No. 99-5525

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a voluntary confession may be admitted into evidence in the government's case-in-chief under 18 U.S.C. 3501, notwithstanding that the confession was taken in violation of the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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STATEMENT

1. On January 24, 1997, the First Virginia Bank in Alexandria, Virginia, was robbed of approximately $876. The robber carried a silver semi-automatic handgun and a black leather bag. Immediately after the robbery, a witness saw the robber place something into the trunk of a white Oldsmobile Ciera, get into the passenger side of the car, and ride away. The witness observed the getaway car's license plate number, and law enforcement agents determined that the car was registered to petitioner. J.A. 36-37, 140-141, 167.

On January 27, 1997, at around 5:30 p.m., a team including agents of the Federal Bureau of Investigation (FBI) and an Alexandria police detective went to petitioner's apartment in Takoma Park, Maryland. Several agents entered the apartment.[1] While the agents were there, FBI Special Agent Lawlor saw a large amount of cash (later determined to be $552) on petitioner's bed. Petitioner refused to allow the agents to search his apartment. Petitioner then accompanied the agents to the FBI field office in Washington, D.C. J.A. 37, 141-142, 167-168.

Agent Lawlor and Alexandria Detective Durkin interviewed petitioner at the FBI field office. Agent Lawlor testified that petitioner initially stated only that he had driven his white Oldsmobile Ciera to the Old Town area of Alexandria at about 10 a.m. to look at a restaurant. Petitioner also said that he parked his car and went to get a bagel. Agent Lawlor testified that the area in which petitioner was parked was near the scene of the bank robbery. J.A. 43, 168. Agent Lawlor testified that he then left the room and obtained by telephone a warrant to search

[1] At the suppression hearing, the testimony of Special Agent Christopher Lawlor and that of petitioner diverged on several issues. See J.A. 141. For example, Agent Lawlor testified that the entry was by consent after he knocked on the door, *ibid.*, while petitioner testified that the agents entered without being invited in, *id.* at 142.

petitioner's apartment. *Id.* at 43, 168-169. Lawlor testified that he returned to the interview room and told petitioner that other agents were about to search his apartment. Lawlor further testified that petitioner was then advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and waived those rights in writing. J.A. 44-46, 170.

According to Lawlor, after the waiver, petitioner admitted that he had been with Jimmy Rochester on the morning of the robbery, and that Rochester had previously committed numerous robberies and might have robbed the First Virginia Bank. Petitioner stated that both he and Rochester left petitioner's car to go separate places, and that when he returned, Rochester was already in the car and the two drove away. He also stated that he stopped the car at Rochester's request, and Rochester put something in the trunk. Later, Rochester told him to run a red light, and petitioner began to surmise that Rochester might have robbed a bank. Petitioner also said that later that day Rochester gave him a silver .45-caliber pistol, and that the agents might find the gun and dye-stained money in petitioner's apartment. J.A. 46-47, 170. Officers subsequently searched petitioner's apartment and found a .45-caliber handgun, dye-stained money and a bait bill from another robbery or robberies, ammunition, and masks. *Id.* at 56, 170.

2. A grand jury sitting in the Eastern District of Virginia indicted petitioner on one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. 371, three counts of bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and three counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Petitioner moved to suppress his statements and the evidence seized from his apartment. The district court held a hearing at which Agent Lawlor and petitioner both testified. Petitioner testified that, contrary to Agent Lawlor's testimony, he had not been advised of his *Miranda* rights until after he had made all of the statements at issue.

Following the hearing, the district court granted petitioner's suppression motions. J.A. 140-155. With respect to the statements, the district court found that petitioner had been in custody during the questioning, and the court credited petitioner's testimony that he had not been read his *Miranda* rights and had not executed a waiver until after he had made all of the statements at issue. *Id.* at 151-155. The court also suppressed the evidence seized from petitioner's apartment pursuant to a search warrant.[2]

3. The government filed a motion for reconsideration. In support of its motion, the government submitted the affidavit of Detective Durkin, who was present throughout petitioner's interview. In his affidavit, Detective Durkin stated that petitioner had been read *Miranda* warnings and executed the written waiver before petitioner gave his more elaborate statement acknowledging his activities with Rochester on the day of the robbery. J.A. 102-103. The government further submitted petitioner's own handwritten statement acknowledging that he had been advised of his rights. *Id.* at 105. The government also argued (*id.* at 87) that even if petitioner's statements had been elicited in violation of *Miranda*, they were voluntary and therefore admissible under 18 U.S.C. 3501, which provides in relevant part that "[i]n any criminal prosecution brought by the United States or by the District of Columbia, a confession * * * shall be admissible in evidence if it is voluntarily given," 18 U.S.C. 3501(a), that "[t]he trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession," and that the "presence or absence" of any

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[2] Petitioner also moved to suppress a leather backpack and solvent used to clean dye-stained money, which were recovered from a search of the getaway car. The district court denied that motion. J.A. 144-145 & n.2.

particular factors "need not be conclusive on the issue of voluntariness of the confession," 18 U.S.C. 3501(b).

The district court denied the motion for reconsideration on the ground that the government had failed to establish that the additional evidence it proffered had been unavailable at the time of the suppression hearing. J.A. 159. The district court did not address Section 3501. See *id.* at 157-161.

4. The government appealed, and a divided panel of the court of appeals reversed. J.A. 162-225.

a. With respect to petitioner's statements, the court first held that the district court did not abuse its discretion in denying the government's motion for reconsideration, because the government had not availed itself of earlier opportunities to offer the additional evidence that petitioner had received *Miranda* warnings. J.A. 177-184. The court then turned to Section 3501. Although the majority noted that the government explicitly declined to make any argument based on 18 U.S.C. 3501 on appeal, Gov't C.A. Br. 34 n.19, the majority found that it was required to consider whether petitioner's statements were admissible under Section 3501 notwithstanding the absence of prior *Miranda* warnings. J.A. 184-191.

The majority held that "[Section] 3501, rather than the judicially created rule of *Miranda*," governs the admissibility of confessions in federal court. J.A. 211. The majority noted that Congress had enacted Section 3501 "with the express purpose of legislatively overruling *Miranda*," *id.* at 197, and that Congress had the authority to do so only if the rules set forth in *Miranda* were not required by the Constitution, *id.* at 201. Relying on cases decided after *Miranda* in which this Court "referred to the warnings as 'prophylactic,' and 'not themselves rights protected by the Constitution,'" *id.* at 203-207 (citations omitted), the court of appeals held that "Congress necessarily possesses the legislative authority to supersede the conclusive presumption

created by *Miranda* pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts," *id.* at 207-208. The majority noted the dissent's contention that, under the majority's theory, it remained unexplained how this Court could continue to apply *Miranda* to state prosecutions if *Miranda* is not a constitutional rule. But the majority found that to be an "interesting academic question" that "has no bearing on our conclusion that *Miranda*'s conclusive presumption is not required by the Constitution." *Id.* at 208 n.21.

The court of appeals therefore reversed the district court's order suppressing petitioner's statements. J.A. 211-212. Because the district court had refused to suppress the fruits of petitioner's statements, the court of appeals also concluded that the district court had "necessarily found that [petitioner's] statements were voluntary under the Fifth Amendment" and thus admissible under Section 3501. *Ibid.*[3]

b. Judge Michael dissented in part. He would not have addressed the applicability of Section 3501, because the government had not invoked the statute and the court of appeals did not have the benefit of full briefing and argument on the issue. J.A. 218-223. In his view, it was "a mistake for our court to push § 3501 into this case." *Id.* at 221.

5. Petitioner sought rehearing en banc. The government filed a brief in support of partial rehearing en banc. In that brief (at 12), the government argued that the *Miranda* jurisprudence has a constitutional basis, and, accordingly, the lower federal courts are bound by *Miranda* unless and

[3] The court of appeals also reversed the district court's order suppressing the physical evidence seized from petitioner's apartment. J.A. 212-217. Judge Michael disagreed with the majority's conclusion that the search warrant was sufficiently particular, but agreed that the evidence seized was nonetheless admissible pursuant to the good-faith exception. *Id.* at 224-225. This Court did not grant certiorari on this issue.

until the Supreme Court itself overrules it. *Id.* at 6 (citing *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997)). The government thus concluded that the lower federal courts "may not apply Section 3501 to admit confessions that *Miranda* would exclude." *Id.* at 12.

The court of appeals denied rehearing en banc by an 8-5 vote. J.A. 226. This Court granted certiorari, limited to the first question presented by the petition, *i.e.*, whether Section 3501 "was an unconstitutional attempt by Congress to legislatively overrule the Supreme Court's decision in *Miranda*." Pet. i; 120 S. Ct. 578 (1999).[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 3501 cannot constitutionally authorize the admission of a confession that would be excluded from evidence under this Court's *Miranda* cases. *Miranda* and its progeny represent an exercise of this Court's authority to implement and effectuate constitutional rights, and, accordingly, those decisions are binding on Congress. See *City of Boerne* v. *Flores*, 521 U.S. 507, 516-529 (1997); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). The voluntariness test in Section

[4] We continue to believe that the court of appeals erred in concluding that it was free to depart from this Court's decision in *Miranda* based on a perception that that case was undermined by other precedents, and we also note (as we did in our brief in support of partial rehearing en banc at 13 n.5 and in our brief at the petition stage at 37-38 n.24) that, if the court of appeals had ordered the district court to consider the evidence presented by the government on motion for reconsideration, it might have avoided an unnecessary decision of a constitutional question, see *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The Fourth Circuit nevertheless reached the validity of Section 3501. If this Court reverses the Fourth Circuit on that issue, and if the Fourth Circuit determines not to revisit its affirmance of the district court's refusal to hear the government's supplemental evidence on motion for reconsideration, the case will return to the district court for trial of petitioner based on the physical and testimonial evidence that shows petitioner's complicity in the charged bank-robbery and firearms offenses.

