CRIMINAL PROCEDURE--FIFTH AMENDMENT--LAW ENFORCEMENT OFFICIAL, POSING AS A FELLOW INMATE, IS NOT REQUIRED TO ISSUE A *MIRANDA* WARNING TO AN INCARCERATED SUSPECT WHILE ATTEMPTING TO ELICIT INCRIMINATING INFORMATION--*Illinois v. Perkins*, 110 S. Ct. 2394 (1990).

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I. INTRODUCTION

The fifth amendment to the United States Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."[1] Known as the "self-incrimination clause," the fifth amendment grants individuals the right to refuse to speak with law enforcement officials once they become suspected of criminal activity.[2] Indeed, the Framers of the Constitution elevated the procedural fairness of the criminal trial above societal interest in conviction, mandating that a criminal defendant not be forced to contribute to his own conviction.[3] Throughout history, the parameters of the fifth amendment have on numerous occasions been the subject of judicial debate.[4] Recently, in *Illinois v. Perkins*,[5] the United States Supreme Court revisited the question of how far the fifth amendment extends and determined that an incriminating statement obtained by an undercover police officer from a suspect, incarcerated for an unrelated matter, was admissible in a criminal prosecution.[6]

In 1984, Richard Stephenson was killed in an Illinois suburb.[7] The crime remained unsolved until Donald Charlton, an inmate at Graham Correctional Facility, contacted police in March 1986.[8] Mr. Charlton, who was serving a sentence for burglary, advised the police that a fellow

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[1] U.S. CONST. amend. V.

[2] *See generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 430 (1986).

[3] *Id.* at 432.

[4] For a discussion of various interpretations of the Court's role in shaping the fifth amendment, see Project: *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1986-1987*, 76 GEO. L.J. 521, 660 (1988) [hereinafter Project].

[5] 110 S. Ct. 2394 (1990).

[6] *Id.* at 2396. The statement was obtained before Perkins had even been indicted for the murder of Stephenson. *Id.* Indeed, the police were merely acting on a "tip." *Id.*

[7] *Id.*

[8] *Id.*

inmate, Lloyd Perkins, had described in detail his responsibility for the murder of Stephenson.[9] Because Charlton knew details of Stephenson's murder which had not been widely publicized, the police believed Charlton's story was credible.[10]

Perkins was thereafter released from Graham Correctional Facility but was subsequently incarcerated in another county, pending trial on an unrelated charge.[11] In an effort to further investigate his involvement in the Stephenson murder, the police placed Charlton, along with John Parisi, an undercover police agent, in Perkins' cell.[12] Charlton met Perkins in a common area of the prison, and introduced Parisi by the alias "Vito Bianco."[13] Shortly after meeting, the three schemed to "break out" of the prison.[14]

Later that day, while refining their escape plan in Perkins' cell, Parisi inquired as to whether Perkins had ever killed anyone.[15] Perkins

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* An informant was used, rather than an eavesdropping device, because the police feared that the eavesdropping device would fail, creating a dangerous situation for Charlton. *Id.* Instead, the police decided to play Parisi and Charlton as two "escapees" from a work release program who were arrested during the commission of a burglary. *Id.* Parisi and Charlton were instructed to engage Perkins in casual conversation. *Id.*

[13] *Id.*

[14] *Id.* Parisi indicated to Perkins that he "wasn't going to do any more time," and Perkins suggested that, since Montgomery County jail was "rinky dink," they could break out. *Id.*

[15] *Id.* The conversation began when Perkins indicated that his girlfriend could get them a pistol to facilitate the escape. *Id.* Charlton responded that he was not a murderer, but a burglar. *Id.* At that point, Parisi said that he would take responsibility for any murder that occurred. *Id.* The following conversation between Perkins, Parisi and Charlton ensued:

> [Parisi]: You ever do anyone?
> [Perkins]: Yeah, once in East St. Louis, in a rich white neighborhood.
> [Charlton]: I didn't know they had any rich white neighborhoods in East St. Louis.
> [Perkins]: It wasn't in East St. Louis, it was by a race track in Fairview Heights.
> . . .
> [Parisi]: You did a guy in Fairview Heights?
> [Perkins]: Yeah in a rich white section where most of the houses look the same.
> [Charlton]: If all the houses look the same, how did you know you had the right house?
> [Perkins]: Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner.

answered affirmatively and then recounted the circumstances surrounding the Stephenson murder.[16] Perkins was subsequently charged with the murder of Richard Stephenson, and prior to trial, moved to suppress these incriminating statements.[17]

The trial court granted Perkins' motion to suppress the statements.[18] This ruling was affirmed by the Appellate Court of Illinois, which held that, pursuant to *Miranda v. Arizona,*[19] a warning must be issued prior to any interrogation of an incarcerated suspect conducted by a police officer which is likely to disclose incriminating information.[20] The United States Supreme Court granted certiorari to determine whether the traditional *Miranda*[21] warnings were required when an undercover police officer asked questions of an incarcerated, pre-indicted suspect which had the potential of producing incriminating responses.[22]

This Note will examine the *Perkins* decision in the historical context of three fundamental considerations: first, the evolution of the fifth amendment with regard to the concepts of "voluntariness" and "interrogation" and the development of each in relation to the *Miranda* warning; second, the right against self-incrimination and the governmental responsibility to give meaning to the protections afforded under *Miranda;* and third, the sixth amendment right to counsel and the determination of precisely when in the criminal process this right attaches.

[Parisi]: How long ago did this happen?
[Perkins]: Approximately two years ago. I got paid $5,000 for that job.
[Parisi]: How did it go down?
[Perkins]: I walked up to . . . this guy['s] house with a sawed-off under my trench coat.
[Parisi]: What type gun[?]
[Perkins]: A .12 gauge Remmington [sic] Automatic Model 1100 sawed-off.

Id. at 2401-02.

[16] *Id.* at 2402.

[17] *Id.*

[18] *Id.*

[19] 384 U.S. 436 (1966).

[20] *Perkins*, 110 S. Ct. at 2402.

[21] For a discussion of the *Miranda* Court's determination of circumstances which require a warning, see *infra* notes 56-65 and accompanying text.

[22] 384 U.S. at 479. For a review of the warning required by *Miranda*, see *infra* note 57 and accompanying text.

A. THE EVOLUTION OF THE FIFTH AMENDMENT

The American legal system may be distinguished from others in one critical respect, namely, that the defendant enters the litigation process clothed in a presumption of innocence.[23] It is fundamental that this presumption may only be rebutted by the accuser based on properly admitted evidence.[24] Hence, the Supreme Court has for several decades examined the admissibility of confessions by a criminal defendant as a means of rebutting the presumption.[25]

Generally, under the common law, all confessions were admissible.[26] Gradually, however, the common law tended to exclude confessions which were the product of coercion, deeming them unreliable.[27]

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[23] *See* Powell v. Alabama, 287 U.S. 45, 52 (1932).

[24] *See generally* F. WHARTON, EVIDENCE IN CRIMINAL ISSUES § 24b (10th ed. 1912) (In criminal cases, evidence that neither tends to prove nor disprove the charge is inadmissible.).

[25] *See* Rhode Island v. Innis, 446 U.S. 291 (1980) (Where there is no direct questioning by the police, and a suspect offers incriminating information, that information is admissible at trial.); Brewer v. Williams, 430 U.S. 387 (1977) (Any statement given once the right to counsel has been invoked is inadmissible.); Miranda v. Arizona, 384 U.S. 436 (1966) (Suspect must be warned that he has a right to remain silent but that he may waive that right, and if he chooses to speak, he has a right to the assistance of counsel.).

[26] B. JAMES GEORGE, JR., CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES, 87 (1966).

[27] *Id.* The seminal case addressing the admissibility of coerced confessions is Brown v. Mississippi, 297 U.S. 278 (1936). The *Brown* Court held that confessions resulting from torture and physical abuse were inadmissible because they denied the defendant his due process guarantees under the fourteenth amendment. *Id.* at 285-86. Other cases affirming the *Brown* exclusionary principle include Payne v. Arkansas, 356 U.S. 560 (1958) (defendant denied food for approximately 25 hours, made to surrender his shoes and socks and subjected to extended questioning and a lie detector test); Leyra v. Denno, 347 U.S. 556 (1954) (defendant unknowingly hypnotized and confession elicited); Rochin v. California, 342 U.S. 165 (1952) (use of stomach pump to obtain evidence of morphine ingested by defendant); Williams v. United States, 341 U.S. 97 (1951) (use of rubber hose, pistol, sash cord and bright lights); Malinski v. New York, 324 U.S. 401 (1945) (defendant forced to remove clothing during interrogation and subsequently beaten); McNabb v. United States, 318 U.S. 332 (1943) (forcing the defendant to remove his clothing during interrogation); Ward v. Texas, 316 U.S. 547 (1942) (use of whips and burns); Chambers v. Florida, 309 U.S. 227 (1940) (restriction of food and sleep). *See also* Stein v. New York, 346 U.S. 156 (1953). The *Stein* Court recognized that innocent, as well as guilty, individuals may often confess rather than endure the physical pain of torture. *Id.* at 182. The *Stein* Court determined that the evidence did not "connect" the defendant's injuries to the events surrounding the interrogation. *Id.* at 183. Accordingly, the conviction was affirmed. *Id.* at 197. However, the Court announced that if the evidence had shown a "connection," then the scales would have been tipped in the defendant's favor. *Id.* at 183. *But cf.* Breithaupt v. Abram, 352 U.S. 432 (1957) (Use

Accordingly, the concept of "voluntariness" became a critical factor for judicial scrutiny regarding admissible confessions.[28] As early as 1897, the United States Supreme Court held that a confession must be "free and voluntary: that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[29] Situations in which the accused was unaware that he was furnishing incriminating information to a law enforcement official have through the years, however, tested the boundaries of "voluntariness."[30] Notably, the Court has examined three instances in which deception was used to elicit incriminating, but voluntary statements from a defendant, and the statements were subsequently introduced by the state as evidence at trial.

