# Criminal Procedure

## NINTH EDITION

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# Chapter 1

# INTRODUCTION

## § 1.01 OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM

### [H] Trial

**[Page 11—Last paragraph before Section [I], add:]**

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Court rejected the conclusions in *Apodaca v. Oregon*, 406 U.S. 404 (1971) and *Johnson v. Louisiana*, 406 U.S. 356 (1971), and held that the Fourteenth Amendment incorporates the Sixth Amendment right to a jury trial against the states and requires a unanimous verdict of guilt in all criminal trials. Although 48 states and the federal court system already required a unanimous jury verdict of guilt, Louisiana and Oregon did not based on the *Apodaca* and *Johnson* precedents. *Ramos* makes clear that the practices in Oregon and Louisiana are unconstitutional.

## § 1.04 THE CONSTITUTION AND PRIVATE ACTION

**[Page 21—after the final paragraph, add:]**

Until recently, it was unclear what role Tribal police officers were permitted to play in Fourth Amendment searches and seizures of non-Indians on a reservation. In *United States v. Cooley*, 141 S. Ct. 1638 (2021), the Court held that an officer of the Crow Police Department was authorized to seize the driver of a truck parked on a public right-of-way within a reservation. The officer could also subject the driver to a pat-down search, and search the truck he was in, based on a reasonable belief that the driver was violating state or federal law. In an unanimous opinion, the Court emphasized a Tribe's authority to exercise power over "non-Indians on fee lands within its reservation *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe*."

## Chapter 2

## THE FOURTH AMENDMENT AND THE DEPRIVATION OF LIBERTY

### § 2.01 THE SEIZURE REQUIREMENT

**[Page 27—Notes and Questions, Add after Note (1):]**

In *Torres v. Madrid*, 141 S. Ct. 989 (2021), the Court resolved any question remaining about the "break away" suspect. There, state police intended to execute an arrest warrant at an apartment complex and spotted a woman (not the target of the warrant) outside the building. When they approached her to ask some questions, she got into an SUV and began to drive away. An officer tried to open her car door, and she accelerated, believing the officers were car jackers. Police shot at her SUV as she drove away, and struck her in the back with two of the thirteen bullets fired. The issue in *Torres* was whether the woman was seized when she was struck by bullets (the application of physical force) but failed to stop. Citing *Hodari D.*, the Court held that she was seized and that police seize a person when they use force with an intent to restrain. The Court was satisfied that the officers applied physical force when they shot Torres and that they did so to stop her from driving away. But, the Court made clear that not every physical touching is a seizure. The majority, for example, distinguished a situation when police apply "accidental force" to a suspect. And, the majority explained that whether police intend to restrain is to be evaluated by an objective, not subjective, standard. "[T]he appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely prove the subjective motivations of police officers in the Fourth Amendment context." Finally, the Court clarified that "a seizure by force—absent submission—lasts only as long as the application of force." Thus, Torres was seized "for the instant that the bullets struck her[,]" but the seizure did not continue as Torres drove away.

In *United States v. Daniels*, 2022 WL 1540035 (N.D. Cal. 2022), two officers were pursuing suspect Daniels, one officer on foot, the second in a police car with lights and siren activated. The officer in the car bumped Daniels' bicycle, causing Daniels to "pitch over the front handle bars and fall off the bicycle." Daniels jumped to his feet and continued to flee. As he ran, Daniels threw at least one "black object" into the air toward a neighboring house. Daniels was then subdued and handcuffed. A search of the neighboring area uncovered ammunition and a handgun. Citing *Torres*, the government argued that Daniels was not seized when he was hit by the police car because the officer did not intend to hit Daniels with the car. The court found the argument unconvincing. "[T]he Court finds that the Government has not met its burden to show by a preponderance of the evidence that Officer Aponte did not have the intent to restrain Daniels with his vehicle. Daniels was thus seized at the moment Officer Aponte's vehicle collided with the bike."

## § 2.02 THE SLIDING SCALE OF SUSPICION

### [D] REASONABLE SUSPICION

**[Page 63—Notes and Questions, Add after Note (4):]**

(5) In *Kansas v. Glover*, 140 S. Ct. 1183 (2020), a majority of the Court held that an officer acted reasonably and with reasonable suspicion when he initiated a traffic stop of a driver after running a car tag and learning that the driver's license was revoked. The Court found it reasonable, in the absence of contrary information, to believe that the person driving was the owner of the car with the revoked license. In reaching this conclusion, the Court noted, "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence and obviously less than is necessary for probable cause."

**[Page 85—At the end of the Navarette case, Add a Note:]**

Note:

In *United States v. McCants*, 920 F.3d 169 (3d Cir. 2019), the Third Circuit Court of Appeals cited *Navarette* when holding that reasonable suspicion was created by a 911 call from an anonymous caller reporting: "This guy is out here beating up his girlfriend. He's about to kill her." The caller also provided a description of where – "on Grove Street in East Orange" . . . "Grove and, and, and like Williams" and a description of the suspect: "He's wearing a red hat, with braids and he's beating her up really bad right now I wanna break – I wanna break it up but, I don't wanna do nothing." Finally, the caller said "I think he has a gun." Police arrived within one minute and saw a male fitting the description provided by the caller.

### [F] The Scope of the Frisk

**[Page 97—Notes and Questions, Add between Notes (1) and (2):]**

In *United States v. Johnson*, 921 F.3d 991 (11th Cir. 2019), the court held that an officer acted reasonably and did not exceed the scope of a *Terry* frisk when he patted the defendant's clothing and "felt something nylon covering 'a small, round, hard object' that he immediately recognized as ammunition" before reaching in to remove the bullet from the defendant's pocket.

### [G] The Duration of the Detention

**[Page 106—Notes and Questions, Add at the end of Note (1):]**

*See also United States v. Rodriguez*, 762 Fed. Appx. 938 (11th Cir. 2019) (noting that there is no rigid time limit on a *Terry* stop and that some stops between 30 and 75 minutes are "not beyond the pale of reasonableness.").

## § 2.03 ARREST

### [A] The Presence of Probable Cause

**[Page 122—at the end of note (1) add:]**

In *State v. Moore*, __ N.W. 2d __ (Wisc. Jun. 20, 2023), the Wisconsin Supreme Court ruled that police who smell marijuana emanating from a car lawfully stopped along the roadside are justified in searching the sole occupant of the vehicle. Although the search in Moore did not reveal marijuana, it did uncover cocaine and fentanyl. The search was lawful because the odor of marijuana gave officers reasonable grounds for the search.

### [C] The Method of Accomplishing the Arrest

**[Page 131—Between Notes (2) and (3) add:]**

In *Watson v. Burton*, 764 Fed. Appx. 539 (6th Cir. 2019), the court held that officers violated the Fourth Amendment and the principles established in *Payton* when they grabbed the defendant by the arm and pulled him from inside his home in an open doorway to outside the home. The court noted that "the police crossed the threshold of [the defendant's] home and seized him by physical touching."

**Chapter 3**

**§ 3.01 The Constitutional Choice: Trespass versus Privacy**

**[Page 157—Add to the end of the Notes:]**

(3) In *Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019), the Sixth Circuit applied the reasoning in *Jones* and held that police conduct a search subject to the Fourth Amendment reasonableness requirement when they mark tires of parked cars to track how long they remain parked in the same location. "In accordance with *Jones*, the threshold question is whether chalking constitutes common-law trespass upon a constitutionally protected area. . . . There has been a trespass in this case because the City made intentional physical contact with Taylor's vehicle."