3501 cannot supersede *Miranda* on the theory that *Miranda* represents only supervisory "rules of procedure and evidence," J.A. 208, because this Court's consistent application of *Miranda* to the States demonstrates that *Miranda* is a constitutionally based ruling. Section 3501 could be validly applied to require the admission in evidence of confessions that would be inadmissible under *Miranda* and its progeny only if this Court overrules its decisions in *Miranda* and the cases that have followed it. Taking into account principles of stare decisis and the role *Miranda* has come to play in the criminal justice system, we do not believe that *Miranda* should be overruled. Rather, we believe, as this Court concluded more than a decade ago, that *Miranda* "strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights." *Moran* v. *Burbine*, 475 U.S. 412, 424 (1986).

I. Before this Court's decision in *Miranda* in 1966, the admissibility of a confession was judged under a voluntariness test, developed under the Due Process Clause, that took into account the totality of the circumstances. *Miranda* prescribed an additional inquiry based on the Fifth Amendment's Self-Incrimination Clause, which had been made applicable to the States in 1964. Two years after the decision in *Miranda*, Congress enacted Section 3501 to overrule *Miranda* in federal prosecutions and to return the law to the due process test that this Court had found inadequate in *Miranda*. Section 3501(a) accordingly provides that "a confession * * * shall be admissible in evidence if it is voluntarily given." Section 3501(b) specifies a list of non-exclusive factors that a judge "shall take into consideration" in making the voluntariness determination, but it provides that "[t]he presence or absence of any of [those factors] need not be conclusive." Because the factors listed in Section 3501(b) are non-exclusive, the weight to be given them is not specified, and their presence or absence is not determinative,

Section 3501 would, if valid, return the law applied in federal prosecutions to its pre-*Miranda* state.

Returning the law to its pre-*Miranda* state is beyond Congress's power, because this Court's decision in *Miranda* was a constitutional decision and Congress may not overrule constitutional decisions of this Court. It is true that this Court has referred to the rule of *Miranda* as a "prophylactic rule" that sweeps more broadly than does the Fifth Amendment itself and that requires the suppression of some confessions that would be deemed voluntary under the due process totality-of-the-circumstances test. Nonetheless, this Court has also frequently stated that *Miranda*'s requirements are based on its power to interpret and apply the Constitution. In addition, this Court has consistently applied *Miranda* to the States, including in three of the four consolidated cases that were resolved in the *Miranda* decision itself. Although the court of appeals believed that the application of *Miranda* to the States presented only an "interesting academic question," such application would not be permissible under the "supervisory" authority of this Court. The application of *Miranda* to the States therefore establishes that *Miranda*'s requirements are constitutional in nature. This Court has also held that the *Miranda* rules are applicable on federal habeas review of state convictions—a holding that can be explained only on the premise that *Miranda* states a rule of constitutional law.

The court of appeals relied in part on this Court's statements in *Miranda* itself that it did not intend to create a "constitutional straitjacket" that would preclude any legislative action in this area, 384 U.S. at 467, and that "the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation," *id.* at 490. But the Court added several times in its opinion that any such legislative solution must be "fully as effective as [the *Miranda* rules themselves] in informing accused persons of their right of silence and in

affording a continuous opportunity to exercise it." *Ibid.* The Court thus made clear that while the Constitution does not itself require that any particular measures be taken, nonetheless *some* measures must be taken that will be adequate for the purpose at hand—here, the protection of the Fifth Amendment privilege. Congress may not simply overrule *Miranda* and enact legislation like Section 3501 that provides no more protection to the Fifth Amendment privilege than did pre-*Miranda* law. The recognition in *Miranda* that Congress may choose to play a role in this area provides no support for the proposition that Congress may override a determination by this Court regarding what is necessary to provide adequate protection to constitutional rights.

II. Because the *Miranda* decision is of constitutional dimension, Congress may not legislate a contrary rule unless this Court were to overrule *Miranda*. We submit that principles of stare decisis do not favor the overruling of *Miranda*, and we do not request the Court to take that step. In the thirty-four years since that decision was handed down, it has become embedded in the law and defined through the decisions of this Court. If *Miranda* were to be overruled, this Court would have to disavow a long line of its cases that have interpreted *Miranda*, and it would have to overrule directly at least eleven cases that have reaffirmed that a confession obtained in violation of *Miranda* must be suppressed in the government's case-in-chief. At this date, there is no sufficient justification to overrule the balance struck in *Miranda* between the need for police questioning and the privilege against compelled self-incrimination, and there are substantial benefits to retaining that balance.

We acknowledge that there is a profound cost to the truthfinding function of a criminal trial when probative evidence is suppressed. That value necessarily must weigh heavily in this Court's appraisal of the continued validity of *Miranda*. In many respects, however, *Miranda* is beneficial to law enforcement. Its core procedures provide clear guid-

ance to law enforcement officers, and thus are not difficult to administer. If those procedures are followed, a defendant will frequently forgo any challenge to the voluntariness of an ensuing confession, because the fact that a defendant chooses to speak after receiving *Miranda* warnings is highly probative that his confession was voluntary. By contrast, the totality-of-the-circumstances test that was the sole measure of a confession's admissibility before *Miranda*, and that would govern in its absence, would be much more difficult for the police and the courts to apply and much more uncertain in application.

There is no sufficient change in the factual premises on which this Court based its decision in *Miranda* that would justify revisiting its holding. Although technological changes—such as the availability of videotaping—might be of relevance as a part of a package of safeguards intended to provide alternative protection for the Fifth Amendment privilege, Section 3501 does not adopt those safeguards or any others to ensure that a suspect is aware of his rights and has an opportunity to exercise them.

Finally, both the confidence of the public in the fairness of the criminal justice system and the stability of this Court's constitutional jurisprudence are of surpassing importance to the system of justice, and each may be expected to suffer if *Miranda* were overruled. Those values weigh heavily against discarding the essence of the balance that the Court struck in *Miranda*. Accordingly, *Miranda* should not be overruled, and Section 3501 cannot constitutionally authorize the admission of a statement that would be excluded under this Court's *Miranda* cases.

ARGUMENT

I. SECTION 3501 COULD BE VALIDLY APPLIED TO REQUIRE THE ADMISSION IN EVIDENCE OF CONFESSIONS THAT WOULD BE INADMISSIBLE UNDER *MIRANDA* AND ITS PROGENY ONLY IF THIS COURT WERE TO OVERRULE ITS DECISIONS IN *MIRANDA* AND THE CASES THAT HAVE FOLLOWED IT

The text and legislative history of Section 3501 demonstrate that it was intended to restore the pre-*Miranda* totality-of-the-circumstances voluntariness test as the sole test for admitting confessions in federal court.[5] An examination of this Court's cases, however, reveals that this Court decided *Miranda*, and has continued to apply it in numerous subsequent cases, in the exercise of its power to interpret and apply the Constitution. Accordingly, unless this Court overrules its decision in *Miranda*, Congress does not have the authority to return the law to its pre-*Miranda* state. *City of Boerne* v. *Flores*, 521 U.S. 507, 516-529 (1997). Section 3501 therefore may not validly be applied to permit the admission of a confession that would be inadmissible under *Miranda* and its progeny.

A. Section 3501 Was Intended To And Does Return To The Pre-*Miranda* Voluntariness Test

1. In *Brown* v. *Mississippi*, 297 U.S. 278 (1936), this Court first reversed a criminal conviction on the ground that it was based on a confession that was obtained by physical force in violation of the Due Process Clause. As the Court explained in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 223 (1973), "[i]n some 30 different cases decided during the era that intervened between *Brown* and *Escobedo* v. *Illinois*,

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[5] Except where otherwise indicated, our references to Section 3501 refer only to Section 3501(a) and (b). The balance of Section 3501 addresses other issues not pertinent here. See note 14, *infra*.

378 U.S. 478 [(1964)], the Court was faced with the necessity of determining whether in fact the confessions in issue had been 'voluntarily' given." The due process "voluntariness" test that emerged from those cases demands an inquiry into "whether a defendant's will was overborne," *id.* at 226, and it requires a reviewing court to "assess[] the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation," *ibid.* The Court emphasized in *Schneckloth* that "none of [the confession cases] turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances." *Ibid.*

2. In 1964, the Supreme Court decided *Malloy* v. *Hogan*, 378 U.S. 1 (1964), which held that the Fifth Amendment's Self-Incrimination Clause is applicable to the States because it is incorporated in the Fourteenth Amendment's Due Process Clause.[6] Two years later in *Miranda*, the Court thus addressed afresh the issue of the admissibility of confessions in state courts, operating for the first time under the Self-Incrimination Clause, rather than the Fourteenth Amendment's Due Process Clause. The Court reached the now-familiar conclusion that statements stemming from custodial interrogation of a suspect are inadmissible at trial unless the police first provide the suspect with a set of four specific warnings.[7] 384 U.S. at 444. The Court noted that, while it

[6] See *Michigan* v. *Tucker*, 417 U.S. 433, 442-443 (1974) ("Th[e] privilege had been made applicable to the States in *Malloy* v. *Hogan* * * * and was thought to offer a more comprehensive and less subjective protection than the doctrine of previous cases.").

[7] Those warnings are that (1) the defendant has the right to remain silent; (2) any statement he makes may be used as evidence against him; (3) he has the right to the presence of an attorney; and (4) if he cannot afford an attorney, one will be appointed for him. 384 U.S. at 479. The Court made clear that, in specifying warnings-and-waiver procedures, it did not preclude Congress and the States from "develop[ing] their own safeguards for the privilege, so long as they are fully as effective as those

might not find statements taken without the warnings "to have been involuntary in traditional terms," *id.* at 457, procedural safeguards were necessary because custodial interrogation is inherently coercive. The Court thus reasoned that, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458; see *id.* at 467.