First, the Court has examined the propriety of confessions obtained

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of blood test, taken while defendant was unconscious, was held admissible in a trial for involuntary manslaughter.).

[28] *See* Malloy v. Hogan, 378 U.S. 1 (1964) (The voluntariness doctrine includes all techniques likely to exert sufficient pressure upon the suspect rendering him unable to exercise his free will.). *See also* Spano v. New York, 360 U.S. 315, 323 (1959) (Statements that were elicited after indictment were held inadmissible because they resulted from the petitioner's will having been "overborne by official pressure, fatigue and sympathy falsely aroused" in the post-indictment period.). *But cf.* Colorado v. Connelly, 479 U.S. 157 (1986). In *Connelly*, the Supreme Court held that suppressing the voluntary confession of a mentally incompetent individual would "serve absolutely no purpose in enforcing constitutional guarantees." *Id.* at 166. Additionally, the *Connelly* majority recognized that excluding relevant evidence results mainly in deterring the criminal courts from their primary purpose. *Id.*

For an in-depth discussion of confessions of the mentally ill, see Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59 (1989); Note, *Confessions Compelled By Mental Illness: What's An Insane Person To Do?* 56 U. CIN. L. REV. 1049 (1988).

[29] Bram v. United States, 168 U.S. 532, 542-43 (1897) (quoting 3 RUSSELL ON CRIMES 478 (6th ed. 1896)). In *Bram*, the defendant was accused of murder on the high seas. *Id.* at 561. The defendant was brought, in irons, to the United States Consul where he was ordered to remove his clothing and was searched. *Id.* The investigating officer then advised him that a witness located at the wheel of the ship had seen the act, to which the defendant responded "he could not see me from there." *Id.* at 562. This statement was offered as a confession, but the Supreme Court determined that it had been the product of hope or fear, and had not been voluntary. *Id.* at 563. *See also* Brady v. United States, 397 U.S. 742 (1970). In *Brady*, a suspect entered a guilty plea believing he would receive a more lenient sentence. *Id.* at 749. In determining whether or not the statement was wholly voluntary, the Court held that all relevant circumstances must be considered. *Id.*

[30] *See* United States v. Henry, 447 U.S. 264 (1980); Hoffa v. United States, 385 U.S. 293 (1966); Massiah v. United States, 377 U.S. 201 (1964); Lopez v. United States, 373 U.S. 427 (1963); Wong Sun v. United States, 371 U.S. 471 (1963). *See also infra* notes 31-51, 119-30 and accompanying text.

through the use of electronic surveillance equipment.[31] Specifically, in *Lopez v. United States*,[32] an Internal Revenue Service agent investigating possible tax evasion was bribed by his suspect.[33] During a subsequent investigation, the agent was wired with two electronic devices and instructed to direct the conversation toward eliciting a bribe.[34] The agent was successful, and a conversation incriminating the defendant was obtained.[35] Prior to trial, the defendant moved to suppress this conversation, alleging entrapment.[36]

The Supreme Court concluded that in order to support a defense of entrapment in a criminal prosecution the defense must demonstrate that the actions of the government agent actually induced the conduct of the accused.[37] Reaching this conclusion, the majority emphasized that the defendant himself initiated the bribe and that the agent's role was

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[31] *See Lopez*, 373 U.S. 427. The *Lopez* Court upheld the validity of eavesdropping even without a warrant if conducted only for short periods of time as a means of obtaining evidence. *Id.* at 439. For a general review of the development and constitutionality of electronic surveillance, see J. J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 2.5 (2d ed. 1986).

[32] 373 U.S. 427 (1963).

[33] On October 21, 1961, Lopez made the following statement to the agent: "You can drop this case. Here's $200. Buy your wife a present. And I'll have more money for you at Christmas time. This is all I have now." *Id.* at 430.

[34] *Id.* at 429-30.

[35] *Id.* at 432-33. The taped conversation of October 24, was as follows:

> Lopez: Whatever we decide to do from here on I'd like you to be on my side and visit with me. Deduct anything you think you should and I'll be happy to . . . because you may prevent something coming up in the office. If you think I should be advised about it let me know. Pick up the phone. I can meet you in town or anywhere you want. For your information the other night I have to . . . .
> Davis: Well, you know I've got a job to do.
> Lopez: Yes, and Uncle Sam is bigger than you and I are and we pay a lot of taxes, and if we can benefit something by it individually, let's keep it that way and believe me anything that transpires between you and I, not even my wife or my accountant or anybody is aware of it. So I want you to feel that way about it.

Id. at 431.

[36] *Id.* at 432. In Sorrells v. United States, 287 U.S. 435 (1932), the Supreme Court held that the defense of entrapment encompassed acts performed by the defendant solely because of the influence or instigation of law enforcement officials, and did not include acts which the defendant was predisposed to commit without the official's assistance.

[37] *Lopez*, 373 U.S. at 435. For an extensive review of history of the entrapment defense, see P. MARCUS, THE ENTRAPMENT DEFENSE § 1.02-1.10 (1989).

limited to affording the defendant an opportunity to continue his criminal behavior.[38] Additionally, the *Lopez* Court deemed this evidence admissible because the electronic device did not make it possible for the government to hear a conversation it would otherwise have missed; rather, it enabled the government to obtain the most reliable duplication of the conversation.[39]

The Supreme Court addressed a second type of incriminating statement in *Wong Sun v. United States*.[40] In *Wong Sun*, law enforcement officials relied upon an illegally obtained statement from a suspect in order to uncover illegal drug sales.[41] Finding the statement inadmissible, the Court established the "fruit of the poisonous tree" doctrine, namely, that evidence obtained as the result of illegal police activity need not always be excluded.[42] Under this doctrine, the Court stated that the determining criteria was whether the objected to evidence had been "sufficiently distinguishable to be purged of the primary taint."[43] If the evidence sought to be admitted could be effectively separated from that which was illegally obtained, it was purged of its original taint and could be introduced at trial.[44]

The *Wong Sun* Court applied the "fruit of the poisonous tree" doctrine a second time and concluded that voluntary statements made by the defendant after his arraignment and subsequent to a properly

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[38] *Lopez*, 373 U.S. at 436.

[39] *Id.* at 439. The Court stated that, when available, recorded evidence of a conversation should not be excluded as that evidence was inherently more reliable than the listener's recollection of the conversation. *Id.* at 440.

[40] 371 U.S. 471 (1963).

[41] *Id.* at 486. Hom Way had been under surveillance by San Francisco narcotics agents for approximately six weeks. *Id.* at 473. He was eventually arrested for possession of heroin. *Id.* He advised the agents that he had purchased the heroin from Blackie Toy, the owner of Oye's Laundry. *Id.* Approximately seven federal agents went to Oye's Laundry to find Blackie Toy, where, upon arrival, they were advised by James Wah Toy that the laundry service was not open. *Id.* at 473-74. The agents subsequently broke down the door, and chased Toy into his bedroom, where he identified someone named Johnny as the person who had been selling him drugs. *Id.* at 474.

[42] *Id.* at 487-88. The Court referred to this standard as the "fruit of the poisonous tree" because it involved information that would not have been received but for illegal police activity. *Id.* Specifically, the Court found that the evidence sought to be introduced was obtained by exploiting the illegal information. *Id.*

[43] *Id.* (quoting MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

[44] *Id.* *See infra* notes 45-47 and accompanying text (explaining how the evidence in *Wong Sun* was purged of its original taint).

issued *Miranda* warning were admissible.[45] Specifically, the Court determined that the statements were purged of their primary taint[46] because they had been obtained in accordance with the procedural safeguards required by *Miranda.*[47]

The Supreme Court addressed a third type of "deception" regarding voluntary statements in *Hoffa v. United States.*[48] In *Hoffa,* a government informant, Edward Partin, obtained various incriminating statements from the defendant concerning jury tampering in the defendant's trial for embezzling union funds.[49] Determining that these statements were admissible, the Court relied on two critical factors. First, the majority found that the defendant had made these incriminating statements believing that Partin would not reveal the information to government officials, therefore, the defendant had relied only on Partin's integrity.[50] Second, because the Court concluded that the statements were wholly voluntary, it found that the necessary element of coercion was absent; hence, the statements were admissible.[51]

As these cases illustrate, the Supreme Court has frequently wrestled with the admissibility of incriminating statements made without the knowledge or consent of the accused.[52] A common thread running through each case in which an incriminating statement was admitted, however, has been the voluntary manner in which the accused made the

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[45] 371 U.S. at 491.

[46] *Id.* The Court found that certain statements were "tainted" because they were the product of an illegal search. *Id.* However, the Court held that the recovery of narcotics as a result of Toy's inadmissible statements was purged of its taint. *Id.*

[47] *Id.* Finding the statements admissible, the *Wong Sun* Court further relied on the fact that Wong Sun was released after arraignment on his own recognizance and he returned of his own volition several days later to make the statement. *Id.* Because Wong Sun's actions in giving the statement were voluntary, the Court concluded that the statement was independent of the legal arrest and therefore properly admissible. *Id.*

[48] 385 U.S. 293 (1966). The facts of *Hoffa* are substantially similar to *Perkins* in that the defendant had not yet been indicted, nor had he been accused, of jury tampering at the time these incriminating statements were obtained by a government informant. *Id.* at 296.

