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Moran v. Burbine: Supreme Court Tolerates Police Interference With the Attorney-Client Relationship

Althea Kuller

Casenotes

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I. INTRODUCTION

The right to counsel is a fundamental component of our adversarial system of justice. A criminal defendant's right to the assistance of counsel for the preparation and presentation of his or her defense is constitutionally recognized. For example, under the Supreme Court's interpretations of the sixth amendment, criminal defendants have a right to the presence of counsel during interrogations conducted after the first formal charging proceeding.[1] The Court also has held that the fifth amendment privilege against compelled self-incrimination implies a right to counsel.[2] The fifth amendment right exists during all custodial interrogations, whether or not charges have been filed.[3] If police fail to honor a suspect's exercise of his right to counsel under either the fifth or sixth amendment, and thereafter obtain a confession, that confession may not be admitted into evidence at trial.[4]

Despite the Court's recognition of the importance of counsel's presence during interrogation, the Court, in *Moran v. Burbine*,[5] approved the admission of a confession into evidence though the police had failed to inform the defendant of his attorney's efforts to represent him and had falsely stated to the defendant's attorney that they would not interrogate her client.[6] The *Moran* Court held that under these circumstances the defendant had not been deprived of his right to counsel under either the fifth or sixth amend-

1. United States v. Gouveia, 467 U.S. 180, 187 (1984); Kirby v. Illinois, 406 U.S. 682, 689 (1972). *See also* Massiah v. United States, 377 U.S. 201, 204-06 (1964).

2. Miranda v. Arizona, 384 U.S. 436, 469-70 (1966).

3. *Id.* at 465-66.

4. *Id.* at 479. *See also* Massiah v. United States, 377 U.S. 201, 207 (1964). Although statements obtained in violation of the fifth amendment right to counsel may not be used as direct evidence, they may be used for impeachment. Harris v. New York, 401 U.S. 222, 223-24 (1971).

5. 106 S. Ct. 1135 (1986).

6. *Id.* at 1140.

ment.[7] The Court further held that the police treatment of the defendant and his attorney had not violated the fundamental fairness guarantee of the fourteenth amendment due process clause.[8] Consequently, *Moran* has sanctioned police interference with efforts by attorneys to represent suspects during custodial interrogations conducted prior to the initiation of formal charges.

This note first will trace the development of the constitutional doctrines the Court has used to analyze the admissibility of confessions under the fifth, sixth, and fourteenth amendments. Next, it will examine the ethical issues raised by the interrogation of a represented suspect without the knowledge or consent of the suspect's attorney. This note will then discuss the *Moran* decision, and conclude with an analysis of *Moran's* impact upon an individual's constitutional rights and the integrity of the attorney-client relationship.

II. BACKGROUND

A. The Role of Due Process in Confession Case Analysis

The Supreme Court historically has followed a flexible approach in defining the requirements of due process.[9] The Court has indicated that the rights guaranteed by due process are simply those rights mandated by fundamental and immutable precepts of liberty and justice.[10]

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7. *Id.* at 1143, 1147.

8. *Id.* at 1147-48.

9. In 1855, the Court suggested that the fifth amendment due process clause derived its meaning from the "settled usages and modes of proceeding existing in the common and statute law of England." Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1855). Thirty years later, the Court, in interpreting the fourteenth amendment due process clause, indicated that a more flexible approach was necessary to preserve the clause's significance for an "undefined and expanding future." Hurtado v. California, 110 U.S. 516, 530-31 (1884).

10. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (due process rights defined to be those rights "implicit in the concept of ordered liberty" and described as rights without which "a fair and enlightened system" could not be imagined); Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (due process rights considered to be those rights "inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men"); Powell v. Alabama, 287 U.S. 45, 67 (1932) (due process rights viewed as those rights mandated by "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

In the criminal context, the Court has applied its flexible due process analysis to reach various results. *See, e.g.*, Mooney v. Hologan, 294 U.S. 103 (1935) (to mandate reversal of a conviction obtained by the prosecutor's knowing use of perjured testimony); Moore v. Dempsey, 261 U.S. 86 (1923) (to preclude a state from convicting a defendant in a proceeding dominated by an antagonistic mob); Powell v. Alabama, 287 U.S. 45 (1932) (to require that a state provide counsel to indigent defendants charged with capital crimes). Although *Powell* established a fourteenth amendment right to counsel, the right

In *Brown v. Mississippi*,[11] decided in 1936, the Court, applying due process standards, held that a confession elicited through physical torture was inadmissible in a state court because the interrogation method had offended fundamental principles of justice.[12] The coerced confessions in *Brown* were clearly unreliable. Accordingly, the holding in that case arguably went no further than to establish trustworthiness as a minimum requirement of due process in confession cases.[13] In subsequent years, however, the Court indicated that the purpose of the due process requirement was not to exclude unreliable confessions, but rather to ensure that police interrogation methods comport with notions of fundamental fairness.[14]

The method of analysis for determining the admissibility of a confession under the due process clause has been labeled the "vol-

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to the assistance of counsel at trial is specifically guaranteed by the sixth amendment. U.S. Const. amend. VI. It was not until 1963, however, that the Court held that the protections of the sixth amendment were binding on the states. Gideon v. Wainwright, 372 U.S. 335 (1963).

More recently, the Court has held that the prosecution's use at trial of a suspect's silence following the *Miranda* warnings violates the fundamental fairness requirements of due process because this use breaches an implicit promise that silence shall carry no penalty. Wainwright v. Greenfield, 106 S. Ct. 634 (1986). Similarly, the prosecution's suppression of requested evidence which is favorable to the accused violates due process when the evidence is probative of guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963).

11. 297 U.S. 278 (1936).

12. *Id.* at 286. In *Brown*, a deputy sheriff severely whipped one of the defendants and said that he would continue the whippings until the suspects confessed; they promptly did so. *Id.* at 282-83.

13. *See* Note, *Deceptive Interrogation Techniques and the Relinquishment of Constitutional Rights*, 10 RUT.-CAM. L. J. 109, 114 (1978).

14. *See, e.g.*, Lisenba v. California, 314 U.S. 219, 236 (1941) ("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."); Spano v. New York, 360 U.S. 315, 320 (1959) (confession obtained by exploiting the defendant's friendship with a police officer was inadmissible on due process grounds); Leyra v. Denno, 347 U.S. 556 (1954) (confession held to be inadmissible on due process grounds where a doctor who the police had sent to treat the defendant's sinus condition was actually a highly skilled psychiatrist employed to extract a confession); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (admission of confession obtained after thirty-six hours of questioning violated due process even though its trustworthiness was not in question).

In Rogers v. Richmond, 365 U.S. 534 (1961), the Court specifically held that in determining the admissibility of a confession under the due process clause, judges should not consider the probable truth of a confession, but only the fairness of the police methods used to elicit the confession. *Id.* at 540-44. In *Richmond*, Justice Frankfurter wrote that involuntary confessions must be excluded "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system." *Id.* at 540-41.

untariness" test.[15] Whether a statement has been voluntarily given depends upon an examination of the "totality of the circumstances" surrounding the interrogation.[16] The "totality of the circumstances" approach permits courts to scrutinize police conduct during the interrogation.[17] This approach also allows for consideration of the suspect's age,[18] physical condition,[19] and level of education or intelligence.[20]

Although the Court generally has not hesitated to exclude confessions elicited through physical coercion,[21] the Court has demonstrated a reluctance to exclude confessions induced by police trickery or deception absent physical coercion.[22] Lower courts

15. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961).

16. The "totality of the circumstances" approach was first employed in Johnson v. Zerbst, 304 U.S. 458 (1938). The *Zerbst* Court stated in a sixth amendment right to counsel case that "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case." *Id.* at 464. The phrase "totality of the circumstances" was first used in connection with the due process voluntariness test in Fikes v. Alabama, 352 U.S. 191, 197 (1957), but the approach of examining the circumstances surrounding the confession in each case existed long before the Court started using the phrase. *See, e.g.*, Leyra v. Denno, 347 U.S. 556, 558 (1954); Watts v. Indiana, 338 U.S. 49, 53 (1949).

17. The Court has found a variety of coercive police stratagems to be factors weighing against the admissibility of confessions. *See* Davis v. North Carolina, 384 U.S. 737 (1966) (sixteen day incommunicado detention); Reck v. Pate, 367 U.S. 433 (1961) (four day incommunicado detention); Payne v. Arkansas, 356 U.S. 560 (1958) (forty-nine hour incommunicado detention); Ziang Sung Wan v. United States, 266 U.S. 1 (1924) (enforced sleeplessness); Brooks v. Florida, 389 U.S. 413 (1967) (solitary confinement); Greenwald v. Wisconsin, 390 U.S. 519 (1968) and Sims v. Georgia, 389 U.S. 404 (1967) (denial of food and water); Rogers v. Richmond, 365 U.S. 534 (1961) and Harris v. South Carolina, 338 U.S. 68 (1949) (threats to arrest or prosecute family members); Malinski v. New York, 324 U.S. 401 (1945) (humiliation; forced disrobing); Darwin v. Connecticut, 391 U.S. 346 (1968) and Townsend v. Sain, 372 U.S. 293 (1963) (use of drugs or hypnosis).

18. *See, e.g.*, Reck v. Pate, 367 U.S. 433 (1961); Haley v. Ohio, 332 U.S. 596 (1948).

19. *See, e.g.*, Clewis v. Texas, 386 U.S. 707 (1967) (suspect suffering physical illness); Mincey v. Arizona, 437 U.S. 385 (1978) (suspect wounded and in hospital intensive care unit).

20. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737 (1966) (defendant's lack of education remarked on in holding confession to be involuntary); Crooker v. California, 357 U.S. 433 (1958) (defendant's college education and one year of law school emphasized in holding confession to be voluntary).

21. *See* Davis v. North Carolina, 384 U.S. 737 (1966); Crooker v. California, 357 U.S. 433 (1958).