**§ 3.03 Special Considerations**
**[C] Technological Devices**
***[3] Global Positioning Systems and Cell-Site Location Information***
***[2] Electronic Tracking***

**[Page 275—Add, after Note 2:]**

In *United States v. Tuggle*, 4 F. 4th 505 (7th Cir. 2021), the court considered whether the government's use of cameras attached to poles located on public property that observed Tuggle's private residence for an extended period of time was a Fourth Amendment search. The Seventh Circuit held, no. The cameras only captured the outside of Tuggle's home, and "Tuggle knowingly exposed the areas captured by the three cameras." The court distinguished *Jones* and *Carpenter* in which technology helped police capture "the whole of his physical movements" or his "public movements." The court noted that the pole cameras highlighted Tuggle's lack of movement, documenting only his time spent at home.

**[Page 286—Add between Notes 1 and 2:]**

After *Carpenter*, the Seventh Circuit in *United States v. Hammond*, 996 F.3d 374 (7th Cir. 2021), held that law enforcement officers do not engage in a search protected by the Fourth Amendment when they obtain CSLI in real-time. The court in *Hammond* described *Carpenter* as a "narrow" decision that had distinguished real-time tracking of cell phone data.

In contrast to the Seventh Circuit, the Rhode Island Supreme Court in *State v. Sinapi*, ___ A.3d ___ (R.I. Jun. 20, 2023), held that the "acquisition of an individual's real-time CSLI is a search that requires a warrant." There, law enforcement used "pings" on nearby cell towers from defendant's cell phone to locate the defendant. The Court reasoned that unlike historical CSLI, which provides a user's past movements, real-time CSLI allows the government to "track and pinpoint the current location of an individual via their cell phone." *See also Commonwealth v.*

*Reed*, 647 S.W. 3d 237, 250 (Ky 2022) (holding that when law enforcement obtains real-time cell-site location information, they conduct a search protected by the Fourth Amendment).

Also in a case of first impression, the Fifth Circuit Court of Appeals distinguished the decision in *Carpenter* when deciding whether the records of a Bitcoin transaction were protected by Fourth Amendment privacy. In *United States v. Gratkowski*, 964 F.3d 307 (5th Cir. 2020), the defendant paid a child-pornography website in Bitcoin, a virtual currency. To use Bitcoin, the user transfers the currency either through Bitcoin's specialized software or, as the defendant did, using a virtual currency exchange. The defendant, citing *Carpenter*, argued that he had a Fourth Amendment privacy interest in the records of his Bitcoin transaction on Coinbase, the virtual currency exchange he used to pay the website. The Fifth Circuit rejected that argument, finding the situation "more analogous to the bank records in *Miller* and telephone call logs in *Smith* than to CSLI in Carpenter."

**§ 3.04 Warrantless Searches**
**[A] Incident to Arrest**

**[Page 361 at the end of note (3):]**

In *United States v. Castillo*, __ F.4th __ (5th Cir. Jun. 19, 2023), the Fifth Circuit Court of Appeals decided, as a matter of first impression within its jurisdiction, that no warrant or individualized suspicion is required for the government to conduct a "manual border search of a cell phone." The defendant was traveling from Mexico into Texas. At the border, he was stopped driving a recreational vehicle. During a secondary search, an officer found a gun and ammunition hidden in an oven within the RV. Subsequently, the defendant provided agents with the passcode to his phone, and agents "manually scrolled through the apps" on defendant's phone, finding what they thought was child pornography. The court adopted "the consensus view of [its] sister circuits," holding that "the government can conduct manual cell phone searches at the border without individualized suspicion."

**§ 3.04 Warrantless Searches**
**[D] Curtilage**

**[Page 385 after note (3):]**

In *Collins v. Virginia*, 138 S. Ct. 1663 (2018), the Court held that the automobile exception to the warrant requirement did not permit law enforcement to trespass onto the curtilage of a suspect's property without a search warrant. In *Collins*, an officer found evidence on Facebook that the defendant kept an orange and black motorcycle, which was suspected stolen, at his girlfriend's home, where he often stayed. The officer subsequently observed the motorcycle under a tarp in the driveway of the home. The officer trespassed on the property to remove the tarp, revealing

the license plate and VIN number. The officer used that information to confirm that the bike was stolen. The Court found a Fourth Amendment intrusion. "Officer Rhodes not only invaded Collins' Fourth Amendment interest in the item searched, *i.e.*, the motorcycle, but also invaded Collins' Fourth Amendment interest in the curtilage of his home."

Although *Collins* could be read very broadly to protect all searches conducted on someone's driveway, that has not been the norm. For example, in *Commonwealth v. Wittey*, ___ N.E.3d ___ (Mass. Jun. 5, 2023), the defendant, who was convicted of first degree murder, argued that state troopers violated the Fourth Amendment when they examined his vehicle parked in the driveway leading to his home. The Massachusetts Supreme Judicial Court held, to the contrary, that "the defendant's vehicle was not parked within the curtilage of his home" and that "the trooper's observations of the vehicle did not constitute a search for constitutional purposes." In reaching this conclusion, the Court noted that "a driveway is only a 'semiprivate area,'" and that any expectation of privacy in the driveway will depend on the "nature of the activities and the degree of visibility from the street."

**§ 3.04 Warrantless Searches**
**[H] Vehicles**
***[2] The Inventory Rationale***

**[Page 431—Add between Notes 1 and 2:]**

In *Caniglia v. Strom*, 141 S. Ct. 1596 (2021), the Court distinguished *Cady v. Dombroski* from cases involving a "caretaking" search and seizure of a home. In *Caniglia*, police without a warrant or valid consent entered a home to find and seize guns to ensure that one of the residents, whom they believed to be suicidal, would not later access the guns. The Court emphasized the constitutional difference between a lawfully impounded vehicle and a home. The majority opinion, authored by Justice Thomas, emphasized: "What is reasonable for vehicles is different from what is reasonable for homes."

# Chapter 4

# The Right to Counsel

## § 4.01 Recognition of the Right

[A] Determination of Indigency

**[Page 468—Add to text:]**

The defendant lived with his parents and they paid his household expenses. Should the parents' income be counted in determining defendant's entitlement to court-appointed counsel? Yes, wrote the dissenters, as the parents "are household members who contribute monetarily to the common support of the household." No, wrote the majority. "[I]ncome from a defendant's household members who contribute monetarily to the household should not be included in an indigency determination if such income isn't available to the defendant." *People v. Greer*, 502 P.3d 1012 (Colo. 2022).

## § 4.02 Joint Representation

**[Page 493—Add to Note (3):]**

If the defendant is required to demonstrate harm from the joint representation, she must show "a reasonable likelihood that…counsel's performance would have been different had there been no conflict of interest." *United States v. Grayson Enterprises, Inc.*, 950 F.3d 386 (7th Cir. 2020). In *United States v. Pacheco-Romero*, 374 F. Supp. 2d 1326 (N.D. Ga. 2019), two lawyers sought to jointly represent the six defendants in a drug conspiracy prosecution. The court noted that while "a defendant may waive conflict—free representation . . . courts are not bound to accept the waiver." This judge did not accept the waiver.