[49] *Id.* at 296-98.

[50] *Id.* at 302.

[51] *Id.* at 304. *Hoffa* was decided several months after Miranda v. Arizona, 384 U.S. 436 (1966), but *Miranda* is mentioned only briefly by the *Hoffa* Court.

[52] *See supra* notes 48-51 and accompanying text (discussing *Hoffa*); *supra* notes 31-39 and accompanying text (discussing *Lopez*); *supra* notes 40-47 and accompanying text (discussing *Wong Sun*).

statement.[53] This conclusion was reached regardless of whether the accused was aware at the time he made the statement that it would be used as evidence against him.[54] This concept was elaborated upon, and arguably laid to rest, in the seminal case of *Miranda v. Arizona*.[55]

B. *MIRANDA v. ARIZONA* AND ITS PROGENY

In one of its most notorious decisions, the United States Supreme Court in 1966 formulated a checklist in order to safeguard the due process rights of a criminal suspect during a custodial interrogation.[56] Today, this checklist has come to be known as the *Miranda* warning, and is familiar to most American television and movie viewers:

> [A suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.[57]

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[53] *See supra* notes 35-38, 45-46 and 50-51 and accompanying text.

[54] *See supra* note 28 and accompanying text. *But cf.* Moran v. Burbine, 475 U.S. 412, 466-67 (1986) (Stevens, J., dissenting). Justice Stevens rejected the simplistic approach taken by the *Burbine* majority that the voluntariness of a confession may be evaluated by whether it "shocks the conscience." *Id.* Rather, Justice Stevens emphasized that the due process clause mandates "fairness, integrity and honor in the operation of the criminal justice system . . . ." *Id.* at 467 (Stevens, J., dissenting). Furthermore, the dissent noted that "tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness." *Id.* at 466-67 n.6 (Stevens, J., dissenting) (citing Rogers v. Richmond, 365 U.S. 534, 541 (1961)). For an in-depth analysis of Justice Stevens' dissent, see Comment, Moran v. Burbine: *Duty to Inform, Police Deception and the Egregious Standard for Miranda*, 23 NEW ENG. L. REV. 151 (1988).

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

[56] *Id. Miranda v. Arizona* was actually a consolidation of four distinct matters: No. 584 *California v. Stewart*; No. 759 *Miranda v. Arizona;* No. 760 *Vignera v. New York*; and No. 761 *Westover v. United States*. In all four cases, the Court reversed lower court decisions which admitted incriminating statements at trial made in the absence of notification of the right to remain silent. For an in-depth analysis of *Miranda v. Arizona*, see Project, *supra* note 4, nn. 713-56 (1988).

[57] *Miranda*, 384 U.S. at 479. Additionally, the *Miranda* warning provides that any waiver of these rights must be made "knowingly and intelligently." *Id.* at 475. In the absence of such waiver, once a suspect has indicated a desire to have counsel present at interrogation, all questioning must cease until an attorney can be present. *Id.* at 472. Finally, the suspect may indicate at any time during the interrogation that he no longer

Recognizing the inherent difficulty in police investigations, however, the *Miranda* Court was mindful of instances in which incriminating statements remained admissible.[58] Specifically, the Court enunciated that voluntary statements given in the absence of coercion posed no threat to the right against self-incrimination, and therefore were admissible.[59] The *Miranda* majority further emphasized that coercion was not necessarily restricted to physical abuse, but was often psychological.[60]

The *Miranda* Court also established a guideline for lower courts to determine which settings constituted a custodial interrogation, thereby mandating the issuance of a *Miranda* warning.[61] The Court concluded that a custodial interrogation was questioning initiated by government agents once a suspect was "taken into custody" or otherwise significantly denied his freedom.[62] Additionally, the majority declared that a custodial interrogation normally took place in a "police-dominated atmosphere"[63] producing an element of psychological stress for the suspect.[64] The Court found that statements given under conditions intended to disturb the suspect's mental state, therefore, were the product of the suspect's

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wishes to participate, and at that point all questioning must cease. *Id.* at 474.

[58] *Id.* at 477.

[59] *Id.* at 478. On numerous occasions the Court has noted the restriction of *Miranda* to coercive interrogations. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298 (1985). For a discussion of the *Elstad* decision see *infra* notes 97-108 and accompanying text.

In Harris v. New York, 401 U.S. 222 (1971) the Court provided that statements voluntarily given, but in violation of *Miranda*, could be used for impeachment purposes on cross-examination, although the statements could not be part of the state's case-in-chief. In 1990, however, the Court refused to expand this holding to admit prior statements made by the defendant's witnesses in violation of *Miranda* safeguards to impeach the defendant's witnesses. *See*, Michigan v. Harvey, 110 S. Ct. 1176 (1990).

[60] *Miranda*, 384 U.S. at 448. The Court noted that the most effective means for placing psychological pressure upon a suspect during interrogation were set forth in police manuals. *Id.* The Court referred specifically to INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956); DIENSTEIN, TECHNIQUES FOR THE CRIME INVESTIGATOR 97-115 (1952); and, KIDD, POLICE INTERROGATION (1940). *Miranda*, 384 U.S. at 449 n.8. Summarizing the techniques set forth in these manuals, the Court noted that some essential elements in successful interrogation are to have patience and perseverance, to keep the suspect isolated, and to appear convinced of the suspect's guilt. *Id.* at 450-55. The Court also discussed the "Mutt and Jeff" act, where one police officer befriends the suspect and the other acts with hostility based on the suspect's guilt. *Id.* at 452.

[61] *Miranda*, 384 U.S. at 445-56

[62] *Id.* at 444.

[63] *Id.* at 445.

[64] *Id.* at 448.

impaired ability to employ his sound judgment, and accordingly were inadmissible.[65]

Perhaps the most significant aspect of the *Miranda* decision, however, was the Court's conclusion that any violation of the *Miranda* safeguards would give rise to a presumption that the incriminating statement had been obtained through coercion.[66] Moreover, the Court declared that once such a presumption arose, the burden was upon the state to demonstrate that the suspect had "knowingly and intelligently" waived his right to counsel.[67] The exact parameters of *Miranda* have since been the subject of judicial scrutiny on numerous occasions.[68] For example, in 1977, the Supreme Court examined an interrogation somewhat unique in comparison with the "traditional" interrogation methods discussed by the *Miranda* Court.[69] *Brewer v. Williams,*[70] a case actually decided on sixth amendment grounds, had profound effects upon the scope of the fifth amendment as well.[71]

In *Brewer*, the respondent murdered a ten year old girl in Des

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[65] *Id.* at 466.

[66] *Id.* at 474. The *Miranda* Court emphasized the necessity of requiring the state to prosecute a suspected criminal using only evidence legally obtained by the state's own hand, rather than by relying on compelled incriminating statements elicited from the defendant's own mouth. *Id.* at 460. In considering the propriety of the voluntary statements, therefore, the majority noted the importance of ensuring that the defendant would not have remained silent had the state official not participated in some coercive activity. *Id.* at 462.

[67] *Id.* at 475. *See also* Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964) (An accused may intelligently and knowingly waive both the right to counsel and the privilege against self-incrimination.).

[68] *See* Oregon v. Elstad, 470 U.S. 298 (1985); Rhode Island v. Innis, 446 U.S. 291 (1980); Brewer v. Williams, 430 U.S. 387 (1977).

For a discussion of the economic ramifications inherent in upholding *Miranda*, see Lippmann, *A Commentary on Inbau & Manak's* "Miranda v. Arizona - *Is It Worth The Cost? (A Sample Survey, With Commentary, of the Expenditure of Court Time and Effort)*," 25 CAL. W.L. REV. 87 (1988) (The Inbau and Manak article appeared at 24 CAL. W.L.2 REV. 185 (1988)).

[69] 430 U.S. 387 (1977). The *Miranda* Court suggested that interrogations would take place in a police-dominated atmosphere, causing the suspect psychological stress. *See Miranda*, 384 U.S. at 445.

[70] 430 U.S. 387 (1977). *Brewer* became known as the "Christian burial case."

[71] *Id.* at 397-98. The Court actually decided this case based on the sixth amendment, concluding that the respondent had clearly invoked his right to counsel. *Id.*

Moines, Iowa, and subsequently fled the jurisdiction.[72] Approximately two days later, the respondent's lawyer advised police that his client had contacted him and expressed a desire to return to Des Moines and surrender himself to the police.[73] Prior to his indictment, the respondent was advised of his *Miranda* rights by Detective Leaming, one of the custodial police officers, and was transported by Detective Leaming and other officers back to Des Moines.[74] While en route, Detective Leaming made what has come to be known as the "Christian burial speech," that the family of the victim had a right to her body so that she might have a proper Christian burial.[75] The respondent then directed the police

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[72] *Id.* at 390. The respondent, an escapee from a mental institution, abducted Pamela Powers from a wrestling tournament at the YMCA in Des Moines, Iowa on December 24, 1968. *Id.* A 14-year old boy observed the respondent carrying Pamela Powers out of the YMCA wrapped in a blanket and placed her in his automobile. *Id.* The boy later told police that the girl's legs were exposed from under the blanket. *Id.* The police recovered the respondent's automobile the following day in Davenport, Iowa. *Id.*

[73] *Id.* The respondent's lawyer, Henry McKnight, advised the respondent to surrender himself to the Davenport police. *Id.* The respondent was subsequently charged with abduction and given his *Miranda* warnings. *Id.*

