Frequent Fliers at the Court: The Supreme Court Begins to Take the Experience of Criminal Defendants Into Account in *Miranda* Cases

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I. INTRODUCTION

Frequent fliers in the criminal justice context are a "very active group of minor offenders who cycle through local correctional institutions on a regular basis."[1] Police and prosecutors use the term generically, often referring to a defendant with many prior arrests as a "frequent flier."[2] Frequent fliers are, presumably, familiar with interrogation procedures employed by the police and are less likely to be coerced by the hostile and intimidating environments of a custodial interrogation. In particular, because they are familiar with police

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[1] Marilyn Chandler Ford, *Frequent Fliers: The High Demand User in Local Corrections*, 3 CALIFORNIAN J. HEALTH PROMOTION 61, 61 (2005) ("These persons, whom practitioners have labeled frequent fliers, are characterized by their high-volume of jail admissions and discharges. In most cases, these offenders have dozens of arrests and jail admissions—but some high-demand users have been admitted more than a hundred times."). *See also Frequent Flier Definition*, DOUBLETONGUED.ORG, http://www.doubletongued.org/index.php/dictionary/frequent_flier (defining frequent flier as "a repeat offender; a recidivist; (*generally*) a person who regularly or habitually uses or takes advantage of a service"). The Pierce County, Washington, Criminal Justice Task Force formed a work group to deal with the issue of "frequent fliers," defined as "chronic minor offenders who are heavy users of county and private sector resources." *Criminal Justice Task Force Work Groups*, PIERCE COUNTY WASH. (Nov. 3, 2008), http://www.co.pierce.wa.us/xml/abtus/plans/perf-audit/CJTF_Work_Groups-Nov4-revised.pdf.

[2] For example, a captain of the Massillon Police Department referred to a suspect (named Donald Duck) with "multiple previous DUIs, multiple previous no operator's license and operating under suspension," as a frequent flier. Ben Muessig, *Cops Accuse Donald Duck of Driving Drunk*, AOL NEWS (June 29, 2010, 11:56 AM), http://www.aolnews.com/weird-news/article/cops-accuse-donald-duck-of-driving-drunk/19535273 (internal citations omitted). *See also* KIDCOP, *Cop Talk Forum*, OFFICER.COM (Oct. 5, 2001, 12:05 AM, http://forums.officer.com/forums/archive/index.php/t-16243.html (defining "frequent flier" as "someone who goes to jail allot/often [sic]"); and *From Halfway House Back To The Big House: "Frequent Flier" (Repeat Offender) Returns to Prison*, LEXINGTONPROSECUTOR.COM (Mar. 5, 2010), http://www.lexingtonprosecutor.com/?p=2922#more-2922 (prosecutor news release states that "frequent flier" with six convictions was returned to prison).

procedure and tactics, the psychological effects of police interrogation tactics—which are the result of isolating suspects and cutting them off from the outside world—have a less significant effect on frequent fliers.[3] The original purpose underlying the Court's decision in *Miranda v. Arizona*,[4] thus, was to reduce the likelihood that suspects would fall victim to constitutionally impermissible practices of police interrogation in an intimidating atmosphere.[5] *Miranda* was intended to limit what was thought to be the inherently coercive atmosphere of custodial interrogations.[6] In *Miranda*, the Court established a set of "procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation."[7]

Between May 2009 and the end of the October 2009 term, the Supreme Court decided four cases interpreting *Miranda* that featured frequent fliers: *Montejo v. Louisiana*,[8] *Florida v. Powell*,[9] *Maryland v. Shatzer*,[10] and *Berghuis v. Thompkins*.[11] In all four cases, the suspects were presumably familiar with the *Miranda* warnings, were aware that the police would honor the *Miranda* warnings, were familiar with police tactics, and, as a result, were less likely to be intimidated by the isolation

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[3] *Contra* Russell L. Weaver, *Reliability, Justice and Confessions: The Essential Paradox*, 85 CHI.-KENT L. REV.179 (2010) (stating that confessions may be unreliable because "suspects may be surrounded by the police, isolated in an interrogation room, cut off from the outside world, and not fully aware of their rights or the legal system. When a suspect is scared, the suspect may be more likely to make incriminating statements by mistake.").

[4] 384 U.S. 436 (1966).

[5] *Id.*

[6] *Id.* at 444–45. *See also* Mark Godsey, Miranda's *Final Frontier—The International Arena: A Critical Analysis of* United States v. Bin Laden*, and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703, 1758 (2002) ("The *Miranda* warnings were designed to counteract the inherently coercive atmosphere of custodial interrogation. By advising a suspect of his rights, the police alleviate some of the compulsion associated with custodial questioning and provide an atmosphere in which a suspect could knowingly and freely invoke those rights if he so desires."); Harvey Gee, *An Ambiguous Request for Counsel Before, and Not After a* Miranda *Waiver:* United States v. Rodriguez*,* United States v. Fry *and* State v. Blackburn, 5 CRIM. L. BRIEF 51, 52 (2009) ("[T]he *Miranda* Court was concerned with the inherently coercive atmosphere of custodial interrogations."); Conor G. Bateman, Note, Dickerson v. United States*:* Miranda *Is Deemed a Constitutional Rule, but Does It Really Matter?*, 55 ARK. L. REV. 177, 201 (2002) ("The 'protective devices' that the *Miranda* Court thought necessary to dispel the inherently coercive atmosphere of custodial interrogation are now collectively known as the '*Miranda* warnings.'").

[7] Duckworth v. Eagan, 492 U.S. 195, 201 (1989).

[8] 129 S. Ct. 2079 (2009).

[9] 130 S. Ct. 1195 (2010).

[10] 130 S. Ct. 1213 (2010).

[11] 130 S. Ct. 2250 (2010).

of custodial interrogation. In deciding these four cases, the Court could infer that the suspects were less likely to make a coerced confession as a result of the psychological effects of police interrogation techniques. In other words, while the original *Miranda* decision held that the atmosphere of a custodial interrogation generates "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," these later decisions shift the focus from the atmosphere to whether the individual suspects were actually compelled to make incriminating statements.[12] As a result, the Court was able to continue a process of limiting the scope of the original *Miranda* decision by focusing more responsibility on the subjective knowledge of suspects rather than the actions of law enforcement.

Montejo, *Powell*, *Shatzer*, and *Thompkins* all begin with the generally uncontested premise that the rights described in *Miranda* may be waived.[13] While the validity of a waiver is assessed based on the totality of the circumstances, the Supreme Court has yet to elaborate a set of factors for courts to consider in determining whether a suspect's waiver was voluntary. In particular, the Court has not explicitly considered a suspect's criminal history and familiarity with the criminal justice system in determining whether a waiver was voluntary. However, lower federal and state courts interpreting the voluntariness of a confession have explicitly included a suspect's criminal background among the factors to be considered in determining voluntariness.[14]

This Article examines the Supreme Court and lower courts' increased consideration of the criminal background of suspects, whether implicit or explicit, in determining whether a *Miranda* waiver is made in a knowing, intelligent and voluntary manner. Part I of this Article reviews existing *Miranda* doctrine and the factors considered by the Supreme Court in determining whether a waiver of *Miranda* rights is knowing, intelligent, and voluntary. Part II reviews the four *Miranda* cases recently decided by the Supreme Court. Part III examines the common theme of experienced defendants in the four cases, and proceeds to review the manner in which lower courts have taken the criminal background of suspects into account in determining whether a

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[12] *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[13] *See, e.g.*, *Montejo*, 129 S. Ct. at 2085 ("Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent.") (citing Patterson v. Illinois, 487 U.S. 285, 292, n.4 (1988); Brewer v. Williams, 430 U.S. 387, 404 (1977); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). *See also Burghuis*, 130 S. Ct. at 2264; *Shatzer*, 130 S. Ct. at 1219; *Powell,* 130 S. Ct. at 1203.

[14] *See infra* Part IV.

Miranda waiver is knowing, intelligent, and voluntary. Finally, Part IV examines the implications for the future of the *Miranda* doctrine as the Supreme Court considers the subjective knowledge of suspects in determining whether a *Miranda* waiver is knowing, intelligent, and voluntary.

II. CURRENT VIEWS ON *MIRANDA*

Miranda, as currently understood, protects the Fifth and Sixth Amendment rights of the accused.[15] The Fifth Amendment provides protection against compelled self-incrimination, providing that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[16] Meanwhile, the Sixth Amendment guarantees an accused the assistance of counsel at all critical stages of a criminal proceeding.[17] The Sixth Amendment states that "[i]n all criminal

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[15] *Miranda*, 384 U.S. at 436. Although *Miranda* has its roots in the Fifth Amendment, the case is now understood as establishing rules to protect rights under both the Fifth and Sixth Amendments. The *Miranda* Court described the original issue before the Court as "the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege *under the Fifth Amendment* to the Constitution not to be compelled to incriminate himself." *Id.* at 439 (emphasis added). In *Patterson*, 487 U.S. at 293, the Court explained that the required warnings adequately inform defendants not only of their Fifth Amendment rights, but of their Sixth Amendment right to counsel as well. *See also* United States v. Seale, 600 F.3d 473, 484 (5th Cir. 2010) (stating that *Miranda* has "roots in the Fifth and Sixth Amendments"); United States v. Tyler, 993 F.2d 1548 (Table) (6th Cir. 1993) ("A waiver of the right to counsel after receiving proper *Miranda* warnings constitutes a limited relinquishment of the right to counsel under both the Fifth and Sixth Amendment."); United States v. Carneglia, 603 F.Supp.2d 488, 496 (E.D.N.Y. 2009) (noting that a "proper *Miranda* warning serves to advise an arrestee of both his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel").

