DISTINGUISHING CONFESSIONS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT FROM THOSE OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT

Arnold H. Loewy[*]

I. INTRODUCTION

Miranda v. Arizona held that the Fifth Amendment precludes the admission of involuntary confessions obtained at the station house.[1] It further provided a series of now-familiar warnings as a necessary predicate to finding the confessions voluntary.[2] The Fifth Amendment itself provides, among other things, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[3]

The purpose of this provision is to guard against compulsion. So, if a confession is obtained without compulsion—that is, what the court calls voluntary—it is admissible in court and everybody is happy so far as the Fifth Amendment is concerned.[4] *Miranda* ensures that unless a person knows of his right to silence and to an attorney, his confession will be conclusively presumed involuntary and, as a matter of law, compelled.[5]

But *Miranda* has a corollary.[6] Not only will a statement obtained without touching all of the *Miranda* bases be conclusively presumed involuntary, a confession obtained after touching all of the bases will almost conclusively be presumed voluntary.[7] It does not matter that the defendant, had he known additional information, may have decided not to confess.

---

* George R. Killam Jr. Chair of Criminal Law, Texas Tech University School of Law.

1. *See* Miranda v. Arizona, 384 U.S. 436, 498–99 (1966).
2. *Id*. at 479. You have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to speak to an attorney and to have an attorney present during any questioning; and if you cannot afford a lawyer, one will be provided for you at government expense. *Id.*
3. U.S. CONST. amend. V.
4. *See Miranda*, 384 U.S. at 478.
5. *See id.* at 467–71.
6. *See id.* at 479.
7. *See id.*

Consider *Moran v. Burbine*[8] and *Colorado v. Spring*.[9] In *Burbine*, the defendant was informed of all of his *Miranda* rights.[10] He was not, however, informed that his sister had obtained counsel for him who, at the very moment he confessed, was attempting to see him and was told that he was not going to be questioned until the next day.[11]

The Court held that this additional information could not affect the voluntariness of a waiver and, therefore, could not contribute to rendering Burbine's confession involuntary.[12] As the Court put it: "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."[13]

The Court in *Spring*, relying on *Burbine*, held that a waiver of *Miranda*, and the confession, were valid even though the defendant was arrested for the federal crime of transporting guns and questioned about a murder in Colorado.[14] The Court addressed the additional warning Spring thought he should have been given about the nature of the crime: "Here, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature."[15]

Thus, the Court drew a sharp line between wisdom and voluntariness, putting knowledge on the side of wisdom.[16] So, as far as the Fifth Amendment is concerned, a voluntary, foolish confession—made because of police deception in failing to provide the suspect with important information in their possession—is just fine.[17]

What about the Sixth Amendment? Is that different? It certainly ought to be. The reason is that the role of counsel envisioned by the framers of the Constitution was to advise a client so that he could have all of the relevant information needed to reach a decision on how to proceed. As the Court first put it in the landmark "right-to-counsel" case, *Powell v. Alabama*:[18]

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise

8. *See generally* Moran v. Burbine, 475 U.S. 412 (1986).
9. *See generally* Colorado v. Spring, 479 U.S. 564 (1987).
10. *Burbine*, 475 U.S. at 415.
11. *Id.*
12. *See id.* at 422–23.
13. *Id.* at 422.
14. *See Spring*, 479 U.S. at 577.
15. *Id.*
16. *See id.* at 576–77.
17. *See id.* at 564.
18. *See* Powell v. Alabama, 287 U.S. 45 (1932).

> inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[19]

However, there still remains the question of when the right to counsel begins.[20] For good or ill, the Court has answered that question.[21] The right begins at the onset of formal proceedings—an indictment,[22] arraignment,[23] or preliminary hearing.[24] Although the Court once thought otherwise,[25] it is clear that an arrest, simpliciter, no longer triggers the Sixth Amendment right to counsel.[26] It does, however, trigger a Fifth Amendment right to counsel—designed to protect against coercion, but not to provide the arrestee with assistance in making wise decisions.[27]

I have argued elsewhere, and continue to believe, that the adversarial process should begin with arrest and, consequently, so should the right to counsel.[28] However powerful that argument may be normatively, it has not been, nor is it likely to be, adopted by the Court. Consequently, at least descriptively, it seems fair to say that the adversarial process begins at the onset of formal proceedings such as indictment,[29] arraignment,[30] or preliminary hearing.[31]

II. ARE SIXTH AMENDMENT RIGHTS REAL OR PROPHYLACTIC?

The Court never seems to tire of telling us that *Miranda* rights are not real Fifth Amendment rights, but only prophylactic rights designed to protect the real Fifth Amendment right.[32] Well, what about Sixth Amendment rights? Are they also prophylactic? The answer is, "sometimes." In

---

19. *Id.* at 69.