[74] *Id.* The respondent clearly indicated a desire to have the assistance of counsel. *Id.* at 391. Accordingly, the officers transporting the respondent to Des Moines were instructed on two separate occasions by Kelly, a lawyer temporarily acting on the respondent's behalf, not to interrogate the respondent concerning the murder. *Id.* In addition, Detective Leaming advised the respondent that he was under no obligation to discuss the matter with either Detective Leaming or the other custodial officer during the trip. *Id.*

[75] *Id.* at 392-93. The contents of the speech were as follows:

> I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

Id.

officers to the location where he had abandoned the girl's body.[76] This evidence was admitted at trial, and the respondent was convicted.[77]

Reviewing the comments made by Detective Leaming, the Supreme Court found that the "Christian burial speech" had been a deliberate attempt by Detective Leaming to elicit incriminating information from the respondent and therefore was tantamount to an interrogation.[78] In addition, the majority concluded that, once charged with a crime and once "adversary proceedings have commenced against an individual," a decision to exercise the right to counsel effectively precluded the admission of statements such as those elicited from the respondent.[79] Therefore, the Court decided *Brewer* based on sixth amendment considerations, specifically, that the "Christian burial speech" was held to impermissibly interfere with the respondent's right to counsel.[80]

While the "Christian burial speech" may easily be identified as coercive, the Supreme Court has also encountered more subtle and even unintended inducements to incriminating statements.[81] In *Rhode Island v. Innis*,[82] the respondent was arrested in connection with the robbery of a taxicab driver in which a sawed-off shotgun was used.[83] Subsequent to the arrest, the respondent was advised of his rights under *Miranda v. Arizona*,[84] and he indicated that he wished legal representation.[85] The

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[76] *Id.* at 393. The respondent first directed the officers to the place where the girl's shoes and blanket had been left. *Id.*

[77] *Id.* at 394. The trial court found Williams guilty of murder. *Id.* at 394. This judgment was affirmed by the Iowa Supreme Court. *Id.* (citing State v. Williams, 182 N.W. 2d 396, 402 (1970)).

[78] *Id.* at 399. The Court found that Detective Leaming's speech was not a "traditional" interrogation as defined by the *Miranda* Court. *Id.* For an explanation of a "traditional" interrogation, see *supra* notes 48-57 and accompanying text.

For a discussion of hypotheticals testing the validity of the *Williams* decision, see Y. Kamisar, Brewer v. Williams, *Massiah and Miranda: What is "Interrogation"? When Does It Matter?* 67 GEO. L.J. 1, 45 (1978).

[79] *Brewer*, 430 U.S. at 401. For an explanation of when adversarial proceedings begin, see *infra* notes 114-17 and accompanying text.

[80] 430 U.S. at 401.

[81] *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291 (1980).

[82] *Id.* For an in-depth analysis of the Court's decision, see Note, *Confusing The Fifth Amendment with the Sixth: Lower Court Misapplication of the Innis Definition of Interrogation*, 87 MICH. L. REV. 1073 (1989).

[83] *Innis*, 446 U.S. at 293-94.

[84] *Id.* at 294. For a discussion of the rights established under *Miranda*, see *supra* notes 57-68 and accompanying text.

[85] *Innis*, 446 U.S. at 294.

respondent was transported to the police station by three police officers.[86] En route, one of the officers commented to the other that there was a large number of handicapped children in the area, and that someone might get hurt if one of those children were to recover the sawed-off shotgun used by the respondent.[87] Emotionally moved by the officer's comment, the respondent directed the officers to the location of the gun.[88] The trial court admitted these actions by the respondent and he was subsequently convicted.[89]

Expounding upon the definition established by *Miranda*,[90] the Supreme Court concluded that an interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself."[91] Accordingly, the majority extended an "interrogation" to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[92]

In an important interpretation of the limits of *Miranda*, the *Innis* Court determined that the presence of coercion must be analyzed from the perspective of the suspect, rather than examining the intent of the interrogating police officer.[93] This holding, clearly, negates any requirement that the defendant produce objective proof of the officer's

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[86] *Id.*

[87] *Id.* at 294-95. Specifically, the officer commented that there were "a lot of handicapped children running around" because there was a school for special needs children in the neighborhood, and "God forbid one of them might find a weapon with shells and they might hurt themselves." *Id.*

[88] *Id.* at 295.

[89] *Id.* at 296. The statement occurred when Innis interrupted the conversation between the officers and advised that he would direct them to the location of the gun. *Id.* at 295. Upon arriving at the scene, the police again advised Innis of his rights, to which he responded that he was aware of those rights, but "wanted to get the gun out of the way because of the kids in the area in the school." *Id.*

[90] The *Innis* Court examined the *Miranda* Court's definition of interrogation. *Id.* at 298 (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966). "By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (emphasis deleted)).

[91] *Id.* at 300.

[92] *Id.* at 301. The Court defined "incriminating response" as "any response - whether inculpatory or exculpatory - that the prosecution may seek to introduce at trial." *Id.* at 301 n.5.

[93] *Id.*

intent to show an infringement of the defendant's constitutional rights.[94] Applying this rationale to the facts of *Innis*, the Court concluded that the police officer had no previous knowledge that their conversation would evoke incriminating statements from the respondent; consequently, the statement was held admissible.[95]

In 1985, however, the Supreme Court further narrowed the protections afforded under *Miranda*.[96] In *Oregon v. Elstad*,[97] a suspect in a burglary made incriminating statements prior to the issuance of a *Miranda* warning.[98] He was subsequently advised of his *Miranda* rights, at which time he waived them and signed a written confession.[99] Ruling that the statements were admissible, the Court employed the "fruit of the poisonous tree" theory articulated in *Wong Sun*,[100] and concluded that the confession was not inherently tainted, even though obtained in violation of *Miranda*.[101] Rather, the presumption that the confession had been compelled only excluded it from the state's case in chief, allowing it to be introduced on cross-examination.[102]

In addition, the *Elstad* Court determined that statements made

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[94] *Id.* In fact, the burden of establishing that a statement obtained in violation of the suspect's right to counsel, once that right has been invoked, rests absolutely upon the state. Miranda v. Arizona, 384 U.S. 436, 475 (1966). In addition, the *Innis* Court considered the conclusion of the Rhode Island Supreme Court that the conversation was tantamount to "subtle compulsion," but determined that the incriminating response had not been the result of the actions or words of the police. *Innis*, 446 U.S. at 303.

[95] *Innis*, 446 U.S. at 303.

[96] Oregon v. Elstad, 470 U.S. 298 (1985). For an in-depth discussion of this movement away from *Miranda*, see Note, Oregon v. Elstad: *The Supreme Court Goes Back To The Future With A New Voluntariness Test For Unwarned Confessions*, 27 ARIZ. L. REV. 913 (1985).

[97] 470 U.S. 298 (1985).

[98] *Id.* at 301. Officer Burke asked Elstad if he had heard that the Gross residence had been robbed, and Elstad responded affirmatively. *Id.* Officer Burke then told Elstad that he believed Elstad was involved in the robbery. *Id.* Elstad responded, "[y]es, I was there." *Id.* Elstad was subsequently transported to the Sheriff's office where he was advised of his *Miranda* rights. *Id.* Elstad indicated that he understood his rights and admitted that he and a friend had robbed the Gross residence. *Id.* This statement was typed, reviewed and signed by Elstad. *Id.*

[99] *Id.*

[100] *Id.* at 307. *See supra* notes 41-47 and accompanying text.

[101] *Elstad*, 470 U.S. at 307.

[102] *Id.* The Court stated that the failure to issue a *Miranda* warning did not actually indicate that the statement was in fact the product of coercion. *Id.* at 310. Rather, the Court found that the judicial system would presume that the suspect's fifth amendment rights had not been intelligently exercised. *Id.*

without the *Miranda* warning should be subject to the traditional due process "voluntariness" standard to determine admissibility.[103] In such cases, the majority held that the simple failure to give a *Miranda* warning in itself, absent police coercion, was insufficient to make the statement absolutely inadmissible.[104] The Court posited that a contrary conclusion would constitute an "unwarranted extension" of the *Miranda* doctrine.[105]

Finally, the *Elstad* Court noted that a voluntary disclosure of a wrongful act was insufficient to compromise a suspect's fifth amendment rights.[106] In so finding, the Court emphasized that confessions had long played a critical role in effective police investigation, and that the criminal justice system should not be denied their probative value without adequate justification.[107] Moreover, the Court recognized that exclusion of such statements gave suspects little additional protection, while interfering significantly with the legitimate needs of law enforcement.[108]

Since 1966, the Supreme Court has regularly deferred to the *Miranda* doctrine.[109] On occasion, however, that deference has taken the form of strict interpretation, resulting in diminished protection to those

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[103] *Id.* at 307-08.

[104] *Id.* at 310-11.

[105] *Id.* at 309. The *Elstad* Court held that *Miranda* was not intended to protect statements given in the absence of coercion where the suspect's will was not overborne. *Id.* Rather, the Court concluded that only statements not the product of free will "taint[ed] the investigatory process." *Id.*

[106] *Id.* at 312. The Court stipulated, however, that voluntary disclosure must occur after a knowing and intelligent waiver of the right to remain silent. *Id.* at 316. In addition, the Court emphasized that ignorance of the consequences of such a disclosure would have no effect on voluntariness. *Id.*

[107] *Id.* at 312. In an important caveat, however, the majority emphasized that the statements could not be made in response to police questioning. *Id.* at 317. Indeed, the Court held that even if the response was deemed voluntary, a presumption of coercion would arise. *Id.* Moreover, the *Elstad* Court emphasized that there was no bright-line rule for determining when an inculpatory statement, voluntarily given but in violation of *Miranda*, was inadmissible. *Id.* at 318.

[108] *Id.* at 312.

