STATEMENT HANDBOOK:

Questions To Ask About The Admissibility Of A Criminal Defendant's Statements

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Introduction

Imagine that you have just been appointed to represent a client charged with murder. You immediately make an appointment to meet with him at the county jail. When you arrive for your appointment, however, you discover that two detectives have just obtained a waiver of *Miranda* rights, placed your client in a squad car, and are currently out driving him around while they look for the murder weapon. When your client returns, you learn that during the car ride, the detectives gave your client a pen and some paper and asked him to write a letter apologizing to the victim's wife for killing her husband. Your client has written an incriminating two-page letter before you even had a chance to confer with him and advise him of his rights. This past term, the United States Supreme Court held that, under these facts, admission of the incriminating letter was not a violation of the Sixth Amendment right to counsel. *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009). In doing so, the Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), which previously barred police from initiating interrogation after the right to counsel had attached, and was considered a core Sixth Amendment protection for criminal defendants.

After *Montejo*, what do you tell your next client with regard to his Sixth Amendment rights – assuming you make it to the station house before the police take him out for a drive? And what about your client's Fifth and Fourteenth Amendment rights? Did what occurred here implicate those rights as well? The answer to this question is "yes." The admissibility of a criminal defendant's statement implicates several different constitutional safeguards, including the Fifth Amendment right against compelled self-incrimination, the Sixth Amendment right to counsel, and the Fourteenth Amendment's Due Process Clause. Each constitutional protection must be carefully considered and analyzed.

The law in some of these areas is well settled. As evidenced by *Montejo* and a handful of upcoming U.S. Supreme Court cases for next term, however, some of this once settled terrain is in flux. But all of it can be understood with a few simple steps. This handbook provides a rubric for understanding and analyzing the various constitutional provisions under which a client's statements may be inadmissible. For each constitutional safeguard, we give you a series of questions to ask yourself and provide a discussion of the most relevant state and federal law. We also provide previews of upcoming cases that may affect your analysis in one or more of these areas. Finally, in the back of this handbook you will find a series of tables summarizing the material for quick review. The tables can be removed for use as a pocket guide at trial.

Was the statement obtained in violation of the Fifth Amendment?

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V; S.C. Const. Art. I, section 12. This provision governs state as well as federal criminal proceedings. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *Brown v. State*, 340 S.C. 590, 594, n.1, 533 S.E.2d 308, 310, n.1 (2000). The Fifth Amendment itself does not prohibit all incriminating admissions; "[a]bsent some officially coerced self-accusation, the Fifth Amendment privilege is not violated even by the most damning admissions." *United States v. Washington*, 431 U.S. 181, 187, (1977). In *Miranda v. Arizona*, 384 U.S. 436(1966), however, the United States Supreme Court presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights. The *Miranda* warnings, therefore, are "not themselves rights protected by the Constitution, but [are] instead measures to insure[1] that the right against compulsory self-incrimination [is] protected." *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

In the years since its decision in *Miranda*, the Court has frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of his *Miranda* rights, his responses cannot be introduced into evidence to establish his guilt. *See, e.g., Estelle v. Smith*, 451 U.S. 454, 466-467 (1981); *Rhode Island v. Innis*, 446 U.S. 291, 297-298 (1980); *Orozco v. Texas*, 394 U.S. 324, 326-327 (1969); *Mathis v. United States*, 391 U.S. 1, 3-5 (1968). Of course, as with most legal principles, *Miranda's* basic tenet has a number of caveats and nuances, but they are not insurmountable. The Fifth Amendment analysis can be undertaken with a series of simple questions.

[1] It is perhaps more accurate to say that the *Miranda* warnings were originally *designed* to insure that the Fifth Amendment right against compulsory self-incrimination is protected. Whether the warnings actually accomplish this task is a separate question, and many scholars agree that they do not. *See, e.g.*, Welsh S. White, Miranda's Waning Protections: Police Interrogation Practices after Dickerson 139-86 (2001); George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091 (2003); Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001); William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975 (2001); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 740, 745-46 (1992).

1. Was the suspect in custody?

Miranda and its progeny bar the admission of certain statements given by a suspect during "custodial interrogation" without a prior warning. Thus, the first question to consider is whether or not the suspect was in custody. Although all of the circumstances surrounding the interrogation must be considered, the ultimate inquiry is simply ***whether there has been a formal arrest or whether the suspect's freedom of movement has been restricted in any significant way***. *California v. Beheler*, 463 U.S. 1121 (1983); *Beckwith v. United States*, 425 U.S. 341 (1976); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *State v. Peele*, 298 S.C. 63, 378 S.E.2d 254 (1989); *State v. Ridgely*, 251 S.C. 556, 164 S.E.2d 439 (1968); *see also, Lemon v. South Carolina*, 2009 WL 764418, *12 (D.S.C. 2009) ("In determining whether a person is 'in custody,' the question is whether, examining the totality of the circumstances, a reasonable person in the defendant's position would have felt 'at liberty to terminate the interrogation and leave'") (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

Courts have consistently stated that ***the "in custody" determination is governed by an objective test.*** In *Stansbury v. California*, 511 U.S. 318 (1994), the United States Supreme Court held that courts must examine "all of the circumstances surrounding the interrogation" and determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Id.* at 322. Similarly, in *Thompson v. Keohane*, 516 U.S. 99 (1995), the Court offered the following description of the *Miranda* custody test:

> Two discrete inquires are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry; was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Id. at 112 (internal quotation marks and footnote omitted); *see also, State v. Easler*, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997) (holding that the custody determination "depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person

being questioned"); *Bradley v. State*, 316 S.C. 255, 257, 449 S.E.2d 492, 493-494 (1994) (holding that the custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody).

But certain personal characteristics may matter. The United States Supreme Court has never clearly indicated whether or not some specific characteristics of the suspect – such as age or mental impairments – should be considered in the analysis. In *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the Court held that the state court's failure to consider Alvardo's age and prior experience with law enforcement was not an unreasonable application of clearly established federal law under the Antiterrorism and Effective Death Penalty Act of 1996 because "our Court has not stated that a suspect's age or experience is relevant to the *Miranda* custody analysis, and counsel for Alvarado did not press the importance of either factor on direct appeal or in habeas proceedings." *Id.* at 666. But, the Court has never squarely addressed the merits of this question. If such an issue were to come before the Court in the future, a majority of the *Alvardo* Court, at least, agreed that certain personal characteristics *would* be relevant to the custody determination in some contexts. *Id.* at 669 ("There may be cases in which a suspect's age will be relevant to the 'custody' inquiry under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)") (O'Connor, J., concurring); *Id.* at 673-674 ("[T]he 'reasonable person' standard does not require a court to pretend that Alvarado . . . was the statistically determined 'average person' – a working, married, 35-year-old white female with a high school degree. . . . [T]he precise legal definition of 'reasonable person' may, depending on the legal context, appropriately account for certain personal characteristics") (Bryer, J., joined by Stevens, J., Souter, J., and Ginsburg, J., dissenting).

Thus, in determining custody, ***consider the following factors***:

- The location of the questioning.
- The duration of the questioning.
- The purpose of the questioning.
- The circumstances of the questioning.
- How the suspect got to the police station (i.e., did he come voluntarily or was he escorted by the police; how many police officers were present; whether any weapons were drawn).
- Was the suspect's access to an exit blocked or was the suspect otherwise not free to leave?
- The suspect's age, experience and mental status.

See, e.g., Berkemer v. McCarty, 468 U.S. 420 (1984); *State v. Evans*, 354 S.C. 579, 584, 582 S.E.2d 407, 410 (2003).