20. *See id.* at 59–60 (holding that a criminal defendant is entitled to counsel starting at the time of his or her arraignment).

21. *See id.*

22. Massiah v. United States, 377 U.S. 201, 205 (1964).

23. Brewer v. Williams, 430 U.S. 387, 398 (1977).

24. Michigan v. Jackson, 475 U.S. 625, 630 (1986).

25. *See* Escobedo v. Illinois, 378 U.S. 478 (1964).

26. *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966) (highlighting the Fifth Amendment, as opposed to the Sixth Amendment).

27. *See* Moran v. Burbine, 475 U.S. 412, 421 (1986). *But see* Colorado v. Spring, 479 U.S. 564, 574 (1987).

28. Arnold H. Loewy, *The Supreme Court, Confessions, and Judicial Schizophrenia*, 44 SAN DIEGO L. REV. 427, 435 (2007).

29. Massiah v. United States, 377 U.S. 201, 205 (1964).

30. Brewer v. Williams, 430 U.S. 387, 398 (1977).

31. Michigan v. Jackson, 475 U.S. 625, 630 (1986).

32. *See, e.g.*, Minnick v. Mississippi, 498 U.S. 146, 159 (1990); New York v. Quarles, 467 U.S. 649, 653 (1984).

Michigan v. Jackson,[33] in which the Court held that the Sixth Amendment applies when a preliminary hearing is held for a defendant and the defendant asks for counsel, the Court said nothing about the right being anything but real.[34] However in *Michigan v. Harvey*,[35] the Court held that *Jackson*, like *Miranda* was prophylactic and not to be applied retroactively.[36] Now that *Jackson* has been overruled by *Montejo v. Louisiana*,[37] it likely does not matter whether it was prophylactic or not.[38] The other right to counsel cases seem to involve the real right to counsel, but the Court has been inconsistent on whether the real right amounts to very much.[39]

Let us start with a line of cases in which the Court did take the right to counsel seriously: *Massiah v. United States*,[40] *Maine v. Moulton*,[41] and *Fellers v. United States*.[42] These cases all involved an attempt to deliberately elicit a confession from the suspect, but without the custodial interrogation required to trigger *Miranda*.[43]

Massiah and *Moulton* were both cases in which the indicted suspect was not in custody.[44] Instead, the defendant was questioned by a confederate who had agreed to work for the police.[45] In each case, the government argued that it had a legitimate reason for what it did: Finding evidence for crimes for which the defendant had not yet been indicted.[46]

In each case, the Court held that, although the government had a legitimate reason for obtaining the statements, using the statements in a subsequent criminal trial violated the defendants' Sixth Amendment right to counsel.[47] This holding was because, while the government acted properly in obtaining the statements, the use of the statements in a criminal trial was inconsistent with the adversary process that the Sixth Amendment was designed to protect.[48]

---

33. *See generally Jackson*, 475 U.S. 625.

34. *See id.* at 630.

35. *See generally* Michigan v. Harvey, 494 U.S. 344 (1990).

36. *See id.* at 346.

37. *See* Montejo v. Louisiana, 556 U.S. 778 (2009).

38. *See Montejo*, 556 U.S. at 799; *Jackson*, 475 U.S. at 636.

39. *See* Fellers v. United States, 540 U.S. 519 (2004); Maine v. Moulton, 474 U.S. 159 (1985); Massiah v. United States, 377 U.S. 201 (1964).

40. *See generally Massiah*, 377 U.S. 201.

41. *See generally Moulton*, 474 U.S. 159.

42. *See generally Fellers*, 540 U.S. 519.

43. *See id.* at 525; *Moulton*, 474 U.S. at 180; Miranda v. Arizona, 384 U.S. 436, 444 (1966); *Massiah*, 377 U.S. at 207.

44. *See Moulton*, 474 U.S. at 162–66; *Massiah*, 377 U.S. at 203.

45. *See Moulton*, 474 U.S. at 165–66; *Massiah*, 377 U.S. at 202–03.

46. *See Moulton*, 474 U.S. at 167; *Massiah*, 377 U.S. at 206.

47. *See Moulton*, 474 U.S. at 180; *Massiah*, 377 U.S. at 206–07.

48. *See Moulton*, 474 U.S. at 169 (citing Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938)); *Massiah*, 377 U.S. at 205–06; *see also Miranda*, 384 U.S. at 477 (contrasting the adversarial criminal process in the American litigation system with the inquisitorial system of others).