[109] *See Elstad*, 470 U.S. 298; Rhode Island v. Innis, 446 U.S. 291 (1980); Brewer v. Williams, 430 U.S. 387 (1977). For a discussion of these cases, see *supra* notes 70-80, 82-95, 97-108 and accompanying text.

suspected of criminal activity.[110] Most recently, the Supreme Court has curtailed the *Miranda* safeguards in *Illinois v. Perkins*.[111] While an analysis of the fifth amendment is crucial in examining the historical significance of *Perkins*, this case also raised important concerns related to the scope and vitality of the sixth amendment.[112]

C. THE SIGNIFICANCE OF THE SIXTH AMENDMENT

The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[113] Traditionally, the Supreme Court has marked the arraignment or indictment as the time when the right to counsel attached.[114] By establishing the arraignment

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[110] *See* Illinois v. Perkins, 110 S. Ct. 2394 (1990) (voluntary statements given to an undercover agent absent *Miranda* warning admissible); Colorado v. Connelly, 479 U.S. 157 (1986) (voluntary statements of a mental incompetent admissible); Moran v. Burbine, 475 U.S. 412 (1986) (voluntariness of a statement judged by whether it shocks the conscience); Oregon v. Elstad, 470 U.S. 298 (1985) (voluntary statements given in the absence of *Miranda* warnings admissible on cross-examination); Harris v. New York, 401 U.S. 222 (1971) (voluntary statements given in violation of *Miranda* admissable only on cross-examination).

[111] 110 S. Ct. 2394 (1990). For an in-depth review of *Perkins*, see *infra* notes 171-210 and accompanying text.

[112] For a discussion of the sixth amendment concerns addressed by the Court in *Perkins*, see *infra* notes 182-89 and accompanying text.

[113] U.S. CONST. amend. VI. The Supreme Court has developed the precise application of the sixth amendment through various decisions. *See* Maine v. Moulton, 474 U.S. 159 (1985); Brewer v. Williams, 430 U.S. 387 (1977); Kirby v. Illinois, 406 U.S. 682 (1972); Massiah v. United States, 377 U.S. 201 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court indicated that any statement obtained once a suspect indicated a desire to have an attorney present gave rise to a presumption that the statement was illegal. *Id.* at 475. The *Miranda* majority further indicated that any subsequent attempts by the state to introduce the statement as evidence at trial must be accompanied by a showing that the suspect had knowingly and intelligently issued a waiver of his fifth and sixth amendment rights. *Id.* Recognizing that this was a difficult burden to satisfy and not merely a meaningless ritual, the Court stated that mere silence was not indicative of an intentional waiver of these rights. *Id.*

[114] *See Massiah*, 377 U.S. at 201 (the right to counsel, post-indictment, applicable to federal as well as state cases); Spano v. New York, 360 U.S. 315, 325 (1959) (Douglas, J., concurring) (Denial of counsel post-indictment may result in as much, or more, harm than denial of counsel during the trial.); Powell v. Alabama, 287 U.S. 45, 57 (1932) (Defendants are entitled to the assistance of counsel during the critical time after their arraignment as much as they are entitled to counsel at the trial itself.). *But cf.* Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (The right to counsel may arise prior to the actual

or indictment as the commencement of adversarial proceedings, the Court has been sensitive to the complexities presented to the defendant during the investigation and trial preparation, noting the critical nature of these functions in the criminal process.[115] Perhaps more important, however, the Court has focused upon this time period as the point at which "a defendant finds himself faced with the prosecutorial forces of organized society."[116] Accordingly, the Supreme Court has almost uniformly elevated the defendant's sixth amendment right to counsel at this juncture above societal interest in investigation, and even conviction.[117]

The seminal case addressing post-indictment incriminating statements is *Massiah v. United States*.[118] In *Massiah*, inculpatory statements were

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adversarial proceedings, when the investigation has begun to focus on one particular individual.).

[115] *Powell*, 287 U.S. at 69 ("Even the intelligent and educated layman . . . lacks both the skill and knowledge adequately to prepare his defense. . . ."). *See also* Kirby v. Illinois, 406 U.S. 682, 689-90 (1972).

[116] *Kirby*, 406 U.S. at 689-90. *But cf.* Schmerber v. California, 384 U.S. 757 (1966). In *Schmerber*, the defendant was hospitalized and treated for injuries sustained in an automobile accident. *Id.* at 758. He was subsequently arrested for driving while intoxicated and police directed that a blood sample be taken. *Id.* The defendant objected and asserted his right to have counsel present. *Id.* The Supreme Court, however, determined that the defendant's sixth amendment guarantees had not been called into question because the presence of counsel would not have assisted the defendant. *Id.* at 765-66.

[117] *Miranda*, 384 U.S. at 436 (1966). Recognizing the imperative that a defendant actually receive protection under the fifth and sixth amendments, the *Miranda* Court predicted that if the state failed to uphold the safeguards afforded American citizens under the Constitution, retribution and anarchy would result. *Id.* at 479-80. "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Id.* at 480 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Butler, J., dissenting)). *But cf.* Anolik, Fraenkel, Gaffney, Inbau, Kuh, McClellan, Moore, Murphy, Roulston, Stakel and Sutherland, *A Forum On The Interrogation Of The Accused*, 49 CORN. L.Q. 382 (1964). The authors noted:

> There is a case in the Supreme Court now from the Supreme Court of Illinois, *People v. Escobedo*, (citation omitted), that involves this very issue [of precisely when the rights afforded under the sixth amendment attach] and I am scared that the Court is going to hold that this right exists from the time of arrest - if a person asks for counsel and he is not given counsel, [subsequent statements obtained] from him [must] be excluded.

Id. at 401.

[118] 377 U.S. 201 (1964).

surreptitiously obtained from the defendant after his indictment for violation of the federal narcotics laws and admitted as evidence at the trial.[119] The Supreme Court held that the defendant had been denied his constitutional guarantee under the sixth amendment to have the assistance of counsel in his defense, reasoning that these statements had been wilfully adduced from the defendant subsequent to his indictment without the benefit of counsel present.[120] One important caveat, however, was that the majority limited the use of the incriminating statements made by the defendant during the investigation to the those statements to be used against the defendant himself.[121]

Similarly, in *United States v. Henry,*[122] the Court addressed the admissability of incriminating statements made by a defendant to his cell mate after his indictment. In *Henry*, the informant, Nichols, was an inmate at the prison in which the defendant was incarcerated.[123] Government agents investigating the robbery in which the defendant was involved, advised Nichols not to ask the respondent any questions concerning the robbery, but merely to "be alert to any statements made" by the prisoners.[124] At trial, Nichols then testified as to his knowledge of the respondent's illegal activity, which the respondent argued violated his sixth amendment rights.[125]

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[119] *Id.* at 202. Federal narcotics agents arrested both petitioner and his partner, Colson. *Id.* Unknown to the petitioner, Colson decided to cooperate with the agents by permitting the installation of a concealed radio transmitter in his automobile. *Id.* at 202-03. Several days later, Colson engaged the defendant in a conversation in his automobile. *Id.* at 203. During the conversation, the defendant made several incriminating statements that were transmitted to an agent parked down the street via the radio. *Id.* The agent, listening to the conversation via the radio, testified as to the content of these incriminating statements at trial. *Id.*

[120] *Id.* at 206.

[121] *Id.* at 207. This limitation reflects a realization by the Court of the importance of investigating suspected criminal activity even after the indictment has been obtained. *Id.*

[122] 447 U.S. 264, 265 (1980). *But cf.* Illinois v. Perkins, 110 S. Ct. 2394 (1990) (where the incriminating statements were elicited prior to indictment). For an in-depth analysis of the *Perkins* decision, see *infra* notes 171-210 and accompanying text.

[123] *Henry*, 447 U.S. at 266.

[124] *Id. But cf. supra* note 15 (The instruction to the informant not to ask questions, but rather to listen for useful information, represents a significant departure from the method of obtaining the incriminating statement from Perkins.).

[125] *Henry*, 447 U.S. at 268. Nichols testified that he had conversations with the defendant while in prison, and that the defendant had described to him, in detail, the defendant's role in the commission of the robbery with which he was charged. *Id.* at 267. The jury was not advised that Nichols had been paid by the government to be an

The government argued that the statements were admissible, claiming they were not elicited by the agents,[126] but were merely obtained through conversation.[127] The Court concluded, however, that the defendant would not have revealed the incriminating information to Nichols had he known that Nichols was a government informant.[128] The Court, therefore, declared that the respondent could not have given a knowing and voluntary waiver because the respondent dealt with an undercover informant, thereby compromising his right to counsel.[129] Accordingly, the Court maintained that Nichols' testimony was inadmissible.[130]

One year later, the Supreme Court developed a protective device to prevent a defendant from carelessly or unintentionally relinquishing his sixth amendment rights once exercised.[131] In *Edwards v. Arizona*,[132] the defendant was charged with first-degree murder, burglary and robbery.[133] After police informed the defendant that another suspect had revealed the defendant's involvement in the crimes, the defendant gave an alibi defense and attempted to plea bargain with the officers.[134] When his efforts failed, the defendant attempted to refuse any further communication with police until consulting with an attorney.[135] When police insisted that the defendant "had" to talk, he consented and made incriminating statements.[136] Prior to trial, the defendant moved to have

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informant. *Id.*

[126] *Id.* at 269.

[127] *Id.* at 271.

[128] *Id.* at 273. *But cf.* Hoffa v. United States, 385 U.S. 293 (1966) (placement of an undercover agent in a suspect's hotel room not violative of the fifth amendment). For an analysis of the *Hoffa* decision, see *supra* notes 48-51 and accompanying text.

