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A Need for a New Fifth Amendment Custodial Interrogation Formula: *United States* ex rel. *Church v. De Robertis*

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CASENOTES

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I. INTRODUCTION

Michael Church and his younger brother Casey were arrested and arraigned on Friday, August 10, 1974, on charges of aiding and abetting the prison escape of their older brother, Kelly.[1] Police detectives read Michael his *Miranda*[2] warnings and attempted to question him about a recent unrelated murder.[3] The suspect, however, refused to discuss the offense.[4] The following morning, the detectives contacted Michael's court appointed attorney and requested permission to question Michael about the murder. The attorney instructed the detectives not to speak with his client until Monday morning when he would have the opportunity to consult with his client. The detectives agreed to wait until after the weekend to interrogate Church.[5]

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1. United States *ex rel.* Church v. De Robertis, 771 F.2d 1015, 1017 (7th Cir. 1985).
2. Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* requires that the accused:
> [M]ust be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.

Id. at 479.
3. *Church*, 771 F.2d at 1017.
4. United States *ex rel.* Church v. De Robertis, No. 83 C 4512, slip op. at 2 (N.D. Ill. June 14, 1984).
5. *Id.* at 3; People v. Church, 102 Ill. App. 3d 155, 158, 429 N.E.2d 577, 580 (1981).

That night, the police arrested Kelly on the escape charge.[6] The police told Kelly that Casey had a "lot of heavy stuff to lay on him"[7] and placed him in Casey's cell. On Sunday morning, Kelly told the police that if they put him in Michael's cell, he would persuade Michael to make a statement.[8] That evening, the police placed Kelly in Michael's cell knowing that he would attempt to elicit a statement from his younger brother.[9] Kelly told Michael to make a statement in order to get Casey out of trouble.[10] Late that night, Kelly called the jailer to notify the detectives that Michael wished to speak with the detectives.[11] Once the detectives arrived, Michael stated that he would talk to them.[12] The detectives did not inform Michael that his attorney had instructed them not to question him about the murder. Moreover, the officers did not tell Michael that the attorney planned to meet with him the next morning about the murder.[13] Michael received the *Miranda* warnings and stated that he did not want an attorney.[14] The officers did not question Michael, but left him with pencil and paper with which Michael wrote an eleven page confession.[15]

Michael Church was indicted and convicted for murder and armed violence.[16] On appeal, he argued that the trial court erred in admitting his handwritten eleven page confession because he had not

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The attorney did not know he was representing Michael until the detective contacted him on Saturday morning. *Church*, No. 83 C 4512, slip op. at 3.

6. Kelly was arrested in the home of his parents. The parents were quite worried about Casey Church because he had never before been incarcerated. Kelly assured his parents that he would find out why Casey was in trouble. *Church*, 771 F.2d at 1017; *Church*, No. 83 C 4512, slip op. at 3-4.

7. *Church*, No. 83 C 4512, slip op. at 4. According to the officer, his comment to Kelly referred to Casey's alleged involvement in the murder. *Id.*

8. Brief and Appendix of Petitioner-Appellant at 6 n.*, United States *ex rel.* Church v. De Robertis, 771 F.2d 1015 (7th Cir. 1985). Michael was not present during this discussion. The brief paraphrases this undisputed fact from the unpublished memorandum opinion of the district court. *Church*, No. 83 C 4512, slip op. at 21. There was some controversy surrounding the events of the case. *See infra* note 80.

9. *Church*, 771 F.2d at 1017.

10. *Id.*

11. Brief and Appendix of Petitioner-Appellant at 6 n.**, *Church*.

12. *Church*, 771 F.2d at 1017.

13. *Id.* at 1018.

14. *Id.*

15. *Id.*

16. The defendant was sentenced to concurrent sentences of forty years on each count after a jury trial in the Illinois Eleventh Judicial Circuit. Brief and Appendix of Petitioner-Appellant at 2, *Church*. Before trial, Church filed a motion to suppress his handwritten confession. He argued that he had not effectively waived his right to remain silent and thus was denied effective assistance of counsel. To support his proposition, Church relied on Massiah v. United States, 377 U.S. 201 (1964). The trial court denied the suppression motion, holding that *Massiah*, a sixth amendment case, was inapplicable because Church's sixth

effectively waived his right to remain silent and to have an attorney present during the "custodial interrogation" that the police conducted. Further, Michael claimed that the state denied him effective assistance of counsel because his attorney was not present when he wrote the confession.[17] The Illinois Appellate Court affirmed the conviction[18] and the Illinois Supreme Court denied leave to appeal.[19] Church then filed a petition for writ of habeas corpus in federal district court. The district court denied Church's motion for an evidentiary hearing and summary judgment finding that he had exhausted all claims raised in his habeas corpus action.[20] The Seventh Circuit Court of Appeals affirmed, holding that the confession was admissible. The court reasoned that the police's conduct in placing Michael in a jail cell with his brother, who the police knew would elicit a statement from the suspect, did not constitute a custodial interrogation. Moreover, because a custodial interrogation did not occur, neither the police's failure to inform Michael that his attorney planned to meet with him the next morning nor their failure to contact the attorney before Church made his statement rendered the confession invalid. *United States ex rel. Church v. De Robertis*, 771 F.2d 1015 (7th Cir. 1985).

In *Miranda v. Arizona*,[21] the Supreme Court of the United States held that the prosecution cannot use a suspect's statements elicited during a custodial interrogation in a criminal trial unless the state has provided certain procedural safeguards to protect the suspect's fifth amendment rights.[22] This note examines the *Church* decision in light of these procedural safeguards. First, it will examine what constitutes

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amendment rights had not attached with regard to the murder charge. People v. Church, No. 79-CF-195 (Ill. 11th Jud. Cir. May 8, 1980) (order denying motion to suppress).

17. People v. Church, 102 Ill. App. 3d 155, 161, 429 N.E.2d 577, 582 (1981).

18. *Id.* at 168, 429 N.E.2d at 587. The court held that "[t]he right to counsel is a personal one inhering in the accused . . . that [when] retained counsel is not notified of his client's choice to forego assistance does not invalidate an otherwise valid waiver." *Id.* at 161, 429 N.E.2d at 582. Relying on *Brewer v. Williams*, a sixth amendment waiver case, the state appellate panel further held that the state met its heavy burden of proving Church's intentional relinquishment and abandonment of his known right. People v. Church, 102 Ill. App. 3d at 162, 429 N.E.2d at 582 (relying on Brewer v. Williams, 430 U.S. 387 (1977)). Finally, the court noted that the detective lacked candor in withholding the fact that Church's appointed counsel had instructed the police not to question him. Nevertheless, the detective's inaction was not "likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291 (1980) (formulating test to determine whether a custodial interrogation had occurred for fifth amendment purposes).

19. Brief and Appendix of Petitioner-Appellant at 2, *Church*.

20. United States *ex rel.* Church v. De Robertis, No. 83 C 4512, slip op. at 2, 45 (N.D. Ill. June 14, 1984); Brief and Appendix of Petitioner-Appellant at 1, *Church*.

21. 384 U.S. 436 (1966).

22. *Id.* at 479; *see supra* note 2.

a custodial interrogation and apply the tests and policy rationales associated with *Miranda* and its progeny to the factual circumstances in *Church*. The author then promotes an additional fifth amendment safeguard designed to close the loophole in the current standards that permits the police to employ a "dupe" to elicit a statement from a suspect. Finally, the note explores an issue, which the Supreme Court recently addressed, that *Church* left unresolved. Here, the author comments on the validity of a fifth amendment waiver when the police do not inform a suspect that they have agreed to refrain from questioning him until after his attorney has had the opportunity to meet with him.