22. Frazier v. Cupp, 394 U.S. 731, 737 (1969). In *Frazier*, police falsely told the defendant that his accomplice had confessed. Although the defendant "still was reluctant to talk," a confession eventually was obtained. *Id.* The Court held that the police misrepresentation, while relevant, was insufficient to render the otherwise voluntary confession inadmissible. *Id.* at 739. *Frazier* was not the first time the Court was presented with a case involving the accomplice confession ploy. In Turner v. Pennsylvania, 338 U.S. 62 (1949), the Court noted that the police had falsely told the defendant that his accomplice

have demonstrated a similar reluctance to exclude apparently reliable confessions that are elicited through police trickery or deception.[23] Some courts have reasoned that police trickery is permissible when nothing has been said or done to the suspect that would be apt to make an innocent person confess.[24] Among the forms of police trickery that have been condoned are placing co-suspects together to encourage discussions of their criminal conduct,[25] confronting suspects with physical evidence against them,[26] and making promises of leniency[27] or promises to secure bail.[28]

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had "opened up" on him, but did not stress this fact in finding that the defendant's confession was involuntary. *Id.* at 64.

In Reck v. Pate, 367 U.S. 433 (1961), a confession was held to be involuntary because the defendant's statement was given after a forty-eight hour incommunicado detention. *Id.* at 440-42. In a strong dissent, Justice Clark condemned the trickery practiced in *Turner*, stating:

> [T]he petitioner "was falsely told that other suspects had 'opened up' on him." Such a falsification, in my judgment, presents a much stronger case for relief because at the outset Pennsylvania officers resorted to trickery. Moreover, such a psychological artifice tends to prey upon the mind, leading its victim to either resort to countercharges or to assume that "further resistance [is] useless," and abandonment of claimed innocence the only course to follow.

Id. at 453 (Clark, J., dissenting).

23. *See, e.g.*, Tucker v. State, 549 S.W.2d 285 (Ark. 1977); People v. Houston, 36 Ill. App. 3d 695, 344 N.E.2d 641 (1976); State v. Stubenrauch, 503 S.W.2d 136 (Mo. Ct. App. 1973); State v. Aguire, 91 N.M. 672, 579 P.2d 798 (1978); Evans v. Commonwealth, 215 Va. 609, 212 S.E.2d 268 (1975).

24. *See, e.g.*, Canada v. State, 56 Ala. App. 722, 725, 325 So. 2d 513, 515 (Crim. App.), *cert. denied*, 295 Ala. 395, 325 So. 2d 516 (1976) (tricks acceptable unless "likely" to produce false confessions); R.W. v. State, 135 Ga. App. 668, 671, 218 S.E.2d 674, 676 (1975) ("test in determining voluntariness is whether an inducement, if any, was sufficient, by possibility, to elicit an untrue acknowledgement of guilt"); Commonwealth v. Baity, 428 Pa. 306, 315, 237 A.2d 172, 177 (1968) (trick permissible as long as it has "no tendency to produce a false confession").

25. *See, e.g.*, People v. Crowson, 124 Cal. App. 3d 198, 177 Cal. Rptr. 352 (1981). Commenting on the practice of placing co-suspects together, the *Crowson* court said:

> Admittedly, this technique is not used for a defendant's benefit to memorialize the nostalgia of errant behavior or for therapy to relieve his guilty conscience, but for the purpose of obtaining relevant evidence to convict him. This reasonable law enforcement goal is not forbidden police deception or trickery where the practice used does not intend to produce an unreliable result nor involve brutality.

Id. at 201, 177 Cal. Rptr. at 354.

26. *See, e.g.*, Combs v. Commonwealth, 438 S.W.2d 82 (Ky. 1969) (admissibility of confession upheld where defendant was read ballistics report during interrogation); State v. Burnett, 429 S.W.2d 239 (Mo. 1968) (admissibility of confession upheld where, during interrogation, defendant was shown money seized from his home).

27. People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964) (confession admissible despite statement by authorities that it would "go easier" for suspect in court if statement was made).

28. Hickox v. State, 138 Ga. App. 882, 227 S.E.2d 829 (1976) (statement admissible despite promise to secure bail if statement was made).

In the 1960s, authorities began questioning the adequacy of the totality of the circumstances approach.[29] The totality of the circumstances test was perceived as deficient because it did not provide an objective standard that could be applied consistently by lower courts.[30] More importantly, the vagueness of the voluntariness test allowed courts to use it as a smoke screen to admit reliable confessions without regard to the fairness of the police interrogation methods.[31] In addition, because lower courts frequently applied the voluntariness test improperly, its use resulted in a severe administrative burden on the Supreme Court which was forced to repeatedly review the erroneous lower court decisions.[32]

B. The Sixth Amendment Right to Counsel and the Law of Confessions

During the 1960s, the Court began to look beyond due process guidelines in analyzing the admissibility of confessions. Initially, the Court turned to the sixth amendment which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[33] Originally, the Court viewed the sixth amendment right to counsel as primarily, if not exclusively, concerned with the presence of counsel at trial.[34] In 1932, the Supreme Court first recognized that for a defendant to enjoy effective assistance of counsel at trial, he may need a lawyer's assistance prior to the trial itself.[35] The Court reasoned that because pretrial consultation, preparation, and investigation are of

29. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 515 (1963); Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogations and Confessions*, 17 RUTGERS L. REV. 728, 744-46 (1963); Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, WASH. U. L. Q. 275, 294-97 (1975).

30. Haynes v. Washington, 373 U.S. 503, 515 (1963) ("[t]he line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly . . . where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused").

31. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737 (1966). In *Davis*, the defendant had been held incommunicado for sixteen days prior to making a confession. His arrest sheet indicated that he was to have no visitors and was not allowed to use a telephone. *Id.* at 744. Despite the obvious coerciveness of the circumstances, both the North Carolina appellate courts and the lower federal courts had found the apparently trustworthy confession to be voluntary. *Id.* at 738-39.

32. *See* Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 102-03.

33. U.S. Const. amend. VI.

34. Powell v. Alabama, 287 U.S. 45 (1932).

35. *Id.* at 71.

such vital importance, defendants are as much entitled to counsel's assistance before trial as at trial itself.[36]

In the 1964 case of *Massiah v. United States*,[37] the Court extended the sixth amendment right to counsel to interrogations following indictments or arraignments.[38] Under *Massiah*, if the accused is interrogated after indictment and without being afforded the opportunity to seek the assistance of counsel, statements obtained during the interrogation cannot be used against him at trial.[39] The *Massiah* Court recognized that assistance of counsel during interrogation upholds the integrity of the sixth amendment right to counsel at trial because statements elicited during interrogation may determine the outcome of a subsequent trial.[40]

In *Escobedo v. Illinois*,[41] decided the same year as *Massiah*, the Court again addressed the possibility of a sixth amendment right to the presence of counsel during police interrogations.[42] In *Escobedo*, the police denied the defendant's requests to speak with his lawyer and failed to advise him of his right to remain silent during a custodial interrogation.[43] Unlike *Massiah*, the police interrogation in *Escobedo* occurred before the defendant had been indicted or arraigned.[44] The *Escobedo* Court determined that the preindictment interrogation of the defendant had violated the sixth amendment because the defendant had not been permitted to consult with his attorney.[45] In justifying its extension of the sixth amendment protections to preindictment interrogations, the Court reasoned that "the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.' "[46] Using broad language, the Court suggested that a suspect's right to counsel attaches at

36. *Id.* at 57. *See also* Maine v. Moulton, 106 S. Ct. 477, 484 (1985) ("the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself").

37. 377 U.S. 201 (1964).

38. *Id.* at 206-07.

39. *Id.* at 207.

40. *Id.* at 204. The *Massiah* Court suggested that denying the defendant counsel at post-indictment interrogations might deny him " 'effective representation by counsel at the only stage when legal aid and advice would help him.' " *Id.* (quoting Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)).

41. 378 U.S. 478 (1964).

42. *Id.* at 491.

43. *Id.*

44. *Id.* at 485.

45. *Id.* at 492.

46. *Id.* at 487 (quoting *In re* Groban, 352 U.S. 330, 344 (1957) (Black, J., dissenting)).

some time before the suspect formally is charged, when "the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession."[47]

Although *Escobedo* appeared to signal an expansion of the sixth amendment's applicability to confession cases, the Court has limited that decision to its own facts.[48] Instead of clarifying *Escobedo's* vaguely articulated "focus" test, the Court has held that the sixth amendment right to counsel attaches only when "adversary judicial proceedings" are initiated against the accused, such as by a formal charge, indictment, information, arraignment, or preliminary hearing.[49] The Court has reasoned that until adversary judicial proceedings have been initiated against a suspect, there is no " 'criminal prosecution' to which alone the explicit guarantees of the Sixth Amendment are applicable."[50] The Court further has confined the reach of the sixth amendment right to counsel by holding that once adversary judicial proceedings have commenced, the accused is entitled to the guiding hand of counsel only at "critical stages" of the criminal process.[51] "Critical stages" have been defined as proceedings at which the substantial rights of the accused may be affected, and at which counsel's absence might derogate the accused's right to a fair trial.[52]

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47. *Id.* at 492. In Miranda v. Arizona, 384 U.S. 436 (1966), the Court reaffirmed *Escobedo* in dicta, stating that the sixth amendment is violated when police prevent an attorney from consulting with his client irrespective of whether formal charges have been filed. *Miranda*, 384 U.S. 436, 465-66 n.35 (1966).

48. Kirby v. Illinois, 406 U.S. 682, 689 (1972). Not only has the Court limited *Escobedo* to its facts, but it has also "in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, to guarantee full effectuation of the privilege against self-incrimination. . . ." *Id.* at 689 (citing Johnson v. New Jersey, 384 U.S. 719, 729 (1966)).

For an explanation of the *Miranda* decision, see *infra* notes 53-64 and accompanying text.

49. *See generally* Kirby v. Illinois, 406 U.S. 682 (1972); Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964).