> If the defendants choose to go to trial, a serious potential conflict of interest remains with joint representation. Should any defendant elect to testify in his own defense, his testimony could prove to be harmful to the other defendants, and Lee and Bennett "would be faced with the prospect of examining or cross-examining a witness whom he represents and whose interest lies in direct conflict with his other client." Lee and Bennett, who are associated in law practice, have represented all of the defendants since the case initiated with the filing of a criminal complaint, and because there is an irrebutable presumption that they received confidential communications from the defendants during the course of that representation, Lee and Bennett have "divided loyalties that prevent [them] from effectively representing the defendant[s]."

## § 4.03 The Right to a *Pro Se* Defense

Looking to *Faretta*, the California Supreme Court explained how a trial judge is to determine if defendants are fit so that they may waive counsel and represent themselves.

> A two-part inquiry determines whether a defendant may waive the right to counsel: (1) The defendant must be competent to stand trial, and (2) the trial court must "satisfy itself" that the waiver of "constitutional rights is knowing and voluntary." "[T]he purpose of the 'knowing and voluntary' inquiry ... is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." When there is reason to doubt a defendant's mental capacity to waive counsel, the court's determination should be made after a careful inquiry into the defendant's competence, including consideration of psychiatric evidence.

*People v. Waldon*, 522 P.3d 1059 (Ca. 2023). The trial court's appointed expert there testified as to the defendant's ability to represent himself.

> Dr. Kalish, the court's expert, offered examples of Waldon's inability to understand the nature of the proceedings and gave his opinion that Waldon had a psychotic disorder and was not competent to waive counsel. On cross-examination by the prosecutor, Dr. Kalish explained that Waldon's intelligence was normal but his paranoia affected his ability to decide whether to waive counsel: "[l]t clouds and distorts his perceptions" and leaves him "so inundated by neurotic and other input" that he is not able to make "decisions clearly, reasoned, with eyes wide open." Dr. Kalish also noted that Waldon expressed contradictory goals simultaneously, which was indicative "of mental disease, of the confusion, the lack of appreciation of what's going on."
>
> Asked more specifically about Waldon's understanding of self-representation, Dr. Kalish said that he was particularly concerned that Waldon did not understand the responsibilities of self-representation and did not "appreciate that distinction between the advisory attorney and the attorney representing him." Dr. Kalish explained that normal intelligence can co-exist with mental illness and dysfunction; he observed that Waldon was generally able to portray a "veneer" of competence but lacked any meaningful understanding of his circumstances and had no insight into his mental impairment. Dr. Kalish concluded, based on his conversations with Waldon, that Waldon was not capable of mounting a rational, coherent defense. These factors were relevant to whether Waldon was able to make a reasoned decision to waive counsel; Dr. Kalish stated that the fact that "he may not do a good job is not the issue here, as I understand it."

**[Page 505—Add to Note (3):]**

Numerous state and federal courts have affirmed a capital defendant's right to self-representation at trial. *See, e.g.*, *People v. Ng*, 513 P.3d 858 (Cal. 2022); *Mosley v. State*, 349 So. 3d 861 (Flo. 2022); *State v. McAlpin*, 204 N.E.3d 459 (Oh. 2022). As noted, some judges maintain that the request for self-representation cannot be equivocal. On this point, consider *State v. Dugar*, 2023 WL 378833 (La. App. 2023). There the defendant asked the trial judge for permission to represent himself. The judge denied the request. Counsel was appointed to represent the defendant at trial. During the course of the trial the defendant consulted with the lawyer before electing not to testify on his own behalf. Was this inconsistent with the request for self-representation, and did it constitute a waiver of that right? No, and no, decided the appeals court.

> Defendant's assertion was clear and unequivocal, and he contemporaneously objected to the court's ruling against him. Also, we note Defendant asserted his right to self-representation months ahead of trial, so it does not appear to have been a mere dilatory tactic....[I]t appears that Defendant never re-asserted his right after the initial denial, and he apparently consulted with trial counsel about the issue of whether he should testify on his own behalf. However, we find this lay defendant could logically have concluded that any reassertion of his right to self-representation would be fruitless.

**[Page 508—Add to Note (4):]**

In *United States v. Hansen*, 929 F.3d 1238 (10th Cir. 2019), the court wrote

> that a knowing and intelligent waiver can only be made with the defendant's ''apprehension'' of:
>
> > the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and *all other facts essential to a broad understanding of the whole matter*.

The court reversed the defendant's conviction, finding that

> the district court here failed to engage in a sufficiently thorough colloquy with Mr. Hansen that would properly warn him under the circumstances of this case that—if he proceeded pro se—he would be obliged to adhere to federal procedural and evidentiary rules….

The court in *United States v. Owen*, 963 F.3d 1040 (11th Cir. 2020), set out the eight factors it considers in determining "whether a defendant's waiver of his right to counsel was knowing and voluntary . . . ."

> (1) the defendant's age, educational background, and physical and mental health; (2) the extent of the defendant's contact with lawyers prior to trial; (3) the defendant's knowledge of the nature of the charges, possible defenses, and penalties; (4) the defendant's understanding of rules of procedure, evidence, and courtroom decorum; (5) the defendant's experience in criminal trials; (6) whether standby counsel was appointed, and the extent to which that counsel aided the defendant; (7) mistreatment or coercion of the defendant; and (8) whether the defendant was trying to manipulate the events of the trial.

**[Page 509—Add to Note (5):]**

Most courts scrutinize closely the waiver of counsel, especially early in pre-trial proceedings. The issue in *United States v. Hakim*, 30 F. 4th 1310 (11th Cir. 2022), was whether a waiver "is knowing when a court gives materially incorrect or misleading information about his potential maximum sentence." A jury found the defendant guilty of misdemeanor tax charges. Although he was represented by a lawyer at trial, he represented himself during the pretrial process. At his arraignment, he told the judge that he wanted to waive his right to counsel and to represent himself. The judge told him that the maximum sentence he could receive if convicted was 12 months of imprisonment. This was erroneous, and after trial, the defendant was sentenced to 21 months of imprisonment. Held, the waiver was not knowing, as "a defendant must have an awareness of the penal consequences of conviction before his decision to represent himself can constitute a knowing waiver of his Sixth Amendment right to counsel."

**§ 4.04 When the Right Applies**

**[Page 526—Add to Note (1):]**

Is the taking of defendant's DNA a "critical stage" at which the defendant has a right to a lawyer? No, found the court in *Johnson v. State*, 325 So. 3d 1177 (Miss. App. 2021), rehearing denied (2022), as the defendant's attorney had the opportunity at trial to, and did, cross-examine the detective who obtained the DNA and the forensic biologist who tested the DNA sample.

**[Page 554—Add to Note (6):]**

The defendant in *Commonwealth v. German*, 134 N.E.3d 542 (Mass. 2019), was arrested for a robbery. He was standing in front of a wall on a public street with police officers; the two victims of the crime were brought to him and before the officer could ask them anything, they simultaneously identified the defendant as the robber. The defendant argued that the identification was improper because it was so suggestive. The court wrote that a showup identification conducted in the immediate aftermath of a crime is "disfavored as inherently suggestive." Alone, however, it is not sufficient to render it inadmissible in evidence. Here the identification was allowed, with the appeals court focusing on the time involved, the location, the spontaneous statements of the witnesses, and the instructions given at trial.