A Note on Traffic Stops:

Note that custody for Fourth Amendment purposes is not the same as custody for Fifth Amendment purposes. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the United States Supreme Court held that questioning during a roadside traffic stop is not custodial interrogation. The Court reasoned that even though such stops are "unquestionably a seizure within the meaning of the Fourth Amendment, such stops typically are brief, unlike a prolonged station house interrogation." *Id.* at 438-439. The Court also emphasized that traffic stops commonly occur in the public view, not in a police-dominated atmosphere. *Id.* In the context of roadside questioning, therefore, ***the suspect's "freedom of action [must be] curtailed to a degree associated with formal arrest"*** in order to trigger the requirement of *Miranda* warnings. *Id.* at 440 (internal quotations omitted); *see also, State v. Morgan*, 282 S.C. 409, 319 S.E.2d 335 (1984) (*Miranda* warnings are not required for statements made at the scene of a traffic accident to be admissible); *State v. Peele*, 298 S.C. 63, 378 S.E.2d 254 (1989) (the performance of field sobriety tests at the request of a police officer following a routine traffic stop does not trigger Fifth Amendment rights); *but cf. State v. Easler*, 327 S.C. 121, 127, 489 S.E.2d 617, 620 (1997) (holding that the case did not involve a routine traffic stop where officers were advised that there had been an accident and went looking for an individual who had left the scene based on a description given by two eyewitnesses).

Application

In *State v. Evans*, 354 S.C. 579, 584, 582 S.E.2d 407, 410 (2003), the South Carolina Supreme Court reversed the lower court's determination that Evans was not in custody when she confessed to setting her trailer-home on fire and killing her three small children. 354 S.C. at 584, 582 S.E.2d at 410.

After the fire, an arson investigator from the South Carolina Law Enforcement Division (SLED) sought to contact Evans at her cousin's home where she had been staying. *Id.* at 581, 582 S.E.2d at 408. Evans's cousin drove her to the police station later that day where two male SLED agents questioned her in a small, back office for approximately two hours. *Id.* Family members who had accompanied Evans to the station asked to come with her into the interrogation room, but the SLED agents refused. *Id.* During the interview, Evans gave several reasons for how the fire may have started, but the officers insisted that they did not believe any of her explanations. *Id.* Evans was upset and sobbing and repeatedly asked the SLED agents to help her. *Id.*

Eventually, the agents suggested that a third, female SLED agent speak with

Evans. Jennifer Edwards, of the child fatality unit, spoke with Evans alone for approximately forty-five minutes to an hour. *Id.* at 582, 582 S.E.2d at 410. Twice Edwards accompanied Evans to the bathroom and stood outside the door because, according to Edwards, she was afraid that Evans would try to harm herself. Evans continued to plead for help. Edwards responded: "I don't know what kind of help you need until you tell me." Evans then whispered, "I dropped a lit piece of paper on the floor. . . . I walked next door and waited until somebody saw the fire." *Id.* Edwards then summoned the two male SLED agents, and the three of them obtained a more detailed confession from Evans.

The South Carolina Supreme Court held that there was ample evidence to support the trial judge's determination that Evans was in police custody at the time of her statement. *Evans*, 354 S.C. at 584, 582 S.E.2d at 410. First, the trial judge found that Evans was not free to leave because agent Edwards accompanied her to the bathroom and because the agents would not permit her family members to go back to the interview room. *Id.* Second, the place where the agents interviewed Evans concerned the trial judge in that it was a back office in the police station. *Id.* Third, the judge noted that the interview was lengthy, as it lasted three hours. *Id.* Finally, the judge was most concerned with the agent's purpose, saying that once the officers began challenging Evans's story, the circumstances changed from "just a routine inquiry" to something more. *Id.* The Court held that these facts, viewed together, were sufficient to place Evans in a custodial setting which warranted a recitation of her *Miranda* rights. *Id.*

Similarly, in *State v. Navy*, 370 S.C. 398, 635 S.E.2d 549 (S.C. App. 2006), the South Carolina Court of Appeals held that the trial court erred in finding Navy was not in custody at the time of his oral inculpatory statement. *Id.* at 408, 635 S.E.2d at 554. The court found that the totality of circumstances present in *Navy* was substantially similar to *Evans*. *Id.* In particular, the court noted that although Navy willingly accompanied police officers to the Sheriff's Department for questioning, he was transported there in the backseat of a patrol car, rendering him unable to return home on his own. Moreover, the officers told Navy that questioning could not wait until after the victim's funeral, which one could reasonably interpret as a mandate to accompany the officers. Further, Navy was repeatedly questioned for approximately 2 1/2 hours, and he was accompanied by an officer for smoke breaks. Finally, the court noted that the officers were familiar with the victim's autopsy report, which suggested traumatic injury, before they began questioning Navy, indicating that the purpose of their questioning was to obtain an inculpatory statement. *Id.* at 408-409, 635 S.E.2d at 554.

2. Was the suspect interrogated?

Miranda warnings are required if a suspect is both in custody and being interrogated. Thus, the second question to consider is whether or not the suspect was interrogated. This is not always as straightforward as it seems. In most cases it will be obvious; the police ask the suspect questions. But some cases present difficult questions. ***The Supreme Court has held that interrogation occurs when the police engage either in express questioning or its functional equivalent.*** *Rhode Island v. Innis*, 446 U.S. 291, 299-300 (1980); *State v. Franklin*, 299 S.C. 133, 136, 382 S.E.2d 911, 912-913 (1989). ***Police actions are the functional equivalent of interrogation if the police's comments or actions were reasonably likely to result in an incriminating statement.*** *Innis*, 446 U.S. at 300; *Franklin*, 299 S.C. at 136, 382 S.E.2d at 913. The test is partially objective. ***The police officer's intent is relevant, but not determinative.*** *Innis*, 446 U.S. at 301 n.7 (the intent of police "may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response"). The *Innis* Court gave the following examples of what would constitute interrogation:

- The use of line-ups in which a coached witness picks the defendant as the perpetrator.
- The use of a "reverse line-up" in which a defendant is identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he is suspected.
- The use of psychological ploys and other techniques of persuasion, such as to posit the guilt of the subject, to minimize the moral seriousness of the offense, and to cast blame on the victim or on society.

Id. at 299.

Application

In *State v. Caulder*, 287 S.C. 507, 339 S.E.2d 876 (S.C. App. 1986), the South Carolina Court of Appeals held that Caulder had been interrogated by a medical doctor who examined scratches on his chest. 287 S.C. at 514, 339 S.E.2d at 880. Caulder was arrested for the murder and criminal sexual assault of Jean Iriel, who was found dead in the trunk of her abandoned car. Two days after Iriel's body was discovered, a prospective tenant of a trailer owned by Caulder's step-father called the police after he discovered blood, pieces of flesh, and ladies clothing and accessories in the living room of the trailer. Caulder was arrested shortly thereafter. During the booking process, law enforcement officers noticed scratches on Caulder's chest. Pursuant to a search warrant issued by the court, a medical doctor examined the scratches and estimated them to be between one and five days old.

During the course of the examination, and without first giving *Miranda* warnings, the doctor asked Caulder how he had received a particular scratch. *Id.* Over Caulder's objection, the doctor was later permitted to testify that Caulder stated he had received several of the wounds at work, but that he did not know how he got the particular scratch on his chest to which the doctor referred. The court held that "the solicitor and police should have known that . . . the [doctor's] questions were reasonably likely to produce incriminating responses." 287 S.C. at 516, 339 S.E.2d at 881. Further, that the questions came from a medical doctor, rather than a police officer, did not immunize the questions from *Miranda* scrutiny. *Id.* (citing *Estelle v. Smith*, 451 U.S. 454 (1981); *State v. Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982)). Finally, the court rejected the State's argument that Caulder's response was not incriminating, noting that the definition of "incriminating" refers to "any response – whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial." *Id.* (citing *Rhode Island v. Innis*, 446 U.S. at 302, n.4 ("The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination")).