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

[17] U.S. CONST. amend VI. *See* United States v. Cronic, 466 U.S. 648, 659 n.25 (1984) (noting that courts must reverse criminal defendants' convictions "without any showing of prejudice [to defendant] when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding"). In particular, the Supreme Court has stated that a critical stage is "a step of a criminal proceeding . . . that h[olds] significant consequences for the accused." Bell v. Cone, 535 U.S. 685, 696 (2002). A critical stage is one at which "[a]vailable defenses may be [ ] irretrievably lost," Hamilton v. Alabama, 368 U.S. 52, 53 (1961), and "where rights are preserved or lost," White v. Maryland, 373 U.S. 59, 60 (1963). However, interrogation is one of the critical stages. *See Patterson*, 487 U.S. at 290; Michigan v. Jackson, 475 U.S. 625, 629–30 (1986). The Supreme Court has not provided a definitive list of *Cronic* "critical stages." United States v. Benford, 574 F.3d 1228, 1232 (9th Cir. 2010). But the Court's cases provide several examples of critical stages. *See, e.g.*, Iowa v. Tovar, 541 U.S. 77, 81 (2004) (entry of a guilty plea); Gardner v. Florida, 430 U.S. 349, 358 (1977) (sentencing); United States v. Wade, 388 U.S. 218, 236–37 (1967) (post-indictment lineup). The Court has also provided examples of stages that are not critical. *See* United

prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defenses."[18]

The Court established in *Miranda* a set of "procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation."[19] While the possibility of physical coercion remained a fear, the focus of the Court in *Miranda* was on the psychological effects of custodial interrogation.[20] The Court stated, for example, that it was concerned that "[e]ven without employing brutality, the 'third degree' or the specific stratagems [of police], the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[21] The original purpose underlying *Miranda*, thus, was to "reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation . . . ."[22] *Miranda* accomplished this purpose through a preemptive effort to alleviate the inherently coercive atmosphere of custodial interrogations by informing or reminding the subject of the interrogation of the rights to silence and counsel.[23] In this way, the focus of *Miranda* was on police

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States v. Ash, 413 U.S. 300, 321 (1973) (post-indictment photographic lineup); Gilbert v. California, 388 U.S. 263, 267 (1967) (handwriting exemplar).

[18] U.S. CONST. amend. VI. *See Williams*, 430 U.S. at 398 ("The right to counsel . . . 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 whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (internal quotes omitted)).

[19] Florida v. Powell, 130 S. Ct. 1195 (2010) (citing Duckworth v. Eagan, 492 U.S. 195, 201 (1989)). The Supreme Court originally defined custodial interrogation as "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." *Miranda*, 384 U.S. at 444. *But see infra* notes 160–61 and accompanying text (explaining that the Court distinguished between its earlier characterization of "custodial interrogation," and the scenario presented in Maryland v. Shatzer, 130 S. Ct. 1213 (1210)).

[20] *Miranda*, 384 U.S. at 448 ("[W]e stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented").

[21] *Id.* at 456.

[22] New York v. Quarles, 467 U.S. 649, 656 (1984). *See also* Rice v. Cooper, 148 F.3d 747, 750 (7th Cir.1998) ("The relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers.").

[23] *Miranda*, 384 U.S. at 467 ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.").

conduct, not on whether a particular suspect was subject to psychological coercion in a particular case.[24]

The warnings required by *Miranda* are part of the popular culture, and well known to all Americans with a television set.[25] Accordingly, prior to any custodial interrogation, a defendant must be informed:

> [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[26]

Although the content of the four warnings is necessary, no "magic words" or specific language has been required by the Court.[27] Rather, the only requirement is that the *Miranda* warnings "clearly inform[ ]" the individual of his rights.[28] In determining whether law enforcement officers adequately conveyed the four warnings, courts are not required to examine the words employed "as if construing a will or defining the terms of an easement."[29] Further, "[t]he inquiry is simply whether the warnings reasonably "convey to [a suspect] his rights as required by *Miranda*.'"[30] All that is required is that the warning reasonably conveys the contents of the four rights specified in *Miranda*.[31]

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[24] *Id.* at 468 ("[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given").

[25] United States v. Harris, 515 F.3d 1307, 1311 (D.C. Cir. 2008) ("As every television viewer knows, an officer ordinarily may not interrogate a suspect who is in custody without informing her of her *Miranda* rights."); United States v. DeNoyer, 811 F.2d 436, 439 n.4 (8th Cir. 1987) (noting that term "*Miranda* Warnings" "is commonly used, both in court and in television shows, to describe the ritual prescribed in *Miranda v. Arizona*"); United States v. Lacy, No. 2:09-CR-45 TS, 2010 WL 1451344, at *2 (D. Utah, Apr. 8, 2010) (defendant testified "that he was very aware of his *Miranda* rights because of television . . ."). *See also* Russell Dean Covey, Miranda *and the Media: Tracing the Cultural Evolution of a Constitutional Revolution*, 10 CHAP. L. REV. 761, 761 (2007) ("Not only did television make the *Miranda* warnings famous, its adoption of *Miranda* as an icon of criminal procedure may be main the reason *Miranda* is good law today.").

[26] Florida v. Powell, 130 S. Ct. 1195, 1203 (2010) (citing *Miranda*, 384 U.S. at 479).

[27] *See* Duckworth v. Eagan, 492 U.S. 195, 203 (1989) ("The inquiry is simply whether the warnings reasonably 'convey to [a suspect] his rights as required by *Miranda*.'"); California v. Prysock, 453 U.S. 355, 359 (1981) (*per curiam*) ("[N]o talismanic incantation [is] required to satisfy [*Miranda's*] strictures"); Thai v. Mapes, 412 F.3d 970, 977 (8th Cir. 2005) ("[T]he Court has recognized that there are no magic words that automatically satisfy *Miranda's* constitutional concerns.").

[28] *Miranda*, 384 U.S. at 471.

[29] *Duckworth*, 492 U.S. at 203 (quoting *Prysock*, 453 U.S. at 361).

[30] *Id.*

[31] *See, e.g.*, *id.*

There are clear consequences to law enforcement for the failure to follow the procedure set forth in *Miranda.* "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[32] This aspect of the *Miranda* decision is often the subject of the most impassioned debate. Critics of the decision have, for a long time, claimed that valid confessions are excluded because of the failure of police to follow proper procedures and, as a result, the guilty go free. In 1986, for example, a Wisconsin judge wrote that the Supreme Court's jurisprudence seemed to be "more intent on finding reasons to let admittedly guilty criminals escape punishment than in doing justice for society."[33] And, in 2000, Professor Cassel argued on PBS's NewsHour that "70,000 violent criminal cases each year go unsolved because of *Miranda*."[34]

A. Assertion of Rights: Edwards, Minnick and Davis

In *Edwards v. Arizona*[35] and *Minnick v. Mississippi*, [36] the Supreme Court addressed the actions law enforcement must take after suspects assert their *Miranda* rights. The defendant in *Edwards* had been arrested at his home on a warrant for robbery, burglary, and first-degree murder.[37] At the police station, the detectives provided the defendant with his *Miranda* warnings.[38] The defendant acknowledged that that he understood his rights, provided a taped statement presenting an alibi defense, and indicated that he wanted to negotiate "a deal."[39] The defendant then indicated that he "want[ed] an attorney before making a deal."[40] At this point, the police stopped any questioning.[41] However, the next morning, two detectives came to the jail to interview the defendant.[42] The detectives provided the defendant with his *Miranda*

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[32] *Miranda*, 384 U.S. at 444.

[33] RALPH ADAM FINE, ESCAPE OF THE GUILTY xii (1986).

[34] *PBS Newshour: Revisiting* Miranda (PBS television broadcast Jan. 6, 2000), http://www.pbs.org/newshour/bb/law/jan-june00/miranda_1-6.html). *See also* LAWRENCE S. WRIGHTSMAN & MARY L. PITMAN, THE MIRANDA RULING: ITS PAST, PRESENT, AND FUTURE 16–17 (Oxford Univ. Press 2010).

[35] Edwards v. Arizona, 451 U.S. 477, 481–84 (1981).

[36] Minnick v. Mississippi, 498 U.S. 146 (1990).

[37] *Edwards*, 451 U.S. at 478.

[38] *Id.*

[39] *Id.* at 479.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 479

warnings.[43] The detectives were able to obtain a confession from the defendant by playing a portion of his accomplice's statement.[44] Based, in part, on this statement, the defendant was convicted.[45]

The Supreme Court held that the use of the defendant's second statement violated his Constitutional rights.[46] In reaching this conclusion, the Court reasoned that the right to counsel required "special protection," and that in order to provide that special protection additional safeguards would be necessary.[47] The Court then set forth what has become known as the "*Edwards* rule"—when an accused requests an attorney, he may not be questioned unless an attorney has been made available or the accused initiates the conversation.[48]

The Supreme Court revisited the *Edwards* rule in *Minnick v. Mississippi*.[49] In *Minnick*, the defendant was accused of, among other crimes, murdering two people in Mississippi after escaping from a local jail.[50] The defendant was arrested in California four months later.[51] The defendant claimed that while in jail in California, the police mistreated him.[52] The FBI subsequently interviewed the defendant.[53] The FBI special agents provided the defendant with his *Miranda* warnings.[54] The defendant provided a brief statement and told the special agents to "come back . . . when I have a lawyer," and that he would make a more complete statement with his lawyer present.[55]

The FBI special agents ended the interview and a court-appointed attorney met with the defendant.[56] A few days later, a sheriff's deputy from Mississippi arrived in California and interviewed the defendant.[57] The deputy provided defendant with his *Miranda* warnings; he

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[43] Edwards v. Arizona, 451 U.S. 477, 479 (1981).

[44] *Id.*

[45] *Id.*

[46] *Id.* at 487.

[47] *Id.* at 483–84.

[48] *Id.* at 484–85. *Cf.* Oregon v. Bradshaw, 462 U.S. 1039, 1045–46 (1983) (suspect who had invoked his right to counsel initiated conversation while being transported by asking the officer, "Well, what is going to happen to me now?").

[49] 498 U.S. 146, 146 (1990).

[50] *Id.* at 148. The defendant, along with a co-defendant, escaped from a local jail and broke into a mobile home. *Id.* During the course of the burglary, the men were interrupted by the owner and another man, accompanied by an infant. *Id.* The two adults were murdered. *Id.* Two women who subsequently arrived at the mobile home "were held at gunpoint, then bound hand and foot." *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Minnick v. Mississippi, 498 U.S. 146, 148–49 (1990).

[56] *Id.*

[57] *Id.* at 149.

proceeded to provide a statement to the deputy sheriff.[58] Based on the inculpatory statements to the deputy, as well as other evidence, the defendant was convicted on two counts of murder and sentenced to death.[59]

The *Minnick* Court explained that *Edwards* was "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights" and that the *Edwards* rule was intended to ensure that "any statement made in subsequent interrogation is not the result of coercive pressures."[60] For this reason, the Court believed that the presence of counsel prevents coercion and that the *Edwards* rule's purpose is served by an interpretation that after a suspect has requested counsel, just the opportunity to consult with counsel is insufficient; instead, "the authorities may not initiate questioning of the accused in counsel's absence."[61] This interpretation was justified by the view that meeting with an attorney would not eliminate the inherently coercive pressures of custody or the possibility of abusive tactics by the police.[62] The Court was also concerned that suspects may not fully understand their rights by just meeting with, or consulting, an attorney.[63] The Court concluded: "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[64] The Court emphasized that this rule was not intended to undermine the principle of "individual responsibility" inherent in the decision by suspects to knowingly, intelligently and voluntarily waive their *Miranda* rights, even after counsel has been requested.[65] The Court maintained that suspects

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[58] *Id.* at 148.

