1-1-1994

Police Interrogation: The Privilege Against Self-Incrimination, the Right to Counsel, and the Incomplete Metamorphosis of Justice White, 48 U. Miami L. Rev. 511 (1994)

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University of Miami Law Review

VOLUME 48 JANUARY 1994 NUMBER 3

Police Interrogation: The Privilege Against Self-Incrimination, the Right to Counsel, and the Incomplete Metamorphosis of Justice White

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I. INTRODUCTION

After thirty-one years of service, United States Supreme Court Justice Byron White retired from the bench.[1] This Article focuses on the

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1. Justice White was appointed to the Court by President Kennedy in 1962. Dennis J. Hutchinson, *Byron White Justice from Colorado, in* THE SUPREME COURT JUSTICES, ILLUSTRATED BIOGRAPHIES 1789-1993, at 461, 464 (Clare Cushman ed. 1993); THE BURGER COURT—THE COUNTER-REVOLUTION THAT WASN'T 254-55 (Vincent Blasi ed. 1983). On March 19, 1993, he announced his retirement. *See Supreme Court Justice White to Step Down, Conservative Justice, a Foe of Abortion, to Retire at End of Term, Giving Clinton Opportunity to Make Court Appointment*, CHI. TRIB., March 19, 1993, at 1; Joan Biskupic, *Clinton's Chance for Change; Choice Could Ease Conservative Grip on Court*, WASH. POST, March 20, 1993, at A1; *In Years on*

evolution of Justice White's position on the constitutional rights of criminal suspects during police interrogations.[2] Shortly after his appointment, Justice White penned three biting dissents in cases limiting the admissibility of incriminating statements made by suspects while being interrogated by the police or their surrogates.[3] These dissents rebuked the Court for unnecessarily expanding the Constitution.[4] Further, these dissents clearly identified Justice White as a staunch defender of law enforcement.

In the first of these cases, *Massiah v. United States*,[5] Justice White admonished the Court for attempting to "sweep these disagreeable matters under the rug"[6] and bar "relevant, reliable and highly probative" evidence.[7] He also reprimanded the Court for basing its decision to bar the admissibility of all incriminating statements made after indictment on the feeblest of foundations.[8] Similarly, in *Escobedo v. Illinois*,[9] Justice White castigated the Court for extending *Massiah*'s Sixth Amendment "post-indictment" rule to bar all incriminating statements made before indictment at the "critical stage"[10] of a criminal investigation.[11] Justice White's strongest condemnation of the Court, however, was expressed in his dissent in *Miranda v. Arizona*.[12] Justice White attacked the Court's Fifth Amendment-based decision, which required the police to inform a suspect of his right to remain silent and right to an attorney, as unsupported by history or the language of the Fifth Amendment privilege against self incrimination.[13]

Despite the strong language of the *Miranda* dissent, it is evident

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Court, White Gradually Swung to Right, USA WEEKEND, March 20, 1993, at 2A. On June 28, 1993, with much-deserved recognition for his judicial achievements, Justice White ended his service as a United States Supreme Court Justice. *Justice White's Last Day*, WASH. POST, June 29, 1993, at A6.

2. The use of the term "police interrogation" throughout this Article includes the interrogation of criminal suspects by all law enforcement agencies, federal, state, and local.

3. *See* Massiah v. United States, 377 U.S. 201, 207 (1964) (White, J., dissenting); Escobedo v. Illinois, 378 U.S. 478, 495 (1964) (White, J., dissenting); Miranda v. Arizona, 384 U.S. 436, 526 (1966) (White, J., dissenting).

4. *See, e.g.*, *Massiah*, 377 U.S. at 209 (White, J., dissenting); *Escobedo*, 378 U.S. at 497 (White, J., dissenting); *Miranda*, 384 U.S. at 527 (White, J., dissenting).

5. 377 U.S. 201 (1964). For a full discussion of *Massiah*, see *infra* notes 145-164 and accompanying text.

6. *Massiah*, 377 U.S. at 207 (White, J., dissenting).

7. *Id.* at 208.

8. *Id.*

9. 378 U.S. 478 (1964). For a full discussion of *Escobedo*, see *infra* notes 165-180 and accompanying text.

10. This term was used by Justice Goldberg in the Court's opinion. *Id.* at 486.

11. *Id.* at 495-99 (White, J., dissenting).

12. 384 U.S. 436 (1966). For a full discussion of *Miranda*, see *infra* notes 20-39 and accompanying text.

13. *Miranda*, 384 U.S. at 526-45 (White, J., dissenting).

that Justice White later abandoned his former steadfast opposition to *Miranda*, although his antipathy to the rules established in *Escobedo*, *Massiah*, and their progeny remained. This Article examines the incomplete metamorphosis of Justice White's position on the rights of criminal suspects during police interrogation and posits that he eventually embraced the *Miranda* decision at the expense of the Sixth Amendment right to counsel. Part II analyzes Justice White's position in decisions concerning the Fifth Amendment privilege against self-incrimination, from his early antagonism to *Miranda* to recent decisions where he authored opinions, or joined majority decisions, expanding the *Miranda* doctrine or maintaining the status quo. Part III examines Justice White's stance on the Sixth Amendment right to counsel in the area of police interrogation. Part IV assesses and compares the divergent lines of jurisprudence created by Justice White and suggests that his change of heart on *Miranda* was designed to curtail the expansion of the Sixth Amendment right to counsel. In addition, Part IV examines the invalidity of Justice White's position on the Sixth Amendment right to counsel in light of his other transformation.

II. JUSTICE WHITE AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The Supreme Court's 1966 *Miranda* decision provoked great controversy, which persists to this day.[14] Despite the vociferous outcry from "supporters of law enforcement" and *Miranda* detractors, the doctrine survives. Given the composition of the former Burger Court and

14. *See, e.g.*, RICHARD Y. FUNSTON, CONSTITUTIONAL COUNTER REVOLUTION? THE WARREN COURT AND THE BURGER COURT: JUDICIAL POLICY MAKING IN MODERN AMERICA 133-210 (1977); FRED P. GRAHAM, THE SELF-INFLICTED WOUND 153-93 (1970); Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test, reprinted in* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY (Yale Kamisar ed. 1980) [hereinafter KAMISAR, ESSAYS]; Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985); Donald A. Dripps, *Beyond the Warren Court and its Conservative Critics: Toward A Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REF. 591 (1990); Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979); Fred E. Inbau, *Over-Reaction—The Mischief of* Miranda v. Arizona, 73 J. CRIM. L. & CRIMINOLOGY 797 (1982); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda", 54 U. CHI. L. REV. 938 (1987); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 1, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION, (February 12, 1986), *reprinted in* 22 U. MICH. J.L. REF. 437 (1989); Charles J. Ogletree, *Are Confessions Really Good For The Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826 (1987); Stephen A. Saltzburg, Miranda v. Arizona *Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1 (1986); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987); David Sonenshein, Miranda *and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405 (1982).

present Rehnquist Court, it is, to no small measure, the advocacy of Justice White that has sustained *Miranda* beyond expectations.[15] Section A traces Justice White's early opposition to the decision. Section B explores the later opinions written or endorsed by Justice White in support of *Miranda*.

A. *Justice White's* Miranda *Dissent and Other Opinions Opposing the* Miranda *Decision*

Justice White signaled his opposition to the Warren Court's Fifth Amendment jurisprudence in the 1964 case of *Malloy v. Hogan*.[16] In *Hogan*, the Court held that the Due Process Clause of the Fourteenth Amendment incorporated the privilege against self-incrimination contained in the Fifth Amendment making it applicable to the states.[17] Justice White dissented, pointing to an unwarranted departure from established rules governing the privilege against self-incrimination.[18] He noted that the Court was allowing the witness to invoke the privilege on his own estimation of the tendency to incriminate, rather than the

15. *Miranda* was a 5-4 decision written by Chief Justice Warren, and supported by Justices Black, Douglas, Brennan and Fortas. Justices Harlan, Stewart, Clark and White dissented. At the time of his retirement in 1993, Justice White was the sole Justice on the Court who participated in the *Miranda* decision.

The softening of the Court on the issue of confessions law has been discussed by several commentators. They concluded that the conservative Burger and Rehnquist Courts have sought to weaken *Miranda* by narrowing its reach, rather than overruling it. *See* Yale Kamisar, *The Warren Court (Was it Really So Defense-Minded?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices, reprinted in* THE BURGER COURT—THE COUNTER-REVOLUTION THAT WASN'T at 62 (Vincent Blasi ed. 1983); Sonenshein, *supra* note 14.

16. 378 U.S. 1 (1964). In *Malloy*, the petitioner, while testifying before a referee appointed by the Superior Court of Hartford County, Connecticut, was asked several questions about illegal gambling. *Id.* at 3. The petitioner had pleaded guilty to a gambling charge sixteen months prior to the hearing, and was on probation at the time of the hearing. *Id.* When asked questions about his arrest and gambling activities preceding that arrest, the petitioner refused to answer, citing the Fifth Amendment privilege against self-incrimination. *Id.* The Superior Court held him in contempt and ordered him incarcerated. The Supreme Court granted the petitioner habeas corpus relief. *Id.*

17. *Id.* at 6. The Court drew analogies to its earlier decisions in Spano v. New York, 360 U.S. 315 (1959), and Haynes v. Washington, 373 U.S. 503 (1963). The Court noted that these cases prohibited the use of a confession gained through false sympathy, *Spano*, 373 U.S. at 323, or other inducement, *Haynes*, 373 U.S. at 503. *Malloy*, 378 U.S. at 8. The opinion then applied its conclusion to the facts of the case by holding that the states may not use penalties, such as imprisonment, to compel a person to speak. *Id.* The Court held that, had the petitioner answered the questions concerning his arrest, he could have potentially implicated himself in a crime or crimes. *Id.* at 13-14. Therefore, he properly invoked the privilege against answering those questions at the hearing. *Id.*

18. *Id.* at 33 (White, J., dissenting). In his dissent, Justice White cited the general duty of a citizen to testify when subpoenaed, as well as the trial court's ability to determine when an answer may be incriminating. *Id.* at 34. Additionally, Justice White applied the traditional process of determining whether the answer tends to incriminate the witness and found the danger of self-incrimination to be speculative. *Id.* at 37-38.

more learned appraisal of the trial court.[19]

Two years later, in his dissent in *Miranda v. Arizona*,[20] Justice White attacked the majority decision as unsupported by the history or the language of the Fifth Amendment.[21] To substantiate his position, Justice White advanced five specific objections to the Court's ruling. First, he identified the privilege as a trial right only, namely that the government cannot compel the testimony of the accused.[22] While noting that the privilege later embraced coerced confessions, Justice White pos-

19. *Id.* at 33. At the conclusion of his dissent, Justice White said he would require the witness to state reasons for asserting the privilege in response to questions that are "seemingly irrelevant to any incriminating matters." *Id.* at 38.

20. 384 U.S. 436 (1966). *Miranda* was a consolidation of four cases involving confessions given during police interrogations. *Id.* at 440. In each case, the police neglected to inform the suspects of their right to remain silent. *Id.* at 445. The interrogations all yielded confessions, and three of the suspects signed statements confessing to the crimes. *Id.* In *Miranda v. Arizona*, No. 759, the defendant's written confession was admitted as evidence and the jury returned a conviction for rape. *Miranda*, 384 U.S. at 492. In *Vignera v. New York*, No. 760, a detective testified about the defendant's oral confession, and Vignera was found guilty of first degree robbery. *Miranda*, 384 U.S. at 493-94. In *Westover v. United States*, No. 761, the defendant's two separate confessions were admitted at trial, and the defendant was found guilty of bank robbery. *Miranda*, 384 U.S. at 495. These three convictions were subsequently affirmed. In *California v. Stewart*, No. 584, the defendant confessed to the crime after the ninth interrogation session. *Miranda*, 384 U.S. at 497. At trial, transcripts of the oral confession and a written confession were admitted in evidence, and the defendant was convicted of robbery and first degree murder. *Id.* at 498. The Supreme Court of California reversed these convictions and the State of California appealed. *Id.*

The Supreme Court reversed the convictions in the first three cases and affirmed the California Supreme Court's decision. *Id.* at 499. In reaching these decisions, the Court held that an individual being held for custodial interrogation must be informed of his right to remain silent during the interrogation. *Id.* at 467-68. Additionally, the person must be informed of his right to an attorney during questioning, even if one must be appointed for him. *Id.* at 471-72. For an in-depth analysis of the *Miranda* decision and the roles of the major players, see generally LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983). *See also* GRAHAM, *supra* note 14, at 186 (characterizing the *Miranda* decision as "a colossal blunder . . . result[ing] in a serious self-inflicted wound").

21. Miranda v. Arizona, 384 U.S. 436, 526 (1966) (White, J., dissenting). In addition, Justice White challenged the Court to consider all relevant factors in a case of this magnitude. *Id.* at 532. Noting that this decision must both weather critical analysis and offer a concrete constitutional basis for the holding, Justice White stated, "[d]ecisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice." *Id.* at 531-32. Later in his dissent, Justice White stated that the Court

> ma[de] new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

Id. at 531 (footnote omitted). *See also* FUNSTON, *supra* note 14, at 167 (arguing that Justice White opposed *Miranda* on the basis of it being inconsistent with prior precedent, rather than incorrect policy); Irene Merker Rosenberg & Yale L. Rosenberg, *In The Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988).

22. Miranda v. Arizona, 384 U.S. 436, 526-27 (1966) (White, J., dissenting).

ited that the privilege only concerned itself with forced judicial admissions.[23] In addition, Justice White explored the history of the privilege against self-incrimination in the context of the Fifth Amendment and the common law and concluded that the privilege did not encompass a right to be free from custodial police interrogation.[24]

Justice White next challenged the Court's underlying assumption that compulsion is inherent in every custodial interrogation.[25] Using his-

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23. *Id.* (citing E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 18 (1949); Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 2 (1930)).

24. *Id.* at 527. Justice White did recognize, however, that the protections against compelled grand jury testimony and the compulsory production of books and papers enjoy strong constitutional and historical support. *Id.* His dissent cited Boyd v. United States, 116 U.S. 616 (1886), and Counselman v. Hitchcock, 142 U.S. 547 (1892), as examples of cases properly interpreting the Fifth Amendment privilege against self-incrimination. *Miranda*, 384 U.S. at 527 (White, J., dissenting). In *Boyd*, the Court found that a court-ordered production of papers in a forfeiture case violated the Fifth Amendment privilege against self-incrimination and the Fourth Amendment's protections against unreasonable searches and seizures. *Boyd*, 116 U.S. at 634-35. The Court in *Counselman* extended the protections granted in *Boyd* to grand jury testimony, relying on the Fifth Amendment privilege against self-incrimination. *Counselman*, 142 U.S. at 585-86.

After his dissent in *Miranda*, Justice White took part in several decisions involving the privilege against self-incrimination in areas outside of police interrogation. *See, e.g.*, Couch v. United States, 409 U.S. 322 (1973) (holding, in an opinion joined by Justice White, that a taxpayer who had regularly given tax records to her accountant could not claim the privilege in response to an I.R.S. subpoena demanding production of the records); Bellis v. United States, 417 U.S. 85 (1974) (holding, in an opinion joined by Justice White, that the privilege against self-incrimination cannot be invoked by a member of a partnership in response to a subpoena for records, even if the records could incriminate the individual petitioner); Maness v. Meyers, 419 U.S. 449, 472 (1975) (White, J., concurring in result) (arguing that a witness may not be compelled to give incriminating testimony absent a grant of immunity in a case where the Court held that a trial judge may not hold an attorney in contempt for advising a client, in good faith, to invoke the Fifth Amendment); Andresen v. Maryland, 427 U.S. 463 (1976) (holding, in an opinion joined by Justice White, that the introduction of records seized under a valid warrant during trial does not violate the privilege against self-incrimination); United States v. Doe, 465 U.S. 605 (1984) (holding, in an opinion joined by Justice White, that an owner of a sole proprietorship did not have to produce records subpoenaed by a grand jury without a grant of immunity); Doe v. United States, 487 U.S. 201 (1988) (finding, in an opinion joined by Justice White, that a judge's order compelling the target of a grand jury investigation to sign a release authorizing disclosure of bank records did not constitute "testimony," and thus, did not violate the privilege against self-incrimination).

25. *Miranda*, 384 U.S. at 532-37. He criticized the Court's reliance upon Bram v. United States, 168 U.S. 532 (1897), arguing that the *Bram* decision lacked widespread support from either British or American authorities. *Miranda*, 384 U.S. at 527-28. Justice White then denounced the Court's expansion of *Bram*, and noted that "[t]he question in *Bram* was whether a confession, obtained during custodial interrogation, had been compelled, and if such interrogation was to be deemed inherently vulnerable the Court's inquiry could have ended there." *Id.* at 528. Justice White cited a line of cases in which custodial confessions were admitted despite a lack of warnings. *Id.* at 530.

After laying this historical foundation, Justice White stated that "the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the

tory and precedent, he noted the lack of new data supporting the Court's decision, and characterized the basis of the Court's opinion as speculative.[26] He stated that the majority's "novel conclusion" did not rest on any traditional rationale for judicial policy-making.[27] In addition, Justice White commented on the incongruity between admitting a spontaneous statement made after arrest, and forbidding the admission of the accused's response to express questioning.[28] He also advocated the continued use of the "totality of the circumstances test," or some other less intrusive method of assuring the reliability of in-custody statements.[29]

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course of interpreting other great clauses of the Constitution." *Id.* at 531. He noted that this type of policy-making is inherent in the Court's constitutionally defined powers. He indicated, however, that the Court must offer some justification for such an extension of Constitutional rights as was done in *Miranda*. *Id.* at 531-32.

26. *Id.* at 532-33. Justice White noted that the Court, while "reject[ing] . . . 70 years' experience" with its decision in *Miranda*, could not point to any "sudden inrush of new knowledge" to justify this departure from precedent. *Id.* at 532.

27. *Id.* Justice White stated that the Court's holding:

> [does not] reflect[ ] a changing consensus among state courts, or that a succession of cases had steadily eroded the old rule and proved it unworkable. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings.

Id. (citations omitted). Justice White also noted that the Court neglected to study any actual facts from the cases to support its decision. *Id.* at 533. Instead, the Court relied on police manuals that did not reflect recent Court decisions. *Id.* at 532-33. Therefore, "by any of the standards for empirical investigation . . . the Court's premise [that custodial interrogation is inherently coercive] is patently inadequate." *Id.* at 533.

28. *Id.* at 533-34. Justice White found this disparity incomprehensible. He noted that the pressures surrounding an arrest are similar to interrogation. *Id.* Therefore, allowing a spontaneous statement to be admissible, but not an unwarned response to express questioning, defied common sense. *Id.*

29. *Id.* at 534-35. After stressing the historical validity of the totality of the circumstances test, Justice White stated that "it has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will." *Id.* at 535. To Justice White, such a conclusion had no "rational foundation." *Id.*

Justice White offered several alternative measures to the Court's ruling. These measures would allow the totality of the circumstances test to remain the primary method for evaluating the voluntariness of a confession and its admissibility. The use of observers, transcripts, time limits, or other devices would insure that confessions were voluntary. *Id.* at 535. Justice White also noted that the safeguards addressed by the majority's decision were traditionally used to determine the voluntariness of a confession. He said:

> The duration and nature of incommunicado custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry [into the voluntariness of a confession].

Id. at 534. *Compare* Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701-02 (1988) (advocating the disincorporation of the privilege against self-incrimination from the protections of the Fourteenth Amendment and allowing judicial confessions to be admissible while prohibiting the

In his third objection, Justice White chided the Court for placing the decision to remain silent in the hands of the defense attorney rather than in the hands of the accused. He explained his objection by first pointing out the irregularities in the Court's new procedure for waiving the privilege.[30] He then questioned the efficiency of prohibiting the use of inculpatory statements given without warnings, while allowing a suspect to waive the privilege in the same "coercive" atmosphere.[31] Therefore, in Justice White's opinion, the Court shifted the "focus [from] . . . the will of the accused, [to] the will of counsel and how much influence he can have on the accused."[32]

Justice White's fourth objection to the *Miranda* decision is based on his perception that the Court elevated the interest in personal autonomy over society's interest in security. Justice White noted that "[m]ore than the human dignity of the accused is involved; the human personality of others in the society must also be preserved."[33] According to Justice White, any advantages the Court's ruling might have are "far outweighed by [the] likely undesirable impact on other very relevant and important interests."[34]

Finally, Justice White pointed to the inherent reliability of confes-

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admissibility of statements made during police interrogation). *But see* Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69 (1989) (advocating the adoption of a *per se* rule barring the admissibility of all custodial confessions).

30. *Miranda*, 384 U.S. at 535-36.