[129] *Henry*, 447 U.S. at 273.

[130] *Id.* Concluding that the statements were inadmissible, the Court focused on three critical factors: first, that Nichols was a paid government informant; second, that Nichols was a fellow inmate in the prison with the defendant; and third, that the defendant had already been indicted and taken into custody. *Id.* at 270.

[131] Edwards v. Arizona, 451 U.S. 477 (1980).

[132] *Id.*

[133] *Id.* at 478.

[134] *Id.* at 479.

[135] *Id.* This interrogation took place at the police station. *Id.* at 478-79.

[136] *Id.* at 479. Prior to revealing his involvement in these crimes, the defendant requested to hear the tape recording of the persons implicating him. *Id.* After listening to a portion of the tape, the petitioner said "I'll tell you anything you want to know, but I don't want it on tape." *Id.* The petitioner then confessed to his participation in the crime. *Id.*

these incriminating statements suppressed based on a violation of his sixth amendment rights.[137] The lower court denied his motion, however, concluding that Edwards' statements were made voluntarily.[138] The Supreme Court rejected this determination.[139]

Reversing, the Court first emphasized that an incriminating statement must be both voluntary and must constitute "a knowing and intelligent relinquishment or abandonment of a known right or privilege."[140] Elaborating upon the effectiveness of a waiver, the majority required that such determination be fact sensitive, giving consideration to the totality of circumstances in each individual case.[141]

Moreover, the *Edwards* Court stressed that once an accused announced his desire to have counsel present during the interrogation this right could not be waived, even if the defendant voluntarily responded to police-initiated questioning.[142] Rather, to fully insulate the defendant from a potential unintended waiver of his right to counsel, the Court established that the accused himself must initiate the communication with police.[143]

The Supreme Court reaffirmed the importance of safeguards against an uninformed waiver of the right to counsel in *Michigan v. Jackson*.[144]

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[137] *Id.*

[138] *Id.* at 480.

[139] *Id.*

[140] *Id.* at 482. The Court emphasized that both prongs of this test must be addressed: voluntariness in and of itself was insufficient to constitute effective waiver. *Id.* at 483-84.

[141] *Id.* at 482. The Court specifically determined that the "background, experience and conduct of the accused" should be examined. *Id.* at 482 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[142] *Id.* at 484.

[143] *Id.* at 485. The court hypothesized that if Edwards himself had initiated a meeting with the police for the purpose of giving a voluntary statement, that statement would be admissible against him at trial. *Id.* The Court noted that in this case, however, Edwards had expressed a desire to cease communication with the police and that request had not been honored. *Id.* at 479.

[144] 475 U.S. 625 (1986). For an in-depth look at *Jackson*, see Note, *Criminal Procedure--Right to Counsel/Waivers--A confession obtained at police-initiated interrogation after defendant has requested counsel at arraignment is inadmissible as a violation of the sixth amendment right to counsel, and any waiver of that right for that police-initiated interrogation is invalid*, 64 U. DET. L. REV. 807 (1987).

For an analysis of the *Jackson* Court's interpretation and application of the *Edwards* rule, see Note, *Constitutional Law - The Edwards Rule Applies to Sixth Amendment Claims When the Accused Has Been Formally Charged with a Crime and Has Explicitly Expressed His Right to Counsel*, 37 DRAKE L. REV. 153 (1988).

In *Jackson*, the respondent was one of four persons involved in a conspiracy to commit murder.[145] On July 30, 1979, the respondent was arrested on an unrelated charge, at which time he made six incriminating statements.[146] The respondent was arraigned on August 1, 1979, at which time he requested the appointment of counsel.[147] Before he was able to speak with his attorney, however, the police elicited another incriminating statement.[148] The statement was obtained after the respondent was advised of, and waived, his *Miranda* rights.[149] The Supreme Court granted certiorari[150] and reiterated that once a defendant exercised his sixth amendment right, it could not be waived under any circumstances.[151] Further, the majority held that a request for counsel made at an arraignment was no less valid, and therefore entitled to no less protection, than when requested during a post-indictment interrogation.[152]

Finally, the *Jackson* Court observed a distinction between a mere "suspect" and an "accused."[153] Specifically, the majority determined that a "suspect" became an "accused" after a formal accusation was made.[154] Moreover, the Court recognized a need to prevent previously acceptable tactics for eliciting incriminating statements, such as deception and trickery, and to protect an accused from unintentionally implicating himself in criminal activity once his sixth amendment rights were

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[145] *Jackson*, 475 U.S. at 628. Specifically, a woman gathered four persons together in furtherance of a plan to kill her husband. *Id.*

[146] *Id.* The respondent was given a *Miranda* warning. *Id.*

[147] *Id.* A law firm was appointed to represent the respondent. *Id.* at 627. Notice, however, was sent through the mail and the law firm did not receive it for two days. *Id.* During this two day period, the respondent incriminated himself. *Id.*

[148] *Id.*

[149] *Id.*

[150] 471 U.S. 1124 (1985).

[151] *Jackson*, 475 U.S. at 636. The Court declared that any waiver in response to police-initiated questioning was absolutely invalid. *Id.* *See also* Edwards v. Arizona, 451 U.S. 478 (1980) (Once an accused has requested counsel, the *Miranda* warning, together with acquiescence in custodial interrogation, are insufficient to constitute a valid waiver.). *But cf.* Michigan v. Harvey, 110 S. Ct. 1176 (1990) (declaring that counsel could be validly waived in response to a police interrogation when the waiver was knowing, voluntary and intelligent).

[152] *Jackson*, 475 U.S. at 636.

[153] *Id.* at 632.

[154] *Id.*

exercised.[155]

Focusing on the requirement that a suspect who has been indicted or formally charged receive the *Miranda* warning, the Court in 1985 decided *Maine v. Moulton*.[156] In that case, Perley Moulton and Gary Colson were indicted on four counts of receiving stolen property.[157] Subsequent to the indictment, Colson consented to be a witness for the state in exchange for dismissal of the charges against him.[158] Accordingly, Colson, wearing a body wire, initiated several conversations with Moulton concerning their criminal activities.[159] The Supreme Court, finding the statements inadmissible, determined that the police had intentionally created a situation in which they "knew, or should have known" that Moulton would incriminate himself.[160]

Addressing the guarantees of the sixth amendment, the Court reflected upon its previous decisions which held that the right to counsel was not restricted to the time of trial, but arose at a much earlier stage in the criminal process.[161] Indeed, the majority declared that the time period preceding the trial was critical in preparing an effective defense

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[155] *Id.* (citing Maine v. Moulton, 474 U.S. 159 (1985) (upholding electronic surveillance prior to indictment); United States v. Henry, 447 U.S. 264 (1980) (upholding the surreptitious placement of an informant in a prison cell prior to indictment)).

[156] 474 U.S. 159 (1985).

[157] *Id.* at 162. In *Moulton*, the Court indicated that, according to the parties involved, the Colson in that case was totally unrelated to the Colson in *Massiah*. *Id.* at 172 n.8.

[158] *Id.* at 163.

[159] *Id.* at 164-66.

[160] *Id.* at 168 (quoting Maine v. Moulton, 481 A.2d 155, 161 (Me. 1984)). The Court, referring to the lower court's decision, held that the close relationship between Colson and Moulton, the fact that their meeting was set up to discuss the criminal activity in which they engaged, and that Colson's cooperation with the police necessarily placed Moulton at a disadvantage, created a situation in which Moulton was very likely to incriminate himself. *Id.* *See also* Rhode Island v. Innis, 466 U.S. 291, 292 (1980) (*Miranda* safeguards come into play when a police officer should be aware that certain words or actions are likely to elicit incriminating statements from a defendant.); Brewer v. Williams, 430 U.S. 387, 399 (1977) (The "Christian burial speech" had been designed to elicit an incriminating response and therefore was tantamount to interrogation.).

[161] 474 U.S. at 170. The Court stressed that the right to counsel arose prior to trial in order to ensure that the accused was treated fairly and was adequately prepared with a defense for trial. *Id.*

In *Brewer*, 430 U.S. 387 (1977), the Court held that "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." *Id.* at 398. *See also* Kirby v. Illinois, 406 U.S. 682 (1972); Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967).

and, if denied at that juncture, created the potential of destroying any possibility that the defendant could prevail.[162] Because the right to counsel had attached by virtue of an indictment, the *Moulton* Court concluded that the statements were inadmissible.[163]

In 1988, the Court reevaluated the *Edwards* safeguard in *Arizona v. Roberson*.[164] In *Roberson*, the defendant was incarcerated for a separate crime when the police questioned him concerning his involvement in an unrelated burglary.[165] While the defendant had requested counsel on the separate charge, he incriminated himself on the burglary charge prior to effectuating his right to counsel.[166] Although the defendant argued that his assertion of the right to counsel in the first instance should be imputed to his second charge, the Supreme Court rejected this argument, holding that the right to counsel must be asserted with regard to each individual investigation.[167]

As these cases suggest, the right to counsel has uniformly arisen in a post-indictment setting, or once the "suspect" has become an "accused" faced with the state's efforts toward conviction.[168] Additionally, the Supreme Court has established safeguards to ensure that, once invoked, a defendant will not carelessly surrender incriminating information without the assistance of counsel.[169] It is against this consistent interpretation of the sixth amendment that Lloyd Perkins asserted an entitlement to a *Miranda* warning prior to conversing with an

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[162] 474 U.S. at 170.

[163] *Id.* at 176. The Court recognized that the state had an affirmative duty to preserve the defendant's choice to seek the assistance of counsel. *Id.* at 171. Construing that obligation, the Court asserted that, at the very least, the state was prohibited from acting contrary to the defendant's right to counsel. *Id.*

[164] 486 U.S. 675 (1988).