3. In 1968, Congress enacted Section 3501. As the court of appeals noted, "[b]ased on the statutory language alone, it is clear that Congress enacted § 3501 with the express purpose of returning to the pre-*Miranda* case-by-case determination of whether a confession was voluntary." J.A. 199.[8] Section 3501(a) provides in pertinent part that "[i]n any criminal prosecution brought by the United States or by the District of Columbia, a confession * * * shall be admissible in evidence if it is voluntarily given." Section 3501(b) provides that a trial judge "determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including" five factors. Those factors are

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, * * * (2) whether such defendant knew the nature of the offense with

described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." *Id.* at 490. See pp. 26-29, *infra*.

[8] The language of Section 3501 requires the admission of all voluntary confessions. Accordingly, it would logically extend to post-arraignment confessions that are taken in violation of the Sixth Amendment and would be inadmissible under *Massiah* v. *United States*, 377 U.S. 201 (1964), and to confessions that were the fruits of a Fourth Amendment violation and hence inadmissible under *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Applying Section 3501 according to its terms would therefore apparently require that two additional lines of cases be overruled. Neither, however, is at issue in this case.

> which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

18 U.S.C. 3501(b). Section 3501(b) goes on to specify, however, that "[t]he presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

In setting forth the basic rule that a confession "shall be admissible in evidence if it is voluntarily given," Section 3501(a) restates the due process "voluntariness" test that governed the admissibility of confessions before this Court decided *Miranda*. Section 3501(b) confirms that the statute's "voluntariness" test is identical to that applied under pre-*Miranda* law by providing that "the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession." Compare *Schneckloth*, 412 U.S. at 226 (before *Miranda*, admissibility of confession was based on "totality of all the surrounding circumstances"); *Haynes* v. *Washington*, 373 U.S. 503, 513 (1963) ("an examination of all of the attendant circumstances"); *Gallegos* v. *Colorado*, 370 U.S. 49, 55 (1962) ("There is no guide to the decision of cases such as this, except the totality of circumstances."); *Reck* v. *Pate*, 367 U.S. 433, 440 (1961) ("all the circumstances attendant upon the confession must be taken into account"); *Malinski* v. *New York*, 324 U.S. 401, 404 (1945) ("If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant.").

The listing of five specific factors in Section 3501(b) that a court "shall take into consideration" does not alter the conclusion that Section 3501 purports to reinstate the pre-*Miranda* voluntariness test. It is difficult to see how the enumeration of any number of non-exclusive factors would differ from the pre-existing analysis, which required consideration of *all* factors that might bear on voluntariness. In this respect, it is significant that the five factors are neither exclusive nor determinative—as Section 3501(b) states, their "presence or absence * * * need not be conclusive on the issue of voluntariness." Nor are they necessarily the most significant factors; the use or threat of violence or other similar treatment by an interrogator, for example, could easily dictate the conclusion that a confession is involuntary without regard to any other factors.[9]

Furthermore, the five factors had specifically been recognized by this Court as significant under the pre-*Miranda* voluntariness test, so that their listing in Section 3501(b) marked no change from pre-*Miranda* law. For example, the presence of counsel during interrogation had always been an important factor in establishing voluntariness.[10] Two other

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[9] See, *e.g.*, *Stein* v. *New York*, 346 U.S. 156, 182 (1953) ("Physical violence or threat of it * * * serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, there is no need to weigh or measure its effects on the will of the individual victim."); *Brown* v. *Mississippi*, 297 U.S. 278, 285-286 (1936) ("The rack and torture chamber may not be substituted for the witness stand."); cf. *Ashcraft* v. *Tennessee*, 322 U.S. 143, 151 (1944) (defendant questioned by relays of interrogators for 36 hours without sleep).

[10] See, *e.g.*, *Haynes* v. *Washington*, 373 U.S. 503, 507 (1963) (holding confession involuntary where police refused defendant's requests to call attorney); *Gallegos* v. *Colorado*, 370 U.S. 49, 55 (1962) (holding confession involuntary where there was a "failure to see to it that [the defendant] had the advice of a lawyer or a friend"); *Spano* v. *New York*, 360 U.S. 315, 323 (1959) (holding confession involuntary where police "ignored [the defendant's] reasonable requests to contact the local attorney whom he had

factors—the defendant's knowledge of his right to remain silent and of his right to the assistance of counsel—had also been a regular part of the analysis.[11] Since its decision in

already retained"); *Cicenia* v. *Lagay*, 357 U.S. 504, 509 (1958) (holding confession voluntary, but noting that "defendant's lack of counsel [is] one pertinent element"); *Leyra* v. *Denno*, 347 U.S. 556, 561 (1954) (holding confession involuntary where defendant was "unprotected by counsel" at time of confession); *Haley* v. *Ohio*, 332 U.S. 596, 600 (1948) (plurality opinion) (holding confession involuntary where "[n]o lawyer stood guard * * * to see to it that [the police] stopped short of the point where [the defendant] became the victim of coercion"); *Malinski* v. *New York*, 324 U.S. 401, 405 (1945) (holding confession involuntary where among the "circumstances [that] stand out" are that defendant "was not allowed to see a lawyer, though he asked for one"); *Lisenba* v. *California*, 314 U.S. 219, 240 (1941) (holding confession voluntary where "[c]ounsel had been afforded full opportunity to see [defendant] and had advised him," but noting that special scrutiny is required where defendant "is subjected to questioning by officers for long periods, and deprived of the advice of counsel").

[11] See, *e.g.*, *Haynes*, 373 U.S. at 510-511 (holding confession involuntary where defendant not "advised by authorities of his right to remain silent, warned that his answers might be used against him, or told of his rights respecting consultation with an attorney"); *Culombe* v. *Connecticut*, 367 U.S. 568, 609-610 (1961) (opinion of Frankfurter, J.) (holding confession involuntary where "[t]here is no indication that at any time [the defendant] was warned of his right to keep silent."); *Crooker* v. *California*, 357 U.S. 433, 438 (1958) (holding confession voluntary where there was "police statement to [the defendant] that he did not have to answer questions"); *Ashdown* v. *Utah*, 357 U.S. 426, 428 (1958) (holding confession voluntary where, *inter alia*, interrogator "advised [the defendant] that she did not have to answer any questions and that she was entitled to consult with an attorney"); *Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958) (holding confession involuntary where defendant "was not advised of his right to remain silent or of his right to counsel"); *Brown* v. *Allen*, 344 U.S. 443, 476 (1953) (holding confession voluntary where "[t]here is evidence that petitioner was told he could remain silent and that any statement he might make could be used against him"); *Harris* v. *South Carolina*, 338 U.S. 68, 70 (1949) (opinion of Frankfurter, J.) (holding confession involuntary where there was "failure to advise the petitioner of his rights"); *Turner* v. *Pennsylvania*, 338 U.S. 62, 64 (1949) (opinion of Frankfurter, J.) (holding confession involuntary where defendant was "not informed of his right to

Brown, the Court had frequently adverted to the length of time the defendant had been held in custody as an important factor in determining voluntariness, and that factor had apparently been dispositive in some cases.[12]

One Section 3501(b) factor that had received less attention in this Court's pre-*Miranda* confession cases was whether the "defendant knew the nature of the offense with which he was charged or of which he was suspected." 18 U.S.C. 3501(b). In at least one case, however, in determining the voluntariness of a confession, the Court had referred to the fact that "[n]o warrant was read to [the defendant] and he was not informed of the charge against him." *Harris* v. *South Carolina*, 338 U.S. 68, 69 (1949); see also *id.* at 72

remain silent until after he had been under the pressure of a long process of interrogation and had actually yielded to it"); *Haley*, 332 U.S. at 598 (plurality opinion) (holding confession involuntary where "[a]t no time was [the defendant] advised of his right to counsel.").

[12] See *Stein* v. *New York*, 346 U.S. at 187 (Because "[t]o delay arraignment, meanwhile holding the suspect incommunicado, facilitates and usually accompanies use of 'third-degree' methods, * * * we regard such occurrences as relevant circumstantial evidence in the inquiry as to physical or psychological coercion."); see also *Reck* v. *Pate*, 367 U.S. 433, 440 (1961) (holding confession involuntary where defendant held four days before first confession and an additional four days before arraignment); *Thomas* v. *Arizona*, 356 U.S. 390, 401 n.8 (1958) (holding confession voluntary where, "[u]nlike many cases where this Court has found coercion, there apparently was no failure here to comply with the state statute requiring that a prisoner be taken before a magistrate without unnecessary delay after arrest"); *Fikes* v. *Alabama*, 352 U.S. 191, 194-197 (1957) (holding confession involuntary where defendant held without arraignment five days before first confession and an additional five days before second confession); *Watts* v. *Indiana*, 338 U.S. 49, 52-53 (1949) (opinion of Frankfurter, J.) (holding confession involuntary where defendant held five days without arraignment before confessing); *Turner*, 338 U.S. at 64 (opinion of Frankfurter, J.) (holding confession involuntary where defendant held five days without arraignment before confessing); *Chambers* v. *Florida*, 309 U.S. 227, 239 (1940) (holding confession involuntary where defendants held without arraignment incommunicado five days).

(Douglas, J., concurring) (mentioning same factor). In any event, Section 3501 does not dictate the weight to be given this factor in the analysis of whether a confession is voluntary. In *Colorado* v. *Spring*, 479 U.S. 564, 577 (1987), the Court "h[e]ld that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." Accordingly, the defendant's knowledge of the crimes of which he is suspected is an insignificant factor in the voluntariness inquiry.[13]

4. The history of Section 3501 confirms that Congress intended Section 3501 to overrule this Court's decision in *Miranda* and restore the totality-of-the-circumstances test of voluntariness in federal prosecutions. Senator McClellan introduced the original bill, S. 674, to "rectify" what he perceived as "the mockery of justice" reflected in the "5-to-4" *Miranda* decision and to restore "voluntariness [as] the only test" for determining the admissibility of a confession. 113 Cong. Rec. 1583, 1584 (1967).[14] Senator McClellan ex-

[13] Indeed, because a defendant's knowledge of the crimes of which he is suspected is "not relevant" to the validity of a defendant's waiver of his rights under *Spring*, even if Section 3501 expressly gave that factor great weight in determining whether a confession was admissible, it would not accomplish any purpose in protecting the defendant's Fifth Amendment rights. It would therefore not respond to any concern underlying this Court's determination in *Miranda* that exclusive reliance on the pre-*Miranda* "voluntariness" test was inadequate.