50. Kirby v. Illinois, 406 U.S. 682, 690 (1972). In *Kirby*, the Court attempted to justify its decision to limit the applicability of the sixth amendment to stages of the criminal process occurring after the initiation of adversary judicial proceedings, stating:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of the government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of the substantive and procedural criminal law.

Id. at 689.

51. *Id.* at 690; Coleman v. Alabama, 399 U.S. 1, 9 (1970); United States v. Wade, 388 U.S. 218, 224 (1967).

52. United States v. Wade, 388 U.S. 218, 227-28 (1967). Under the critical stage

C. Miranda v. Arizona: *The Role of the Fifth Amendment in Confession Cases*

Two years after *Escobedo*, the Court, continuing to look beyond the fourteenth amendment voluntariness test,[53] yet disinclined to clarify *Escobedo's* sixth amendment "focus" test, injected the fifth amendment privilege against self-incrimination into confession case analyses.[54] In the landmark decision of *Miranda v. Arizona*,[55] the Court recognized that custodial interrogations,[56] by their very nature, generate "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."[57] To combat the inherent pressures of the interrogation room and thereby protect the privilege against self-incrimination, the *Miranda* Court mandated that law enforcement officers follow certain procedural safeguards.[58] These safeguards require that prior to custodial interrogation, law en-

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standard, the Court has recognized a right to counsel at various points in the criminal process. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearings); United States v. Wade, 388 U.S. 218 (1967) (post-indictment line-ups); Massiah v. United States, 377 U.S. 201 (1964) (interrogations).

After the initiation of criminal charges, however, a defendant does not have a right to counsel at various other stages of the criminal process. *See, e.g.*, United States v. Mandujano, 425 U.S. 564 (1976) (grand jury proceedings); United States v. Ash, 413 U.S. 300 (1973) (post-indictment photo throwdowns); Kirby v. Illinois, 406 U.S. 682 (1972) (preindictment line-ups).

53. *See* Dix, *supra* note 29, at 294-97. *See also* Kamisar, *supra* note 29, at 513.

54. Miranda v. Arizona, 384 U.S. 436 (1966). An early Supreme Court case applied the fifth amendment self-incrimination clause to interrogations conducted by federal officers. Bram v. United States, 168 U.S. 532 (1897). *Bram*, however, signaled no real change in the law of confessions due to the Court's holding that the fifth amendment merely represented a "crystallization" of common law confession doctrine. *Id.* at 543.

Two years prior to *Miranda*, the Court first held the self-incrimination clause applicable to state criminal proceedings. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

55. 384 U.S. 436 (1966).

56. *Id.* at 444. By custodial interrogation, the *Miranda* majority meant police-initiated questioning "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*

57. *Id.* at 467-68.

58. *Id.* at 444. The fifth amendment provides in pertinent part: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. It is clear from the language of the fifth amendment that the self- incrimination clause prohibits prosecutors from forcing criminal defendants to testify at trial. But the Court has never read this clause literally so as to bar compelled testimony only during the criminal trial itself. *See* Miranda v. Arizona, 384 U.S. 436, 467-70 (1966). Rather, the Court has recognized that if defendants could be required to testify at preliminary proceedings, and prosecutors could then use this testimony against the defendant at trial, the defendant's right not to testify at trial would be meaningless. *Id.* Accordingly, the fifth amendment has been interpreted to prohibit compelled testimony at preliminary hearings, grand jury hearings, or any other proceedings where the witness's answers might furnish evidence that could be used against him in a criminal case. *Id.*

forcement officers advise the suspect of his rights to remain silent and to have an attorney present during questioning.[59] Unless the prosecution can demonstrate compliance with these safeguards, it is prohibited from using statements elicited from a suspect during custodial interrogation.[60] *Miranda's* requirement that suspects be warned of their right to have counsel present during questioning, in effect, has created a *fifth* amendment right to counsel during preindictment custodial interrogation that is distinct from the right to counsel assured by the sixth amendment. The rationale for the fifth amendment right is that counsel's presence in the interrogation room "insure[s] that the statements made in the government-established atmosphere are not the product of compulsion."[61]

Miranda further provided that a suspect may waive his rights against self-incrimination "provided the waiver is made voluntarily, knowingly, and intelligently."[62] Because of the compelling atmosphere of the custodial setting, and because of the difficulty of proving what actually occurs during custodial interrogation, the *Miranda* Court placed a "heavy burden" on the prosecution to show the effectiveness of a waiver.[63] The *Miranda* Court also

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59. *Id.* at 479.

60. *Id.*

61. *Id.* at 466-69. ("the right to have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment privilege [against self-incrimination] under the system we delineate today").

62. *Id.* at 444.

63. *Id.* at 475. Not only is there a natural tendency to discredit the testimony of crime suspects because of their alleged deeds and their obvious interest, but the desire to insure convictions of apparently guilty suspects may lead law enforcement officers to color their testimony about police conduct during custodial interrogation. *See* United States v. Carigan, 342 U.S. 36, 46 (1951) (Douglas, J., concurring) ("[w]hat happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient").

Describing the prosecution's burden with regard to establishing that a valid waiver was made, the *Miranda* Court stated:

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

Miranda, 384 U.S. at 475.

The "heavy burden" language of *Miranda* presently is subject to some question. F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL, G. STARKMAN, CRIMINAL PROCEDURE 135 (2d ed. 1980) [hereinafter "F. INBAU"]. In Lego v. Twomey, 404 U.S. 477 (1972), the Court held that the prosecution can introduce a confession upon proof of its voluntariness by a preponderance of the evidence. *Id.* at 484. It has been argued from this decision that because the coercion of a confession is more serious than a *Miranda* violation, the prosecution should not bear a greater burden of proof in showing compliance with *Miranda* than it does in establishing voluntariness. F. INBAU, *supra*, at 135.

stated that "any evidence that the accused was threatened, tricked or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege [against self-incrimination]."[64]

Subsequent to *Miranda*, the Court further has defined the standard for determining whether a suspect has waived his privilege against self-incrimination.[65] The Court has held that an express statement is not essential for a finding of valid waiver, but that waivers can be inferred from the actions and words of the suspect.[66] In addition, the Court has indicated that waivers should be examined for validity under the totality of the circumstances test.[67] The totality of the circumstances test in the waiver context, however, suffers from the same problems as the totality test used for determining the voluntariness of confessions.[68] Before *Miranda*, debate had centered around the voluntariness of confessions; since *Miranda* the debate simply has shifted to the voluntariness of waivers.[69]

Although the validity of a waiver generally is determined by the totality of the circumstances test, in certain situations courts have found it necessary to establish conclusive presumptions against the validity of waivers made in the custodial setting.[70] For instance,

64. *Miranda*, 384 U.S. at 476. The standards for valid waiver set out in the *Miranda* opinion have proven to be a source of great confusion and disagreement for the Court. The major Supreme Court cases addressing the issue of waivers under *Miranda* have featured vehement dissents and lengthy concurrences. *See, e.g.*, Moran v. Burbine, 106 S. Ct. 1135 (1986); Oregon v. Bradshaw, 462 U.S. 1039 (1983); Edwards v. Arizona, 451 U.S. 477, *reh'g denied*, 452 U.S. 973 (1981); North Carolina v. Butler, 441 U.S. 369 (1979); Michigan v. Mosley, 423 U.S. 96 (1975).

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

66. *Id.* at 373.

67. *Id.* ("the question of waiver must be determined on the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused").

68. *See generally* Note, *Totality of the Circumstances: A Guideline for Waiver of* Miranda *Rights?*, 51 U. COLO. L. REV. 247 (1980).

69. *Id.* The fourteenth amendment voluntariness test still plays an important role in confession case analyses. A confession may be involuntary on due process grounds, and therefore inadmissible, even though police complied with *Miranda* requirements. *See* United States v. Scott, 592 F.2d 1139, 1142 (10th Cir. 1979); United States v. Brown, 557 F.2d 541, 551 (6th Cir. 1977). Additionally, while statements obtained in violation of *Miranda* may not be used as direct evidence, they may be used for impeachment in cases in which "the trustworthiness of the evidence satisfie[s] legal standards." Harris v. New York, 401 U.S. 222, 224 (1971). Involuntary statements obtained in violation of due process, however, cannot be used for either direct or impeachment evidence. Mincey v. Arizona, 437 U.S. 385, 398 (1978). Finally, due process voluntariness standards will govern in non-custodial contexts in which *Miranda* does not apply. *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam).

70. *See, e.g.*, *Miranda*, 384 U.S. at 444; Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

the Supreme Court in *Miranda* created a conclusive presumption against the validity of a waiver given during custodial interrogation when the suspect was not warned of his constitutional rights.[71] The Court also has established a conclusive presumption against the validity of waivers of counsel given during custodial interrogation when law enforcement officers initiate questioning after the suspect has invoked his right to counsel.[72]

In addition, numerous state courts have created conclusive presumptions against the validity of waivers of counsel when a lawyer retained by or for a suspect attempted to render legal advice or assistance to the suspect, and the police intentionally or negligently failed to inform the suspect of that fact.[73] These courts have reasoned that a suspect aware that he has present access to his own attorney will be far less likely to waive his right to consult with that attorney than a suspect who is merely advised of an abstract right to consult with some unknown attorney.[74] Because knowledge of his attorney's availability is likely to affect a suspect's decision whether or not to exercise his rights, those courts have concluded that depriving the suspect of this knowledge precludes a knowing and intelligent waiver.[75]

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71. *Miranda*, 384 U.S. at 444.

72. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). The rule in *Edwards* rested on the fifth amendment privilege against compelled self-incrimination. *Id.* More recently, the Court has held that the sixth amendment also precludes a valid waiver after the right to counsel has been asserted. Michigan v. Jackson, 106 S. Ct. 1404, 1411 (1986).