A Note on Snitches:

Note that if a suspect does not realize that she is speaking with a police officer or government agent (e.g., a "snitch" in the jail cell), then it is unlikely there is custodial interrogation for Fifth Amendment purposes. In *Illinois v. Perkins*, 496 U.S. 292, 296 (1990), the Court held that the essential ingredients of a police-dominated, coercive atmosphere are not present when an incarcerated person speaks freely to an undercover officer whom he believes to be a fellow inmate. Relying on *Perkins*, the South Carolina Court of Appeals recently held that an inmate was not entitled to be advised of his *Miranda* rights when he spoke to a television reporter about a prison riot because even if the reporter had been a government agent, the inmate would not have known this. *State v. Lynch*, 375 S.C. 628, 636, 654 S.E.2d 292, 296 (S.C. App. 2007); *see also, State v. Turner*, 371 S.C. 595, 597, 641 S.E.2d 436, 437 (2007) (holding *Miranda* was not implicated by a tape recording made while the defendant and his co-defendant were in the backseat of a police car following their arrests because there was no actual interrogation or its functional equivalent); *State v. Sprouse*, 325 S.C. 275, 283, 478 S.E.2d 871, 875-876 (1996) (holding defendant was not entitled to *Miranda* warnings during his interview with a Department of Social Services (DSS) worker who was investigating allegations of sexual abuse where the DSS worker was not a law enforcement officer, did not wear a uniform or carry a gun, and did not tell defendant that he was under arrest).

3. If the suspect was in custody and interrogated, was the suspect given the *Miranda* warnings?

If the tests for both custody and interrogation are met, the next consideration is whether the *Miranda* warnings were given. If the warnings were not given, consider whether one of two possible exceptions applies.

Does the Public Safety Exception apply?

The Public Safety Exception generally turns on ***whether there is an objectively reasonable need to protect the police or the public from immediate danger.*** In *New York v. Quarles*, 467 U.S. 649 (1984), Quarles was arrested in a supermarket after a young woman identified him as her rapist and told police officers that he had just entered the store and was carrying a gun. *Id.* at 652-653. Officer Frank Kraft placed Quarles under arrest, handcuffed and frisked him and discovered that he was wearing an empty shoulder holster. *Id.* at 653. Without advising Quarles of his *Miranda* rights, Officer Kraft asked him where the gun was. Quarles nodded in the direction of some empty cartons and responded, "the gun is over there." *Id.* The Court found that *Miranda* does not apply in situations in which police officers ask questions "reasonably prompted by a concern for public safety." *Id.* at 656. In this context, ***the motivation of the individual officers involved does not matter.*** "The need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657; *see also, United States v. Washington*, 2007 WL 320957, *3 (D.S.C. 2007) (public safety exception applies when police officers ask suspect whether he has a gun during a lawful arrest); *Green v. Dailey*, 2007 WL 1034999, *4 (D.S.C. 2007) (public safety exception applied where officers arrested plaintiff's boyfriend in a hotel room she shared with him; the officers inquired as to whether there were any weapons in the room, plaintiff's boyfriend responded that he had placed a gun under the mattress, and officers found illegal drugs while conducting a protective sweep).

Does the Booking Exception apply?

The Booking Exception may also eliminate the need for *Miranda* warnings. This will generally turn on whether the questions were "routine," i.e., ***were the questions necessary to secure the biographical data necessary to complete booking or pretrial services.*** *Pennsylvania v. Muniz*, 496 U.S. 582, 602 (1990).

Application

In *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), Muniz was arrested after he performed poorly on three standard field sobriety tests and told the arresting officer that he failed the tests because he had been drinking. *Id.* at 585. The officer transported Muniz to the police station where the booking process was recorded on videotape. Muniz was told that his actions and voice were being recorded, but he was not advised of his *Miranda* rights. An officer then asked Muniz to give his name, address, height, weight, eye color, date of birth and current age. Muniz responded to each of these questions, stumbling over his address and age. The officer then asked, "Do you know what the date was of your sixth birthday?" Muniz initially gave an inaudible reply, and ultimately responded that he did not know the answer. *Id.* at 586. Muniz was then asked to perform each of the three sobriety tests that he had failed during the roadside stop. Two of these tests required Muniz to perform tasks while counting from 1 to 9 and from 1 to 30. Muniz again failed all three tests. He was unable to walk in a straight line, he could not balance himself on one leg for more than a few seconds, and he did not complete the requested verbal counts. Moreover, while performing the tests, Muniz attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform. Finally, the officer asked Muniz to submit to a breathalyzer test. Muniz asked a number of questions about the test and commented on his state of inebriation. Muniz ultimately refused to take the breathalyzer test. At that point, Muniz was for the first time advised of his *Miranda* rights. He signed a statement waiving his rights and then admitted that he had been driving while intoxicated. *Id.*

The Supreme Court held that Muniz's answers to questions about his name, address, height, weight, eye color, date of birth, and current age were all admissible despite the lack of *Miranda* warnings because the questions were designed to secure "biographical data" necessary for routine police administrative purposes and did not force the Muniz "'to express the contents of his mind.'" *Id.* at 597 (quoting *Doe v. United States*, 487 U.S. 201, 210, n.9 (1988)). When Muniz was asked to provide the date of his sixth birthday, however, the Court held that this question was reasonably likely to elicit an incriminating response and therefore should have been suppressed. *Id.* at 605. On the other hand, most of Muniz's utterances in response to the officer's sobriety test instructions did not qualify as responses to custodial interrogation. *Id.* at 604, n.17. Aside from the officer's requests that Muniz count from 1 to 9 and from 1 to 30, the test instructions were "not likely to be perceived as calling for any verbal response and

therefore were not 'words or actions' constituting custodial interrogation." *Id.* at 603. Instead, the officer's instructions were necessarily attendant to legitimate police procedure, and Muniz's utterances in response to these instructions were admissible. *Id.* at 605; *compare State v. Clute*, 324 S.C. 584, 592, 480 S.E.2d 85, 89 (S.C. App. 1996) (where State conceded that the audio portion of the video-taped field sobriety tests wherein Clute recites the alphabet was improperly admitted over Clute's objection) (overruled on other grounds by *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000)).

A Note on Mid-Interrogation Warnings:

Generally, "an initial failure to administer *Miranda* warnings before a statement is given does not taint a subsequent statement made after a suspect has been fully advised of and has waived his *Miranda* rights." *State v. Campbell*, 287 S.C. 377, 379, 339 S.E.2d 109, 110 (1985). In *Oregon v. Elstad*, 470 U.S. 298, 309 (1985), the United States Supreme Court explained:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

There is a difference, however, between a mere oversight and a purposeful effort designed to undermine the *Miranda* warnings. In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Supreme Court held that the police tactic of "question-first," where officers intentionally question a suspect until inculpatory information is given and then provide *Miranda* warnings prior to having the suspect repeat the inculpatory information, is unconstitutional. *Id.* at 613. The plurality in *Seibert* noted:

> When *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. By the same token, it would ordinarily be

> unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Id. at 613-614. The *Seibert* Court set forth a list of factors for courts to consider in determining whether mid-interrogation *Miranda* warnings are effective:

- The completeness and detail of the questions and answers in the first round of interrogation.
- The overlapping content of the two statements.
- The timing and setting of the first and the second rounds of interrogation.
- The continuity of police personnel.
- The degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615-616; *see also, State v. Navy*, 370 S.C. 398, 411, 635 S.E.2d 549, 556 (S.C. App. 2006) (applying the *Seibert* factors and holding that "the questioning of Navy was an integrated, coordinated and continuing interrogation such that giving warnings mid-interrogation was ineffective and rendered the second and third written statements inadmissible").