[14] The bill was part of Title II of the Omnibus Crime Control and Safe Streets Act of 1967. Title II also contained provisions designed to overturn this Court's decisions in *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957), which held that delay before bringing an accused before a magistrate bars the admission of the accused's pre-arraignment confession, and *United States* v. *Wade*, 388 U.S. 218 (1967), which established the right of an accused to have counsel at police line-ups. Those provisions ultimately were enacted as 18 U.S.C. 3501(c) and 3502, which are not at issue in this case. Title II also contained

pressed similar views during the Senate hearings on the bill in the Spring and Summer of 1967. *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Crim. Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 1174 (1967) (*Hearings*) ("In view of the *Miranda* decision, we have the bill that I introduced which would restore what had been a traditional procedure heretofore."). And Attorney General Ramsey Clark advised the Senate that S. 674 was unconstitutional to the extent it "intended to dispense with the requirement that [*Miranda*] warnings be given and to substitute a flexible standard that the presence or absence of such warnings need only be *considered* on the issue of voluntariness." *Id.* at 82.[15]

The Senate Committee Report accompanying Section 3501 stated that the Committee was convinced by the evidence presented during the Senate hearings "that the rigid and inflexible requirements of the majority opinion in the

provisions that the Senate failed to pass which would have stripped the Supreme Court and federal courts of jurisdiction to review state-court decisions admitting confessions and would have abolished federal habeas corpus review of state-court judgments. See S. Rep. No. 1097, 90th Cong., 2d Sess. 10 (1968); 114 Cong. Rec. 11,189 (1968).

[15] In its original form, S. 674 provided in subsection (b) that a court "shall take into consideration all the circumstances surrounding the giving of the confession," but nothing in the bill expressly stated that a court could find a confession voluntary in the absence of the warnings set forth in *Miranda*. *Hearings* 74. The Attorney General of California therefore testified that the Senate should close that "possible loophole" by amending S. 674 "to provide that the presence or absence of any of the factors listed in subsection (b) shall not be conclusive on the issue of voluntariness." *Hearings* 926 (statement of Thomas C. Lynch). The bill was subsequently amended to provide, as it presently does, that "[t]he presence of absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive of the issue of voluntariness," thereby removing any doubt that Congress intended to dispense with the requirements laid down in *Miranda*.

Miranda case are unreasonable, unrealistic, and extremely harmful to law enforcement" and that the proper test for admissibility should be the traditional "totality of circumstances" test of voluntariness that was endorsed by the dissenting Justices in *Miranda*. S. Rep. No. 1097, 90th Cong., 2d Sess. 46, 49-51 (1968).[16] During the weeks of debate concerning Section 3501, members of both the House and Senate similarly expressed their understanding that the statute was designed to restore the law on the admissibility of confessions as it existed before *Miranda*.[17]

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[16] The committee members in the minority agreed that Section 3501 "repeal[ed]" *Miranda* by making "voluntariness the sole criterion of the admissibility of a confession in a Federal court." S. Rep. No. 1097, *supra*, at 148.

[17] See, *e.g.*, 114 Cong. Rec. 11,206 (1968) (Sen. McClellan) (statute would "restore" voluntariness test as "the only test * * * in determining admissibility"); *id.* at 11,594 (Sen. Morse) (Section 3501 "would overrule" *Miranda*); *id.* at 11,612 (Sen. Thurmond) (statute "would restore the test for admissibility of confessions in criminal cases to that time-tested and well-founded standard of voluntariness"); *id.* at 13,202 (Sen. Scott) (statute "would restore the test which had been in use and considered constitutional until recent Supreme Court decisions, most notably *Miranda* v. *Arizona*"); *id.* at 14,136 (Sen. Fong) ("Sections 3501(a) and (b) * * * would overrule all of the Miranda standards and render them merely as guidelines to determine the admissibility and the weight to be given a confession."); *id.* at 14,158 (Sen. Hart) (statute "would repeal" *Miranda*); *id.* at 14,167 (Sen. McIntyre) (statute "would overrule [*Miranda*], whereby the Court established a constitutional requirement * * * above and beyond the traditional test of voluntariness"); *id.* at 14,176 (Sen. Erin) ("John Marshall said that voluntary confessions are admissible. And this is what the Constitution meant until the 13th day of June, 1966, when an attempt was made by five Judges to change the Constitution over the opposition of the other four Judges."); *id.* at 16,066 (Rep. Cellar) ("the main purpose * * * is to overrule [*Miranda*]"); *id.* at 16,075 (Rep. Rogers) (statute "is the first step to reverse the actions of the Supreme Court of the United States in favoring the criminals"); *id.* at 16,296 (Rep. Randall) (statute "simply provides that confessions may be voluntarily given, notwithstanding the line of decisions announced by the U.S. Supreme Court").

B. This Court's Decisions In *Miranda* And The Cases That Have Followed It Reveal That The *Miranda* Rule Is Based On This Court's Authority To Interpret And Apply The Constitution

1. In *Miranda* itself, the Court left no doubt that it was basing its decision on the Court's authority to interpret and apply the Constitution. The Court began its opinion by noting that it had granted certiorari "to explore some facets of the problems * * * of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 441-442. The balance of the opinion is replete with references to the constitutional basis for the decision—"rights grounded in a specific requirement of the Fifth Amendment of the Constitution." *Id.* at 489. As the Court held, the unwarned confessions in the four cases before the Court in *Miranda* "were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege." *Id.* at 491.[18]

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[18] See also 384 U.S. at 445 ("The *constitutional* issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody.") (emphasis added), 457 (referring to the Court's "concern for adequate safeguards to protect precious *Fifth Amendment rights*") (emphasis added), 458 (examining "history and precedent *underlying the Self-Incrimination Clause* to determine its applicability in this situation") (emphasis added), 476 ("The requirement of warnings and waiver of rights is a fundamental *with respect to the Fifth Amendment* privilege and not simply a preliminary ritual to existing methods of interrogation.") (emphasis added), 478 ("The fundamental import *of the privilege* while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.") (emphasis added), 479 ("The whole thrust of our foregoing discussion demonstrates that *the Constitution has prescribed the rights of the individual when confronted with the power of government* when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself.") (emphasis added),

2. In a line of cases beginning with *Michigan* v. *Tucker*, 417 U.S. 433 (1974), the Court has held that a failure to apply *Miranda*'s interrogation safeguards is not per se a constitutional violation and that a statement will not invariably be deemed "compelled" in violation of the Fifth Amendment simply because it was unwarned. In *Tucker*, the Court declined to suppress the testimony of a witness whose identity was learned from a statement taken from the defendant in violation of *Miranda*, because the Court found that the police conduct at issue did not "breach the right against compulsory self-incrimination[,] * * * but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege," 417 U.S. at 445-446, and because "[t]he deterrent purpose of the exclusionary rule" would not have been served in that case, *id.* at 447.

Since *Tucker*, this Court has frequently observed that the *Miranda* rules are "prophylactic" in character and that an unwarned statement is not necessarily "compelled" in violation of the Fifth Amendment. See, *e.g.*, *Davis* v. *United States*, 512 U.S. 452, 457 (1994); *Duckworth* v. *Eagan*, 492 U.S. 195, 203 (1989); *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987). Consistent with the description of *Miranda*'s procedures as prophylactic, the Court has weighed the advantages and disadvantages of *Miranda* in defining its application. In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), the Court declined to suppress the fruits of an unwarned statement, emphasizing that the "fruit of the poisonous tree" doctrine "assumes the existence of a constitutional violation" (*id.* at 305), but that "[t]he *Miranda* exclusionary rule * * * may be triggered even in the absence of a Fifth Amendment violation." *Id.* at

481 n.52 ("[d]ealing as we do here with *constitutional standards* in relation to statements made") (emphasis added), 490 ("the issues presented are of *constitutional dimensions* and must be determined by the courts") (emphasis added).

306. The Court has also recognized a "public safety" exception to *Miranda*'s "prophylactic rule," stating that a violation of the procedural safeguards of *Miranda* is not itself a violation of the Fifth Amendment. *New York* v. *Quarles*, 467 U.S. 649, 657 (1984). And the Court has concluded that unwarned statements may be used to impeach a testifying defendant at trial, notwithstanding the violation of *Miranda*, if the traditional test for "voluntariness" is satisfied. See *Oregon* v. *Hass*, 420 U.S. 714, 722-723 (1975); *Harris* v. *New York*, 401 U.S. 222, 224 (1971).

Considered in isolation, the language used in *Tucker* and its progeny that a violation of *Miranda* is not itself a violation of the Constitution could be read to support an inference that *Miranda* is not a constitutional rule. Indeed, the Fourth Circuit read those statements to mean that *Miranda* is simply a "judicially created rule" that may be supplanted by legislation. J.A. 211. A well-established line of this Court's cases, however, requires the conclusion that *Miranda*, as applied by this Court, does indeed rest on a constitutional basis.