73. *See* Weber v. State, 457 A.2d 674, 688 (Del. 1983); Haliburton v. Florida, 476 So. 2d 192, 194 (Fla. 1985); People v. Smith, 93 Ill. 2d 179, 189, 442 N.E.2d 1325, 1329 (1982); State v. Matthews, 408 So. 2d 1247, 1248 (La. 1982); Commonwealth v. Sherman, 389 Mass. 287, 296, 450 N.E.2d 566, 571 (1983); Lodowski v. State, 302 Md. 691, 721, 490 A.2d 1228, 1243 (1985); Lewis v. State, 695 P.2d 528, 531 (Okla. 1984); State v. Haynes, 288 Or. 59, 70, 602 P.2d 272, 277 (1979), *cert. denied*, 446 U.S. 945 (1980); State v. Jones, 19 Wash. App. 850, 853, 578 P.2d 71, 73 (1978).

74. This rationale was first articulated by Judge Linde of the Oregon Supreme Court who reasoned as follows:

> To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second.

State v. Haynes, 288 Or. 59, 72, 602 P.2d 272, 278 (1979), *cert. denied*, 446 U.S. 945 (1980).

75. *See* Weber v. State, 457 A.2d 674, 688 (Del. 1983); Haliburton v. Florida, 476 So.2d 192, 194 (Fla. 1985); People v. Smith, 93 Ill. 2d 179, 189, 442 N.E.2d 1325, 1329 (1982); State v. Matthews, 408 So. 2d 1247, 1248 (La. 1982); Lodowski v. State, 302 Md. 691, 721, 490 A.2d 1228, 1243 (1985); Commonwealth v. Sherman, 389 Mass. 287, 296, 450 N.E.2d 566, 571 (1983); Lewis v. State, 695 P.2d 528, 531 (Okla. 1984); State v. Haynes, 288 Or. 59, 70, 602 P.2d 272, 277 (1979), *cert. denied*, 446 U.S. 945 (1980); State v. Jones, 19 Wash. App. 850, 853, 578 P.2d 71, 73 (1978).

The New York courts have promulgated a more expansive rule than that adopted by most states for determining the validity of waivers made by represented suspects during custodial interrogation.[76] In *People v. Hobson*,[77] the New York Court of Appeals held that state constitutional guarantees of the privilege against self-incrimination, the right to assistance of counsel, and due process of law, require that ". . . once a lawyer has entered the proceedings in connection with the charges under investigation, a person in custody may validly waive the assistance of counsel only in the presence of a lawyer . . . ."[78] The New York court acknowledged that the state constitutional basis for this rule extended defendants' state constitutional protections beyond those afforded by the federal Constitution.[79] The court, however, found that this extension was mandated by the nexus between the suspect's privilege against self-incrimination and his right to the assistance of counsel.[80] The *Hobson* court reasoned that while warnings alone may sufficiently protect the privilege against self-incrimination, the presence of counsel is a more effective safeguard against an involuntary waiver of counsel than the mere written or oral warnings given in counsel's absence.[81]

D. The Ethics of Interrogating Suspects Known to be Represented Without Counsel's Knowledge

In invalidating the waiver after police failed to inform the suspect of his attorney's efforts to represent him, the *Hobson* court considered the ethical issues raised by the interrogation of represented suspects in the absence of their attorneys.[82] The court held that an attempt to secure a waiver of the right to counsel in the

76. *See* People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

77. 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

78. *Id.* at 484, 348 N.E.2d at 897, 384 N.Y.S.2d at 422. *See also* People v. Donovan, 13 N.Y.2d 148, 151, 193 N.E.2d 628, 629, 243 N.Y.S.2d 841, 843 (1963) (". . . quite apart from the Due Process clause of the Fourteenth Amendment, this State's constitutional and statutory provisions pertaining to the privilege against self-incrimination and the right to counsel, not to mention our own guarantee of due process, require the exclusion of a confession taken from a defendant, during a period of detention, after his attorney has requested and been denied access to him") (citations omitted). In 1977, Pennsylvania became the first, and, thus far, the only other state to adopt the New York rule. Commonwealth v. Hillard, 471 Pa. 318, 320, 370 A.2d 322, 324 (1977).

79. *Hobson*, 39 N.Y.2d at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422 (1976).

80. *Id.* at 483-84, 348 N.E.2d at 897, 384 N.Y.S.2d at 422.

81. *Id.* at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422.

82. *Id.* at 487, 348 N.E.2d at 898, 384 N.Y.S.2d at 423.

absence of a lawyer, already retained or assigned, constitutes a breach of Disciplinary Rule ("DR") 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility.[83]

DR 7-104(A)(1) prohibits a lawyer for one party from discussing his client's case with another represented party unless the lawyer has the other attorney's consent or is authorized by law to do so.[84] The purpose of this provision is to "preserve the integrity of the attorney-client relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer."[85]

Authorities agree that DR 7-104(A)(1) applies to prosecutors.[86] Accordingly, it is considered unethical for a prosecutor to question a represented defendant without notice to the defendant's attorney and either a reasonable opportunity for that attorney to be present or the attorney's permission to question the defendant in his ab-

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83. *Id.*

84. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A) (1969). Since 1908, the legal profession has had in force rules restricting an attorney's communication with the opposing party. In 1908 the American Bar Association ("ABA") adopted the Canons of Professional Ethics which included Canon 9, entitled "Negotiations with Opposite Party." CANONS OF PROFESSIONAL ETHICS CANON 9 (1908). Canon 9 prohibited lawyers from communicating directly with a party represented by counsel on the subject of the controversy. *Id.* In 1969, the ABA replaced the Canons with the Code of Professional Responsibility. DR 7-104(A)(1) of the Code provides in part:

> (A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1969). Additionally, Ethical Consideration 7-18 accompanying the ABA Code provides in part:

> The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. . . .

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1969).

In 1983, the American Bar Association adopted the Model Rules of Professional Conduct with the intention that they eventually replace the Model Code. Rule 4.2 of the new Model Rules of Professional Conduct is similar to DR 7-104(A). Rule 4.2 provides:

> In representing a client a lawyer shall not communicate about the subject of the representation with a party that the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

MODEL RULES OF PROFESSIONAL CONDUCT RULE 4.2 (1983).

The majority of the states still follow the Model Code with some differences in its provisions from state to state. The Model Rules, however, have been adopted in eleven states again with some variations in its provisions among the individual states.

85. ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT § 71:303 (1984).

86. *Id.* at § 71.320.

sence.[87] Prosecutors, however, have argued that DR 7-104(A)(1) is inapplicable when the interrogator is not an attorney.[88] This argument has been rejected by the American Bar Association because non-lawyer interrogators may be considered agents of the prosecuting attorney, and because the danger that a police interrogator will threaten or deceive a suspect is as great as the danger that a lawyer will do so.[89] Thus, it also is considered unethical for a prosecutor to take advantage of the results of such an interrogation by police officers.[90]

While state and federal courts agree that a prosecutor commits an ethical violation by interrogating a represented suspect without the knowledge or permission of the suspect's attorney or by using the results of such an interrogation, most courts have held that such a violation does not rise to the level of constitutional error and does not mandate suppression of statements obtained during the improper interrogation.[91] A minority of courts, however, have held that ethical considerations preclude authorities from offering a confession that they extracted in the absence of the defendant's retained attorney.[92]

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87. *Id. See also* Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974); United States v. Cobbs, 481 F.2d 196 (3d Cir. 1973); United States v. Thomas, 474 F.2d 110 (10th Cir. 1973); United States v. Four Star, 428 F.2d 1406 (9th Cir. 1970); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

88. *See* Leubsdorf, *Communicating With Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 701 (1979).

89. *See* ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT § 71:320 (1984). In *Hobson*, 39 N.Y.2d at 486, 348 N.E.2d at 898, 384 N.Y.S.2d at 423, the New York Court of Appeals articulated the rationale for applying DR 7-104 (A)(1) to police interrogations:

> Of course, it would not be rational, logical, moral or realistic to make any distinction between a lawyer acting for the State who violates the ethic directly and one who indirectly uses the admissions improperly obtained by a police officer, who is the badged and uniformed representative of the State. To do so would be, in the most offensive way, to permit that to be done indirectly what is not permitted directly.

90. *See* Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974); United States v. Cobbs, 481 F.2d 196 (3d Cir. 1973); United States v. Thomas, 474 F.2d 110 (10th Cir. 1973); United States v. Four Star, 428 F.2d 1406 (9th Cir. 1970); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

91. *See, e.g.*, Moore v. Wolff, 495 F.2d 35, 37 (8th Cir. 1974) (". . . such a violation has not been felt to rise to the level of constitutional error, nor even to compel reversal in those federal prosecutions where reversal might have been made under the general supervisory power of the courts of appeals [sic] over federal district courts.").

92. *See, e.g.*, United States v. Thomas, 474 F.2d 110 (10th Cir. 1973). In *Thomas*, the court held that once a criminal defendant has retained an attorney or had an attorney appointed for him, any statement obtained by interrogating the defendant cannot be *offered* into evidence for any purpose unless the defendant's attorney was notified of the interrogation and was given a reasonable opportunity to be present. *Id.* at 112.

Several of the other federal courts of appeal have condemned the practice of custodial

III. *MORAN V. BURBINE*

A. Factual Background

On the afternoon of June 29, 1977, the defendant, Burbine, was arrested by Cranston, Rhode Island police in connection with a local burglary.[93] Shortly after Burbine was placed in custody, a Cranston police officer learned that Burbine may have been the person responsible for murdering a young woman several months earlier in Providence, Rhode Island.[94] Burbine was advised of his *Miranda* rights and at that time refused to sign a written waiver or to make a statement.[95]

Later that day, Burbine's sister, unbeknownst to him, telephoned the Public Defender's Office to obtain legal assistance for her brother.[96] As she was unaware that her brother was under suspicion for murder, her only concern was the breaking and entering charge.[97] As a result of this telephone call, an Assistant Public Defender, Allegra Munson, learned of Burbine's custody.[98] Approximately five hours after Burbine's arrest, Ms. Munson called the detective division of the Cranston police station, identified herself and asked if Burbine was being held.[99] She was told that he was.[100] Ms. Munson stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a line-

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interrogation in the absence of and without the permission of retained or appointed counsel, but have stopped short of requiring the suppression of statements obtained through this practice. *See* United States v. Foley, 735 F.2d 45 (2d Cir. 1984); Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974); United States v. Cobbs, 481 F.2d 196 (3d Cir. 1973); United States v. Thomas, 474 F.2d 110 (10th Cir. 1973); United States v. Four Star, 428 F.2d 1406 (9th Cir. 1970).