31. *Id.* at 536. He did note that the Court's decision to erect a "severe, if not impossible," barrier forces the state to show that the waiver was not itself compelled. *Id.* Justice White stated his belief that the Court's decision "for all practical purposes forbids interrogation except in the presence of counsel." *Id.* He found this holding unnecessary in light of the distinction between a compelled confession and a voluntary confession given while in custody. *Id.*

32. *Id.* at 537. Justice White concluded this argument by stating that "there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege." *Id.*

33. *Id.* at 537. Justice White also stated that "society's interest in the general security" must be given "equal weight" with the values protected by the Fifth Amendment privilege. *Id.* He went on to say that the crux of the majority opinion was that the Court saw police interrogation as "inherently wrong." *Id.* at 538. That is the main point of difference between the majority opinion and Justice White's dissent, Justice White believed that there is nothing inherently wrong or unconstitutional with police questioning. *Id.* Justice White then recalled Escobedo v. Illinois, 378 U.S. 478, 499 (1964) (White, J., dissenting), where he stated that the absence of warnings would be one of many factors in determining voluntariness. *Miranda*, 384 U.S. at 538.

34. *Miranda*, 384 U.S. at 539. Justice White characterized the "most basic function of any government" as the duty to provide continuing protection to the individual and his property. *Id.* To this end, society has enacted criminal laws. *Id.* Therefore, he disparaged the Court's elevation of the suspect's human dignity over society's security as "idle." *Id.* He pointed to the preventive nature of the criminal law. In his view, the Court's decision would hobble society's efforts to control crime through isolation, deterrence and rehabilitation. *Id.* at 539-41. By making confessions, and therefore convictions, harder to obtain, the Court's rule "measurably weaken[ed] the ability of the criminal law to perform [its] tasks." *Id.* at 541.

sions.[35] He stated that confessions "contribute to the certitude with which we may believe the accused is guilty," especially when corroborated by physical evidence.[36] Justice White could find no basis for the Court's assertion that a confession is injurious to the accused; instead, he saw the possibility of a confession "provid[ing] psychological relief and enhanc[ing] the prospects for rehabilitation."[37] Ultimately, according to Justice White, the Court "establish[ed] a new constitutional barrier to the ascertainment of truth."[38] He concluded his dissent by characterizing the Court's decision as a "constitutional straitjacket."[39]

When the Court expanded on the protections established in *Miranda*, Justice White continued to defend his original criticisms of the ruling. In *Mathis v. United States*,[40] Justice White dissented from the majority's decision to reverse a conviction based on the statements an incarcerated state prisoner gave to an Internal Revenue Service investigator.[41] In the first sentence of his dissent, Justice White again reiterated his opposition to *Miranda* and the basis for that opposition.[42] He further stated that even if he were to accept the rationale for the *Miranda* decision, he would not extend it to the present matter.[43] Justice White also cast doubts on the validity of the *Miranda* doctrine in *Garrity v.*

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35. *Id.* at 538. Justice White stated that prior to the Court's ruling, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Id.* (quoting Brown v. Walker, 161 U.S. 591, 596 (1896)).

36. *Id.*

37. *Id.*

38. *Id.* at 542. *See also* Caplan, *supra* note 14, at 1419 ("*Miranda* was not a wise or necessary decision . . . ."). *But see* Ogletree, *supra* note 14, at 1827. In his article, Professor Ogletree finds fault with many of the arguments in Justice White's dissent, particularly Justice White's predictions that *Miranda* would cripple law enforcement. Ogletree postulated that the *Miranda* warnings are "not an effective means of informing suspects both of the existence and extent of their privilege against self-incrimination and of their right to consult with counsel before they make any statements." *Id.* at 1827-28.

39. *Miranda*, 384 U.S. at 545. Justice White also noted that the majority's decision, while purporting to establish a "bright line" rule, nonetheless leaves several questions unresolved for lower courts. *Id.* at 544-45. Specifically, these questions are: whether the accused was, in fact, in custody; whether the statements were spontaneous; whether the accused has validly waived his rights; and whether non-testimonial evidence was obtained in violation of *Miranda*. *Id.* at 545.

40. 391 U.S. 1 (1968). The Court rejected the government's attempts to narrow *Miranda* to cases where the suspect is in custody for the crime which is the subject of the investigation. *Id.* at 4-5. In addition, it refused to limit *Miranda* to investigations that definitely result in a criminal prosecution. *Id.* at 4.

41. *Mathis*, 391 U.S. 1, 5 (White, J., dissenting).

42. *Id.* He called for the abandonment of *Miranda* and the admission of "unquestionably voluntary" statements. *Id.* at 5-6.

43. *Id.* at 6. Justice White characterized the interview as "indistinguishable from the thousands of inquiries into tax liability made annually." *Id.* He then expressed disbelief that *Miranda*'s "checklist of warnings" applied to routine civil inquiries conducted by the government. *Id.* at 7. Furthermore, he could find no basis for such an extension in the language of the *Miranda* opinion. *Id.*

New Jersey.[44] In his dissent in *Spevack v. Klein*, *Garrity*'s companion case, Justice White belied the need for the Court's *per se* rule barring the use of statutorily compelled statements and instead urged that a case-by-case standard be adopted.[45]

Justice White continued his attack on the Court's expansion of *Miranda* in *Orozco v. Texas*.[46] He characterized the *Orozco* decision as "a new and unwarranted extreme."[47] Justice White reasoned that the facts in *Orozco* did not endanger the rights protected by *Miranda*. He pointed to the fact that the interrogation took place in the suspect's room and that it was relatively brief.[48] Therefore, Justice White could find

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44. 385 U.S. 493, 530 (1967) (White, J., dissenting). In *Garrity*, several police officers were accused of conspiring to "fix" traffic tickets. *Id.* at 494. As part of the Attorney General's investigation, the police officers were questioned as to their role in the conspiracy. Prior to the questioning, the police officers were informed of their right to remain silent, but were additionally advised that any invocation of that right would result in the loss of their employment. *Id.* The police officers answered the questions, which did incriminate them in the conspiracy, and were subsequently convicted. *Id.* at 495.

The Court, in an opinion by Justice Douglas, relied on *Miranda* to reverse these convictions. *Id.* at 500. In reaching its decision, the Court noted that the subtle pressures used in this case are just as coercive as the more overt methods to which the *Miranda* warnings traditionally apply. *Id.* at 497-98. The Court also rejected the argument that a valid waiver allowed the statements to be admitted, noting that the waivers were the product of duress, not a voluntary attempt to make a "clean breast of the whole affair." *Id.* at 498-99.

Spevack v. Klein, 385 U.S. 511 (1967), a companion case to *Garrity*, dealt with a lawyer disbarred for refusing to surrender incriminating documents. *Spevack*, 385 U.S. at 530, 531 (White, J., dissenting).

45. *Spevack*, 385 U.S. at 530, 531 (White, J., dissenting). *But see* Lefkowitz v. Turley, 414 U.S. 70 (1973) (holding that a statute requiring all state contractors to submit to potentially incriminating questioning is unconstitutional in an opinion written by Justice White).

46. 394 U.S. 324 (1969). In *Orozco*, the petitioner was arrested in his room in a boarding house several hours after a murder. The petitioner was not advised of his constitutional right to an attorney or of his right to remain silent. *Id.* at 326. During the questioning, the petitioner made several incriminating statements, and subsequently led the police to the location of the murder weapon. *Id.* at 325.

The Court decided *Miranda* after Orozco's arrest, but before his trial; thus, according to Johnson v. New Jersey, 384 U.S. 719 (1966), *Miranda*'s protections were applicable to the case at hand. At trial, the petitioner's lawyer unsuccessfully attempted to suppress the incriminating statements. *Orozco*, 394 U.S. at 326. The petitioner was then convicted of murder without malice. *Id.* at 324. The Supreme Court reversed the conviction, finding that the use of the statements at trial was "a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*." *Id.* at 326. The Court, however, did not render a decision on the admissibility of the murder weapon to which the petitioner led the police after the interrogation. This omission was a key point in Michigan v. Tucker, 417 U.S. 433 (1974). *See infra* notes 53-54 and accompanying text for a discussion of that case and Justice White's concurring opinion.

47. *Orozco*, 394 U.S. at 328 (White, J., dissenting). Justice White reiterated his belief that the *Miranda* decision was a "constitutional straitjacket," and further proclaimed that it was being tightened further by the *Orozco* decision. *Id.* at 328.

48. *Id.* at 328-31. In the dissent, Justice White advocated the very points advanced by the State of Texas and rejected by the majority. He noted that much of the *Miranda* decision was devoted to the dangers of coercion brought on by isolated and prolonged interrogation in an unfamiliar setting. *Id.* at 328-29. After again stating that *Miranda*'s reach exceeds *Miranda*'s

none of the coercion that the *Miranda* majority addressed, and he certainly saw no reason to apply its protections in this case.[49] With these opinions, Justice White clearly established himself as an opponent to the Fifth Amendment jurisprudence of the Warren Court and the "barriers" the *Miranda* decision erected to the search for truth.[50]

With the advent of the Burger Court, however, the more conservative wing of the Court, including Justice White, began carving out exceptions to these "barriers," eroding some of *Miranda*'s protections. In *Harris v. New York*,[51] for example, Justice White voted with the majority in a decision allowing the limited use of statements taken in violation of *Miranda* to impeach the defendant's testimony at trial.[52] Similarly, in *Michigan v. Tucker*[53] Justice White concurred in a decision allowing the prosecution to use the testimony of a witness whose iden-

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need, Justice White charged the Court with overextending *Miranda*'s protections. *Id.* at 328. He could find no reason for enlarging the scope of *Miranda* to include an interrogation conducted outside the station house and inside the suspect's home. *Id.* at 329-31.

49. *Id.* at 331. In Justice White's view, the Court "diluted" the custody requirements set forth in *Miranda*. *Id.* at 330-31. He found this extension of *Miranda* unjustified in light of the slight danger of coercion. *Id.* at 331. It should be noted, however, that Justice Harlan, also a dissenter in *Miranda*, concurred in this case out of a stated respect for stare decisis. *Id.* at 327 (Harlan, J., concurring).

50. *See also* Harrison v. United States, 392 U.S. 219, 228 (1968) (White, J., dissenting) (criticizing the Court for basing its decisions on "fuzzy ideology about confessions").

51. 401 U.S. 222 (1971). In *Harris*, the prosecution sought to use statements that were inadmissible under *Miranda* to impeach the petitioner's testimony. The trial judge allowed the statements to be used for impeachment and gave a limiting instruction to the jury. *Id.* at 223. The Court affirmed the limited use of the statements, stating that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense." *Id.* at 226.

52. *Id.* at 226. As Justice Brennan noted in his dissent, however, the *Miranda* opinion stated that "[t]he privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner." *Id.* at 230 (Brennan, J., dissenting) (quoting Miranda v. Arizona, 384 U.S. 436, 476-77 (1966)). *See also* New York v. Quarles, 467 U.S. 649, 651 (1984) (holding, in an opinion joined by Justice White, that a "public safety" exception exists to allow the admissibility of statements made without *Miranda* warnings).

53. 417 U.S. 433 (1974). The United States Supreme Court found that the use of the witness obtained from the respondent's unwarned statements did not unconstitutionally infringe on his right to be free from self-incrimination. *Id.* at 445-46. Although the interrogation violated the procedure set forth in *Miranda*, this was not held to be a constitutional violation because "these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right . . . was protected." *Id.* at 444. The Court reached this conclusion after an examination of the historical precedent surrounding the right. *Id.* at 439-44. Accordingly, the Court found that there was no reason to exclude the witness' testimony. *Id.* at 452.

The *Tucker* decision was discussed in Professor Kamisar's article comparing the Warren and Burger Courts. *See* Kamisar, *supra* note 15, at 85-86. He identified Justice Rehnquist's characterization of *Miranda*'s warnings as "the most ominous note of all" for *Miranda* supporters. *Id.* at 85. Professor Kamisar also noted the inconsistency of the *Tucker* reasoning with the underlying rationale of *Miranda*. He pointed out that the Court's new system of "equat[ing] 'compulsion' within the meaning of the privilege with 'coercion' or 'involuntariness,' " as in the pre-*Miranda* cases, "miss[ed] the point" of *Miranda*. *Id.* at 85. In *Miranda*, Professor Kamisar

tity it obtained from an interrogation preceded by incomplete warnings.[54]

Furthermore, in *Michigan v. Mosley*,[55] Justice White concurred in the result of a decision that upheld the authority of the police to reinterrogate an accused who had previously invoked his right to remain silent, but failed to request an attorney during an interrogation for an unrelated crime.[56] With these opinions, Justice White continued to manifest his

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explained, the Court abandoned the harsh "totality of the circumstances" test to safeguard individual liberty. *Id.* at 85-86.

54. Michigan v. Tucker, 417 U.S. at 460 (White, J., concurring). Justice White stated "I continue to think that *Miranda v. Arizona* was ill-conceived and without warrant in the Constitution." *Id.* (citations omitted). He then noted that the exact status of this type of evidence was left open by the Court's decision in Orozco v. Texas, 394 U.S. 324 (1969). Justice White also expressed his reluctance to extend the "prophylactic scope" of *Miranda* to bar evidence revealed in unwarned interrogations. *Tucker*, 417 U.S. at 461 (White, J., concurring).

55. 423 U.S. 96 (1975). In *Mosley*, the police arrested the respondent in connection with two robberies. *Id.* at 97. He was advised of his rights under *Miranda*, whereupon he told the police that he did not want to answer any questions and the police halted the interrogation. *Id.* He did not, however, request an attorney. *Id.* Two hours later, the respondent was questioned by another police officer regarding a murder. After again being informed of his rights, the respondent denied any involvement in the murder. *Id.* at 98. The respondent changed his story when the questioning officer falsely informed him that another suspect had implicated him in the crime. *Id.* at 98 n.3. The respondent then made incriminating statements that he sought to suppress at his trial. *Id.* at 98. The trial court's decision to allow the statements was reversed by the Michigan Court of Appeals. *Id.* at 99.

In deciding the issue, the Supreme Court did not challenge the validity of *Miranda*; instead, the Court relied on the peculiar semantics of that decision. The Court noted that *Miranda* orders a cessation of interrogation when the suspect expresses a desire to remain silent, but "does not state under what circumstances, if any, a resumption of questioning is permissible." *Id.* at 101. The Court interpreted *Miranda* to mean that police could resume questioning after "a significant period of time" had elapsed, so long as they gave the suspect "a fresh set of warnings." *Id.* at 106. The Court's new test for determining compliance with *Miranda* was whether the police "scrupulously honored" the accused's "right to cut off questioning." *Id.* at 104. In fact, the new set of warnings was critical in allowing the later use of the confession. *See id.* at 106-07. *Compare* Inbau, *supra* note 14, at 797-98.

In his article, Professor Inbau examined the impact of *Miranda* on the case of John W. Hinckley, Jr., the failed assassin of President Reagan. Professor Inbau blamed *Miranda* for the suppression of statements made by Hinckley during F.B.I. questioning. Inbau placed great emphasis on the fact that Hinckley asked for a lawyer "rather hesitatingly." *Id.* at 798. In his view, this loss of evidence which forced the government to prove Hinckley's sanity through independent evidence was symptomatic of the "mischief" caused by *Miranda*. *Id.* at 798, 799. Professor Inbau concluded that the use of repeated warnings causes suspects to actually exercise their constitutional right to remain silent when they might have otherwise decided to speak with the police. *Id.* at 799. Professor Caplan expressed similar sentiments in his article on *Miranda*. *See* Caplan, *supra* note 14, at 1451 (stating that the *Miranda* warnings, "[i]f delivered faithfully . . . will encourage the suspect to withhold information").

56. *Mosley*, 423 U.S. at 107 (White, J., concurring). In his concurrence Justice White first expressed his continuing distaste for *Miranda* stating, "I am no more convinced that *Miranda* was required by the United States Constitution than I was when it was decided." *Id.* at 108. He then reasoned that the majority's time limit rule was not mandated by *Miranda*. He further theorized that the Court would adopt a voluntariness standard to determine the validity of a waiver. *Id.* at 108. In addition, he noted that the *Miranda* decision provided an express requirement for the

distaste for the *Miranda* decision.[57] He sought to disparage *Miranda* at every opportunity.[58] Justice White's later acceptance of *Miranda* is inconceivable in light of these strong criticisms.

B. *The Rebirth of Justice White as a Supporter of the* Miranda *Doctrine*

The erosion of Justice White's opposition to *Miranda* was signaled in *Rhode Island v. Innis*.[59] Although the Court ultimately allowed the use of the accused's statement, it also legitimized *Miranda* in its decision.[60] In *Innis*, Justice White joined the majority opinion, written by

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termination of all interrogation by merely requesting an attorney. *Id.* at 109-10. He noted that a waiver of the right to an attorney following a request for counsel "may properly be viewed with skepticism." *Id.* at 110 n.2. He also continued to fault *Miranda*'s requirement that questioning cease after the assertion of the right to silence for being unclear and arbitrary. *Id.* at 110; *see also* Kamisar, *supra* note 15, at 83-84 (noting that *Mosley* exemplifies the predicament that proponents of *Miranda* faced when arguing cases before a Court that included Justice White, a *Miranda* dissenter); North Carolina v. Butler, 441 U.S. 369, 375-76 (1979) (finding that an express waiver of the right to an attorney is not necessary for the subsequent confession to be admissible in an opinion joined by Justice White); Fare v. Michael C., 442 U.S. 707, 727-28 (1979) (holding that a juvenile's request for his probation officer in response to the *Miranda* warnings does not constitute a request for an attorney in an opinion supported by Justice White).

57. The case of United States v. Hale, 422 U.S. 171 (1975), presents a rare early example of Justice White's tolerance of *Miranda* at some level. In *Hale*, the Court decided the issue of the propriety of using a defendant's post-arrest silence for impeachment purposes. The Court declined to resolve the issue on constitutional grounds, and instead found that the prejudicial effect of such evidence outweighed its probative value. *Id.* at 173. In his concurrence, however, Justice White stated that he would affirm the Court's decision on the basis of *Miranda*'s protections. *Id.* at 182-83 (White, J., concurring); *see also* Doyle v. Ohio, 426 U.S. 610, 611 (1976) (establishing a rule based on *Miranda* that post-arrest silence could not be used against a defendant). *But see* Jenkins v. Anderson, 447 U.S. 231, 240-41 (1980) (finding that the use of pre-arrest silence to impeach defendant credibility does not violate the Constitution); Fletcher v. Weir, 455 U.S. 603, 607 (1982) (*per curiam*) (allowing cross-examination concerning pre-arrest silence in the absence of *Miranda* warnings).

58. *See, e.g.*, Mathis v. United States, 391 U.S. 1, 5 (1968) (White, J., dissenting) ("The Court [in *Miranda*] accepted an interpretation of the Fifth Amendment having 'no significant support in the history of the privilege or in the language of the Fifth Amendment,' . . . .") (citation omitted); Orozco v. Texas, 394 U.S. 324, 328 (1969) (White, J., dissenting) ("I continue to believe that the original rule amounted to a 'constitutional straitjacket' on law enforcement which was justified neither by the words or history of the Constitution . . . ."); Michigan v. Tucker, 417 U.S. 433, 460 (1974) (White, J., concurring) ("For the reasons stated in my dissent in that case, I continue to think that *Miranda v. Arizona* was ill-conceived and without warrant in the Constitution.") (citation omitted); United States v. Hale, 422 U.S. 171, 182 (1975) (White, J., concurring) ("I am no more enthusiastic about *Miranda v. Arizona* now than I was when that decision was announced." (citation omitted)); Michigan v. Mosley, 423 U.S. 96, 108 (1975) (White, J., concurring) ("I am no more convinced that *Miranda* was required by the United States Constitution than I was when it was decided.").

59. 446 U.S. 291 (1980). The Court held that a defendant, who had been advised of his right and invoked the right to counsel, was not interrogated in violation of *Miranda* when police officers spoke to each other, in the presence of the defendant, about the missing murder weapon and its proximity to a school for handicapped children. *Id.* at 294-95.

60. The Court's rationale strengthened the *Miranda* holding. In defining interrogation for the

Justice Stewart, wherein the Court expanded the definition of interrogation to include "express questioning" and its "functional equivalent."[61] Of additional importance is the concurring opinion of Chief Justice Burger which stated that he would "neither overrule *Miranda*, disparage it, nor extend it at this late date."[62] The *Innis* decision exemplifies the conservative Burger Court's validation of the *Miranda* doctrine.

Ultimately, the decision penned by Justice White in *Edwards v. Arizona*[63] shows how far he removed himself from his dissent in *Miranda*. In a remarkable reversal, Justice White rejected the Arizona Supreme Court's use of a pure voluntariness standard in assessing the admissibility of a confession.[64] Instead, the Court reaffirmed *Miranda*'s requirement that "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a known right or privilege."[65] The Court then broadened the parameters of *Miranda* in a *per se* rule stating that an accused who has requested

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purposes of *Miranda*, the Court expanded the original holding. The Court "conclude[d] that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or *its functional equivalent*." *Id.* at 300-01 (emphasis added). To clarify this definition, the Court held that any words or actions "that the police should know are reasonably likely to elicit an incriminating response" will be considered an interrogation. *Id.* at 301.

61. *Id.* at 302.

62. *Id.* at 304 (Burger, C.J., concurring).

