ADMISSIONS, CONFESSIONS, and MIRANDA:
The Basics All Texas Peace Officers Need To Know

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Food for thought as you read this article:

“In civilized life, law floats in a sea of ethics.”
- Chief Justice Earl Warren

"A good man would prefer to be defeated than to defeat injustice by evil means."
- Sallust, *Jugurthine War*, 41 B.C.
Roman historian & politician (86 BC - 34 BC)

*Nemo tenetur seipsum accusare.*
("No man is bound to accuse himself.")
Overview

This article is written with the intent of making the basic rules of *Miranda* understandable to Texas working peace officers. It is by no means an all-inclusive tome on this specialized topic; it is, instead, an attempt to make some rather complex rules understandable to those who must enforce them.

Despite the mind-boggling advances in the technology used in law enforcement today -- from DNA to AFIS to CODIS to the Internet and a veritable cornucopia of other acronyms and tools -- confessions remain one of the most important, most sought-after, and most highly-prized pieces of evidence in an investigation ("Electronic Recording of Custodial Interrogations in Texas: A Review of Current Statutes, Practices, and Policies," 2009). Even when physical evidence is overwhelming, officers still seek to obtain confessions from the perpetrators of crimes big and small (Benoit, 2010). Confessions, though, are like any other piece of evidence: they are useless if they are not admissible in court.

The laws and rules governing confessions, admissions, and statements come from the Constitution of the United States, from state constitutions and statutory law, and from case law. The protections provided by these various sources are in place to help ensure that confessions are both trustworthy and voluntary, since our system of justice has long held that coerced statements are unreliable (Klotter, Kanovitz, & Kanovitz, 1999).

In their *Spano v. New York* (1959) decision, the Supreme Court held that "...in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves" (p. 320). From the Court's opinion in the case comes this brief retelling of the events leading to Spano's conviction:

After petitioner [Spano], a foreign-born young man of 25 with a junior high school education and no previous criminal record, had been indicted for first-degree murder, he retained counsel and surrendered to police at 7:10 p.m. He was then subjected to persistent and continuous questioning by an assistant prosecutor and numerous police officers for virtually eight hours until he confessed, after he had repeatedly requested, and had been denied, an opportunity to consult his
counsel. At his trial in a state court, his confession was admitted in evidence over his objection, and he was convicted and sentenced to death. (p. 315)

The Supreme Court saw the incredible danger inherent in a situation such as the one in *Spano*. Our system of justice is built on the idea that all persons are innocent until proven guilty. Our judicial system today has multiple checks and balances built into it so that the government must use only lawfully-obtained evidence -- including confessions or admissions (see, for example, *Mapp v. Ohio*; *Wong Sun v. United States*; Texas Code of Criminal Procedure Articles 38.21, 38.22, and 38.23).

Evidence lawfully obtained is generally admissible at trial. This includes confessions, even when those confessions are not in the accused's self-interest: "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions" (*United States v. Washington*, 1977, p. 187).

**Definition of Confession.** Stride & Rolater (2006, p. 3) define 'confession' as "any written, oral, or sign language statement that is self-incriminatory." Notice that *confessions are statements*. Confession law relates specifically to statements. Confession law is concerned with testimonial, rather than physical, evidence (Stride & Rolater, 2006). Despite the fact that confessions are testimonial, they *are* evidence. As such, they are valuable in court. FBI Academy instructor Kenneth Myers refers to confessions as having "great value" (2010, para. 1). It is one of our responsibilities as peace officers to ensure that the admissions, confessions, and statements we obtain are admissible as evidence. To do so, officers must follow the letter of the law. Our society does not tolerate practices and actions by police which result in coerced statements (Klotter, et al., 1999).

**Background.** The rules we use today began to take shape in the early 1960s. The Warren Court during that most transformative of decades handed down multiple cases which affirmed the rights of individuals who were suspected of committing crimes (see, for just a few examples, *Escobedo v. Illinois*; *Miranda v. Arizona*; *Gideon v. Wainwright*; *In re Gault*). These cases helped to ensure that due process was available to all. Several of these cases shed light on improper police conduct as it related to confessions, admissions, and the admissibility of evidence at trial. In *Escobedo v.*
Illinois (1964), for example, the police failed to inform Mr. Escobedo of his right to remain silent or of his right to speak to his attorney. They further refused to permit him to speak with his attorney who was just outside of the interrogation room. The Escobedo case was followed by a cascade of rulings which, taken together, fundamentally reshaped our criminal justice system. A police officer from the 1950s would recognize very little of what is required today when interrogating a suspect.

**Miranda v. Arizona.** The Supreme Court reviewed four similar cases in 1966 to explore this area of law and to set a national standard (Mason & Stephenson, 2005). One of the cases the Court reviewed involved 23 year old Ernesto Miranda. Miranda was a suspect in a 1963 rape and kidnapping case in Phoenix, Arizona. Miranda was identified at the police station by the complaining witness. Miranda was subjected to two hours of 'mild' questioning during which he confessed to the kidnapping and rape of one person and the robbery of $4 from another (Petrocelli, 2010). Miranda, an indigent individual who had only a 9th grade education, did not request a lawyer at any time during the interrogation. Miranda's signed confession included a typed paragraph saying that his statement was made voluntarily and "with full knowledge of my legal rights," including the fact that any statement he made might be used against him (Miranda v. Arizona, 1966, p. 492). It is important to note that the interrogating police officers never informed Miranda of his Constitutional right to have a lawyer present to advise him during the questioning (Mason & Stephenson, 2005).

Miranda was convicted and sentenced to two concurrent 20-30 year terms of confinement in prison. Miranda appealed his conviction. The Supreme Court agreed to hear his appeal and handed its decision down in 1966. In the Court's opinion for Miranda v. Arizona, Chief Justice Earl Warren wrote:

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the
Fifth Amendment to the Constitution not to be compelled to incriminate himself.
(p. 439)

The Court overturned Miranda's conviction and remanded it for trial without the improperly-obtained confession. The Court ruled that the Fifth Amendment privilege against self-incrimination takes effect at the time a suspect is taken into custody (Klotter, et al., 1999). Police custodial interrogation is "inherently coercive" (Miranda v. Arizona, 1966, p. 533, dissenting opinion of Justice White). The combination of custody and interrogation is so coercive, in fact, that anyone who is subjected to it is presumed to have been compelled to talk (Rutledge, 2009a). To combat this coercion, the Court laid down specific rules to be followed if custodial confessions were to be admitted into evidence in the United States. These rules, now generally referred to as "Miranda Rules," were laid out in the Miranda opinion:

[W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. 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. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. (pp. 478-479)

The Miranda decision brought about a sea change in American police practices as they related to confessions and admissions. Miranda has been referred to as "an
icon of the Warren Court’s transformation of American criminal procedure" (O’Neill, 2000, p. 185). *Miranda* is now so well-known that it is seen as a cornerstone of American jurisprudence. The case name is so ubiquitous that it has even been "verbed" into a new word: to "Mirandize" someone is to read him his rights. The *Miranda* rule imposed three duties on police, who must: (1.) Warn the suspect of his Fifth Amendment rights; (2.) secure a knowing, intelligent, and voluntary waiver before initiating questioning; and (3.) cease interrogating if the suspect anytime thereafter manifests a desire to remain silent or to consult with an attorney (Klotter, et al., 1999, p. 289, Figure 6.7). Put differently, the *Miranda* decision created two "prophylactic measures" for suspects who are subjected to custodial interrogation: the right to remain silent and the right to counsel (Myers, 2010, para. 2).

**When *Miranda* Applies**

There are three separate ways a suspect can confess, according to Texas District & County Attorneys Association (TDCAA) author and attorney Diane Burch Beckham (2008): he can make an admission while not in custody; he can make an admission without being interrogated; or he can submit to a custodial interrogation which results in a confession.

The formula officers must remember is custody + interrogation = *Miranda*. If a suspect is in custody and is being interrogated, he must receive the *Miranda* warnings. He may choose to waive his right to remain silent, his right to an attorney, or both -- but only after he has been given the required warnings and only if the waiver is done knowingly, intelligently, and voluntarily (Myers, 2010).

**Types of interactions.** There are three different types of police-citizen interactions: a voluntary encounter, with no police intrusion into a person's freedom of movement; a temporary detention, with minimal police intrusion into a person's freedom of movement; and an arrest, with significant police intrusion into a person's freedom (Stride & Rolater, 2006; TCLEOSE, 2008, p. 1 of Unit 7).

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1 "Prophylactic measures" in this context refers to a set of actions designed to prevent a violation from happening before it occurs; used in the same sense as "a medicine or course of action used to prevent disease."
Many people, both in and out of the law enforcement community, misunderstand the *Miranda* requirement -- thinking that police must read *Miranda* warnings even when, in reality, they're not required to do so (Klotter, et al., 1999). Movies and television programs often incorrectly give the impression that officers are required to read a suspect his *Miranda* rights any time that they talk to someone whom the officer suspects to have been involved in a crime; some even mistakenly show that officers are forced to Mirandize everyone immediately upon arrest (Rutledge, 2009a). This "Joe Friday Syndrome" has become pervasive in modern American popular culture. Many peace officers, myself included, have dealt with arrestees who claimed to have the basis for a huge lawsuit because the officer did not read the *Miranda* warnings as soon as the handcuffs clicked on the actor's wrists!

As shown in the *Miranda* Formula above, nothing could be further from the truth. In order for *Miranda* to apply, the suspect must be in custody and must be subject to interrogation (Klotter, et al., 1999). If the suspect is not in custody, officers are not required to Mirandize him. If he is in custody but not being interrogated, officers are not required to Mirandize him immediately. Both conditions must be met to trigger *Miranda*.

