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Butzin v. Wood: The Eighth Circuit's End Run of Miranda [Butzin v. Wood, 886 F.2d 1016 (8th Cir. 1989)]

Robert T. Brabbit

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STUDENT COMMENTS

BUTZIN v. WOOD: THE EIGHTH CIRCUIT'S END RUN OF MIRANDA

[Butzin v. Wood, 886 F.2d 1016 (8th Cir. 1989)]

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INTRODUCTION

In Butzin v. Wood, the Eighth Circuit Court of Appeals addressed the admissibility of two incriminating statements made by the defendant in a homicide case. Both statements were used at trial and the defendant was convicted of second-degree murder. The court found it unnecessary to address the adequacy of the Miranda warning issued before the first statement by determining the second statement was volunteered, thus rendering Miranda inapplicable. The court determined that the strength of the second statement coupled with other untainted evidence provided sufficient basis to support the conviction and render admission of the first statement harmless error.

This comment first examines the evolution, creation, and application of the Miranda standards. Although not intended to be a comprehensive review, this brief examination of fifth amendment law will help put the Butzin decision in the proper context. Second, the Butzin analysis will discuss the majority opinion and Chief Judge Lay's dissent regarding separation of the two confessions, and the application of the harmless error rule to a Miranda question. The majority's

1. 886 F.2d 1016 (8th Cir. 1989).
2. This comment follows the Eighth Circuit's lead and uses the terms "incriminating statements" and "confession" interchangeably.
opinion in Butzin illustrates how the courts are moving away from strict enforcement of rules and consequently, protection of individual rights.

I. Miranda: Creation and Evolution of the Rule

A. Pre Miranda: The Voluntariness Standard and Totality of Circumstances Test

The United States Constitution provides one of the most important protections against self-incrimination. Specifically, three independent constitutional doctrines limit police interrogation aimed at obtaining incriminating information from a suspect: the fourteenth amendment due process clause, the fifth amendment, and the sixth amendment. The fourteenth amendment due process clause provides that no state shall deprive a citizen of due process of law. The fifth amendment protects a suspect from compelled self-incrimination. The sixth amendment insures that each person accused of a crime will have the assistance of counsel for their defense. In 1963 and 1964, the Supreme Court held that fifth and sixth amendment protections applied to the states through the fourteenth amendment.


4. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law .... " U.S. Const. amend. XIV. See, e.g., Haynes v. Washington, 373 U.S. 503, 519 (1963) (Court held that a coerced confession was constitutionally impermissible); Payne v. Arkansas, 356 U.S. 560, 568 (1958) ("[T]he admission in evidence ... of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."); Ward v. Texas, 316 U.S. 547, 555 (1942) (Court set aside a conviction based on a confession obtained by protracted questioning, threats of mob violence and the defendant being held incommunicado, based on due process grounds); White v. Texas, 310 U.S. 530, 533 (1940) (considered a coerced confession and held that due process commanded that the practice not be used); Chambers v. Florida, 309 U.S. 227, 240–41 (1940) (Court found that coerced confessions were a lawless means used to achieve the end result and so they could not be allowed as evidence under due process standards). See also Crossley, Miranda and the State Constitution: State Courts Take a Stand, 39 Vand. L. Rev. 1693, 1697 (1986) ("During the 1950s and 1960s the Supreme Court ... 'nationalized' federal constitutional rights by selectively incorporating most of the provisions in the Bill of Rights into the fourteenth amendment's prohibitions.").

5. "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law .... " U.S. Const. amend. V.