63. 451 U.S. 477 (1981). In *Edwards*, the petitioner was arrested for burglary, robbery, and murder, and was advised of his rights. He indicated that he was willing to answer questions. *Id.* at 478. The police officers told the petitioner that an accomplice had implicated him in the crimes. The petitioner then told the police that he " 'want[ed] an attorney before making a deal.' " *Id.* at 479. The police ended the interrogation and took the petitioner to the county jail. After spending the night in his holding cell, the petitioner was informed that "he 'had' to talk" with two detectives. *Id.* The detectives, after again informing the petitioner of his *Miranda* rights, played an accomplice's tape-recorded statement implicating the petitioner in the crimes for which he was arrested. *Id.* After listening to the tape, the petitioner stated that he would make a statement, so long as it was not tape-recorded. *Id.* The officers informed the petitioner that a recording was irrelevant, as they could testify in court as to what he said. *Id.* The petitioner then made incriminating statements about the crimes. *Id.* At trial, the petitioner's attorney tried unsuccessfully to suppress the statements. *Id.* at 479-80. The petitioner was convicted of burglary and murder. The Supreme Court reversed the conviction based on a violation of the petitioner's rights guaranteed by the Fifth and Fourteenth Amendments. *Id.* at 480.

64. *Id.* at 482. Justice White reasoned that the Arizona Supreme Court erred when it focused solely on the voluntary nature of the waiver. *Id.* Instead, the trial court should have concerned itself with whether the suspect had knowingly and intelligently yielded the right to counsel. *Id.* at 483. Justice White characterized the Arizona Supreme Court's interpretation of the law as a "misunder[standing of] the requirement for finding a valid waiver of the right to counsel, once invoked." *Id.* at 484. *Compare* Michigan v. Mosley, 423 U.S. 96, 108 (1975) (White, J., concurring) (stating that the Court would adopt a voluntariness standard to determine the validity of a waiver).

65. *Edwards*, 451 U.S. at 482. Later, Justice White stated "an accused . . . is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85.

counsel cannot be subjected to further interrogation until an attorney is "made available to him."[66] With this decision, Justice White's disdain for *Miranda* was silenced by his own words when he said:

> *Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." Our later cases have not abandoned this view. In *Michigan v. Mosley*, the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. In *Fare v. Michael C.*, the Court referred to *Miranda*'s "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the "undisputed right" under *Miranda* to remain silent and to be free of interrogation "until he had consulted with a lawyer." *We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.*[67]

The Court, in an opinion joined by Justice White, further refined *Edwards* when it decided *Arizona v. Roberson*.[68] In *Roberson*, the Court explained that the suspect's invocation of the right to counsel precludes all further police-initiated interrogation on related and unrelated offenses.[69] The Court rejected the distinction between an interrogation

66. *Id.* at 484-85. It should also be noted that Chief Justice Burger opted for the use of the knowing and intelligent waiver standard under Johnson v. Zerbst, 304 U.S. 458 (1938), to measure the waiver of the right to counsel. *Edwards*, 451 U.S. at 488 (Burger, C.J., concurring in the judgment). In addition, Justice Powell, joined by Justice Rehnquist, rejected Justice White's per se approach, but not *Miranda*. *Id.* at 489-90 (Powell, J., concurring in the result). *But see* Moran v. Burbine, 475 U.S. 412 (1986) (holding that failure to inform suspect of his attorney's attempts to reach him did not render the suspect's waiver of *Miranda* rights invalid); Colorado v. Spring, 479 U.S. 564 (1987) (finding that defendant does not have to be informed of the nature of the crimes he will be questioned about to execute a valid waiver).

67. *Edwards*, 451 U.S. 485 (citations omitted) (emphasis added).

68. 486 U.S. 675 (1988). In *Roberson*, the respondent had asserted his right to counsel after being arrested for a burglary. *Id.* at 678. While still in police custody, the respondent was questioned by another police officer concerning a separate burglary. *Id.* During this interrogation, the respondent made an incriminating statement. *Id.* The trial court's decision to suppress the statement was affirmed by the Arizona Court of Appeals. *Id.* at 678-79. The Supreme Court affirmed this decision, rejecting the state's attempts to carve an exception to *Edwards* based on a separate offense theory. *Id.* at 687-88.

69. *Id.* at 684-85. In reaching its decision, the Court distinguished the case from Mosley v. Michigan, 423 U.S. 96 (1975). The Court differentiated asserting the right to remain silent from requesting the aid of counsel. *Roberson*, 486 U.S. at 680-84. The former assertion does not

arising from the original arrest and one arising from a new investigation.[70] Therefore, after *Roberson*, all police-initiated interrogation must cease after a suspect requests counsel.

The Court then recognized the outer limits of *Miranda* and *Edwards* in *Minnick v. Mississippi*.[71] There, a majority of the Court, including Justice White, held that the suspect's right to be free from unwanted police-initiated interrogation continues even after the suspect confers with counsel, and that a suspect who had previously invoked the right to counsel could not be interrogated without his attorney being present.[72] In reaching its decision, the Court relied on the importance that *Miranda* and *Edwards* placed on having counsel present during interrogation.[73] The Court reasoned that, notwithstanding earlier consul-

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inform the police that the suspect is unwilling to proceed without the aid of counsel. *Id.* at 683. Specifically relying on *Mosley*, the Court stated that "a suspect's decision to cut off questioning, *unlike his request for counsel*, does not raise the presumption that he is unable to proceed without a lawyer's advice." *Id.* (emphasis added). The Court then strengthened this distinction by citing Connecticut v. Barrett, 479 U.S. 523 (1987), where the defendant himself distinguished between oral statements that he would make alone, and written statements that he would make only with a lawyer present. *Roberson*, 486 U.S. at 683-84. It was, therefore, a limited request for counsel. With these distinctions in mind, the Court characterized the State of Arizona's argument that Roberson's requests were similarly limited as "flawed both factually and legally." *Id.* at 683. To support this contention, the Court noted that Roberson "stated that 'he wanted a lawyer before answering *any* questions.' " *Id.* (citing police report). The Court also stated that the suspect's need for counsel "does not disappear simply because the police have approached [him] . . . about a separate investigation." *Id.* In addition, the Court precluded the nascent "good faith" exception by stating that the second interrogator's ignorance of the suspect's request for counsel was of no importance. *Id.* at 687-88.

70. *Roberson*, 486 U.S. at 687-88.

71. 498 U.S. 146 (1990). Justice Kennedy, who dissented in *Roberson*, delivered the Court's opinion. The Court stated that the "clear and unequivocal" procedures set forth in *Edwards* and refined in *Roberson* governed this case. *Id.* at 151. The Court reasoned that the initial request for counsel halts all subsequent interrogations without an attorney present. *Id.* at 153. In reaching its decision, the Court noted that this case is illustrative of the continuing need for counsel at all interrogations, as well as the abuses and pressures inherent in custody. *Id.* at 154.

72. *Id.* at 153. *Compare* Ogletree, *supra* note 14, at 1830. In his article, written before the Court's decision in *Minnick*, Professor Ogletree proposed that per se rules be adopted barring the interrogation of criminal suspects without an attorney present. *Id.* Professor Ogletree supported the *Miranda* decision and was critical only of its practical ineffectiveness at informing criminal suspects of their constitutional rights during interrogation. *Id.* at 1827-28. Ogletree's per se rule, however, would have allowed the confession in *Minnick*. *See id.* at 1830. Therefore, the *Minnick* Court's extension of *Miranda*'s protections beyond the position of even this strong supporter of *Miranda* indicates the dramatic shift in the area of Fifth Amendment jurisprudence exhibited by Justice White and the rest of the Court.

73. *Minnick*, 498 U.S. at 150-53. The *Edwards* Court's insistence on the attorney's presence is "not unique," the Court reasoned in *Minnick*, but stems from *Miranda*'s purpose of insuring " 'that statements made in the government-established atmosphere are not the product of compulsion.' " *Id.* at 152 (quoting Miranda v. Arizona, 384 U.S. 436, 466 (1966)). The majority also noted that the lawyer's absence deprived the petitioner of crucial advice regarding the admissibility of any statements he made. Specifically, the Court stated:

> [o]ne plausible interpretation of the record is that petitioner thought he could keep

tations between the suspect and his attorney, the suspect's will "can be swiftly overcome by the secret interrogation process," when the attorney is not present throughout the interrogation.[74] Therefore, after *Edwards*, *Roberson*, and *Minnick*, a suspect who requests an attorney cannot be subsequently interrogated outside of his attorney's presence, regardless of whether the interrogation concerns the crime for which the suspect was initially arrested or some other investigation.[75]

The procedures for in-custody interrogation were also clarified in

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> his admissions out of evidence by refusing to sign a formal waiver of rights. If the authorities had complied with Minnick's request to have counsel present during interrogation, the attorney could have corrected Minnick's misunderstanding, or indeed counseled him that he need not make a statement at all.

Minnick, 498 U.S. at 154. *Compare* Patterson v. Illinois, 487 U.S. 285 (1988).

74. *Minnick*, 498 U.S. at 154 (citing Miranda v. Arizona, 384 U.S. 436, 470 (1966)).

75. These decisions did not affect police interrogation of a suspect who did not request counsel. In Moran v. Burbine, 475 U.S. 412 (1986), for example, the Court held that the police do not have to inform a suspect of his attorney's attempts to reach him before interrogation. *Id.* at 424. In *Burbine*, the respondent was arrested for a burglary. The respondent's sister contacted the public defender who agreed to act as her brother's attorney. *Id.* at 416-17. The attorney phoned the police station and received assurances from an officer that the police "were through with [Burbine] for the night." *Id.* at 417. While the respondent was in custody, police officers from another city began questioning him about an unrelated murder. *Id.* The respondent signed several waivers and confessed to the murder after being informed of his rights to an attorney and to remain silent. *Id.* at 417-18. In deciding to allow the confession, the majority, including Justice White, placed great emphasis on the fact that the respondent did not request an attorney and was unaware of the fact that his sister had arranged for his representation. *See id.* at 422-24. Similarly, in Colorado v. Spring, 479 U.S. 564 (1987), a majority of the Court, which included Justice White, found that the police are not required to keep a suspect informed of important developments or to tell him what crimes they wish to interrogate him about for a waiver to be valid. *Id.* at 574. In *Spring*, the respondent waived his right to remain silent in response to questioning about the illegal transportation of firearms. While answering questions concerning this offense, however, the respondent made incriminating statements about an unrelated murder. *Id.* at 567. The Court found that the failure by the police to supply the respondent with new information did not invalidate his waiver. *Id.* at 577.

On the same day the Court decided *Spring*, Justice White joined the majority in Connecticut v. Barrett, 479 U.S. 523 (1987). In *Barrett*, the Court found that an accused could invoke the right to counsel for written statements without invoking the same right for oral statements. *Id.* at 529. The Court found that the respondent invoked the right to an attorney's presence for any written statements by refusing to give any written accounts without his attorney present. *Id.* The Court also held that the respondent validly waived his right to remain silent when he said that he "had 'no problem' in talking about the incident." *Id.* at 525, 529-30. To reach this conclusion, the Court distinguished the right to remain silent from the right to refuse to give a written statement in the absence of an attorney. *Id.* at 528-30. Therefore, by exercising the latter right only, the respondent's oral statements were not protected by the right to counsel. *Id.* at 528-30. *Compare* Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (interpreting a suspect's refusal to sign a waiver as a belief that no oral statements could be used against him at trial).

In contrast, the Court in McNeil v. Wisconsin, 111 S. Ct. 2204 (1991), declined to expand this principle by refusing to equate a Sixth Amendment invocation as a preclusion of Fifth Amendment interrogation. *Id.* at 2209-11. Justice Scalia, for the Court, stated that "[t]he Sixth Amendment right . . . is offense specific. It cannot be invoked once for all future prosecutions . . . ." *Id.* at 2207. *See infra* notes 112-122 and accompanying text for a fuller discussion of *McNeil*.

Berkemer v. McCarty.[76] In a decision joined by Justice White, the Court reaffirmed *Miranda*'s "central principle" by stating that a suspect's unwarned statements could not be used against him.[77] In its decision, the Court rejected attempts to create a "misdemeanor exception" to *Miranda*'s protections.[78] The Court indicated that the petitioner's proposed set of rules and exceptions would render the *Miranda* rule less than clear.[79] In addition, the Court noted that the police were well-accustomed to giving the *Miranda* warnings.[80] As a result, *Miranda* warnings would not "significantly hamper the efforts of the police to investigate crimes."[81] The Court also addressed the status, for *Miranda* purposes, of a traffic stop.[82] The Court rejected the respondent's position advocating that all traffic stops should be treated as arrests for *Miranda* purposes.[83] The Court did state, however, that a traffic stop would be transformed into an arrest with its accompanying warnings

76. 468 U.S. 420 (1983). The respondent was stopped by a highway patrolman for driving erratically. The patrolman made a decision to arrest the respondent almost immediately after the respondent exited his car in a disoriented fashion. *Id.* at 423. After the respondent failed a "balancing test," the patrolman asked him if he had used any intoxicants. *Id.* The respondent stated that he had smoked marijuana and drank beer that night. *Id.* The patrolman then arrested the respondent and conveyed him to the police station. *Id.* While at the station, a blood test failed to show any alcohol in the respondent's system. *Id.* The respondent, in answer to the patrolman's question, stated that he was "barely" under the influence of alcohol. *Id.* at 424. The respondent was never informed of his right to remain silent or his right to an attorney at any time during these occurrences. *Id.* The respondent was convicted of operating a motor vehicle while intoxicated and later granted habeas corpus relief. *Id.* at 424-25. The Court affirmed the decision to grant relief based on the privilege against self-incrimination. *Id.* at 434-35.

77. *Id.* at 429.

78. *Id.* at 430. In reaching this decision, the Court noted the difficulty of determining the precise nature of the ultimate charge at the time of arrest. *Id.* In addition, the Court pointed to the fact that the exact offense may well depend on facts unknown to the police at the time of the initial stop. *Id.* at 430-31.

79. *Id.* at 431. The Court briefly noted the foreseeable problems to the petitioner's proposed system. The escalation of investigations, the dividing line between misdemeanors and felonies, and the litigation that would follow to determine these points were some of the Court's concerns. *Id.* at 431-32.

80. *Id.* at 434.

81. *Id.*

82. *Id.* at 435-40.

83. *Berkemer*, 468 U.S. at 437. The Court rejected the respondent's argument that *Miranda* mandated that the police give warnings whenever they issue a citation for a traffic offense because a traffic stop "deprive[s a person] of his freedom of action in [a] significant way." *Id.* at 435 (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966)). To support this position, the Court cited the brevity that accompanies the average traffic stop, as well as the more relaxed circumstances in which such events occur. *Id.* at 437-38. The Court did note that an "aura of authority" accompanies the police officer, and that this may "exert some pressure on the detainee to respond to questions." *Id.* at 438. The Court reasoned that these pressures are offset by the public nature of the typical traffic stop. *Id.* at 438. As such, the Court analogized a traffic stop to a "*Terry* stop," see Terry v. Ohio, 392 U.S. 1 (1968), which allows a police officer to detain a person without probable cause. *Berkemer*, 468 U.S. at 439. Therefore, as in *Terry*, there is no requirement for *Miranda* warnings. *Id.* at 440.

when the motorist is actually, or is in effect, placed "in custody".[84]

The Court then addressed the role of the Fifth Amendment privilege against self-incrimination in the context of booking procedure in *Pennsylvania v. Muniz*.[85] In a divided opinion,[86] the Court determined that an accused who is in custody and is asked to respond to questions aimed at eliciting "an express or implied assertion of fact or belief . . . confronts the 'trilemma' of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component."[87] As a result, responses to such questions are inadmissible.[88] Justice White joined Chief Justice Rehnquist's dissent, which focused almost exclusively on the majority's characterization of the booking

84. *Berkemer*, 468 U.S. at 440.

85. 496 U.S. 582 (1990). In this case, a drunk driver failed several field sobriety tests and informed the officer that he had been drinking. *Id.* at 585. He was not advised of his rights under *Miranda*. *Id.* at 585-86. The respondent was asked several questions during the procedure, including his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. *Id.* In the course of the booking process, the respondent made several incriminating statements and actions. While attempting sobriety tests, the respondent also made several incriminating statements. *Id.* The booking interview and the sobriety tests were videotaped and later admitted at trial. *Id.* at 587. The trial court overruled the respondent's motion to suppress the video and audio evidence, and later refused to grant a new trial based on the failure to suppress such evidence. *Id.* This decision was reversed by the Superior Court of Pennsylvania. *Id.* at 588. The Supreme Court vacated and remanded the case. *Id.* at 606.

86. The Court was divided on several aspects of this case. A majority of the Court, including Justice White, agreed that the respondent's slurred responses to questions were properly admitted. *Id.* at 592. In reaching this decision, the majority differentiated between testimonial and physical evidence. Testimonial responses could not be compelled under *Miranda*. *Id.* at 591-92. A different majority (Justices Brennan, Marshall, O'Connor, Scalia and Kennedy) agreed that the response to the question, "what was the date on your sixth birthday?" was testimonial in nature and, therefore, inadmissible. *Id.* at 600. The majority reasoned that the response to this question did not involve an allowable inquiry into the suspect's physical state, but rather concerned personal knowledge of fact or belief. *Id.* at 598-99. Therefore, the suspect was impermissibly asked to incriminate himself. *Id.* at 599. A majority of the Court also agreed that the responses to the booking questions were admissible, although for different reasons. *Id.* at 601-02, 606 (opinion of C.J. Rehnquist) (joined by Justice White). In addition, a majority of the Court, again including Justice White, agreed that the respondent's statements made during the sobriety tests were admissible, as the statements were not made in response to interrogation, but were, instead, voluntary. *Id.* at 605.

87. *Id.* at 597 (footnote omitted). The Court clarified this example by noting the difference between compelling physical evidence, such as blood samples or handwriting exemplars, and compelling the admission of culpability. *Id.* at 598. The Court stated that "the definition of 'testimonial' evidence . . . must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the 'cruel trilemma.' " *Id.* at 597. *See generally* Peter Westen & Stewart Mandell, *To Talk, to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response"*, 19 AM. CRIM. L. REV. 521 (1982) (discussing the "cruel trilemma" and the efforts of states to place criminal suspects in the position of having to choose between being punished for remaining silent, committing perjury or incriminating themselves).

88. *Muniz*, 496 U.S. at 600.

questions.[89] The dissent would have enlarged the "booking exception" recognized by the majority.[90]

Additional questions concerning interrogation, specifically the adequacy of warnings and the absence of warnings were examined in *Duckworth v. Eagan*[91] and *Illinois v. Perkins*,[92] respectively. Justice White joined the majority's opinion in *Duckworth*, which reaffirmed *Miranda*, yet found that the Constitution does not mandate rigid adherence to the exact wording of the warnings.[93] While clinging to the language of *Miranda*,[94] the Court held that the warnings given in *Duckworth* "touched all of the bases required."[95] The Court noted that the

> police told respondent that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had 'this right to the advice and presence of a lawyer even if [he could] not afford to hire one,' and that he had the 'right to stop answering at

89. *Id.* at 606 (Rehnquist, C.J., concurring in part, dissenting in part). The Chief Justice noted that he agreed with the majority's conclusion that the seven "booking" questions were properly admitted, albeit for different reasons. *Id.* Nevertheless, he could not accept the majority's rationale that the response to the sixth birthday question implicated *Miranda* concerns. *Id.* The Chief Justice compared the response to the question as more akin to complying with requests for handwriting samples or voice comparison. *Id.* at 607. He characterized it as a "simple mathematical exercise." *Id.* Therefore, he saw "no reason why [the police could] not examine the functioning of Muniz's mental processes" to determine if he was sober. *Id.*

90. *Id.* at 608.

91. 492 U.S. 195 (1989). In *Duckworth*, the crucial issue was whether the police adequately warned the suspect. The warnings did not follow the typical *Miranda* wording and instead informed the respondent of his right to have an attorney present during questioning, his right to remain silent and his right to have an attorney appointed; the divergence occurred when the respondent was informed that an attorney would be appointed for him, "if and when [he went] to court." *Id.* at 197-98. After receiving these warnings, the respondent signed a waiver and confessed to the murder. *Id.* at 198-99. The confession was admitted at trial over the respondent's objection, and he was convicted. *Id.* The respondent was later granted habeas corpus relief. *Id.* at 200. The Court, per Chief Justice Rehnquist, rejected the respondent's argument that the warnings were ambiguous and reversed the decision granting habeas corpus relief. *Id.* at 205.

92. 496 U.S. 292 (1990). *See infra* notes 98-104 and accompanying text for a discussion of *Perkins*.