[59] *Id.*

[60] *Id.* at 150 (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)). The Court also asserted a practical justification for the *Edwards* rule: "*Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms." *Id.* at 151.

[61] Minnick v. Mississippi, 498 U.S. 146, 152 (1990).

[62] *Id.* at 155.

[63] *Id.* The Court explained:

> Consultation is not a precise concept, for it may encompass variations from a telephone call to say that the attorney is en route, to a hurried interchange between the attorney and client in a detention facility corridor, to a lengthy in-person conference in which the attorney gives full and adequate advice respecting all matters that might be covered in further interrogations.

Id.

[64] *Id.* at 153.

[65] *Id.* at 156.

retain the ability to waive their *Miranda* rights after counsel has been requested, so long as the suspects initiate the conversations.[66]

The Court considered the necessary language the defendant must use to make the protections of *Edwards* and *Minnick* applicable in *Davis v. United States*.[67] In *Davis*, the defendant was a suspect in a murder investigation conducted by the Naval Investigative Service (NIS).[68] The defendant was interviewed at the NIS office and, after receiving the appropriate warnings required by military law, waived his rights to remain silent and to counsel, both orally and in writing.[69] After about ninety minutes of questioning, the defendant said, "[m]aybe I should talk to a lawyer."[70] The NIS interviewers reminded the defendant of his rights, and he continued the interview for another hour before stating, "I think I want a lawyer before I say anything else."[71]

In reviewing whether the defendant's initial statement constituted an invocation of *Miranda* rights for *Edwards* and *Minnick* purposes, the Court instructed lower courts to conduct an "objective inquiry" into whether the "statement . . . can reasonably be construed to be an expression of a desire for the assistance of an attorney."[72] The Court limited this inquiry, however, by holding that a "reference to an attorney that is ambiguous or equivocal" is not sufficient to trigger *Miranda* rights and require the cessation of a custodial interview.[73] Rather, the suspect must unambiguously request counsel.[74] In reaching this conclusion, the *Davis* Court explained:

> The rationale underlying *Edwards* is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into

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[66] *Id.*

[67] Davis v. United States, 512 U.S. 452 (1994).

[68] *Id.* at 454.

[69] *Id.* at 454–55.

[70] *Id.* at 455.

[71] *Id.*

[72] *Id.* at 458–59.

[73] Davis v. United States, 512 U.S. 452, 459 (1994). *But see* United States v. Plugh, 576 F.3d 135, 143 (2d Cir. 2009) ("*Davis* does not instruct courts how to analyze an initial invocation of one's Fifth Amendment rights following the *Miranda* warnings where no waiver occurred. In our view, *Davis* only provides guidance for circumstances in which a defendant makes a claim that he subsequently invoked previously waived Fifth Amendment rights.").

[74] *Davis*, 512 U.S. at 459 (citing Smith v. Illinois, 469 U.S. 91, 97–98 (1984) (*per curiam*)).

> wholly irrational obstacles to legitimate police investigative activity," because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.[75]

The Court acknowledged that this rule could "disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present."[76] However, the Court believed that the potential loss of legitimate confessions that might not otherwise be obtained from a tighter rule outweighed this concern.[77]

B. Waiver Inquiry

The subject of a custodial interrogation may waive the rights described in *Miranda*. In *Miranda* the Court held that a "defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently."[78] There is a presumption against waiver, of which the Government may overcome by a preponderance of the evidence.[79]

The validity of a waiver must be assessed by a reviewing court on the totality of the circumstances.[80] The prosecution must present evidence that the defendant was aware of "the nature of the right being abandoned and the consequences of the decision to abandon it."[81] The waiver inquiry has two dimensions: First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free

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[75] *Id.* at 460 (quoting Michigan v. Mosley, 423 U.S. 96, 102 (1975)).

[76] *Id.* at 461.

[77] *See id*.

[78] Miranda v. Arizona, 384 U.S. 436, 444 (1966). *Cf*. Johnson v. Zerbst, 304 U.S. 458 (1938). Some analysts have suggested that because of the differences between the Fifth and Sixth Amendment rights, the Court has employed a different waiver standard. *See, e.g.*, Geoffrey Sweeney, Note, *If You Want It You Had Better Ask For It: How* Montejo v. Louisiana *Permits Law Enforcement to Sidestep the Sixth Amendment*, 55 LOY. L. REV. 619, 621 (2009). However, the Supreme Court recently held that the waiver analysis is the same whether the suspect is waiving *Miranda* rights under the Fifth or Sixth Amendments. Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) ("[T]here is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel."). *See also infra* notes 184–88 and accompanying text (discussing *Thompkins*).

[79] *See* Colorado v. Connelly, 479 U.S. 157, 168 (1986); North Carolina v. Butler, 441 U.S. 369, 373 (1966).

[80] *See Miranda*, 384 U.S. at 475–77. *Cf.* Fare v. Michael C., 442 U.S. 707, 725 (1979) (finding that the requirements of *Miranda* apply the same to juveniles as adults).

[81] Moran v. Burbine, 475 U.S. 412, 421 (1986).

and deliberate choice rather than intimidation, coercion, or deception.[82] Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.[83]

The Supreme Court has yet to elaborate a set of factors for courts to consider in determining whether a suspect's waiver was knowing, intelligent and voluntary. The limit of the guidance provided by the Court is that "the totality of the circumstances surrounding the interview and waiver must reveal both an uncoerced choice and the requisite level of comprehension."[84] The Court has said that the question of whether *Miranda* rights have been knowingly and voluntarily waived must be determined "on the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused."[85]

The closest the Court has come to setting forth a comprehensive list of factors to be considered in evaluating a *Miranda* waiver was in *Fare v. Michael C.*[86] In *Fare*, the Court considered a confession by a juvenile.[87] In assessing whether a *Miranda* waiver by the juvenile was knowing, intelligent and voluntary, the Court explained:

> [The] totality of the circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved . . . . The totality approach permits—indeed it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.[88]

The *Fare* Court did not, however, suggest that the list provided was exhaustive.[89]

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[82] Edwards v. Arizona, 451 U.S. 477, 482 (1981); Brewer v. Williams, 430 U.S. 387, 404 (1977).

[83] *Edwards*, 451 U.S. at 482.

[84] Machacek v. Hofbauer, 213 F.3d 947, 954 (6th Cir.2000) (citing *Moran*, 475 U.S. at 421).

[85] North Carolina v. Butler, 441 U.S. 369, 374–75 (1966) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[86] 442 U.S. 707 (1979).

[87] *Id.* at 710–11.

[88] *Id*. at 725.

[89] In contrast, compare the detailed direction provided by the Supreme Court in reviewing whether consents to searches are voluntary in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). In that case, the Supreme Court relied upon cases assessing the voluntary nature of confessions, and held that the voluntary nature of providing consent

Many of the Circuit Courts of Appeals have established a more comprehensive set of factors for consideration when assessing whether a waiver of *Miranda* rights was voluntary. The Seventh Circuit, for example, has suggested that trial courts consider, among other factors, the defendant's background, his mental and physical condition, and the duration and conditions of detention.[90] Similarly, the Eighth Circuit has explained that examination of the totality of circumstances includes, but is not limited to, such considerations as the "background, experience, and conduct" of the defendant.[91] The Tenth Circuit has identified five factors that should be considered to determine whether a *Miranda* waiver was voluntary:

> (1) the age, intelligence, and education of the defendant; (2) the length of [any] detention; (3) the length and nature of the questioning; (4) whether the defendant was advised of [his or] her constitutional rights; and (5) whether the defendant was subjected to physical punishment.[92]

The Third Circuit has provided several factors to guide this analysis: the defendant's age, education, intelligence, occupation, advice of rights administered, length of detention, length of questioning, physical or mental punishment or exhaustion.[93] Accordingly, an advisement of *Miranda* rights and a subsequent valid waiver of those rights are significant factors, among other factors, to be considered in determining whether a confession is voluntary. Significantly, no single factor is dispositive. The purpose of looking at all of the factors involved is to determine whether the will of the suspect was overborne through improper coercion.[94]

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to a search must be assessed in "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226 (internal citations omitted). The Court continued: "Some of the factors taken into account have included the youth of the accused; his lack of education; or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep" *Id.*

[90] United States v. Steele, 82 Fed. App'x 172, 175 (7th Cir. 2003).

[91] United States v. Jones, 23 F.3d 1307, 1313 (8th Cir. 1994) (citing United States v. Barahona, 990 F.2d 412, 418 (8th Cir. 1993)).

[92] United States v. Carrizales-Toledo, 454 F.3d 1142, 1153 (10th Cir. 2006); United States v. Glover, 104 F.3d 1570, 1579 (10th Cir. 1997). These factors are not exclusive. The Tenth Circuit has also instructed trial courts to consider whether "the government obtained the statements by physical or psychological coercion such that the defendant's will was overborne." United States v. Rith, 164 F.3d 1323, 1333 (10th Cir. 1999).

[93] Miller v. Fenton, 741 F.2d 1456, 1460 (3d Cir. 1984).

[94] *See, e.g.*, United States v. Artis, No. 5:10-cr-15-01, 2010 U.S. Dist. LEXIS 97279 at *27 (D. Vt. Sept. 16, 2010) (determining whether statements by suspect with a criminal history were the result of coercion).

III. THE COURT'S RECENT MIRANDA CASES: *MONTEJO*, *POWELL*, *SHATZER*, AND *THOMPKINS*

Between May 2009 and the end of the October 2009 term, the Supreme Court decided four cases, described below, dealing with *Miranda*-related issues. In deciding these four cases, the Court began a process of limiting *Miranda* by focusing less on the objective actions of the police and more on the subjective knowledge of suspects.

A. Montejo

The Supreme Court decided *Montejo v. Louisiana* in May 2009.[95] In *Montejo* the defendant was a twenty-three-year-old at who had not graduated from high school, had an "extensive" juvenile record, and had been incarcerated for six years in Florida.[96] The wife of the victim found him dead in their home.[97] The victim had suffered two gunshot wounds.[98] The defendant became a suspect because several neighbors noticed his blue van, which had a "distinctive chrome cattle bar," near the victim's home at the time of the murder.[99] The police later determined that a disgruntled former employee of the victim had been an accomplice to the defendant.[100] The former employee was familiar with the victim's routine and would have been aware that he was likely to possess a large amount of cash on the day of the murder.[101]

The defendant was taken into custody and repeatedly provided with his *Miranda* warnings, signed written waivers, and consented to speak to the police detectives.[102] Over the course of four hours of interviews, the defendant admitted that he had shot the victim during an attempted burglary.[103] The defendant initially claimed that his only involvement was in driving a co-defendant to the victim's home and leaving him there without knowing that the co-defendant was going to rob and kill the victim.[104]

Montejo then proceeded to tell other versions of his story before asking to speak with an attorney, at which point the detectives ended the

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[95] Montejo v. Louisiana, 129 S. Ct. 2079 (2009).