3. Beginning with *Miranda* itself, this Court has repeatedly applied the warnings requirement, and its associated suppression remedy, to cases arising in state courts.[19] See, *e.g.*, *Stansbury* v. *California*, 511 U.S. 318 (1994) (per curiam); *Minnick* v. *Mississippi*, 498 U.S. 146 (1990); *Arizona* v. *Roberson*, 486 U.S. 675 (1988); *Edwards* v. *Arizona*, 451 U.S. 477, 481-482 (1981). Although this Court has the power to announce rules of procedure and evidence binding on federal courts, it has consistently disclaimed—both before and after *Miranda*—any such supervisory authority over state

[19] Three of the four consolidated cases in *Miranda* itself arose in state courts, as did *Tucker*, *Elstad*, *Quarles*, and other cases on which the court of appeals relied in concluding that *Miranda* lacks a constitutional basis. The fourth of the consolidated cases in *Miranda* involved a federal conviction (*Westover* v. *United States*, No. 761).

courts. The Court's authority in state cases "is limited to enforcing the commands of the United States Constitution." *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991). See *Smith* v. *Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."); *Cicenia* v. *Lagay*, 357 U.S. 504, 508-509 (1958) ("Were this a federal prosecution we would have little difficulty in dealing with [the admissibility of the confession] under our general supervisory power over the administration of justice in the federal courts. But to hold that what happened here violated the Constitution of the United States is another matter.") (citation omitted). Because federal judges "may not require the observance of any special procedures" in state courts "except when necessary to assure compliance with the dictates of the Federal Constitution," *Harris* v. *Rivera*, 454 U.S. 339, 344-345 (1981) (per curiam), the Court's continued application of *Miranda*'s exclusionary rule in state cases necessarily means that *Miranda* rests on the Court's authority to apply the Constitution.

The same point is manifest in this Court's holding that claims of *Miranda* violations are cognizable on federal habeas review. See *Withrow* v. *Williams*, 507 U.S. 680, 690-695 (1993); see also *Thompson* v. *Keohane*, 516 U.S. 99 (1995). Habeas corpus is available only for claims that a person "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a). Because *Miranda* is not a "law" or a "treaty," the Court's holding in *Withrow* necessarily depends on the premise that the requirements of *Miranda* implement and protect constitutional rights.

Significantly, this Court has regularly described the *Miranda* holding, and subsequent extensions of that holding, as resting on constitutional grounds. See, *e.g.*, *Illinois* v. *Perkins*, 496 U.S. 292, 296 (1990) (describing *Miranda* rules as resting on "the Fifth Amendment privilege against self-

incrimination"); *Butler* v. *McKellar*, 494 U.S. 407, 411 (1990) (noting holding of *Arizona* v. *Roberson* "that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation"); *Michigan* v. *Jackson*, 475 U.S. 625, 629 (1986) ("The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations."); *Moran* v. *Burbine*, 475 U.S. 412, 427 (1986) (describing *Miranda* as "our interpretation of the Federal Constitution"); *Edwards* v. *Arizona*, 451 U.S. 477, 481-482 (1981) (describing *Miranda* as having "determined that the Fifth and Fourteenth Amendments[]" required custodial interrogation to be preceded by advice concerning the suspect's rights). As those cases highlight, the Court's description of the *Miranda* rules as "prophylactic" does not mean that the rules are therefore extra-constitutional. As the Court stated in *Withrow*: "'[p]rophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right.'" 507 U.S. at 691 (emphasis omitted).

The court of appeals in this case did not confront the import of this Court's application of *Miranda* to the States and on habeas review, nor did the court of appeals address the Court's own description of its *Miranda*-based holdings as constitutional in nature. Rather, the court stated that, although it "raises an interesting academic question," this Court's application of *Miranda* in state prosecutions "has no bearing on our conclusion that *Miranda*'s conclusive presumption is not required by the Constitution." J.A. 208 n.21. Any conclusion about the legal source of *Miranda*, however, must take into account the fact that the Court has applied that case to the States and on habeas review, since this Court could not do so if *Miranda* were a non-constitutional decision.

C. Congress May Not Overrule This Court's Decision In *Miranda*, Because That Decision Is Based On The Constitution And Congress May Not Overrule Constitutional Decisions Of This Court

When this Court decides a case on a statutory or supervisory basis, Congress has general authority to alter the law and undo the decision, within otherwise applicable constitutional limits. *Miranda*, however, was not a statutory or supervisory power case, but instead rests on constitutional grounds. Accordingly, unless this Court overrules *Miranda*, Section 3501 may not constitutionally be applied to permit admission of a confession that would be inadmissible under *Miranda*.

1. The court of appeals in this case suggested that Section 3501 is valid because "the Court [in *Miranda*] acknowledged that the Constitution did not require the warnings, disclaimed any intent to create a 'constitutional straitjacket,' repeatedly referred to the warnings as 'procedural safeguards,' and invited Congress and the States 'to develop their own safeguards for [protecting] the privilege.'" J.A. 203 (citations omitted; quoting *Miranda*, 384 U.S. at 467, 444, 490). That represents, however, a fundamental misunderstanding of this Court's decision in *Miranda*, based on truncated quotations from the Court's opinion and an untenable theory of this Court's authority to impose rules on the States.

2. The court of appeals' quotation of the *Miranda* opinion omits the crucial portion of the sentence that follows the portion quoted by the court. The full sentence in this Court's opinion in *Miranda* states that "Congress and the States are free to develop their own safeguards for the privilege, *so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.*" 384 U.S. at 490 (emphasis added). The Court therefore clearly did not merely invite Congress and the States to develop "their own

safeguards," regardless of their efficacy or adequacy, to replace the Court's *Miranda* holding. Instead, the Court invited Congress and the States to develop "their own safeguards" only if they were "fully as effective" as the *Miranda* rules to "inform[] accused persons of their right of silence and * * * afford[] a continuous opportunity to exercise it."

Indeed, the Court consistently emphasized in *Miranda* that legislation providing alternative safeguards had to satisfy the test of constitutional adequacy that the Court set forth in *Miranda*. For example, earlier in its opinion, the Court set forth the standard with even greater precision:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. *However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.*

384 U.S. at 467 (emphasis added). In at least two other places in its opinion, the Court similarly emphasized that any legislative alternative must meet this standard of adequacy. See *id.* at 476 ("The warnings required * * * in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any state-

ment made by a defendant.") (emphasis added), 478-479 ("Procedural safeguards must be employed to protect the privilege, *and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored*, the following measures are required.") (emphasis added).[20]

This could not be clearer. Although Congress and the States could surely seek to provide alternative safeguards for the Fifth Amendment privilege, such legislation would be valid only if the safeguards satisfied the constitutional standard of adequacy stated in *Miranda*.[21] Section 3501 does not satisfy that standard. Indeed, it does not attempt to do so. As Professor Wright has noted, "It is one thing to devise alternative safeguards and quite another to provide, as the

[20] Amicus Washington Legal Foundation argues that various post-violation remedies, such as criminal actions under 18 U.S.C. 241 and 242, civil actions under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and administrative actions under the Federal Tort Claims Act, are available to ensure that officers comply with the Fifth Amendment. Amicus Br. 14 (filed Nov. 1, 1999). None of those remedies—even if they are as readily available as amicus contends—purports to satisfy *Miranda*'s holding that alternatives must "notify the person of his right of silence and * * * assure that the exercise of the right will be scrupulously honored." 384 U.S. at 479.

[21] This circumstance—in which there is a goal that must be reached, but a variety of different means by which a legislature may reach that goal—is not unfamiliar in constitutional law. In its procedural due process cases, for example, this Court has made clear that the Constitution sets various minimum standards that must be satisfied, but that the legislature may select between a variety of possible procedures that would satisfy those standards. See, *e.g.*, *Bell* v. *Burson*, 402 U.S. 535, 542 (1971) (stating that "[w]e deem it inappropriate in this case to do more than lay down this requirement" and noting that "[t]he alternative methods of compliance are several"). See also Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1279 (1975) ("[T]he elements of a fair hearing should not be considered separately; if an agency chooses to go further than is constitutionally demanded with respect to one item, this may afford good reason for diminishing or even eliminating another.").

1968 legislation does, that no safeguards are needed." 1 Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 76, at 185 (3d ed. 1999).

3. In sum, the Court in *Miranda* expressly rested its decision on constitutional grounds, and the Court's continued application of *Miranda*'s requirements to the States and on habeas review cannot be explained on any ground other than that the Court regards those requirements as implementing and effectuating constitutional rights. The specific warnings articulated in *Miranda* are not required by the Fifth Amendment. But *Miranda* is of constitutional dimension and cannot be superseded by legislation that would return the law to its pre-*Miranda* state, as does Section 3501. "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." *Miranda*, 384 U.S. at 491. Accord *City of Boerne* v. *Flores*, 521 U.S. at 516-529. That principle has long been a fundamental feature of our constitutional structure of government. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Accordingly, before Section 3501 could be applied in a manner that is inconsistent with this Court's *Miranda* jurisprudence, the Court would have to reconsider and overrule *Miranda*.

II. *MIRANDA* SHOULD NOT BE OVERRULED

The resolution of whether *Miranda* should be overruled or reaffirmed raises fundamental questions and implicates competing interests of the highest order. Weighing those interests is not an easy task. But in our view, sound application of principles of stare decisis dictates that at this point in time, thirty-four years after *Miranda* was decided and many years after it has been absorbed into police practices, judicial procedures, and the public understanding, the *Miranda* decision should not be overruled. As Chief Justice Burger stated twenty years ago: "The meaning of *Miranda* has become reasonably clear and law enforcement

practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Burger, CJ., concurring).

Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillary*, 474 U.S. 254, 265-266 (1986). While "*stare decisis* is not an 'inexorable command,'" especially in a constitutional case, *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854 (1992), "[e]ven in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *International Business Machines Corp.*, 517 U.S. 843, 856 (1996).

The Court's judgment regarding whether to overrule prior cases "is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Casey*, 505 U.S. at 854. Among the considerations that govern are

> whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id. at 854-855 (citations omitted). The Court has regularly sought guidance by applying these factors—costs and workability, reliance, developments in the law that have affected the validity of the past precedent, and a change or perceived change in factual premises—to determine whether prior precedents should be reconsidered or overruled. See, *e.g.*, *Payne* v. *Tennessee*, 501 U.S. 808, 827-830 (1991); *Vasquez*, 474 U.S. at 265-266. In addition, in a case involving a precedent of the significance of *Miranda*, larger considerations enter into the calculus as well. Cf. *Casey*, 505 U.S. at 861.