**Custody.** So what then, exactly, is custody? A person is in custody if he has been formally arrested or if he is restrained to the degree that a reasonable person would associate with a formal arrest (Beckham, 2008; Petrocelli, 2010; Stride & Rolater, 2006). "Custody exists when a reasonable person, based on the objective circumstances of an encounter, would assess the situation as an arrest" (Klotter, et al., 1999, p. 291) It's important to note, however, that "custody" and "arrest" are not necessarily synonymous. If a person is arrested, he obviously is in custody. It is quite possible, however, to be in custody but not under arrest (Stride & Rolater, 2006). A person can be 'seized' in the context of the Fourth Amendment (e.g., a temporary detention) while not, at the same time, be in 'custody' in the context of the Fifth Amendment for purposes of *Miranda* (Petrocelli, 2010; Stride & Rolater, 2006).

The Texas Court of Criminal Appeals has identified four situations in which an individual may be in custody (Stride & Rolater, 2006):

- When he is physically deprived of his freedom of action in any significant way;
- When a law enforcement officer tells him he cannot leave;
• When law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and
• When there is probable cause to arrest and law enforcement officers do not tell him that he is free to leave\(^2\) (p. 24).

There are multiple factors which courts take into account when determining whether or not a person was in custody. For example, the courts might look at any or all of the following conditions:

prolonged questioning; questioning in isolated surroundings; threatening presence of several police officers; display of a weapon; some physical touching of the person; a hostile or accusatory attitude; language or tone of voice indicating that compliance with officer’s request might be compelled; handcuffs or physical restraints; and being specifically told that he or she is the prime suspect in an investigation (Klotter, et al., 1999, p. 292).

Courts examine the "totality of the circumstances" when determining whether or not a person was in custody (Florida v. Royer, 1983). Thus, an individual who is told he's under arrest is considered to be in custody for purposes of Miranda, as would someone who was handcuffed, locked in the back of a patrol car, or kept at a police station and not permitted to leave. Although there can be exceptions to being in custody because of handcuffs or in the back of the patrol car [if, for example, the officer placed the suspect in that situation temporarily and solely for the purpose of officer safety during a temporary detention, or if the officer placed a person in the patrol car while he secured the scene] officers should tread carefully when in those circumstances. Keep the "totality of circumstances" concept in mind when making decisions in this area.

Traffic stops and Terry Stops are not generally considered to be 'custody' for purposes of Miranda. “There is a ‘non-coercive aspect of ordinary traffic stops’ that

\(^2\) From Stride & Rolander (2006): “…the officer’s knowledge of probable cause must be clearly revealed to the suspect as result of either information shared by the officer to the suspect or information shared by the suspect to the officer. But custody is only established … if the manifestation of probable cause and the other circumstances would lead a reasonable person to believe that he is under restraint equivalent to an arrest.” (p. 24)
leads to the conclusion that ‘persons temporarily detained pursuant to such stops are not in custody for the purposes of *Miranda*” (Petrocelli, 2010, p. 18). “As a general rule, suspects are not considered to be in custody when they are subjected to investigative questioning during … *Terry* stops” (Klotter, et al., 1999, p. 293).

Merely being the focus of an officer's subjective suspicions does not trigger the *Miranda* requirements. Remember: custody + interrogation must be present to invoke *Miranda*. Just because the officer suspects a particular person doesn't automatically bring *Miranda* into play\(^3\). No custody means no *Miranda* (Petrocelli, 2010).

**Interrogation.** An interrogation is defined in *Miranda* (1966, p. 436) as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in a significant way." Interrogations take place when police ask investigative questions, engage in words, or engage in conduct that they know are likely to generate an incriminating response from the suspect (Klotter, et al., 1999). Note the emphasis on *incriminating* answers.

The Court has ruled that if the purpose of questioning is to obtain evidence against the suspect, even the most mundane questions can be considered an interrogation. Not all direct questions are considered to be interrogatory, though; thus, some pointed, direct questions would not be subject to the *Miranda* rules. For example, asking a DWI suspect his name, date of birth, and address would not normally be subject to *Miranda*, even if the *way* the suspect answered the question was incriminating -- such as slurring his speech while being video recorded. Asking that same suspect a question along the lines of "When you turned six years old, do you remember what the date was?" would be classified as interrogation (*Pennsylvania v. Muñiz*, 1990, p. 586). Why, you ask? Because the intent of the question, in this example, was to determine Muñiz' *mental state*, rather than to simply determine his booking details.

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\(^3\) From Klotter, et al. (1999): “That the subject has become the focus of the investigation or that the officer intends to arrest him or her has no bearing on whether the suspect is in custody because, without communication, the officer's intentions have no impact on a reasonable person's assessment of the situation." (pp. 291-292)
Justice Brennan, in the *Muñiz* opinion, quoted an earlier case\(^4\) to help explain why asking booking questions does not qualify as an interrogation even when the suspect's slurred, drunken speech could be used against him in court to prove intoxication:

"[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." Further, "both federal and state courts have usually held that it [the Fifth Amendment] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." (p. 591)

**Situations When *Miranda* Is Not Needed**

**In general.** Officers should keep the custody + interrogation = *Miranda* formula in mind at all times. Doing so will help to ensure that *Miranda* is given when needed, but it will also prevent officers from giving the warning when it's not needed (Stride & Rolater, 2006). To quote Los Angeles County, California, District Attorney's Office Special Counsel Devallis Rutledge, "When giving *Miranda* warnings, *timing* matters" (2009a, p. 60). Rutledge goes on to warn his readers that giving the *Miranda* warnings too soon has "potential drawbacks" (p. 60). Rutledge goes so far as to quote from Supreme Court opinions on the sometimes-chilling\(^5\) effect of giving a *Miranda* warning: "The Supreme Court itself has acknowledged that its 'compulsion-neutralizer' is actually a 'confession inhibitor.' *Miranda* warnings may inhibit persons from giving admissions, confessions, and *Miranda* the basics all texas peace officers need to know

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\(^4\) *Holt v. United States*, 218 U.S. 245 (1910)

\(^5\) Rutledge on his assertion that *Miranda* has had a negative effect on the ability of law enforcement officers to fight crime and solve cases: "Statistics from the FBI's Uniform Crime Reports show that during the years before the *Miranda* decision was issued in 1966, law enforcement officers in the U.S. cleared an average of 63 percent of the Part 1 violent crimes (murder, rape, robbery and aggravated assault). Immediately after *Miranda*, the clearance rate fell sharply, averaging only 45 percent ever since. This 18-percentage-point drop represents a 28-percent reduction in our ability to clear violent crimes, attributable solely to the effect that hearing a *Miranda* warning has on the suspect's willingness to admit his crimes" (2009a, p. 62). Unfortunately, Rutledge does not cite in his article any empirical studies which show that there is a definitive causal relationship between *Miranda* and the drop in clearance rates. It is a tenant of objective research that 'correlation does not mean causation,' but Rutledge's UCR statistics do make for interesting discussion.
information.' (Oregon v. Elstad) In many cases, 'Miranda warnings deter a suspect from responding' (New York v. Quarles)" (p. 62).

Rutledge's thesis is not that officers should avoid Miranda; it is, instead, that officers should Mirandize suspects only when it is necessary to do so. Doing so prematurely may prevent a suspect from making what would otherwise be an admissible statement. TDCAA's Diane Burch Beckham (2009) puts it this way: "Giving the warnings under circumstances that do not involve custody risks creating a factor in favor of custody and defeats the purpose of noncustodial interviews" (p. 344). Chief Justice Earl Warren put it brilliantly when he wrote in the Supreme Court's Miranda opinion that

[t]here is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment, and their admissibility is not affected by our holding today. (p. 478)

General, on-scene questioning, such as "what happened here?" does not trigger the Miranda warning (Beckham, 2008, p. 141; Petrocelli, 2010). Garcia v. State (1995) is a Texas case that helps to explain this concept. Garcia was convicted of Voluntary Manslaughter and sentenced to 50 years in prison after he killed a friend of one of his family members. Garcia threw the murder weapon away and then told his friends and family that he and Silvestre, the victim, had been robbed at an intersection and that Silvestre had been shot during the robbery. Houston PD officers arrived and began to investigate the crime. From the Court's opinion in Garcia:

Houston Police Officer Miller found appellant [Garcia] at Dever's home shortly after the crime. It is undisputed that Officer Miller took appellant back to the crime scene in his patrol car and that prior to receiving his Miranda warnings, appellant told Officer Miller that Silverstre had been shot when they were robbed at the intersection. Appellant contends, however, this statement was the product of custodial interrogation because he was handcuffed when he made the statement. Dever testified that appellant was put in handcuffs by Officer Miller at Dever's house. Officer Miller testified that he did not put appellant in handcuffs at Dever's
house, but gave appellant a ride in the patrol car solely to bring the main witness to the alleged robbery back to the scene. (pp. 729-730)

The original trial court judge found Officer Miller's testimony to be credible and took as fact that Garcia was not handcuffed at the time he was taken to the crime scene. The Fourteenth Court of Appeals ruled that "because appellant was not in custody at the time he told Officer Miller he had been robbed and that Silverstre had been killed by the robbers, this statement was admissible" (p. 730).