*See also*, *People v. Sammons*, 949 N.W.2d 36 (Mich. 2020), where the court wrote this:

> Due process protects criminal defendants against "the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." Exclusion of evidence of an identification is required when (1) the identification procedure was suggestive, (2) the suggestive nature of the procedure was unnecessary, and (3) the identification was unreliable.
>
> The inherently suggestive nature of showups has long been beyond debate. Showups have been called "the most grossly suggestive identification procedure now or ever used by the police." In this case, all we need to observe in order to conclude that the procedure was suggestive is that defendant was shown singly to the witness. The prosecution argues that the showup was not suggestive because defendant was wearing his street clothes and was not handcuffed or restrained. To be sure, the showup would have been more suggestive if defendant had been shackled in a striped jumpsuit, but noting other ways the showup could have been more suggestive does not help us determine whether this showup was suggestive…we do not believe that the prosecution has met its burden to show that the indicia of reliability in this case "are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances….

The court in *United States v. Muhanad Mahmoud Al-Farekh*, 956 F.3d 99 (2nd Cir. 2020), wrote this:

> In reviewing Al-Farekh's due process challenge to the admission of Murad's identification, we must first ask whether the identification procedures employed overseas were "unduly suggestive of the suspect's guilt." In conducting this threshold inquiry, we must "examine the procedures employed in light of the particular facts of the case and the totality of the surrounding circumstances." If the procedures were not unduly suggestive, "the trial identification testimony" is generally admissible without further inquiry into the reliability of the [out-of-court,] pretrial identification." That is so because, where there is no possible taint of suggestiveness in the identification procedures, "any question as to the reliability of the witness's identifications goes to the weight of the evidence, not its admissibility."

Is this a correct statement of the law?

The court in *State v. Derri*, 511 P.3d 1267 (Wash. 2022) began its opinion by noting that "eyewitness identification is a leading cause of wrongful conviction." And, it found that the procedure used in the case was suggestive. Still, it determined that there were sufficient indicia of reliability to allow for the admission of the identification by the two witnesses at trial. The photo identification procedure used by police was troubling because of "double exposure". The witnesses were shown two different photo montages and the defendant was the only person in both of them." The identification, though, was reliable because of the special circumstances involved. "[B]oth witnesses claimed to recognize the robber as ... the man who came into the bank about two weeks before .... [One witness] interacted with the man for several minutes and

wrote down his name. [The other witness] observed the interaction and heard the man's distinctive voice."

The trial lawyer in *United States v. Nolan*, 956 F.3d 71 (2nd Cir. 2020), initially moved to exclude the eyewitness testimony of the four victims but then decided instead to impeach the victims' testimony at trial. The appeals court found ineffective assistance of counsel [*see* § 4.05 *infra*] for the abandonment of the pretrial motion to exclude. In assessing the ineffective assistance claim, the court discussed its view of eyewitness testimony.

> A growing body of scientific research, moreover, has clarified and expanded what factors a court should examine in determining whether to exclude eyewitness identification testimony. As this Court has observed, this "literature indicates that certain circumstances surrounding a crime — including the perpetrator's wearing a disguise, the presence of a weapon, the stress of the situation, the cross-racial nature of the crime, the passage of time between observation and identification, and the witness's exposure to [the] defendant through multiple identification procedures — may impair the ability of a witness ... to accurately process what she observed."

Expressing great concerns as to misidentification, the New Mexico Supreme Court adopted a "per se exclusionary rule":

> If a witness makes an identification of a defendant as a result of a police identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification, the identification and any subsequent identification by the same witness must be suppressed.

*State v. Martinez*, 478 P.3d 880 (N. Mex. 2020).

For an excellent overview of both the law and the science as to eyewitness identification, *see* Albright and Garrett, *The Law and Science of Eyewitness Identification*, 102 B.U. L. REV. 511 (2022).

**§ 4.05 Ineffective Assistance of Counsel**

**[*Incompetent Counsel,* Page 624—Add to discussion of *Strickland v. Washington*:]**

The court in *United States v. Rosemond*, 958 F.3d 111 (2nd Cir. 2020), made clear the heavy burden on defendants asserting ineffective assistance of counsel claims:

> Courts reviewing ineffective assistance of counsel claims are "highly deferential," and must "strongly presume[ ]" that counsel "made all significant decisions in the exercise of reasonable professional judgment." This presumption is overcome only if "counsel failed to act reasonably considering all of the circumstances." When analyzing whether an attorney's performance was objectively reasonable, courts must avoid "the distorting effects of hindsight" and consider the lawyer's

> perspective at the time the decision was made. If the attorney made a strategic choice after thoughtful consideration, that decision will be "virtually unchallengeable."

**[*Incompetent Counsel,* Page 625—Add to Comment:]**

*See also*, *Urquhart v. State*, 203 A.3d 719 (2019), where the court found a Sixth Amendment violation because the defendant's public defender

> "went from one trial into another trial into another trial" over Urquhart's entire pretrial period—requiring different public defenders to represent Urquhart in his place at the pretrial hearings, including the final case review. In addition… Urquhart's counsel did not meet with him for almost four months before trial. Lastly, and most significantly, Urquhart's repeated requests for help were effectively pushed aside by his trial counsel and the court.

**[Page 627—Add to capital punishment cases:]**

The most recent substantive decision of the United States Supreme Court to deal with ineffective assistance of counsel in a capital case is *Andrus v. Texas*, 140 S. Ct. 1875 (2020). In a per curiam decision, the Court laid out its reasoning for sending the matter back to the state court.

> To prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. To show deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." And to establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."
>
> It is unquestioned that under prevailing professional norms at the time of [Andrus'] trial, counsel had an "obligation to conduct a thorough investigation of the defendant's background." Counsel in a death-penalty case has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."
>
> Here, the habeas record reveals that Andrus' counsel fell short of his obligation in multiple ways: First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence. Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case. Third, counsel failed

> adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation. Taken together, those deficiencies effected an unconstitutional abnegation of prevailing professional norms.

**[Page 628—Add to Comment:]**

For a sharp disagreement among the Justices as to the application of the *Strickland* standard in a capital case see *Thomas v. Lumpkin*, 143 S. Ct. 4 (2022). There, six members of the Court, without comment, voted to deny certiorari. The three dissenting Justices disagreed.

> Petitioner Andre Thomas was sentenced to death for the murder of his estranged wife, their son, and her daughter from a previous relationship. Thomas is Black, his wife was white, and their son was biracial. Thomas was convicted and sentenced to death by an all-white jury, three of whom expressed firm opposition to interracial marriage and procreation in their written juror questionnaires. Among other reasons, these jurors opined that such relationships were against God's will and that people "should stay with [their] Blood Line." Despite their declarations of bias, Thomas' counsel not only failed to exercise peremptory strikes on these individuals or move to strike them for cause, but failed even to question two of the three jurors about their stated bias and whether it could affect their deliberations. Without objection from Thomas' counsel or the State's attorney, the three jurors were seated....
>
> In support of his ineffective-assistance-of-counsel argument, Thomas' lead trial counsel filed an affidavit declaring that his failure to question jurors opposed to interracial marriage "was not intentional; [he] simply didn't do it." Second-chair counsel explained that Thomas' case was her first capital trial, that she was "new at capital voir dire," and that "[v]oir dire in this case was a nightmare."....
>
> Thomas' trial counsel failed to object or to exercise available peremptory strikes for three jurors who expressed personal hostility to interracial marriage and procreation. Additionally, counsel entirely failed to inquire into the race-based views two of the jurors had expressed in their written questionnaire and the potential impact those views could have on their verdict and during the penalty phase. As a result, Thomas was convicted and sentenced to death by a jury that included three jurors who expressed bias against him....
>
> This is a capital case involving interracial violence where three seated jurors and an alternate expressed prejudicial views. Had defense counsel requested individual *voir dire* of the three prospective jurors, it would have been reversible error for the trial judge to deny that request.
>
> This case involves a heinous crime apparently committed by someone who suffered severe psychological trauma. Whether Thomas' psychological

> disturbances explain or in any way excuse his commission of murder, however, is beside the point. No jury deciding whether to recommend a death sentence should be tainted by potential racial biases that could infect its deliberations or decision, particularly where the case involved an interracial crime. Ignoring issues of racial bias in the jury system "damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.' …. It is ultimately the duty of the courts "to confront racial animus in the justice system." That responsibility requires courts, including this one, vigilantly to safeguard the fairness of criminal trials by ensuring that jurors do not harbor, or at the very least could put aside, racially biased sentiments.