4. If *Miranda* warnings were given, were the warnings adequate?

In the absence of circumstances sufficient to support either the Public Safety Exception or the Booking Exception, a suspect in custody may not be subjected to interrogation unless she is informed that: (1) she has the right to remain silent; (2) anything she says can be used against her in a court of law; (3) she has a right to the presence of an attorney; (4) if she cannot afford an attorney, one will be appointed for her prior to any questioning, if she so desires; and, (5) she has the right to terminate the interrogation at any time and not to answer any further questions. *See, e.g.*, *State v. Kennedy*, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (S.C. App. 1996) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

In *State v. Tyson*, 283 S.C. 375, 323 S.E.2d 770 (1984), Tyson was initially arrested and advised of his full *Miranda* rights by Officer Hobson. *Id.* at 378, 323 S.E.2d at 770. Several hours later, Tyson was again advised of his rights by Detective Friarson. However, the detective failed to tell Tyson that he had the right to court-appointed counsel. *Id.* Instead, Friarson advised Tyson that he could talk to an attorney "if

he wished." *Id.* The South Carolina Supreme Court ruled that Friarson's warnings constituted the "effective equivalent" of the *Miranda* warnings. *Id.*

No "talismanic incantation" of the warnings is required as long as the officer's explanation was the "fully effective equivalent" of the Miranda warnings. *California v. Prysock*, 453 U.S. 355, 359-360 (1981); *State v. Singleton*, 284 S.C. 388, 391, 326 S.E.2d 153, 155, *cert. denied*, 471 U.S. 1111 (1985), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). ***Strict compliance with Miranda is not required if the warnings "touched the bases," and reasonably conveyed a suspect's rights.*** *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *State v. Easler*, 322 S.C. 333, 338, 471 S.E.2d 745, 749 (S.C. App. 1996). In *State v. Ridgely*, 251 S.C. 556, 567, 164 S.E.2d 439, 444 (1968), the South Carolina Supreme Court stated that an officer's warning that the court would appoint a lawyer for the defendant "should he be charged with anything" did not comply with the requirements of *Miranda*.

United States Supreme Court Preview:

Next term, the United States Supreme Court will consider whether a suspect must be expressly advised of his right to counsel during questioning. In *Florida v. Powell*, 129 S.Ct. 2927 (2009) (granting petition for a writ of certiorari), the Florida Supreme Court ruled that the warnings given to Powell after his arrest were deficient under the Fifth Amendment because the standard police department form used by detectives advised Powell only that he could "talk to a lawyer before answering any of our questions." *Florida v. Powell*, 998 So.2d 531, 540 (Fla. 2008). This instruction, the court found, did not clearly inform Powell of his right to have counsel present during questioning. *Id.* Powell was merely instructed that he had a right to talk with a lawyer *before* questioning and that he could use that right at any time; this was "not the functional equivalent of having the lawyer present with you *during* questioning." *Id.* (emphasis added). Relying on *Miranda*, the court held that "the right to have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment privilege," and that "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning." *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 469-470 (1966)). The State's petition to the United States Supreme Court for a writ of certiorari notes a recurring conflict among state and federal courts regarding the scope of *Miranda*'s dictates on this issue and argues that those on the "explicit instruction required" side of the split are "demanding more from law enforcement than this Court ever envisioned or deemed necessary in *Miranda*."

Petition for Writ of Certiorari, 2009 WL 759408, *20 (2009). The State advocates for a "reasonable clarity" test and argues that the warnings given to Powell meet that proposed test. *Id.* at *21. No date for oral argument has been set at this time.

5. If the warnings were adequate, did the suspect invoke his rights or waive his rights?

If the suspect was properly advised of his *Miranda* rights, the next consideration is whether the suspect invoked his rights or waived his rights.

6. If the suspect waived his rights, was the waiver "knowing and intelligent?"

A valid waiver of rights must be made knowingly and intelligently,[2] meaning that ***"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."*** *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

There is a presumption against waiver. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) ("The courts must presume that a defendant did not waive his rights; the prosecution's burden is great"). A waiver may not be presumed from the silence of the accused after the warnings and a subsequent statement. *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)); *State v. McCray*, 332 S.C. 536, 546, 506 S.E.2d 301, 306 (1998) ("A valid waiver of the right to counsel will not be presumed simply from the silence of the accused after *Miranda* warnings are given. The record must show that the accused was offered counsel but intelligently and knowingly rejected the offer").

A valid waiver does not, however, necessarily have to be express. *Butler*, 441 U.S. at 373. ("An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but it is not inevitably either necessary or sufficient to establish waiver"); *State v. Kennedy*, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998) ("[a]n express waiver is unnecessary"). At least in some cases, waiver may be inferred from the actions and words of the person interrogated. *Butler*, 441 U.S. at 373; *compare State v. Doby*, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979) (holding that a signed waiver of rights form is not conclusive as the State still must prove a

[2] A waiver must also be made voluntarily. See the section on Due Process at pages 28-29 for a more detailed discussion of voluntariness.

knowing and voluntary waiver); *and State v. Simmons*, – S.E.2d –, 2009 WL 1752742, *6 (S.C. App. 2009) (holding waiver was valid where officers testified that Simmons verbally agreed to waive his rights and stated that he was familiar with how the system worked, but he was not asked to sign a waiver of rights form).

Whether a waiver has occurred is determined by a totality of the circumstances test. *Butler*, 441 U.S. at 374-375 ("the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused'") (citation omitted).

A suspect does not have to be aware of the scope of the interrogation for the waiver to be valid. *Colorado v. Spring*, 479 U.S. 564, 577 (1987) ("a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege"); *see also*, *State v. Crawley*, 349 S.C. 459, 463-464, 562 S.E.2d 683, 685 (S.C. App. 2002) (officer's admission that she did not tell defendant the subject of the investigation before she signed the *Miranda* waiver did not affect the voluntariness of the confession). In *Spring*, the United States Supreme Court held that the failure of law enforcement to inform the suspect of the subject matter of the interrogation did not render the waiver invalid. 479 U.S. at 577. But the Court specifically noted that it was "not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation." *Id.* at 576, n.8. The Court pointed out that the lower courts had made no finding of official trickery. As such, the Court did not reach the question of whether a waiver of *Miranda* rights would be valid in such a circumstance. *Id.*

Similarly, the suspect does not have to be informed that an attorney is trying to reach him in order for the waiver to be valid. *Moran v. Burbine*, 475 U.S. 412, 422 (1986) ("Events occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right"); *State v. Drayton*, 293 S.C. 417, 426-427, 361 S.E.2d 329, 334-335 (1987) (holding that the police's failure to inform the defendant of the Public Defender's office's request to speak with him did not render the waiver invalid). In *Moran*, the Supreme Court suggested that even deliberate deception of an attorney, "[a]lthough highly inappropriate," would not "affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident." 475 U.S. at 423.

Finally, ***the suspect does have the right to qualify his waiver.*** *See Connecticut v. Barrett*, 479 U.S. 523, 529 (1987). For example, the suspect can refuse to give a written statement, but agree to waive his rights with respect to an oral statement. *Id.*

7. If the suspect invoked his rights, which right(s) did the suspect invoke?

If the suspect invoked his right to silence, was the invocation "Scrupulously honored?"

A suspect may invoke the right to silence by clearly articulating his desire to end the interrogation. *Davis v. United States*, 512 U.S. 452, 459 (1994); *State v. Reed*, 332 S.C. 35, 42, 503 S.E.2d 747, 750 (1998). The South Carolina Supreme Court has held that a suspect's statement, "that's all I've got to say," after giving a tape-recorded account of his involvement in the crime was not a clear invocation of the right to silence. *State v. Aleksey*, 343 S.C. 20, 31, 538 S.E.2d 248, 253-254 (2000). The Court held that this statement was ambiguous in the context in which it was given, "indicating either a desire to discontinue questioning or simply the end of his story." *Id.*

If the suspect clearly invokes the right to silence, however, law enforcement must ***"scrupulously honor"*** that invocation. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). At a minimum, this means that the police must immediately cease questioning for a significant period of time and administer a new set of warnings prior to reinitiating interrogation. *Id.* at 105-106. The South Carolina Supreme Court found that a suspect's invocation of the right to silence was scrupulously honored where he told the arresting officer that he did not want to speak with him, but agreed an hour later to speak with a SLED agent at the sheriff's office. *State v. Benjamin*, 345 S.C. 470, 475-476, 549 S.E.2d 258, 261 (2001). Other factors may include whether the interrogation involved the same or different charges and the location of the second interrogation. *Id.*

If the suspect invoked the right to counsel, was the invocation ambiguous?