II. PERSPECTIVE

A. *Custodial Interrogation*

The fifth amendment provides that a criminal suspect may not be forced to incriminate himself.[23] In *Miranda*, Chief Justice Warren warned against the privacy associated with police questioning procedures.[24] He found that privacy often leads to secrecy, and secrecy to compulsion. The Chief Justice was concerned that psychological interrogation methods and police trickery would result in involuntary confessions. He concluded that without procedural warnings, the compelling nature of an in-custody interrogation could easily overbear an individual's will to resist compulsion.[25]

The Court sought to overcome the subtle coercion resulting from custodial interrogation by requiring law enforcement personnel to inform suspects of their fifth amendment rights before questioning. In protecting the "evidentiary value of confessions or inculpatory statements,"[26] the safeguards sought to ensure the voluntary nature of a suspect's statements. Without the safeguards, a court could not be

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23. *Miranda*, 384 U.S. at 439, 457-58. The fifth amendment provides in relevant part: "No person shall . . . be compelled, in any criminal case, to be a witness against himself . . . ." U.S. CONST. amend. V.

24. *Miranda*, 384 U.S. at 448.

25. *Id.* at 479. Chief Justice Warren conducted a comprehensive analysis of police interrogation methods and procedures in order to understand the custodial interrogation atmosphere. He found that most questioning took place in discrete, private circumstances. He learned that the strategy of interrogators was to "keep the subject off balance . . . [and] then to persuade, trick, or cajole him out of exercising his constitutional rights." *Id.* at 455. *See also* Moran v. Burbine, 54 U.S.L.W. 4265, 4270-80 (U.S. Mar. 10, 1986) (No. 84-1485) (Stevens, J., dissenting).

26. *Id.* at 458. For an excellent illustration of the type of environment that may lead to coercion, see United States v. Mesa, 638 F.2d 582 (3d Cir. 1980).

assured that a confession was the product of a free choice.[27]

The majority defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[28] Courts must analyze the complete facts of the case before determining whether the defendant's statements were the product of a custodial interrogation.[29]

Essentially, a court must conduct a two part test to determine the presence of custodial interrogation. First, the court must determine whether the accused was in custody or deprived of his freedom in a significant way.[30] In *California v. Beheler*,[31] the Supreme Court sought to clarify the custody standard. The Court held that the ultimate inquiry for the purposes of receiving *Miranda* warnings "is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[32]

In the second phase of its analysis, a court must determine whether there was an interrogation.[33] Here, the question is: Did the police's attempt to elicit information from the suspect rise to the level of express questioning? The Supreme Court sharpened the definition of interrogation in *Rhode Island v. Innis*.[34] The Court held that the

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27. Smith, *The Threshold Question in Applying* Miranda: *What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699, 702 (1974).

28. *Miranda*, 384 U.S. at 444. *See also* Kamisar, Brewer v. Williams, Massiah *and* Miranda: *What is Interrogation? When Does it Matter?*, 67 GEO. L.J. 1, 50 (1978) (*Miranda* protects against police compulsion created by police questioning).

29. United States v. Thierman, 678 F.2d 1331, 1334 (9th Cir. 1982) (crucial factual determination must be made in light of all circumstances in case).

30. The *Miranda* Court defined custody as incarceration or deprivation of freedom in any significant way. *Miranda*, 384 U.S. at 444. In Orozco v. Texas, the Court expanded the meaning of custody by applying *Miranda* to a person under arrest in his own home. 394 U.S. 324 (1969).

In Oregon v. Mathiason, the Court held that police are required to give *Miranda* warnings only where there has been such a restriction of freedom as to render the accused "in custody." 429 U.S. 492, 495 (1977) (per curiam). The Court held that a suspect was not in custody where he voluntarily came to a police station for questioning and was allowed to depart without restriction. *Id.* at 495. The Court implied that *custody* leads to the coercive atmosphere to which *Miranda* applies. *Id.*

31. 463 U.S. 1121 (1983) (per curiam). *See also* Project, *Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-1984*, 73 GEO. L.J. 225, 373 & nn.671-79 (1984) (courts use different tests to determine whether suspect is in custody for fifth amendment purposes); Project, *Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1982-1983*, 72 GEO. L.J. 249, 340-41 & nn.592-600 (1983).

32. *Id.* at 1125 (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).

33. *Miranda*, 384 U.S. at 444.

34. 446 U.S. 291 (1980). In *Innis*, three different police officers administered the *Miranda* warnings to the suspect after his arrest. The suspect stated that he understood his rights and wanted to speak with an attorney. *Id.* at 293-94. Once he invoked his rights, Innis was placed

Miranda protections apply "whenever a person in custody is subjected to either express questioning or its functional equivalent."[35] According to the *Innis* majority, the use of custodial interrogation in *Miranda* "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally associated with arrest and/or custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[36] In determining whether police conduct constituted the functional equivalent of express questioning, the *Innis* test[37] examines the

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in a caged van with two police officers who were instructed not to question, intimidate or coerce him in any way. *Id.* at 294. During the ride to police headquarters, Innis overheard the conversation of the two officers. The officers spoke of the danger that the lost murder weapon would pose to young handicapped children in the area. *Id.* at 294-95. Innis became concerned about the safety of the children and eventually told the officers that he would show them where the weapon was located. Once again, the officers administered the *Miranda* warnings to Innis and he then led the officers to the weapon. *Id.* at 295. Innis was convicted of murder. The Supreme Court of Rhode Island reversed the conviction, holding that the conversation about the dangerous weapon violated the suspect's rights. The court stated that Innis had been subjected to "subtle coercion" that was essentially equivalent to custodial interrogation. *Id.* at 296. Hence, the officers had violated his fifth amendment right to counsel. *Id.* at 296-97. The Supreme Court of the United States reversed the state court holding that the police did not interrogate Innis. *Id.* at 302-03.

35. *Id.* at 300-01.

36. *Id.* at 301. In United States v. Thierman, the court held that an officer's discussion of possible consequences of a suspect's failure to cooperate did not constitute interrogation even though one officer "guessed" he was attempting to get the suspect to respond. 678 F.2d 1331, 1333-34 (9th Cir. 1982). *See also* United States v. Bailey, 728 F.2d 967, 969-70 (7th Cir.), *cert. denied*, 104 S. Ct. 2686 (1984) (no interrogation where officer passively listened to bulk of conversation that defendant initiated).

37. There have been several interpretations of the *Innis* test. 1 W. LA FAVE & J. ISRAEL, CRIMINAL PROCEDURE, 491-94 (1984); White, *Interrogation Without Questions*: Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1231-32 (1980). Professor White suggests an "objective" approach. Under his theory, interrogation exists when a policeman should realize that the suspect will view his actions as designed to elicit an incriminating response. *Id.* at 1231-32.

Professor White adds two caveats to the objective test. First, the objective observer's analysis will be dependent upon the extent of his knowledge of police interrogation tactics. Second, if the police are not aware of a suspect's "peculiar characteristics," the suspect may comprehend the police conduct differently than would the objective observer. *Id.* at 1235 n.162. Thus, any knowledge the police may have concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor for a court to consider. *Innis*, 446 U.S. at 302 n.8. To determine whether an interrogation has taken place, Professor White asks whether "an objective observer (with the same knowledge of the suspect as the police officer) would, on the sole basis of hearing the officer's remarks, infer that the remarks were designed to elicit an incriminating response." White, *supra* note 37, at 1232.

Professor Kamisar would view the atmosphere of police questioning from the suspect's perspective.