**[Appeals: The *Anders* Rule, Page 634—Add to Note (1):]**

Appointed counsel raised only claims of non-reversible error on appeal. Held, this violated the *Anders* requirement.

> "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client. . . ." In other words, counsel's decision to raise non-reversible error outside the context of *Anders* in this case deprives appellant of his right to be heard by the filing of a pro se response raising "any points that he chooses," and it deprives this Court the opportunity to conduct an independent review of the record."

*Allison v. State*, 609 S.W.3d 624 (Tx. App. 2020).

## Chapter 5

## Confessions and Other Incriminating Statements

### § 5.01 The Due Process Approach

**[Page 642—Add to Note (2):]**

As noted in the text, "promises and threats, both explicit and implicit, pose difficult problems." *See Budhani v. State*, 830 S.E.2d 195 (Ga. 2019), where the investigating officer told the defendant that no additional charges would be brought against him if he made a confession. The statement should have been held inadmissible, as "promises made by law enforcement to bring no additional charges … constitute[] an impermissible hope of benefit." *Contrast with Brown v. State*, 258 A.3d 961 (Md. App. 2021) where the police officers told the defendant he was "not in trouble with us", that he would walk out the door "a free man" after talking with them, and that they were not going to take the defendant to jail. The court found the resulting statement to be voluntary, for "the detectives never expressly promised appellant that he would not be prosecuted for any statements that he made to them."

**[Page 657—Add to Note (1):]**

The defendant in *State v. Vasquez-Santiago*, 456 P.3d 270 (Or. App. 2019), had a very low IQ. The majority emphasized this in finding the confession involuntary.

> It is true that lower levels of intellectual functioning by a defendant do not, automatically of themselves, prohibit the state from meeting its burden to prove voluntariness…. However, it is well established that the personal characteristics of a defendant must be considered in assessing the totality of the circumstances surrounding voluntariness. Characteristics, like age, education, and intelligence, "are relevant only if police, in fact, exert coercion and only insofar as those circumstances render a suspect less able to resist that coercion"…. [Also] defendant was, in fact, under the belief that his infant son was in custody and under the subjective belief that his cooperation would lead to his son's release. That is, regardless of how a father of average intellectual functioning would have responded to the possibility of an infant being in police custody, this particular defendant, with an IQ of 53, understood the circumstances to involve urgency, including urgency over the child being breast fed by his mother.

The dissenters sharply disagreed:

> Here, assuming that defendant has below-average intelligence, it is notable that the majority never identifies exactly *how* that affected his conduct. That conduct

> supports the trial court's finding that defendant was not impeded; rather, he entered the interrogation room with a view to securing the best deal that he could get, and the interrogation was essentially a negotiation. By giving decisive weight to defendant's IQ score in the face of evidence about how he actually conducted himself, the majority departs from how we have treated defendants' personal characteristics in past cases. We have looked beyond general assertions regarding a defendant's level of mental competence and evaluated the record for indications of actual impairment in the interactions between the defendant and the police.

**[Page 662—Add to Problem B, "Deceitful Interrogation":]**

The state supreme court in *Tigue v. Commonwealth*, 600 S.W.3d 140 (Ky.), did not give precise direction as to expert testimony regarding false confessions. "Our conclusion is not a statement that false-confession expert testimony is always admissible. The more accurate statement of our holding here is that false-confession expert testimony is not always inadmissible."

**§ 5.03 The Self-Incrimination Approach**

**[Page 715—Add to discussion of *Dickerson v. United States* in Note (1):]**

In Vega v. Tekoh, 142 S. Ct. 2095 (2022), the Court was faced with a different challenge to *Miranda*. There the criminal defendant [the civil plaintiff] was in custody, did not receive the necessary warnings during the interrogation. His confession was admitted at trial, but he was acquitted. He then filed suit under 42 U.S.C. § 1983, the federal remedial statute for asserting federal civil rights claims. He contended that he was constitutionally entitled to receive the *Miranda* warnings, and that by withholding those warnings the officer violated his constitutional right. The Supreme Court was faced with a quandary as to the meaning of the majority opinion in *Dickerson*. On one side of the argument was this language from the *Dickerson* opinion: "[The warnings had] become embedded in routine police practice" and had "become part of the national culture." Since the *Miranda* decision had "announced a constitutional rule," the federal statute in *Dickerson* that sought to overrule it was itself unconstitutional. On the other side of the argument, as Chief Justice Roberts remarked during oral argument, "Chief Justice Rehnquist in *Dickerson*] didn't say *Miranda* is in the Constitution. He talked about constitutional underpinnings, constitutional basis." In a 6-3 vote, the Court construed *Miranda* and *Dickerson* narrowly, denying relief under § 1983.

> In *Miranda*, the Court concluded that additional procedural protections were necessary to prevent the violation of this important right when suspects who are in custody are interrogated by the police. To afford this protection, the Court required that custodial interrogation be preceded by the now-familiar warnings mentioned above, and it directed that statements obtained in violation of these new rules may not be used by the prosecution in its case-in-chief.

*Miranda* itself and our subsequent cases make clear that *Miranda* imposed a set of prophylactic rules. Those rules, to be sure, are "constitutionally based," *Dickerson*, 530 U.S. at 440, 120 S. Ct. 2326, but they are prophylactic rules nonetheless.

*Miranda* itself was clear on this point. *Miranda* did not hold that a violation of the rules it established necessarily constitute a Fifth Amendment violation, and it is difficult to see how it could have held otherwise. For one thing, it is easy to imagine many situations in which an un-*Mirandized* suspect in custody may make self-incriminating statements without any hint of compulsion. In addition, the warnings that the Court required included components, such as notification of the right to have retained or appointed counsel present during questioning, that do not concern self-incrimination *per se* but are instead plainly designed to safeguard that right. And the same is true of *Miranda*'s detailed rules about the waiver of the right to remain silent and the right to an attorney.

At no point in the opinion did the Court state that a violation of its new rules constituted a violation of the Fifth Amendment right against compelled self-incrimination. Instead, it claimed only that those rules were needed to safeguard that right during custodial interrogation. …

Since *Miranda*, the Court has repeatedly described the rules it adopted as "prophylactic."

. . . .