Fellers reached a similar result on a somewhat different fact pattern.[49] In that case, the police officers went to the home of an indicted defendant.[50] They questioned him without *Miranda* warnings and later argued that he was not in custody because he was questioned in his home, not in the coercive atmosphere of the police station.[51] The Court assumed that the police were correct in arguing there was a lack of custody.[52] Nevertheless, it invalidated the confession on the ground that the Sixth Amendment, unlike the Fifth, did not require custody. [53]

Although *Massiah*, *Moulton*, and *Fellers* emphasize the difference between Fifth and Sixth Amendment cases, there is a series of cases that emphasize their similarity, perhaps none more significant than *Patterson v. Illinois*.[54] In *Patterson*, the Court reaffirmed that upon indictment, the right to counsel kicks in.[55] The Court then held that the right means nothing more than the right to counsel under the Fifth Amendment. [56]

But, given the *Massiah* line of cases, how can that be? Well, the Court thought that the difference was that, in cases like *Massiah*, the defendant was never given any kind of warning of his right to counsel because he was not in custody.[57] However, in *Patterson* the defendant was given *Miranda* warnings, but he argued that those were insufficient to render his post-warning confession admissible.[58]

Assuming that it is constitutional for the prosecutor, through the investigative arm, the police, to approach the suspect at all after he has been indicted (a point on which four of the nine Supreme Court Justices on the case and I would disagree), why is *Miranda* sufficient to justify a waiver of his Sixth Amendment rights?[59] The Court's answer appears to be that *Miranda* is a more accurate gauge of what counsel can do for a suspect than the right to counsel at trial cases.[60]

Specifically, the Court said: "Petitioner knew that any statement that he made could be used against him in subsequent criminal proceedings."[61] The Court then added: "This warning also sufficed . . . to let petitioner know what

---

49. *See* Fellers v. United States, 540 U.S. 519, 520–23 (2004).
50. *See id.* at 520–21.
51. *See id.*
52. *See id.* at 524–25.
53. *See id.* at 525.
54. *See generally id.*; Patterson v. Illinois, 487 U.S. 285 (1988). *Cf.* Kansas v. Ventris, 556 U.S. 586, 594 (2009) (holding that the right to counsel is only applicable when the confession is obtained rather than when it is used). For a criticism of the *Ventris* logic, see Arnold H. Loewy, *Why the Supreme Court Will Not Take Pretrial Right to Counsel Seriously*, 45 TEX. TECH L. REV. 271–74 (2012).
55. *See Patterson*, 487 U.S. at 290–91, 300.
56. *Id.* at 297–98, 300.
57. *See id.* at 293–94; Massiah v. United States, 377 U.S. 201, 206 (1964).
58. *See Patterson*, 487 U.S. at 292.
59. *See id.* at 300–02 (Blackmun & Stevens, J., dissenting).
60. *Id.* at 285–86.
61. *Id.* at 293.

a lawyer could 'do for him' during the postindictment questioning: namely, advise petitioner to refrain from making any such statements."[62]

Of course, that is not all counsel could have done.[63] In this very case, Patterson was accused of participating in a gang-related killing.[64] Upon being read the indictment, Patterson asked why a fellow gang member who did the actual killing was not indicted.[65] Had Patterson been represented, his lawyer might have tried to negotiate a deal in exchange for Patterson's confession and his implication of the possibly primary killer.[66] Such deals happen all the time—not on their own or even by the suspects themselves—but nearly always by counsel.[67]

It is also true that an unindicted suspect might have used a lawyer in the same way, but the cases are different. As I have noted, for good or ill, the Court has held that there is no real, as opposed to prophylactic, right to counsel prior to indictment.[68] But there is a real right to counsel post-indictment.[69] And while Patterson knew that, he did not know what counsel could do for him beyond telling him not to confess.[70]

However, depending on the deal a suspect makes, a confession might be a good thing for a defendant.[71] Patterson gained no concessions from the state in exchange for his confession.[72] With an attorney, he might have. Whether he would have opted for counsel if he was aware that an attorney could help him negotiate a deal with the state is something we will never know because the police never told him what an attorney could do in defending him.[73]

Whether this is a good or a bad thing largely depends on how we view Justice Scalia's statement for the Court in *McNeil v. Wisconsin*,[74] a case in which the Supreme Court limited the Sixth Amendment to the crime for which the defendant had previously been indicted.[75] While that holding was consistent with prior Supreme Court jurisprudence, the statement was not.[76] Specifically, Justice Scalia said: "[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . . Admissions of guilt