**Sudden Outbursts.** Spontaneous statements or sudden outbursts are also outside of the purview of *Miranda.* In *Rhode Island v. Innis* (1980), Innis was arrested as a suspect in a robbery. After hearing his *Miranda* rights, Innis, who was unarmed when he was arrested, asked to speak to a lawyer. The arresting officers placed him in a police car and began to drive him to the police station. On the way to the station, three of the officers began to discuss the shotgun that was used in the robbery for which Innis was arrested. One of the officers said that there was a school for the handicapped near the scene of the crime, and then commented about how terrible it would be should one of the school children find the shotgun and hurt himself. Innis, without prompting, interrupted the officers and told them to turn the car around so that he could show them where the shotgun was. In a 6-3 decision, the Court ruled that Innis' statements were admissible. The Court reasoned that *Miranda* applied "whenever a person in custody is subjected to either express questioning or its functional equivalent" (p. 292). The Court's majority determined that the officers' conversation on the way to the police station did not qualify as express questioning or its equivalent. Innis met only one half of the formula (custody); the officers had not initiated an interrogation, so Innis' statement was admissible in court.

*Innis* is significantly different from another case which, on the face of it, seems similar: *Brewer v. Williams* (1977), often referred to as the "Christian Burial Case." The basic details of *Brewer v. Williams* are as follows (taken from the Court's synopsis of the case):

Respondent [Williams] was arrested, arraigned, and committed to jail in Davenport, Iowa, for [an arrest warrant which charged him with] abducting a 10-year-old girl in Des Moines, Iowa. Both his Des Moines lawyer and his lawyer at
the Davenport arraignment advised respondent not to make any statements until after consulting with the Des Moines lawyer upon being returned to Des Moines, and the police officers who were to accompany respondent on the automobile drive back to Des Moines agreed not to question him during the trip. During the trip, respondent expressed no willingness to be interrogated in the absence of an attorney, but instead stated several times that he would tell the whole story after seeing his Des Moines lawyer. However, one of the police officers, who knew that respondent was a former mental patient and was deeply religious, sought to obtain incriminating remarks from respondent by stating to him during the drive that he felt they should stop and locate the girl's body because her parents were entitled to a Christian burial for the girl, who was taken away from them on Christmas Eve. Respondent eventually made several incriminating statements in the course of the trip, and finally directed the police to the girl's body. Respondent was tried and convicted of murder, over his objections to the admission of evidence relating to or resulting from any statements he made during the automobile ride, and the Iowa Supreme Court affirmed, holding, as did the trial court, that respondent had waived his constitutional right to the assistance of counsel. (p. 387)

Note that there are some major differences between the two cases. Innis, at the time he told the officers where to find the shotgun used in his case, had not yet been arraigned, had not yet spoken to an attorney, and had not yet been in jail. He did invoke his Fifth Amendment right to assistance by counsel, at which time the officers stopped asking questions. When Innis broke his silence and told the officers where to find the shotgun, he did so in response to the officers speaking to each other -- not to him. There was no interrogation or its functional equivalent.

Williams' case is just the opposite. He had been arrested on the authority of a warrant signed by a magistrate, taken to jail, arraigned, and had an attorney as provided for in the Sixth Amendment. He repeatedly told the officers that he didn't want to talk until he spoke with his lawyer in Des Moines. Williams' attorneys had reached a verbal agreement with the police that they would not question him on the ride between Davenport and Des Moines. The officers refused to let Williams' Davenport lawyer, Mr.
Kelly, ride in car with the three of them on the trip to Des Moines despite his request to do so (p. 392). Almost as soon as they were on the road to Des Moines,

the detective and his prisoner … embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the detective said: "I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I felt that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in, rather than waiting until morning and trying to come back out after a snow storm, and possibly not being able to find it at all." (pp. 392-393)

Detective Leaming admitted on the stand that his intent was to solicit information from Williams before they arrived in Des Moines (p. 399), where Williams could speak to his lawyer there as had been prearranged and as he had repeatedly told the officers who were transporting him.

The Supreme Court ruled that Williams' Sixth and Fourteenth Amendment right to counsel had been violated by the "Christian Burial Speech" delivered on the road between Davenport and Des Moines. Despite the "senseless and brutal" nature of the crime itself (p. 406), the Court ruled as it had to: in a neutral, dispassionate manner. Put in different terms, the Court reaffirmed that in our system of justice, the ends do not
justify the means. Even with the best of intentions, the police must always follow the dictates of the law.

It is clear, then, that Innis and Williams are polar opposites despite what seem initially to be somewhat similar circumstances. Officers are reminded that the Sixth Amendment right to counsel "attaches 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' Thus, the 6th Amendment right to counsel is self-triggering, not invoked" (Stride & Rolater, 2006, p. 51, internal citations omitted).

**Non-testimonial evidence.** As Justice Brennan wrote in Muñiz (citing Holt v. United States), physical actions are not considered to be testimonial and, therefore, are not protected by Miranda. The Texas Court of Criminal Appeals followed that line of thought in Gassaway v. State (1997). In that case, the Court of Criminal Appeals ruled that activities such as reciting the alphabet or counting are not testimonial, but are instead more like physical evidence. Michael Gassaway appealed his DWI conviction, claiming in his appeal

that the jury should not have been allowed to view that portion of the DWI videotape showing appellant [Gassaway] counting and reciting the alphabet during the course of taking field sobriety tests. Appellant contends that counting and reciting the alphabet was testimonial in nature and violates a defendant's Fifth Amendment rights. (p. 49)

The Court of Criminal Appeals shot down Mr. Gassaway's argument, ruling that the use of the videotaped evidence did not violate his Fifth Amendment right to be free from self-incrimination. Because reciting the alphabet and counting backwards were not testimonial in nature, "his recitation of the alphabet and counting backwards was not compelled in violation of his right to be free from self-incrimination, therefore failing to trigger Fifth Amendment protection" (p. 51).

**Physical evidence.** Fingerprints, blood samples, hair samples, etc., are not protected by Miranda. The Supreme Court, in Schmerber v. California (1966) made this

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6 Oliver Wendell Holmes, Jr., once made the statement that "This is a court of law, young man, not a court of justice."
clear while dealing with a case involving an intoxicated driver. The Court's synopsis of the case gives the basic details:

Petitioner [Schmerber] was hospitalized following an accident involving an automobile which he had apparently been driving. A police officer smelled liquor on petitioner's breath and noticed other symptoms of drunkenness at the accident scene and at the hospital, placed him under arrest, and informed him that he was entitled to counsel, that he could remain silent, and that anything he said would be used against him. At the officer's direction a physician took a blood sample from petitioner despite his refusal on advice of counsel to consent thereto. A report of the chemical analysis of the blood, which indicated intoxication, was admitted in evidence over objection at petitioner's trial for driving while intoxicated. (p. 757)

The Court ruled against Mr. Schmerber. The Supreme Court said that "[t]he privilege against self-incrimination is not available … where there is not even a shadow of compulsion to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature" (p. 757). The Court again, as it has multiple other times, ruled that the Fifth Amendment's prohibition on forced self-incrimination referred to testimonial rather than physical evidence. Schmerber was not asked any questions, so the Fifth Amendment protections didn't apply.

**Emergency exception: New York v. Quarles.** There are certain limited situations when officers are permitted to ask questions without Miranda warnings, despite the fact that the situation is most likely a custodial interrogation. This is an emergency exception to the Miranda rule (New York v. Quarles, 1984). The Court held that an officer's immediate concern with protecting the safety and welfare of the public represented a justified exception to the Miranda rule. The Court briefly recounted the facts of the case:

[A] woman approached two police officers who were on road patrol, told them that she had just been raped, described her assailant, and told them that the man had just entered a nearby supermarket and was carrying a gun. While one of the officers radioed for assistance, the other (Officer Kraft) entered the store and spotted respondent [Quarles], who matched the description given by the woman.
Respondent ran toward the rear of the store, and Officer Kraft pursued him with a drawn gun, but lost sight of him for several seconds. Upon regaining sight of respondent, Officer Kraft ordered him to stop and put his hands over his head; frisked him and discovered that he was wearing an empty shoulder holster; and, after handcuffing him, asked him where the gun was. Respondent nodded toward some empty cartons and responded that "the gun is over there." Officer Kraft then retrieved the gun from one of the cartons, formally arrested respondent, and read him his rights under *Miranda v. Arizona*. Respondent indicated that he would answer questions without an attorney being present and admitted that he owned the gun and had purchased it in Florida. (p. 649)

The Court explained in its opinion why it permitted the statement into evidence. Although Mr. Quarles was clearly in custody at the time of the statement, the exigency of the situation gave the officer the right to ask the question when he did. Again, from the Court's ruling:

> Although respondent was in police custody when he made his statements and the facts come within the ambit of *Miranda* … there is a ‘public safety’ exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence… In this case, so long as the gun was concealed somewhere in the supermarket, it posed more than one danger to the public safety: an accomplice might make use of it, or a customer or employee might later come upon it. (pp. 649-650)

It is imperative that officers realize that this exception is very narrow. Much like the emergency exception to the need for a search warrant under the Fourth Amendment, this exception ends when the emergency ends. The *Miranda* warnings may only be delayed when the officer believes that the need for immediate action is required for his own safety or the safety of others; this belief by the officer must be "objectively reasonable" (Klotter, et al., 1999, p. 297). Officers are limited to asking only those questions that are necessary to mitigate the immediate danger which justifies the exception, such as "where's the gun?" or "do you have a knife?" Asking "where did you buy it?" or "who owns it?" would not be acceptable (Klotter, et al., 1999, p. 297).