93. 492 U.S. at 200-01. The Court noted that *Miranda* does not require a "talismanic" recitation of the warnings. *Id.* at 202-03. In attempting to justify its decision, the Court noted that the exact wording of the *Miranda* warnings is not always available to the police. Furthermore, elaboration may be required in some cases. *Id.* at 203. The modified warnings were also vindicated as anticipating a suspect's question about the availability of an attorney. *Id.* at 204. Finally, the Court stated that *Miranda* merely requires that the suspect be informed of his right to an attorney; it does not require the immediate production of a lawyer. *Id.*

94. Chief Justice Rehnquist relied on the following phrase from *Miranda*: "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by the defendant." *Id.* at 202 (quoting Miranda v. Arizona, 384 U.S. 436, 476 (1966)).

95. *Id.* at 203. *See also* California v. Prysock, 453 U.S. 355 (1981) (per curiam) (holding that the specific order of *Miranda* warnings is irrelevant for purposes of waiver).

any time until [he] talked to a lawyer.'[96]

The Court reasoned that these warnings fully apprised the respondent of his rights.[97]

In *Perkins*, Justice White joined the majority's opinion that limited the necessity for *Miranda* warnings to instances where the suspect knows that he is talking to a law enforcement officer.[98] Though again reaffirming the validity of *Miranda*,[99] the Court stated that *Miranda* must be "enforced strictly," but only to prevent the dangers against which it protects.[100] According to the Court, those concerns were not implicated here.[101] The hazards of coercion and compulsion are not present when the conversation takes place between a suspect and a presumed cellmate.[102] Furthermore, *Miranda* does not protect a suspect

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96. *Duckworth*, 492 U.S. at 203. The exact warnings given to the respondent and reproduced in the Court's opinion were as follows:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*

Id. at 198.

97. *Id.* at 205. The Court offered several reasons for this position. First, the Court noted that the warnings "accurately described the procedure for the appointment of counsel in Indiana." *Id.* at 204. Indiana law provides for the appointment of counsel at the defendant's initial appearance in court, and charges must be filed at or before this appearance. *Id.* The Court further reasoned that the "if and when" language of the warnings "simply anticipates" a suspect's question of when he will receive counsel. *Id.* Second, the Court noted that *Miranda* does not mandate that a "station house lawyer" be present to advise a suspect of his rights. *Id.* Instead, it proscribes questioning of a suspect without a valid waiver of the right to counsel. *Id.* The Court also distinguished its decision in California v. Prysock, 453 U.S. 355 (1981), which "suggested that *Miranda* warnings would not be sufficient 'if . . . the right to appointed counsel was linked [to a] future point in time *after* the police interrogation.' " *Duckworth*, 492 U.S. at 204. According to the Court, the key distinction was that the police in *Prysock* did not inform the suspect of his right to have counsel *present* during questioning. *Id.* at 205.

98. Illinois v. Perkins, 496 U.S. 292 (1990). In *Perkins*, the respondent made incriminating statements concerning a murder while talking with an undercover police agent in a county jail. The agent "suggested" to the respondent and another inmate "that the three of them escape." *Id.* at 295. After stating that "he would be responsible for any murder that occurred [during the escape, the agent] asked respondent if he had ever 'done' anybody." *Id.* The respondent then made his incriminating statements to the agent. *Id.* At trial and on review, the respondent's motion to suppress the jailhouse confession was successful. *Id.* The Court, in an opinion written by Justice Kennedy, reversed the suppression. *Id.* at 300.

99. *Id.* at 296. The Court reiterated that the holding in *Miranda* prevents the admission of custodial statements without a prior warning, because of the "inherently compelling pressures" of custodial interrogation. *Id.*

100. *Id.* at 296 (citing Berkemer v. McCarty, 468 U.S. 420, 437 (1984)).

101. *Id.* at 297-98. The Court stated that "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*." *Id.* at 296. The Court reasoned that the "essential ingredients" of compulsion are missing. *Id.*

102. *Id.* at 296-97. The Court reasoned that the "coercive atmosphere is lacking" when a

from "strategic deception."[103] The Court could find no violation of the Fifth Amendment and held that the statement was voluntary.[104]

The *Perkins* decision, however, must be read in conjunction with *Arizona v. Fulminante*,[105] which also dealt with the use of an undercover informant in a jail setting. In the majority opinion, Justice White, relying on the totality of the circumstances test, established that the respondent's confession was coerced, and that its admission prejudiced his case.[106] Justice White could not muster the votes to hold that "the harmless-error rule is inapplicable to erroneously admitted coerced confessions."[107] Writing for himself and Justices Marshall, Blackmun, and

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suspect converses with an assumed equal. *Id.* at 296. The Court also stated that the fear of reprisal or hope of lenient treatment is also missing in such circumstances. *Id.* at 296-97.

103. *Id.* at 297. Here, the Court relied on the language of *Miranda* that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Id.* (citing Miranda v. Arizona, 384 U.S. 436, 478 (1966)). The Court also stated that tricks do not rise to the level of compulsion. *Id.* In addition, the Court noted that the respondent "spoke at his own peril" when he "boast[ed] about [his] criminal activities." *Id.* at 298.

104. *Id.* at 300. The Court also distinguished several Sixth Amendment cases from the case at hand, namely, Massiah v. United States, 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264 (1980); and Maine v. Moulton, 474 U.S. 159 (1985). *Perkins*, 496 U.S. at 299. The Court stated that those cases dealt with circumvention of the Sixth Amendment right to counsel through the use of undercover agents after the right to counsel had attached. *Perkins*, 496 U.S. at 299. Here, no charges were filed concerning the crime about which the respondent made incriminating statements. Therefore, the Sixth Amendment cases did not apply. *Id.*

105. 111 S. Ct. 1246 (1991). In *Fulminante*, the respondent was incarcerated in New York when he befriended an F.B.I. informant posing as an organized crime member. *Id.* at 1250. The informant told the respondent that the prison population knew of the respondent's involvement with an unrelated murder of his step-daughter in Arizona. *Id.* As a result, the respondent began to experience a rough time from the other prisoners. *Id.* The informant offered to help the respondent in exchange for information concerning the murder. *Id.* After repeated denials, the respondent confessed to the murder. *Id.* Shortly after his release from prison, the respondent was indicted for the murder of his step-daughter in Arizona. Before the trial, the respondent tried to suppress the confession he made to the informant and the informant's wife. *Id.* The trial judge denied the motion and allowed the use of the confessions and the respondent was convicted. *Id.* at 1251. The conviction was reversed by the Arizona Supreme Court. *Id.* The Court, in an opinion by Justice White, found that the confession was coerced and that its admission required reversal. *Id.* at 1251-61.

106. The Court reasoned that the "credible threat" to the respondent's safety were sufficient to show coercion. *Id.* at 1253. When determining the effect that the confession had on the trial, the Court noted that "[a] confession is like no other evidence." *Id.* at 1257. The Court further posited that a full confession may be the sole deciding piece of evidence in a criminal case. *Id.* The Court then examined the facts in the case at hand. The Court noted that the confessions were the key pieces of evidence, without which the case would not have reached the trial level. *Id.* at 1258. In addition, the two confessions relied on each other for mutual support; without the one, the other would surely fall. *Id.* at 1259. Finally, the confessions led to the introduction of highly prejudicial evidence with little probative value. *Id.* at 1259-60. The Court also noted that the confessions played a role in the sentencing hearing. *Id.* at 1260.

107. *See id.* at 1253 (White, J., dissenting in part). Chief Justice Rehnquist spoke for the Court on the issue of the proper standard in this case. *Fulminante*, 111 S. Ct. at 1263 (opinion of Rehnquist, C.J.). He noted that in cases involving "trial errors," the harmless error standard is properly utilized in conjunction with the other evidence presented. *Id.* at 1264. Nonetheless, he

Stevens, Justice White castigated the Court for using a harmless error standard in reviewing a trial where a coerced confession had been admitted as evidence.[108]

The *Fulminante* decision, although decided on due process grounds, signifies the sweeping changes in Justice White's position on the protections guaranteed by the Fifth Amendment. For example, in the dissenting portion of his opinion, Justice White clearly abandoned his earlier view that the Fifth Amendment encompassed only the right to be free from compelled judicial admissions.[109] The dissent also noted the distinction between a violation of due process and a violation of the Sixth Amendment.[110] Justice White's abandonment of the "search for

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distinguished the use of a coerced confession from the right to counsel and the right to trial before an impartial judge. The basis for distinguishing these rights, which were previously treated alike, lies in the fact that the attorney and the judge are part of the "structural . . . framework" of a trial, rather than a mere component of the trial process itself. *Id.* at 1265. To bolster this assertion, Chief Justice Rehnquist pointed to the ease with which the impact of a coerced confession on the trial can be gauged against the other evidence. *Id.* The Chief Justice did admit, however, that the impact of a coerced confession may be more "dramatic" than other erroneously admitted evidence. *Id.* at 1266. Such an occurrence could be readily corrected by a reviewing court, in the Chief Justice's opinion. *Id.*

108. *Fulminante*, 111 S. Ct. at 1253 (White, J., dissenting in part). In his dissent, Justice White cited the tradition, memorialized in several cases, of treating coerced confessions as grounds for an automatic reversal. *Id.* He then strongly questioned the majority's attempt to distinguish the coerced confession from other reversible errors by labeling it a harmless trial error. *Id.* at 1254-55. He dismissed the distinction as illusory in light of precedent. Justice White also pointed out the inherent difficulty facing a reviewing court in assessing the weight a particular jury may have given to the confession. *Id.* at 1255. In addition, Justice White noted that the use of coerced confessions "may distort the truth-seeking function of the trial." *Id. Compare* Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting). Furthermore, he found the admission of a coerced confession to be "inconsistent" with an accusatorial system of justice. *Id.* at 1256. Finally, he proclaimed that the use of a coerced confession "render[s] a trial fundamentally unfair." *Id.* at 1257 (citing Rose v. Clark, 478 U.S. 570, 578 n.6 (1986) (Stevens, J., concurring in judgment)).

109. *Id.* at 1253-57. Justice White wrote that the majority "overrule[d a] vast body of precedent without a word and in so doing dislodge[d] one of the fundamental tenets of our criminal justice system" by applying a harmless error standard to coerced confessions. *Id.* at 1254. He justified this position by stating that a "coerced confession is fundamentally different from other types of erroneously admitted evidence." *Id.* The logic and tone of this dissent mirrors his dissent in Miranda v. Arizona, 384 U.S. 436, 527 (1966) (White, J., dissenting), yet totally departs from his position there that the Fifth Amendment concerned itself only with compelled judicial admissions.

This new outlook also influenced the majority opinion Justice White wrote concerning the admissibility of the confession under the harmless error standard. He stated that a "confession is like no other evidence." *Fulminante*, 111 S. Ct. at 1257. In addition, when analyzing Fulminante's confession, Justice White noted that a full confession revealing motive and means may "tempt the jury to rely upon that evidence alone in reaching its decision." *Id.* at 1258. He also noted that in *Fulminante*, the circumstances of the confession demonstrated its lack of absolute reliability. *Id.* at 1258.

110. *Fulminante*, 111 S. Ct. at 1256. Justice White first noted that "the majority overlooks the obvious" in its characterization that no "meaningful distinction" exists between a due process violation and a Sixth Amendment violation. *Id.* The key to differentiating the two lies in the

truth" rationale denotes another critical aspect of *Fulminante*.[111] Finally, *Fulminante* demonstrates the level of importance Justice White accords to due process considerations in the law of confessions.

Justice White's conversion to the *Miranda* doctrine is firmly embedded in Fifth Amendment jurisprudence. In *McNeil v. Wisconsin*[112] he joined the majority opinion, written by Justice Scalia,[113] which distinguished the right to counsel protected by the Sixth Amendment

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presence or absence of coercion. None of the cases relied on by the majority involved coerced confessions as was the case in *Fulminante*. As Justice White stated:

> [s]ome coerced confessions may be untrustworthy. Consequently, admission of coerced confessions may distort the truth-seeking function of the trial upon which the majority focuses. More importantly, however, the use of coerced confessions, "whether true or false," is forbidden "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—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth[.]" This reflects the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," as well as "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves[.]" Thus, permitting a coerced confession to be part of the evidence on which a jury is free to base its verdict of guilty is inconsistent with the thesis that ours is not an inquisitorial system of criminal justice.

Id. (citations omitted).

111. *Id.* at 1257. Justice White signaled his departure from this rationale in the dissent when he stated that "the admission of coerced confessions may distort the truth-seeking function of the trial upon which the *majority* focuses." *Id.* at 1256 (emphasis added). Later, Justice White devotes the following paragraph to the "search for truth":

> The search for truth is indeed central to our system of justice, but "certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial." The right of a defendant not to have his coerced confession used against him is among those rights, for using a coerced confession "abort[s] the basic trial process" and "render[s] a trial fundamentally unfair."

Id. at 1257 (citations omitted).

112. 111 S. Ct. 2204 (1991). In *McNeil*, the petitioner was arrested in Nebraska on an outstanding warrant for armed robbery in Wisconsin. *Id.* at 2206. After his arrest, the petitioner met with two deputy sheriffs from Milwaukee County to transport him back to Wisconsin. *Id.* The deputies informed the petitioner of his rights under *Miranda*, and the petitioner refused to answer any questions concerning the crime for which he was arrested. *Id.* The petitioner did not, however, request an attorney. *Id.* At a preliminary examination, an attorney from the Public Defender's office represented the petitioner. *Id.* While the petitioner was in jail, a detective questioned the petitioner about a new series of crimes distinct from the armed robbery for which he was originally arrested: murder, attempted murder, and armed burglary. *Id.* During the first interview, after waiving his rights under *Miranda*, the petitioner denied participating in the crimes. *Id.* The detective returned with more officers to conduct a second interview two days later. *Id.* After again waiving his rights under *Miranda*, the petitioner confessed to involvement in these crimes. *Id.* at 2206-07. At the trial for the second series of crimes, the petitioner unsuccessfully sought to suppress these statements. *Id.* at 2207.

from the right to have an attorney present during questioning protected by the Fifth Amendment.[114] The Court began its opinion by noting that the Sixth Amendment right is "offense-specific."[115] The Sixth Amendment guarantees the accused the expertise of an attorney in adverse proceedings with the government after the government has committed itself to prosecution.[116] In contrast, the accused invokes the right to an attorney under the Fifth Amendment to utilize the attorney's expertise when responding to police questioning.[117] In short, the Fifth Amendment shields a suspect from police interrogation.[118] The Court found, however, that the invocation of one right does not invoke the other.[119] To properly invoke the *Miranda* rights, a suspect must indicate that he desires the aid of an attorney during questioning.[120] Merely accepting the appointment of counsel at a preliminary examination does not activate the *Miranda* protections.[121] After explaining the distinctions between the two rights, the Court found that an invocation of the right to

113. In addition to Justice White, Justices Souter, Kennedy, O'Connor, and Chief Justice Rehnquist joined the opinion. *Id.* at 2206.

114. *Id.* at 2209. Note that this decision departed from Justice Scalia's stance on Fifth Amendment issues in the context of confessions.

115. *Id.* at 2207. Justice Scalia noted that the Sixth Amendment right to counsel "cannot be invoked once for all future prosecutions." *Id.* In *McNeil*, the petitioner made his inculpatory statements before the Sixth Amendment right to counsel attached for the crimes to which he confessed. As such, the Court reasoned, "that right poses no bar to the admission of the statements in this case." *Id.* at 2208.

116. *Id.* at 2208-09.

117. *Id.* at 2208. The Court noted that the prophylaxis had two layers, the protections established in *Miranda* and the additional safeguards set forth in *Edwards* and *Minnick*. *Id.* The Court further noted that the guarantees of the *Edwards* rule are "*not* offense specific." *Id.* In fact, a suspect who has invoked the right to counsel under *Miranda* may not be approached with any additional questions until his attorney is present. *Id.*

118. *Id.* at 2208. The Court stated that the guarantees of the *Miranda* line of cases preserve the suspect's decision "to deal with the police only through counsel." *Id.* at 2209. Justice Scalia then noted that the rights guaranteed by *Miranda* and its progeny are "in one respect narrower . . . and in another respect broader" than the rights protected by the Sixth Amendment. *Id.* He continued by stating that "invok[ing] the Sixth Amendment interest is, as a matter of *fact, not* to invoke the *Miranda-Edwards* interest." *Id.*

119. *Id.* at 2209.

120. *Id.* Justice Scalia stated that the invocation of the right to counsel guaranteed by *Miranda* and *Edwards* "requires at a minimum, some statement that can reasonably be construed to be [sic] expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." *Id.* at 2209. Here, the Court could not equate the request for an attorney at a bail hearing with a request for an attorney to act as an intermediary between the suspect and the police as *Miranda* allows. *Id.*

121. *Id.* at 2209-10. In reaching this conclusion, the Court relied on its holding and reasoning in Michigan v. Jackson, 475 U.S. 625 (1986). The Court noted that *Jackson* held that any statements made as a result of police-initiated interrogation after the Sixth Amendment right to counsel attaches are inadmissible, even if the suspect attempts to waive his rights. *Id.* at 2209. The critical language of *Jackson*, however, was its rejection of the notion that *Miranda* rights and Sixth Amendment rights are "equivalent." *Id.* at 2209-10.

counsel under the Sixth Amendment does not invoke it under the Fifth Amendment.[122]

Just prior to his retirement, Justice White further distanced himself from his original opposition to *Miranda* in two habeas corpus cases decided on the same day, *Brecht v. Abrahamson*[123] and *Withrow v. Williams*.[124] In *Brecht*, the Court applied a substantial and injurious effect test to the use of a defendant's post-*Miranda* silence for impeachment purposes.[125] The Court found it "entirely proper—and probative—for the State to impeach" the criminal defendant's trial testimony with his post-*Miranda* silence.[126] Following this reasoning, the Court held that the use of the petitioner's post-*Miranda* silence did not prejudice the defense.[127] In his dissent, Justice White criticized the majority's adop-

122. *Id.* at 2209-10. *See also* Colorado v. Connelly, 479 U.S. 157 (1986) (holding that the state could show by a preponderance of evidence that a mentally ill person could validly waive *Miranda* rights, and that the essence of a valid waiver is the absence of police coercion, in an opinion joined by Justice White); Buchanan v. Kentucky, 483 U.S. 402 (1987) (holding that the use of psychiatric testimony about an interview held in the absence of counsel did not violate the Fifth Amendment when used to rebut a mental disturbance defense, in an opinion joined by Justice White). *But see* Wainwright v. Greenfield, 474 U.S. 284 (1986) (holding that the use of a defendant's post-*Miranda* silence to prove his sanity violated his right to due process, in an opinion joined by Justice White).

123. 113 S. Ct. 1710 (1993). In *Brecht*, the petitioner sought habeas corpus relief following his conviction for murder. His claim was based on the use of his post-*Miranda* silence for impeachment purposes. *Id.* at 1713-14. The petitioner argued that the Court's ruling in Doyle v. Ohio, 426 U.S. 610 (1976), entitled him to habeas corpus relief based on a violation of due process. The Court rejected this position and adopted a standard requiring a showing that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 1714 (citing Kotteakos v. United States, 328 U.S. 750 (1946)).

124. 113 S. Ct. 1745 (1993).

125. *Brecht*, 113 S. Ct. at 1714. In reaching this decision, the Court classified the use of post-*Miranda* silence as a trial error. *Id.* at 1717. The Court then contrasted the different standards of review for collateral review and for direct review. *Id.* at 1720. With this in mind, the Court adopted a "less onerous" standard for collateral review in cases of a *Doyle* violation. *Id.* at 1722. The standard it adopted was the "substantial and injurious effect" test. *Id.* To meet this burden, the habeas petitioner must establish that a trial error caused "actual prejudice" at his trial. *Id.* The Court then found that the use of the petitioner's post-*Miranda* silence was harmless in light of the other evidence presented at trial. *Id.*

126. *Id.* at 1716. The Court noted that it held in *Doyle* that the use of a defendant's silence for impeachment purposes "violate[s] the Due Process clause of the Fourteenth Amendment." *Id.* at 1716 (citing *Doyle*, 426 U.S. at 619). The rationale for this rule rests on principles of fairness and the "implicit assurance" of the *Miranda* warnings. *Id.* As a result, the defendant's silence when no warnings are given, or before they are given, is "probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." *Id.* The Court found that this case exemplified the concerns of *Doyle* and its progeny. *Id.*

Any violation of the protections granted under *Doyle* and its progeny was classified as a "trial error" by the Court. The Court reasoned that the harm that occurred as a result of wrongfully admitting evidence in violation of *Doyle* could be measured against the remaining evidence to determine the intensity of its negative effect. The appropriate standard in such a case is whether the "trial error" was "harmless-beyond-a-reasonable-doubt." *Id.* at 1717.