> In the "jail plant" or other "undercover" situations, however, there is no *integration* of "custody" and "interrogation," . . . at least . . . in the suspect's mind. So far as the suspect is aware, he is not "surrounded by antagonistic forces"; "[t]he presence of an attorney, and the warnings delivered to the

actions and peculiarites of the suspect and, simultaneously considers the intent of the police.[38] Determination of the police officer's intent assists the court in deciding whether the officer "should have known that [his] words or actions were reasonably likely to evoke an incriminating response."[39]

In *Berkemer v. McCarty*,[40] the Court appears to have developed a suspect-oriented test to determine whether a person has been induced to speak during police questioning. The test examines a suspect's expectations during police interrogation. The Court found that in certain interactions with the police, individuals do not believe that they are solely at the mercy of the officers.[41] Rather, certain interchanges reduce "the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and [diminish] the [suspect's] fear that, if he does not cooperate, he will be subjected to abuse."[42] If the suspect, therefore, does not believe he is under compulsion or in custody *Miranda* does not come into play. Indeed, *Miranda* rights have been held inapplicable in situations where a suspect made incriminating statements while the police were eavesdropping from a distant place[43] and in jail plant cases.[44]

> individual" are not needed to "enable [him] under otherwise compelling circumstances to tell his story . . . in a way that eliminates the evils in the interrogation process." . . .
>
> So far as the suspect is aware, his fellow prisoner neither controls his fate, nor has a professional interest in his case. . . . [H]is fellow prisoner does not care whether he confesses. . . . Moreover, even if the fellow prisoner did care, and cared a great deal, there is no reason to think that he possesses the power over the suspect or the necessary skills and training to press demands and to weary the suspect with contradictions of his assertions until the case "is brought to a definite conclusion."

Kamisar, *supra* note 28, at 64-65 (citations omitted) (brackets in original).

See also Note, *What Constitutes Interrogation?*: Rhode Island v. Innis, 22 B.C.L. REV. 1177, 1181 (1977) (*Miranda* views interrogation environment from suspect's perspective).

38. Courts will focus on the perceptions of the suspect in determining whether police action is reasonably likely to elicit an incriminating response. *Cf.* United States v. Booth, 669 F.2d 1231, 1238 (9th Cir. 1981) (intent of the police is relevant). *See also* W. LA FAVE & J. ISRAEL, *supra* note 37, at 499-501, 510 (discussing the functional equivalent test).

39. *Innis*, 446 U.S. at 302 n.7.

40. 104 S. Ct. 3138 (1984).

41. *Id.* at 3150.

42. *Id.*

43. W. LA FAVE & J. ISRAEL, *supra* note 37, at 513-14 (police eavesdropping of suspect's jail cell is not interrogation).

44. United States v. Surridge, 687 F.2d 250, 255 (8th Cir.), *cert. denied*, 459 U.S. 1044 (1982) (no affirmative police duty to prevent a person from providing assistance as long as no police direction, control or involvement). *But cf.* White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979). Professor White argues the need for per se rules to prohibit unfair interrogation methods. He notes the "unique police opportunity to exploit the

B. *The Right to Counsel During Custodial Interrogation*

Chief Justice Warren recognized that modern police interrogation techniques can be extremely sophisticated. The Court found that law enforcement techniques are rarely physically oriented.[45] Rather, the police will often attempt to overcome a suspect's will through psychological techniques.[46] Later, the Court also recognized that the police are able to provoke a response through means other than "express questioning."[47] The Court believed coercion was greatest when counsel was not present during a custodial interrogation.[48]

To overcome these psychological interrogation techniques, the Court in *Miranda* held that a suspect has a fifth and fourteenth amendment right to have counsel present during custodial interrogation.[49] That right may be exercised before or during any part of an interrogation.[50] Once a suspect has received the *Miranda* warnings, he may voluntarily waive his right to have an attorney present, and to make a statement or answer any questions that law enforcement personnel present.[51] The Court reasoned that a suspect's voluntary confession is not compelled and is, therefore, admissible.[52]

C. *Waiving Fifth Amendment Rights*

A court weighs the totality of factors presented in the case to determine the validity of an individual's waiver of his fifth amendment rights.[53] A court must additionally consider the "background,

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[incarcerated] suspect's vulnerability" by "select[ing] people with whom he can confide." *Id.* at 605.

45. *Miranda*, 384 U.S. at 448. The Court stated that " '[s]ince Chambers v. Florida, 309 U.S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.' " *Id.* at 448 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

46. White, *supra* note 37, at 1211. *See also* Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 113 (*Miranda* guards against the possibility of the coercive atmosphere of custodial interrogations eliciting untrue and unreliable statements.). For an older decision underscoring the Court's long-time concern with psychologically induced confessions, see Chambers v. Florida, 309 U.S. 227 (1940).

47. The Court stated that the *Miranda* safeguards come into play with the "functional equivalent" of express questioning. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

48. *Miranda*, 384 U.S. at 465-66.

49. *Id.* at 474.

50. *Id.* at 473-74.

51. *Id.* at 475-76, 479.

52. *Id.* at 478.

53. A waiver must be voluntarily, knowingly and intelligently made. Voluntariness implies the waiver "was the product of a free and deliberate choice rather than intimidation, coercion or deception. . . . [T]he waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 54 U.S.L.W. 4265, 4267 (U.S. Mar. 10, 1986) (No. 84-1485).

experience and conduct of the accused."[54] In *Edwards v. Arizona*,[55] the Court held that a waiver is valid where a suspect who had previously invoked his right to have counsel present during interrogation, initiates further discussion about the offense with the police.[56] The state, however, will not meet its heavy burden of proving a "knowing and intelligent relinquishment or abandonment of a known right"[57] when the suspect merely responds to police initiated questioning or conduct designed to elicit a response.[58]

The *Edwards* Court noted that additional safeguards are needed when a suspect requests counsel, but left unresolved the issue of what constitutes an *intelligent* waiver.[59] Generally, the right to counsel is recognized as a personal one, belonging to the accused and not his attorney.[60] The *Edwards* Court cited various lower court opinions with approval which held that an individual, acting alone, may waive a previously invoked right to counsel, even when he has never actu-

54. North Carolina v. Butler, 441 U.S. 369, 374-75 (1979) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). *See also* United States v. Voice, 627 F.2d 138, 145 (8th Cir. 1980) (waiver determined on facts and circumstances surrounding the case, including the suspect's background, experience, and conduct); *Miranda*, 384 U.S. at 478 (fifth amendment does not bar voluntary confessions). Lengthy interrogation or incommunicado incarceration is strong evidence that the accused did not validly waive his rights as are threats, trickery, or evidence that a suspect was cajoled into a waiver. *Id.* at 476. *See* Fare v. Michael C., 442 U.S. 707, 729-30 (1979) (Marshall, J., dissenting) (A juvenile's request to speak with probation officer serves as both an attempt to receive advice and a general invocation of the right to remain silent.).

55. 451 U.S. 477 (1981).

56. *Id.* at 484-85. Prior to *Edwards*, the Court applied a voluntariness standard. *Miranda*, 384 U.S. at 475, 479; *see also* U.S. v. Hackley, 636 F.2d 493, 499 (D.C. Cir. 1980) (courts look to totality of circumstances to determine if statement was made voluntarily and whether confession was product of rational intellect and free will); U.S. v. Voice, 627 F.2d 138, 145 (8th Cir. 1980) (government has heavy burden to prove suspect has voluntarily waived his *Miranda* rights).

The voluntariness, or *Johnson*, rule required both knowledge and intent. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 491-92 (1981). *See also* Case Comments, CONSTITUTIONAL LAW — *Knowledge of Counsel's Efforts to Contact Suspect Not Required for Knowing Waiver of Fifth Amendment Rights* — State v. Burbine, 451 A.2d 22 (R.I. 1982), 17 SUFFOLK U.L. REV. 313, 317 n.26 (1983) (reviewing the waiver issue); Recent Decisions, *Constitutional Law —Sixth Amendment — Waiver of the Right to Counsel*, 18 DUQ. L. REV. 999, 1001 (1980) (resolution of waiver issue requires totality of circumstances analysis which provides greater flexibility than a per se rule).