93. Moran v. Burbine, 106 S. Ct. 1135, 1138 (1986).

94. *Id.* Burbine actually was arrested along with two other men in connection with the burglary and the trio of suspects was placed in separate rooms for interrogation. *Id.* Two days before the arrest, Detective Ferranti of the Cranston police department learned from a confidential informant that the man responsible for the beating death of Mary Jo Hickey in Providence lived at 306 New York Avenue and went by the name of "Butch." Ferranti found out from one of the men arrested with Burbine that Burbine was the only "Butch" living at that address. Burbine v. Moran, 753 F.2d 178, 180 (1st Cir. 1985).

95. 106 S. Ct. at 1138. When Burbine refused to sign a written waiver Ferranti spoke separately with the two other burglary suspects and obtained statements from them implicating Burbine in the Providence murder. *Id.* At about 6:00 p.m., Ferranti telephoned the Providence police to convey the information he had uncovered, and an hour later three Providence police officers arrived intending to question Burbine about the murder. *Id.*

96. *Id.* at 1139.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* The person Ms. Munson spoke to answered the telephone with the word "detectives," but the record apparently did not reveal who this individual was.

up or question him.[101] She was informed that the police would not be questioning Burbine or putting him in a line-up and that they were through with him for the night.[102] Ms. Munson was not informed that Burbine was a suspect in the murder.[103]

Less than an hour after this conversation, the Cranston and Providence police officers began conducting a series of interviews with Burbine about the murder.[104] Although Burbine was informed of his *Miranda* rights prior to each session, he did not request an attorney.[105] Additionally, at all relevant times, Burbine was unaware of his sister's efforts to retain counsel on his behalf.[106] During the course of the evening, Burbine signed three waiver-of-rights forms.[107] Burbine subsequently made three written statements in which he admitted to the murder.[108]

The trial court denied Burbine's motion to suppress the three statements.[109] Burbine's confession was admitted at trial, and he was found guilty of first degree murder.[110] On appeal to the Supreme Court of Rhode Island, a divided court affirmed Burbine's conviction.[111] The Rhode Island Supreme Court rejected the defendant's contention that the failure of the police to inform Burbine of Ms. Munson's efforts to represent him had undermined the validity of the defendant's waivers.[112]

After unsuccessfully petitioning the United States District Court for the District of Rhode Island for a writ of habeas corpus,[113] the defendant appealed to the United States Court of Appeals for the First Circuit. That court reversed, finding that the police conduct had fatally tainted Burbine's waiver.[114] The appellate court reasoned that by failing to inform Burbine that his attorney had called and that she had been assured that no questioning would take place

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101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. Burbine v. Moran, 589 F. Supp. 1245, 1248 (D. R.I. 1984).
109. *Id.* The lower court found that Ms. Munson had made the phone call; that there had been no collusion or conspiracy on the part of the police to secrete Burbine from his attorney; that Burbine had not been threatened, coerced, or promised any benefit in exchange for his statements; and that Burbine had validly waived his right to counsel and his privilege against self-incrimination. *Id.*
110. *Moran*, 106 S. Ct. at 1140.
111. State v. Burbine, 451 A.2d 22 (R.I. 1982).
112. *Id.* at 29.
113. Burbine v. Moran, 589 F.Supp. 1245 (D. R.I. 1984).
114. Burbine v. Moran, 753 F.2d 178, 184 (1st Cir. 1985).

until the next day, the police had deprived Burbine of information crucial to his ability to knowingly and intelligently waive his rights.[115] The court also found that the police conduct amounted to "deliberate or reckless irresponsibility,"[116] and that this kind of blameworthy action by the police, combined with the defendant's ignorance of his attorney's telephone call, precluded any claim of valid waiver.[117] The United States Supreme Court granted certiorari to decide whether pre-arraignment confessions preceded by otherwise valid waivers must be suppressed either because the police failed to inform the suspect of his attorney's communications or because they misinformed the suspect's attorney about their plans to interrogate the suspect.[118]

B. The Majority Opinion

Justice O'Connor's opinion for a six member majority began with a discussion of the waiver issue.[119] The Court applied a two-part test to determine whether the defendant had validly waived his *Miranda* rights.[120] First, the waiver had to be voluntary: the product of free and deliberate choice rather than police intimidation, coercion, or deception.[121] Second, the waiver had to be made with full awareness of the nature of the right being waived and the consequences of its relinquishment.[122] Commenting that the police had not employed physical or psychological pressure to obtain Burbine's confession, the Court determined that the voluntariness of the defendant's waiver was not at issue.[123] Similarly, the Court said there was no question that the defendant had understood the nature and extent of the rights set out in the *Miranda* warnings and the potential consequences of his decision to relinquish them.[124] Accordingly, the defendant's waiver was deemed valid.[125]

The Court rejected the First Circuit's conclusion that the failure

115. *Id.* at 187.

116. *Id.* at 185. On review, the Supreme Court expressed "serious doubts" about whether the First Circuit was free to conclude that the police conduct constituted "deliberate or reckless irresponsibility" in light of the state court's finding that there had been no police conspiracy or collusion. 106 S. Ct. at 1142.

117. Burbine v. Moran, 753 F.2d at 187.

118. Moran v. Burbine, 105 S. Ct. 2319 (1985).

119. *Moran*, 106 S. Ct. at 1141.

120. *Id.* at 1141 (citing Edwards v. Arizona, 451 U.S. 477 (1981); Brewer v. Williams, 430 U.S. 387 (1977)).

121. *Moran*, 106 S. Ct. at 1141.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1142.

of the police to inform Burbine of his attorney's telephone call had fatally undermined his otherwise valid waiver.[126] The Court reasoned that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[127] While recognizing that informing Burbine of his attorney's communication might have affected his decision to confess, the Court held that the Constitution does not require police to provide suspects with a "flow of information" to help them calibrate their self-interest while deciding whether to waive their constitutional rights.[128]

Concluding its discussion of the waiver issue, the Court held that the level of police culpability in failing to inform the defendant of his attorney's telephone call also did not undermine the validity of the defendant's waiver.[129] Recalling *Miranda's* dicta that a suspect who is "threatened, tricked or cajoled" into a waiver has not voluntarily waived his rights,[130] the *Moran* Court determined that the failure to inform Burbine of his attorney's telephone call was not the kind of trickery that can vitiate a waiver.[131] According to the Court, police trickery is only relevant to the validity of a waiver if it deprives the suspect of knowledge essential to his ability to comprehend the nature of his rights and the consequences of their relinquishment.[132]

Having dispensed with the waiver issue, the Court next rejected Burbine's invitation to extend *Miranda* principles to create a constitutional rule requiring the police to inform a suspect of an attorney's efforts to reach him.[133] According to the majority, interpreting *Miranda* to forbid police deception of an attorney would ignore the very purpose of that decision which was to insure the privilege against self-incrimination, not to "mold police conduct for its own sake."[134] The Court remarked that although the

126. *Id.*
127. *Id.* at 1141.
128. *Id.* at 1142.
129. *Id.* ("[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of the respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident.").
130. *Miranda*, 384 U.S. at 476.
131. *Moran*, 106 S. Ct. at 1142.
132. *Id.*
133. *Id.* at 1142-43.
134. *Id* at 1143 ("[t]he . . . *Miranda* warnings are not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against self-

proposed rule might add marginally to *Miranda's* goal of reducing the compulsion inherent in custodial interrogation, overriding practical considerations counseled against its adoption.[135] Specifically, the Court feared that a constitutional rule requiring police to inform suspects of their attorney's communications would inevitably muddy "*Miranda's* otherwise relatively clear waters,"[136] leaving police officers, prosecutors, and courts in doubt about the circumstances under which statements obtained during custodial interrogations will be admissible.[137] The other "overriding practical consideration" mentioned by the Court was the danger that the proposed rule would upset the balance struck in *Miranda* between the need for police questioning as a tool for effective law enforcement, and the need to ensure that suspects are free from compelled self-incrimination.[138]

Although the questioning in *Moran* took place before the initiation of "adversary judicial proceedings,"[139] the defendant had argued that the police conduct nonetheless violated the sixth amendment right to counsel.[140] Burbine claimed that the sixth amendment carries a right to noninterference with the attorney client relationship.[141] This right, Burbine argued, attaches at the mo-

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incrimination [is] protected.") (citing New York v. Quarles, 467 U.S. 649, 654 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

135. *Moran*, 106 S. Ct. at 1143.

136. *Id.* The Court speculated that the proposed rule would spawn a multitude of legal questions, including:

> To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?

Id. The dissenters had ready responses to all three questions: ". . . police should be held accountable [for knowing that the suspect has counsel] to the extent that the attorney or the suspect informs the police of the representation." *Id.* at 1162 n.46 (Stevens, J., dissenting). As to who in the police station must know of counsel's efforts, the dissenters responded: "police should be held responsible for getting a message of this importance from one officer to another." *Id.* Finally, to the question of whether counsel's efforts to represent the suspect in connection with one charge trigger a police obligation to inform before interrogating the suspect on another charge, the dissenters answer simply, "yes." *Id.*

137. *Id.* at 1143.

138. *Id.* at 1144 ("Because neither the letter nor the purposes of *Miranda* require this additional handicap on otherwise permissible investigatory efforts, we are unwilling to expand the *Miranda* rules to require the police to keep the suspect abreast of the status of his legal representation").

139. *See supra* notes 48-50 and accompanying text.

140. *Moran*, 106 S. Ct. at 1145.