127. *Id.* at 1722. To support this conclusion, the Court cited the infrequent use of the

tion of divergent standards for direct and collateral review of constitutional claims.[128] He accused the Court of adopting a standard for collateral review that renders most constitutional errors unreviewable.[129] In his view, the Court transformed the area of habeas corpus into a "confused patchwork."[130]

In *Withrow*, five members of the Court, including Justice White, rebuffed attempts to limit the use of habeas corpus in claims based on *Miranda*.[131] The Court rejected the notion that *Miranda*'s status as a prophylactic rule renders it unreviewable on petition for a writ of habeas corpus.[132] In addition, the Court analyzed the rationale of *Miranda* and the application of the Fifth Amendment privilege to the states through

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petitioner's silence, the permissible use of the petitioner's pre-*Miranda* silence, as well as the autopsy report, all of which refuted the petitioner's story. *Id.* The Court also looked at evidence of the petitioner's motive to commit the crime and the presence of a second bullet in the murder weapon, which suggested to the Court that the weapon was not accidently discharged, as the defense contended. Therefore, the Court concluded the use of the petitioner's post-*Miranda* silence "did not 'substantially influence' the jury's verdict." *Id.*

128. *Id.* at 1725 (White, J., dissenting). Justice White characterized the majority's disposition of the case as "illogical." *Id.* To support this proposition, he pointed out the error in allowing the violation of a constitutional right simply because it appears on collateral review. *Id.* at 1726. He also argued that claims based on a violation of the exclusionary rule were the only cases treated with a different standard on habeas corpus, until this case. *Id.* (citing Stone v. Powell, 428 U.S. 465 (1976)). Justice White then discussed the adverse consequences of the Court's decision. Since the Court has classified most constitutional errors as trial errors, use of the standard set forth in Chapman v. California, 386 U.S. 18 (1967), will now be drastically reduced. *Id.* at 1727. The effect is that a state court's determination that a constitutional error was harmless is now "unreviewable." *Id.* Thus, White stated that this result is "at odds with the role Congress has ascribed to habeas review." *Id.*

129. *Brecht*, 113 S. Ct. at 1727 (White, J., dissenting).

130. *Id.* at 1728.

131. Withrow v. Williams, 113 S. Ct. 1745 (1993). In *Withrow*, the respondent was questioned by two police officers about a double murder. *Id.* at 1748. The respondent at first denied any knowledge of the crimes, but later began to reveal incriminating details. *Id.* The officers assured the respondent that they were concerned only with the identity of the person who had actually killed the victims. *Id.* After conferring, the officers decided to deliberately forego giving the respondent his *Miranda* warnings. *Id.* When the respondent persisted in his denial of any involvement, one of the officers threatened the respondent with incarceration. *Id.* The respondent then made several incriminating statements, after which the officers informed him of his rights under *Miranda*. *Id.* at 1749. The respondent waived those rights and made several more incriminating statements. *Id.* The trial court suppressed two statements, but allowed the third statement to be used at trial. After his conviction for murder, the respondent received habeas corpus relief. *Id.* The Court affirmed in part, reversed in part, and remanded for further proceedings. *Id.* at 1756.

132. *Id.* at 1752. In reaching this decision, the Court examined the differences between the rights protected by the exclusionary rule and *Miranda*. *Id.* at 1750-55. The Court noted that *Miranda* protects a fundamental trial right. In addition, the *Miranda* rule serves to protect the trial process from the use of unreliable statements. *Id.* at 1753. The Court also analogized *Miranda*'s protections to several other key constitutional issues that have retained their viability on collateral review. For example, the Court likened *Miranda* to a due process claim of insufficient evidence; an equal protection claim based on racial discrimination in jury selection; and a Sixth Amendment claim of ineffective assistance of counsel. *Id.* at 1750-51. As a result, the Court rejected the

Malloy.[133] The Court distinguished the rights protected by *Miranda* from those protected by *Mapp v. Ohio*,[134] by noting that the former safeguards "a fundamental trial right" while the exclusionary rule serves as a deterrent to prevent constitutional violations.[135] After acknowledging that the privilege against self-incrimination "embodies 'principles of humanity and civil liberty[,]' " the Court could find no significant benefit in banning habeas corpus suits based on the *Miranda* decision.[136] In her opinion, dissenting in part and concurring in part, Justice O'Connor could find no rationale to support the Court's decision.[137] To bolster her argument, she relied heavily on Justice White's earlier pronouncements on *Miranda*. Referring to Justice White's statements that confessions "aid in the pursuit of truth,"[138] that confessions "when corroborated . . . have the highest reliability,"[139] and that the *Miranda* decision "establish[ed] a new . . . barrier to the ascertainment of truth,"[140] Justice O'Connor concluded that Justice White's former prediction that

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petitioner's invitation to apply the limitations of Stone v. Powell, 428 U.S. 465 (1976), to *Miranda*-based claims on collateral review. *Withrow*, 113 S. Ct. at 1751.

133. *Withrow*, 113 S. Ct. at 1752. The Court noted that *Miranda*'s protections "countered" the "inherent pressures" of police-dominated interrogation. *Id.*

134. 367 U.S. 643 (1961) (applying the exclusionary rule to bar the trial use of evidence seized in violation of the Fourth Amendment in state prosecutions).

135. *Withrow*, 113 S. Ct. at 1753. Furthermore, the Court responded to the petitioner's argument that the *Miranda* protections fall under the *Stone* rationale because they are only "prophylactic" in nature. *Id.* The difference between *Miranda*'s protections and those found in *Mapp* lies in the nature of the rights protected by the cases. The Court explained that "the *Mapp* rule 'is not a personal constitutional right,' but serves to deter future constitutional violations." *Id.* (quoting *Stone*, 428 U.S. at 486). On the other hand, *Miranda* protects "a fundamental *trial* right." *Id.* (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990)). Moreover, this right "embodies 'principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle.' " *Id.* at 1753 (citing Bram v. United States, 168 U.S. 532, 544 (1897)).

136. *Id.* at 1753 (quoting *Bram*, 168 U.S. at 544). The Court noted that barring *Miranda* claims from collateral review would not significantly advance the goals of federalism. *Id.* at 1754. In fact, the Court reasoned that any bar to *Miranda* based errors would transform these cases into due process cases. *Id.* In addition, the law-enforcement apparatus has grown to accept *Miranda*. Therefore, there is no reason for the eradication of *Miranda* from the area of habeas corpus. *Id.* at 1755.

137. *Id.* at 1756 (opinion of O'Connor, J.). In her answer to the majority opinion, Justice O'Connor pointed out the effect that collateral review has on finality. *Id.* She also noted the concerns of equity and federalism that accompany *habeas corpus*. *Id.* at 1757. Furthermore, she advocated restraint in the area of habeas corpus.

Justice O'Connor then analogized the lack of deterrent effect in *Miranda* cases on collateral review to search and seizure cases. Relying on the notion that the *Miranda* rules encompass more than the Constitution requires, she advocated a limit on its use on collateral review. *Id.* at 1759-60. Finally, Justice O'Connor rejected the rationale offered by the majority to maintain the status quo in regard to *Miranda*. *Id.* at 1760-65.

138. *Id.* at 1759 (citing Michigan v. Tucker, 417 U.S. 433, 461 (1974) (White, J., concurring)).

139. *Id.* at 1759 (citing Miranda v. Arizona, 384 U.S. 436, 538 (1966) (White, J., dissenting)).

140. *Id.* at 1762 (opinion of O'Connor, J.) (citing Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting)).

Miranda would ask more questions than it answered has been proven by experience.[141] The irony of Justice O'Connor's use of Justice White's dissent in *Miranda* is that he himself no longer subscribed to that position. With the reasoning set forth in these later opinions, Justice White's early opposition to *Miranda* had been completely reversed.

Justice White made a complete break with his earlier opposition to the privilege against self-incrimination as a means of insuring the interests of the accused during police interrogation. The transformation was dramatic. From the dissent in *Miranda* and the opinions that followed up to *Innis*, Justice White demonstrated an unwavering zeal to eradicate the *Miranda* doctrine. Yet, in *Edwards*, he not only accepted *Miranda*, but enshrined its protections through a *per se* rule which he created. His opposition to *Miranda* vanished completely in *Brecht*.[142] This metamorphosis, however, arrived with a stiff cost—the restriction of the right to counsel under the Sixth Amendment.

III. JUSTICE WHITE AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

The barrier to police interrogation erected by the Sixth Amendment right to counsel has lost much of its vitality because of its juxtaposition with the *Miranda* doctrine. A key player in this evisceration of the Sixth Amendment right to counsel was Justice White.[143] This section of the Article traces Justice White's hostility to the right to counsel in the context of interrogation from his initial disdain shown in the *Massiah* and *Escobedo* cases to the realization of his more receptive position in *Patterson v. Illinois*.[144]

In *Massiah v. United States*,[145] the Court examined the petitioner's

141. *Id.* at 1764 (citing Miranda v. Arizona, 384 U.S. 436, 544-45 (1966) (White, J., dissenting)). *But see* Lawrence Herman, *The Supreme Court, The Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 737 (1987) (noting that the police, after initial resistance to the *Miranda* decision, have accepted its directives, while the Supreme Court continues to try to undermine it).

142. *See also* New York v. Harris, 495 U.S. 14, 20 (1990) (clarifying that confessions must be free of coercion and in accordance with *Miranda* and *Edwards*, in *dicta*).

143. For an analysis of the weaknesses of the initial jurisprudence in this area, see *infra* notes 255-337 and accompanying text.

144. 487 U.S. 285 (1988).

145. 377 U.S. 201 (1964). In *Massiah*, the petitioner was indicted for violating narcotic laws. After retaining a lawyer and pleading not guilty, he was released on bail. *Id.* at 202. At that time, a codefendant, in cooperation with federal narcotics agents, elicited several incriminating statements from the petitioner. *Id.* at 202-03. This conversation was overheard by a federal agent via a radio transmitter, and the incriminating statements were admitted at the petitioner's trial. The petitioner was convicted of several offenses, and these convictions were subsequently affirmed by the Court of Appeals. *Id.* at 203.

The Supreme Court reversed these convictions based on the Sixth Amendment. *Id.* at 205-06. The Court held that the petitioner's Sixth Amendment right to counsel was violated by the agents' tactics in obtaining the incriminating statements. *See also* McLeod v. Ohio, 381 U.S. 356

claim that the government violated his Sixth Amendment right to counsel.[146] The Court found that the petitioner had been denied the assistance of counsel when governmental agents "deliberately elicited" incriminating statements from him in the absence of his attorney.[147] The Court found that the occurrence of the conversation after an indictment and outside the presence of the accused's attorney violated the petitioner's right to counsel.[148] The Court explained the importance of counsel at this stage by quoting the seminal case of *Powell v. Alabama*,[149] as follows:

> during perhaps the most critical of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself.[150]

In his dissent, Justice White vociferously disagreed with the Court.[151] He first characterized the decision to suppress the incriminating statements as "barring the use of evidence which is relevant, reliable and highly probative."[152] He argued that such extreme suppression measures are warranted to serve "other policies of overriding importance."[153] Here, however, no such justification existed.[154] Justice White

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(1965) (applying *Massiah* to the states); James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, 22 U.C. DAVIS L. REV. 1 (1988) (providing an analysis of the rationale and implications of *Massiah*).

146. *Massiah*, 377 U.S. at 206-07.

147. *Id.* at 206. To reach its decision, the Court relied on the concurring opinions in Spano v. New York, 360 U.S. 315, 326, 327 (1959) (Douglas, J., concurring) (Stewart, J., concurring). In *Massiah*, the Court noted that the concurrences in *Spano* emphasized a defendant's need for an attorney at the trial level to safeguard his due process interest. *See Spano*, 360 U.S. at 327 (Stewart, J., concurring). In addition, the Court also relied on *Spano* for the proposition that the defendant must be afforded an attorney at post-indictment interrogation to provide effective legal assistance "at the only stage when legal aid and advice would help him." *See Massiah*, 377 U.S. at 204 (quoting *Spano*, 360 U.S. at 326 (Douglas, J., concurring)). The Court then pointed to Powell v. Alabama, 287 U.S. 45, 57 (1932), to emphasize the important role counsel plays in the period between arraignment and trial in preparing for trial. *Massiah*, 377 U.S. at 205. The Court also adopted the language of a dissenting judge in the lower court to point out that the use of surreptitious, rather than obvious interrogators, had no bearing on the constitutionality of the government's methods. *Id.* at 206. If anything, the use of the undercover agent "more seriously imposed upon" the petitioner's right to counsel because of its secrecy. *Id.* Finally, the Court allowed the continued use of secret investigations after indictment, but barred the government from using any statements made concerning the indicted offense. *Id.* at 207.

148. *Massiah*, 377 U.S. at 207.

149. 287 U.S. 45 (1932).

150. *Massiah*, 377 U.S. at 205 (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)).

151. *Id.* at 207 (White, J., dissenting).

152. *Id.* at 208.

153. *Id.* Justice White noted that the search for truth is impeded without this evidence. *Id.* He also observed, however, that the ultimate result of releasing a guilty defendant is justified when doing so reflects a sound policy. *Id.* He called attention to the fact that the Court had previously

went on to explain that the government did not interfere with Massiah's right to counsel as it has been previously defined as merely a trial right.[155] He observed that the government did not interfere here with attorney-client conferences, spy on these meetings, or obstruct counsel's preparation for trial.[156]

Justice White then portrayed the Court's decision as a "thinly disguised constitutional policy of minimizing or entirely prohibiting the use . . . of voluntary out-of-court admissions and confessions made by the accused."[157] The voluntary nature of the statements in *Massiah* prompted him to characterize the Court's new rule as excessive and unwarranted by the Fifth Amendment.[158] He also suggested that *Massiah*'s majority position was based on the Fifth Amendment privilege against self-incrimination while masquerading as a Sixth Amendment decision.[159] The protections contained in the self-incrimination clause of the Fifth Amendment and the Sixth Amendment right to counsel provision, Justice White argued, were designed to benefit the accused's trial rights, not to act as a barrier to the pre-trial interrogation process.[160] In his view, the admissibility of pre-trial statements should be governed by the voluntariness-due process test of the Fifth and Fourteenth Amendments.[161]

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erected such sweeping measures to safeguard the protections of the Fourth Amendment in Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961). *Massiah*, 377 U.S. at 208. Justice White reasoned that such exclusions of evidence must be based on solid constitutional footing, and that the requisite foundation was lacking in the majority's decision. *Massiah*, 377 U.S. at 208 (White, J., dissenting).

154. *Massiah*, 377 U.S. at 208 (White, J., dissenting). Justice White also noted that the Court's rationale would apply to statements made after an unindicted suspect has asked for a lawyer, to "the fruits of admissions improperly obtained under the new rule," to state court cases, and to habeas corpus cases. *Id.* at 208-09. To Justice White, the potential for widespread effect underscored the need for "solid foundations," which the decision lacked. *Id.* at 208.

155. *Id.* at 209. Justice White also noted that the basis for this new definition of the right to counsel merits further elaboration which the Court failed to supply. *Id.* at 209. He predicted a "severe and unfortunate impact upon the great bulk of criminal cases" if the Court followed its rationale to its logical conclusion. *Id.*

156. *Id.* at 209. Justice White characterized the majority's rationale as "a sterile syllogism . . . [and] an unsound one, besides." *Id.* He relied on Crooker v. California, 357 U.S. 433 (1958) and Cicenia v. Lagay, 357 U.S. 504 (1958), to show that the Court had expanded the definition of the attorney-client relationship without explanation. *Massiah*, 377 U.S. at 209 (White, J., dissenting).

157. *Massiah*, 377 U.S. at 209 (White, J., dissenting).

158. *Id.*

159. *Id.* He stated that the key inquiry in this area was to determine whether the confession was coerced. *See id.* at 209-10.

160. *Id.* at 210. Justice White noted that the underlying concern of these protections is coercion. In the absence of coercion, pre-trial statements should be admitted. *Id.*

161. *Id.* Justice White saw the Court's departure from the voluntariness test as unjustified. He stated: "[t]he Court presents no fact, no objective evidence, no reasons to warrant scrapping the voluntary-involuntary test for admissibility in this area. Without such evidence I would retain it in its present form." *Id.*

In concluding his dissent, Justice White reaffirmed the need for rules that prevent the use of coercive tactics, but recognized that "here there was no substitution of brutality for brains."[162] He further stated that the voluntariness test would provide ample protection to criminal defendants.[163] Under that standard, interrogation in the absence of an attorney would not be the sole dispositive concern but only one factor in determining the voluntariness of a confession.[164] Therefore, Justice White based his opposition to *Massiah* on his preference for the voluntariness test and the decision's potential for impeding law enforcement.

In *Escobedo v. Illinois*[165] the Court expanded the *Massiah* rule to bar incriminating statements made after a criminal investigation shifted its "focus [to] a particular suspect," during a custodial interrogation in the absence of counsel.[166] Here, the Court extended the Sixth Amendment right to counsel to a pre-indictment stage, which it found to be a critical stage.[167] Justice Goldberg, writing for the majority, saw this type of interrogation as an adversarial evidence gathering proceeding that denuded the subsequent trial.[168] The Court also emphasized the

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162. *Id.* at 213. Justice White was also quick to point out that "[l]aw enforcement may have the elements of a contest about it, but it is not a game." *Id.*

163. *Id.*

164. *Id.* Justice White reasoned that the new rule would prevent the finder of fact from utilizing reliable evidence and would hinder the search for truth. *Id. But see* James J. Tomkovicz, *The Truth About Massiah*, 23 U. MICH. J.L. REF. 641 (1990). In his article, Professor Tomkovicz addresses the contention expressed by the United States Department of Justice that the *Massiah* decision obstructs truth in criminal justice. *See id.*; *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 3, REPORT TO THE ATTORNEY GENERAL ON THE SIXTH AMENDMENT RIGHT TO COUNSEL UNDER THE *Massiah* Line of Cases, *reprinted in* 22 U. MICH. J.L. REF. 661, 706 (1989). Professor Tomkovicz concluded that the values expressed in *Massiah*, notably fair-play, reflect the "core of the Sixth Amendment." Tomkovicz, *supra*, at 683. As a result, the decision in *Massiah* is both "constitutionally legitimate and necessary." *Id.* Indeed, he espouses the view that while *Massiah* may hinder "truth in criminal justice," it safeguards the "truth in constitutional law" by protecting the constitutional rights of the accused. *Id.* at 644.

165. 378 U.S. 478 (1964). In *Escobedo*, the petitioner refused to make any statements to the police after his arrest and expressed a desire to talk with his attorney. *Id.* at 479. His attorney arrived at the police station during the interrogation and requested access to his client. *Id.* at 480. The police repeatedly denied the petitioner all contact with his attorney. *Id.* at 479-84. When the police confronted Escobedo with another suspect, he made statements admitting involvement in the murder. *Id.* at 483. These statements were admitted into evidence over objection, and Escobedo was convicted of murder. *Id.* at 483-84. The conviction was eventually affirmed by the Illinois Supreme Court. *Id.*

The Supreme Court reversed the conviction, based on the Sixth Amendment right to counsel. *Id.* at 491. The Court held that the petitioner was denied his right to counsel at a "critical" stage of the proceedings. *Id.* at 486. The Court extended the right to counsel established in *Massiah* to encompass the time when a criminal investigation ceases to be a general investigation, and "focus[es] on a particular suspect." *Id.* at 490.

166. *Id.* at 490-91.

167. *Id.* at 486.

168. *Id.* at 488. The Court also devoted considerable attention to the folly of relying on a

importance of the attorney during these interrogations.[169] Relying on *Massiah*, the Court reiterated the decisive influence an attorney's legal advice has at this stage of an investigation.[170] The Court also referred to *Gideon v. Wainwright*,[171] for the proposition that a criminal defendant is entitled to have legal representation at trial.[172] With that in mind, the Court reasoned that the state's argument that the police should be allowed to interrogate the accused without his attorney present would make the trial "an appeal from the interrogation," rather than a meaningful determination of guilt or innocence.[173]

In response to the majority's position in *Escobedo*, Justice White speculated that the Court's ultimate goal was to bar all statements made by a suspect "whether involuntar[y] . . . or not."[174] He further posited that the rationale behind this goal was the majority's view "that it is uncivilized law enforcement to use an accused's own admissions against him at his trial."[175] Justice White characterized the abandonment of the voluntariness test in favor of the new rule based on the Sixth Amendment as "nebulous."[176] He also emphasized that the Sixth Amendment was designed to protect a defendant at "proceedings in which definable

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confession for convictions. *Id.* at 488-90. The Court, citing Dean Wigmore, noted the superiority of "skillful investigation," as well as the potential for abusing the interrogation process. *Id.* at 489, 490. In addition, the Court observed that the defendant's use of an attorney at an interrogation is not something a free society should fear. *Id.* at 490.

169. *Id.* at 488. The Court reasoned that the right to an attorney would be practically meaningless if it "began at a period when few confessions were obtained." *Id.* The Court noted that this stage is important to the police because of their investigation and to the accused because of his "need for legal advice." *Id.* As the Court recognized, however, the "Constitution . . . strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." *Id.*

170. *Id.* at 488. The Court reasoned that the "fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed." *Id.* at 488.

171. 372 U.S. 335 (1963).

172. *Escobedo*, 378 U.S. at 487.