As with the right to silence, a suspect seeking to invoke the right to counsel must do so unambiguously. ***An unambiguous request for counsel occurs when the suspect articulates her desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.*** *Davis v. United States*, 512 U.S. 452, 459 (1994). This is an objective test. *Id.*

South Carolina courts have held that neither a suspect's request "to speak to either a lawyer or her mother," *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001), nor a suspect's inquiry: "[w]hat if I ask for an attorney?" *State v.*

Kennedy, 325 S.C. 295, 309, 479 S.E.2d 838, 845 (S.C. App. 1996), qualifies as an unambiguous request for counsel. *See also*, *State v. McCray*, 332 S.C. 536, 547, 506 S.E.2d 301, 306 (1998) (holding that the mere appointment of the public defender did not constitute evidence of an intent by appellant to invoke the right to counsel for Fifth Amendment purposes); *State v. Goodwin*, – S.E.2d –, 2009 WL 1851309, *4-*5 (S.C. App. 2009) (defendant's statements – "can I have some time to think on this here? I can think on this?" – were not an invocation of right to counsel).

On the other hand, the South Carolina Supreme Court has held that the statement, "[w]ell, I think I need a lawyer," is an "obvious" invocation of the right to counsel. *State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998). The *Kennedy* court compared this statement to the one rejected as ambiguous in *Davis*, 512 U.S. at 459 – "[m]aybe I should talk to a lawyer" – and held that unlike *Davis*, Kennedy's statement was not an uncertain request. *Kennedy*, 333 S.C. at 430, 510 S.E.2d at 715. Moreover, notes taken by one of the interrogating officers supported this interpretation because they indicated that he, a reasonable officer, believed Kennedy's statement to be a request for a lawyer. *Id*; *see also, State v. Cox*, 287 S.C. 260, 263, 335 S.E.2d 809, 810 (S.C. App. 1985) (defendant effectively asserted his right to counsel by saying, "I'll tell you about it when I talk to my lawyer"), overruled on other grounds by *State v. Cox*, 290 S.C. 489, 351 S.E.2d 570 (1986).

A Note on The Scope of The Fifth Amendment Right to Counsel:

Note that a Fifth Amendment invocation of the right to counsel is not offense specific. In other words, it not only applies to the current charges, but it also applies to any additional or other charges about which the police may wish to ask the suspect. *Arizona v. Roberson*, 486 U.S. 675, 684 (1988) ("there is no reason to assume that a suspect's state of mind is in any way investigation-specific"); *State v. McCray*, 332 S.C. 536, 546-547, 506 S.E.2d 301, 306 (1998) ("once an accused invokes the right to counsel for interrogation regarding one offense, he may not be approached regarding any offense unless counsel is present").

If the invocation was unambiguous, did the police cease questioning immediately?

If the suspect unambiguously invokes his right to counsel, ***the police must cease questioning immediately***. *Edwards v. Arizona*, 451 U.S. 477 (1981). Note that even if interrogation ceases immediately, and the suspect is permitted to speak with an attorney, the police still may not question the suspect without the presence of counsel unless the suspect initiates interrogation. *Minnick v. Mississippi*, 498 U.S.

146, 153 (1990) ("consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody that may increase as custody is prolonged"); *State v. Henderson*, 286 S.C. 465, 468, 334 S.E.2d 519, 521 (S.C. App. 1985) ("once the right to counsel is asserted, questioning of a suspect must cease until counsel is either obtained for the suspect or retained by him. Only in instances in which the suspect initiates subsequent conversations or communication with the investigating authority is a waiver of the right to counsel possible") (citing, *inter alia*, *Oregon v. Bradshaw*, 462 U.S. 1039 (1983)).

United States Supreme Court Preview

The Supreme Court will decide *Maryland v. Shatzer* this term. The case raises the issue of whether *Edwards v. Arizona*, 451 U.S. 477 (1981), applies to an interrogation that takes place nearly three years after the initial invocation of the right to counsel.

In July 2003, Detective Shane Blankenship received a report from a social worker containing allegations that Michael Shatzer had asked his son to perform oral sex on him. *Brief for Respondent*, 2009 WL 1538536 at *1. Detective Blankenship met with Shatzer at the Maryland Correctional Institution where Shatzer was incarcerated on other charges. After receiving *Miranda* warnings, Shatzer invoked his rights, stating that he refused to give a statement and wanted to speak to an attorney. Detective Blankenship discontinued the interview and wrote a report stating: "When I attempted to again initiate the interview, he told me that he would not talk about this case without having an attorney present." *Id.*

Nearly three years later, on February 28, 2006, Detective Paul Hoover was assigned to conduct a follow-up investigation in the case previously assigned to Detective Blankenship. *Id.* at *2. Detective Blankenship testified that he "may have" told Detective Hoover that Shatzer had asked for a lawyer during the 2003 interview, but he could not "remember that specifically." *Id.* Detective Hoover interviewed Shatzer at the Roxbury Correctional Instituion where he had been transferred and was serving the same sentence that he was serving in 2003. Detective Hoover told Shatzer that he wanted to talk to him again about the same allegations from 2003. Hoover provided *Miranda* warnings, obtained a waiver, and questioned Shatzer for one-half hour after which Shatzer agreed to a polygraph examination. *Id.* at *3. Shatzer was administered the polygraph examination on the following day, after a second set of *Miranda* warnings and accompanying waiver. Following the polygraph examination, Detective Hoover and another officer questioned Shatzer again. During this interrogation,

Shatzer ultimately began to cry and confessed to sexually molesting his son. *Id.*

The trial judge admitted Shatzer's statement over his *Edwards* objection, because "of the significant length of time, the fact that the defendant was continuously incarcerated, the fact that he waived his right to *Miranda* two years and seven months after being originally interviewed, [and] the fact that Detective Hoover did not know that the defendant had asserted his rights to have an attorney back in August of 2003." *Brief of Petitioner*, 2009 WL 977964 at *6. Shatzer sought review from the Court of Special Appeals of Maryland. *Brief of Respondent*, 2009 WL 1538536 at *4. Before Maryland's intermediate court could rule, the Court of Appeals of Maryland issued a writ of certiorari on its own initiative and reversed the trial judge's ruling. The Court noted that the two interrogations were separated only by time, the detectives questioned Shatzer about the same allegations, and there was no intervening event such as a guilty plea or sentencing between the interrogations. *Id.* at *5. The Court held that the passage of time alone was insufficient to void the protections of *Edwards*. *Id.*

The State of Maryland filed a petition for a writ of certiorari, which the United States Supreme Court granted on January 26, 2009. The State argues that "[c]onstruing *Edwards* to encompass cases involving a long break in custody or a substantial lapse of time does not protect against coerced confessions and needlessly impairs police investigations." *Brief of Petitioner*, 2009 WL 977964 at *11. Shatzer argues that "[t]here is no logical point on a time line at which the rule of *Edwards* should diminish or expire." *Brief of Respondent*, 2009 WL 1538536 at *9. The Court will hear oral arguments on Monday, October 5, 2009.

8. Did the suspect subsequently initiate interrogation?

Even if a suspect has invoked her rights, law enforcement may nonetheless speak with her if she reinitiates communication subsequent to the invocation. *See Edwards v. Arizona*, 451 U.S. 477, 485 (1981). Whether a suspect has initiated interrogation turns on ***whether the suspect's comments or questions evidenced a willingness or desire to engage in a generalized discussion about the investigation***. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-1046 (1983) (finding that a suspect's question about what was going to happen to him met this test because "it was not merely a necessary inquiry arising out of the incidents of the custodial relationship").

Application

In *State v. Sims*, 304 S.C. 409, 416, 405 S.E.2d 377, 381 (1991), the South Carolina Supreme Court held that Sims had initiated interrogation after first invoking his right to remain silent and his right to an attorney upon his arrest. On the following day, Sergeant Anderson visited Sims to ask him if he wanted to sign a form waiving extradition. *Id.* Sims stated that he did not and then requested to see the officers who had originally advised him of his rights. After a general discussion with those officers, Sims agreed to waive his rights and gave an incriminating statement. *Id.* The Court held that Sergeant Anderson's question concerning extradition was "related to routine administrative processing and clearly was not an attempt to elicit an incriminating response." *Id.* at 417, 405 S.E.2d at 382. Thus, it was Sims who initiated the interrogation by asking questions and then making statements which "open[ed] up a more generalized discussion relating . . . to the investigation." *Id.* (quoting *Bradshaw*, 462 U.S. at 1045).