57. *Edwards*, 451 U.S. at 482.

58. *Id.* at 484-85. *But see* United States v. Madison, 689 F.2d 1300, 1307 (7th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983) (defendant voluntarily waived both his right to remain silent and to counsel where after invoking them he subsequently initiated contact with the police and again refused the presence of counsel); McCree v. Housewright, 689 F.2d 797, 802-03 (8th Cir.), *cert. denied*, 460 U.S. 1088 (1982) (government met its "heavy" burden of proving defendant knowingly and intelligently waived his right to have counsel present during interrogation where he repeatedly refused this right).

59. *Edwards*, 451 U.S. at 484 & n.8.

60. *See infra* notes 61-62.

ally conversed with his attorney.[61] If the *Church* court had found custodial interrogation, it would have had to address the validity of Michael's waiver in the absence of counsel. After years of conflicting lower court opinions,[62] the Supreme Court recently settled this issue in *Moran v. Burbine*.[63] In *Burbine*, the police interrogated the suspect after informing the suspect's attorney that an interrogation would not take place in her absence. The Supreme Court held that the police's failure to inform the incarcerated suspect that the attorney retained for him was seeking to counsel him, did not invalidate his waiver of his fifth amendment right to counsel because Burbine had received *Miranda* warnings before interrogation.[64] The Court saw the issue as whether the police conduct "deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."[65] Writing for the majority, Justice O'Connor said: "Although highly inappropriate, even deliberate

61. *Edwards*, 451 U.S. at 486 n.9. The Court cited cases that generally hold that a person in custody who has previously requested counsel may knowingly and voluntarily decide he no longer wishes to be represented by counsel. *Id. See also* Wyrick v. Fields, 459 U.S. 42 (1982) (waiver of right to have counsel present at polygraph exam was knowing, intelligent and voluntary where accused understood that right and was aware he could conclude questioning at any time); United States v. Springer, 460 F.2d 1344, 1350 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972) (court rejected contention that defendant may not be interviewed without prior notice to or consent of attorney).

62. Jones v. United States, 342 F.2d 863, 871 (D.C. Cir. 1964) (failure to inform counsel of an impending examination deprived defendant of assistance of counsel at a crucial time); United States *ex rel.* Magoon v. Reincke, 304 F. Supp. 1014, 1018 (D. Conn. 1968), *aff'd*, 416 F.2d 69 (2d Cir. 1969) (when counsel asks police to cease interrogation until he is present, he speaks "in behalf of his client" and all interrogation must cease until the attorney is present). "[T]o admit into evidence statements thereafter obtained from the accused by police interrogation in the absence of counsel violates the defendant's constitutional rights." *Id.* at 1019; Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. July 23, 1985) (No. 85-23) (where police know that retained counsel is present, seeking to provide legal assistance, failure to inform suspect of this fact renders any statements derived thereafter inadmissible); Elfadl v. State, 61 Md. App. 132, __, 485 A.2d 275, 280-81 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. July 23, 1985) (No. 85-24) (same); Dunn v. State, 696 S.W.2d 561 (Tex. Crim. App. 1985), *petition for cert. filed*, 54 U.S.L.W. 3272 (U.S. Oct. 22, 1985) (No.85-587) (failure to inform suspect that attorney retained by family was attempting to offer assistance invalidated waiver of fifth amendment rights). *But see* Fuentes v. Moran, 733 F.2d 176 (1st Cir. 1984) (where police did not inform defendant that his attorney had made inquiry regarding his status, interrogation without presence of counsel is permissible, but heavy burden rests on government to demonstrate that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain counsel); Coughlan v. United States, 391 F.2d 371 (9th Cir. 1968) (statement, admission, or confession by a defendant who is represented by an attorney is admissible even though law enforcement personnel did not timely advise the attorney of proposed interrogation).

63. 54 U.S.L.W. 4265 (U.S. Mar. 10, 1986) (No. 84-1485).

64. *Id.* at 4268.

65. *Id.*

deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident."[66]

D. *A Note on the Sixth Amendment*

Once an adversarial relationship begins, the sixth amendment offers the protection of counsel to a criminal defendant.[67] Courts generally limit a suspect's sixth amendment right to counsel to a critical stage in the pretrial proceedings.[68] The most notable critical stage periods include those in which a formal charge, indictment, preliminary hearing, or arraignment has taken place.[69] Courts apply a higher

66. *Id.* at 4267. The potential for abuse of the Court's holding is alarming. As Justice Stevens expressed in dissent: "The possible reach of the Court's opinion is stunning. For the majority seems to suggest that police may deny counsel all access to a client who is being held." *Id.* at 4279 (Stevens, J., dissenting).

67. The sixth amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]." U.S. CONST. amend. VI. The amendment is effective whenever necessary to assure a meaningful defense. Maine v Moulton, 106 S. Ct. 477, 484 (1985) (sixth and fourteenth amendments guarantee right to assistance of counsel in adversarial system of criminal justice); United States v. Wade, 388 U.S. 218, 225 (1967) (accused has right to counsel at all critical stages once prosecution initiated).

68. A critical stage is a specific pretrial event in a criminal prosecution. Moss & Kilbreth, Maine v. Moulton: *The Sixth Amendment and Deliberate Elicitation: The State's Position*, 23 AM. CRIM. L. REV. 59, 63 (1985). The sixth amendment attaches at or after initiation of adversary proceedings. United States v. Gouveia, 104 S. Ct. 2292 (1984); Kirby v. Illinois, 406 U.S. 682, 688 (1972).

69. Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (limiting sixth amendment right to counsel to period "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment"). In Massiah v. United States, the Court held that the admission of statements into evidence that the prosecution "deliberately elicited" from the accused in the absence of his attorney after indictment or arraignment violated the suspect's sixth amendment right to counsel. 377 U.S. 201, 206-07 (1964). *Massiah* involved the use of an undercover agent in a non-custodial setting. Several months later in Escobedo v. Illinois, the Court, at first glance, seemed to broaden the application of the sixth amendment. 378 U.S. 478, 485 (1964). The state had not begun adversarial proceedings against Escobedo when the police denied him the opportunity to consult with his attorney. *Id.* at 481-82, 485. While the narrow holding was tied to its facts, the majority suggested that the right to counsel under the sixth amendment may attach prior to indictment. The precise period, however, was unclear. The majority opinion implied that the right attaches as the process shifts from an "investigatory" relationship to an "adversarial" one and the purpose of the questioning is to elicit a confession. *Id.* at 486-87, 490-91. In a compelling dissent, Justice Stewart stressed that one's sixth amendment rights commence with formal, meaningful judicial proceedings. *Id.* at 493-94 (Stewart, J., dissenting). In *Kirby*, a sharply divided Court endorsed Justice Stewart's line and limited *Escobedo* to its distinct facts. *Kirby*, 406 U.S. at 689. *See* W. LA FAVE & J. ISRAEL, *supra* note 37, at 460-66. *But cf.* Kamisar, *supra* note 28, at 81 (right to counsel should not turn on arbitrary point); Note, *Pretrial Rights to Counsel Under the Fifth and Sixth Amendments: A Distinction Without a Difference*, 12 LOY. U. CHI. L.J. 79, 106-07 (right to counsel should extend to pre-arraignment period).

standard to the waiver of one's sixth amendment rights than to the waiver of one's fifth amendment rights.[70] This is in part due to a belief that a violation of the sixth amendment is more severe.[71] In *Burbine* and *Innis*, the Court noted that the fifth and sixth amendment definitions of interrogation are not interchangeable because the policies behind each are distinct.[72] Moreover, while the custodial interrogation tests for the two amendments are similar they are not the same.[73] The sixth amendment right to counsel is not violated without interrogation or a *deliberate* effort to elicit information from the suspect.[74] Until recently, courts permitted the police to question a

70. *Miranda* warnings alone do not suffice to meet the "higher" standard of a sixth amendment waiver of the right to counsel. United States v. Brown, 699 F.2d 585 (2d Cir. 1983); Carvey v. LeFevre, 611 F.2d 19, 22 (2d Cir. 1979), *cert. denied*, 446 U.S. 921 (1980).