173. *Id.*

174. *Id.* at 495 (White, J., dissenting). *See also* Caplan, *supra* note 14, at 1443. In his article, Professor Caplan agreed with Justice White's characterization of the *Escobedo* decision as the first step towards barring all custodial confessions. He also noted that the *Escobedo* decision, while giving the criminal defendant a "sporting" chance, denied that same fairness to the government by providing the accused with an attorney. *Id.* at 1443. It should be noted, however, that the Fourteenth Amendment and the Fifth Amendment Due Process Clauses protect the accused, not the government. U.S. CONST. amend. XIV, V. In addition, the Sixth Amendment speaks only of providing the accused with an attorney. U.S. CONST. amend. VI.

175. *Escobedo*, 378 U.S. at 496.

176. *Id.* Justice White was critical of the Court for erecting an "impenetrable barrier" to interrogation by means of the right to counsel. *Id.* at 496. He explained that the new rule would be unworkable absent absurd modifications to the present system, such as equipping every police car with a public defender. *Id.* Justice White also characterized the new principle as "amorphous and wholly unworkable" in comparison to the former standards. *Id.*

rights can be won or lost, not [at] stages where probative evidence might be obtained."[177] In other words, for Justice White, the Sixth Amendment right to counsel is a trial right only.

Alternatively, he opposed using the Sixth Amendment as a device to safeguard the rights of the accused during police interrogation, because they are already guaranteed by the Fifth Amendment self-incrimination clause.[178] Justice White further argued that the majority created new protections that surpassed the requirements of the Constitution.[179] Finally, Justice White once again advocated the position that the absence of an attorney during interrogation should be nothing more than *a* factor in determining the voluntariness of a confession and not the sole point of inquiry.[180]

Escobedo's rationale was obliterated in *Moran v. Burbine*.[181] Justice White joined the opinion written by Justice O'Connor which gave little weight to the fact that the investigation had focused on the respondent. Instead, the Court found the absence of an indictment more compelling.[182] The Court further noted that *Escobedo*, although originally decided on Sixth Amendment grounds, actually protected Fifth Amendment interests[183] and "provides no support for respondent's argu-

177. *Id.* at 497. Justice White further argued that the majority's rationale, when taken to its fullest and most absurd lengths, would require the presence of attorneys when crimes are committed because that is when "crucial incriminating evidence is put within the reach of the Government." *Id.*

178. *Id.* at 497. In outlining this opposition, Justice White stated:

> [i]t is incongruous to assume that the provision for counsel in the Sixth Amendment was meant to amend or supersede the self-incrimination provision of the Fifth Amendment, which is now applicable to the States. That amendment addresses itself to the very issue of incriminating admissions of an accused and resolves it by proscribing only compelled statements. Neither the Framers, the constitutional language, a century of decisions of this Court nor Professor Wigmore provides an iota of support for the idea that an accused has an absolute constitutional right not to answer even in the absence of compulsion—the constitutional right not to incriminate himself by making voluntary disclosures.

Id. (citations omitted).

179. *Id.* at 498. Justice White stated that "[t]he only 'inquisitions' the Constitution forbids are those which compel incrimination." *Id.* He pointed out that the Court did not find that Escobedo's statements fell under this proscription. *Id.*

180. *Id.* at 499. Justice White stated that the use of a confession was unlikely when the suspect was ignorant of his rights. He also stated that Escobedo was in fact aware of his right to remain mute. *Id.* The dissent concluded with Justice White's pronouncement that the *Escobedo* decision would not destroy law enforcement, but cripple it for "unsound, unstated reasons" without support in the Constitution. *Id. See also id.* at 492 (Harlan, J., dissenting) (characterizing the decision as "ill-conceived" and an illegitimate bar to effective law enforcement); *id.* at 493 (Stewart, J., dissenting) (reasoning that *Massiah* and the Sixth Amendment are irrelevant in this case).

181. 475 U.S. 412 (1986).

182. *Id.* at 428.

183. *Id.* at 429 (citing Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

ment."[184] The opinion continued with the Court's analysis of the right to counsel. The Court derided the notion that the Sixth Amendment is designed "to wrap a protective cloak around the attorney-client relationship for its own sake."[185] Instead it is designed to shield the individual, after formal accusation, from the more knowledgeable and skilled forces of the prosecution.[186]

The Court revisited the *Massiah* doctrine and further clarified the role of the Sixth Amendment in *Brewer v. Williams*.[187] In *Brewer*, the Court focused on the Sixth Amendment right to counsel and a suspect's entitlement to the assistance of an attorney after formal judicial proceedings had begun.[188] This right, the Court stated, "is indispensable to the

184. *Id.* at 430.

185. *Id.* at 430.

186. *Id.* The Court also relied on Maine v. Moulton, 474 U.S. 159 (1985), for the proposition that the indictment is "fundamental to the proper application of the Sixth Amendment right to counsel." *Moran*, 475 U.S. at 431. The Court undermined *Escobedo* when it stated that "the Sixth Amendment right to counsel does not attach until after the initiation of formal charges." *Id.* at 431. *See also* Minnesota v. Murphy, 465 U.S. 420 (1984) (holding, in an opinion penned by Justice White, that incriminating statements made by a probationer to a probation officer during a mandatory meeting were admissible, and that the meeting was not custodial for *Miranda* purposes).

187. 430 U.S. 387 (1977). In *Brewer*, the respondent surrendered to the police in Davenport, Iowa, in response to an arrest warrant for abduction that was issued for him in Des Moines, Iowa. *Id.* at 390. The respondent then spoke with his lawyer in Des Moines. The attorney told the respondent that the Des Moines police would be transporting him to Des Moines. *Id.* In addition, the lawyer told the respondent that he should not discuss the case with the police. In Davenport, the respondent was arraigned and advised of his *Miranda* rights. While in the courtroom, the respondent spoke with a local attorney who told the respondent not to talk to the police until after he consulted with his Des Moines attorney. When the Des Moines detectives arrived, they consulted with the local attorney and, after some hesitation, agreed not to interrogate the respondent on the trip to Des Moines. *Id.* at 391-92. In the car, the respondent told the two detectives that he would tell "the whole story" after he consulted with his attorney in Des Moines. *Id.* at 392. One of the detectives then made what has come to be known as "the Christian burial speech." *Id.* The detective knew that the respondent was deeply religious, and played on this characteristic in a speech that reminded the respondent of the ensuing blizzard and the fact that the victim was kidnapped and murdered on Christmas Eve. *Id.* at 392-93. Sometime after the speech, the respondent asked questions about the ongoing search for clues, and then led the police to the victim's body. *Id.* at 393. Before the respondent's trial, his attorney moved to suppress the evidence gained as a result of the detective's speech. The trial court found that the evidence was gathered at a "critical stage" when the respondent had a right to counsel, but that this right had been waived. *Id.* at 394. The respondent was convicted of murder, and the conviction was affirmed by the Iowa Supreme Court. *Id.* The respondent then received habeas corpus relief from the federal court which found that the state violated the respondent's right to counsel, violated his Fifth Amendment rights as defined in *Miranda* and *Escobedo*, and involuntarily obtained the respondent's statements. *Id.* at 395. The Court of Appeals affirmed on the first two grounds, but did not address voluntariness. *Id.* at 397 n.5. The Supreme Court affirmed the granting of habeas corpus relief. *Id.* at 406.

188. *Id.* at 397-98. In deciding the case in the respondent's favor on the Sixth Amendment right to counsel, the Court did not see the need to discuss the involuntary nature of the statements or *Miranda* concerns. *Id.*

fair administration of our adversary system of criminal justice."[189] Thus, the Court validated *Massiah*, and then proceeded to define the right.[190] The Court stated that the initiation of formal adversarial judicial proceedings against a suspect, an arraignment for example, triggers the protections of the Sixth Amendment right to counsel.[191] Because Williams had been arraigned, the Court concluded that the police had deliberately elicited incriminating statements from the respondent after this right had attached.[192]

The Court also found that the respondent did not waive his right to be interrogated only in the presence of counsel.[193] Analyzing the waiver question under the "knowing and intelligent waiver" standard of *Johnson v. Zerbst*,[194] the Court found that the respondent's expressly stated desire to deal with the police only through his attorney belied any notion that he validly waived his right to counsel.[195] The Court stated that "waiver requires not merely comprehension but relinquishment, and Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived [the right to counsel]."[196]

In his dissent, Justice White did not attack *Massiah*, but instead concentrated on the issue of waiver.[197] Justice White explained that the circumstances of the case supported his conclusion that the respondent

189. *Id.* at 398. The Court then cited Powell v. Alabama, 287 U.S. 45 (1932), to emphasize the "vital need" for an attorney at the pre-trial stage. *Id.*

190. *Brewer*, 430 U.S. at 398. The Court noted that jurisprudence in this area had become somewhat murky, but that the overriding concerns remained clear. In both state and federal contexts, the defendant is entitled to a lawyer's assistance when facing the forces of the prosecution. *Id.*

191. *Id.*

192. *Id.* at 399. The Court began by stating that "[t]here can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines." *Id.* The arrest warrant, the arraignment, and the jailing of the respondent were all critical factors in this determination. In addition, the Court found that the detective had "deliberately and designedly set out to elicit information" when he made the Christian burial speech. *Id.* at 399-400. The Court found the case indistinguishable from *Massiah*. *Id.* at 400.

193. *Id.* at 401. The Court began its discussion of waiver by noting that the nature of waiver is one of constitutional law, and not fact. *Id.* at 403.

194. 304 U.S. 458 (1938).

195. *Brewer*, 430 U.S. at 404-05. The Court focused on the respondent's repeated statements to speak with the police only through his attorneys. In addition, the Court noted that the detective was aware of the respondent's desire to speak only through his attorney, yet he proceeded to elicit incriminating statements from the respondent. *Id.* The detective's failure to warn the respondent of his constitutional right to a lawyer, as well as the failure to secure a waiver, were significant factors in the Court's decision. As the Court stated, "[t]he circumstances . . . in this case thus provide no reasonable basis for finding that Williams waived his right to assistance of counsel." *Id.* at 405.

196. *Id.* at 404.

197. *Id.* at 430 (White, J., dissenting).

had validly waived his right to counsel.[198] Specifically, Justice White focused on the respondent's knowledge of his right to remain silent, the length of time between the detective's statements and the respondent's statements, and the lack of coercion.[199] In addition, Justice White argued that the waiver requirements in *Miranda* and its progeny would have been met on the facts of this case.[200] Therefore, he reasoned, the majority was needlessly increasing the requirements for waiver in this case and allowing a guilty man to go free.[201]

In *United States v. Henry*,[202] Justice White also dissented from the

198. *Id.* at 431.

199. *Id.* at 431-33. Justice White observed that the respondent had received five separate *Miranda* warnings. *Id.* at 431. In addition, Justice White noted that the respondent discussed several topics that the speech did not cover, such as the location of the victim's clothing. *Id.* at 433. *But see* Yale Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What Is "Interrogation"? When Does It Matter?, reprinted in* KAMISAR ESSAYS, *supra* note 14, at 147-50. In this article, Professor Kamisar attacks the basic premises of Justice White's dissent. He points out the similarity between the police officer's technique and the methods described in common interrogation manuals. *Id.* at 148 n.16.

200. *Brewer*, 430 U.S. at 435 n.5. Justice White also pointed to the respondent's numerous consultations with his attorneys. *Id.* at 434. These discussions served to unequivocally inform the respondent of his right to remain silent. Therefore, Justice White reasoned that the waiver was knowing and intelligent. *Id.* at 435. He concluded that a waiver is proper whenever the facts demonstrate that the suspect knew of his rights and relinquished them. *Id.*

201. *Id.* at 437-38. Justice White's prediction of injustice did not hold true. The respondent was retried, convicted, and again granted habeas corpus relief. Nix v. Williams, 467 U.S. 431, 437-39 (1984). This time, the Supreme Court reversed the grant of habeas corpus relief. *Id.* at 440. In its decision, the Court adopted the "inevitable discovery" exception to the exclusionary rule, set the burden of proof for this exception at the preponderance of evidence level, refused to employ a requirement of good faith, and allowed this exception to be used in Sixth Amendment violations. *Id.* at 440-48. The Court then found, under the facts of this case, that the victim's body and the other evidence would have been inevitably discovered by the search party. *Id.* at 448-50. In his concurring opinion, Justice White commended the detective who initially made the Christian burial speech. *Id.* at 450-51 (White, J., concurring). Justice White noted that the "intricacies" of *Miranda* might readily confuse the layman police officer, as it had closely divided the Court. He concluded his concurrence by stating:

> [Officer Leaming] was no doubt acting as many competent police officers would have acted under similar circumstances and in light of the then-existing law. That five Justices later thought he was mistaken does not call for making him out to be a villain or for a lecture on deliberate police misconduct and its resulting costs to society.

Id. at 451.

202. 447 U.S. 264 (1980). In *Henry*, the respondent was indicted for bank robbery and placed in jail to await trial. *Id.* at 265-66. In the same jail cell as the respondent was another prisoner, a paid F.B.I. informant, who had been instructed to "be alert" for any incriminating statements, but not to initiate any conversations about the bank robbery. *Id.* at 266. The respondent made several incriminating statements to the informant. The informant told the F.B.I. agents of these statements, and was paid for providing the information. *Id.* at 266. At the respondent's trial, the informant testified about the statements, and the respondent was convicted. *Id.* at 267. The Supreme Court reversed the conviction based on a violation of the Sixth Amendment. *Id.* at 274-75.

majority opinion.[203] The Court, in an opinion authored by Chief Justice Burger, held that the government violated the respondent's Sixth Amendment right to counsel by arranging for a paid informant to listen for incriminating statements in a jail cell.[204] The Court found that the government's actions were a deliberate attempt to elicit incriminating statements from the respondent in violation of the Sixth Amendment.[205] Specifically, the Court rejected the government's attempt to circumvent the Sixth Amendment by focusing on the voluntary nature of the statements.[206] In finding a breach under the Sixth Amendment, Chief Justice Burger relied on three factors: 1) the informant was in the paid employ of the government; 2) the informant pretended to be just another prisoner; and 3) the respondent was under indictment and was in custody when he made the statements.[207]

Justice White joined the dissent written by Justice Blackmun.[208] The dissenters stated that the Court overstepped *Massiah*, the Sixth Amendment, and sound policy in its decision.[209] Justice Blackmun reasoned that the Court twisted the meaning of "deliberately elicited" by applying it to the facts of this case.[210] In addition, he chastised the Court for extending Sixth Amendment protections to the "passive" measures used by the government in this case.[211] Furthermore, Justice Blackmun could find no overriding policy concerns to justify the Court's

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203. *Id.* at 277 (Blackmun, J., dissenting).

204. *Henry*, 447 U.S. at 274.

205. *Id.* at 274-75. *But see* Kuhlman v. Wilson, 477 U.S. 436 (1986) (finding that incriminating statements made to a jailhouse informant who was placed in close proximity to respondent with orders to listen, but not to initiate conversations, were admissible).

206. *Henry*, 447 U.S. at 273.

207. *Id.* at 270. The Court characterized conversations with known government agents as "arm's length" encounters. *Id.* at 273. In contrast, conversations with undercover agents may cause the suspect to unintentionally reveal information to his adversary, the government. This "surreptitious" elicitation is precisely what *Massiah* was designed to protect against. *Id.* In addition, without actual knowledge of the informant's true colors, a constitutionally valid waiver is impossible. *Id.* The Court also noted that "the powerful psychological inducements to reach for aid when a person is in confinement" could not be overlooked. *Id.* at 274. These factors, the Court found, were critical to the respondent's trust in the informant. *Id.*

208. *Id.* at 277 (Blackmun, J., dissenting). It is interesting to note that Justice White joined Justice Blackmun's dissent rather than Justice Rehnquist's. In his dissent, Justice Rehnquist called for a re-examination of *Massiah* and relied on Justice White's dissent in that opinion. *Id.* at 289, 290 (Rehnquist, J., dissenting).

209. *Id.* at 277 (Blackmun, J., dissenting).

210. *Id.* at 279. After analyzing the facts of the case, specifically, the agent's warning to the informant that he not initiate any conversations, Justice Blackmun found the Court's ruling implausible. He postulated that the Court's reasoning would allow *Massiah*'s protections to bar incriminating statements that are obtained as a result of accidental or coincidental events. *Id.*

211. *Id.* at 280. Justice Blackmun could find no support for this extension of precedent. He noted that the basis for the Sixth Amendment protection embodied in *Massiah* was the deliberate attempts to gather information. *Id.* at 279-80. In contrast, this case exemplified passive methods of information gathering. *Id.* at 280.

decision.[212]

In *Maine v. Moulton*[213] the Court again relied on the Sixth Amendment, finding incriminating statements made to a co-indictee turned informant inadmissible.[214] The Court reasoned that the state had "knowingly circumvent[ed]" the petitioner's right to counsel by arranging for his codefendant to tape record post-indictment conversations.[215]

Justice White dissented from this ruling and joined an opinion written by Chief Justice Burger.[216] The dissent focused on several facts in the case that the majority "glosse[d] over."[217] After outlining the threats and criminal plans that the respondent had made in the recorded conversations,[218] the dissent noted the offense specific nature of the Sixth Amendment's protections.[219] The critical factor to the dissent's reasoning was that the incriminating statements concerning the indicted offense

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212. *Id.* at 280. Justice Blackmun gave several reasons. First, he stated that the decision would "significantly broaden [the] Sixth Amendment exclusion[ary rule]." *Id.* Second, the Court ignored the necessity of undercover work. *Id.* at 280-81. Third, the Court disregarded the fact that the statements were voluntarily made. *Id.* at 281. Fourth, the Court "condemn[ed]" faultless police tactics. *Id.* Fifth, the Court relied on considerations of fairness when there was no planned attempts to deceive here. *Id.* Finally, the Court extended *Massiah* without a valid justification for doing so. *Id.* at 281-82.

In addition, Justice Blackmun examined the basis for the majority's opinion, and found it wanting. *Id.* at 282. He stated that the Court's finding that the informant was paid on a contingent-fee arrangement was unsupported by the record. *Id.* at 283. He also noted that the majority retreated from its holding in *Brewer* that the surreptitious nature of an interrogator was irrelevant. Finally, he noted that the Court's concern with the inherently coercive nature of a jail cell was misplaced because of the informant's status as a prisoner. *Id.* at 284-85.

213. 474 U.S. 159 (1985). In *Moulton*, the respondent made incriminating statements to a codefendant after he was indicted. *Id.* at 162-66. The codefendant had arranged with the police to record his telephone calls and wear a tape recorder in order to capture the statements. *Id.* at 163, 164. The stated reason for recording the statements was to investigate crimes for which the respondent had not been indicted. *See id.* at 166-67. Nonetheless, the respondent made incriminating statements concerning the for which charges he was indicted. *Id.* at 165-66. The statements were used at the respondent's trial over his objection. *Id.* at 166. The Supreme Judicial Court of Maine reversed the trial court's decision. *Id.* at 168. The Supreme Court affirmed the decision and held that the incriminating statements were inadmissible. *Id.* at 168.

214. *Id.* at 180.

215. *Id.* at 176. The Court rejected the state's attempts to distinguish the case from *Massiah* and *Henry*. The state pointed to the fact that the conversations were initiated by the respondent; however, the Court found this irrelevant. *Id.* at 174-75. In addition, the Court rejected the state's attempts to justify the recordings as integral to a separate investigation. *Id.* at 178-80.

216. *Id.* at 181 (Burger, C.J., dissenting).

217. *Id.* at 181.

218. *Id.* at 181-84. The Chief Justice pointed out that the codefendant had approached the police after receiving threatening phone calls. *Id.* at 181. The dissent also noted that several witnesses had been threatened either anonymously or by the respondent himself. *Id.* at 182. In addition, the dissent referred to the fact that several incriminating statements concerned charges for which the respondent was not indicted. *Id.* at 183.

219. *Id.* at 185. In his dissent, the Chief Justice relied on Hoffa v. United States, 385 U.S. 293 (1966), which also involved the recording of incriminating statements after an indictment, relating to separate offenses. *Moulton*, 474 U.S. at 185.

were made during an investigation of unindicted offenses.[220] Therefore, the *Massiah* concerns with "deliberate elicitation" were not endangered, as the police sought to gather evidence for unindicted crimes.[221] The statements concerning the indicted crimes were merely incidental to the other investigation.[222] Finally, the dissent faulted the Court for applying its new rule in this case because it served to deter police behavior that was not designed to deprive the respondent of a crucial constitutional right, but was, in fact, commendable.[223] The dissent noted that the respondent did not have the right to an attorney's assistance in planning future crimes, and that the police officers' "careful actions" avoided any hint of impropriety.[224] As a result, the dissent viewed the majority's decision as expanding *Massiah*'s protections "well beyond the limits of precedent and logic."[225]

In *Michigan v. Jackson*,[226] Justice White temporarily abandoned his Sixth Amendment criticism when he joined the majority in upholding the Sixth Amendment right to counsel in an interrogation setting. The Court in *Jackson* held that confessions obtained during police initiated interrogation after the attachment of the Sixth Amendment right to counsel must be suppressed.[227] In the course of its opinion, the Court held

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220. *Moulton*, 474 U.S. at 185. The Chief Justice stated:

> the State engaged in no impermissible conduct in its investigation of respondent based on [the informant's] revelations. By recording conversations between respondent and [the informant, the police] succeeded in obtaining evidence that the Court's opinion concedes could have been used to convict respondent of further crimes. In fact this record shows clearly that, based on the recordings, the State was able to obtain additional indictments against respondent for burglary, arson, and three more thefts.