More recently, the South Carolina Supreme Court has held that a suspect may initiate interrogation even when the police explicitly invite him to do so, as long as that invitation is not the "functional equivalent" of an interrogation. *State v. Binney*, 362 S.C. 353, 359, 608 S.E.2d 418, 421 (2005). Binney was arrested at his home on murder charges. As he was being arrested, Binney's wife was talking on a cordless phone to Bill Bannister, Binney's attorney in another matter. *Id.* at 355, 608 S.E.2d at 419. While Binney's wife was on the phone, she repeatedly told him not to say anything to the officers. After Binney's arrest, public defender Don Thompson went to the county jail to talk to Binney and also told him not to talk to the police. *Id.* at 356, 608 S.E.2d at 419. Thereafter, SLED agent DeWitt McCraw and the solicitor repeatedly contacted Thompson, asking him for permission to interrogate Binney. *Id.* Thompson refused their requests. Undeterred, McCraw decided to try a different route. He contacted the jailer at the prison where Binney was incarcerated and asked the jailer to tell Binney that if he wanted to talk, he had to make a written request to speak to a detective without the presence of an attorney. *Id.* Hours later, McCraw received a handwritten note from Binney that included the specific request McCraw had suggested. McCraw then brought Binney to the Sheriff's Office, where Binney executed a waiver of rights and gave a five-page statement confessing to the murder. *Id.* at 357, 608 S.E.2d at 420. The Court held that McCraw's actions were not the initiation of interrogation because they were not reasonably likely to elicit an incriminating response. *Id.* at 361, 608 S.E.2d at 422. Instead, McCraw's message "was simply an invitation for Binney to initiate contact," which Binney subsequently did by sending McCraw the handwritten note. *Id.*

9. If the suspect initiated interrogation:

Even where the suspect has initiated interrogation, she is still entitled to adequate *Miranda* warnings, which must be validly waived. Thus, don't forget to re-consider:

Were the new warnings adequate? (see question #4)
Was there a valid waiver? (see question #6)

Was the statement obtained in violation of the Sixth Amendment?

The Sixth Amendment guarantees that in all criminal prosecutions "the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The essence of this right is the opportunity for a defendant to consult with an attorney and to have her investigate the case and prepare a defense for trial. *Powell v. Alabama*, 287 U.S. 45, 58 (1932). "The right is grounded in the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense." *State v. Quattlebaum*, 338 S.C. 441, 446, 527 S.E.2d 105, 107 (2000) (quotation omitted).

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court created a bright-line rule for deciding whether an accused who has "asserted" his Sixth Amendment right to counsel has subsequently waived that right. Transposing the reasoning of *Edwards v. Arizona*, 451 U.S. 477 (1981), which announced an identical "prophylactic rule" in the Fifth Amendment context, the Court held that after a defendant requests assistance of counsel, any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid, and evidence obtained pursuant to such a waiver is inadmissible in the prosecution's case in chief. *Jackson*, 475 U.S. at 636.

The Court recently overruled *Jackson*, however, in a 5 to 4 decision in *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009). *Montejo* originally raised only the narrow issue of whether a criminal defendant "asserts" his Sixth Amendment right to counsel when he simply stands mute while a judge orders the appointment of counsel, as Montejo did, or whether the defendant must do something more to affirmatively request counsel and thereby trigger the protections of the Sixth Amendment. But after oral argument in January 2009, the Supreme Court ordered supplemental briefing as to whether it should entirely overrule its former decision in *Jackson*, and ultimately the Court did just that.

The Court's decision in *Montejo* hinges on the argument that *Jackson* provides

only a "meager benefit" which is not outweighed by its substantial costs. The majority ignored the traditional core of the Sixth Amendment, and claimed instead that the real issue is protection from police badgering, not the defendant's right to the assistance of counsel. *Montejo*, 129 S.Ct. at 2089-90. The Court held that Fifth Amendment precedent, including *Miranda*, *Edwards* and *Minnick*, already provides sufficient protection from coercive police practices. *Id.* at 2090. Although the Court acknowledged that *Jackson's* protection was designed to encompass situations broader than those protected by the Fifth Amendment, it dismissed that issue by simply asserting that the relevant reasoning is the weighing of the rule's benefits against its costs. And since the majority believed that "the marginal benefits of *Jackson* . . . are dwarfed by its substantial costs (*viz.*, hindering society's compelling interest in finding, convicting, and punishing those who violate the law)," the Court struck down its twenty-three year old precedent in *Jackson* as "superfluous." *Id.*

Thus, police are now free to initiate interrogation and attempt to obtain a waiver of rights even after the Sixth Amendment right to counsel has attached through the initiation of formal proceedings. In the aftermath of *Montejo*, the Sixth Amendment protection carries significantly less force. The issue can be analyzed by considering the following three questions.

1. Did the defendant have a Sixth Amendment right to counsel?

The Sixth Amendment right to counsel ***attaches once formal adversary proceedings have commenced*** against an individual. *Brewer v. Williams*, 430 U.S. 387, 398 (1977) ("the right to counsel guaranteed by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him whether by way of formal charge, preliminary hearing, indictment, information, or arraignment") (internal quotation omitted); *see also*, *State v. Register*, 323 S.C. 471, 477, 476 S.E.2d 153, 157 (1996) ("The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages") (citing *Michigan v. Harvey*, 494 U.S. 344 (1990)).

The Sixth Amendment right to counsel is offense specific. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) ("It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced"). In other words, once the Sixth Amendment right to counsel attaches to a formal prosecution, police may not interrogate a defendant about *that particular prosecution* without the presence of counsel, unless the defendant initiates the interrogation or makes a valid waiver.

Note, however, that after *Montejo*, the police may approach a defendant, seek to obtain a waiver even after the Sixth Amendment right has attached, and then interrogate the defendant about the particular offense to which the right has attached. If, at that point, the defendant asserts his right to counsel, then the analysis shifts back to Fifth Amendment considerations. If the defendant makes a clear assertion of his right to counsel, then no interrogation should take place unless the defendant initiates it. Even if the defendant subsequently agrees to waive his rights, that waiver is invalid under *Edwards* if it follows an unequivocal election of the right to counsel. *See Montejo*, 129 S.Ct. at 2091 ("Although our holding means that the Louisiana Supreme Court correctly rejected Montejo's claim under *Jackson*, we think that Montejo should be given an opportunity to contend that [his statement] should still have been suppressed under the rule of *Edwards*").

2. Did the police "deliberately elicit" incriminating statements?

If the Sixth Amendment right to counsel has attached, the next consideration is ***whether the police "deliberately elicited" incriminating statements from the defendant.*** *Massiah v. United States*, 377 U.S. 201, 206 (1964); *Brewer v. Williams*, 430 U.S. 387, 405 (1977) (holding police officer's "Christian burial speech" was tantamount to interrogation because it was a deliberate attempt to elicit incriminating statements). The core concern is not only with direct interrogation, but also with "indirect and surreptitious interrogations" brought about by "investigative techniques that [are] the functional equivalent to interrogation." *Kuhlmann v. Wilson*, 477 U.S. 436, 457 (1986). Deliberately elicited statements, without an express waiver of the right to counsel, are inadmissible. *See Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Brewer,* 430 U.S. 387 (1977); *Massiah*, 377 U.S. 201 (1964). ***The subjective motivation of the police officer or government agent does matter.*** Relevant considerations are:

- What was the purpose of the questions or comments?
- Who set up the encounter?
- Was there an attempt to exploit or otherwise take advantage of the encounter?