[165] *Id.* at 678. Roberson was advised of his *Miranda* rights subsequent to his arrest for burglary on April 16, 1985. *Id.* Roberson notified the arresting officer that he wished to have an attorney present during questioning, and questioning ceased. *Id.* Within a few days, however, Roberson became a suspect in an unrelated burglary which occurred on April 15, 1985. *Id.* While Roberson was again advised of his *Miranda* rights, this time he incriminated himself with regard to this second burglary. *Id.*

[166] *Id.*

[167] *Id.* at 686.

[168] For a discussion of the distinction between a "suspect" and an "accused," see *supra* notes 153-55 and accompanying text.

[169] *See* Edwards v. Arizona, 451 U.S. 478 (1980) (Once an accused had requested counsel, the *Miranda* warning together with acquiescence in a custodial interrogation are insufficient to constitute a valid waiver.).

undercover agent placed in his prison cell.[170]

II. FOCUS ON VOLUNTARY STATEMENTS AND NON-CUSTODIAL INTERROGATIONS: *ILLINOIS v. PERKINS*

Justice Kennedy, writing for the seven person majority, addressed both the fifth and sixth amendment concerns.[171] The Court began its analysis by reviewing the applicability of *Miranda* to custodial interrogations.[172] Applying the *Miranda* protections to the facts of *Perkins*, however, the majority concluded that elements of coercion, such as a police-dominated atmosphere and psychological stress, were absent.[173] In reaching its conclusion, the majority emphasized that conversations between undercover officers and suspects were not encompassed within the protections of *Miranda*, nor were conversations between a suspect and an individual believed to be a fellow inmate, because it was the suspect's perception of the person with whom he was speaking which gives rise to coercion.[174] Rejecting the necessity of a *Miranda* warning, the majority determined that the guarantees of the fifth amendment were not intended to protect suspects who boast about criminal activity in the presence of persons they believed were fellow inmates.[175]

Next, the majority distinguished between "coercion" and "deception," pointing out that statements which result from coercion were typically

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[170] Illinois v. Perkins, 110 S. Ct. 2394 (1990).

[171] *Id.* Chief Justice Rehnquist and Justices White, Blackmun, Stevens, O'Connor, and Scalia joined in the majority opinion. *Id.* at 2395. Justice Brennan filed a separate opinion concurring in the judgment of the Court. *Id.* at 2399 (Brennan, J., concurring). Justice Marshall filed a dissenting opinion. *Id.* at 2401 (Marshall, J., dissenting).

[172] *Id.* at 2397. The *Miranda* Court defined a custodial interrogation as an "incommunicado interrogation of individuals in a police-dominated atmosphere" or after the individual has otherwise been denied his liberty to act in any significant capacity. Miranda v. Arizona, 384 U.S. 436, 445 (1966). *See also* Kamisar, *supra* note 78.

[173] *Perkins*, 110 S. Ct. at 2397.

[174] *Id.* *See supra* note 15 for the conversation which took place between Perkins and the undercover agent. *See* Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (Coercion is determined from the perspective of the suspect, rather than by the intentions of the police.).

[175] *Perkins*, 110 S. Ct. at 2398. The Court emphasized that, because Perkins believed he was among fellow inmates, he felt no threat and perceived his confidant, Parisi, as an equal. *Id.* at 2397. Because he perceived Parisi as a peer, Perkins had no reason to feel that he was compelled to answer Parisi's questions, or that Parisi would in any way affect his future. *Id.*

the product of police interrogation conducted in a custodial setting and were inadmissible.[176] Justice Kennedy elaborated that deception was permissible in pre-indictment circumstances where the police sought to exploit a suspect's vulnerability to other inmates he believed were legitimate prisoners.[177]

Reviewing the *Miranda* holding, the Court further emphasized that an interrogation requiring a *Miranda* warning would most likely be conducted in private.[178] Concluding that this conversation took place between inmates, the Court asserted that the element of privacy was lacking and, therefore, this was not a *Miranda*-type interrogation.[179] Accordingly, Justice Kennedy determined that the statements made by Perkins did not offend the fifth amendment's self-incrimination clause.[180] Additionally, the majority acknowledged that coercion must be assessed from the perspective of the defendant, concluding that Perkins felt no compulsion to speak.[181]

The Court then addressed the sixth amendment concerns raised by the respondent.[182] Specifically, Perkins argued that a bright-line test must be formulated to determine when *Miranda* applied, and that his interrogation in the prison sent mixed signals to law enforcement officials.[183] Rejecting this concept, the *Perkins* Court opined that police

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[176] *Id.* The Court indicated a clear intent to apply *Miranda* strictly, without extending it beyond the situations initially contemplated by the *Miranda* Court. *Id.*

[177] *Id.*

[178] *Id.* Reviewing *Miranda*, the Court emphasized the probability that a *Miranda* interrogation would be conducted in private. *Id.* Because this "conversation" between Perkins and Parisi was voluntary and merely a conversation between inmates, the Court rejected the possibility of an interrogation. *Id.* at 2398. The Court's failure to classify this escape plan as trickery or deception finds support in Kamisar, *supra* note 78.

[179] *Perkins*, 110 U.S. at 2398. *But cf.* United States v. Henry, 447 U.S. 264 (1979) (An accused would speak freely if he believed he was in the presence of fellow inmates, however, he would not reveal incriminating information if he was aware that a fellow inmate was in fact a government informant.). *See supra* notes 122-30 and accompanying text.

For a discussion of police trickery and deceptive practices, see Note, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593 (1988).

[180] *Perkins*, 110 U.S. at 2398. *See* Hoffa v. United States, 385 U.S. 293 (1966) (Statements given voluntarily are admissible even when the suspect is fooled into giving them.). For a general discussion of the *Hoffa* decision, see *supra* notes 48-51 and accompanying text.

[181] *Perkins*, 110 U.S. at 2398.

[182] *Id.* Perkins argued that a *Miranda* warning was required prior to the questions posed by Parisi in the prison cell. *Id.* at 2399.

[183] *Id.*

officers would experience little, if any, difficulty in interpreting its holding that incarcerated suspects were not entitled to a *Miranda* warning.[184]

Similarly, the majority rejected the respondent's argument that *Miranda* warnings were always required when a suspect, technically in custody, conversed with a government agent.[185] The Court concluded that the right to counsel had not yet attached, and cited past instances where an undercover agent was legally employed to obtain incriminating statements.[186] The majority noted, however, that once charges have been filed, the right to counsel attaches and the use of such deception and trickery could no longer pass constitutional muster.[187]

Limiting the holding of *Miranda* to confessions or statements resulting from the inherent pressure of being questioned as a suspect, the Court reaffirmed that any voluntary statement remained admissible.[188] Defining the extent of a "voluntary" statement, the majority proclaimed that "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns.[189]

Justice Brennan, concurring in the opinion, agreed with the majority's assertion that because Perkins was unaware that he was conversing with a law enforcement official the *Miranda* protections were premature.[190] Justice Brennan also determined, however, that closer scrutiny was warranted in this case.[191] Finding that the incriminating statements were deliberately elicited, Justice Brennan concluded that the

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[184] *Id.*

[185] *Id.* at 2397. By "technically in custody," the Court referred to the fact that Perkins had been incarcerated on an unrelated charge. Therefore, while the statements were obtained in prison, Perkins was not technically in custody for the murder of Richard Stephenson. *Id.*

[186] *Id.* An undercover agent may be used as long as the suspect had not yet been formally charged with the commission of a crime. *Id.* *See* Maine v. Moulton, 474 U.S. 159 (1985); United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964). *See also supra* notes 119-30, 157-63 and accompanying text.

[187] *Perkins*, 110 S. Ct. at 2399. Perkins had not yet been accused of killing Stephenson at the time these statements were obtained. *Id.* at 2396. Rather, the police were merely investigating a tip which implicated Perkins to the murder. *Id.*

[188] *Id.* For a discussion of the concept of "voluntariness" in the context of admissions and confessions, see *supra* notes 28-30 and accompanying text.

[189] *Perkins*, 110 S. Ct. at 2397.

[190] *Id.* at 2399 (Brennan, J., concurring).

[191] *Id.* at 2399-400 (Brennan, J., concurring).

statements were a near infraction of the defendant's due process rights.[192] Specifically, Justice Brennan contended that the rules governing the admissibility of confessions must be compatible with a system of justice which presumes innocence, rather than permit a suspect's will to be overborne.[193] Accordingly, Justice Brennan stressed the need for the lower court, on remand, to analyze the "totality of the circumstances" to determine whether the statements had in fact been obtained illegally.[194]

In a vigorous dissent, Justice Marshall rejected the majority's exclusive application of *Miranda* to an interrogation conducted in a custodial setting.[195] Applying his interpretation of *Miranda*, Justice Marshall determined that Parisi's conversation with Perkins was exactly the type of custodial interrogation the *Miranda* Court contemplated in establishing its safeguards,[196] therefore, Perkins was entitled to a *Miranda* warning.[197]

Moreover, Justice Marshall criticized the majority's attempt to create an exception under *Miranda* for cases in which an undercover agent posed questions to an incarcerated suspect which had the potential to elicit incriminating responses.[198] Finding this rationale contrary to the protections encompassed by *Miranda*, Justice Marshall posited that the majority's exception would effectively allow police officers to take advantage of suspects unaware of their constitutional rights.[199]

Addressing the propriety of the conversation which transpired between Perkins and Parisi, Justice Marshall noted that it consisted of a series of inquiries lasting approximately thirty-five minutes.[200] This, Justice Marshall concluded, was a sufficient justification for rejecting the

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[192] *Id.* at 2400 (Brennan, J., concurring).