Id. at 185-86.

221. *Id.* at 186-87.

222. *Id.* The Chief Justice saw the extension of *Massiah* to the facts in this case as a departure from precedent. *Id.* at 187 n.3. The statements were not obtained as a result of a "deliberate circumvention" of counsel. *Id.* at 188. Therefore, *Massiah* was not applicable. *See id.* at 189. *But see* Tomkovicz, *supra* note 145, at 83-89. Professor Tomkovicz discussed the exception proposed by Chief Justice Burger in his dissent and concluded that the Court correctly rejected the invitation. *Id.* at 88. He further argued that the "good faith" exception is "rooted in 'ends justify means' reasoning." *Id.*

223. *Moulton*, 474 U.S. at 192.

224. *Id.* at 188, 189.

225. *Id.* at 190.

226. 475 U.S. 625 (1986). *Jackson* arose from the consolidation of two separate murder cases. Both respondents requested counsel at their arraignment. Counsel was appointed for each, but neither consulted with counsel before his interrogation. *Id.* at 626. Both respondents were informed of their *Miranda* rights by the police prior to interrogation. They made incriminating statements in response to the police initiated interrogation, and all of these statements were received into evidence, resulting in the respondents' convictions. *Id.* at 627. The Michigan Supreme Court reversed these convictions. *Id.* at 627-29. The Supreme Court affirmed the Michigan Supreme Court's decision. *Id.* at 629.

227. *Id.* at 628-29.

that the right to counsel attaches at the stage of formal accusation,[228] and that while this right does not turn on whether the accused retains or requests the appointment of counsel,[229] the request for counsel is "an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation."[230] Consequently, the Court applied Justice White's Fifth Amendment reasoning in *Edwards* to a Sixth Amendment context and held that any subsequent waiver is invalid.[231] The Court found that, although differences exist in the legal principles underlying the Fifth and Sixth Amendments, the suspect's right to counsel at a post-arraignment interrogation merits as much protection as the right to have counsel present at a pre-indictment "custodial" interrogation.[232] Although Justice White did not write a separate opinion in *Jackson*, his vote with the majority is consistent with the Fifth Amendment jurisprudence which he developed in *Edwards*.[233]

Justice White's embrace of the Sixth Amendment right to counsel was short lived, however. In *Patterson v. Illinois*,[234] Justice White, writing for the majority, held that the police may initiate a post-indictment interrogation of the accused if the accused had not previously requested

228. *Id.* at 629. The Court noted that the "arraignment signals 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment; thereafter, government efforts to elicit information from the accused, including interrogation, represent 'critical stages' at which the Sixth Amendment applies." *Id.* at 629-30 (citations omitted). In making this statement, the Court reaffirmed the principles established in *Massiah*, *Brewer*, *Henry*, and *Moulton*. *See id.* at 630.

229. *Id.* at 633 n.6. The Court rejected the state's argument that the request for counsel at arraignment only encompasses a desire to be represented by counsel at formal proceedings. *Id.* at 632-33. The Court found such distinctions to be beyond the ken of the average person. *Id.* at 633 n.7. The Court also found the state's argument that the police may be ignorant of the request to be "unavailing," and in the context of the case "unconvincing." *Id.* at 634. The Court then found the waivers to be "insufficient" in light of its decision in *Edwards*. *Id.* at 635.

230. *Id.* at 633 n.6.

231. *Id.* at 636. *But see* Michigan v. Harvey, 494 U.S. 344 (1990) (holding, in an opinion joined by Justice White, that a confession taken in violation of *Jackson* could be used to impeach the defendant's testimony); Harris v. New York, 401 U.S. 222 (1971).

232. *Id.* at 632.

233. *See infra* notes 255-337 and accompanying text for further analysis.

234. 487 U.S. 285 (1988). In *Patterson*, the petitioner and several other gang members participated in two fights with a rival gang. A murder resulted from the second confrontation. In connection with the first fight, the police arrested a gang member who implicated the petitioner in the second fight and murder. *Id.* at 287. The police arrested the petitioner and gave him the *Miranda* warnings. The petitioner then gave statements about the first fight, but denied any knowledge of the murder. *Id.* at 287-88. The petitioner was then indicted for the murder. While the petitioner was being transferred to a county jail, he made an incriminating statement. *Id.* at 288. One of the police officers gave the petitioner a *Miranda* waiver form, which he signed. *Id.* The petitioner then made a confession to several police officers and an assistant state's attorney. At trial, the petitioner tried unsuccessfully to suppress his statements. *Id.* at 289. He was found guilty of murder, and the Illinois Supreme Court affirmed. *Id.* at 287-90. The Supreme Court subsequently affirmed the Illinois Supreme Court's decision to allow the use of the confessions at trial. *Id.* at 300.

the appointment of counsel or retained counsel and made a knowing and intelligent waiver of the right to counsel.[235] Justice White rebuffed the petitioner's first argument that a police-initiated interrogation was "barred" by his status as an indictee.[236] In rejecting this contention, he distinguished the case from the facts in *Jackson*.[237] He noted that the petitioner never tried to exercise his right to counsel, while *Jackson* "turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police."[238] He then stated, "[i]f an accused 'knowingly and intelligently' pursues the latter course [of facing questioning without counsel], we see no reason why the uncounseled statements he then makes must be excluded at his trial."[239]

Justice White then addressed the "more substantial claim," the validity of the petitioner's waiver.[240] First, Justice White recalled the earlier requirements that a waiver must be 'knowing and intelligent.'[241] In a Sixth Amendment context, he reasoned, a suspect should be aware of his right to have counsel present during questioning as well as the possible consequences of foregoing this right.[242] He explained that the police could meet this burden by demonstrating that *Miranda* warnings were given and that the suspect made a knowing and intelligent waiver.[243] Justice White noted that the *Miranda* warnings served the dual purpose of informing the petitioner of his right to have counsel

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235. *Id.* at 291.

236. *Id.* at 290-91.

237. *Id.*

238. *Id.* at 291. This was a key distinction for Justice White. He noted that the petitioner had to exercise his right to avoid questioning. *Id.* In this respect, the petitioner, an indictee, was no different from an unindicted suspect with counsel available who does not request his attorney. *Id.* As in *Jackson* and *Edwards*, the petitioner would have to request counsel to prevent questioning. *Id.*

239. *Id.* In support of this notion, Justice White characterized *Edwards* as "[p]reserving the integrity of an accused's choice to communicate with the police only through counsel . . . not [as] barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Id.*

240. *Id.* at 292.

241. *Id.* (citation omitted). Justice White referred to the knowing and intelligent standard as set forth in Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938), or, as described in Moran v. Burbine, 475 U.S. 412, 421 (1986), "full awareness [of] both the nature of the right being abandoned and the consequences of [abandonment]." *Patterson*, 487 U.S. at 292.

242. *Patterson*, 487 U.S. at 292. In defining the appropriate standard for waiver, Justice White stated that the proper inquiry must be: "[w]as the accused, who waived his Sixth Amendment rights during postindictment questioning, made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel?" *Id.* at 292-93.

243. *Id.* Justice White was careful to limit the scope of the petitioner's waiver, however. He was quick to point out that the waiver was made for the interrogation only. *Id.* at 293 n.5. In addition, he pointed out that the waiver could have been revoked at any time had the petitioner requested a lawyer. *Id.*

present during questioning and of the consequences of his decision to forego the right to counsel.[244] Justice White found that those warnings "satisfied the constitutional minimum" required to inform the suspect of his rights.[245]

The Court then addressed and rejected the petitioner's contention that the Sixth Amendment's "superiority" to the Fifth Amendment demands additional protection.[246] In fact, Justice White categorically stated that neither amendment is " 'superior' or 'greater' than the other," thus negating the argument that a Sixth Amendment waiver, as compared to a Fifth Amendment waiver, requires additional protection.[247]

The most significant parts of Justice White's position in *Patterson* are his narrow reading of the Sixth Amendment's right to counsel and his view of an attorney's limited role in a post-indictment interrogation.[248] At the trial stage, he agreed, counsel plays an extremely important role—rendering effective legal representation. In a post-indictment interrogation, however, "a lawyer's role is rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer."[249] Justice White reasoned that because an attorney's role at a post-indictment interrogation is less demanding than at trial,[250] a waiver of the right to counsel at this type of an interrogation requires a less "searching or formal inquiry" than a

244. *Id.* at 293-94. To Justice White, the *Miranda* warnings conveyed the "sum and substance" of the Sixth Amendment. *Id.* at 293. The petitioner was told of his right to an attorney, to have the attorney present during questioning and to exercise these rights even if he could not afford his own attorney. *Id.* Justice White also noted that as a result of the *Miranda* warnings, the petitioner knew that his statements could be used against him in court. *Id.* at 293-94. Furthermore, the warnings served to inform the petitioner of an attorney's functions, specifically, to advise the petitioner to remain silent. *Id.* at 294.

245. *Id.* at 294. The Court stated that the petitioner's ignorance or misunderstanding of the consequences of a waiver is irrelevant to the state's methods of satisfying the "constitutional minimum." *Id.*

246. *Id.* at 297-300.

247. *Id.* at 297. In rejecting this argument, Justice White refused to acknowledge the notion that a Sixth Amendment waiver may have more dire consequences than a Fifth Amendment waiver. As a result, Justice White rebuffed attempts to make the requirements for a Sixth Amendment waiver more stringent than the requirements for a Fifth Amendment waiver. *Id.*

248. *Id.* at 296-300. Justice White acknowledged that an attorney plays a role of "enormous importance" at trial. *Id.* at 298. As a result, the Court has imposed the "most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." *Id.*

249. *Id.* at 294 n.6.

250. *Id.* at 298. Justice White noted that the Court weighed the "usefulness of counsel" against the "dangers . . . of proceeding without counsel" in assessing the requirements for waiver. *Id.* Basically, a waiver is constitutional when the accused knows of both the role the attorney plays at that particular stage and the consequences of proceeding alone. To support the use of *Miranda* warnings in the Sixth Amendment context, Justice White stated that the Court did "not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning." *Id.* at 299.

waiver of the right to an attorney at trial.[251] Therefore, he concluded that a defendant may validly waive the Sixth Amendment right to counsel in a post-indictment interrogation session so long as he has received the *Miranda* warnings.[252]

The *Patterson* decision can be characterized as Justice White's triumph over *Massiah*. In *Patterson*, Justice White succeeded in confining the requirement of the Sixth Amendment right to counsel to the trial stage of the criminal prosecution. While this limitation is reminiscent of his dissent in *Massiah*, his triumph over the Sixth Amendment is inconsistent with his earlier transformation[253] with regard to the Fifth Amendment as Part IV of this Article demonstrates.

IV. AN ANALYSIS OF THE JUSTIFIABLE, UNJUSTIFIABLE, AND PARADOXICAL ASPECTS OF JUSTICE WHITE'S PARTIAL METAMORPHOSIS

Justice White's transformation in the area of Fifth Amendment jurisprudence has breathed new life into the *Miranda* doctrine. Nonetheless his change in position, although welcome, cannot be reconciled with his continued opposition to *Massiah* and its progeny. With the exception of his position in *Michigan v. Jackson*,[254] Justice White's refusal to embrace the Court's Sixth Amendment decisions is irreconcilable with his Fifth Amendment jurisprudence. Part IV of this Article analyzes the contradictory nature of Justice White's positions under the Fifth and Sixth Amendments *vis-a-vis* police interrogation. Section A focuses on Justice White's reaction to *Escobedo* and examines the validity of his view. Section B analyzes the overly narrow reading of the Sixth Amendment protections first noted in his *Massiah* dissent and later established as law in *Patterson*. Finally, Section C discusses the inconsistency of Justice White's continued scorn for the Sixth Amendment's protections in light of his acceptance of *Miranda* and its progeny.

A. *The Constitutional Illegitimacy and Eradication of* Escobedo

The Court's holding in *Escobedo v. Illinois*,[255] was based on its decision in *Massiah* to make the Sixth Amendment a source of constitu-

251. *Id.* Justice White rationalized that the dangers presented at the interrogation stage are minor and easily recognized. *Id.* Therefore, a "simple and limited" set of *Miranda* warnings serves to inform the defendant of the choices and consequences available to him. *Id.* at 299-300.

252. *Id.* at 299-300.

253. *See supra* notes 59-142 and accompanying text for a discussion of Justice White's transformation.

254. 475 U.S. 625 (1986).

255. 378 U.S. 478 (1964). *See supra* notes 165-180 and accompanying text for an analysis of the facts and reasoning in *Escobedo*.

tional protection for a suspect during a police interrogation prior to indictment.[256] Justice Goldberg, who wrote the majority opinion, stated that the absence of an indictment "should make no difference" in determining the constitutionality of an interrogation.[257] As a result, the Court found that an interrogation that focused on the accused was as much a critical stage as an indictment.[258] Furthermore, the Court held that, based on its decision in *Gideon v. Wainwright*,[259] an accused is entitled to the presence of counsel during an interrogation.[260]

In his dissent, Justice White challenged the constitutional basis of the majority's decision.[261] He characterized the majority's new rule as "nebulous" and "wholly unworkable,"[262] and labelled as "incongruous" the Court's assumption that the Sixth Amendment right to counsel overshadowed the privilege against self-incrimination.[263] In the long run his views prevailed.

The Court adopted the spirit, if not the reasoning, of Justice White's *Escobedo* dissent when it distinguished that decision to the point of obscurity in later decisions. For example, in *Johnson v. New Jersey*,[264] the Court shifted the emphasis of *Escobedo* from the Sixth Amendment to the Fifth Amendment.[265] Later in that decision, the Court noted that *Escobedo* was limited to its unique facts.[266] In short, *Johnson* greatly reduced the scope of *Escobedo*.

The Court reaffirmed the vitality of *Johnson*, and the demise of

256. *Escobedo*, 378 U.S. at 484-85.

257. *Id.* at 485.

258. *Id.* at 486.

259. 372 U.S. 335 (1963). In *Gideon*, the Court held that every person accused of a felony crime is constitutionally entitled to the assistance of an attorney at trial.

260. *Escobedo*, 378 U.S. at 491.

261. *Id.* at 495-99 (White, J., dissenting).

262. *Id.* at 496.

263. *Id.* at 497.

264. 384 U.S. 719 (1966). In *Johnson*, the Court had to decide whether *Miranda* and *Escobedo* were to be applied retroactively. The petitioners were jointly tried for felony murder. Prior to the interrogation, the petitioners were warned of their right to remain silent; however, the petitioners did not receive the complete warnings mandated by *Miranda*. *Id.* at 720-25. During the interrogation, the petitioners gave full confessions that were later used at their trial. *Id.* They were convicted of felony murder and sentenced to death. *Id.* at 725. The Court held that *Miranda* and *Escobedo* were not to be applied retroactively. *Id.* at 733.

265. *Id.* at 729. *See also* GRAHAM, *supra* note 14, at 172-74. In his work on Warren Court decisions, Professor Graham explained that the *Escobedo* decision was a "constitutional trial balloon" which the Court used to gauge the efficacy of further expansion of the constitutional rights of criminal defendants. *Id.* at 172. Professor Graham also noted that the *Escobedo* and *Miranda* decisions were quite distinct from previous constitutional testing and groundbreaking engaged in by the Court because of the substantial changes imposed on unsuspecting state jurisdictions. *Id.* at 172-74.

266. Johnson v. New Jersey, 384 U.S. at 733-34.

Escobedo, in *Kirby v. Illinois*.[267] In *Kirby*, the Court held that an accused does not have a constitutional right to have an attorney present during pre-indictment identification procedures.[268] In distinguishing *Kirby* from *United States v. Wade*[269] and *Gilbert v. California*,[270] the Court found that "[t]he initiation of judicial proceedings" was a crucial factor in determining the legitimacy of identification procedures.[271] Curiously, Justice White ignored this opportunity to discredit *Escobedo* when he dissented from the majority's decision.[272] Instead, he briefly stated that *Wade* and *Gilbert* "govern this case and compel reversal of the judgment below."[273]

It was not until *Moran v. Burbine*[274] that the Court, including Justice White, discarded *Escobedo* for all practical purposes. In *Moran*, the Court affirmed its belief that *Escobedo* interpreted the Fifth Amendment privilege against self-incrimination, not the Sixth Amendment right to counsel.[275] The Court found that "*Escobedo* provides no support for [the] argument" that the right to counsel attaches prior to the initiation of formal judicial proceedings.[276] In the aftermath of these decisions, *Escobedo* has been relegated to a sterile and ineffectual existence.

Justice White's view has rightly prevailed. The *Escobedo* majority incorrectly applied the Sixth Amendment right to counsel to pre-indictment interrogation based on unsupported and misplaced reasoning. The

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267. 406 U.S. 682 (1972) (plurality opinion). In *Kirby*, the petitioner was stopped for investigation by a police officer. In the course of showing the officer identification, the petitioner and his companion displayed traveler's checks and other papers bearing the name of a recent robbery victim. *Id.* at 684. The police then brought the victim to the station and escorted him into the room where the petitioner and his companion were seated. *Id.* The victim positively identified the two men as the men who robbed him. *Id.* No lawyer was present at the time of the "show-up," although an attorney was appointed at the subsequent arraignment. This attorney tried unsuccessfully to suppress any identification testimony from the "show-up." *Id.* at 685. The victim testified at trial and again identified the petitioner and his confederate as the men who robbed him. *Id.* at 685-86. The petitioner was convicted of robbery. *Id.* at 686. The Supreme Court affirmed the conviction. *Id.* at 691.

268. *Id.* at 691.

269. 388 U.S. 218 (1967). *Wade* established that the post-indictment lineup was a "critical stage" of the prosecution, triggering the protections of the Sixth Amendment right to counsel.

270. 388 U.S. 263 (1967). *Gilbert* expanded on *Wade* and required an examination of the in-court identification testimony to determine whether it was tainted by illegal lineup identification procedures.

271. *Kirby*, 406 U.S. at 689-90. The Court reasoned that the initiation of formal proceedings "is far from a mere formalism." *Id.* at 689. Instead, it signifies the government's commitment to prosecution. It is at this point that the protections of the Sixth Amendment are triggered. *Id.* at 690.

272. *Id.* at 705 (White, J., dissenting).

273. *Id.*

274. 475 U.S. 412 (1986). *See supra* notes 75, 181-186 for an analysis of the facts and reasoning in *Moran*.

275. *Moran*, 475 U.S. at 430.

276. *Id.*

Court first recognized the flaws in extending the Sixth Amendment, then limited it through subsequent decisions, and finally cast *Escobedo* aside in *Moran*. In his dissent in *Escobedo*, Justice White recognized the fallacy of the Court's decision. As later decisions have demonstrated, Justice White correctly identified the error of applying the Sixth Amendment right to counsel to the facts in *Escobedo*. In this area, Justice White's view enjoys considerable support.[277]

B. *Justice White's Unjustified Narrowing of the Sixth Amendment Right to Counsel in his Opinions from* Massiah *to* Patterson

In his *Escobedo* dissent, Justice White reprimanded the majority for unnecessarily broadening the right to counsel. His opinions from the *Massiah* dissent to the majority decision in *Patterson*, however, unjustifiably diminished the proper role a defense attorney plays after the initiation of formal adversarial proceedings. While undermining the importance of defense counsel, Justice White has ignored two primary purposes which counsel serves: ensuring that the criminally accused receives a fair trial, and rendering effective assistance.[278]

In his dissent in *Massiah*, Justice White criticized the Court for extending the right to counsel to encompass post-indictment interrogations.[279] He faulted the Court's rule proscribing post-indictment interrogation in the absence of counsel as being an unwarranted extension of the Sixth Amendment.[280] According to Justice White, this new rule

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277. *See, e.g.*, FUNSTON, *supra* note 14, at 162-64. In his book, Professor Funston outlines the difficulty in interpreting *Escobedo* clearly. He notes that the Court established a five part test that included the following factors: 1) whether the investigation had "focused" on the accused; 2) whether the accused was in custody; 3) whether the interrogation was designed to elicit incriminating statements; 4) whether a request for counsel was made; and 5) whether warnings were given. *Id.* at 163. Professor Funston also noted that "most criminal suspects lack[ed the] sophistication" to appreciate these crucial nuances. *Id. But see* Dripps, *supra* note 14, at 631 (advancing the theory that the majority's *Escobedo* decision was a well-reasoned and supportable opinion).

278. *See* United States v. Cronic, 466 U.S. 648, 658 (1984) ("the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial").

279. *See generally* Massiah v. United States, 377 U.S. 201, 207-13 (1964) (White, J., dissenting).