See Maine v. Moulton, 474 U.S. 159, 176 (1985) ("the Sixth Amendment is not violated whenever – by luck or happenstance – the State obtains incriminating statements from the accused after the right to counsel has attached. . . .

[However], the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent").

A Note on Snitches:

Note that *Montejo* presumably does not affect the Sixth Amendment analysis in cases where the defendant does not know that he is speaking with a law enforcement officer or government agent. In this context, the Sixth Amendment protections differ from the Fifth Amendment safeguards. ***The Sixth Amendment right to counsel is not limited to the context of custodial interrogation by police officers.*** Unlike the Fifth Amendment right, it applies to statements that were deliberately elicited by other government agents such as "snitches" and "informants." In *United States v. Henry*, 447 U.S. 264 (1980), the Court held that the defendant's Sixth Amendment right to counsel was violated when a government informant "developed a relationship of trust" with the defendant and "deliberately used his position to secure incriminating information from [the defendant] when counsel was not present." *Id.* at 269-270. Although the informant did not directly question the defendant, the informant "stimulated" conversations with the defendant in order to "elicit" incriminating information. *Id.* at 273. The Court held that the situation in *Henry* was "quite a different matter" from the Fifth Amendment context in which an undercover agent may obtain incriminating statements without advising the suspect of his *Miranda* rights. *Id.* at 272 (citing *United States v. White*, 401 U.S. 745 (1971) (holding that the Fifth Amendment is not implicated by the use of undercover Government agents before charges are filed because of the absence of potential for compulsion))[3]. In the Sixth Amendment context, the relevant inquiry is "whether the Government has interfered with the right to counsel of the accused by 'deliberately eliciting' incriminating statements.'" *Henry*, 447 U.S. at 272. The informant's participation in *Henry* was the functional equivalent of interrogation. Thus, the government violated Henry's Sixth Amendment right to counsel by surreptitiously encouraging the informant to deliberately elicit information from Henry after the Sixth Amendment protections had attached. *See also, Maine v. Moulton*, 474 U.S. 159 (1985) (finding Sixth Amendment violation where accomplice, who had agreed to cooperate with police, wore a wire transmitter, discussed with the defendant the charges pending

[3] *See also, Hoffa v. United States*, 385 U.S. 293, 302 (1966) (holding that "no interest legitimately protected by the Fourth Amendment is involved" because "the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it").

against him, repeatedly asked the defendant to remind him of the details of the crime, and encouraged the defendant to describe his plan for killing witnesses).

But, the Sixth Amendment protection does not extend to situations involving "passive" listeners. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). The Sixth Amendment does not forbid admission in evidence of an accused's statements to a jailhouse informant who merely listens and makes no effort to stimulate conversations about the crime charged. *Id.* at 456. Rather, "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Id.* at 459.

3. Did the suspect make a valid waiver?

To demonstrate a valid waiver, the State must prove ***a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel.*** *Patterson v. Illinois*, 487 U.S. 285, 292, and n.4 (1988); *Brewer*, 430 U.S. at 404. When a suspect waives his right to counsel after receiving warnings equivalent to those prescribed by *Miranda v. Arizona*, that will generally suffice to establish a knowing and intelligent waiver of the Sixth Amendment right to counsel for purposes of post-indictment questioning. *Patterson*, 487 U.S. at 292 and n.4; *see also*, *Montejo v. Louisiana*, 129 S.Ct. at 2092 ("In determining whether a Sixth Amendment waiver was knowing and voluntary, there is no reason categorically to distinguish an unrepresented defendant from a represented one. It is equally true for each that, as we held in *Patterson*, the *Miranda* warnings adequately inform him 'of his right to have counsel present during the questioning,' and make him 'aware of the consequences of his decision by him to waive his Sixth Amendment rights.'").

Comparing the Fifth and Sixth Amendment Rules	
The 5th Amendment	**The 6th Amendment**
Edwards v. Arizona **–** If the suspect requests counsel in the context of custodial interrogation, then questioning must cease unless the suspect initiates interrogation.	***Montejo v. Louisiana*** **–** even if the defendant requests counsel at an arraignment or other judicial proceeding, the police may still initiate interrogation and ask the defendant to waive his Sixth Amendment rights.
It is unclear whether the suspect can invoke the 5th Amendment right except in the context of custodial interrogation.	This is an anticipatory invocation, but after *Montejo* the invocation is essentially meaningless.
Minnick v. Mississippi **–** the 5th Amendment invocation is not offense specific, i.e., the police are also prohibited from interrogating the suspect about other offenses.	***McNeil v. Wisconsin*** **–** A 6th Amendment invocation, however, is specific, i.e., the police are not prohibited from questioning the defendant about other offenses than those for which the defendant requested counsel.
The 5th Amendment does not apply to statements made where the defendant was unaware that he is speaking to a government agent.	***The Sixth Amendment*** does apply to statements given to "snitches" and "informants," but not to "passive listeners."

Was the statement obtained in violation of the Due Process Clause?

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV; *see also*, S.C. Const., Article I, Section 3. By virtue of the Due Process Clause, "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." *Miller v. Fenton*, 474 U.S. 104, 109 (1985). Whether or not a statement was voluntary is determined by a totality of the circumstances test. ***The relevant inquiry is whether the particular suspect's will was overborne.*** *Arizona v. Fulminate*, 499 U.S. 279, 287 (1991) (finding that the defendant's confession was coerced by a credible threat of physical violence where the defendant confessed to a government informant who promised to protect him from other inmates in exchange for information about

the crime); *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) (holding the pertinent inquiry is always whether the defendant's will was overborne); *see also, Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (holding that a confession was coerced because the interrogating police officer promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door). All of the relevant facts and circumstances should be considered, including but not limited to:

- 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.
- The use of physical punishment such as the deprivation of food or sleep.

Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); *see also, State v. Pittman*, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007) (citing *Schneckloth*). No single factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. *Schneckloth*, 412 U.S. at 226.

The Due Process Clause voluntariness inquiry is not limited to the context of custodial interrogation, but the statement must be obtained by a police officer or other state agent. In other words, there must be a link between the coercive activity of the state and the confession. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) ("Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law"); *State v. Salisbury*, 330 S.C. 250, 272, 498 S.E.2d 655, 666 (S.C. App. 1998) ("Coercive police activity is a necessary predicate to finding a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment"). In *Connelly*, the Court held that there was no Due Process violation where the defendant, a chronic schizophrenic in a psychotic state, felt compelled by "voices" and "the voice of God" to approach a police officer and confess to murder. *Id.* at 161.

Can the statement be used for impeachment purposes?

Finally, bear in mind that even if a confession is not admissible during the prosecution's case-in-chief, it may still be admissible for impeachment purposes. A statement obtained in violation of *Miranda* may be used for impeachment

purposes. *Harris v. New York*, 401 U.S. 222, 225-226 (1971) ("Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief. . . The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances"); *State v. Brown*, 296 S.C. 191, 193, 371 S.E.2d 523, 525 (1988) ("A statement obtained in violation of a defendant's fifth amendment right to counsel is admissible for impeachment, as is a confession obtained in violation of *Miranda*") (citations omitted).

Moreover, a statement obtain in violation of the Sixth Amendment right to counsel may also be used for impeachment purposes. *Michigan v. Harvey*, 494 U.S. 344, 350-351 (1990) ("We have already decided that although statements taken in violation of only the prophylactic *Miranda* rules may not be used in the prosecution's case in chief, they are admissible to impeach conflicting testimony by the defendant . . . There is no reason for a different result in a [Sixth Amendment] case"); *State v. Anderson*, 357 S.C. 514, 518, 593 S.E.2d 820, 822 (Ct. App. 2004) ("statements obtained in violation of [The Sixth Amendment] may not be admitted as substantive evidence in the prosecution's case in chief").