71. United States v. Wade, 388 U.S. 218, 226-27 (1967). *See supra* note 67.

72. Moran v. Burbine, 54 U.S.L.W. 4265, 4269-70 (U.S. Mar. 10, 1986) (No. 84-1485) (purpose of sixth amendment is to assure that accused is not left alone during criminal prosecution); Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980). At least one commentator argued that the right to counsel in both the fifth and sixth amendment contexts protects the accused from unfair law enforcement methods. Note, *supra* note 69, at 102-04 (rights of both amendments promote same objective and should provide similar protection).

73. For an explanation of the sixth amendment test, see *supra* note 67 & *infra* note 74 and accompanying text. The fifth amendment test is discussed in notes 34-44 and accompanying text.

74. In sixth amendment cases where the government intentionally placed a person in a cell in order to induce statements by another prisoner, courts have found the government conduct to constitute a "deliberate elicitation" of incriminating information. Such statements, therefore, are inadmissable into evidence. Wilson v. Henderson, 742 F.2d 741 (2d Cir. 1984) (intentionally placing an informant in a cell to elicit inculpatory statements from a suspect violates suspect's sixth amendment rights); United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980) (informant not transformed into agent, but government conduct in deliberately eliciting statements violated suspect's sixth amendment right to counsel). *But cf.* United States v. Panza, 750 F.2d 1141 (2d Cir. 1984) (no sixth amendment violation where informant acted on own volition, rather than in response to government solicitation); Thomas v. Cox, 708 F.2d 132, 135 (4th Cir.), *cert. denied*, 464 U.S. 918 (1983) (deliberate elicitation of comments by "self-initiated" informant motivated by conscience did not violate suspect's sixth amendment protection); United States v. Van Scoy, 654 F.2d 257 (3d Cir. 1981) (same).

In Brewer v. Williams, the Court held that a detective's comment directed to an arraigned suspect, who had invoked his right to counsel, concerning the need for a proper Christian burial for the victim constituted interrogation under the sixth amendment because the officer "deliberately and designedly set out to elicit information from" the suspect. 430 U.S. 387, 389 (1977). The defendant challenged his conviction on both fifth and sixth amendment grounds. The Court stressed that sixth amendment "protection would [not] have come into play if there had been no interrogation." *Id.* at 400. *See also* W. LA FAVE & J. ISRAEL, *supra* note 37, at 460-66; White, *supra* note 37, at 1214-15. The Court's holding caused some confusion in the lower courts. *Innis*, 446 U.S. at 300 n.4.

The Court clarified the issue with two 1980 decisions, *Innis* and United States v. Henry, 447 U.S. 264 (1980). In *Henry*, an informant was paid for information he gathered from Henry who had been indicted and incarcerated, after the police directed the informant not to question or initiate a discussion with the accused. *Henry*, 447 U.S. at 266. The Court held that the government violated the accused's sixth amendment right to counsel "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements

suspect who had been indicted for an unrelated offense with respect to his involvement in new criminal activity without infringing upon his right to counsel.[75] In *Maine v. Moulton*,[76] however, the Court appears to have curtailed the breadth of that standard.

III. APPLYING THE *MIRANDA-INNIS* SAFEGUARDS TO *CHURCH*

A. *Fifth Amendment Rights at Stake*

The *Church* court held that Michael Church could not claim an infringement of his sixth amendment right to counsel because the state had not yet initiated adversarial judicial proceedings relating to the *murder* charge against him.[77] Church had only been arraigned for assisting his brother's escape. Indeed, throughout his incarceration in the local jail, he was at most, merely a suspect in the murder until the time of his confession. Even though the court had arraigned Church

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without the assistance of counsel." *Id.* at 274. *See supra* notes 34-39 and accompanying text for a discussion of the *Innis* decision.

75. Prior to 1985, appellate courts did not grant indicted defendants broad protection for unrelated criminal activity. United States v. Moschiano, 695 F.2d 236 (7th Cir.), *cert. denied*, 464 U.S. 831 (1982) (no *Massiah* prohibition against the use of statements that relate to a new crime); United States v. Capo, 693 F.2d 1330, 1338-39 (11th Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983) (where defendant was arrested and indicted for one offense, incriminating evidence relating to another offense obtained in absence of counsel is admissible); United States v. Merritts, 527 F.2d 713 (7th Cir. 1975) (prosecution may use post-indictment statements, made without the assistance of counsel, which refer to new crime).

76. 106 S. Ct. 477 (1985). The Court held that:

> Once the right to counsel has attached and been asserted, the State must . . . honor it. . . . [A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.
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> . . . [K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, 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.
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> . . . The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes . . . . To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*.

Id. at 484-85, 487, 489. Apparently, the majority in *Moulton* refused to extend this new standard to fifth amendment cases. *Id.* at 489.

77. United States *ex rel.* Church v. DeRobertis, 771 F.2d 1015, 1016 n.1 (7th Cir. 1985).

on the aiding and abetting charge,[78] his sixth amendment rights were not at issue with respect to the murder because the police had not charged him with that crime.

Once the court concluded that only Church's fifth amendment rights were at issue, the court's primary concern was to determine whether or not there was a "custodial interrogation." If there had not been an interrogation, the court would not need to address the more troubling waiver issue.[79] While there was a certain degree of controversy surrounding the facts of the case,[80] the court concluded that there was "no reason to go behind the state courts' description of the events"[81] because the petitioner did not challenge the state court's findings of fact.[82] Still, it is not clear whether the court considered all

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78. *Id.* at 1017.

79. For a discussion of fifth amendment waiver, see notes 54-65 and accompanying text.

80. The Church brothers claimed that the police questioned Michael and called him a liar before he actually wrote out the confession. Each court, however, chose to believe the police version. United States *ex rel.* Church v. De Robertis, 771 F.2d 1015, 1018 (7th Cir. 1985). The police account of events is as follows: Michael told the detective he wanted to make a statement. The detective read him the *Miranda* warnings and Michael waived all rights including the right to counsel. The officers then departed, leaving Michael with pencil and paper on which he wrote an eleven page inculpatory statement. *Id.*

81. *Church*, 771 F.2d at 1018.

82. Unless subject to attack under 28 U.S.C. § 2254 (d), a federal court is bound to accept the state court's historical findings of fact. 28 U.S.C. § 2254(d) provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State . . . were parties, . . . shall be presumed to be correct, unless the applicant shall establish . . . or the respondent shall admit —
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> (1) that the merits of the factual dispute were not resolved in the State court hearing;
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> (2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;
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> (3) that the material facts were not adequately developed at the State court hearing;
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> . . . .
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> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
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> (8) or . . . the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: . . . [u]nless the existence of one or more of the circumstances . . . set forth . . . is shown by the applicant, otherwise appears, or is admitted . . . the burden shall rest upon the applicant to establish that the factual determination by the State court was erroneous.

Id.