280. *Id.* at 209. Justice White recognized that the majority's view would invite further expansion of the Sixth Amendment. He stated:

> [t]he importance of the matter should not be underestimated, for today's rule promises to have wide application well beyond the facts of this case. The reason given for the result here—the admissions were obtained in the absence of counsel—would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not; to admissions made prior to arraignment, at least where the defendant has counsel or asks for it; to the fruits of admissions improperly obtained under the new rule; to criminal

improperly enlarged the role of defense counsel and hindered the search for the truth that is the focus of every trial.[281]

His opposition to *Massiah* lay dormant until he authored the majority opinion in *Patterson*. For example, in *United States v. Henry*,[282] Justice White joined Justice Blackmun's dissent which sought to distinguish the facts in that case from the facts in *Massiah*.[283] The dissent did not challenge *Massiah* or question its correctness.[284] Instead, the dissent characterized *Massiah* as the "outermost point" of the Sixth Amendment.[285] Furthermore, the dissent echoed Justice White's view of *Massiah* when it criticized the Court for approving the suppression of statements without considering their voluntary nature.[286]

Similarly, Justice White joined the dissent in *Maine v. Moulton*,[287] which did not call *Massiah* into question, but instead focused on expanding the "deliberate elicitation" requirement of *Massiah*.[288] In his dissent, Chief Justice Burger objected to the Court's decision to bar evidence concerning an indicted offense which was gained during a post-indictment investigation of separate uncharged crimes.[289] The dissent also expressed reservations about using the Sixth Amendment as a vehicle to bar relevant and reliable evidence.[290]

It was not until *Patterson v. Illinois*[291] that Justice White returned to his steadfast opposition to *Massiah*. In *Patterson*, Justice White gutted *Massiah* and severely diminished the role of defense counsel. The *Patterson* decision, in the context of interrogation, confined the defense attorney's post-indictment role to "advising his client as to what ques-

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proceedings in state courts; and to defendants long since convicted upon evidence including such admissions.

Id. at 208-09.

281. *Id.* at 208, 209.

282. 447 U.S. 264 (1980). *See supra* notes 202-212 and accompanying text for an analysis of the facts and reasoning in *Henry*. Justice White's dissent in Brewer v. Williams, 430 U.S. 387, 429 (1977) (White, J., dissenting), also signaled an acquiescence to *Massiah*. In *Brewer*, Justice White focused on the issue of waiver, rather than the validity of *Massiah*.

283. *See generally Henry*, 447 U.S. at 277-89 (Blackmun, J., dissenting).

284. *Henry*, 447 U.S. at 277 n.1 (Blackmun, J., dissenting). *Compare id.* at 289-302 (Rehnquist, J., dissenting) (questioning the underlying rationale and continuing validity of *Massiah*).

285. *Id.* at 282 (Blackmun, J., dissenting).

286. *Id.* at 281.

287. 474 U.S. 189 (1985). *See supra* notes 213-225 and accompanying text for an analysis of the facts and reasoning in *Moulton*.

288. *See generally Moulton*, 474 U.S. at 181-92 (Burger, C.J., dissenting).

289. *Id.* at 184-90.

290. *Id.* at 191.

291. 487 U.S. 285 (1988). *See supra* notes 234-252 and accompanying text for an analysis of the facts and reasoning in *Patterson*.

tions to answer and which ones to decline to answer."[292]

This constricted view is unjustified and cannot be reconciled with the Supreme Court's broad interpretation of the Sixth Amendment right to counsel in post-indictment settings. Justice White's narrow definition of counsel's role failed to account for the role an attorney plays in preparing for trial after indictment and rendering effective assistance. Beyond these goals, an attorney can do more than simply advise his or her client which questions to answer and which questions to refuse to answer. In the pre-trial stage, for example, counsel is in a position to assess the strength of the prosecution's case and the client's defense, advise the client of how a confession adds evidence to the prosecutor's case, ascertain the impact of a confession on trial strategy, analyze the consequences of a confession at a later sentencing hearing, and finally, estimate the influence of a confession on an affirmative defense and particularly on a possible insanity defense. In contrast to Justice White's belief, the Supreme Court has implicitly and explicitly recognized these aspects of the attorney's function in several cases.

The Court, in *Powell v. Alabama*,[293] recognized the vital need for an attorney at every step of the proceedings to insure that the accused receives a fair trial. In *Powell*, the Court observed that the effectiveness of the trial attorney depends on the attorney's pre-trial preparation and investigation of the underlying facts of a charge.[294] The paramount objective of the Court was providing a fair trial and realizing that goal by providing counsel to the accused to offset the forces of the prosecution arrayed against him.[295] Therefore, *Powell* established the vital role

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292. *Patterson*, 487 U.S. at 294 n.6.

293. 287 U.S. 45 (1932). *See also* FUNSTON, *supra* note 14, at 143 (describing the trial court proceedings as "one of the major perversions of procedural fairness in America's legal history").

294. *Id.* at 58.

295. *Id.* at 69. The Court reasoned as follows:

> [e]ven the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. Similar sentiments were expressed in opinions joined by Justice White. For example, in Gideon v. Wainwright, 372 U.S. 335 (1963), the Court held that the Sixth Amendment, as applied to the states through the Fourteenth Amendment, requires that indigent defendants be afforded counsel when brought to trial for a felony crime. In reaching its decision, the Court noted that "any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him."

an attorney plays in a criminal trial.[296] That role was advanced to an earlier point in time before trial and clarified in later decisions.

In *Fare v. Michael C.*,[297] for example, a majority of the Court, including Justice White, analyzed the proper role of an attorney at the pre-trial stage. Although decided on Fifth Amendment grounds, *Fare* provides crucial insight into the Court's assessment of the defense attorney's role. The Court noted that in an interrogation setting, counsel acts as "the protector of the legal rights of [the defendant] in his dealings with the police and the courts."[298] In addition, the Court recognized the important role an attorney plays in ascertaining the extent of his client's involvement in the crime under investigation.[299]

Justice White also joined a decision by the Court in *Strickland v. Washington*,[300] which recognized the importance of pre-trial investiga-

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Id. at 344. In addition, the Court later observed that the use an attorneys in criminal courts are "necessities, not luxuries." In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court clarified *Gideon* when it held that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." *Id.* at 37. In the course of its opinion, the Court stated that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial." *Id.* at 31. Furthermore, the Court relied on *Gideon* and *Powell* for the proposition that the right to an attorney is a "fundamental" right of the accused. *Id.* at 32. Finally, in Scott v. Illinois, 440 U.S. 367 (1979), the Court limited *Argersinger*'s extension of *Gideon* to a case where the accused was actually incarcerated. The Court explained that the severity of a prison or jail term of any duration mandates that the accused be afforded the assistance of counsel, despite the financial cost to society of providing attorneys to indigent defendants. *Id.* at 372-73.

296. Of utmost importance is the sentiment expressed in the following sentences of the Court's opinion: "[h]owever guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial." Powell v. Alabama, 287 U.S. 44, 52 (1932).

297. 442 U.S. 707 (1979). *Fare* was brought to the Court on a claim that the respondent, a juvenile, was denied the protections of *Miranda*. The police took the respondent into custody to question him about a murder. The respondent was informed of his right to an attorney, and requested a consultation with his probation officer. *Id.* at 710. This request was denied, and the respondent subsequently gave the police a statement implicating himself in the murder. These statements provided the bulk of the state's evidence against the respondent at his trial. *Id.* at 711. The Court held that the respondent's request for his probation officer was not, in this case, a request for an attorney, and therefore, did not trigger *Miranda*'s protections. *Id.* at 727-28.

298. *Id.* at 719. The Court noted that the *Miranda* protections were aimed at safeguarding the "critical position" an attorney plays in protecting the Fifth Amendment rights of his client during police interrogation. *Id.* As a result, the right to have an attorney present at an interrogation "is indispensable to the protection of the Fifth Amendment privilege." *Id.* In addition, the presence of counsel at the interrogation protects the accused from police misconduct. In contrast, the probation officer lacks the necessary tools to be an effective advocate before "both police and courts." *Id.*

299. *Id.* at 721. The Court also noted that the attorney-client privilege exists to protect these trial preparations. *Id.* at 721-22.

300. 466 U.S. 668 (1984). In *Strickland*, the Court examined the merits of the respondent's claim that he was denied the effective assistance of counsel at his sentencing hearing. The respondent voluntarily confessed to a murder and related crimes after his accomplices were arrested. He was indicted and an attorney was appointed for him. Against his attorney's advice,

tion by defense counsel. In *Strickland*, the Court reiterated that "the right to counsel exists . . . in order to protect the fundamental right to a fair trial."[301] The Court noted that counsel must make "reasonable investigations" into the validity of the accused's defense or the prosecutor's case.[302] In *Strickland*, the court also touched upon the effect of a confession on trial strategy. The accused's decision in *Strickland* to forego his attorney's advice and give complete confessions to the police severely impacted on the attorney's sentencing strategy.[303] The defense attorney, faced with the overwhelming effect of the confessions, focused his advocacy on the petitioner's acceptance of responsibility for the crimes.[304] In deciding the case, the Court recognized that the attorney's efforts were reasonable in light of the evidence presented by the state, including the confessions.[305] The Court also noted that the admissibility of the confessions was a crucial aspect of the defense attorney's strategy at sentencing.[306] The overpowering effect of the confessions, coupled with the attorney's knowledge of the trial judge's preference for the accused to accept responsibility for his criminality, prompted the defense counsel to highlight his client's remorse.[307] Again, the Court found this decision to be reasonable in light of the accumulated evidence.[308] Thus, in *Strickland*, the Court acknowledged the importance of an attorney's pre-trial investigation and the effect confessions have on trial and sentencing strategy.

The Court also analyzed the influence of incriminating statements

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the respondent confessed to two more murders and waived his right to a jury trial. At a "plea colloquy" the respondent informed the trial judge that he had committed the crimes while laboring under "extreme stress." *Id.* at 672. The respondent again rebuffed his attorney's advice and waived his right to an advisory jury at the sentencing phase of his trial. *Id.* At the sentencing hearing, the attorney elected to forego presenting evidence about the respondent's character and mental state. This decision was made after weighing the evidentiary impact of the respondent's confessions. *Id.* at 673. At the sentencing hearing, the attorney argued that the respondent committed the crimes while under "extreme mental or emotional disturbance," in an attempt to show mitigating circumstances. *Id.* at 674. The trial judge found several aggravating circumstances and sentenced the respondent to death. *Id.* at 675. The respondent received habeas corpus relief after successfully arguing that he was denied effective assistance of counsel. *Id.* at 682-83. The Supreme Court reversed the court of appeals and held that the respondent did receive effective assistance of counsel. *Id.* at 701.

301. *Id.* at 684.

302. *Id.* at 691.

303. *Id.* at 672-73. The Court noted that the attorney's decision to omit character evidence "reflected [his] sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes." *Id.* at 673.

304. *Id.*

305. *Id.* at 699.

306. *Id.*

307. *Id.*

308. *Id.*

on the sentencing stage in *Estelle v. Smith*.[309] In *Estelle*, the Court, including Justice White, found that the state had violated the accused's Sixth Amendment right to counsel at the sentencing hearing when it used statements made by the accused during a psychiatric interview.[310] The Court reasoned that the psychiatric interview was a "critical stage" of the litigation, and therefore, the accused had a right to the assistance of an attorney at that time.[311] As a result, the Court held that the expert's testimony at the sentencing phase violated the right to counsel.[312]

In *Wainwright v. Greenfield*,[313] the Court, in an opinion supported by Justice White, addressed the effects that a suspect's behavior during interrogation has on the insanity defense. In *Greenfield*, the prosecution discredited the accused's insanity defense by pointing to the accused's post-*Miranda* silence.[314] Although *Greenfield* does not address the effect of a confession on the insanity defense, it is instructive in analyzing the emphasis the Court placed on the "fundamental unfairness" of using constitutionally allowed silence to establish sanity (or guilt).[315] It follows logically from *Greenfield* that a confession, which is the ultimate waiver of the privilege against self-incrimination, could be used constitutionally to rebut an insanity defense and prove the accused's guilt.

Finally, in *Nix v. Whiteside*,[316] the Court once again addressed the

309. 451 U.S. 454 (1981). In *Estelle*, the respondent was indicted for murder. After being informed that the prosecution was seeking the death penalty, the trial court ordered a psychiatric examination of the respondent. *Id.* at 456-57. The psychiatrist informed the trial judge that the respondent was competent to stand trial. After a jury trial, the respondent was convicted of murder. *Id.* at 457. At the penalty phase of the trial, the prosecution called the psychiatrist to testify on the "future dangerousness" of the respondent, a factor in imposing the death penalty. *Id.* at 458-60. The respondent received the death penalty. *Id.* at 460. After unsuccessful appeals to the state court system, the respondent received habeas corpus relief from the federal courts. *Id.* at 460-61. The Supreme Court affirmed on the basis of the Fifth Amendment privilege against self-incrimination, *id.* at 468-69, and the Sixth Amendment right to counsel. *Id.* at 471.

310. *Id.* at 471.

311. *Id.* at 470.

312. *Id.* at 471.

313. 474 U.S. 284 (1986). In *Greenfield*, the respondent was arrested for battery and informed of his *Miranda* rights. At this point, the respondent requested an attorney. *Id.* at 286. At trial, the prosecutor used the respondent's request for an attorney to rebut the insanity defense, and the respondent was convicted. *Id.* at 287. After exhausting direct review, the respondent was granted habeas corpus relief. *Id.* at 289. The Supreme Court affirmed, finding that the prosecutor's actions violated the respondent's exercise of *Miranda* rights as described in Doyle v. Ohio, 426 U.S. 610 (1976). *Greenfield*, 474 U.S. at 295.

314. *Greenfield*, 474 U.S. at 287.

315. *Id.* at 291 n.6. The Court noted that the *Miranda* warnings provide "implicit assurances" that there will be no reprisals for the exercise of the right to remain silent. *Id.*

316. 475 U.S. 157 (1986). The Supreme Court held that the right to effective assistance of counsel does not include the right to present perjured testimony. *Id.* at 176.

value of pre-trial preparation by counsel. In the opinion, joined by Justice White, the Court stressed that the right to counsel is designed to advance a fair trial, and that the attorney's role is coordinated to "legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."[317] To that end, an attorney "must take all reasonable lawful means to attain the objectives of the client."[318] In recognizing that counsel must serve the needs of the accused in an ethical manner, the Court did not narrow the scope of the role of the attorney in pre-trial or trial representation.

In light of the general acceptance by the Court and Justice White of the broad interpretation of the right to counsel in judicial proceedings, Justice White's narrow interpretation of the right to counsel in post-indictment interrogations is unfounded. He has ignored the crucial part an attorney plays before trial in safeguarding the accused's right to a fair trial and overlooked how the interrogation process endangers the constitutional requirement that the accused be afforded effective trial assistance. Justice White's position on the Sixth Amendment right to counsel is highly unsettling, and his views are inconsistent with his metamorphosis in regard to the Fifth Amendment privilege against self-incrimination.

C. *The Paradox of Justice White's Positions on the Fifth Amendment and the Sixth Amendment*

Justice White's opposition to the application of the Sixth Amendment right to counsel in post-indictment interrogations cannot be reconciled with his position on the Fifth Amendment privilege against self-incrimination. When he penned his dissent in *Miranda*, it was consistent with his position in *Massiah* that neither the Fifth Amendment nor the Sixth Amendment protects the accused from police interrogation. His eventual embrace of *Miranda* would therefore suggest an acceptance of *Massiah* as well. Nonetheless, his steadfast refusal to use the Sixth Amendment right to counsel as a vehicle for protecting the accused at post-indictment interrogation remained unchanged. A juxtaposition of Fifth Amendment analysis on Sixth Amendment jurisprudence makes this position all the more puzzling.

An examination of Justice White's positions after his partial metamorphosis demonstrates that his Fifth Amendment jurisprudence is ultimately concerned with safeguarding the accused's right to a fair trial.

317. *Id.* at 166.
318. *Id.*

That is also the goal of the Sixth Amendment. In *Edwards v. Arizona*,[319] Justice White first dropped his opposition to *Miranda* and the Fifth Amendment for safeguarding the accused's constitutional rights during custodial interrogation. *Edwards* also signaled Justice White's acceptance of the "knowing and intelligent" waiver standard for determining the validity of a confession.[320] In the *Edwards* decision, the accused's unfulfilled request for counsel during interrogation was a critical fact to the Court's holding.[321] Justice White reasoned that it was "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel."[322] The basis for that inconsistency was the denial of the accused's right to counsel, which is guaranteed by the Fifth Amendment, during interrogation.[323] The *Edwards* decision indicates the level of importance Justice White accords to the right of counsel at an interrogation.

The *Edwards* decision formed the basis for the Court's Sixth Amendment decision in *Michigan v. Jackson*.[324] *Jackson* provides a rare instance of Justice White's toleration of the authority of the Sixth Amendment right to counsel in interrogation proceedings. To be consistent with his reasoning in *Edwards*, Justice White had no choice but to acquiesce to the Court's analysis in *Jackson*.[325] Five years after *Jackson*, Justice White's opinion in *Arizona v. Fulminante*[326] signified his further acceptance of the concerns that underlie the *Miranda* decision. In *Fulminante*, Justice White abandoned his "search for truth" argument against *Miranda*,[327] as well as his earlier view that the privilege against self-incrimination only shields the accused from judicially compelled admissions.[328] He observed that a "coerced confession is fundamentally different from other types of erroneously admitted evidence,"[329] because

319. 451 U.S. 477 (1981). *See supra* notes 63-67 and accompanying text for an analysis of the facts and reasoning in *Edwards*.

320. *Id.* at 482.

321. *See id.* at 482.

322. *Id.* at 485.

323. *Id.* at 485-86.

324. 475 U.S. 625 (1986). *See supra* notes 226-233 and accompanying text for an analysis of the facts and reasoning in *Jackson*.

325. In *Jackson*, the Court adopted the reasoning of the *Edwards* decision. *See generally Jackson*, 475 U.S. at 629-36. It was not until the Court's decision in *Patterson* that Justice White was able to return to his original opposition to the Sixth Amendment right to counsel. *See supra* notes 234-252 and accompanying text.

326. 111 S. Ct. 1246 (1991). *See supra* notes 105-111 and accompanying text for an analysis of the facts and reasoning in *Fulminante*.

327. *Fulminante*, 111 S. Ct. at 1257 (White, J., dissenting in part).

328. *Id.* at 1253-57.

329. *Id.* at 1254.

of the overpowering effect it has on the fact-finding process.[330] A coerced confession " 'abort[s] the basic trial process' and 'render[s] a trial fundamentally unfair.' "[331]

Justice White's position in *Withrow v. Williams*[332] offers further proof of his approval of *Miranda* and its concerns. In *Withrow*, Justice White aligned himself with the defenders of *Miranda*. There, the Court focused on the ingredients of a fundamentally fair trial, comparing the policy of *Miranda* to the requirement of proof beyond a reasonable doubt and non-discriminatory jury selection.[333] The Court noted that these types of constitutional violations would affect the fairness of the trial.[334] Similarly, the Court likened *Miranda*'s protection to the concerns of the Sixth Amendment regarding effective assistance of counsel and a fair trial.[335] As the Court correctly concluded, the right to effective assistance of counsel is the means of assuring the accused a fair trial.[336] Ultimately the Sixth Amendment "confers a 'fundamental right' on criminal defendants, one that 'assures the fairness, and thus the legitimacy, of our adversary process.' "[337] By joining this opinion, Justice White once again showed his concern for the interests of a fair trial and the effective assistance of counsel. With that in mind, his continued hostility to the Sixth Amendment right to counsel is not justified.

V. CONCLUSION

The concerns of the Sixth Amendment right to counsel are similar to the Fifth Amendment privilege against self-incrimination. Both seek to prevent the introduction of unreliable confessions and promote the accused's right to a fair trial. The congruence of the two amendments, therefore, compels analogous attitudes in the area of police interrogation. Justice White's continued enmity towards the right to counsel in this area is unexplained, and perhaps unexplainable, in light of his firm acceptance of *Miranda* and the privilege against self-incrimination as a means of protecting the accused's constitutional rights during police interrogation and at the subsequent trial. When the *Miranda* decision was handed down, Justice White was its harshest critic. Since 1981 he

330. *Id.* at 1255.

331. *Id.* at 1257 (quoting Rose v. Clark, 478 U.S. 570, 577, 578 n.6 (1986) (Stevens, J., concurring in judgment)).

332. 113 S. Ct. 1745 (1993). *See supra* notes 131-141 and accompanying text for an analysis of the facts and reasoning in *Withrow*.

333. *Withrow*, 113 S. Ct. at 1750-51.

334. *Id.*

335. *Id.*

336. *Id.* at 1751.

337. *Id.* at 1751 (quoting Kimmelmann v. Morrison, 477 U.S. 365, 374 (1986)).

has embraced and even expanded the protections set forth in that opinion. This change is commendable and most welcome, but it cannot be reconciled with his continued opposition to the application of the Sixth Amendment right to counsel in post-indictment custodial interrogation. As a result, Justice White retired from the Court with his metamorphosis in the area of police interrogation incomplete.