[96] State v. Montejo, 974 So. 2d 1238, 1264 (La. 2008).

[97] *Id.* at 1241.

[98] *Id.*

[99] *Id.* at 1242. The police later discovered the defendant's DNA beneath the victim's fingernails. *Id.*

[100] *Id.* at 1241.

[101] *Id.*

[102] The defendant conceded that he received appropriate *Miranda* warnings. Brief for Petitioner at 2–3, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (No. 07-1529).

[103] State v. Montejo, 974 So. 2d 1238, 1244 (La. 2008).

[104] *Id.* at 1245.

interview.[105] The interview resumed, however, at the request of the defendant.[106] The defendant told several variations of the story, finally admitting that he had believed that the house was unlocked, contained a lot of money, and would be unoccupied.[107] The defendant claimed that he found a gun inside the house and picked it up to scare anyone away who might come home.[108] When the victim returned home, the defendant hit him over the head with the gun, fired a warning shot, and then, after a struggle, shot him in the head.[109] The defendant then fled in the victim's vehicle, threw the gun into a lake, gave some money to his co-defendants, and used the rest of the money to pay bills.[110] The validity of Montejo's first statement was not an issue before the Supreme Court.[111]

Four days after Montejo was first detained and interrogated, the officers brought him before a judge for a mandatory initial hearing.[112] The hearing was not transcribed, but the minute entry indicates that the defendant was denied bail and had counsel appointed through the Office of the Indigent Defender.[113] After the hearing, the detectives again approached Montejo.[114] They requested that he accompany them to the area where he had allegedly thrown the gun into the lake.[115] According to the detectives, Montejo denied that he had obtained counsel.[116] Montejo subsequently testified at the trial that he told the detectives, "Yeah, I think I got a lawyer appointed to me."[117]

Montejo was again provided with his *Miranda* rights and again agreed to waive the same. He accompanied the detectives to the lake, but the gun was never found.[118] He also wrote a letter to the victim's widow, in which he sought to minimize his role in the murder and expressed some remorse.[119]

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[105] *Id.* at 1244–47.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 1247.
[109] State v. Montejo, 974 So. 2d 1238, 1247 (La. 2008).
[110] *Id.* at 1248.
[111] Brief for Respondent at 15 n.3, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (No. 07-1529).
[112] *Montejo*, 129 S. Ct. at 2082.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] Brief for Respondent at 15, *Montejo*, 129 S. Ct. 2079 (2009) (No. 07-1529).
[117] State v. Montejo, 974 So. 2d 1238, 1262 (La. 2008).
[118] *See id.* at 1250 n.44.
[119] The two-page letter is reprinted in the Louisiana Supreme Court's opinion, and reads as follows (with spelling and punctuation unaltered, but capitalization normalized for legibility):

The issue before the Court was whether to overrule *Michigan v. Jackson*.[120] *Jackson* concerned the ability of law enforcement officers to initiate an interrogation once a defendant had obtained counsel at an arraignment or similar proceeding.[121] The Court acknowledged that the Sixth Amendment guarantees a defendant the right to counsel at all critical stages of a criminal proceeding, and that the interrogation was one of those critical stages.[122]

> Ms. Ferrari,
> This is very hard to put in the right words but I will try hard. My soul is feeling you very much. If I could rwind time I wish that bullet would of hit me. Please finish reading. I really want you to know I had no intention on his death and I am in a log of true pain I'm so sorry I can picture your heart dropping at sight it is eating me up inside so bad. I try to talk to Loue every day to say I'm sorry and wish I could let you feel my emotion to know truely how sorry and how bad this is tearing me up. I promise you I didn't cold blood kill Mr. Loue if I could change places I would be dead. Please be strong only God really knows why this happen you a beautiful woman and I'm huting more than you would really expect to know I caused that I did crimes before but I'm really not as harmful as what happen please forgive me Ms. Ferrari I prey for you to be strong and get through I will prey every day I'm accepting God for once in my life and begging for forgiveness I'm so sorry please forgive me I was going for a simple burgulary in and out that someone put me on and instead I found the gun so I thought if some reason some one does come in I can scare with the gun and run but he wasn't scared I swear I tried to just run Ms. Fearri but he wouldn't let me I even fired a warning which skint him on the side but he still kept coming strong I couldn't see then the shot and he flew back I ran with no ride I grabed his keys I almost shot myself the gun was cocked back agin and I didn't know how thats how scared I was so I shot into the couch I know you needed to know this Ms. Ferri and may God make you strong please I need your forgiveness Ms. Ferri I'm more than sorry for what happen please forgive me please I'm sorry I lost my life too, my baby my beautiful girl I'm so sorry. [signature] Please forgive me Miss. Ferri may God be with you and make you strong because hes killing me inside.

Id. at 1250 n.49 (reprinted verbatim).

[120] 475 U.S. 625 (1986).

[121] *Montejo*, 129 S. Ct. at 2082. The *Montejo* majority and the dissent disagree about the actual holding of *Jackson.* The majority claims that *Jackson* held that law enforcement officers could not initiate an interrogation of a defendant "once he has requested counsel at an arraignment or similar proceeding." *Id.* The dissent claims that *Jackson* stood for the proposition that law enforcement officers could not initiate an interrogation once an attorney-client relationship had been established. *Id.* at 2095 (Stevens, J., dissenting).

[122] *Id.* at 2085 (majority opinion). The Court has not provided a definitive list of "critical stages." But some cases have held certain stages to be critical. *See, e.g.*, Iowa v. Tovar, 541 U.S. 77, 81 (2004) (entry of a guilty plea); Gardner v. Florida, 430 U.S. 349, 358 (1977) (sentencing); United States v. Wade, 388 U.S. 218, 236–37 (1967) (post-indictment lineup). *See also supra* note 17 and accompanying text (providing additional examples of "critical stages).

The *Montejo* Court did not re-examine whether the right to have counsel present at an interrogation may be waived, so long as the waiver is "voluntary, knowing, and intelligent."[123] The Court explained that "when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick . . . ."[124] The Court refused to apply a prophylactic rule prohibiting any contact with represented defendants, similar to the rule established in *Edwards v. Arizona.*[125] In *Edwards,* the Court had held that once a suspect requests the presence of counsel, no further interrogation may be initiated by the officers.[126] This decision was based on the premise that such a rule was necessary "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."[127] In *Montejo,* the Court placed a greater obligation on the defendant or suspect to speak up. The Court said:

> [A] defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment . . . .[128]

Accordingly, the Court in *Montejo* was willing to abandon the *Jackson* rule because the existing safeguards of the *Miranda* regime are sufficient to guarantee that any waiver is truly voluntary.[129]

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[123] *Montejo*, 129 S. Ct. at 2085 (citing Patterson v. Illinois, 487 U.S. 285, 292 n.4 (1988); Brewer v. Williams, 430 U.S. 387, 404 (1977); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[124] *Id.*

[125] 451 U.S. 477 (1981).

[126] *Id.* at 484–85.

[127] *Montejo*, 129 S. Ct. at 2085 (citing Michigan v. Harvey, 494 U.S. 344, 350 (1990)).

[128] *Id.* at 2090 (citations omitted).

[129] A number of commentators have criticized the approach taken by the *Montejo* Court. The staff of the University of Kansas Law Review stated:

> *Montejo* is an abrupt departure from twenty-four years of precedent under *Jackson*. Indeed, the appellant Montejo did not even make the appropriate arguments to succeed in a *Jackson*-less legal landscape. The five-to-four split amongst the Court indicates that this was a contentious decision. *Jackson's* longevity suggests that Justice Scalia may have exaggerated the rule's practical problems. Although *Jackson's* policy interests may be served by the other prophylactic rules, the Court should

B. Powell

In *Florida v. Powell*, the Court considered the Tampa Police Department's use of a *Miranda* form that did not explicitly advise the suspect that he could have a lawyer present during questioning.[130] The defendant in *Powell* was facing possible charges of being a convicted felon in possession of a gun.[131] He had ten prior felony convictions.[132]

After arresting the defendant at his girlfriend's apartment in connection with a robbery investigation, the police took him into custody.[133] The police conducted a search of the apartment and discovered a gun underneath the bed in the room that the defendant appeared to have been occupying, at the time of their arrival.[134] Prior to his interview, the police showed the defendant the standard waiver form.[135] He indicated that he understood his rights and signed the waiver form.[136] At trial, as the State pointed out in its brief, the defendant acknowledged that he had "waived the right to have an attorney present during . . . questioning."[137] He then confessed to his prior felonies, possessing the weapon for protection, and knowing that he was prohibited by law from possessing the weapon.[138]

The defendant argued that the warnings used by the Tampa Police were insufficient because they did not inform him that he could have an attorney present during questioning.[139] The warning form did not state that the suspect had the right to have counsel present during questioning.[140] Instead, the form stated that the suspect could "talk to" an attorney "before answering any of our questions."[141] This argument was based on a reading of the warnings that suggested that while suspect

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> have attempted to fine-tune *Jackson* instead of simply dumping it and risking exposure to even a small category of defendants.

58 KAN. L. REV. 1311, 1352–53 (2010).

130 Florida v. Powell, 130 S. Ct. 1195, 1200 (2010).

131 *Id.*; *See* FLA. STAT. ANN. § 790.23(1).

132 Brief for Petitioner at 4, *Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175).

133 *Powell*, 130 S. Ct. at 1200.

134 Florida v. Powell, 998 So. 2d 531, 532 (Fla. 2008).

135 *Powell*, 130 S. Ct. at 1200. The form states: "You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview." *Id.* (internal citations omitted).

136 *Id.*

137 Brief for Petitioner at 4, *Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175).

138 *Powell*, 130 S. Ct. at 1200.

139 *Id.*

140 *Id.* at 1201.