In Sumner v. Mata, Justice Rehnquist held that the federalism policy behind § 2254(d) requires federal courts to defer to the state courts' factual determinations, especially where the federal court and the state appellate court evaluate an identical record. 449 U.S. 539 (1981). Recently, the Court reiterated this concept in Miller v. Fenton, 106 S. Ct. 445 (1985). "The

of the state trial court's findings of fact in light of the *Miranda-Innis* definition of custodial interrogation.[83] That is, the court looked at only some of the facts and applied only random portions of the *Miranda* and *Innis* decisions rather than looking at the overall policy rationales that formed the basis of these decisions.

In determining whether custodial interrogation exists, courts should consider the overall policy behind the safeguards of *Miranda* and its progeny.[84] The Seventh Circuit in *Church* ignored the *Miranda* and *Innis* decisions' concern with the potential for subtle coercion when police conduct custodial interrogations in the absence of counsel. Likewise, the court's analysis sidestepped the *Miranda* Court's concern with sophisticated, psychologically-induced interrogation methods that law enforcement personnel utilize to provoke self-incriminating statements. The *Church* court also negated the *Miranda* Court's concern with the voluntary nature of confessions.[85] Instead, the court concentrated only on official police trickery[86] and in finding none, held that there was no interrogation.

It is clear that Michael Church's confession met the first part of the *Miranda-Innis* custodial interrogation test. Throughout the period in controversy, Michael was incarcerated in the local jail.[87] Applying the *California v. Beheler*[88] standard, even though the police had not formally arrested Church for the murder, his restraint on the aiding and abetting charge was sufficient to constitute custody for fifth amendment purposes. Michael Church, therefore, was "in-custody" for the purpose of receiving the *Miranda* warnings.

Given the facts of this case, the interrogation analysis is significantly more complex than the custody test. Courts have recognized that not every attempt to elicit information should be regarded as tantamount to an interrogation.[89] The officers did not *explicitly* question

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law is therefore clear that state court findings on such matters [interrogation circumstances] are conclusive on the habeas court if fairly supported in the record and if the other circumstances enumerated in § 2254(d) are inapplicable." *Id.* at 453.

83. For a discussion of the facts that were before the court, see *supra* notes 8, 80 and INTRODUCTION.

84. For a discussion of the policy of fifth amendment procedural safeguards see *supra* notes 21-27 and accompanying text. *See also* United States v. Fioravanti, 412 F.2d 407, 413 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969) ("Thus, *Miranda* has created a presumption of coercion by the mere presence of the dual factors of a police-initiated interrogation and the defendant's being in custody.").

85. *See supra* notes 23-26 accompanying text.

86. *Church*, 771 F.2d at 1019.

87. *Id.* at 1017.

88. 463 U.S. 1121 (1983). *See supra* notes 31 & 32 and accompanying text.

89. Rhode Island v. Innis, 446 U.S. 291, 301-02 (1980); *see also* W. LAFAVE & J. ISRAEL,

Michael once he invoked his *Miranda* rights.[90] The case does, however, present police *conduct* which could rise to the level of the "functional equivalent" of express questioning.

Placing Kelly in Michael's cell when the police knew he was "reasonably likely to elicit an incriminating response" from his brother could be construed as custodial interrogation. Kelly told Michael that the only way to help their younger brother was for Michael to make a statement.[91] The court, however, inferred that Kelly's only motivation in eliciting Michael's confession was a desire for the three brothers to be incarcerated in the same cell. In fact, the court stated that this was the only apparent promise that the police made to Kelly.[92] The Seventh Circuit, therefore, reasoned that the police action in putting the two brothers together was not an interrogation, even though it was not normal police conduct.[93]

The court stated that Kelly was merely acting on behalf of the Church family and concluded that the only police intent, if any, in allowing Kelly to enter Michael's cell was to ease the concern of the Church family for young Casey.[94] Nonetheless, it is apparent from Kelly's statement to Michael that Kelly may have been motivated by a greater desire than the court implied. When compared to other cases in which family-induced confessions occurred, it is not at all certain that Kelly was acting solely on his family's behalf.[95] It is clear from the police's prior attempts to question Michael that they strongly desired his statement.[96]

Church presents a distinct contrast to other cases of family-

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supra note 37, at 505-06 (police may ask innocuous questions not intended to elicit inculpatory remarks).

90. *Church*, 771 F.2d at 1017.

91. *Id.*

92. *Id.* at 1019.

93. *Id.* at 1018.

94. *Id.* at 1019-20.

95. Two fifth amendment waiver cases are illustrative of factual situations in which the family induces the confession. In Watkins v. Callahan, the police advised Watkins of his rights and eventually allowed the suspect to use a telephone to call his attorney after he requested the assistance of counsel. 724 F.2d 1038, 1040 (1st Cir. 1984). Rather than calling counsel, Watkins, acting independently of official control or suggestions, spoke with his mother and sister for thirty minutes. *Id.* at 1040. He then informed the officer that he would give a further statement. *Id.* The court admitted his post-telephone inculpatory comments holding that there was no denial of his fifth amendment rights. *Id.* at 1042-43. In United States v. Shaw, after the repeated requests of the suspect's parents, FBI agents reluctantly met with a suspect who had previously asserted his right to counsel. 701 F.2d 367 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1419 (1984). The suspect stated that he, not his parents, initiated the interview. *Id.* at 376. The court admitted his inculpatory statements. *Id.* at 380.

96. Michael was a prime suspect. The police, however, had been unable to obtain inculpatory statements through direct questioning. *Church*, 771 F.2d at 1017.

induced confessions. In *Church*, the police controlled the environment that led to the questioning.[97] In other cases, either the family never spoke with the police, or if they had, the suspect was aware of that fact and made it clear that it was he, not the family, that had initiated the conversation that led to the inculpatory remarks.[98] The *Church* court did find that it was Michael who commenced contact with the police. This contact, however, occurred only after Kelly's private discussions with the police and only after he had called the police to Michael's cell.[99] Additionally, at the time of contact, the effects of the coercive environment were present and controlling. The facts of this case are therefore inapposite to those in other family-induced confession cases.

There are two alternative ways of viewing the police conduct. In one sense, Kelly became a police agent. In another, the police transformed him into a dupe. The Seventh Circuit rejected the former, finding that the detectives did not make, nor intend to make Michael their agent.[100] Nevertheless, the court could have viewed Kelly as a police dupe under the following scenario: If Michael was particularly susceptible to his older brother's influence, it is not at all difficult to imagine the extent of Kelly's ability to affect Michael's behavior. The police should have known Michael was susceptible to his older brother's influence because he had already assisted him in completing one crime.[101] The police would therefore need little ingenuity to manipulate the older brother's influence because they were well aware that the parents had discussed their deep concern for Casey with Kelly.[102] Hence, under this scenario, the family concern for Casey would be transformed into police conduct constituting the "fundamental equivalent" of express questioning. Rather than serving as a police agent, Kelly in a sense became a dupe for the police in an effective interrogation ploy that took advantage of familial trust.[103] If the dupe proposition is correct, improper police conduct is evident

97. From the time of Kelly's arrest, police actions set events in motion that eventually led to Kelly's virtual promise that he would induce a statement from Michael.

98. *See supra* note 95.

99. *See supra* text accompanying note 11.

100. *Church*, 771 F.2d at 1018-19. In his argument before the Seventh Circuit, appellant put forth the theory that the police used Kelly as an agent. Brief and Appendix of Petitioner-Appellant at 24-26, United States *ex rel.* Church v. De Robertis, 771 F.2d 1015 (7th Cir. 1985).

101. *Church*, 771 F.2d at 1017.

102. *Id.*

103. The police controlled Kelly's influence in the sense that they did not have to place Kelly in Michael's cell. Additionally, the police could have removed Kelly from the cell at any time. In his dissenting opinion in *Innis*, Justice Stevens noted that criminal suspects are susceptible to appeals to their conscience. He stated that an often successful interrogation

because through Kelly, the police elicited self-incriminating information from Michael after he invoked his rights. The Court, therefore, should have excluded Michael's statement.