A. Costs And Workability

The core holding of *Miranda* is that, absent a "fully effective equivalent," 384 U.S. at 476, see pp. 26-28, *supra*, statements that are obtained in custodial interrogation are inadmissible in the prosecution's case-in-chief unless the suspect, before speaking, was given the prescribed warnings and waived his rights to remain silent and to consult counsel. Any consideration of whether that holding should be overruled must begin with an assessment of *Miranda*'s costs and benefits, and whether *Miranda* has proven workable in practice.

1. There are undeniably instances in which the exclusionary rule of *Miranda* imposes costs on the truth-seeking function of a trial, by depriving the trier of fact of "what concededly is relevant evidence." *Colorado* v. *Connelly*, 479 U.S. 157, 166 (1986); see also, *e.g.*, *McNeil* v. *Wisconsin*, 501 U.S. 171, 181 (1991) (the "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"); *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990) (*Miranda*'s exclusionary rule "result[s] in the exclusion of some voluntary and reliable statements"); *Oregon* v. *Elstad*, 470 U.S. 298, 312 (1985) (loss of "highly probative evidence of a voluntary

confession" is a "high cost to legitimate law enforcement").[22] In our view, however, the cost of *Miranda*'s exclusionary rule does not so impede or undermine law enforcement that the overruling of *Miranda* is warranted. Rather, the judgment and experience of federal law enforcement agencies is that *Miranda* is workable in practice and serves several significant law enforcement objectives.[23] Indeed, in the

[22] The Court has made the same point in discussing the Fourth Amendment exclusionary rule. See, *e.g.*, *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 364 (1998) ("Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions."); *United States* v. *Leon*, 468 U.S. 897, 907 & n.6 (1984) ("The substantial social costs exacted by the exclusionary rule * * * have long been a source of concern. * * * 'Any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness.'") (quoting *Illinois* v. *Gates*, 462 U.S. 213, 257-258 (1983) (White, J., concurring)).

[23] A lively debate in the law reviews has considered whether the social scientific evidence demonstrates that *Miranda* has had any effect on the rates at which criminals are prosecuted and convicted. In our view, the social scientific evidence is at best inconclusive and certainly insufficient on which to base a decision to overrule an important constitutional precedent. Compare Paul G. Cassel & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055 (1998), with Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U.L. Rev. 500 (1996), and John J. Donahue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 Stan. L. Rev. 1147 (1998). See also Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397 (1999). The argument that *Miranda* should be superseded by Section 3501 to increase the number of confessions is also hopelessly at odds with the argument of amicus that Section 3501 continues to give law enforcement agents sufficient incentives to give *Miranda* warnings. See Br. Amicus Curiae of Washington Legal Found. 13 (filed Nov. 1, 1999). If amicus's appraisal of the incentives provided by Section 3501 to give warnings is correct, replacing *Miranda* with Section 3501 would have little or no benefit in increasing the rate at which offenders confess.

thirty-two years since the enactment of Section 3501, the United States has never asked this Court to reconsider its decision in *Miranda*.

2. *Miranda*'s core procedures are not difficult to administer. Federal agents do not find it difficult, in general, to read a suspect his rights and determine whether the suspect wishes to answer questions. And the administration of *Miranda* warnings is useful, for a defendant who waives his rights will often forgo any challenge to the admissibility of an ensuing confession. In those instances in which such challenges nonetheless are made, compliance with *Miranda* helps ensure that statements will be found admissible because they were voluntary. Indeed, long before *Miranda* was decided, the Federal Bureau of Investigation had adopted a practice of administering warnings similar to those required by *Miranda* to all suspects before questioning them. See 384 U.S. at 483-488 & n.54. That practice was instituted to ensure that agents treat suspects fairly while simultaneously obtaining important investigative information and reliable statements that are admissible in court. See *id.* at 483 n.54 (noting statement of J. Edgar Hoover, then-Director of the FBI, explaining that the FBI's policy of giving warnings was based on the principle that "[l]aw enforcement, * * * in defeating the criminal, must maintain inviolate the historic liberties of the individual."). The FBI's policy was workable before *Miranda*, and the FBI has had very little difficulty complying with the bright-line core mandates of the *Miranda* decision since 1966.

The experience of other federal law enforcement agencies since *Miranda* has also confirmed that *Miranda* has proved workable in practice and is in many respects beneficial to law

enforcement. It is the policy of some agencies, such as the Internal Revenue Service and the Bureau of Alcohol, Tobacco, and Firearms, to provide *Miranda* warnings not only before engaging in custodial interrogation, but also in some non-custodial settings. The experience of those agencies is that the core *Miranda* warnings and waiver framework is administrable and does not impede law enforcement. In short, federal law enforcement agencies have concluded that the *Miranda* decision itself generally does not hinder their investigations and the issuance of *Miranda* warnings at the outset of a custodial interrogation is in the best interests of law enforcement as well as the suspect.

3. This Court has frequently noted that it is a virtue of *Miranda* that it provides bright-line rules that can be readily applied by the police and the courts to a large variety of factual circumstances.[24] Indeed, even when, as in *New York* v. *Quarles*, 467 U.S. 649 (1984), the Court recognized an

[24] See *Arizona* v. *Roberson*, 486 U.S. 675, 681 (1988) ("We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*."); *Colorado* v. *Spring*, 479 U.S. 564, 577 n.9 (1987) (*Miranda* has the "important virtue of informing police and prosecutors with specificity as to how a pretrial questioning of a suspect must be conducted.") (internal quotation marks omitted); *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986) ("As we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application."); *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984) (noting "the simplicity and clarity" of *Miranda*); *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979) (*Miranda*'s "gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts."); see also *New York* v. *Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in the judgment and dissenting in part) (*Miranda* rules have "afforded police and courts clear guidance on the manner in which to conduct a custodial investigation."). The Court has thus noted that "there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *Withrow* v. *Williams*, 507 U.S. 680, 695 (1993).

exception to the *Miranda* rules for public safety, the Court explained that "the exception will not be difficult for police officers to apply," 467 U.S. at 658, and that "police officers can and will distinguish almost instinctively" between questions permitted and prohibited under the exception, *id.* at 658-659.

While *Miranda* itself is generally workable, federal law enforcement agencies have encountered difficulties with some of the extensions of *Miranda* in *Edwards* v. *Arizona*, 451 U.S. 477, 480 (1981), and later cases. Those cases require that, once a suspect invokes his right to counsel during custodial interrogation, law enforcement agents may not later reinitiate questioning without counsel present, even on matters unrelated to the crime for which the suspect was being held and questioned. See *Arizona* v. *Roberson*, 486 U.S. 675 (1988); *Minnick* v. *Mississippi*, 498 U.S. 146 (1990). Whatever difficulty is caused by those decisions, however, is more properly charged to the account of *Edwards* and *Roberson* than to *Miranda*, and any such difficulty would properly be far more relevant should the Court be faced with reconsideration of those decisions rather than *Miranda* itself. The *Miranda* doctrine has undergone a continuous course of development in this Court since 1966.[25] Insofar as it is shown

[25] In many respects, the Court has tailored the *Miranda* doctrine as necessary to make it more workable. See, *e.g.*, *Davis* v. *United States*, 512 U.S. 452 (1994) (ambiguous invocation of right to counsel does not require cessation of all questioning); *Berkemer* v. *McCarty*, 468 U.S. 420 (1984) (*Miranda* warnings not required in a routine traffic stop); *Quarles*, 467 U.S. at 657 (public safety exception). The Court has not recently decided an *Edwards* issue, but in *United States* v. *Green*, 504 U.S. 908 (1992) (No. 91-5121), the Court granted certiorari to review "[w]hether *Edwards* * * * requires the suppression of a voluntary confession because law enforcement officers initiated interrogation of the suspect five months after he invoked his right to counsel in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation." The case became moot after oral argument when the respondent died. See 507 U.S. 545 (1993).

that some applications of *Miranda* create inequity or are otherwise unworkable, there is no reason to believe that the doctrine will not continue to develop in future years as appropriate.[26]

4. Finally, a return to a totality-of-the-circumstances test in all settings is unlikely to be more workable in practice than is the *Miranda* rule itself. Rather, it is likely to be more difficult to apply both for agents and courts. The underlying due process rule that confessions are inadmissible unless they are found voluntary under the traditional totality-of-the-circumstances test remains applicable, even if the *Miranda* warnings have been administered. See, *e.g.*, *Miller* v. *Fenton*, 474 U.S. 104 (1985). As a general matter, however, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer* v. *McCarty*, 468 U.S. at 433 n.20. See also *Oregon* v. *Elstad*,

Had the case not become moot, the Court would have decided whether a further refinement to the *Edwards-Roberson* rules was appropriate.

[26] Another problem that can occur in applying *Miranda* is that officers who have detained or are questioning a suspect without arresting him may be found by a court to have applied a "restraint on freedom of movement of the degree associated with a formal arrest." *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995) (internal quotation marks omitted). In that situation, an officer may inadvertently fail to issue *Miranda* warnings. As this Court has noted, "the task of defining 'custody' is a slippery one, and 'policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever.'" *Oregon* v. *Elstad*, 470 U.S. at 309. It therefore stands to reason that in some close cases, the officers will make a mistake, but it will be a "reasonable" one under all the circumstances. While the Court has not considered whether to recognize an exception to *Miranda*'s suppression rule in such a case, it has adopted a rule in the Fourth Amendment exclusionary rule context for cases in which police acted in good-faith reliance on a warrant or authorization by another governmental actor. See *United States* v. *Leon*, 468 U.S. at 906-913; *Arizona* v. *Evans*, 514 U.S. 1, 15 (1995).

470 U.S. at 318 ("The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative [on the voluntariness of his statements]."); *Colorado* v. *Spring*, 479 U.S. at 576 ("Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."). In the absence of *Miranda*, additional pressure would be placed on the voluntariness doctrine to determine the result in close and difficult cases. Although many law enforcement agencies would continue to observe the *Miranda* procedures to help ensure the admissibility of confessions they obtain, it is likely that some police departments would become less rigorous in requiring warnings, others might significantly modify them, and some police officers would, in the "often competitive enterprise of ferreting out crime," *Johnson* v. *United States*, 333 U.S. 10, 14 (1948), fail to issue warnings at all before conducting custodial interrogation.