**Fifth Amendment Right to an Attorney**
Davis v. United States. One of the rights guaranteed you is the right to have an attorney to help you if you so desire. The Miranda warning clearly states that you have the right to consult with an attorney and to have him present during questioning. The Supreme Court has ruled that a request for a lawyer must be made unambiguously and clearly by the suspect. In Davis v. United States (1994), a member of the United States Navy was a suspect in the killing of another service member. From Davis:

[Davis] initially waived his rights to remain silent and to counsel when he was interviewed by Naval Investigative Service agents in connection with the murder of a sailor. About an hour and a half into the interview, he said, "Maybe I should talk to a lawyer." However, when the agents inquired if he was asking for a lawyer, he replied that he was not. They took a short break, he was reminded of his rights, and the interview continued for another hour, until he asked to have a lawyer present before saying anything more. A military judge denied his motion to suppress statements made at the interview, holding that his mention of a lawyer during the interrogation was not a request for counsel. He was convicted of murder, and, ultimately, the Court of Military Appeals affirmed. (p. 452)

The Court ruled that "[a]fter a knowing and voluntary waiver of rights under Miranda v. Arizona, law enforcement officers may continue questioning until and unless a suspect clearly requests an attorney" (p. 452). The suspect must make a clear and unambiguous request for a lawyer; one that can reasonably be understood as an expression of a desire for an attorney.

One final thought on this topic before moving on: it is important to note that a third person may not vicariously invoke the suspect's Fifth Amendment right to an attorney for him (Moran v. Burbine, 1986). The defendant himself must assert his rights and must request the lawyer. In the words of Williamson County, Texas, District Attorney John Bradley, "the Fifth Amendment right to counsel is a personal right that may be waived or invoked only by the defendant" (2009, para. 8).

Edwards v. Arizona. The Davis ruling dovetails with an earlier ruling regarding the right to a lawyer, one in which the Court ruled that officers must stop questioning a suspect immediately upon his request for a lawyer: Edwards v. Arizona (1981). Mr. Edwards was charged with Robbery, Burglary, and First Degree Murder in the State of
Arizona. After being arrested for the charges, Edwards was informed of his rights pursuant to *Miranda*. After agreeing to talk to an investigator, Edwards tried to negotiate a deal. The officer told Edwards that he didn't have the authority to make a deal with him. After speaking with a county attorney on the telephone, Edwards requested the assistance of a lawyer. The interrogation immediately stopped and Edwards was taken to the county jail.

At 9:15 the next morning, two detectives (colleagues of the initial officer) arrived at the jail and asked to talk to Edwards, who initially refused to speak to the detectives but was told by a jailer that he "had to" talk to them (p. 488). After identifying themselves and reading him his *Miranda* warning, the detectives began to speak with Edwards about the crime. Edwards eventually agreed to make a statement so long as it wasn't tape recorded. Edwards' statement implicated him in the crime. Over his objections, Edwards' statement was admitted into trial and used against him. Edwards was convicted and subsequently appealed the conviction. The Court held that Edwards' statement was inadmissible because of his earlier request for a lawyer:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges, or conversations with the police. (pp. 484-485)

The Court's desire was to ensure that once a suspect had invoked his Fifth Amendment right to counsel, the police did not come back and badger the suspect into giving up that right (Bradley, 2009). The case prevents police from trying to persuade a detained suspect to change his mind about his request for a lawyer (Kerr, 2010). The Court ruled clearly that once a request for a lawyer has been made, the interrogation must stop and may not be reinitiated by the police without the lawyer present. Any subsequent waiver that comes at the behest of the authorities, as opposed to at the suspect's own volition, is the product of "inherently compelling pressures" and not the
voluntary choice of the suspect (Myers, 2010, para. 3). The Edwards Rule was, in effect, a big, red STOP sign which required a complete cessation of the interrogation until such time as the suspect's attorney was present.

**Maryland v. Shatzer.** The "Edwards Rule" remained the law of the land until it was slightly modified in February of 2010 by the Court's decision in *Maryland v. Shatzer.* The primary question in *Shatzer* was whether or not a detained suspect who has requested a lawyer could ever be questioned again without his lawyer present (Kerr, 2010). There was previously no clear, bright-line rule on situations such as those in the *Shatzer* case. Although Mr. Shatzer was no longer in police custody, he was most assuredly still in state custody. After all, he was in prison -- he wasn't going anywhere.

From the Court's opinion in *Shatzer:*

In 2003, a police detective tried to question respondent Shatzer, who was incarcerated at a Maryland prison pursuant to a prior conviction, about allegations that he had sexually abused his son. Shatzer invoked his Miranda right to have counsel present during interrogation, so the detective terminated the interview. Shatzer was released back into the general prison population, and the investigation was closed. Another detective reopened the investigation in 2006 and attempted to interrogate Shatzer, who was still incarcerated. Shatzer waived his Miranda rights and made inculpatory statements. (*Maryland v. Shatzer, 2010, bench opinion syllabus p. 1*)

The Supreme Court ruled that a suspect may be approached and questioned in situations such as those in *Shatzer.* Justice Scalia wrote that Shatzer's return to his normal, pre-interrogation life in prison for over two years constituted a break in custody that was sufficiently long enough to end the Edwards Rule and to permit Shatzer to waive his Miranda rights (Gillis, 2010). Scalia wrote that “[b]ecause Shatzer experienced a break in Miranda custody lasting more than two weeks between the first and second attempts at interrogation, Edwards does not mandate suppression of his 2006 statements” (*Maryland v. Shatzer, 2010, bench opinion p. 18*). Justice Scalia's opinion creates an easily understood, firm, bright-line rule for police to follow. The Court placed a specific waiting period that permits an officer to re-approach a prisoner in Shatzer's situation:
It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody. (bench opinion p. 13)

It is important to remember, though, that *Shatzer* focuses on post-conviction incarceration. Mr. Shatzer was incarcerated in a state prison after being convicted of a child sexual abuse case rather than being held in a police station prior to his trial. In other words, he lived in the prison. It was his place of residence, where he had some control over whom he talked to and some of the other aspects of his daily life (Myers, 2010); it was not an "unfamiliar," "police-dominated atmosphere" (*Maryland v. Shatzer*, 2010, bench opinion p. 4).

The same cannot be said about a suspect who is being held in a local jail before going to trial. "The court distinguished between pretrial detention, where coercive measures are present, and posttrial incarceration" (Myers, 2010, para. 15). Therefore, "[i]f the defendant remains in continuous pretrial custody after previously invoking his Fifth Amendment right to counsel, the *Edwards* rule prohibits law enforcement from initiating contact with the subject about any criminal activity unless counsel is present" (Myers, 2010, para. 19).

This rule is particularly helpful for police officers because it gives them a template to use in their pursuit of admissions or confessions. Instead of trying to interpret the Court's intent, or guess what should be done in certain situations, police "need clear rules to know what they can and cannot do" (Kerr, 2010, para. 4). With *Shatzer*, we now know the rules that govern this type of interaction.

**Sixth Amendment Right to Counsel**

The Sixth Amendment right to counsel is different than the Fifth Amendment protection provided through the *Miranda* decision. Unlike the Fifth Amendment, the Sixth Amendment is offense-specific. After it is invoked for a specific prosecution, it applies only to that prosecution (Stride & Rolater, 2010, p. 52). It is broader than the Fifth Amendment in another way, too: the Sixth Amendment applies regardless of whether or not the defendant is in custody.
Beginning in 1964 with *Massiah v. United States*, the Supreme Court began to restrict the ability of law enforcement officers to obtain waivers (and, thus, confessions or statements) from defendants after the Sixth Amendment's right to counsel had attached or had been invoked (Rutledge, 2009b). In the years since *Massiah*, the Court made adjustments and changes that made the rules governing this particular area of law quite confusing and difficult to apply in the challenging world of investigations.

In 2008, the Supreme Court ruled that the Sixth Amendment attaches at a defendant's first appearance before a magistrate -- even if there is no prosecutor present (*Rothgery v. Gillespie County, Texas*). In *Rothgery*, the Court ruled that the Sixth Amendment attached when Mr. Rothgery appeared before a magistrate for his CCP Article 15.17 hearing. From the Court's opinion in the case comes this brief description of the events leading to the Court's decision:

Texas police relied on erroneous information that petitioner Rothgery had a previous felony conviction to arrest him as a felon in possession of a firearm. The officers brought Rothgery before a magistrate judge, as required by state law, for a so-called “article 15.17 hearing,” at which the Fourth Amendment probable-cause determination was made, bail was set, and Rothgery was formally apprised of the accusation against him. After the hearing, the magistrate judge committed Rothgery to jail, and he was released after posting a surety bond. Rothgery had no money for a lawyer and made several unheeded oral and written requests for appointed counsel. He was subsequently indicted and rearrested, his bail was increased, and he was jailed when he could not post the bail. Subsequently, Rothgery was assigned a lawyer, who assembled the paperwork that prompted the indictment’s dismissal7.

Rothgery then brought this 42 U. S. C. §1983 action against respondent County, claiming that if it had provided him a lawyer within a reasonable time after the article 15.17 hearing, he would not have been indicted, rearrested, or

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7 Mr. Rothgery had never been convicted of a felony, thus rendering the felon in possession of a firearm charge impossible to prove.

8 A Title 42 U. S. C. §1983 lawsuit is one in which an individual files a specific type of civil lawsuit in federal court against a government agent whom the plaintiff accuses of acting under color of law to deprive the plaintiff of his rights.
jailed. He asserts that the County’s unwritten policy of denying appointed counsel to indigent defendants out on bond until an indictment is entered violates his Sixth Amendment right to counsel. (Slip opinion syllabus, p. 1)

In Texas, then, at the very least the Sixth Amendment right to a lawyer attaches at the time when a suspect attends a "magistration" hearing after arrest under CCP Article 15.17, when the suspect is indicted, or a complaint is filed for a misdemeanor case (Stride & Rolater, 2010, p. 51).