Professor Kamisar recognized that "[i]t is the impact on the suspect's mind of the *interplay* between police interrogation and police custody—each condition *reinforcing* the pressures and anxieties produced by the other—that . . . makes 'custodial police interrogation' so devastating."[104] Even if Kelly was only a dupe for the police, the "interplay" between custody and conduct constituting interrogation was present. Michael was isolated in a jail cell unable to prevent the police from influencing him to confess.[105] While the average suspect has the right to terminate a police interrogation at any time,[106] Michael did not have this vital *Miranda* right. Even though Michael did not have to talk to his brother, he was, as the police knew, particularly subject to his brother's influence. The court, however, did not consider Kelly's affidavit in which he claimed to have "pressured" Michael both to waive his rights and to make the statement.[107] Because Michael could not prevent the police's use of Kelly, nor understand the nature of Kelly's ultimate motivations, it was possible to quickly and effectively overwhelm his will in contravention of the *Miranda* safeguards.[108] Under this "dupe-theory," the custodial interrogation test would be met if the police knew Michael was amenable to his older brother's influence. The court would then have had to reach the issue of whether Michael's waiver was knowing and effective.

On one hand, under Professor Kamisar's theory,[109] the facts of this case most likely did not present the type of coercive environment which *Miranda* and *Innis* sought to safeguard.[110] A strict view of the *Miranda* line of cases would hold that a coercive environment did not

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technique is an appeal to a suspect's sense of morality. Rhode Island v. Innis, 446 U.S. 291, 315 (1980).

104. Kamisar, *supra* note 28, at 63.

105. *Church*, 771 F.2d at 1017-18.

106. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

107. *Church*, 771 F.2d at 1018.

108. In discussing the indispensibility of the right to counsel, *Miranda* warned of in-custody situations where interrogators could overbear the suspect's will. *Miranda* sought to assure that one's right to remain silent "remains unfettered throughout the interrogation process." *Miranda*, 384 U.S. at 469.

109. *See supra* note 37.

110. In *Miranda* and its companion cases, each defendant, while in custody, was questioned by a prosecuting attorney, police officer, or a detective. *Miranda*, 384 U.S. at 445. Under a narrow view of *Miranda*, or one such that Professor Kamisar posits, the interplay between compulsion and custody would exist only if Michael perceived official compulsion through Kelly's provocation. *See supra* note 37.

exist because Michael was not under the impression that the police were compelling him to testify. Without some compulsive influence, the fifth amendment procedural safeguards do not come into effect.

Under a similar theory, if an objective observer were to view Kelly's conversations solely as a family matter, as did the court,[111] the only conversation upon which an interrogation can be measured is Michael's request to make a statement. Here, the objective observer would find no interrogation and the confession would be admissible.

On the other hand, by applying an objective theory similar to Professor White's,[112] it is possible for an objective observer to infer that Kelly's remarks (if he was a dupe) were reasonably likely to elicit an incriminating response. The feasibility of this conclusion is practical given the abnormal nature of the police conduct.[113] Under this theory, therefore, a violation of Michael's previously invoked fifth amendment rights occurred.

B. *The Waiver Issue*

Assuming the court had found that Church had been interrogated, it would then have had to determine whether his subsequent waiver was valid. Prior to being left with pencil and paper, the detectives gave Church the *Miranda* warnings and told him that the Court had appointed a lawyer for him.[114] Since the attorney did not know until the day before the confession that he was representing Church on the escape charge, it is more than reasonable to assume that Church did not actually know who would be providing legal assistance to him.[115] While reading the warnings shortly before Church wrote the confession, the police neglected to inform the suspect that his attorney planned to meet with him the following morning and that the police had agreed to his attorney's instruction not to speak with him. Moreover, the attorney was not informed that his client planned

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111. *Church*, 771 F.2d at 1019-20.

112. White, *supra* note 37, at 1232. For a discussion of Professor White's test, see *supra* note 37.

In another article, Professor White discussed a hypothetical in which a defendant could invoke Spano v. New York, to claim that his confession was involuntary because government deceit effectively precluded a "rational choice." White, *supra* note 44, at 605-06 (discussing Spano v. New York, 360 U.S. 315 (1959)).

113. *See supra* notes 9-15 and accompanying text.

114. *Church*, 771 F.2d at 1017, 1020.

115. Church's attorney had agreed to the police's request on Saturday to represent his client in questioning relating to the murder. The police were well aware that he would not be able to meet with his client until early Monday morning at the earliest. *See supra* note 5 and accompanying text.

to make a statement.[116] The facts of the case present the question of whether Church's "waiver" was intelligent and knowing, and thereby, valid.[117] The waiver must be considered in light of the fact that Church was not fully informed of circumstances that may have affected his ability to understand the nature of his decision to relinquish his previously asserted refusal to talk with the police.[118] Had the Seventh Circuit reached the waiver issue, it is probable that they would have had to address a similar issue to that framed in *Burbine*.[119] Even though the Supreme Court has now answered the waiver issue, the need for a revised custodial interrogation standard is still evident.

IV. COMMENT—THE NEED FOR A NEW STANDARD

Church highlights the difficulties associated with the current definition of custodial interrogation. Even if one agrees with the *Church* court that under current law there was no custodial interrogation, the case presents a disturbing loophole in the interpretation of the *Miranda* safeguards.

While Church was incarcerated, the police developed evidence implicating him in the murder.[120] He became a prime murder suspect while being held for another offense. Yet, the evidence relating to the murder may have been insufficient to file formal charges against him. Even if there had been sufficient evidence, it was possible for the police to delay indicting Church until they attained his statement.

The *Church* decision demonstrates the ease with which law enforcement personnel may circumvent the current custodial interrogation standards. Both jurists and commentators recognize that the the law enforcement community can manipulate the start of judicial proceedings.[121] This capacity may provide the government with the ability to establish arbitrary events that trigger fifth amendment protection. For that reason, there is a dangerous threat to the exercise of one's fifth amendment constitutional rights to counsel and silence. Professor Kamisar writes that the *sixth* amendment right to counsel

116. People v. Church, 102 Ill. App. 3d 155, 158, 429 N.E.2d 577, 580 (1981).

117. *See supra* notes 56-59 and accompanying text.

118. The Court in *Burbine* addressed a very similar factual situation. In dissent, Justice Stevens wrote: "Police interference with communications between an attorney and his client violates the due process requirements of fundamental fairness." Moran v. Burbine, 54 U.S.L.W. 4265, 4279 (U.S. Mar. 10, 1986) (No. 84-1485) (Stevens, J., dissenting).

119. For a discussion of *Burbine*, see *supra* notes 63-65 and accompanying text.

120. *Church*, 771 F.2d at 1017.

121. Kamisar, *supra* note 28, at 81.

should not turn on an arbitrary time.[122] Rather, he argues, "it should accomodate both the government's need for evidence and a suspect's need for 'a lawyer's help,' . . . It should concern itself with the 'overall fairness' of the 'interrogation' and the inherent coercion or potential for coercion in the situation."[123]

Professor Kamisar's sixth amendment argument is applicable to the fifth amendment cases. Courts should be more aware of the unfairness and coercion that may result from the incarceration environment. *Church* demonstrates a suspect's fundamental need for a lawyer's help in a fifth amendment case. In a *strict* critical stage[124] analysis, the inquiry into Michael Church's involvement in the murder was in an "investigatory" stage. Nonetheless, from the evidence that the police developed, it is feasible to interpret Church's position as interim, in a sense, a "pre-accusatory" stage.[125] The loophole presented in the *Church* decision is an inherent unfairness in the current state of the law relating to custodial interrogations. The process is unfair because Church's right to counsel had not *formally* attached,[126] under either the fifth or sixth amendments. He stood alone, at what was for *him*, a critical and lasting stage in his life.[127]

The decision demonstrates the need for a refined definition of custodial interrogation. A more rigid standard is needed to assure that government action, beyond normal police procedures, does not derogate one's previously asserted fifth amendment rights.[128] The standard would be applicable even though the police conduct may not meet a stringent reading of the custodial interrogation test. This proposal does not suggest that the police should have the responsibility of preventing family-induced confessions which the suspect's family *actually* induces. Rather, the proposal suggests that the police should not be able to elicit confessions *through* family members.