141. *Id.*

ment the relationship is formed, or alternatively, once the defendant is placed in custodial interrogation.[142] The Court rejected this contention by strongly reaffirming the principle that the sixth amendment right to counsel applies only after adversary judicial proceedings have been initiated.[143] According to the Court, it would be illogical for the sixth amendment right to counsel to attach at various times "depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation."[144] The Court also rejected Burbine's argument that the sixth amendment should attach at the formation of the attorney-client relationship.[145] This argument, said the Court, misconceived the purpose of the right to counsel, which it reasoned was not to protect the attorney-client relationship for its own sake, but rather to assure that in any "criminal prosecution," the accused would not be left to face the "prosecutorial forces of organized society" on his own.[146] The Court concluded that because Burbine had not been formally charged when he was interrogated, he was not facing the prosecutorial forces of society, and therefore had no sixth amendment right to counsel during that interrogation.[147]

Finally, Burbine contended that failure to inform him of his attorney's communication, coupled with police deception of his attorney, violated the due process clause.[148] While conceding that the egregiousness of police deception might rise to the level of a due process violation, the Court held that the police conduct in *Moran* fell short of "the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the state."[149]

C. Dissenting Opinion

Justice Stevens, joined in a ringing dissent by Justices Brennan and Marshall, began by noting the majority's rejection of an abundance of state court precedent under which police failure to inform suspects of their attorney's communications or to permit counsel access to clients in custody had been held to vitiate a suspect's

142. *Id.*
143. *Id.* at 1146.
144. *Id.*
145. *Id.*
146. *Id.* (citing Maine v. Moulton, 106 S. Ct. 477, 484 (1986); Kirby v. Illinois, 406 U.S. 682, 689 (1972)).
147. *Moran*, 106 S. Ct. at 1147.
148. *Id.* at 1147-48.
149. *Id.* at 1148.

waiver of his *Miranda* rights.[150] Justice Stevens commented that this departure from state precedent was particularly surprising in light of the fact that the majority had rejected the defendant's due process argument to avoid "federal intrusion into the criminal processes of the states."[151] Not only had the majority brushed aside an entire body of law on the subject, but, the dissent remarked, it had also disregarded the recommendations of the American Bar Association's Standards for Criminal Justice—a source that the Court had often looked to for guidance in the past.[152]

Having expressed disapproval of the majority's departure from state precedent and the standards of the legal profession, the dissent proceeded to attack the Court's departure from its own precedents.[153] According to the dissent, the Court's prior decisions indicated that the failure of police to inform a suspect of his attorney's communications rendered a subsequent waiver invalid.[154]

The dissent noted that the Court has always applied a heavy presumption against the validity of waivers given during incommunicado custodial interrogation.[155] Justice Stevens also recalled *Miranda's* statement that a waiver induced by threats, trickery, or cajolement was involuntary.[156] In the dissenter's view, no constitu-

150. *Id.* at 1151 (Stevens, J., dissenting). *See also supra* notes 62-72 and accompanying text.

151. *Moran*, 106 S. Ct. at 1159 (Stevens, J., dissenting).

152. *Id.* at 1151-52, n.12 (Stevens, J., dissenting). The ABA Standards for Criminal Justice advise that suspects be provided with counsel or permitted to communicate with counsel as soon as feasible after custody begins. ABA STANDARDS FOR CRIMINAL JUSTICE § 5-5.1, 5-7.1 (2d ed. 1980). The Court has relied on the Standards for guidance in several cases. *See Moran*, 106 S. Ct. at 1152, n.13 (Stevens, J., dissenting) (citing Nix v. Whiteside, 106 S. Ct. 988 (1986); Caldwell v. Mississippi, 105 S. Ct. 2633 (1985); Holloway v. Anderson, 435 U.S. 475 (1978); Dickey v. Florida, 398 U.S. 30 (1970)).

Justice Stevens also noted that the American Bar Association filed an *amicus* brief in *Moran* in which it expressed deep concern that "if the police may constitutionally prevent any communication between a lawyer and an individual held in isolation, an important right to legal representation will be lost. . . . Many cases decided across the country demonstrate that there is cause for concern as to such police tactics." *Moran*, 106 S. Ct. 1152 n.14 (Stevens, J., dissenting) (quoting Brief for American Bar Association as *Amicus Curiae* at 4).

153. *Moran*, 106 S. Ct. at 1152 (Stevens, J., dissenting) ("the Court misapprehends or rejects the central principles that have, for several decades, animated this Court's decisions concerning incommunicado interrogation").

154. *Id.* at 1157. (Stevens, J., dissenting).

155. *Id.* at 1157 n.32 (citing Brewer v. Williams, 430 U.S. 387, 404 (1977) ("courts indulge in every reasonable presumption against waiver"); Miranda v. Arizona, 384 U.S. 436, 475 (1966) ("heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination"); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("courts indulge every reasonable presumption against waiver of fundamental constitutional rights")).

156. *Moran*, 106 S. Ct. at 1158 (Stevens, J., dissenting) (citing *Miranda*, 384 U.S. at

tional distinction should have been drawn between tricking a suspect into waiving his rights by actively misleading him, and tricking him by concealing the "critical fact" that his attorney had offered assistance.[157] Furthermore, the dissent emphasized that an attorney's communications to the police about his client had a direct bearing on the suspect's knowing and intelligent waiver of his constitutional rights.[158] The dissent observed that a suspect informed of a particular attorney's present availability would be less inclined to waive his right to an attorney than a suspect who was merely advised of his abstract right to counsel.[159] Accordingly, the dissent concluded that the failure to inform a suspect of his attorney's communications deprived the suspect of knowledge essential to his ability to "knowingly" exercise his rights.[160]

The *Moran* majority declined to adopt a constitutional rule requiring police to inform suspects of their attorney's communications, stating that such a rule would upset *Miranda's* careful balance between law enforcement interests and the need to prevent compelled self-incrimination.[161] Criticizing the Court's discussion of the *Miranda* balance, Justice Stevens stated that the cost of a rule requiring the police to inform a suspect of his attorney's call simply would be the decreased likelihood that custodial interrogation will enable the police to obtain a confession.[162] This cost, the dissent maintained, "was nothing more than a recognition that the law enforcement interest in obtaining convictions suffers whenever a suspect exercises the rights afforded by our system of criminal justice."[163]

The dissent further observed that in several contexts the Court had considered the reduced likelihood that the police would obtain a confession a cost "necessary to preserve the character of our free society and our rejection of an inquisitorial system."[164] Just as the

476)). The dissent argued that *Miranda* "clearly establishes that both kinds of deception vitiate the suspect's waiver of his right to counsel." *Moran*, 106 S. Ct. at 1158 (Stevens, J., dissenting).

157. *Moran*, 106 S. Ct. at 1158 (Stevens, J., dissenting).

158. *Id.* at 1159 (Stevens, J., dissenting).

159. *Id.* at 1159-60 (Stevens, J., dissenting). *See also supra* notes 73-75 and accompanying text.

160. *Id.* at 1159-60 (Stevens, J., dissenting).

161. *Id.* at 1144 (Stevens, J., dissenting).

162. *Id.* at 1160 (Stevens, J., dissenting).

163. *Id.* at 1161 (Stevens, J., dissenting).

164. *Id.* at 1160-61 (Stevens, J., dissenting) (citing Dunaway v. New York, 442 U.S. 200 (1979); Miranda v. Arizona, 388 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964)). In *Escobedo*, the defendant had not been permitted to consult with his attorney and the attorney had not been allowed access to the defendant. *Escobedo*, 378 U.S. at 479-

cost to efficient law enforcement does not justify taking suspects into custody without probable cause or interrogating suspects without warnings, argued the dissent, this cost also does not justify permitting police to withhold knowledge of an attorney's communications.[165] The dissent further reasoned that the majority's cost/benefit analysis, taken to its logical conclusion, would justify the repudiation of the existing right to be warned of entitlement to counsel.[166] The dissent explained that to presume that advice concerning an attorney's immediate availability does not affect the voluntariness of a decision to confess, was barely distinguishable from presuming that every citizen knows his rights and thus no warnings are needed.[167] Both presumptions serve law enforcement interests in obtaining confessions, and the costs of both presumptions could be dismissed by the majority as no more than an incremental increase in the risk that an individual will unintelligently waive his rights.[168]

The dissent next addressed the majority's concern that a rule requiring police to inform a suspect of his attorney's efforts to reach him would undermine *Miranda's* clarity.[169] On this point, Justice Stevens suggested that the majority's evaluation had been one-sided.[170] According to the dissent, *Miranda* was intended not only as a guide for police officers, but also as a guide to the suspect being asked to waive his constitutional rights.[171] Yet, remarked the dissenters, the majority's conception of the interest in clarity suggested that whenever police convince the trier of fact that they followed the required *Miranda* ritual, the police presumably will prevail.[172]

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82. The dissent noted that the *Escobedo* Court also had remarked, " '[i]f the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.' " *Moran*, 106 S. Ct. at 1160-61 (Stevens, J., dissenting) (quoting *Escobedo*, 387 U.S. at 490). The dissent also emphasized that in *Miranda*, the Court had determined that the accusatorial nature of the American criminal justice system provides that individuals have the absolute right to refuse to respond to police questioning and to have counsel during questioning. *Moran*, 106 S. Ct. at 1161 (Stevens, J., dissenting). Finally, the dissenters recalled that in *Dunaway* the Court held that the police have no right to take an individual into custody for the purpose of interrogating him unless they have probable cause for arrest. *Id.* at 1161 (Stevens, J., dissenting).

165. *Moran*, 106 S. Ct. at 1161 (Stevens, J., dissenting).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1162-63 (Stevens, J., dissenting).

170. *Id.* at 1162 (Stevens, J., dissenting).

171. *Id.*

172. *Id.* at 1163 (Stevens J., dissenting).