[O]ur decision in *Dickerson* did not upset the firmly established prior understanding of *Miranda* as a prophylactic decision. *Dickerson* involved a federal statute, 18 U.S.C. § 3501, that effectively overruled *Miranda* by making the admissibility of a statement given during custodial interrogation turn solely on whether it was made voluntarily. The Court held that Congress could not abrogate *Miranda* by statute because *Miranda* was a "constitutional decision" that adopted a "constitutional rule", and the Court noted that these rules could not have been made applicable to the States if it did not have that status. At the same time, however, the Court made it clear that it was not equating a violation of the *Miranda* rules with an outright Fifth Amendment violation.

[I]n the words of the *Dickerson* Court, the *Miranda* rules are "constitutionally based" and have "constitutional underpinnings." But the obvious point of these formulations was to avoid saying that a *Miranda* violation is the same as a violation of the Fifth Amendment right.

> What all this boils down to is basically as follows. The *Miranda* rules are prophylactic rules that the Court found to be necessary to protect the Fifth Amendment right against compelled self-incrimination. In that sense, *Miranda* was a "constitutional decision" and it adopted a "constitutional rule" because the decision was based on the Court's judgment about what is required to safeguard that constitutional right. And when the Court adopts a constitutional prophylactic rule of this nature, *Dickerson* concluded, the rule has the status of a "La[w] of the United States" that is binding on the States under the Supremacy Clause (as *Miranda* implicitly held, since three of the four decisions it reversed came from state court, and the rule cannot be altered by ordinary legislation.
>
> Allowing a claim like Tekoh's would disserve "judicial economy", by requiring a federal judge or jury to adjudicate a factual question (whether Tekoh was in custody when questioned) that had already been decided by a state court. This re-adjudication would not only be wasteful; it would undercut the "'strong judicial policy against the creation of two conflicting resolutions' "based on the same set of facts. And it could produce "unnecessary friction" between the federal and state court systems by requiring the federal court entertaining the § 1983 claim to pass judgment on legal and factual issues already settled in state court. ....
>
> [A] violation of *Miranda* is not itself a violation of the Fifth Amendment, and ... we see no justification for expanding *Miranda* to confer a right to sue under § 1983….

The dissenters sharply disagreed.

> The Court's decision in *Miranda v. Arizona*, affords well-known protections to suspects who are interrogated by police while in custody. Those protections derive from the Constitution: *Dickerson v. United States* tells us in no uncertain terms that *Miranda* is a "constitutional rule." And that rule grants a corresponding right: If police fail to provide the *Miranda* warnings to a suspect before interrogating him, then he is generally entitled to have any resulting confession excluded from his trial. From those facts, only one conclusion can follow—that *Miranda*'s protections are a "right[]" "secured by the Constitution" under the federal civil rights statute. Rev. Stat. § 1979, 42 U.S.C. § 1983. Yet the Court today says otherwise. It holds that *Miranda* is not a constitutional right enforceable through a § 1983 suit. And so it prevents individuals from obtaining any redress when police violate their rights under *Miranda*. ....
>
> Today, the Court strips individuals of the ability to seek a remedy for violations of the right recognized in *Miranda*. The majority observes that defendants may still seek "the suppression at trial of statements obtained" in violation of *Miranda*'s procedures. But sometimes, such a statement will not be suppressed. And

> sometimes, as a result, a defendant will be wrongly convicted and spend years in prison. He may succeed, on appeal or in habeas, in getting the conviction reversed. But then, what remedy does he have for all the harm he has suffered? The point of § 1983 is to provide such redress—because a remedy "is a vital component of any scheme for vindicating cherished constitutional guarantees." The majority here, as elsewhere, injures the right by denying the remedy.

**[Page 734—Add to Note (1):]**

In *State v. Kent*, 475 P.3d 1211 (Idaho 2020), the police officer was questioning the defendant. All parties agreed that at this point the defendant was not in custody. The officer began reading the *Miranda* rights, at which point the defendant interrupted the officer and said he would not answer any questions. The officer continued to read the rights and, after the warnings were read, the defendant made an incriminating statement. The trial judge suppressed the statement: "Where *Miranda* warnings are read to an individual unnecessarily and the defendant invokes the right to remain silent, an officer may not ignore that invocation." The Idaho Supreme Court reversed, holding that "the specific restrictions regarding questioning a suspect created by *Miranda* are limited to custodial interrogations." Do you agree?

**[Page 734—Add to Note (2):]**

The court in *United States v. Ferguson*, 970 F.3d 895 (8th Cir. 2020), identified the six factors it considers in making a determination as to custody:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of questioning.

The defendant and his seven-year-old son were in a shopping mall. Police officers took physical custody of the son and led him inside a large store, out of the defendant's sight. No threats were made to the father or the son. While the son was away from him, the father made incriminating statements in response to police questions. Was he in custody at that time? Yes, found the court in *United States v. Mora-Alcaraz*, 986 F.3d 1151 (9th Cir. 2021):

> The police were well aware that a father would not walk away from a public place and leave his young son with strangers. No physical restraint of Mora-Alcaraz

> was necessary so long as the police kept him separated from his son. He could not leave.
>
> [A] reasonable person in Mora-Alcaraz's position would not have felt free to end the questioning and leave the mall. . . .

**[Page 753—Add to Note (3):]**

> "[T]he initial step [on the custody question] is to ascertain whether, in light of 'the objective circumstances of the interrogation,' a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" We have previously identified a nonexhaustive number of circumstances that are relevant to this aspect of our custody analysis, including "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." In conducting this analysis, we must keep in mind that a finding of custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."
>
> This inquiry into "whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last." Once we complete the freedom-of-movement step, we must still ask "the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*."

*United States v. Melo*, 954 F.3d 334 (1st Cir. 2020). The police officer told the suspect to "wait here" and questioned him. Custody? No, held the court in *United States v. Parker*, 993 F.3d 595 (8th Cir. 2021). The words were "spoken as a colloquialism to be understood by the reasonable person to mean something more on the order of 'be patient while we finish up here,' not 'you are being detained.'"

Consider the two views of custody in *State v. Diego*, 169 N.E.3d 113 (Ind. 2021):

No custody, majority opinion:

> The interview took place in Detective Munson's personal office, not an interview room. The approximately forty-five minute interview—while certainly lengthy—was not particularly hostile; it was exploratory and conversational rather than accusatory. Domingo Diego and Martin left the station unaided, which gives rise to a reasonable inference that Domingo Diego was not cabined into a remote place in the police station. Although blunt, the interview would not have revealed to a reasonable officer that Domingo Diego did not understand what was being said.

Custody, dissenting opinion:

> [T]here are several factors here that, taken together, lead me to conclude that police subjected Diego to custodial interrogation: the premise that police "needed" to question Diego at the station, the lack of a clear statement from police-department personnel that Diego could freely exit the secured door through which he entered, Diego's separation from his girlfriend on whom he relied for interpreting, the visually cabined space in which the armed detective conducted the interrogation, the police workstations just beyond the detective's office, the officer-interpreter sitting between Diego and the office door, the subterfuge and accusatory line of questioning directed at Diego from the detective, and Diego's need for directions on how to exit the building upon conclusion of the interview.