141 *Id.* at 1204.

could consult with an attorney, he did not have a right to have an attorney present during questioning.[142]

The Court rejected this argument and held that the warnings provided to the defendant were sufficient to convey to the defendant that he could have an attorney present.[143] In reaching this conclusion, the Court explicitly relied upon the common sense of the defendant.[144] The Court said:

> A reasonable suspect in a custodial setting who has just been read his rights, we believe, would not come to the counterintuitive conclusion that he is obligated, or allowed, to hop in and out of the holding area to seek his attorney's advice. Instead, the suspect would likely assume that he must stay put in the interrogation room and that his lawyer would be there with him the entire time.[145]

The Court also rejected the idea that the police would intentionally use an inadequate form in the hopes of tricking suspects into waiving their *Miranda* rights.[146] Instead, the Court accepted the position of the government, especially the Solicitor General as amicus curiae, that law enforcement would prefer to eliminate the risks of suppression and the costs of litigation by providing adequate warnings.[147]

C. Shatzer

In *Maryland v. Shatzer*, the Supreme Court considered the implications of a break in custody on the *Edwards* rule. The defendant was a suspect in the alleged sexual abuse of his three-year-old son.[148] A police detective assigned to the Child Advocacy Center had received a

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[142] The Florida Supreme Court adopted this reasoning. *Id.* at 1205. ("The 'before questioning' warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before questioning; there is nothing in that statement that suggests the attorney can be present during the actual questioning.").

[143] *Id.* at 1204–05.

[144] The Court cited to two cases where warnings, read in context, adequately conveyed to the suspect his right to have counsel present during interrogations. Florida v. Powell, 130 S. Ct. 1195, 1204–05 (2010) (citing Duckworth v. Eagan, 492 U.S. 195 (1989); California v. Prysock, 453 U.S. 355 (1981) (*per curiam*)).

[145] *Id.* at 1205.

[146] *Id.* at 1205–06. At oral argument, Justice Sotomayor raised the question of whether the police may have intentionally used improper warnings. She asked counsel for the government: "Why wouldn't the intent of the entity at issue be placed in question? Meaning, you could have—the police here could have chosen to be explicit, but instead they chose be—to obfuscate a little bit and be less explicit. Shouldn't we assume that that is an intent to deceive or perhaps to confuse?" Transcript of Oral Argument at 15–16, *Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175).

[147] *Powell*, 130 S. Ct. at 1205–06.

[148] Maryland v. Shatzer, 130 S. Ct. 1213 (2010).

report from a social worker that the suspect had received oral sex from the child.[149] The detective went to a state prison to interview the suspect, who at the time was serving a sentence for an unrelated sexual offense. The detective provided the defendant with his *Miranda* warnings and obtained a written waiver. The defendant, after some initial confusion about the allegations being discussed—indicated that he would not talk without an attorney present.[150] The detective then terminated the interview.[151]

Approximately two and one-half years later, the police re-opened the investigation.[152] The defendant remained incarcerated on the unrelated offense.[153] The detective, who had not worked on the original investigation, provided the defendant with his *Miranda* warnings and obtained a written waiver.[154] The defendant denied any physical contact and agreed to take a polygraph examination.[155] Prior to the polygraph examination five days later, the defendant admitted to masturbating in front of the child and then said, "I didn't force him. I didn't force him."[156]

The defendant was charged with the sexual abuse of his son.[157] He filed a motion to suppress his statements, as having been made in violation of *Edwards*. The trial court denied the motion. The defendant was subsequently convicted of sexual child abuse and sentenced to

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[149] The child said that the defendant "pulled his pants down, exposed his penis, apparently put milk on his penis, and told [the child] to lick his worm . . . ." Brief for Petitioner at 3, *Shatzer*, 130 S. Ct. 1213 (2010) (No. 08-680). *See also* Brief for Respondent at 1, *Shatzer*, 130 S. Ct. 1213 (2010) (No. 08-680).

[150] *Shatzer*, 130 S. Ct. at 1217. The detective wrote in his report: "When I attempted to again initiate the interview, he [the defendant] told me that he would not talk without an attorney present." Brief for Respondent at 1, *Shatzer*, 130 S. Ct. 1213 (2010) (No. 08-680).

[151] *Shatzer*, 130 S. Ct. at 1217.

[152] According the brief from the State of Maryland, the investigation was reopened because the police had received "additional, more specific allegations 'because the child was more mature, able to articulate what had happened to him several years before.'" Brief for Petitioner at 4, *Shatzer*, 130 S. Ct. 1213 (2010) (No. 08-680) (citing Testimony from Suppression Hearing contained in Joint Appendix).

[153] *Shatzer*, 130 S. Ct. at 1217–18.

[154] *Id.* at 1218.

[155] Brief for the Petitioner at 5.

[156] *Id.* There is some confusion about the exact timing of the inculpatory statements about masturbating in front of the child. The Supreme Court reports that the statements were made during the initial interview with the new detective. *Id.* This same report of the facts is contained in the opinion from the Maryland Court of Appeals, and appears to be consistent with an agreed statement of facts. Shatzer v. State, 954 A.2d 1118, 1121–22 n.3 (Md. 2008). However, the brief from the state indicates that this admission occurred during the pre-polygraph interview. Brief for Petitioner at 5, *Shatzer*, 130 S. Ct. 1213 (2010) (No. 08-680). The defendant's brief is silent on this factual issue.

[157] *Shatzer*, 130 S. Ct. at 1218.

fifteen years in prison, consecutive to the sentence he was serving, with all but five years suspended.[158]

The Court, in analyzing the defendant's claim under *Edwards*, emphasized that the *Edwards* Rule "is not a constitutional mandate, but [a] judicially prescribed prophylaxis."[159] The court then described what it referred to as the "paradigm *Edwards* case":

> That is a case in which the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated. After the initial interview, and up to and including the second one, he remains cut off from his normal life and companions, "thrust into" and isolated in an "unfamiliar," "police dominated atmosphere," where his captors "appear to control [his] fate."[160]

The Court then explained that, in contrast to the paradigm *Edwards* case, if a suspect is "returned to his normal life," then any "change of heart regarding interrogation without counsel" is not likely to have been coerced.[161] For this reason, the Court rejected the idea that the *Edwards* rule amounted to an "eternal" prohibition against police initiated interrogations after a suspect requested the presence of counsel. Instead, the Court held that the police may re-approach a suspect who had requested counsel after the "termination" of custody and "any of its lingering effects."[162]

The *Shatzer* Court proceeded to determine the appropriate length of time of the break in custody before police may re-approach a suspect who had requested counsel. The Court set the time limit at fourteen days.[163] The Court explained that fourteen days is "plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."[164] In Shatzer's case, even though he was incarcerated, because he was returned to his "accustomed surroundings," and because his detention in prison was unrelated to his willingness to cooperate in the

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[158] *Id.*; *Shatzer*, 954 A.2d at 1122. The defendant waived his right to a jury trial and was convicted on an agreed statement of facts consisting of a summary of the victim's statement and the defendant's admissions. *Id.* at n.3.

[159] *Shatzer*, 130 S. Ct. at 1220 (citing, *inter alia*, Montejo v. Louisiana, 129 S. Ct. 2079, 2085–86 (2009)).

[160] *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 456–57 (1966).

[161] *Id.* at 1221. The Court was also concerned that extending *Edwards* would increase the costs to society by excluding voluntary confessions from trial while minimally deterring police misconduct. *Id.* at 1221–22.

[162] *Id.* at 1222.

[163] *Id.* at 1223.

[164] *Id*. The Court did not provide any rationale for choosing fourteen days.

investigation," the two and one-half year break between interrogations was sufficient to permit a court to conclude that his waiver of his *Miranda* rights during the second interrogation was knowing, intelligent, and voluntary.[165]

D. Thompkins

In *Berghuis v. Thompkins*,[166] the Court considered the manner in which a suspect must invoke, or waive, *Miranda* rights. Thompkins was a suspect in a shooting outside a mall in January 2000.[167] The victims of the shooting were involved in a dispute with the defendant and several other men while driving through a mall parking lot in Michigan.[168] The defendant and the other men proceeded to follow the victims, with the defendant sitting in the passenger seat of his van.[169] The van pulled up alongside the victims. Thompkins said, "What you say, Big Dog" and then fired several shots into the victims car, killing one person and wounding another.[170]

The surviving victim identified the defendant from a photograph taken by a security camera.[171] The defendant was arrested a year later in Ohio.[172] Detectives from Michigan traveled to Ohio to interview the defendant.[173] The detectives read the defendant a form advising him of his *Miranda* rights.[174] The defendant orally indicated that he understood his rights, but refused to sign the form.[175] The detective, at a suppression hearing, described the interview as "very, very one-sided," and as "nearly a monologue."[176] Further, the defendant mostly "remained silent," but "shared very limited verbal responses . . ." and "talk[ed] . . . very sporadically."[177] Mostly the defendant said, "I don't know" or

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[165] Maryland v. Shatzer, 130 S. Ct. 1213, 1227 (2010). The Court maintained a presumption that waivers after a suspect invokes the right to counsel are involuntary. *Id.* at 1223 n.7; *see also id.* at 1227 (Thomas, J., concurring in part).

[166] 130 S. Ct. 2250 (2010). The case was brought as a *habeas* petition in federal District Court in Michigan.

[167] *Id.* at 2256.

[168] See Brief for the Petitioner at 7 (available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1470_Petitioner.authcheckdam.pdf)

[169] *Id.* at 7-8.

[170] Thompkins v. Berghuis, 547 F.3d 572, 575 (6th Cir. 2008).

[171] *Id.*

[172] *Id.* at 576.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Thompkins* , 547 F.3d at 576.

[177] *Id.*

"yeah."[178] The detective said that the defendant occasionally gave non-verbal responses to questions, such as making eye contact, looking up, or nodding his head.[179]

The interview lasted approximately two hours and forty-five minutes.[180] At the end, the detective asked the defendant whether he "believed in God."[181] The detective testified that the about the defendant's response as follows:

> I finally looked at him, and I asked him, tried to take a different tact, what I call a spiritual tact, whether or not he believed in God. He made eye-contact with me for one of the few times that he did for the interview. I saw his eyes well up with tears. He answered me orally and said, "Yes." I asked if he had prayed to God? And he said "Yes." And I asked him if he had asked God to forgive him for – I believe the words were, and I quoted them in my report verbatim "shooting that boy down." And he answered, "Yes."[182]

The defendant was, on the basis of this inculpatory statement and other evidence, convicted of murder.[183]

The Supreme Court held that a suspect must invoke the right to remain silent (and the right to counsel) unambiguously.[184] The Court clarified that, while a waiver of *Miranda* rights cannot be inferred from silence, a waiver can be established without a "formal or express statement."[185] Instead, an "implicit waiver" of *Miranda* rights can be inferred after suspects have been informed of their rights from silence combined with a "course of conduct indicating waiver."[186] The Court explained:

> Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, and accused's uncoerced statement establishes an implied waiver of the right to remain silent . . . . As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made

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178 *Id.*
179 *Id.*
180 *Id.*
181 *Id.*
182 Berghuis v. Thompkins, 130 S. Ct. 2250, 2257 (2010).
183 *Thompkins*, 547 F.3d at 574.
184 *Thompkins*, 130 S. Ct. at 2260.
185 *Id.* at 2261.
186 *Id.* (quoting North Carolina v. Butler, 441 U.S. 369, 376 (1979)).