Montejo v. Louisiana. In 2009's Montejo v. Louisiana, the Court rewrote the rules governing a statement that is given after the attachment of the Sixth Amendment. The right still attaches at either the first appearance before a magistrate or when invoked by the defendant (as described in Rothgery), but under certain circumstances a statement may still be obtained. The pertinent facts of the case are as follows:

At a preliminary hearing required by Louisiana law, petitioner Montejo was charged with first-degree murder, and the court ordered the appointment of counsel. Later that day, the police read Montejo his rights under Miranda v. Arizona, 384 U. S. 436, and he agreed to go along on a trip to locate the murder weapon. During the excursion, he wrote an inculpatory letter of apology to the victim’s widow. Upon returning, he finally met his court-appointed attorney. At trial, his letter was admitted over defense objection, and he was convicted and sentenced to death. (Montejo v. Louisiana, 2009, slip opinion syllabus p. 1)

The Court threw out its previous rulings on this issue and set a fresh, new standard for all 50 states. This new standard provides a bright-line rule which is substantially easier for police and prosecutors to follow. Justice Scalia, writing for the 5-4 majority, adopted a "unified Miranda rule" that is designed to protect an individual's Fifth and Sixth Amendment rights to counsel (Bradley, 2009, para. 10). Justice Scalia wrote that

[u]nder Miranda, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present. Under Edwards, once such a defendant “has invoked his [Miranda] right,” interrogation must stop. And under Minnick v. Mississippi, no subsequent interrogation may take place until counsel is present.
These three layers of prophylaxis are sufficient. (*Montejo v. Louisiana*, 2009, slip opinion syllabus p. 2, internal citations omitted)

What the *Montejo* decision boils down to is this: the defendant, after being advised of his *Miranda* rights, must make a decision to either invoke those rights or to waive them and speak to law enforcement officials. If the defendant waives his rights and agrees to speak to the police (*Bradley*, 2009), or if the suspect independently initiates contact with the police after appointment of a lawyer, he may provide a statement. Rutledge (2009b) puts it this way:

Under the *Montejo* ruling, it will now be possible for law enforcement officers to attempt to obtain a waiver and an admissible statement from a defendant without running afoul of the Sixth Amendment, even after he has been indicted or has made his first court appearance on the case and has an attorney, or has asked for one. (para. 18)

Officers are reminded, however, that if a suspect has remained in continuous police custody and has affirmatively invoked his right to an attorney under either the Fifth or Sixth Amendment, that suspect may not be approached in an attempt to obtain a waiver. The rules set out in *Edwards v. Arizona* and the other cases discussed are still in effect. Additionally, officers are further cautioned to recall the fact that the burden rests on the state to show that the waiver was valid (*Stride & Rolater*, 2010).

**The Right to Remain Silent**

*Berghuis v. Thompkins*. In mid-2010 the Supreme Court handed down yet another case which helped to shape the rules governing how police officers conduct custodial interrogations. The 2010 case focused on an individual's Fifth Amendment right to remain silent. The Court's 5-4 decision in *Berghuis v. Thompkins* mandates that a person who chooses to remain silent must clearly and unambiguously state his intent to do so. In the same manner that *Davis* requires a suspect to affirmatively state his desire for a lawyer, *Thompkins* requires a direct and unequivocal statement of a suspect’s desire to remain silent.

Thompkins was the suspect in a 2000 shooting that resulted in one death and one injury. He fled the scene and was arrested later in Ohio. According to the Court’s
opinion in the case (citations omitted), investigators arrived to interrogate him about the 2000 shooting. Thompkins received his *Miranda* warnings and

[officers] began an interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was “[l]argely” silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as “yeah,” “no,” or “I don’t know.” And on occasion he communicated by nodding his head. Thompkins also said that he “didn’t want a peppermint” that was offered to him by the police and that the chair he was “sitting in was hard.”

About 2 hours and 45 minutes into the interrogation, [officer] Helgert asked Thompkins, “Do you believe in God?” Thompkins made eye contact with Helgert and said “Yes,” as his eyes “well[ed] up with tears.” Helgert asked, “Do you pray to God?” Thompkins said “Yes.” Helgert asked, “Do you pray to God to forgive you for shooting that boy down?” Thompkins answered “Yes” and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later. (*Berghuis v. Thompkins*, 2010, slip opinion pp. 3-4)

Tompkins was charged with first-degree murder, assault with intent to commit murder, and firearms offenses. Thompkins attempted to have his statement excluded on the grounds that he had invoked his right to remain silent during the interrogation. The trial court disagreed and allowed the statement into evidence. Thompkins was convicted; he then began a process of appeals which eventually led to the United States Supreme Court.

Of interest to us is Thompkins' claim "that he 'invoke[d] his privilege' to remain silent by not saying anything for a sufficient period of time, so the interrogation should have 'cease[d]' before he made his inculpatory statements" (*Berghuis v. Thompkins*, 2010, slip opinion p. 8). Thompkins' argument was, as Justice Kennedy put rather bluntly in his opinion for the case, "unpersuasive" (slip opinion p. 9). Kennedy referred to the Court's earlier decision in *Davis* in his analysis of why Thompkins' argument didn't hold water. With respect to a suspect's request for an attorney,
the Court in *Davis v. United States* (1994), held that a suspect must do so “unambiguously.” If an accused makes a statement concerning the right to counsel “that is ambiguous or equivocal” or makes no statement, the police are not required to end the interrogation … or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights. (slip opinion p. 9, internal citations omitted)

The Court thus clarified a few important points. First, if a person wishes to remain silent during a custodial interrogation, he must clearly say so. Simply sitting quietly or refusing to cooperate during an interrogation is not sufficient to notify police of your desire to remain silent (Denniston, 2010). The fact that the interrogation session has lasted for several hours with very few, if any, responses from the suspect is irrelevant. The suspect's desire to exercise his right to remain silent must be stated clearly such that there is no doubt as to his wishes\(^9\). In its *amicus* brief, the United States Solicitor General's Office argued, "[t]he Constitution requires that the police respect a suspect's choice to remain silent once that choice has been made … but it does not require that the police interpret ambiguous statements as invocations of *Miranda* rights" (Kagan, Breuer, Dreeben, Saharsky, & Watson, 2009, p. 14).

Secondly, if a previously-uncooperative or quiet suspect responds to police questions with even one word responses, those responses will be taken as a waiver of the right to remain silent. "The net practical effect is likely to be that police, in the face of a suspect's continued silence after being given *Miranda* warnings, can continue to question him, even for a couple of hours, in hopes eventually of getting him to confess" (Denniston, 2010, para. 2).

**The Exclusionary Rule**

As mentioned earlier, our system of criminal justice is predicated on the presumption that all persons are innocent until proven guilty. Our society demands that the criminal justice system as a whole function fairly and within the parameters of the law. Police misconduct is unacceptable in our system. "Justice," according to Roman

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\(^9\) Justice Sonia Sotomayor wrote a passionate dissent in the *Thompkins* case, saying in the last paragraph that "[t]oday’s decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak" (slip opinion, p. 23 of Justice Sotomayor's dissent).
jurist Domitus Ulpian, "is the constant and perpetual will to allot to every man his due." One of the most important ways our justice system fights police misconduct is by forbidding the use of evidence obtained illegally. Chief Justice Warren put it well when he wrote that "[t]he police must obey the law while enforcing the law" (Spano v. New York, 1959, p. 320).

Mapp v. Ohio. The Supreme Court started providing protection against Fourth Amendment violations with the concept of suppression (Weeks v. United States, 1914). This protection was limited at the time to federal agencies and agents. In 1961's Mapp v. Ohio the Court expanded the suppression concept and made it apply to federal, state, and local police agencies (Benoit, 2010). Put in its most basic form, the Exclusionary Rule makes evidence obtained improperly by government agents or those acting at their direction inadmissible. Mapp has become one of the seminal cases in today's field of criminal justice.

Police officers illegally entered Ms. Mapp's home, roughed her up a bit, refused to let her attorney talk to her, and then searched her entire residence. The search was without a warrant and most certainly without consent. In a trunk in the basement of the home, the officers found 'obscene materials' for which Ms. Mapp was convicted in state court (Mapp v. Ohio, 1961). Ms. Mapp appealed her conviction to the Supreme Court. In a blistering opinion, the United States Supreme Court overturned Ms. Mapp's conviction and implemented what we refer to now as the Exclusionary Rule. Justice Clark wrote that "our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense" (p. 657). Justice Clark further opined that "[t]here is no war between the Constitution and common sense" (p. 657).

Herring v. United States: bad arrest, good evidence. A recent change in the Exclusionary Rule was handed down with the Court's decision in Herring v. United States (2009). In that case, Chief Justice Roberts wrote the opinion for a sharply-divided (5-4) Court. The issue at hand was whether or not the Exclusionary Rule was triggered by an administrative mistake that was the result of negligence by an employee

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10 The Exclusionary Rule as it relates to the federal standard is discussed here. Texas-specific considerations will be discussed at length later in this article.
totally separate from the arresting officer. Put differently, the Court had to decide whether or not evidence which resulted from "careless record keeping by the police" could be used against a criminal defendant (Liptak, 2009).

The facts of the case in *Herring* are relatively simple and straightforward: an Alabama police officer arrested Mr. Herring on the authority of an outstanding warrant from a neighboring county. The officer conducted a search incident to arrest. During that search, Methamphetamine was found on Herring's person and a pistol was found in the vehicle.

Approximately 10-15 minutes after the arrest, the clerk from the neighboring county informed the officer that the warrant was no longer valid and had mistakenly not been pulled from the department's computer system (Means & McDonald, 2009). In other words, the initial arrest was not valid because the warrant was not valid.

Herring was charged with possession of the drugs and the weapon. At his trial, he moved to suppress the evidence as being the product of an illegal arrest. The trial court refused, saying that the officer's mistake fell within the parameters of the good faith exception to the Exclusionary Rule (see, for example, *United States v. Leon*, 1984). Herring's case ended up in front of the Supreme Court. The Court ruled in favor of the police, stating that the Exclusionary Rule was not designed to punish society for simple administrative bookkeeping errors; rather, it was designed to prevent egregious police misconduct (Means & McDonald, 2009).