**[Page 755—Add to Problem F, "Custodial Interrogation":]**

As discussed in the *Perkins* case, the United States Supreme Court has consistently held that "conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*." This led the California court of appeals to find no error in *People v. Valencia*, 2019 WL 6869128, where the undercover officer was placed in a cell with the defendant soon after the arrest, and after the defendant had invoked his *Miranda* rights. The state supreme court denied the petition for review. Justice Liu dissented from the denial:

> Because Valencia confessed to a man he believed was not with the government, there is no reason to assume coercion. Ploys to mislead suspects or to lull them into a false sense of security are not within *Miranda*'s concerns.... I find dubious the claim that it is lawful for the police to continue questioning a suspect who has invoked *Miranda* rights and remains in custody so long as the police disguise the interrogation. A suspect who has invoked *Miranda* rights has made a choice not to speak with the police. It is one thing if the suspect then chooses to make incriminating statements to someone who is not acting at the behest of the police. But it is difficult to see how the use of deceptive schemes by the police to continue questioning the suspect can be compatible with "'[p]reserv[ing] the integrity of an accused's choice to communicate with police only through counsel.'"
>
> ....The fact that the suspect's statements are elicited not by formal interrogation but by a police-concocted scheme of trickery or deceit does not support an inference that the suspect has waived his previously asserted *Miranda* rights. Such deliberate disregard for the exercise of constitutional rights is hard to square with "the respect a government - state or federal - must accord to the dignity and integrity of its citizens," which *Miranda* understood to be "the constitutional foundation underlying the privilege" against self-incrimination.... It is a hard lesson of history that public cynicism and distrust of legal institutions take root

> when constitutional rights are honored in theory but violated in practice. The right to cut off questioning and seek assistance of counsel is deeply embedded in the consciousness of our citizenry as a fundamental protection against the formidable power of the police. It trivializes this protection to say it can be defeated by a simple ruse. The time is ripe for the Legislature to address this issue in light of this court's reluctance to intervene.

Dec. 11, 2019 No. 5258038 (statement by Liu, J., dissenting from denial of review).

**[Page 770—Add to Note (6):]**

The investigating officer in *Texas v. Scarberry*, 2022 WL 2069213 (TX. App. 2022) gave no warnings while the suspect was in custody. The officer asked the suspect if he wished to have the "opportunity to tell his side of the story." Held, this was interrogation.

> We conclude that Levine should have known his query was reasonably likely to result in an incriminating response.... Levine specifically mentioned the offense for which Scarberry was in custody and proclaimed this to be Scarberry's opportunity to "tell his side of the story," implying that the version of the story the police already had was that Scarberry was guilty. By asking Scarberry to give a statement, offering Scarberry an opportunity to give his version of events, and specifically addressing the crime of which Scarberry had been accused, Levine should have known that any actor, guilty or innocent, would have the urge to minimize his involvement.

The dissenting judge disagreed. "Detective Levine's inquiry merely required either a yes or no answer. Scarberry could have replied, 'No, I do not want to tell my side of the story...' or he could have answered, 'Yes.' Neither question required an incriminating answer. Therefore, I disagree that Detective Levine should have known the questions were reasonably likely to elicit an incriminating response from Scarberry

For a striking opinion involving the police having another person approach the defendant, see, *State ex rel. A.A.,* 222 A.3d 681 (N.J. 2020). There, the fifteen-year-old defendant was arrested for aggravated assault. His mother was allowed to go back to the holding cell and speak to her son in an open area. Officers allowed this because they wanted to make sure that the minor defendant understood his right to have a parent present, as required under New Jersey law. The officers did not explain to the mother that they would be listening to the conversation with her son and that anything her son said could be used against him. Also, they did not tell the defendant his rights in front of his mother before the two began to speak. The New Jersey Supreme Court ruled that the defendant's incriminating statements were not admissible.

> Under the circumstances, it was hardly a surprise that A.A. and his mother spoke about the crime for which A.A. had been arrested. The police should have known it was reasonably likely that A.A.'s mother would elicit incriminating responses from him. Although we find no evidence of bad faith on the part of the police, their words and actions set in motion A.A.'s incriminating statements to his mother. Under *Innis*, therefore, A.A. was subjected to the "functional equivalent" of express questioning while in custody. His statements, obtained without the benefit of any *Miranda* warnings, are thus inadmissible.

**[Page 783—Add to Note (1):]**

Litigation continues as to whether comments by defendants are sufficiently clear to invoke protections. The courts carefully scrutinize the precise words spoken. Consider *Smith v. Broughton*, 43 F.3d 702 (7th Cir. 2022), where the suspect was being interrogated about a stolen van; the questioning then shifted to a robbery. At that point the suspect said "I don't want to talk about this." The majority allowed the resulting statement to be admitted relying heavily on the limitation imposed by the Supreme Court.

> But the Supreme Court has likewise underscored that context is an important factor in the plain-meaning analysis.... "In law as in life ... the same words, placed in different contexts, sometimes mean different things." And ordinary listeners would know that the meaning of "I don't want to talk about this" depends on the answer to the question talk about what? Since Smith's statement left that crucial question unanswered, [the Supreme Court] recognizes that an ordinary listener must look to the broader context of the interrogation for the answer.

The dissent took a broader view.

> In *Miranda,* the Supreme Court made clear that if an individual "indicates in any manner, at any time" during an interrogation that he wishes to cut off questioning, "the interrogation must cease." The right to terminate questioning, the Supreme Court explained, is a "critical safeguard" that must be "'scrupulously honored.'" "Without it, an interrogator "through badgering or overreaching—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding [an individual's] earlier request" to terminate questioning.
>
> This case is a poster child for what *Miranda* and its progeny were designed to prevent. Adrean Smith, at the time eighteen years old, stated "I don't want to talk about this" and "I don't want to talk" multiple times. Smith's statements were all he needed to unambiguously invoke his right to terminate questioning. But instead of honoring Smith's request, Detective Travis Guy continued the interrogation and falsely asserted that he had a right to ask Smith questions. Eventually, Detective Guy obtained a confession. This was a violation of Smith's right to cut off questioning.

*See also*

- *State v. Pouliot*, 259 A.3d 798 (N.H. 2021): "no comment", ambiguous.
- *State v. McInnis*, 962 N.W.2d 874 (Mn. 2021): "I have nothing else to say now because now I feel like that I'm being —I'm a suspect and I don't wanna talk about this anymore because I know I didn't have anything to do with this," unambiguous.
- *Lee v. State*, 832 S.E.2d 851 (Ga. 2019): "Can I just wait until I get a lawyer", ambiguous.
- *Subdiaz-Osorio v. Humphreys*, 947 F.3d 434 (7th Cir. 2020): "How can I do to get an attorney here….", ambiguous
- *People v. Frederickson*, 457 P.3d 1 (Cal. 2020): "Hey, when am I going to get a chance to call my lawyer? It's getting late, and he's probably going to go to bed pretty soon", ambiguous.

In contrast to *Davis*, the Connecticut Supreme Court held that, under the state constitution, if the statement by the defendant is ambiguous, interrogation must cease. *State v. Purcell*, 203 A.3d 542 (Conn. 2019).

> It is well settled that the federal constitution sets the floor, not the ceiling, on individual rights…. Recognizing that the promise that dwell within *Miranda* can only be achieved by honoring the premises upon which it rests, we determine that there are compelling reasons to conclude that *Davis*' standard does not adequately safeguard *Miranda*'s right to the advice of counsel during a custodial interrogation. We therefore hold that, consistent with our precedent and the majority rule that governed prior to *Davis*, our state constitution requires that, ''if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel."