The dissent next discussed the majority's holding that the police's treatment of Burbine and his attorney had not deprived Burbine of his right to counsel under the sixth amendment.[173] Justice Stevens began by stating that under principles of agency law, the police deception of Burbine's attorney was tantamount to deception of Burbine himself.[174] Furthermore, the dissent concluded that Burbine's attorney was entitled to a truthful answer when she made inquiries as to the status of her client.[175] In the dissent's view, the misinforming of Burbine's attorney prevented the presence of counsel at the subsequent interrogation, thereby depriving Burbine of his right to have an attorney present during questioning.[176]

Justice Stevens concluded the dissent by discussing Burbine's claim that the police conduct had violated the fundamental fairness requirement of the due process clause.[177] In contrast to the majority's conclusion that the deception of Burbine's attorney had not been so egregious as to rise to the level of a due process violation, the dissent found that "police interference in the attorney-client relationship [was] the type of governmental misconduct on a matter of central importance to the administration of justice that the

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173. *See supra* notes 140-48 and accompanying text.

174. *Moran*, 106 S. Ct. at 1163 (Stevens, J., dissenting). In support of this contention Justice Stevens remarked that in Brewer v. Williams, 430 U.S. 387 (1977), the Court had held that a suspect had "effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, *acting as his agents*, had made clear to the police that no interrogation was to occur during the journey." *Moran*, 106 S. Ct. at 1163 n.49 (Stevens, J., dissenting) (emphasis in original).

175. *Moran*, 106 S. Ct. at 1163 (Stevens, J., dissenting). During oral argument, the Solicitor General, as *amicus curiae*, had suggested that the *Miranda* requirement that suspects be informed of their right to the presence of an attorney during interrogation is "a sort of white lie" because "police do not have to provide a lawyer if [a suspect] asks for a lawyer. They need simply terminate interrogation." Transcript of Oral Arg. at 21.

The majority had taken the position that misinforming Burbine's attorney did not violate the fifth amendment right to counsel because that right is personal to the suspect. *Moran*, 106 S. Ct. at 1147 n.4. According to the majority, the police deception similarly did not violate the sixth amendment right to counsel because adversary proceedings had not yet commenced when Burbine was interrogated. *Id.* at 1147. The dissenters sharply criticized these holdings for suggesting that police may properly deny counsel access to a client who is in custody even when the suspect has requested an attorney. *Id.* at 1164 (Stevens, J., dissenting).

176. *Moran*, 106 S. Ct. at 1163-64 (Stevens, J., dissenting). The dissent declined to specify whether this right to the presence of counsel during interrogations occurring prior to the formal charging of the suspect stems from the fifth or sixth amendment: "Whether the source of [the right to the presence of counsel during interrogation] is the Sixth Amendment, the Fifth Amendment, or a combination of the two is of no special importance, for I do not understand the Court to deny the existence of the right." *Id.*

177. *Id.* at 1163-64 (Stevens, J., dissenting).

Due Process Clause prohibits."[178]

IV. ANALYSIS

A. The Privilege Against Compelled Self-Incrimination

A rule precluding a valid waiver of a suspect's *Miranda* rights when police have failed to inform the suspect of an attorney's efforts to represent him, would provide protection against compelled self-incrimination beyond that which is available under the existing warning and waiver requirements.[179] Without disputing this fact,[180] the *Moran* majority held that a suspect not informed of his attorney's availability still can knowingly and intelligently waive his privilege against self-incrimination because the withholding of such information does not affect the suspect's capacity to understand the nature of his rights and the consequences of their relinquishment.[181] The *Moran* majority, however, failed to recognize the fundamental difference between the abstract right to counsel communicated through a police officer's recital of the *Miranda* litany, and the concrete right to the assistance of a particular lawyer who presently is available and seeking to represent the suspect. A suspect who is willing to waive the abstract right may not be willing to waive the concrete right.[182] Consequently, a suspect's waiver of his abstract right to counsel should not be deemed sufficient to waive the concrete right to consult with an attorney presently available and seeking to render assistance. When an attorney has attempted to represent a suspect in custody, there should be no finding of valid waiver unless the suspect has been informed of his attorney's efforts.[183]

Although state courts are bound by *Moran*'s limited interpretation of the fifth amendment, they may interpret state constitutional guarantees against compelled self-incrimination to extend greater protection than that afforded by the fifth amendment.[184] A rule precluding a valid waiver of *Miranda* rights where police have failed to inform the suspect of his attorney's communications

178. *Id.* at 1165. (Stevens, J., dissenting).
179. *See supra* notes 54-72 and accompanying text.
180. *Moran*, 106 S. Ct. at 1143.
181. *See supra* notes 122-29 and accompanying text.
182. *See supra* notes 74-75 and accompanying text.
183. *See supra* notes 73-81 and accompanying text.
184. *Moran*, 106 S. Ct. at 1145 ("Nothing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law."). *See also* People v. Houston, No. Crim. 23713 (Cal. Oct. 2, 1986) (LEXIS, States library, Cal file); People v. Hobson, 39 N.Y.2d 479, 484, 348 N.E. 2d 894, 898, 384 N.Y.S.2d 419, 422 (1976).

would not only augment the privilege against self-incrimination, but it would also discourage unethical police interference in attorney-client relationships.[185] For these reasons, it is recommended that state courts interpret state constitutional guarantees against compelled self-incrimination to require that police not only advise suspects of their *Miranda* rights, but also that they inform suspects of their attorneys' communications.[186] Failure by the police to so inform a suspect should preclude a finding of valid waiver, thereby necessitating the exclusion of statements obtained after police have neglected to inform the suspect of his attorney's communications.[187]

B. The Right to the Assistance of Counsel and the Integrity of the Attorney-Client Relationship

The *Moran* majority rejected the notion that police interference with an attorney's efforts to represent a suspect in custody violates the sixth amendment.[188] This holding appears to be consistent with the Court's settled view that the sixth amendment right to counsel does not attach until after the first formal charging proceeding.[189] It is, however, difficult to comprehend how the mere filing of a charging document is relevant to the question of whether

185. The *Moran* majority stated that police interference in attorney-client relationships that takes the form of " 'deliberate or reckless' withholding of information [from the suspect] is objectionable as a matter of ethics." *Moran*, 106 S. Ct. at 1142. The American Bar Association also has indicated that police interference with an attorney's efforts to represent a suspect in custody is improper. *See supra* notes 82-90.

186. The only state constitution that does not contain a provision guaranteeing the privilege against compelled self-incrimination is that of New Jersey. Although not written into the New Jersey Constitution, the privilege against compelled self-incrimination is firmly established as part of New Jersey's common law. *See, e.g., In re* Ippolito, 75 N.J. 435, 383 A.2d 117 (1978). The privilege also has been incorporated into the New Jersey Rules of Evidence. N.J.R. EVID. 23(1), N.J. STAT. ANN. § 2A:84A-17 (1976).

The California Supreme Court has already held that police are prohibited from keeping suspects ignorant about their attorneys' communications as a matter of state constitutional law. People v. Houston, No. Crim. 23713 (Cal. Oct. 2, 1986) (LEXIS, States library, Cal file). In *Houston*, police had held the defendant incommunicado and had deliberately neglected to inform him that an attorney retained by friends on the defendant's behalf was at the police station attempting to consult with him. *Id.* The defendant had subsequently waived his rights and made a statement. *Id.* The Court held that the police conduct had violated the defendant's *Miranda* rights as they apply in the context of the state constitutional privilege against compelled self-incrimination. *Id.* (citing CAL. CONST. art. I, § 19). The *Houston* Court concluded that the failure by the police to inform the defendant of his lawyer's presence had vitiated the defendant's waiver and had rendered inadmissible any statements made after the lawyer's arrival at the police station. *Id.*

187. *See supra* notes 73-81 and accompanying text.

188. *Moran*, 106 S. Ct. at 1145.

189. *See supra* notes 49-50 and accompanying text.

counsel's presence at a pretrial interrogation is necessary to protect the defendant's sixth amendment right to effective assistance of counsel at trial. The sixth amendment is designed to provide an individual with the aid of an attorney when he confronts the prosecutorial forces of society.[190] Irrespective of whether the charging instrument has been formally filed, one can hardly imagine an instance when the prosecutorial forces more press an individual than during custodial interrogation. These observations suggest that the purposes of the right to the assistance of counsel at trial would not be thwarted by expanding the scope of that protection to safeguard the integrity of the attorney-client relationship prior to the initiation of formal charges. Accordingly, it is suggested that the constitutional right of defendants to the assistance of counsel for their defense should be read to mandate a narrow rule prohibiting deliberate or careless police interference with existing attorney-client relationships, whether or not adversary judicial proceedings have commenced.[191]

Again, while states are bound by the Supreme Court's interpretation of the scope of the sixth amendment, they are free to interpret state constitutional guarantees of the right to counsel more broadly than the Supreme Court has interpreted the sixth amendment.[192] If the individual states were to expand the protection af-

190. *See supra* note 50.

191. This rule was first suggested by the *Miranda* Court in dicta. *Miranda*, 384 U.S. at 465-66. The *Miranda* Court indicated that the sixth amendment is violated when police prevent an attorney from consulting with his client. *Id.*

Under the suggested rule, courts will have to determine whether an attorney-client relationship existed at the time of the challenged police interference. Contrary to the assertions of the *Moran* majority, however, determining the existence of an attorney-client relationship does not present great difficulty. The point at which an attorney-client relationship is established has traditionally been determined by principles of agency and contract law. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 31:101. Generally, the relationship is formed by the express agreement of the lawyer to represent the client or when the lawyer is consulted, advised of the facts underlying the claim, and agrees to take the case or renders advice to the client. *Id.* Under simple agency principles, the fact that the lawyer has been retained by a person other than the client, as in the *Moran* case, should not preclude a finding that an attorney-client relationship exists.

192. *See Moran*, 106 S. Ct. at 1145. Every state constitution guarantees criminal defendants the right to the assistance of counsel for their defense.