In other words, the Court reasoned that the Exclusionary Rule was not a "get out of jail free card" for every possible police mistake. The Exclusionary Rule was intended to prevent those types of police misconduct where a penalty as serious as excluding evidence would be likely to prevent such misconduct in the future -- not a simple clerical error by a nameless clerk in a distant department. The officer had done nothing wrong in the *Herring* case; it was an "innocent mistake" that led to evidence being seized (Savage, 2009). The arresting officer acted in objective good faith. The error was not deliberate, the officers involved were not culpable, so the evidence was admissible. The Exclusionary Rule imposes substantial costs to society when it is used to exclude evidence against an obviously guilty suspect, so it should be used only in those cases when the benefits outweigh the costs to society (Means & McDonald, 2009). "In future
cases," writes Congressional Research Service legislative attorney Anna C. Henning, "courts will apply the Herring 'deliberate and culpable' test to determine whether to admit evidence obtained as a result of a search or seizure which is unconstitutional as a consequence of police error" (2009, p. 2).

**The Fruit of the Poisonous Tree: confessions.** The Exclusionary Rule as outlined in *Mapp* applied to physical evidence obtained in violation of the law. In 1963's *Wong Sun v. United States*, the Court extended that protection to confessions and admissions obtained illegally. In *Wong Sun*, an arrest without probable cause led to an incriminating statement. The Supreme Court ruled that an illegal arrest made the subsequent admission illegal, too. The "Fruit of the Poisonous Tree Doctrine" became a part of American jurisprudence and modern police practice. As a general rule, if the arrest is illegal, then the confession that follows is illegal as well.

Like any general rule, there are sometimes exceptions. One important aspect to keep in mind about the Fruit of the Poisonous Tree Doctrine is that evidence may possibly be admissible even if improperly obtained. FBI Special Agent Carl Benoit puts it this way in his April, 2010 *FBI Law Enforcement Bulletin* article on the subject of confessions:

[F]or purposes of the … exclusionary rule, suppression is not necessarily automatic: to order the suppression of evidence, including a confession, a court is required to determine if the evidence in question was obtained in violation of the Fourth Amendment and then determine whether anything occurred that may have cleansed the evidence from this violation. (p. 25)

The question is whether the taint between the illegal arrest and the confession that follows has been purged (*Wong Sun v. United States*, 1963). Agent Benoit (2010) uses *Kaupp v. Texas* (2003) to explain this concept. The *Kaupp* case was one in which a 14 year old girl went missing in January, 1999. During the course of an investigation the Harris County, Texas, Sheriff's Office discovered that the missing girl had been involved in a sexual relationship with her 19 year old half brother. The half brother was found to have been in the company of 17 year old Robert Kaupp on the day that the young girl disappeared. The girl's half brother and Mr. Kaupp were questioned at the sheriff's office about the incident. Kaupp was cooperative and was permitted to leave.
The half brother, however, failed his third polygraph exam and eventually confessed to fatally stabbing the victim and hiding her body in a drainage ditch. In his written confession, the half brother implicated Kaupp.

From the Per Curiam opinion (2003) in the case, we are able to get a clear timeline of what happened after Kaupp was implicated in the half brother's confession, as well as the facts that were to be considered in Kaupp's appeal:

Detectives immediately tried but failed to obtain a warrant to question Kaupp. Detective Gregory Pinkins nevertheless decided (in his words) to "get [Kaupp] in and confront him with what [the brother] had said." In the company of two other plain clothes detectives and three uniformed officers, Pinkins went to Kaupp's house at approximately 3 a.m. on January 27th. After Kaupp's father let them in, Pinkins, with at least two other officers, went to Kaupp's bedroom, awakened him with a flashlight, identified himself, and said, "we need to go and talk." Kaupp said "Okay." The two officers then handcuffed Kaupp and led him, shoeless and dressed only in boxer shorts and a T-shirt, out of his house and into a patrol car. The state points to nothing in the record indicating Kaupp was told that he was free to decline to go with the officers.

They stopped for 5 or 10 minutes where the victim's body had just been found, in anticipation of confronting Kaupp with the brother's confession, and then went on to the sheriff's headquarters. There, they took Kaupp to an interview room, removed his handcuffs, and advised him of his rights under Miranda v. Arizona (1966). Kaupp first denied any involvement in the victim's disappearance, but 10 or 15 minutes into the interrogation, told of the brother's confession, he admitted having some part in the crime. He did not, however, acknowledge causing the fatal wound or confess to murder, for which he was later indicted. (pp. 628-629)

Kaupp was convicted and sentenced to 55 years in prison. His attorneys tried unsuccessfully to have his confessions excluded as being the fruit of an illegal arrest. Kaupp appealed his conviction to the Texas Court of Criminal Appeals, which ruled that

11 A "Per Curiam opinion" is an opinion from an appellate court that is issued in the name of the court as a whole, as opposed to being issued in the name of an individual judge or justice of the court.
he had not been under arrest until after his confession; further, the Court of Criminal
Appeals wrote, Kaupp had consented to go with the officers when he said "Okay" to
Detective Pinkins' statement that they needed to "go and talk" (Kaupp, p. 629).

Kaupp then appealed to the United States Supreme Court, which threw out the
conviction. The Court ruled that Kaupp's confession was the fruit of an illegal arrest and
was, therefore, inadmissible in court. The Court reasoned that Kaupp was in custody at
the time he gave the confession; since there was insufficient probable cause for his
arrest at home, the arrest was improper. The Court quoted Florida v. Bostick (1991) in
explaining their thinking: "[T]aking into account all of the circumstances surrounding the
encounter, the police conduct would 'have communicated to a reasonable person that
he was not at liberty to ignore the police presence and go about his business' " (p. 626).
The specific details, listed in the Court's opinion, of the police conduct leave very little
room for doubt in this case as to why the Court felt the way it did:

A 17-year-old boy was awakened in his bedroom at three in the morning by at
least three police officers, one of whom stated "we need to go and talk." He was
taken out in handcuffs, without shoes, dressed only in his underwear in January,
placed in a patrol car, driven to the scene of a crime and then to the sheriff's
offices, where he was taken into an interrogation room and questioned. (p. 631)

How would you have felt in similar circumstances? Would any reasonable
person have felt that he was free to say no or that he was free to leave? The answer, of
course, is no. The Court worded it thusly: "It cannot seriously be suggested that … a
reasonable person in his situation would have thought he was sitting in the interview
room as a matter of choice, free to change his mind and go home to bed" (p. 632).

The Court pointed out that when there is an illegal arrest which results in a
confession, the burden is on the state to show "an act of free will [sufficient] to purge the
primary taint of the unlawful invasion" (p. 632, citing Wong Sun v. United States, 1963).
Relevant considerations include, among others, the following (p. 633, citing Brown v.
Illinois, 1975): observance of Miranda; the temporal proximity\textsuperscript{12} of the arrest and the

\textsuperscript{12} In plain English, how much time elapsed between the illegal arrest and the subsequent statement?
confession; the presence of intervening circumstances; and, particularly, the purpose and flagrancy of the official misconduct.

There must be some attenuation of the original taint in order to make the confession admissible. There was no such attenuation in Kaupp's case. As such, the confession was inadmissible and could not be used against the defendant.

What, then, can peace officers do to attenuate a taint of illegality? What actions should officers take to ensure that the confessions and admissions are as far removed from any illegality as possible? The Texas District & County Attorneys Association recommends the following steps:

- Create a gap in time between the illegally obtained statement and any subsequent statement;
- recite the *Miranda* warnings, if they were given incompletely or incorrectly;
- tell the defendant his earlier statement was collected incorrectly or that his earlier statement cannot be used against him;
- change location, switch interrogation officers, or change the focus of the questions;
- release the defendant and let him go home for a while;
- record any exculpatory reasons (consider assigning an officer to write a supplemental report) why officers neglected to give warnings—for instance, the officer forgot or he didn't consider the defendant in custody at the time;
- make sure to note that the officer was not following a departmental policy that encourages deliberately neglecting to give *Miranda* warnings (and make sure your department does not have such a policy), a practice that drew the Supreme Court's ire. (Beckham, 2008, p. 159; Stride & Rolater, 2006, p. 30)13

The last bullet point above -- ensuring that your department does not have a policy that encourages attempts to deliberately circumvent *Miranda* -- is addressed forcefully and clearly in Stride & Rolater's *Confessions* (2006):

Police departments must eliminate any statement in a policy manual that officers should deliberately neglect to give *Miranda* warnings—regardless of whether the

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13 These recommendations were taken verbatim from both Beckham's *Warrantless Search & Seizure* (2008) book and Stride & Rolater's *Confessions* (2010) book. Both of these TDCAA works are absolutely *superb* sources of information and should, in my opinion, be in every Texas officer's library.
suspect is in custody—until after the suspect makes an incriminating statement. The "questions-first" practice will result in any statement being inadmissible. (p. 31)

Texas-Specific Considerations

There are some aspects of confession law that are particular to the Lone Star State. Despite its reputation among some as being part of the Wild West, Texas has an extremely well-developed system of laws designed to protect those who are subject to police questioning; in fact, “Texas confession law distinguishes itself by providing greater protection to criminal defendants than any other jurisdiction” (Stride & Rolater, 2006, p. 2).

Article I, section 10 of the Texas Constitution states that "In all criminal prosecutions the accused…shall not be compelled to give evidence against himself, and shall have the right of being heard by himself, or by counsel, or both[.]" The Texas Court of Criminal Appeals has determined that this section of the state constitution provides protections similar to those provided by the Fifth Amendment to the United States Constitution (Stride & Rolater, 2006).