**[Page 800—Add to the end of note (5):]**

Even issues of waiver that do not involve minors can prove difficult when law enforcement officers suggest that a suspect will experience no negative consequences from waiving and speaking. Consider People v. Smiley, __P. 3d __, 2023 WL 3943035 (Colo. 2023) and the sharp disagreement as to the waiver question . There "Detective Hawkins immediately said, 'You're not in trouble. You are leaving here today.' Detective Silva repeated, 'You're leaving here today.' And Detective Hawkins reiterated a third time, 'You're leaving here today.'" The defendant then signed a waiver form.

> The trial judge suppressed the resulting incriminating statement.

[A]n affirmative misrepresentation about the gravity of a person's criminal exposure and the reckless disregard of the truth or falsity concerning an individual's freedom are inherently

coercive and are the precise types of trickery and/or cajoling that the Miranda court observed would be the antithesis of a voluntary waiver of the privilege against self-incrimination.

Do you agree? A majority of the Colorado Supreme Court did.

[A]ffirmative misrepresentations by law enforcement officers don't always invalidate a waiver. For example, courts have generally concluded that misrepresentations "involving facts of which a defendant has firsthand knowledge," such as the existence or strength of evidence, don't necessarily constitute coercion that undermines the voluntariness of a suspect's waiver of his Miranda rights.

[I]f a suspect is told he will go free even if he chooses to make a potentially inculpatory statement, he no longer needs to consider possible risks because he has, in essence, been told there aren't any....[T]he detectives immediately and repeatedly told Smiley he was not in trouble and would be leaving the police station that same day. They also said they only had to Mirandize him because they were from out of state. The detectives then read the Miranda advisement, and Smiley signed the waiver form. By telling Smiley that he was not in trouble and that he would be leaving the police station that day, the detectives were engaging in a form of psychological coercion for which the law has less tolerance.

Here, the detectives affirmatively and without condition told Smiley that he would be leaving the police station that day.... The detectives also downplayed the importance of the advisement and the rights contained therein. They told Smiley they only had to advise him because they were from out of state. Not only is this statement objectively false; it implied that the advisement was a mere formality.

The dissenters disagreed:

[T]he detectives weren't lying when they told Smiley before the interview that he was not in trouble and would get to leave at the end of the interview. At that time, he was not in trouble, even if it was possible that he might later be in trouble. And at that time, he was free to leave, even if it was possible that he could incriminate himself during the interview and thereby give the detectives probable cause to detain him.

But even assuming the detectives' statements constituted affirmative misrepresentations, as the majority concludes, they did not so taint Smiley's Miranda waiver as to render it involuntary under the totality of the circumstances. At most, the detectives' statements lulled Smiley into feeling comfortable and safe. But that does not constitute coercion—psychological or otherwise. "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within Miranda's concerns."

Smiley had not been arrested, and the detectives simply told him that he wasn't in trouble and would be able to leave the station "today"—i.e., at the end of the interview. Those statements

said nothing about what might happen later, including whether Smiley might be charged and prosecuted, and if so, whether he'd receive leniency. "A court will not . . . readily imply an improper promise . . . from vague or ambiguous statements by law enforcement officers."

## Chapter 6

## Vindicating Constitutional Violations

### § 6.01 Standing

**[Page 827, Add between notes 2 and 3]**

What happens if law enforcement conducts a warrantless search at the home of the defendant's brother? Five DEA agents and a K9 unit executed a warrantless search of the home and garage of Mario and Monica Arreola-Alvardo. Agents found heroin and cocaine. Although Mario was charged with drug crimes for drugs found in the garage during the search, the charges were later dropped when he successfully moved to suppress. Six months later, a grand jury indicted Mario's brother, Arnoldo. Arnoldo had never lived at Mario's home, but Arnoldo possessed the only other key to the garage, where the drugs were found. The brothers had also remodeled the garage together, and they spent most work-day evenings in the garage drinking and listening to music. Arnoldo kept construction tools in the garage, and he had hosted his daughter's baby shower in there too. Held: Arnoldo had the same standing as his brother to challenge the government's unlawful search. "By providing him the only other key, Mario shared his expectation of privacy with Arnoldo, including the 'ability to exclude others' that no one else —not even Mario's wife—had." *See United States v. Arreola-Alvardo*, 603 F. Supp. 3d 534 (E.D. Mich. 2022).

### § 6.02 The Exclusionary Rule(s)

### [D] The Limits to the Exclusionary Rules

[Page 859, Add to Note (3), after citation to *United States v. Allen*, 211 F.3d 970 (6th Cir. 2000) (en banc):]

In *United States v. Helton*, 35 F. 4th 511 (6th Cir. 2022), the Sixth Circuit Court of Appeals held that a search warrant had issued without the required probable cause. A Sheriff's deputy sought a search warrant for a home "stating only the following":

> Affiant has been an officer in the aforementioned agency for a period of 6 years and information and observations contained herein were received and made in his capacity as an officer thereof.
>
> Deputy Sam Mullins had received numerous drug complaints at the above residence that John Helton was selling methamphetamine. A reliable source advised he was at the residence a few days ago when a subject he was with purchased a half pound of methamphetamine. On 06/09/2019 deputies went to the residence of John Helton to execute a warrant. Upon arrival Helton had a clear baggie that appeared to had [sic]

> residue in it and a sum of US currency in small bills. This deputy has experience and knowledge that there is [sic] illegal narcotics on the property.

A county judge issued the warrant. The Sixth Circuit found probable cause lacking because the affidavit relied on information from an anonymous tip "sparse in detail and inadequately corroborated by the police." As a result, the court concluded that "the affidavit lacks the necessary indicia of both veracity and reliability for the tips." The court found additional flaws in the affidavit.

Nevertheless, the Sixth Circuit held that "the good faith exception articulated in United States v. Leon" saved the search.

**§6.03 The Fruit of the Poisonous Tree**

**[B] The "Tree" Matters**

**[Page 910—Add to Note (1):]**

The two-step process discussed in *Seibert*—and focused on by Justice Kennedy—continues to be litigated. In such a case, the "question is whether the government [can] prove[] by a preponderance of the evidence that . . . the detective 'did not deliberately withhold the requisite warnings as part of a calculated strategy to foil *Miranda*.'" *People v. Sumagan*, 284 Cal. Rptr. 3d 676 (Cal. App. 2021). The court in *Sumagang* found that *Miranda* was violated with a two-step process in which the officer questioned the suspect for 25 minutes without giving warnings, and then further questioned him after giving the warnings.

**Chapter 7**

**§ 7.02 The Right to Trial by Jury**

**[Page 946, Add to the end of the Note, at the end of the page:]**

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), a majority of the Court held that the Sixth Amendment applies to the states, through incorporation, "by way of the Fourteenth Amendment," and requires a unanimous jury of guilt in all serious criminal cases, undermining prior decisions of the Court. "[I]f the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court."

**§ 7.03 The Right to Confront Witnesses**
**[B] Use of Codefendants' Confessions**

**[Page 963, Add between notes (2) and (3):]**

The Supreme Court recently decided a third, post-Bruton redaction case. In **Samia v. United States**, 599 U.S. __ (Jun. 23, 2023), the Court held that the 6th Amendment Confrontation Clause was not violated when a non-testifying co-defendant's confession was admitted after it was modified to avoid directly identifying a non-confessing defendant and the trial court instructed the jury that they should consider the confession only as to the confessing defendant. The government elicited testimony from the law enforcement agent that the confessing defendant said that he and "the other person he was with pulled the trigger on that woman in a van that he and Mr. Stillwell [the third of three defendants] was driving."