---

62. *Id.* at 294.
63. *Id.* at 307–08.
64. *Id.* at 287.
65. *Id.* at 288.
66. *See id.* at 308.
67. *See id.*
68. *See* McNeil v. Wisconsin, 501 U.S. 171, 175 (1991).
69. *See* Massiah v. United States, 377 U.S. 201, 205 (1964).
70. *Patterson*, 487 U.S. at 294.
71. *See id.* at 308.
72. *Id.* at 289.
73. *Id.* at 288–89.
74. McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).
75. *Id.* at 175.
76. *See id.* at 188–89.

resulting from valid *Miranda* waivers 'are more than merely "desirable;" they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'"[77]

If we assume that statement is generally true when the right to counsel has not attached, and the only question is whether a suspect can be persuaded—as opposed to coerced—to confess, the question remains whether it is true in *Patterson* when the suspect has already been indicted.[78] I think that the answer should be "no."

As the Court recognized as far back as *Spano*,[79] once a defendant has been indicted, there is less need for a confession.[80] At pre-indictment, as Justice Jackson famously contended in *Watts v. Indiana*,[81] if suspects remain silent, society may not be able to solve crimes. Surely, that is far less true if a suspect has already been indicted.[82] The Government thinks it has sufficient evidence to bring the defendant to trial, and the grand jury has agreed.[83]

From the defendant's perspective, a post-indicted defendant has nothing to gain by talking to the police without a lawyer.[84] Even if he persuades the police that he is the finest person they ever saw, they are not required to release him.[85] So, having nothing to gain, his discussions with the police have to be lose-lose from his perspective.[86] But, if he has an attorney present, the odds are evened, and it might even be wise for him to talk with the police or a district attorney.[87]

It seems clear that an uncoerced confession of an indicted defendant is not an unmitigated good. It requires compromising the adversarial process, which can never be a good thing. The fact that the defendant gave the statement in a manner that the Court would classify voluntary does not mean that it would have been given if the defendant had an opportunity to carefully weigh his options.[88]

That leaves us with only one question: Should he have such an opportunity? I think that the answer is clearly "yes." We would not want the prosecutor making statements that would prejudice his case if he has not been given time to think before making them.[89] If there are any reasons that a

---

77. *Id.* at 181.
78. *Patterson*, 487 U.S. at 285.
79. *See* Spano v. New York, 360 U.S. 315, 327 (1959) (Stewart, J., concurring).
80. *See id.*
81. *See* Watts v. Indiana, 338 U.S. 49, 58 (1949) (Jackson, J., concurring).
82. *See id.*
83. *See Indictment*, BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).
84. *See Watts*, 338 U.S. at 59.
85. *See* Stack v. Boyle, 342 U.S. 1, 3 (1951) (illustrating that a defendant can ultimately be released on bail post-indictment).
86. *See Watts*, 338 U.S. at 59.
87. *See* Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).
88. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).
89. *See id.*

post-indicted defendant should not have that same dignity, they do not occur to me.

Convicting a guilty defendant is undoubtedly a compelling government interest.[90] But it is not so compelling that we need to abandon the adversarial process to obtain it.[91] If we do, then maybe we need to back off of the idea that adversary proceedings begin at indictment and go back to the days in which the trial was simply an appeal from interrogation.

III. CONCLUSION

The Fifth Amendment is concerned only with voluntariness.[92] Wisdom is irrelevant.[93] The Sixth Amendment actually describes how the process is supposed to work when the parties' adversarial position has hardened.[94] In my judgment, the *Patterson* case is inconsistent with that philosophy.[95] By relying on *Miranda*, it protects against coercion not ignorance.[96]

Quite frankly, its philosophy is predicated upon the false premise that an "uncoerced confession[] is . . . an unmitigated good . . . ."[97] After the Sixth Amendment right has kicked in, however, it is simply untrue.[98] An uncoerced confession ignorantly made by a defendant who had no idea of his best course of action is not only not an unmitigated good, but is positively harmful to the system.

90. *See* Reno v. Flores, 507 U.S. 292, 316 (1993).
91. *See id.*
92. *See* Lanier v. South Carolina, 474 U.S. 25, 25–26 (1985).
93. *See id.*
94. *See* Brewer v. Williams, 430 U.S. 387, 398 (1977).
95. *See* Patterson v. Illinois, 487 U.S. 285 (1988).
96. *See* Miranda v. Arizona, 384 U.S. 436 (1966).
97. McNeil v. Wisconsin, 501 U.S. 171, 181 (1991)
98. *See id.*