Texas courts and laws are permitted to give protections above and beyond those provided by the federal laws and constitution (see, for example, Heitman v. State, 1991). Texas has specific statutory requirements which govern the admissibility of confessions and admissions (or, as they're referred to in Texas law, "statements"). These Texas requirements are above and beyond the minimum requirements already discussed herein. Everything we've discussed up to this point still applies; we're simply going to add more requirements on top of what we have already learned.

Code of Criminal Procedure Article 38.21. The basic rules for statements in Texas start with CCP Article 38.21. Article 38.21 says that "[a] statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed." Article 38.21 applies to all statements -- regardless of whether they're

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14 One way of thinking of it would be like a carpet laid on a bare floor (if you'll forgive the simile). The floor represents the minimum protections provided by the US Constitution, federal laws, and federal case law; the carpet, which goes on top of the bare floor, represents the Texas-specific requirements. The carpet provides protection above and beyond the bare floor.
custodial, non-custodial, the product of an interrogation or not -- "because a judge must make findings of fact and conclusions of law any time a defendant challenges the voluntariness of a statement" (Beckham, 2008, p. 145, internal citations omitted).

**Code of Criminal Procedure Article 38.22.** The Texas legislature placed the *Miranda* protections, along with several statutory protections above and beyond *Miranda*, into Texas law in CCP Article 38.22. These protections are codified into detailed rules governing what types of statements are admissible and how those statements must be structured and documented. Specifically, Article 38.22 prescribes rules for written (§2) and oral (§3) statements. The requirements of Article 38.22 make it an evidentiary and procedural rule as opposed to an exclusionary rule (Stride & Rolater, 2006). It is important to remember that Article 38.22 applies only to statements taken when the suspect is subjected to custodial interrogation. If both the 'custody' and the 'interrogation' portions are not in place, Art. 38.22 doesn't apply (Beckham, 2009).

In order for custodial statements to be admissible in Texas, those statements must be either written or, if given verbally, electronically recorded. The only general exception for oral statements not recorded electronically is if the statement contains an incriminating statement from the suspect, the officer did not previously know about the information, and the information is subsequently proven to be true (Stride & Rolater, 2006, internal citation omitted).

Interestingly enough, the Texas statute requires only that the *statement itself* be recorded or written. Texas law does not mandate that the *interrogation process* be recorded -- a situation which some argue can lead to "statements that may be taken dangerously out of context" ("Electronic Recording of Custodial Interrogations in Texas: A Review of Current Statutes, Practices, and Policies," 2009, p. 2) or to accusations of wrongdoing by the interrogating officer. Many departments record oral interrogations and statements from beginning to end but don't require the same for written statements. Some Texas departments record everything from start to finish, including the act of the accused actually writing his statement if that route is chosen.

There is very little consistency across the state with respect to electronically recording the entire process, despite the fact that the majority of agencies around the nation which do employ such methods overwhelmingly report their experiences as being
positive (Boetig, Vinson, & Weidel, 2006). Some Texas departments don't have any written policies or procedures governing the process (see, for example, "Electronic Recording of Custodial Interrogations in Texas: A Review of Current Statutes, Practices, and Policies," 2009, pp. 5-7 for a selected list of departments that do and do not have written policies).

Among the benefits of recording all interrogations from start to finish are that it helps to protect officers from false accusations of wrongdoing, it provides a permanent record of the events exactly as they transpired in the interrogation room, it helps judges and juries to determine what truly was said and in what context, and it cuts down on courtroom bickering by lawyers (Sullivan, 2005). In addition to its obvious usefulness in the courtroom, electronically recording the entire interrogation process can prove to be an extremely useful training tool for investigators and investigative supervisors (Boetig, et al., 2006), who can critically review and objectively analyze the interrogating officers' performances at a later date.

**Written statements.** Texas law shows a marked preference for written statements over oral statements (Stride & Rolater, 2006). So much so, in fact, that St. Mary's University School of Law Professor Gerald Reamy (2009, p. 71) writes that "Texas confession law is complicated by its basic prohibition of oral confessions." This does not by any means imply that all oral or verbal confessions are prohibited -- clearly they are not -- it simply means that the rules in Texas are more complicated for oral confessions. If given the option of choosing, written statements are almost always preferable to oral statements in our state.

According to CCP Article 38.22 (1), "Written statement of an accused" means a statement signed by the accused person; a statement made by the accused person in his own handwriting; or, if he is unable to write, a statement bearing the accused person's mark\(^\text{15}\). The "best practice" is to have the suspect "write a statement in his own handwriting if he is literate" enough to do so, because the danger of an officer typing the suspect's statement is that the officer, rather than the suspect, may become the focus of the trial (Stride & Rolater, 2006, p. 67).

\(^{15}\) If the accused makes his mark on a statement instead of his affixing his signature, the mark must be witnessed by a person other than a peace officer. See CCP Art. 38.22 §1.
CCP Article 38.22 (2) requires that written statements must include the following within ("on the face of") the statement itself:

(a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of the Code of Criminal Procedure or received from the person to whom the statement is made a warning that:

1. he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
2. any statement he makes may be used as evidence against him in court;
3. he has the right to have a lawyer present to advise him prior to and during any questioning;
4. if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
5. he has the right to terminate the interview at any time; and

(b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

The warnings above must have been given before the statement is made by the accused, according to CCP Art. 38.22 (2)(a) -- notice the "prior to making the statement" verbiage -- either by a magistrate, under Art. 15.17, or by the person taking the written statement. The warnings should be the beginning of the written statement, on its first page (Beckham, 2008, p. 147). Remember that the warnings must be given before the start of any custodial interrogation, not simply before the statement itself.

Missouri v. Seibert (2004) reaffirmed that Miranda warnings must be given before any custodial interrogation may proceed. The basic details of Seibert are as follows (taken from the Court's opinion in the case):

Respondent Seibert feared charges of neglect when her son, afflicted with cerebral palsy, died in his sleep. She was present when two of her sons and their friends discussed burning her family's mobile home to conceal the circumstances

16 Notice that subsection (a)(5), which requires officers to notify suspects that they may terminate the interview at any time, is not found in the "standard" Miranda warning used by other states. This is another situation in which Texas' requirements are above and beyond the requirements set forth by the United States Supreme Court.
of her son's death. Donald, an unrelated mentally ill 18-year-old living with the family, was left to die in the fire, in order to avoid the appearance that Seibert's son had been unattended. Five days later, the police arrested Seibert, but did not read her her rights under *Miranda v. Arizona*. At the police station, Officer Hanrahan questioned her for 30 to 40 minutes, obtaining a confession that the plan was for Donald to die in the fire. He then gave her a 20-minute break, returned to give her *Miranda* warnings, and obtained a signed waiver. He resumed questioning, confronting Seibert with her prewarning statements and getting her to repeat the information. Seibert moved to suppress both her prewarning and postwarning statements. Hanrahan testified that he made a conscious decision to withhold *Miranda* warnings, question first, then give the warnings, and then repeat the question until he got the answer previously given. (p. 600)

The Court ruled that this "question first, then Mirandize" method was not appropriate. Seibert's confession was thrown out. The Court ruled that the two-step, question first, warn second method of interrogation was improper. Officers must warn suspects at the beginning of custodial interrogation sessions if the statements obtained from the suspect are to be admissible in court.

Although the preferred method\(^\text{17}\) is to use the exact language from 38.22, the warnings themselves do not have to be verbatim -- provided that they "substantially comply" with the warnings in the article (Beckham, 2008, 2009; Stride & Rolater, 2006). The statement itself must also contain language on its face showing that the suspect knowingly, intelligently, and voluntarily waived each of the rights listed when making his statement. Quoting again from Stride & Rolater (2006): "The preferred approach is to include near the suspect's signature: 'I knowingly, voluntarily, and intelligently waived the rights described above before and during the making of this statement' " (p. 69, internal citation omitted).

\(^{17}\)Stride & Rolater (2006) go so far as to say that "[t]here is simply no reason to divert" from using the exact language from CCP Art. 38.22 (p. 68). This is one of those situations where it's better to be safe than to be sorry.
Oral statements. The other option available for obtaining admissible statements is to electronically record oral statements. "Record" in this context can mean digital or analog video recording. Audio tapes are admissible, but may require testimony in trial to prove up that the suspect made the statement (Stride & Rolater, 2006). Officers are not obligated under state law to tell the suspect that he's being recorded. CCP Article 38.23 (3)(a)(5) requires that copies of the recording must be made available to the defense no later than 20 days before the start of proceedings against the defendant. The recording must be kept until the suspect's eventual conviction is final and all of his appeals have been exhausted. Please note that actual copies of the recording itself are required; a transcript will not meet the statutory requirement (Beckham, 2009).

The recording itself must contain several different things if it is to be admissible in court. First, every relevant voice on the recording must be identified on the tape itself. Secondly, it must, prior to the statement, contain the warnings required under Article 38.22 (2)(a). It is critically important that the warnings are on the recording and they're read before the statement begins. Failure to do so means the statement will not be admitted into court. Thirdly, the suspect must intelligently, knowingly, and voluntarily waive the rights about which he was just warned. If at all possible, there should be no breaks in the recording -- think Nixon and the missing 18 minutes on his secretly-recorded Oval Office tapes!