If *Miranda* warnings are not required, the result will be uncertainty for the police and an additional volume of litigation focusing on the totality-of-the-circumstances voluntariness standard. That approach takes into account not only what the agents say and do, see, *e.g.*, *Miller*, 474 U.S. at 116, but also facts about the particular suspect (such as his maturity, education, physical condition, mental health, and knowledge of constitutional rights, see *Withrow*, 507 U.S. at 693 (citing cases)), about the circumstances of the questioning (the length of the detention, the length and nature of the interrogation, the physical constraints or deprivations imposed, the suspect's access to friends and relatives, see *id.* at 693-694; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973); *Miranda*, 384 U.S. at 445- 446), and other factors.[27]

[27] See also *Culombe* v. *Connecticut*, 367 U.S. at 601-602 (opinion of Frankfurter, J.) (relevant factors include "extensive cross-questioning," "undue delay in arraignment," "failure to caution a prisoner," "refusal to

As demonstrated by the thirty pre-*Miranda* confession cases decided by this Court under the due process test, see pp. 14-18, *supra* (discussing cases), the totality-of-the-circumstances voluntariness test is more difficult and uncertain in application than *Miranda*. Cf. *Minnick* v. *Mississippi*, 498 U.S. at 151 ("*Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness"). Its many variables would complicate the task of law enforcement in assessing what procedures would reliably secure admissible confessions.

B. Reliance Interests

Reliance interests are also an important factor, and rules of criminal procedure do not in general give rise to substantial reliance interests. See *Payne* v. *Tennessee*, 501 U.S. at 828.[28] As we note below, see pp. 49-50, *infra*, it is of significance, however, that the requirements of *Miranda* have shaped years of police conduct and governed decades of criminal prosecutions. Moreover, upsetting settled public expectations by overruling a constitutional precedent as well-known and widely applied as *Miranda* would tend to have a destabilizing effect on public confidence in the fairness of the criminal justice system and public trust in this Court's legitimacy.

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permit communication with friends and legal counsel," "the duration and conditions of detention," "the manifest attitude of the police toward [the suspect], his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control").

[28] Criminal defendants are unlikely to have given unwarned confessions in reliance on the belief that they would not be used in the prosecution's case-in-chief. Insofar as the government has taken action to foster such a belief in a given case, cf. *California Attorneys for Criminal Justice* v. *Butts*, 195 F.3d 1039, 1042-1043 (9th Cir. 1999), the defendant might advance a claim that the government had failed to fulfill a promise it made; such a claim would be analyzed under due process cases such as *Doyle* v. *Ohio*, 426 U.S. 610 (1976), as well as under the voluntariness test.

C. Developments In The Law That Have Affected The Validity Of The Past Precedent

1. Perhaps the feature of *Miranda* that has raised the greatest doctrinal doubt about that decision's validity is the tension that has emerged in this Court's cases that followed the *Miranda* decision itself. The Court has consistently premised those decisions on the proposition that *Miranda*'s holding requires the suppression of unwarned statements in the government's case-in-chief in state and federal cases. The one exception is the Court's holding in *New York* v. *Quarles*, 467 U.S. 649 (1984), recognizing a "public safety" exception to *Miranda*. But that case did not question the general rule against the use of unwarned statements in the government's case-in-chief, which the Court restated the following year in *Oregon* v. *Elstad*, 470 U.S. at 306-307.[29] The Court has never suggested that the core holding of *Miranda* should be overruled. Indeed, if this Court were to overrule *Miranda*, it would not only have to disavow the line of its cases that have addressed the *Miranda* rule, but would also have to overrule directly at least eleven cases that have reaffirmed that a confession obtained in violation of *Miranda* must be suppressed in the government's case-in-chief.[30]

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[29] *Elstad* made this crystal clear: "When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief. * * * The Court today in no way retreats from the bright-line rule of *Miranda*." 470 U.S. at 317.

[30] *Thompson* v. *Keohane*, 516 U.S. 99 (1995); *Withrow* v. *Williams*, 507 U.S. 680 (1993); *Minnick* v. *Mississippi*, 498 U.S. 146 (1990); *Pennsylvania* v. *Muniz*, 496 U.S. 582 (1990); *Arizona* v. *Roberson*, 486 U.S. 675 (1988); *Berkemer* v. *McCarty*, 468 U.S. 420 (1984); *Smith* v. *Illinois*, 469 U.S. 91 (1984) (per curiam); *Edwards* v. *Arizona*, 451 U.S. 477 (1981); *Estelle* v. *Smith*, 451 U.S. 454 (1981); *Orozco* v. *Texas*, 394 U.S. 324 (1969); *Mathis* v. *United States*, 391 U.S. 1 (1968).

The Court's decision in *Quarles* and its holdings limiting the application of *Miranda*'s suppression rule outside the government's case-in-chief, however, have led some observers to conclude that *Miranda* has lost its character as a rule that protects constitutional rights. The Court's decisions in *Tucker* and later cases rest on the conclusion that the procedural safeguards articulated in *Miranda* are not themselves required by the Constitution and that a violation of *Miranda*'s prophylactic rules does not necessarily produce statements that are themselves "compelled." That reasoning is the foundation of the public-safety exception and of this Court's holdings that unwarned, but voluntary, statements may be used for impeachment and for the acquisition of derivative evidence that may be admitted at trial.[31] Since the Court has said that a *Miranda* violation does not necessarily involve a violation of the Constitution, the question arises whether this Court has properly determined to apply a suppression remedy in the government's case-in-chief in all prosecutions, federal and state, for the violation of judicially imposed prophylactic rules.

2. In our judgment, the Court's statements that *Miranda*'s "prophylactic" requirements sweep more broadly than does the Self-Incrimination Clause itself do not invalidate *Miranda*'s status as a Fifth Amendment decision. It is worth recalling that this Court adopted the procedural safeguards of *Miranda* only after more than thirty years of applying a case-by-case voluntariness test. That judicial experience led the Court to conclude that Fifth Amendment rights in the setting of custodial interrogation could not adequately be protected through case-specific adjudication

[31] In contrast, statements "compelled" under a grant of immunity may generally not be used, consistent with the Fifth Amendment, either for impeachment, see *New Jersey* v. *Portash*, 440 U.S. 450, 458-459 (1979), or for the acquisition of derivative evidence that may be introduced against the defendant, see *Kastigar* v. *United States*, 406 U.S. 441 (1972).

of claims of police coercion, and that procedural safeguards were required. See, *e.g.*, *Haynes* v. *Washington*, 373 U.S. at 515 ("The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused.").[32] The objective of the *Miranda* safeguards "is not to mold police conduct for its own sake. Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege. The purpose of the *Miranda* warnings instead is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgement of the suspect's Fifth Amendment rights." *Moran* v. *Burbine*, 475 U.S. at 425.

[32] *Blackburn* v. *Alabama*, 361 U.S. 199, 207 (1960) ("[A] complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case."); *Spano* v. *New York*, 360 U.S. 315, 321 (1959) ("[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made."); *Haley* v. *Ohio*, 332 U.S. 596, 605 (1948) (Frankfurter, J., concurring in the judgment) ("Because of their inherent vagueness the tests by which we are to be guided are most unsatisfactory, but such as they are we must apply them."); *id.* at 606 ("Unhappily we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in securing a confession reach the coercive intensity that calls for the exclusion of a statement so secured.").

The Court has explained the balance struck in *Miranda* as follows:

> Custodial interrogations implicate two competing concerns. On the one hand, the need for police questioning as a tool for effective enforcement of criminal laws cannot be doubted. Admissions of guilt are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is inherently coercive and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *Miranda* attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

Moran, 475 U.S. at 426-427 (citations and internal quotation marks omitted). *Miranda* thereby serves individual and systemic interests in safeguarding Fifth Amendment rights. Although "[b]oth waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system, * * * neither admissions nor waivers are effective unless there are

both particular and systemic assurances that the coercive pressures of custody were not the inducing cause." *Minnick* v. *Mississippi*, 498 U.S. at 155.

3. The Court has explained not only the need for safeguards in custodial interrogation, but also how *Miranda*'s status as a prophylactic rule is linked to the constitutional provision on which it is based. In *Oregon* v. *Elstad*, the Court explained that the "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion [that is] * * * irrebuttable for purposes of the prosecution's case in chief." 470 U.S. at 307. Because a confession obtained in violation of *Miranda* is subject to an "irrebuttable presumption of compulsion" in the prosecution's case-in-chief, the suppression of confessions in that context is consistent with the Self-Incrimination Clause's requirement that a person not be "compelled" to be a witness against himself. The conclusive presumption is a rule of law that the Court applies to serve systemic goals in protecting Fifth Amendment rights. See *Elstad*, 470 U.S. at 307 n.1 ("A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements [in the government's case-in-chief].") (emphasis in original).

The Court in *Elstad* also explained that, outside the government's case-in-chief, a confession obtained in violation of *Miranda* is subject only to a rebuttable presumption of compulsion. Accordingly, it may be permissible to use an unwarned confession for impeachment or to obtain evidence. 470 U.S. at 307 ("But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted."). The rule in those settings thus permits use of the unwarned confession so long as the presumption of compulsion is overcome by a showing under the totality of the circumstances that the statement was

made voluntarily. *Ibid.*; see *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972).