> a deliberate choice to relinquish the protection those rights afford.[187]

In other words, the Court explained, "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement . . . ."[188]

In *Thompkins,* thus, the Court was able to infer a knowing, intelligent and voluntary waiver of *Miranda* rights by the defendant. There was little dispute that the defendant received his *Miranda* warnings, and there was no evidence of coercion. A waiver was inferred from the mere act of the defendant providing a statement under these circumstances. The Court said, "If [the defendant] wanted to remain silent, he could have said nothing . . . or he could have unambiguously invoked his *Miranda* rights and ended the interrogation."[189] In contrast, ambiguity would harm law enforcement efforts, as "police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'"[190]

IV. COMMON THEMES IN RECENT SUPREME COURT *MIRANDA* CASES

Some commentators have suggested that the recent *Miranda* cases reflect a continued effort by conservative or prosecution oriented Justices to slowly peel back *Miranda* protections. In a web posting, for example, Professor Sherrilyn Ifill of the University of Maryland suggested, after the *Thompkins* decision, that the conservative majority's approach to *Miranda* is the result of a disdain for the initial decision, coupled with a lack of real-world and defense counsel experience on the Court.[191] Professor Patrick Noonan posted an article particularly responding to *Thompkins,* entitled *The Death of* Miranda.[192] In this article, Noonan suggests that the Supreme Court's decisions "disrupt[] the purpose and meaning of *Miranda*. That is, [*Thompkins*] takes the power to exert

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[187] *Id.* at 2261–62.

[188] *Id.* at 2264.

[189] *Id.* at 2263. Although *Miranda* stated that the government has a "'heavy burden' to show waiver," the *Thompkins* Court discounted this standard, observing that "this 'heavy burden' is not more than the burden to establish waiver by a preponderance of the evidence." *Id.* at 2261. The dissent argued that "inculpatory statements by themselves are [not] sufficient" to establish a waiver. *Id.* at 2270 (Sotomayor, J., dissenting).

[190] *Thompkins*, 130 S. Ct. at 2260 (majority opinion) (quoting Davis v. United States, 512 U.S. 452, 461 (1994)).

[191] Sherrilyn Ifill, *Who Will Speak for the Defense on the Supreme Court?*, THEROOT (June 2, 2010, 12:12 PM), http://www.theroot.com/views/who-will-speak-defense-supreme-court.

[192] Patrick J. Noonan, *The Death of* Miranda v. Arizona (2010) (unpublished manuscript) (on file with the *Seton Hall Circuit Review*).

control over the course of the interrogation from the defendant and places it back into the hands of the interrogator."[193]

The limiting of *Miranda* was also noted in the media. *Time Magazine* published an article entitled, *Has the Supreme Court Decimated* Miranda?[194] After reviewing the *Thompkins* decision, the magazine wrote:

> For years, conservatives continued to attack the *Miranda* decision, holding out hope that it would be reversed. In 2000, it seemed like it might finally happen—the court had a case that posed a direct challenge to *Miranda*, and it had a five-member conservative majority. But in the end, Chief Justice William Rehnquist, leader of the conservative bloc, wrote an opinion for a 7-2 majority reaffirming *Miranda*. "*Miranda* has become embedded in routine police practice," he wrote, "to the point where the warnings have become part of our national culture."
>
> Instead of overruling *Miranda*, the conservative Justices have now done something they are doing to many landmark progressive decisions—quietly chipping away to the point that they have little power left.[195]

In a similar fashion, The *New York Times* reported that the recent decisions had "narrowed and clarified the scope of the *Miranda* decision."[196] The *Washington Post* noted that "[t]he Supreme Court [has] backed off . . . from strict enforcement of its historic *Miranda* decision."[197]

A. Consideration of Criminal Backgrounds in Montejo*,* Powell*,* Shatzer*, and* Thompkins

A close reading of the recent opinions, however, suggests that there may be a subtler theme running through the cases than a straightforward attack on *Miranda.* In all four recent *Miranda* cases, the court chose to accept cases with defendants who had significant experience with the criminal justice system. The defendants in these cases, it can be inferred, were familiar with the *Miranda* warnings from having received them in prior contact with law enforcement. In addition, it can be inferred that

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[193] *Id.* (internal citations omitted).

[194] Adam Cohen, *Has the Supreme Court Decimated* Miranda*?*, TIME (June 3, 2010), http://www.time.com/time/nation/article/0,8599,1993580,00.html.

[195] *Id.*

[196] Adam Liptak, *Mere Silence Doesn't Invoke* Miranda*, Justices Say*, N.Y. TIMES, June 2, 2010, at A15.

[197] David G. Savage, *Supreme Court Backs Off Strict Enforcement of* Miranda *Rights*, L.A. TIMES, June 2, 2010.

the defendants were aware that the police would honor the *Miranda* warnings. Finally, it could be inferred that the defendants were familiar with police tactics and were less likely to be intimidated by the isolation of custodial interrogation. This was raised, sometimes implicitly in the four cases:

1. *Montejo*

The Court's decision in *Montejo* does not explicitly mention the defendant's background and experience with the criminal justice system. However, this appears to be an unstated factor in the decision. At oral argument, counsel for the State of Louisiana noted that the defendant had waived his *Miranda* rights on seven prior occasions.[198] The Court's decision extensively discusses the potential badgering by the police during custodial interrogations that *Jackson* was designed to prevent.[199] However, this type of badgering is likely to have a greater effect on a criminal defendant who is inexperienced with police tactics. Some observers have noted that by describing the purpose of *Jackson* as proscribing police badgering of suspects, the court gave less weight to the interest of protecting the relationship "between the uninformed suspect and his hopefully knowledgeable counsel."[200] This contrasts defendants with experience and knowledge about the criminal justice system who are less likely to be impacted. A defendant with multiple prior arrests is more likely to see badgering as a tactic.

In the *Montejo* decision this contrast is especially clear. In deciding to permit officers to approach represented defendants, the *Montejo* Court implicitly took into account the background and experience of the defendant. The result of the *Montejo* decision is most likely to be felt by defendants who, some have noted, are "mentally retarded, mentally ill, and juveniles."[201] For example, Geoffrey Sweeney notes that the "procedural consequences of the *Montejo* decision place vulnerable defendants at peril."[202] Yet the Court seems to be making law based on the assumption that most defendants are like the defendant in *Montejo*. The Court said, "No reason exists to assume *that a defendant like Montejo*, who has done nothing at all to express his intentions with

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[198] Transcript of Oral Argument at 26, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 U.S. Trans. LEXIS 5, at *26. *But see* Transcript of Oral Argument at 36, *Montejo*, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 U.S. Trans. LEXIS 5, at *36 (Justice Kennedy: "He's not versed in the law, he's in this stressful situation.").

[199] *Montejo*, 129 S. Ct. at 2080, 2085, 2086–87, 2089–91.

[200] Adam J. Hegler, *Is the Temple Collapsing?:* Montejo v. Louisiana *and the Extent of the Right to Counsel in Criminal Proceedings*, 66 S.C. L. REV. 867, 883 (2010).

[201] Sweeney, *supra* note 78, at 646.

[202] *Id*.

respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring."[203]

2. *Powell*

In *Powell,* the Court was presented with a suspect who had ten prior felony convictions.[204] The subjective knowledge of a defendant seems to also be behind this decision, even if not stated explicitly. During oral argument, Justice Scalia pointedly questioned the defendant's attorney about whether his client actually was confused by the warning provided.[205] He asked:

> This is angels dancing on the head of a pin. You want us to believe that your client, who decided to talk, even though he was told he could consult an attorney before any question was asked, and he could consult an attorney at any time during the interview, and he went ahead and—and confessed—you are saying, oh, if he had only known. Oh, if I knew that I could have an attorney present during the interview, well, that would have been a different kettle of fish and I would never have confessed. I mean, doesn't that seem to you quite fantastic?[206]

The record before the Court, in fact, suggested that the defendant was well aware of his rights when he executed the improper waiver.

In a footnote, the Court indicated that the defendant had actual knowledge that he could have an attorney present during questioning.[207] However, the Court said that this fact "does not bear on our conclusion."[208] Thus, while the Court was not backing away from the need for adequate warnings, the Court refused to allow possible ambiguity to trump actual knowledge.

3. *Shatzer*

In *Shatzer*, the prior experience of the defendant with interrogations was a significant factor in finding that the *Edwards* prohibition on police-initiated interrogations after a suspect requested the presence of

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[203] *Montejo*, 129 S. Ct. at 2086–87 (emphasis added and omitted).

[204] Brief for Petitioner at 4, Florida v. Powell, 130 S. Ct. 1195 (2010) (No. 08-1175), 2008 U.S. Briefs 1175, at *4.

[205] Transcript of Oral Argument at 34, *Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175), 2009 U.S. Trans. LEXIS 72, at *34.

[206] *Id*.

[207] *Powell*, 130 S. Ct. at 1205 n.7.

[208] *Id. See also id.* at 1212 n.10 (Stevens, J. dissenting) (noting that "the testimony is irrelevant" because "circumstantial evidence" of knowledge cannot replace the need to adequate warnings).

counsel could be limited to fourteen days.[209] Justice Ginsburg, during oral arguments, noted that this past experience was relevant to whether a suspect would understand that he could exercise his right to counsel.[210] She asked counsel for the defendant:

> Why wouldn't he think, I invoked my right to remain silent without a lawyer two years and seven months ago, I will do it again; they will have to stop questioning? Why wouldn't that be the most likely mindset of the defendant? He knew that it worked the first time.[211]

The *Shatzer* Court noted that a defendant "knows from his prior experience that he need only demand counsel to bring the interrogation to a halt, and that investigative custody does not last indefinitely."[212] The Court suggested that it is possible a suspect could determine, based on his experiences "and further deliberation in a familiar setting . . . that cooperating with the investigation is in his interest."[213] Moreover, in weighing the costs and benefits of extending the *Edwards* rule, the court considered the effects of this extension "[i]n a country that harbors a large number of repeat offenders."[214] To support this observation, the Court noted that, in a recent Department of Justice study, 67.5% of released prisoners were re-arrested within three years.[215]

4. *Thompkins*

In *Thompkins*, the precise criminal record of the defendant was not specified in either the Supreme Court or the state court decisions. However, the defendant had at least one prior felony conviction, as evidenced by his conviction for being a felon in possession of a gun, in addition to the murder conviction.[216] He also appeared to be experienced with and unintimidated by the legal system; when he was arrested, he initially fled from the police, then provided a false name and false identification.[217]

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[209] Maryland v. Shatzer, 130 S. Ct. 1213, 1216 (2010).