The standard advocated here would require the police to "scrupulously honor" both a suspect's right to remain silent[129] and, his pre-

122. *Id.*

123. *Id.* (citations omitted).

124. For a definition of a critical stage, see *supra* note 68.

125. The police knew Church was present at the murder. Nevertheless, they still needed to determine his role in the crime. It is reasonable to assume police questioning would contain some level of accusation. The case, therefore, may have been beyond a mere investigatory stage in the proceedings.

126. The court held that *Miranda* offered no protection because there was no custodial interrogation. *Church*, 771 F.2d at 1017.

127. People v. Church, 102 Ill. App. 3d 155, 157, 429 N.E.2d 577, 579 (1981).

128. "Apparent attempts to elicit information from a suspect after he has invoked his right to cut off questioning necessarily demean that right. . . ." Rhode Island v. Innis, 446 U.S. 291, 311 (1980) (Stevens, J., dissenting).

129. In Michigan v. Mosley, the Court held that statements elicited after a suspect had

viously asserted right to counsel. Confessions would not be admissible if either government agents, or individuals duped into assisting the police, induced the suspect to confess. The standard would require courts to skeptically view a suspect's statements rendered in the absence of counsel.[130] A rule of this nature would assure that the *Miranda* safeguards, which are designed to protect a suspect's fifth amendment rights will not turn on the effectiveness of the government in circumventing the current rules.[131]

Any proposal altering constitutional safeguards should be closely scrutinized. Perhaps the best way to measure the necessity of any rule is to balance its advantages or disadvantages against the various social policies that the rule will affect.[132] Using this analysis, one must balance the necessity for effective law enforcement against both the "prophylactic" rules designed to safeguard the fifth and sixth amendments and any deterrent effect the exclusion of statements will have on the government. Critics of the suggested rule may charge that it will lead to undue interference with society's overwhelming interest in effective law enforcement. Moreover, proponents of a narrow reading of the *Miranda* and *Innis* tests may argue that the suggested standard imposes too strict a restraint in gathering necessary evidence.[133]

The "New York Rule" provides that a suspect may not waive his right to counsel in the absence of his attorney even when interrogation is on a charge unrelated to the charge for which counsel was retained.[134] This rule is helpful in determining the social costs of pro-

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elected to remain silent were inadmissible unless the police scrupulously honored the suspect's decision. 423 U.S. 96, 103-04 (1975).

130. Justice White stated that when an individual expresses his desire to consult with counsel, he expresses the view that he is not competent to deal with law enforcement officials "without legal advice." Moreover, "a statement without counsel's presence may properly be viewed with skepticism." *Id.* at 110 n.2 (White, J., concurring).

131. *See supra* notes 121-23 and accompanying text.

132. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 479 (1981).

133. For a discussion of opposing theories, see *infra* notes 135, 136.

134. New York courts have developed the "New York Rule" based on the state constitution. This rule prohibits the state from questioning a client in the absence of counsel regarding "matters encompassed by representation." Kamisar, *supra* note 28, at 88 (quoting People v. Ramos, 40 N.Y.2d 610, 622-23, 357 N.E.2d 955, 963-64, 389 N.Y.S.2d 299, 307-08 (1976) (Jasen, J., dissenting)). *See* People v. Rogers, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979) (suspect may not waive counsel in absence of attorney even when interrogation unrelated to charge on which counsel retained); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (individual held in custody may waive right to counsel, only in presence of counsel); People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968) (same).

The New York state constitution provides in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . nor shall he be compelled in any criminal case to be a witness against himself . . . ." N.Y. CONST. art. I, § 6.

viding suspects with greater assistance of counsel in interrogation and waiver issues. Several critics have argued that the "New York Rule" severely restricts the law enforcement community's ability to obtain confessions from suspects in the absence of counsel. According to these opponents, the decisions creating the rule "sacrifice the effective operation of the criminal justice system. . . . As a result, police efforts to curb crime will be hindered."[135]

The criticism appears to be reactionary. Despite the dicta of the *Burbine* majority,[136] courts have found that rather than hindering law enforcement efforts, the presence of counsel during questioning may actually provide greater assistance to the government.[137] Indeed, a standard such as that advocated here, which would require the police to "scrupulously honor" a suspect's invocation of his right to counsel, will not frustrate or burden proper law enforcement procedures. It will simply emphasize that the police must give warnings to suspects before interrogations, a duty with which they are well acquainted.[138] Moreover, such a standard will more closely guard the right to assistance of counsel than the present standard now guarantees in a fifth amendment case. The presence of counsel *can* in some circumstances lead to greater responsibility on the part of all parties.[139] In the same way, a broad reading of the *Miranda-Innis* custodial interrogation test will promote, rather than hamper the production of reliable evidence. It will add assurance that a suspect's right to counsel will not be abrogated.[140] As Justice Goldberg so eloquently wrote, "[n]o system worth preserving should have to *fear* that if an accused is permitted to

135. Note, *The Expanding Right To Counsel in New York*, 10 FORDHAM URB. L.J. 351, 353 (1982); *see also* United States v. Guido, 704 F.2d 675, 678 (2d Cir. 1983) (rejecting the "New York Rule"); Uviller, *The Judge at the Cop's Elbow*, 71 COLUM. L. REV. 707 (1971) (analysis of the "New York Rule").

136. Justice O'Connor wrote that a rule requiring the police to inform a suspect of an attorney's efforts to contact him would substantially handicap the police while being of minimal benefit in preventing coercion of suspects under the Fifth Amendment. Moran v. Burbine, 54 U.S.L.W. 4265, 4268 (U.S. Mar. 10, 1986) (No. 84-1485).

137. The presence of counsel can mitigate the danger of untrustworthiness, reduce coercion, guarantee accurate statements, and ensure that the prosecution correctly presents the statements at trial. Miranda v. Arizona, 384 U.S. 436, 470 (1966). *See also* Escobedo v. Illinois, 378 U.S. 478, 489 (1964) (reliability of law enforcement system diminished when dependent upon confessions). A shifting majority of the Supreme Court has in recent years argued against the dicta of the *Miranda* and *Escobedo* decisions. *See* Stone, *supra* note 46 (analyzing the Burger Court's treatment of *Miranda*).

138. In Fare v. Michael C., the Court stated that a precise custodial interrogation formula benefits the police, the prosecution *and* the suspect. 442 U.S. 707, 718 (1979).

139. Burbine v. Moran, 753 F.2d 178, 185 (1st Cir. 1985).

140. *See supra* note 76. While the *Moulton* decision was not based on fifth amendment grounds as were *Church* and *Burbine*, the policy concerns expressed in Justice Brennan's majority opinion are similar to those advocated here for fifth amendment purposes.

consult with a lawyer, he will become aware of, and exercise, these rights."[141]

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141. Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

* In honor and in memory of those whose inspiration have made it possible, and with gratitude to my parents for their support and encouragement. Special appreciation to Elisa Fuller and Steven Naturman.