The California Supreme Court has previously extended the protection of that state's constitutional right to counsel beyond the protection afforded by the sixth amendment to the federal constitution. People v. Bustamante, 30 Cal.3d 88, 98-102, 177 Cal. Rptr. 576, 582-85, 634 P.2d 927, 932-35 (1981). In California, events which occur before formal charging can nonetheless be "critical stages" of the prosecution. *Id.* Accusatory custodial interrogations are such "critical stages." *Id.* Since the United States Supreme Court's decision in *Moran*, the California Supreme Court has held that police conduct which is calculated to interfere with an attorney's efforts to represent a suspect during custodial interrogations conducted before formal charging, constitutes a denial of a California sus-

forded by state constitutional provisions guaranteeing counsel to criminal defendants so as to prohibit deliberate or careless police interference with existing attorney-client relationships, *Moran's* unfortunate result of sanctioning unethical police interference in the attorney-client relationship would be avoided. Additionally, under the proposed rule, the unethical practice of interrogating represented individuals in the absence of and without the consent of their attorneys would be terminated, thus sparing prosecutors from having to break rules of professional ethics by introducing statements elicited during improper interrogations of represented individuals into evidence.[193]

C. Due Process Considerations

The *Moran* majority admitted that some forms of police deception might violate the fundamental fairness requirement of due process.[194] Yet, the majority concluded, without discussion, that neither police failure to inform a suspect of his attorney's availability, nor police deception of the suspect's attorney regarding plans to interrogate the client are sufficiently egregious forms of deception to offend due process.[195] The *Moran* Court's conclusion in this regard is thoroughly unconvincing. In the past, the Court has consistently recognized the great value of counsel's presence during custodial interrogation to protect the constitutional right against compelled self-incrimination and the right to effective assistance of counsel at trial.[196] Furthermore, both the courts and the legal profession have expressed strong disapproval of police interrogation of represented suspects without the knowledge or consent of the suspect's counsel.[197] The vital importance of counsel's assistance during custodial interrogation to the protection of constitutional rights, together with the strong public policy against direct communication with represented adverse parties, indicates that the fundamental fairness requirement of the federal due process guarantee supports a rule prohibiting at least some forms of police interference with attorneys' efforts to represent suspects in custody. Under the Court's flexible approach to due process adju-

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pect's *Miranda* right to counsel, and also of his independent state constitutional right of access to counsel at "critical stages" of the proceedings against him. People v. Houston, No. Crim. 23713 (Cal. Oct. 2, 1986) (LEXIS, States library, Cal file).

193. *See supra* notes 82-90 and accompanying text.

194. *Moran*, 106 S. Ct. at 1147.

195. *Id.* at 1147-48.

196. *See supra* notes 35-61 and accompanying text.

197. *See supra* notes 82-92 and accompanying text.

dication, government practices that are inconsistent with fundamental principles of liberty and justice are constitutionally prohibited.[198] Police interference with an attorney's efforts to represent his client during custodial interrogation—a time at which the client's life and liberty are on the line, and at which the client may be most in need of counsel—is offensive to our system of civilized justice and, therefore, should be condemned under the due process clause.

An alternative to the adoption of *per se* rules, based on the privilege against self-incrimination or the right to counsel, that would require police to inform suspects of their attorneys' communications, would be the adoption of a rule, based on due process principles, that would require the exclusion of statements obtained during custodial interrogation when police have interfered with efforts by the suspect's attorney to represent his client, at least where the police conduct is facially unconscionable. In order to determine whether the police interference is sufficiently egregious to offend due process, courts should consider factors such as whether the interference was deliberate or inadvertent; whether the suspect initially requested counsel but later waived this right by initiating a generalized discussion of his case with the police; whether the suspect has been allowed to communicate with friends and family; and whether the attorney actually came to the police station and was there denied access to the suspect, as opposed to merely telephoning with a request that the suspect not be questioned in the attorney's absence.[199] Although the *Moran* opinion appears to allow for the recommended exclusionary rule on the basis of the federal constitution's due process guarantee, state constitutional due process provisions are also available to serve as the basis for the recommended rule.[200]

D. Ethical Considerations

As *Moran* graphically illustrates, law enforcement authorities are not bound by a judicially enforceable code of ethics. Yet, the *Moran* majority expressed "distaste" for the practice of deceiving a

198. *See supra* notes 9-20 and accompanying text.

199. The recommended approach for determining whether police interference in the attorney-client relationship violates due process is similar to the Court's due process "totality of the circumstances" test for determining whether a confession was voluntary. *See supra* notes 15-20 and accompanying text.

200. The only state constitution that does not contain a provision guaranteeing due process of law is that of Oregon. The right to due process of law in Oregon exists exclusively by virtue of the fourteenth amendment to the federal constitution. *See* State *ex rel* Jones v. Crookham, 296 Or. 735, 681 P.2d 103 (1978).

suspect's attorney[201] and viewed the practice of withholding information from suspects as "objectionable as a matter of ethics."[202] Unfortunately, strict adherence to the letter of *Moran* will permit objectionable and unethical practices of the police to flourish.

Under the suggested rule, police officers would no longer be encouraged to lie and scheme in order to keep attorneys from their clients. Moreover, the unethical practice of interrogating represented individuals in the absence of and without the consent of their attorneys would be terminated, thus sparing prosecutors from having to break rules of professional ethics by introducing statements elicited during improper interrogations of represented individuals into evidence.[203]

V. IMPACT

The *Moran* majority admitted that the failure to inform a suspect of his attorney's communications and/or the misinforming of an attorney about plans to interrogate his client are, at the very least, undesirable police practices.[204] Nonetheless, the Court found these practices to be constitutionally permissible. The majority insisted that police are required to do no more than merely inform suspects of their rights and, if counsel is requested, refrain from interrogation until counsel is present. Accordingly, the *Moran* majority sanctioned the police practice of refusing attorneys access to suspects, regardless of whether the right to counsel had been invoked.[205]

Although due process guarantees afford some protection against prolonged incommunicado detention, the permissible length of such detentions under due process principles remains subject to the discretion of lower court judges.[206] Regardless of the length of detention, under the wholly subjective totality of the circumstances test, prosecution-oriented judges can easily avoid finding due process violations in all but the most egregious cases.[207] Consequently, the *Moran* Court has invited police to play a waiting game with suspects in hopes of eventually securing a waiver—a game in which the odds are stacked heavily in favor of the police.

If the suspect has requested counsel, the police cannot interro-

201. *Moran*, 106 S. Ct. at 1143.
202. *Id.* at 1142.
203. *See supra* notes 82-92 and accompanying text.
204. *Moran*, 106 S. Ct. at 1142-43.
205. *See supra* note 174.
206. *See supra* notes 29-32 and accompanying text.
207. *See supra* notes 29-32 and accompanying text.

gate him until counsel is present, though they can hold the suspect incommunicado.[208] This incommunicado detention may in itself exert pressure on the suspect to break his silence.[209] If the suspect maintains his silence long enough, the police may give up and allow the suspect access to his attorney. If, however, the suspect eventually initiates conversation and thereby opens himself to interrogation, the police will have realized their objective.

When the suspect has not requested counsel but also has not waived his rights, under *Moran* he may be detained without access to counsel and interrogated freely, even if counsel is presently seeking access to his client.[210] If the suspect is held incommunicado for the elusive "long enough" period of time, a due process violation might be found, rendering subsequent statements inadmissible.[211] If, however, the suspect succumbs and gives a waiver or makes incriminating statements the police, again, will have realized their objective. In this regard, it is interesting to note that the defendant in *Moran* initially refused to make any statement, but after five hours of detention, changed his mind.

VI. RECOMMENDATIONS

The *Moran* majority specifically remarked that nothing in its opinion precluded the states from adopting different requirements for the conduct of their law enforcement officials as a matter of state law.[212] Prior to *Moran*, the New York Court of Appeals had relied on state constitutional guarantees of the privilege against self-incrimination, the right to the assistance of counsel, and due process of law in holding that once an attorney has entered criminal proceedings on the defendant's behalf, the defendant in custody may not validly waive his right to counsel in the absence of his attorney.[213] To prevent police officers from deliberately scheming to keep attorneys from their clients, other states should adopt rules similar to the New York rule. State constitutional provisions guaranteeing the privilege against compelled self-incrimination, the right to counsel, and due process of law, supply sound bases for

208. Once a suspect has invoked his right to counsel, he cannot be interrogated by the police until counsel has been provided "*unless the accused himself initiates further communication, exchanges, or conversations* with the police." Edwards v. Arizona, 451 U.S. 477, 485 (1981) (emphasis added).

209. *See supra* notes 56-57 and accompanying text.

210. *See supra* note 174.

211. *See supra* notes 15-32 and accompanying text.

212. *Moran*, 106 S. Ct. at 1145.

213. *See supra* notes 76-81 and accompanying text.

requiring the exclusion of statements obtained from a suspect during custodial interrogation where police have interfered with efforts by the suspect's attorney to represent his client.[214] Additionally, the judiciary is not the only institution which can prevent police officers from obstructing the attorney-client relationship. Law enforcement offices and prosecutors' offices, recognizing that the adversarial system embraces an unobstructed right to an attorney, should implement internal policies which require police to inform a suspect of his attorney's efforts to contact him. Furthermore, state legislatures also should impose statutory duties on law enforcement officers to inform suspects when attorneys attempt to reach them.

VII. CONCLUSION

The Supreme Court long has recognized that criminal defendants may need legal representation at pretrial stages of the criminal process in order to ensure effective assistance of counsel at trial. The Court also has recognized that counsel's presence during custodial interrogation is a valuable protective device to ensure that statements made during custodial interrogation are not the product of compulsion. Despite these considerations, the *Moran* Court refused to adopt a constitutional rule requiring police to allow attorneys prompt access to suspects in custody. As a result, the *Moran* decision has sanctioned unethical practices by law enforcement officers. Opportunity for reform rests with the individual states which must adopt rules to protect the integrity of the attorney-client relationship from unethical police interference. Although rules prohibiting police from interfering with attorneys' efforts to represent suspects might occasionally hinder efficient law enforcement, courts and legislatures should bear in mind that "[n]o system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights."[215]

ALTHEA KULLER

214. *See supra* notes 184, 192, 200 and accompanying text.
215. Escobedo v. Illinois, 378 U.S. 478, 490 (1964).