[210] Transcript of Oral Argument at 49, *Shatzer*, 130 S. Ct. 1213 (2010), (No. 08-680), 2009 U.S. Trans. LEXIS 42, at *49.

[211] *Id*.

[212] *Shatzer*, 130 S. Ct. at 1221.

[213] *Id*.

[214] *Id*. at 1222.

[215] *Id*. at 1222 n.6.

[216] People v. Thompkins, No. 242478, 2004 WL 202898 at *1, *4 (Mich. App. Feb. 3, 2004).

[217] Brief for Petitioner at 11, Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (No. 08-1470).

The unambiguous statement requirement in *Thompkins* is a shift of responsibility from law enforcement to the suspect. The Court concluded that the statement given by the defendant was the result of a knowing, voluntary, and intelligent waiver based on a lack of evidence of failure of the police to provide a *Miranda* warning, explicit invocation of *Miranda* rights, or coercion.[218] The Court states its conclusion in the negative:

> The record in this case shows that [the defendant] waived his right to remain silent. There is *no basis to conclude* that he did not understand his rights, and on these facts it follows that he chose not to invoke or rely on those rights when he did speak.[219]

Later in the opinion, the Court provided a list of reasons why a suspect might rationally decide to waive their *Miranda* rights and speak to the police.[220] The Court suggested that a suspect may gain "additional information" to aid in the decision.[221] The Court continued:

> When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect, the apprehension of accomplices, the prevention of continuing injury and fear, beginning steps towards relief or solace for the victims; and the beginning of the suspect's own return to the law and social order it seeks to protect.[222]

The *Thompkins* Court thus signaled that an implied waiver of *Miranda* rights is sufficient. In other words, the law does not require an express waiver of *Miranda* rights. The result is that criminal defendants are required to take the initiative to invoke, expressly and unambiguously, their *Miranda* rights following their advisement of those rights.

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[218] *Thompkins*, 130 S. Ct. at 2263.

[219] *Id.* at 2262. Justice Scalia, during oral argument, put it more plainly:

I don't understand how this person could just sit there for 2 hours and didn't want to be interrogated and doesn't say: You know, I don't want to answer your questions. He just sits there and some questions he doesn't answer. And he does make a few comments, anyway. . . . Why shouldn't we have a rule which simply says if you don't want to be interrogated, all you have to say is "I don't want to answer your questions?"

Transcript of Oral Argument at 15, *Thompkins*, 130 S. Ct. 2250 (2010) (No. 08-1470), 2010 U.S. Trans. LEXIS 18, at *15.

[220] *Thompkins*, 130 S. Ct at 2264.

[221] *Id*.

[222] *Id*.

B. Consideration of Criminal Background by State and Lower Federal Courts

The consideration of the criminal history and background of defendants in *Miranda* cases is not new or unique. The United States Supreme Court has not explicitly considered this factor in determining whether a waiver was voluntary, however, it is implicit in another decision. In *Fare v. Michael C.*, the Supreme Court considered an argument by a juvenile that he had been unable to understand his rights.[223] The Court, in rejecting this argument, noted that the juvenile had "considerable experience with the police" and that he had "a record of several arrests," had served time in a "youth camp," and was on probation.[224]

More explicit examples are found in the lower courts. One example is the recent Sixth Circuit decision in *Simpson v. Jackson*.[225] In *Simpson,* the defendant was under investigation for aiding and abetting an arson—through the use of a Molotov cocktail—which led to the death of a child and injuries to numerous other persons.[226] The defendant challenged the use of four statements he gave to the police.[227] One of the statements was made to a Columbus Police Department homicide detective and a federal special agent while the defendant was in prison on an unrelated charge.[228] The interview was held in a conference room in the warden's office after the defendant was pulled from general population.[229]

After a second statement at the prison (this time, in the infirmary), the law enforcement officers arranged the release of the defendant on probation so that he would cooperate with the investigation.[230] However, the defendant failed to cooperate and to abide by the terms of his probation.[231] He was arrested and interrogated at police headquarters.[232] Prior to the interview, the defendant was given his *Miranda* rights.[233] He subsequently admitted his involvement in starting the fire.[234]

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[223] 442 U.S. 707 (1979). *See also supra* notes 86–89 and accompanying text (discussing *Fare*).

[224] *Fare*, 442 U.S. at 726.

[225] Simpson v. Jackson, 615 F.3d 421, 424 (6th Cir. 2010). The case came before the federal court on a *habeas* review of a state court conviction.

[226] *Id*.

[227] *Id*.

[228] *Id.* at 425.

[229] *Id*. at 426.

[230] *Id*. at 427.

[231] Simpson v. Jackson, 615 F.3d 421, 425–26 (6th Cir. 2010).

[232] *Id*. at 426

[233] *Id*.

[234] *Id.* at 425.

When the defendant was asked whether he was willing to speak with the officers after receiving his *Miranda* rights, he responded:

> (1) "mmm-mmmm," clearly in a negative way; (2) a sideways shake of his hand and a slight shake of his head; (3) mumbling something and then saying "nah" or "naw"; and (4) then saying "I messed up last time I did that." The officer then replied, "So you don't want to talk to us? You do or you don't want to talk to us?" [the defendant] responded with more negative body language and said, "I mean, it can't help." Following four to five seconds of silence, the officer said, "Well that's up to you, whether you want to talk to us or not, we're not going to twist your arm or anything like that." [the defendant] immediately responded, "what y'all wanna talk about?" and the officer stated, "just basically what we're talking about now."[235]

The defendant then started to question the officer about the details of his current arrest; the officer did not ask any questions.[236] Another officer then asked the defendant, "so do you want to talk to us about any of this or not?"[237] The defendant mumbled an intelligible response and was handed a written *Miranda* waiver form.[238] The defendant said, "I mean, this right here, it really don't make no difference, you know what I'm saying, sign it or not."[239]

The defendant in *Simpson* challenged the voluntariness of his waiver, arguing that the officers "used a combination of threats and promises, which had the cumulative effect of overbearing his will."[240] The Sixth Circuit rejected this argument.[241] The court considered the fact that the defendant was "familiar with the officers."[242] The court noted that "it is clear that [the defendant] had extensive experience with the criminal justice system."[243] Accordingly, "the experience of being questioned by the police was neither new nor novel to him."[244]

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235 *Id*. at 429.
236 *Id*.
237 Simpson v. Jackson, 615 F.3d 421, 429 (6th Cir. 2010).
238 *Id*.
239 *Id*.
240 *Id*. at 431.
241 *Id*. at 433–34.
242 *Id*. at 432.
243 Simpson v. Jackson, 615 F.3d 421, 433 (6th Cir. 2010).
244 *Id*.; *See also* United States v. Marda, No. 04-10278-RGS, 2008 WL 2856783, at *1 n.5 (D. Mass. July 21, 2008) (noting that defendant "is an experienced defendant who had been previously arrested on at least two occasions for possession of weapons and drugs. On cross-examination, [the defendant] acknowledged his prior familiarity with the *Miranda* warnings").

In another case, the Eighth Circuit considered the defendant's criminal history as a factor in determining whether a lengthy interrogation rendered a waiver of *Miranda* rights involuntary. In *Williams v. Norris*,[245] the defendant was a suspect in the disappearance of a woman in Little Rock. He was arrested on an outstanding warrant, waived his *Miranda* rights, and during a thirteen-hour interview confessed to kidnapping the woman.[246] The defendant argued that his waiver of his *Miranda* rights was involuntary because, during the "marathon interrogation" in a "cramped room" he was subjected to coercive tactics, including appeals to God and sympathy for the victim's family.[247] In rejecting this argument, the Eighth Circuit noted that the defendant was "relatively well educated and experienced with the criminal justice system."[248]

State courts interpreting the voluntariness of a confession have been more explicit than the federal courts in including criminal background among the factors to be considered in determining voluntariness. The Minnesota Supreme Court has explicitly considered the importance of a suspect's familiarity with the criminal justice system.[249] The court stated, "[i]n assessing voluntariness, this court has focused heavily on both a defendant's education and his familiarity with the criminal justice system. We have found significant in previous cases that the defendant had been read his *Miranda* rights before the investigation at issue."[250]

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[245] Williams v. Norris, 576 F.3d 850 (8th Cir. 2009).

[246] *Id.* at 854. The victim's body was found later. *Id.* Based on forensic evidence, the defendant was convicted of her rape and murder. *Id.*

[247] *Id*. at 868. The *Williams* court suggests, without citation, that appeals to God may be coercive. The author has not found an example in federal courts where a confession has been suppressed as coercive for this reason. *Cf.* Davis v. State of North Carolina, 339 F.2d 770, 776 (4th Cir. 1964) (prayer by officer seeking God's blessing not coercive); Skaggs v. Parker, 27 F.Supp.2d 952, 974 (W.D. Ky. 1998) (finding "insufficient evidence" that religious discussion was coercive). Supreme Court precedents are not to the contrary. *See* Colorado v. Connelly, 479 U.S. 157, 169 (1986) (*Miranda* waiver not involuntary where psychiatrist testified that defendant believed God had told him to confess); Brewer v. Williams, 430 U.S. 387, 407 (1977) ("Christian burial" speech violated right to counsel, not voluntary nature of confession). *See also supra* note 181–82 and accompanying text (discussing interview with suspect in Berghuis v. Thompkins, 130 S. Ct. 2250 (2010), wherein detectives asked the suspect whether he "believed in God").

[248] *Williams*, 576 F.3d at 869. *See also* Treesh v. Bagley, 612 F.3d 424, 434 (6th Cir. 2010) ("In further support of the conclusion that [the defendant] made a knowing and intelligent waiver of his rights . . . . [He] testified that he was familiar with the criminal justice system."); United States v. Doe, 226 F.3d 672, 680 (6th Cir. 2000) (finding that a waiver was valid in part because of the defendant's substantial history with the justice system).

[249] State v. Miller, 573 N.W.2d 661, 672 (Minn. 1998).

[250] *Id*. (citations omitted).

