).

[153] *Id.*

[154] *Id.* at 938.

[155] *Id.*

[156] *Id.*

Michael Donnelly developed and sold a software program, Glider, which automated play for WoW users, allowing players to advance their characters unattended.[157] WoW's license prohibits the creation or use of any third-party software that modifies the game's experience.[158] If Glider users were found to directly infringe Blizzard's license agreement, Donnelly could be held liable for vicarious and contributory infringement.[159]

If the transfer of WoW's software to purchasers were considered a sale, there would be no infringement; however, if the transfer were considered a license, then Glider's users would have directly infringed on a right granted exclusively to copyright owners, and by extension, Donnelly would be liable for contributory and vicarious infringement.[160]

The court used *Vernor's* three-part test to find "significant" and "notable" restrictions, and held that WoW players, including Glider users, were licensees of their copies of Blizzard's software, even though they paid a one-time fee upfront, and were under no obligation to return the product.[161]

It is understandable that players do not "own" Blizzard's online service. A purchaser does not have possession of Blizzard's servers, only access. Additionally, WoW players pay a monthly fee to access those servers.[162]

However, courts should recognize purchasers as owners of the game software that they have: (1) fully paid for; and (2) have no obligation to return.

It makes sense not to allow any one person to ruin the online community WoW players have built, but the software itself poses no such risk. It cannot affect the rest of the community if a user breaches the license agreement because Blizzard would terminate online access per the EULA.[163] A player could not even play the game alone because WoW does not support single-player or offline play.[164]

Therefore, while it is understandable that a breach of the EULA may terminate access to the online service, it is unreasonable for Blizzard to claim that the software does not belong to the purchaser.

"Following termination, players must immediately destroy their copies of the game and uninstall the game client from their computers, but need not

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157 *Id.* at 935-36.

158 *Id.* at 938-39.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 935 (stating that Glider does not allow a player to avoid paying the monthly subscription dues).

163 *World of Warcraft End User License Agreement*, BLIZZARD ENTM'T, http://us.blizzard.com/en-us/company/legal/wow_eula.html (last updated Dec. 12, 2013).

164 *MDY Indus.*, 629 F.3d at 935.

return the software to Blizzard."[165] Players "need not return the software."[166] This is not just indefinite possession, it is perpetual possession. And yet, purchasing Wow is not a sale.

Because players would not have online access to WoW, they would be unable to use the game client software as originally intended. However, the original purchaser could still resell the software on the secondary market and perhaps recoup some of his expenses. The software is clearly worthless to Blizzard. The *new* user could pay Blizzard the monthly fee for access to its online server. Blizzard would have a new customer that it otherwise might not have. Additionally, this new customer might decide to pay for any future upgrades Blizzard distributes for the WoW software. The new customer might even be more inclined to purchase future Blizzard products.

This possession, with no expectation of return in exchange for full upfront payment, should be considered a sale for purposes of the first sale doctrine.

VII. CONCLUSION

The ultimate goal of copyright law is to benefit the public good. The first sale doctrine is an important copyright limitation because it balances the rights of a copyright owner with the rights of society. Although copyright owners would prefer to circumvent the first sale doctrine, a secondary market for digital works can still be profitable for producers.

It is true that digital products are easier to reproduce and disseminate and do not degrade as tangible works do, however, this only supports the idea that digital goods will be the predominant form of copyrighted works in the near future.

Using digital transfers as a method of sale for copyrighted work is rising notably.[167] Additionally, digital transfers, or "transmissions," will likely be the preferred method of transaction between distributors and consumers. Thus, it is important that the first sale doctrine be applied in a manner that upholds the underlying rationale of copyright law.

New methods, techniques, and advances in technology give reality to the idea that distributors may transfer digital works to consumers while ensuring only one usable copy is available. These methods ensure the scarcity of such copyrighted works and thus uphold the integrity of the first sale doctrine.

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165 *Id.* at 939.

166 *Id.*

167 *See generally* Malmsheimer, s*upra* note 72; Milliot, *supra* note 71.

The demand for digital distribution is present.[168] The methods for maintaining scarcity are in place.[169] Sources of revenue from a digital secondary market are available.[170] All that is left is for the legislature to allow the first sale doctrine to enter the digital age and maintain the limitations traditionally enacted for the public good. Producers should not be allowed to dictate the terms of what should otherwise be valid sales.

How far could producers go? They can tell you to stop using their product. They can tell you what machines you can run their programs on. They can tell you where you can and cannot take their product. They can limit the number of personally purchased media devices you can use to download a movie. They can tell you the number of times you can make a CD of music you purchased.

Can producers tell you that you cannot listen to their music while wearing green? Or while wearing a hat? Some might say that sounds ridiculous. Then again, others might say it sounds pretty significant, maybe even notable.

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[168] *See generally* Malmsheimer, s*upra* note 72; Milliot, *supra* note 71.

[169] *See generally* Secondary Market for Digital Objects, U.S. Patent No. 8,364,595 (filed May 5, 2009) (issued Jan. 29, 2013) (Amazon's patent).

[170] *See generally* Streitfeld, *supra* note 51.