On the other hand, an involuntary confession is inadmissible for any purpose, including impeachment. *Mincey v. Arizona*, 437 U.S. 385, 401 (1978) (holding statements made by defendant to police officer while defendant was in the hospital in the intensive care unit, while he was in unbearable pain and unable to think clearly, and while he was encumbered by tubes, needles and a breathing apparatus, were not voluntary and could not be used against defendant, either as direct evidence, or to impeach his in-court testimony); *State v. Victor*, 300 S.C. 220, 223, 387 S.E.2d 248, 249 (1989) ("an accused's *involuntary* incriminating statement is *inadmissible for any purpose*, including impeachment) (emphasis in original).

Fifth Amendment

WAS THE SUSPECT IN CUSTODY?

- Formal arrest or freedom of movement restricted in a significant way? *California v. Beheler*, 463 U.S. 1121 (1983); *Beckwith v. United States*, 425 U.S. 341 (1976).
- This is an objective test. *Stansbury v. California*, 511 U.S. 318 (1994); *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997).
- But some individual characteristics of the defendant may matter. *Yarborough v. Alvarado*, 541 U.S. 652 (2004).
- Factors:
  - Location of questioning.
  - Duration of questioning.
  - Purpose of questioning.
  - How suspect got to the police station.
  - Access to exit blocked or otherwise not free to leave.
  - Suspect's age, experience and mental status. *Berkemer v. McCarty*, 468 U.S. 420 (1984); *State v. Evans*, 354 S.C. 579, 582 S.E.2d 407 (2003).
- For traffic stops, freedom must be curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420 (1984).

WAS THE SUSPECT INTERROGATED?

- Express questioning or its functional equivalent? *Rhode Island v. Innis*, 446 U.S. 291 (1980); *State v. Franklin*, 299 S.C. 133, 382 S.E.2d 911 (1989).
  - Comments or actions reasonably likely to elicit an incriminating statement?
  - Officer's intent is relevant but not determinative.
  - Snitches don't count. *Illinois v. Perkins*, 496 U.S. 292 (1990); *State v. Lynch*, 375 S.C. 628, 654 S.E.2d 292 (2007).

IF THE SUSPECT WAS IN CUSTODY AND INTERROGATED, WAS THE SUSPECT GIVEN MIRANDA WARNINGS?

- Does the Public Safety Exception apply?
  - Objectively reasonable need to protect against immediate danger? *New York v. Quarles*, 467 U.S. 649 (1984).
- Does the Booking Exception apply?
  - Were the questions routine? *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

IF SO, WERE THE MIRANDA WARNINGS ADEQUATE?

- No "talismanic incantation" required if explanation was "fully effective equivalent" of *Miranda* warnings. *California v. Prysock*, 453 U.S. 355 (1981); *State v. Singleton*, 284 S.C. 388, 326 S.E.2d 153 (1985).
- Strict compliance not required if the warnings "touched the bases." *Duckworth v. Eagan*, 492 U.S. 195 (1989); *State v. Easler*, 322 S.C. 333, 471 S.E.2d 745 (S.C. App. 1996).

Fifth Amendment

IF THE WARNINGS WERE ADEQUATE, DID THE SUSPECT INVOKE HIS RIGHTS OR WAIVE HIS RIGHTS?

WAIVER

IF THE SUSPECT WAIVED HIS RIGHTS, WAS THE WAIVER "KNOWING AND INTELLIGENT?"

- Was there a "full awareness" of nature and consequences? *Moran v. Burbine*, 475 U.S. 412 (1986).
- Waiver does not have to be express, but will not be presumed from silence. *North Carolina v. Butler*, 441 U.S. 369 (1979); *State v. McCray*, 332 S.C. 536, 506 S.E.2d 301 (1998).
- Suspect does not have to be aware of the scope of the interrogation, *Colorado v. Spring*, 479 U.S. 564 (1987); *State v. Crawley*, 349 S.C. 459, 562 S.E.2d 683 (2002), or that an attorney is trying to reach him. *Moran v. Burbine*, 475 U.S. 412 (1986); *State v. Drayton*, 293 S.C. 417, 361 S.E.2d 329 (1987).
- Suspect has the right to qualify the waiver. *Connecticut v. Barrett*, 479 U.S. 523 (1987).

INVOCATION

IF THE SUSPECT INVOKED HIS RIGHTS, WHICH RIGHT(S) DID THE SUSPECT INVOKE?

Right to silence

Did the suspect clearly articulate a desire to end the interrogation? *Davis v. United States*, 512 U.S. 452 (1994); *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998).

If so, was the invocation "scrupulously honored"? *Michigan v. Mosley*, 423 U.S. 96 (1975); *State v. Benjamin*, 345 S.C. 470, 549 S.E.2d 258 (2001).

Right to counsel

Was the invocation unambiguous? *Davis v. United States*, 512 U.S. 452 (1994); *State v. Kennedy*, 333 S.C. 426, 510 S.E.2d 714 (1998).

If so, did the police cease questioning immediately? *Edwards v. Arizona*, 451 U.S. 477 (1981).

DID THE SUSPECT SUBSEQUENTLY INITIATE INTERROGATION?

Did suspect's comments or questions evidence a willingness or desire to engage in generalized discussion about the investigation? *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991).

IF THE SUSPECT INITIATED INTERROGATION:

- Were the new warnings adequate?
- Was there a valid waiver?

Sixth Amendment

DID THE DEFENDANT HAVE A SIXTH AMENDMENT RIGHT TO COUNSEL?

- Have formal proceedings been initiated? *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *State v. Register*, 323 S.C. 471, 477, 476 S.E.2d 153, 157 (1996).

WAS THERE DELIBERATE ELICITATION?

- Did the police deliberately elicit incriminating statements? *Massiah v. United States*, 377 U.S. 201, 206 (1964); *Brewer v. Williams*, 430 U.S. 387, 405 (1977)
- The subjective motivation of the police officer or government agent does matter. *Maine v. Moulton*, 474 U.S. 159, 176 (1985).
- Relevant considerations:
  - Purpose of the questions or comments?
  - Who set up the encounter?
  - Was there an attempt to exploit or otherwise take advantage of the encounter?
- The Sixth Amendment applies to snitches and informants. *United States v. Henry*, 447 U.S. 264 (1980)
- But does not include passive listeners. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

DID THE SUSPECT MAKE A VALID WAIVER?

- Was there a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel? *Patterson v. Illinois*, 487 U.S. 285, 292, and n.4 (1988).

Due Process

CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES, WAS THE STATEMENT VOLUNTARY?

- Given the totality of the circumstances, was this particular suspect's will overborne? *Arizona v. Fulminate*, 499 U.S. 279 (1991); *State v. Von Dohlen,* 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996).

- The voluntariness inquiry is not limited to the context of custodial interrogation, but the statement must be obtained by a police officer or other state agent. *Colorado v. Connelly*, 479 U.S. 157 (1986); *State v. Salisbury*, 330 S.C. 250, 272, 498 S.E.2d 655, 666 (S.C. App. 1998).

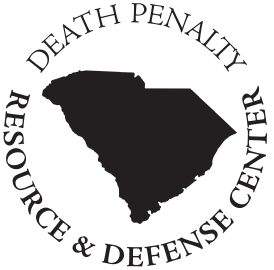
Impeachment Issues

EVEN IF THE CONFESSION IS NOT ADMISSIBLE DURING THE GOVERNMENT'S CASE-IN-CHIEF, IT STILL MAY BE ADMISSIBLE FOR IMPEACHMENT PURPOSES.

- A statement obtained in violation of *Miranda* may be used for impeachment purposes. *Harris v. New York*, 401 U.S. 222 (1971); *State v. Brown*, 296 S.C. 191, 193, 371 S.E.2d 523, 525 (1988).

- A statement obtained in violation of the Sixth Amendment right to counsel may be used for impeachment purposes. *Michigan v. Harvey*, 494 U.S. 344 (1990); *State v. Anderson*, 357 S.C. 514, 518, 593 S.E.2d 820, 822 (S.C. App. 2004).

- An involuntary confession is inadmissible for any purpose, including impeachment. *Mincey v. Arizona*, 437 U.S. 385 (1978); *State v. Victor*, 300 S.C. 220, 223, 387 S.E.2d 248, 249 (1989).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