The Colorado Supreme Court has also explicitly provided that "the background and experience of the defendant in connection with the criminal justice system" is a factor to be considered in determining whether a waiver is voluntary.[251] And the Iowa Supreme Court has held that a court should rely upon a wide range of factors in determining whether a defendant's waiver of rights was voluntary, including "a defendant's prior experience in the criminal justice system."[252]

Even in situations where defendants have more limited mental capabilities, some courts have held that prior experience with the criminal justice system can be a significant factor in finding that defendants voluntarily waived their *Miranda* rights. For example, in *United States v. Rojas-Tapia*,[253] the defendant was arrested on suspicion of being involved in a plan to hijack a helicopter, and then use the helicopter to stage a prison escape in Puerto Rico.[254] During the booking process, and after receiving his *Miranda* warnings, the defendant stated that he wanted to tell the law enforcement officers about his participation in the hijacking.[255] The officers repeated the *Miranda* warning, and the defendant proceeded to make a detailed confession.[256] The defendant later sought to suppress the statements on the grounds that a report indicated he had a significantly below average IQ.[257] The First Circuit rejected this argument, in part because of the defendant's extensive criminal history.[258] The court described that defendant as "hardly a neophyte in the criminal justice system," noting his "extensive prior record."[259] The court, thus, concluded that "whatever the deficiencies in his intellectual functioning, [the defendant's] repeated earlier exposure to *Miranda* warnings made it extremely unlikely that he failed to understand his rights at the time he made these incriminating statements."[260]

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[251] People v. Hopkins, 774 P.2d 849, 852 (Colo. 1989).
[252] State v. Payton, 481 N.W.2d 325, 329 (Iowa 1992).
[253] 446 F.3d 1 (1st Cir. 2006).
[254] *Id.* at 2.
[255] *Id*. at 2–3.
[256] *Id*.
[257] *Id*. at 7.
[258] *Id*. at 8.
[259] *Rojas-Tapia*, 446 F.3d at 8.
[260] *Id.* (citing United States v. Glover, 431 F.3d 744, 748 (11th Cir. 2005); United States v. Pruden, 398 F.3d 241, 246 (3d Cir. 2005); Taylor v. Maddox, 366 F.3d 992, 1015 (9th Cir. 2004); United States v. Morris, 247 F.3d 1080, 1090 (10th Cir. 2001); United States v. Palmer, 203 F.3d 55, 61 (1st Cir. 2000); Correll v. Thompson, 63 F.3d 1279, 1288 (4th Cir. 1995)). A similar standard has been applied to juvenile suspects. *See* United States v. Kerr, 120 F.3d 239, 241 (11th Cir. 1997) (in evaluating voluntary nature of statement by juvenile, noting that juvenile "had a substantial history of involvement in the Juvenile Justice System and, in fact, was a runaway from a state

Other courts have relied upon the prior criminal justice system experience of defendants to overcome concerns stemming from below average intelligence. In *United States v. Jones*,[261] the court found that a defendant with only an eighth grade education and "below average intelligence" could voluntarily waive his *Miranda* rights based, in part on his "considerable previous experience with the criminal justice system."[262] Similarly, in *United States v. Conner*,[263] the court rejected an effort by a defendant with a 71 IQ to have his post-*Miranda* confession found to be involuntary.[264] The court said,

> It should be noted that this particular Defendant has been arrested on a number of occasions. Therefore, the 37-year old Defendant is experienced and familiar with routine police policy such as being read his *Miranda* rights, being hand-cuffed, and being transported to jail, perhaps for additional questioning.[265]

Finally, in *Poyner v. Murray*,[266] the Fourth Circuit rejected a claim that a waiver by a suspect with an IQ between 79 and 85 was involuntary where the suspect with twelve prior convictions "was no stranger to the criminal justice system."[267] The *Poyner* court explained that the suspect's "background provided him with at least some familiarity with his rights and with the process to which he would be subjected."[268]

V. IMPLICATIONS OF INCREASED EMPHASIS ON THE CRIMINAL RECORDS OF DEFENDANTS IN ASSESSING *MIRANDA* WAIVERS

Courts' increased consideration of the criminal background of suspects, whether implicit by the Supreme Court or explicit by state and lower federal courts, in determining whether a *Miranda* waiver is made voluntarily, knowingly, and intelligently has several implications for the

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facility."); *In re Richard UU*, 870 N.Y.S.2d 472, 476–77 (N.Y. App. Div. 2008) (voluntary confession by 14-year-old who "had prior experience with law enforcement and was aware of the significance of his *Miranda* rights").

261 No. 1:09-cr-00110, 2010 WL 1628049 (N.D. Ohio Apr. 7, 2010).

262 *Id.*, at *18.

263 No. 8:06-cr-342-T-30TGW, 2007 WL 1428923 (M.D. Fla. May 14, 2007).

264 *Id.* at *1.

265 *Id*. *But see* Commonwealth v. Boyarsky, 897 N.E. 2d 574, 585 (Mass. 2008) (defendant's mental disorder and previous inexperience with justice system insufficient to raise doubt about voluntariness of confession).

266 964 F.2d 1404 (4th Cir. 1992).

267 *Id*. at 1413–14.

268 *Id*. at 1414. *See also* United States v. Robinson, 404 F.3d 850, 861 (4th Cir. 2005) (waiver by a defendant with a below average IQ valid where the suspect had waived his rights on two prior occasions). *But see Boyarsky*, 897 N.E. 2d at 585 (defendant's mental disorder and previous inexperience with justice system insufficient to raise doubt about voluntariness of confession).

future of the *Miranda* doctrine.[269] In terms of individual cases, as the Court begins to more explicitly take into account the criminal history of suspects, the government will find it easier to make the necessary showing to overcome the presumption against waiver. A suspect who is familiar with the criminal justice system, *Miranda* warnings, and police tactics is—it appears in the view of many courts—more likely to make an uncoerced choice to waive *Miranda* rights because the suspect is more likely to have the requisite level of comprehension.

In more general terms, I foresee two broader implications from the greater consideration of the criminal background of suspects in evaluating *Miranda* waivers. First, an increased focus on the subjective knowledge of suspects signals a shift away from the Court's traditional *Miranda* focus on preventing abusive police practices. In the original *Miranda* decision, the Court focused on "interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice."[270] Later, the Court in *Dickerson v. United States* was more explicit in recognizing that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements."[271] Recent decisions expounding on *Miranda* have maintained the view that *Miranda* is aimed at curbing abusive police practices. In *Thompkins*, for example, the Court examined whether there was evidence that the defendant's statement was coerced.[272] And in *Montejo* and *Shatzer*, the Court emphasized that the *Edwards* rule was a judicially-created rule designed to prevent badgering or coercion by the police.[273]

The focus on the criminal background of a defendant presents a subtle shift in approach. Instead of relying on a prophylactic rule to prevent abusive police tactics, the Court is starting to focus instead on whether a particular defendant was coerced by the tactics used by the police. In this manner, the Court is able to maintain that the failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning requires exclusion of any statements obtained. However, in the absence of a direct failure of the police to provide a necessary *Miranda* warning, the exclusion of statements under the *Miranda* doctrine rule will be required in fewer and fewer cases.

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[269] *See supra* notes 86-94 and accompanying text.

[270] Miranda v. Arizona, 384 U.S. 436, 464–65 (1966). *See also* Chavez v. Martinez, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part) (*Miranda* was intended to "reduce the risk of a coerced confession").

[271] 530 U.S. 428, 435 (2000).

[272] Berghuis v. Thompkins, 130 S. Ct. 2250, 2263 (2010).

[273] Maryland v. Shatzer, 130 S. Ct 1213, 1230 (2010); Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (2009).

This focus on the criminal background of defendants is significant because a court is less likely to find that a suspect with extensive experience with the police and *Miranda* warnings has made an involuntary statement after receiving warnings.[274] The practical implications of this shift include a willingness to allow greater leeway to police and greater use of aggressive police tactics when dealing with suspects with criminal experience. In addition, as demonstrated by *Thompkins*, the Court seems more likely to infer a waiver of *Miranda* rights from the silence of suspects with criminal experience. If the rule that a waiver cannot be inferred from silence is maintained, the police will be required to make a lesser showing in order to prove that the almost-silent suspect had made a knowing and intelligent waiver.

Second, while it seems unlikely that *Miranda* will be directly overruled, recent decisions and an increased focus on the criminal background of suspects, suggest that the *Miranda* rules will be subtly abandoned in favor of a more subjective test focusing on whether a statement is the result of coercion. Indeed, some observers have suggested that *Miranda* has already been indirectly overruled. For example, Professor Friedman's article suggests that *Miranda* has been the subject of "stealth" over-ruling.[275] Professor Friedman went further, in an article on *Slate.com*, suggesting that the Court is intentionally choosing cases with suspects possessing unsympathetic facts or histories:

> Whittle and chip away at the rule any way he can, all the while denying that the rule itself is in jeopardy. But to do their whittling without getting caught, the Roberts Court has been brilliant at stacking the deck—choosing to hear only *Miranda* cases in which what the police did is so sympathetic, or what the suspect did so awful, it's impossible to side with the suspect. Then, while you're rooting against the suspect, they're getting rid of the rule that you thought you liked.[276]

While, of course, it is impossible to know the motives of the Justices, Friedman may be overstating the Court's intention. The question of whether *Miranda* rights have been knowingly and voluntarily waived has

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[274] *See* Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) (noting that cases "in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare").

[275] Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)* (Jul. 1, 2010) (unpublished manuscript), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1206&context=nyu_plltwp.

[276] Barry Friedman and Dahlia Lithwick, *Watch as We Make This Law Disappear. How the Roberts Court Disguises its Conservatism*, SLATE (Oct. 4, 2010, 6:41 AM), http://www.slate.com/id/2269715/.

always been determined on the particular facts and circumstances surrounding the case before the Court, including the background, experience, and conduct of the suspect.[277] This approach may be the best reading of *Montejo*, *Powell, Shatzer*, and *Thompkins*. In all four cases, suspects with experience dealing with law enforcement were voluntarily, knowingly, and intelligently willing to engage in conversations with the police.[278]

VI. CONCLUSION

The four *Miranda* cases decided by the Supreme Court between May 2009 and the end of the October 2009 term, *Montejo*, *Powell*, *Shatzer*, and *Thompkins* all featured suspects who could fairly be described as frequent fliers. In these four cases, the Court has begun to lose sight of *Miranda's* original purpose—limiting the coercive atmosphere of custodial interrogations. Instead, the Court has begun a subtle shift towards focusing more responsibility of the subjective knowledge of suspects rather than the objective actions and tactics of the police.

In particular, the Court has started to implicitly consider the criminal background of suspects among the factors to be considered in determining whether a *Miranda* waiver and subsequent statement is knowing, intelligent, and voluntary. By implicitly—and, someday, probably, explicitly—taking the criminal experience of the suspect into account along with the totality of the circumstances surrounding the interrogation, the Court may be engaging in a more realistic review into whether a waiver and statement were uncoerced.

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[277] North Carolina v. Butler, 441 U.S. 369, 374–75 (1979) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[278] Viewed in hindsight, these may not have been the wisest decisions. Yet all four suspects believed that they could gain some benefit from talking with the police.