4. There are other contexts in which this Court similarly has recognized prophylactic rules that are designed to safeguard constitutional rights, even when those rules may in particular cases sweep more broadly than the constitutional right upon which they are based. For example, in *Douglas* v. *California*, 372 U.S. 353 (1963), this Court held that States must provide appointed counsel to indigent criminal defendants on appeal. Subsequently, in *Anders* v. *California*, 386 U.S. 738 (1967), the Court set forth a procedure to be used by appellate counsel representing an indigent defendant when counsel concludes that there is no non-frivolous ground for appeal and he wishes to withdraw from representation. The *Anders* procedure, however, "is not 'an independent constitutional command,'" but "'a prophylactic framework' * * * established to vindicate the constitutional right to appellate counsel." *Smith* v. *Robbins*, No. 98-1037 (Jan. 19, 2000), slip op. at 10 (quoting *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987)). The Court has recently reaffirmed that some such prophylactic procedure is necessary. In *Smith*, the Court explained that "the States are free to adopt different procedures [from those outlined in *Anders*], so long as those procedures adequately safeguard a defendant's right to appellate counsel." Slip op. 2; see also *id.* at 15 ("In determining whether a particular state procedure satisfies this standard, it is important to focus on the underlying goals that the procedure should serve—to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required by *Douglas*, and also to enable the State to protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent.") (internal quotation marks omitted).

Similarly, in *Michigan* v. *Jackson*, 475 U.S. 625, 636 (1986), the Court held that, once a defendant has invoked his Sixth Amendment right to counsel at an arraignment or

similar proceeding, "any waiver of the defendant's right to counsel for * * * police-initiated interrogation is invalid." In *Michigan* v. *Harvey*, 494 U.S. 344 (1990), however, the Court held that such invalidity requires suppression of a confession obtained in violation of *Jackson* only in the prosecution's case-in-chief, but not when it is offered for impeachment. The Court explained that distinction on the ground that *Jackson* is "not compelled directly by the Constitution," 494 U.S. at 351-352, but sets forth a "prophylactic rule," *id.* at 345, 346, 349, 351, 353, "designed to ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel," *id.* at 351. The Court acknowledged in *Harvey* that the rationale of this line of Sixth Amendment decisions is based on the rationale underlying *Miranda*. See 494 U.S. at 349- 352.[33]

In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court held that an increased sentence imposed on a defendant after a successful appeal and reconviction is presumed to be the product of vindictiveness and therefore unconstitutional unless non-vindictive reasons for the increased sentence appear on the record. The Court has explained that *Pearce* is a "prophylactic rule" and has noted the similarities between the "prophylactic rules" in *Pearce* and *Miranda*.

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[33] Another example of a prophylactic rule is the Confrontation Clause doctrine of *Bruton* v. *United States*, 391 U.S. 123 (1968), which forbids the admission of a nontestifying co-defendant's confession in a joint trial, even with a limiting instruction. The purpose of the *Bruton* rule is to avoid the risk that the jury will disregard its instructions. See *Gray* v. *Maryland*, 523 U.S. 185, 189, 192, 197 (1998) (referring to "protective rule" of *Bruton*). Although some juries might be able to follow a limiting instruction, the Court concluded that the risk that many could not do so warranted a conclusion that the Confrontation Clause itself protects the defendant against the latter possibility. But in a situation in which competing values outweigh that risk, the co-defendant's confession may be used. See *Tennessee* v. *Street*, 471 U.S. 409 (1985) (confession that is inadmissible under *Bruton* rule is admissible for impeachment).

Michigan v. *Payne*, 412 U.S. 47, 53-54 (1973); see also *Wasman* v. *United States*, 468 U.S. 559, 562-563 (1984); *United States* v. *Goodwin*, 457 U.S. 368, 372-377 (1982); *Colten* v. *Kentucky*, 407 U.S. 104, 116 (1972). The Court reached a similar conclusion in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), holding that a State may not respond to a defendant's attempt to seek a trial *de novo* in a higher tier of a two-tier court system by charging the defendant with a more serious offense. The Court has recognized that the rules announced in *Pearce* and *Blackledge*, like the rules in *Miranda* and *Jackson*, require a decision in favor of the defendant in some cases even though the underlying constitutional right being protected may not have been shown to have been violated in a particular case.[34] But the Court determined that such rules were necessary to provide full effectuation of constitutional rights.[35]

Our point is not that such rules are always correct, or that prophylactic rules that lead to the suppression of evidence in a criminal case are often justified. In most criminal settings, the heavy costs of such rules would not outweigh the potential marginal protection they offer for the underlying

[34] See *Blackledge*, 417 U.S. at 28 (applying the rule notwithstanding that there was "no evidence that the prosecutor in this case acted in bad faith or maliciously"); *Payne*, 412 U.S. at 54 (noting that *Pearce* adopted presumption of vindictiveness notwithstanding that "nothing in *Pearce* intimates that the Court regarded [judicial vindictiveness] as anything more than an infrequently appearing blemish on the sentencing process").

[35] The Court has also adopted constitutional prophylactic rules to safeguard constitutional rights in a variety of other settings. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340, 342 (1974) (explaining that, even though "there is no constitutional value in false statements of fact," the Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny nevertheless "extended a measure of strategic protection to defamatory falsehood" in cases involving public officials and public figures); *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965) (setting forth "procedural safeguards designed to obviate the dangers of a censorship system" with respect to motion picture obscenity).

constitutional right. Ordinarily, therefore, this Court requires proof of an individualized constitutional harm before framing a remedy. See, *e.g.*, *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). That does not, however, deprive the *Miranda* rules, or other constitutional prophylactic rules, of their constitutional status. Prophylactic rules are now and have been for many years a feature of this Court's constitutional adjudication. *Miranda* is distinctive in the detail with which the Court specified particular procedural safeguards. But *Miranda*'s adoption of a prophylactic rule—which has since been applied where necessary but not, as *Tucker*, *Quarles*, and *Elstad* show, in categories of cases where its adverse effects would outweigh any benefits—does not uniquely depart from the Court's constitutional jurisprudence.

D. *Change In Factual Premises*

There appear to be at least two key factual assumptions underlying *Miranda*. First, "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures." 384 U.S. at 467. Second, "without proper safeguards"—provided by the administration of the *Miranda* warnings or a fully effective equivalent —there is a great risk that those pressures may "undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Ibid.* Debate concerning each of those premises is possible, as it was at the time *Miranda* was decided. The inquiry for purposes of stare decisis, however, focuses on changes in circumstance, because the rule of stare decisis would provide little stability if the factual premises of previous decisions were constantly subject to reconsideration, even when the evidence showed no change of circumstance. We cannot conclude that the passage of time or other developments in our society have

substantially altered the validity of either of the key factual premises on which *Miranda* was based.[36]

The Court's perception of custodial interrogation as inherently coercive was based on the Court's prior "voluntariness" cases and its review of police interrogation manuals. See *Miranda*, 384 U.S. at 445-456. The Court's conclusion was not driven solely by cases of physical abuse; to the contrary, the Court "stress[ed] that the modern practice of in-custody interrogation is psychologically rather than physically oriented." *Id.* at 448. Custodial interrogation is an important and necessary procedure of law enforcement, and law enforcement agents today are generally better trained than they were in 1966. It cannot be said, however, that the interrogation process is so uniformly different now than at the time of *Miranda* that changes have undercut the validity of that decision.

Likewise, the Court's view that warnings (or other safeguards) would be an effective antidote to the coercive pressures of custodial interrogation has not been undercut by changed circumstances. Some modern technologies—videotaping, for example—could offer promise in documenting that a particular confession was not produced by any coercion inherent in the custodial setting. But no assurance currently exists that such technological substitutes could provide a suitable replacement for the by-now well-understood *Miranda* warnings on a large-scale basis, and in any event the statute at issue in this case does not present the

[36] In a companion federal case decided with *Miranda*, the United States argued that, in deciding whether a suspect's statements during in-custody questioning were the product of compulsion, the Court should require consideration of the totality of the circumstances, rather than adopting a constitutional rule turning on the presence or absence of warnings. Brief for the United States at 28-38, *Westover* v. *United States*, 383 U.S. 903 (1966) (No. 761). The calculus of whether to retain *Miranda*'s rule with respect to unwarned statements, thirty-four years after the Court announced it, presents very different considerations.

question whether such a technological fix could form part of an adequate substitute for the *Miranda* warnings. See pp. 13-20, *supra*. Nor does the widespread public familiarity with the *Miranda* warnings suggest that they are no longer necessary. Not all members of our society are conversant with their rights. And, if *Miranda* were overruled, it is difficult to predict how long even general public familiarity would persist.[37] Finally, even if a suspect held in custody already knows of his rights, the Court in *Miranda* concluded that the provision of warnings in each case "show[s] the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." 384 U.S. at 468. Once again, there is no basis for a conclusion that changed circumstances or a changed perception of the facts warrants reassessment of that view.

* * * * *

In considering whether the Court should revisit *Miranda*, it is appropriate to make an observation that transcends the usual factors considered under the rubric of stare decisis. In our view, *Miranda* has come to play a unique and important role in the nation's conception of our criminal justice system: it promotes public confidence that the criminal justice system is fair. Overruling *Miranda*—at this juncture, more than three decades after it was announced and after law enforcement has accommodated to its basic requirements—would thus tend to undermine public confidence in the fairness of that system. The law enforcement system depends on citizen cooperation and support in myriad ways. Steps that may damage that confidence should not be taken lightly.

[37] Federal law enforcement agencies would, as a matter of policy, continue to comply with the warnings requirements of *Miranda*. We are unable to predict whether state and local law enforcement would do so. More to the point here, there would be no basis for the Court to draw a firm conclusion about what practices would ensue were it to overrule *Miranda*.

There is no doubt that the public pays a heavy price if technical violations of *Miranda* result in suppression of otherwise probative evidence, and non-prosecution or acquittal of felons ensues. But there are concrete benefits of *Miranda* as well: it establishes clear guidelines of conduct for agents; it facilitates the admission in evidence of confessions that follow administration of the warnings; it bolsters the credibility of such confessions in the eyes of jurors; and it generally contributes to the perceived fairness of the criminal justice system. The stability of this Court's constitutional jurisprudence is also of surpassing importance to the system of justice. Especially in light of those factors, we do not urge the Court that *Miranda* be overruled.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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