There is a type of custodial statement by a prisoner that is admissible without identifying all the voices, reading the warnings, etc.: a recording of a prisoner who doesn't have an expectation of privacy in the place where he's recorded. A few examples of this type of recording are dash-cam recordings of prisoners who are in police cars; recordings of inmate telephone calls from the jail; and conversations between inmates. These recordings can be devastating to a suspect's case and are generally admissible in court. They often permit judges and juries to hear the true character of the defendant while implicating himself in his own words and of his own free will.
Texas Attorney General Opinion\(^\text{18}\) No. JC-0208 (2000) ruled that police officers are permitted to record a suspect's conversation without violating state law if the suspect is in a police car. This is especially helpful today since the vast majority of police cars are equipped with on-board video and audio recording equipment. From the published opinion by Attorney General John Cornyn's office:

In our opinion, these cases … inextricably point to the conclusion that a statement made by a person seated in a police car does not occur under circumstances justifying the expectation of privacy. Consequently, such a statement is not an "oral communication" as defined in article 18.20 of the Code of Criminal Procedure. As a result, a police officer who secretly records or broadcasts the conversation of an individual seated in a police vehicle does not violate section 16.02 of the Penal Code. (p. 4)

With reference to phone calls made by inmates in jail, Texas courts are unwilling to accept that society sees jail as a place in which a person has a "reasonable expectation of privacy" (Richardson v. State, 1995). A case that illustrates this revolves around Damon Richardson and his phone calls from the Lubbock County Jail. Richardson was, in effect, continuing to run his Cocaine distribution business from behind bars. Investigators used (among other things) his collect calls from the jail in their case against him and his cohorts. Richardson objected to the use of those records. From the opinion by 7\(^{th}\) Court of Appeals in Amarillo:

[We] … find that any expectation of privacy in the fact of appellant's [Richardson's] telephone calls is not one that society is prepared to accept as reasonable. As this case poignantly illustrates, the need for jail and prison administrators to maintain order and prevent criminal activity requires a greater ability to monitor the activities of inmates that would be permitted by police in society at large. This necessity has been recognized before.

We do not believe that preventing inmates from asserting a privacy interest in the fact that they place a call to a particular destination unnecessarily

\(^{18}\) Attorney General opinions in the State of Texas hold weight of law until overturned by the judiciary or by legislative change in statute.
interferes with the rights retained by an inmate, such as the right to counsel. (p. 694)

Williamson County District Attorney John Bradley is well known as a strong supporter of using jailhouse telephone recordings. He teaches classes to prosecutors and investigators in which he explains the use of these recordings and gives multiple examples of how effective the recordings can be as evidence. "We've developed hundreds of examples of how we've prevented crimes, prevented coercion of perjury and convicted criminals," Bradley was quoted as saying in one article on this topic in the *Dallas Morning News* (McCann, 2007).

Inmates obviously do not lose all of their Constitutional rights when locked up. They still have the right to practice religion, to contact attorneys, to file appeals, to be free from physical abuse, etc. Inmates' Fourth Amendment rights, however, are greatly constrained. Chief Justice Warren Burger explained why that is the case in the Supreme Court's *Hudson v. Palmer* (1984) opinion:

> Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions. (pp. 525-526)

Although *Hudson v. Palmer* was not specifically an inmate telephone call-related case, the concepts contained therein are applicable to recording inmate phone calls. Chief Justice Burger pointed out the fundamental truth that being in jail or prison -- by the very nature of the beast -- entails the loss of some of the freedoms granted to those who are not imprisoned, writing that "[l]oss of freedom of choice and privacy are inherent incidents of confinement" (p. 528, quoting *Bell v. Wolfish*, 1979). Even the United States Department of Justice recognized the loss of Fourth Amendment protections during inmate telephone calls. In a January 14, 1997 official opinion from
the DOJ Office of Legal Council, Deputy Assistant Attorney General Richard Shiffrin wrote that

From a Fourth Amendment perspective, the presence of outside law enforcement officials during taping is indistinguishable from disclosure thereafter. Because inmates have no reasonable expectation of privacy in their telephone calls, the Fourth Amendment simply has nothing to say about the circumstances under which, or even the manner in which, the BOP [the United States Bureau of Prisons] seizes those conversations. […] Thus, we believe that the Fourth Amendment does not prevent outside law enforcement officials from participating in routine prison monitoring and recording. (para. 16)

While it is true that Shiffrin was writing about the federal prison system, the concept remains the same regardless of whether the inmate is in a local, state, or federal lockup. The Fourth Amendment simply does not extend to non-privileged phone calls made by a prisoner.

One final area of oral recordings that can be used without Miranda warnings or the 38.22 requirements is statements made by a prisoner to another person. As was discussed earlier in reference to recording prisoners in a patrol car, it is not necessary to inform the prisoner that he's being recorded "surreptitiously" (Stride & Rolater, 2006, p. 81). This type of statement could be, for example, two prisoners in a holding room at the police station. The prisoners are alone with one another and do not realize that they're being recorded by law enforcement. During the course of their conversation the two discuss details of the crime for which they were arrested. The details of the conversation between the two are admissible in Texas courts because there is no reasonable expectation of privacy in the police station, the holding cell, or a prison. Our society is not willing to recognize such places as protected.

**Code of Criminal Procedure Article 38.23.** The last area of Texas law to be discussed is Texas' Exclusionary Rule, found in CCP Art. 38.23. The Exclusionary Rule in Texas is substantially more restrictive than the federal rule. Whereas the federal rule 19

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19 An inmate's phone calls to his attorney are privileged in the same way as is his correspondence to an attorney. As such, these calls should not be recorded or monitored as a general rule. Officers should contact their local District or County Attorney's office should this particular situation arise during an investigation to ensure that the officer and the department avoid a legal minefield.
applies to actions by government agents, the Texas rule applies to illegal actions by any person -- including private citizens (Reamey, 2009, pp. 62-63; Stride & Rolater, 2010, p. 33).

The current standard of review is that the person who complains about the violation of a law related to seizure of evidence must have "standing to complain." The Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE), in its Intermediate Arrest, Search, and Seizure (2001) course materials, lists the requirements:

1. A person has no standing to assert violations of another's rights, or to complain about the search or seizure of property not under his lawful control or possession.
2. If a person does not own or have legitimate custody of an item, he cannot claim a reasonable expectation of privacy in it.
3. If the arrestee does not have a reasonable expectation of privacy in the place searched or the thing seized, he does not have standing to object to a search. (p. 33)

If the defendant did not have a reasonable expectation of privacy in an area searched, the defendant cannot raise a valid objection to the seizure of the evidence used against him (see, for example, Katz v. United States, 1967; United States v. Salvucci, 1980). Chief Justice Rehnquist worded it this way in Rakas v. Illinois (1978):

"Fourth Amendment rights are personal rights which ... may not be vicariously asserted"\(^2\) ... and a person aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. (p. 128)

The current standard in Texas relating to evidence seized in violation of a particular statute states that unless the law "confers some individual benefit on a suspect, violation of the law does not require the exclusion of evidence" (Beckham,

\(^2\) Quoting Alderman v. United States, 394 U.S. 165 (1968)
Beckham uses the example\textsuperscript{21} of a defendant who tried to have evidence excluded because an undercover officer agreed to have sex with him for money as part of a decoy operation. The defendant argued that by agreeing to engage in sex for a fee, the undercover officer had violated Texas Penal Code §43.02, \textit{Prostitution}; as such, he claimed, the evidence against him was obtained in violation of law and should be inadmissible. The prostitution law did not "give the defendant any rights, and so the officer's acts as a decoy did not violate the defendant's statutory rights" (p. 88).

\textbf{Conclusions and Discussion}

The rules governing the use of statements are constantly in flux. The federal and state legislatures and courts revisit them on a frequent basis. Though \textit{Miranda} is seen as a cornerstone of our American justice system, the specific details governing its requirements change from time to time. The case and its progeny continue to stir strong emotions from both sides of the political spectrum. Supreme Court Justice Antonin Scalia, for example, is known to have a longstanding antipathy towards the case; he referred to \textit{Miranda} as a "milestone of judicial overreaching" in his \textit{Dickerson v. United States} (2000) dissent (Toobin, 2008, p. 146). In the Court's \textit{Montejo v. Louisiana} (2009) opinion, Justice Scalia wrote that "the \textit{Miranda} rights purportedly have their source in the Fifth Amendment" (slip opinion p. 7). Notice Scalia's choice of words -- "purportedly have their source." His writing leaves little doubt as to his feelings about the \textit{Miranda} case.

Whether or not there will continue to be a fine-tuning of \textit{Miranda} is a question that cannot be answered here. It is fairly obvious, though, that \textit{Miranda} is here to stay. Even Chief Justice William Rehnquist, who was known to strongly dislike the \textit{Miranda} decision as being an example of the Warren Court's judicial activism (Toobin, 2008), refused to overturn the \textit{Miranda} decision when it was reviewed in \textit{Dickerson}. Rehnquist wrote in the Court's opinion that "This Court declines to overrule \textit{Miranda}. Whether or

\textsuperscript{21} \textit{Watson v. State}, 10 S.W.3d 782 (Tex. App. – Austin 2000, no pet.)
not this Court would agree with *Miranda*’s reasoning and its rule in the first instance, *stare decisis*\(^{22}\) weighs heavily against overruling it now" (p. 429).

Officers must obey the state and federal rules governing confessions and statements if those statements are to be admissible in court. Failure to do so could cause the guilty to walk free or cause an innocent person to be convicted. Officers and prosecutors are bound to follow the law to ensure that our system of justice continues to be as fair and unbiased as possible. Due process applies to all, regardless of race, gender, socioeconomic status, national origin, or any other modifier. *Miranda* is one of the foundation stones of due process in the United States. Whether you like it or not, whether you agree with it or not, *Miranda* must be adhered to strictly in all instances where it is applicable.

\(^{22}\) Latin for "to stand by things decided." When courts cite previous decisions and adhere to precedent, those courts are abiding by the concept of *stare decisis*. 

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