[193] *Id.*

[194] *Id.* at 2400-01 (Brennan, J., concurring).

[195] *Id.* at 2401 (Marshall, J., dissenting).

[196] *Id.*

[197] *Id.* at 2402 (Marshall, J., dissenting). The *Miranda* Court defined custodial interrogation as police-initiated questioning once a suspect has been taken into custody. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[198] *Perkins*, 110 S. Ct. at 2402 (Marshall, J., dissenting).

[199] *Id.* at 2403.

[200] *Id.* at 2402. Justice Marshall stated that the majority had denigrated this interrogation to a mere conversation by de-emphasizing the nature of the questions asked. *Id.* Specifically, the questions were intended to elicit information regarding the victim, the place where the crime occurred, the weapon, a motive, and the defendant's actions after the commission of the crime. *Id.*

majority's characterization of this transaction as merely a "conversation," and instead found that Perkins was subject to a continuous stream of questions likely to elicit incriminating responses.[201]

The scope of the *Miranda* safeguards, Justice Marshall further argued, were not designed to be limited to instances where the police officer's identity was obvious.[202] Rather, Justice Marshall stressed that *Miranda* represented a desire to protect criminal defendants from all police tactics designed to produce incriminating evidence, whether the officer's identity was known to the suspect.[203]

Next, Justice Marshall addressed the majority's holding with regard to the sixth amendment.[204] Specifically, Justice Marshall emphasized the potential pressures that incarceration imposed upon a suspect, resulting in increased susceptibility to police trickery and deception.[205] Justice Marshall also asserted that the pressures of a prison cell could make an inmate more likely to engage in "tough talk," often embellishing convictions or inventing past criminal acts as a means of protection, even preservation.[206]

Finally, Justice Marshall disparaged the sham escape plot and accused the state of intentionally placing the defendant in a situation where he would feel pressure to demonstrate his willingness to murder if necessary in order to effectuate the escape plan.[207] Extending this reasoning, Justice Marshall pondered the possibility that such practices would be condoned, even encouraged, by police in the wake of the *Perkins* decision.[208] Moreover, Justice Marshall questioned whether *Miranda* would eventually be confined to only those instances in which a suspect perceived a compulsion to talk or considered entering a guilty plea in exchange for a lenient sentence.[209] Justice Marshall candidly

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[201] *Id.*

[202] *Id.*

[203] *Id.* Justice Marshall stressed that *Miranda* applied especially to suspects who were not aware of their constitutional rights. *Id.* Justice Marshall interpreted this objective of *Miranda* as necessitating a *Miranda* warning prior to every interrogation. *Id.*

[204] *Id.*

[205] *Id.* at 2402-03 (Marshall, J., dissenting). Justice Marshall found that confinement increased the chance that a prisoner would seek relief from the stress of incarceration by talking with fellow inmates. *Id.* (citing Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 230 (1975)).

[206] *Perkins*, 110 U.S. at 2403 (Marshall, J., dissenting).

[207] *Id.*

[208] *Id.* at 2404 (Marshall, J., dissenting).

[209] *Id.*

emphasized his apprehension that such diminishing application of *Miranda* would create a "substantial loophole" in the self-incrimination clause.[210]

III. CONCLUSION

Clearly, the *Perkins* majority has relied greatly upon the difference between coercion and deception.[211] While the majority recognized that Parisi intended to deceive Perkins as a means of obtaining the evidence necessary to convict him,[212] the Court has all but overlooked the manner in which the incriminating evidence was obtained.[213] As Justice Marshall correctly noted, the conversation between Parisi and Perkins consisted of a series of pointed inquiries directed at gaining evidence which would implicate Perkins in Stephenson's murder.[214] Indeed, this investigation of Perkins went beyond merely listening for incriminating information, as in *Henry*.[215]

Parisi's actions may, however, be justified on sixth amendment grounds. The one distinguishing factor upon which the Court properly relied was the lack of an indictment.[216] The Supreme Court has consistently required that an individual actually be accused of a crime prior to being entitled to procedural safeguards.[217] Accordingly, because Parisi was merely acting on a tip and only suspected that Perkins was involved in Stephenson's murder,[218] the admission of this conversation

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[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *See supra* note 15 and accompanying text.

[214] *Id.* at 2401-02. Justice Marshall noted that Perkins and Parisi were not equal participants in the conversation. *Id.* at 2402 (Marshall, J., dissenting).

[215] 447 U.S. 264 (1979). *See supra* notes 122-30 and accompanying text.

[216] *Perkins*, 110 S. Ct. at 2398-99. Justice Marshall argued, however, that because Perkins was in custody he was necessarily entitled to a *Miranda* warning. *Id.* at 2402 (Marshall, J., dissenting). The majority rejected this reasoning, concluding that although Perkins was technically in custody, he had not been incarcerated for the Stephenson murder. *Id.* at 2397. *See also* Arizona v. Roberson, 486 U.S. 675 (1988) (A suspect cannot impute his exercise of the right to counsel from one crime to a subsequent crime.).

[217] *See supra* notes 114-17 and accompanying text.

[218] *Perkins*, 110 S. Ct. at 2396. Approximately two years after Richard Stephenson was killed, St. Louis police received a "tip" from Donald Charlton, an inmate at Graham Correctional Facility, that another inmate, Lloyd Perkins, had been boasting about committing the murder. *Id.* Donald Charlton later introduced the undercover officer, Parisi, to Perkins at Montgomery County prison where Perkins was then serving a

did not violate Perkins' sixth amendment right to counsel.[219]

As Justice Marshall aptly pointed out, the methods employed by Parisi in obtaining the incriminating evidence[220] present the potential for an erosion of the protection extended to criminal defendants.[221] By allowing Parisi to enter the prison cell masquerading as a confidant, the state effectively contributed to Perkins' self-incrimination.[222] Justice Marshall also correctly observed that the *Perkins* decision may lead police to conduct undercover investigations pretending to be priests or defense attorneys and thereby claim entitlement to the defendant's trust.[223] While these tactics do have profound implications for police behavior, however, the majority correctly asserted that, absent an indictment, Perkins was not entitled to an increased level of protection.[224]

Additionally, the majority accurately noted that it is unclear whether the interaction between Parisi and Perkins was indeed a *Miranda*-type interrogation.[225] While Parisi's questions were undoubtedly intended to elicit incriminating responses from Perkins,[226] they were deficient with respect to the requirements set forth under a strict application of *Miranda*.[227] Specifically, the *Miranda* Court mandated that a warning be given prior to a custodial interrogation in a police-dominated

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sentence for aggravated battery. *Id.* Shortly after this introduction, Perkins incriminated himself for the murder of Richard Stephenson. *Id.*

[219] *Id.* at 2399.

[220] *Id.* at 2403 (Marshall, J., dissenting). Justice Marshall claimed that the police exploited Perkins' vulnerable mental state by concocting a sham escape plan which would cause Perkins to expose facts about his criminal past. *Id.*

[221] *Id.* at 2403-04 (Marshall, J., dissenting). Justice Marshall was especially critical of the potential for undercover police investigations to be conducted more frequently as a result of the majority's decision. *Id.* at 2404 (Marshall, J., dissenting).

[222] *Id.* at 2401-02.

[223] *Id.* at 2404 (Marshall, J., dissenting). Justice Marshall hypothesized that an undercover police officer might beat incriminating evidence out of an inmate, claiming that the suspect believed the officer to be a fellow prisoner who desired the information for his own use. *Id.*

[224] *Id.* at 2398-99.

[225] *Id.* at 2398. The majority distinguished Perkins' incriminating statements on the grounds that they had been given voluntarily, and that the *Miranda* decision recognized the importance of allowing voluntary statements as evidence at trial. *Id.*

[226] *See supra* note 15 and accompanying text.

[227] 384 U.S. 436 (1966). *See also supra* notes 61-65 and accompanying text.

atmosphere.[228] The *Innis* Court later determined that these factors must be considered from the viewpoint of the accused.[229] As these cases illustrate, Justice Marshall's argument that *Miranda* was designed to encompass the investigation of all criminals, whether they were aware that they were conversing with police informants,[230] exceeded *Miranda*'s proper scope.

The Court's decision in *Perkins* clearly stands in conformity with past precedent. Because the defendant had not been indicted prior to his incriminating statements, the sixth amendment right to counsel was not offended. Additionally, it is apparent that the statement was given voluntarily in a noncustodial setting. However, there remain aspects of the *Perkins* decision which are troubling. It is likely that these subtle distinctions may distinguish *Perkins* from prior law.

One thing is clear, however, the Supreme Court's decision in *Perkins* represents an intensifying trend by the Court to retreat from *Miranda*, where necessary, to facilitate the interests of law enforcement. While this relaxation of *Miranda* safeguards has the clear potential to lower the state's burden in criminal cases, it will also serve to simultaneously elevate society's interest in law enforcement. To the extent that there exist "gray" areas in the application of criminal rights, *Perkins* indicates a tendency by the Court to err on the side of the state.

Perhaps this trend arrives at a time when societal discontent and intolerance for the criminal justice system have peaked. But perhaps the Court is seeking intermittent steps to avoid arousing such disillusionment by the American public with the law enforcement system. In any event, *Perkins* suggests that society's interest in law enforcement will no longer be compromised in favor of expanding criminal protections.

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[228] *Id.* at 445.

[229] 446 U.S. 291, 299 (1980).

[230] Illinois v. Perkins, 110 S. Ct. 2394, 2403 (1990) (Marshall, J., dissenting).