6. "In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence." U.S. Const. amend. VI.
amendment.\textsuperscript{7}

Historically, the Court's approach to confession cases was rooted in the use of a voluntariness test which examined the circumstances surrounding the confession to see if the suspect did in fact confess voluntarily. In the 1884 decision of \textit{Hopt v. Utah}, the United States Supreme Court, for the first time, held that confessions based on promises or inducements by individuals conducting the interrogation are not voluntary and are thus inadmissible.\textsuperscript{8} The Court relied on the evidence law notion that confessions which did not arise voluntarily were not trustworthy.\textsuperscript{9}

Shortly after \textit{Hopt}, the Supreme Court widened the scope of the involuntary confessions rule in the 1897 decision of \textit{Bram v. United States}.\textsuperscript{10} The Court held that confessions induced by police threats render the confession inadmissible.\textsuperscript{11} Resting its decision on the fifth amendment, the \textit{Bram} Court stated:

In criminal trials, in the courts of the United States, whereever [sic] a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."\textsuperscript{12}

Because the fifth amendment did not reach state actions until 1964, coerced confessions obtained by state officials posed an entirely different problem for the Court. In the 1936 decision of \textit{Brown v. Mississippi}, the Court addressed this problem with the due process clause of the fourteenth amendment.\textsuperscript{13}

In \textit{Brown}, the defendants were indicted on murder charges and pleaded not guilty.\textsuperscript{14} After a one day trial, the defendants were con-
victed and sentenced to death. The defendants argued that their confessions were inadmissible because they were obtained through physical torture. The United States Supreme Court reversed the convictions, holding that the actions by the state officials violated the due process clause of the fourteenth amendment. The Court noted that: "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" The Court in Brown used a coerced confession rule to exclude incriminating statements elicited by police tactics that were "revolting to the sense of justice." Thus in Brown, the Court found whipping the suspects with a buckle-studded leather strap to be revolting to the sense of justice.

In later confession cases, the Court began to develop the totality of circumstances analysis. For example, in 1961 the Court in Culombe v. Connecticut set forth a three-pronged test for evaluating the voluntariness of a confession. The Culombe Court stated that first, the

15. Id. at 279. The convictions were based solely on the confessions. Besides the confessions, there was no evidence sufficient to warrant a jury trial. Id.

16. Id. at 281–82. One of the suspects had been hung from a tree and whipped until he confessed. The other two suspects were taken to jail, forced to strip and lay naked over chairs, and were whipped with a leather strap. The deputy made it clear that the beatings would continue until they confessed in the manner demanded. Indeed, the beatings did continue until the suspects confessed. Id.

17. Brown, 297 U.S. 278, 287. The Brown Court relied on the fourteenth amendment because the coercion was by state officials and not federal officials. Id. at 285–86.

18. Id. at 285 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Rogers v. Peck, 199 U.S. 425, 434 (1905)).

19. Id. at 286. The Brown Court stated: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." Id. Although the Court in Brown concentrated on the brutality element as rendering the confessions inadmissible, it later concentrated on other factors. The Court found that psychological overbearing rendered confessions inadmissible. See Haynes v. Washington, 373 U.S. 503, 514 (1963) (isolating suspect for 16 hours and refusing to allow him to call his wife constituted coercion); Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (threatening suspect with loss of financial aid and her children constituted coercion); Rogers v. Richmond, 365 U.S. 534, 541–44 (1961) (threatening to bring suspects ailing wife to the station constituted coercion); Blackburn v. Alabama, 361 U.S. 199, 209 (1960) (suspect’s mental incompetence coupled with a lengthy interrogation in a coercive atmosphere rendered confession inadmissible); Spano v. New York, 360 U.S. 315, 323 (1959) (threatening suspect with a friend losing his job constituted coercion).

20. 367 U.S. 568, 603 (1961). In Culombe, a suspect was interrogated for several weeks, regarding a series of holdups and holdup killings. Id. at 570. The interrogation was aimed specifically at obtaining a confession. Id. at 625. After four nights and five days of being in custody of the police, the suspect confessed. Id.
atmosphere surrounding the interrogation must be examined.\textsuperscript{21} Second, the Court considered the psychological factors and mental capacity of the suspect.\textsuperscript{22} Third, the Court analyzed the facts with respect to the mental condition of the suspect.\textsuperscript{23} Justice Frankfurter stated, there is “[n]o single litmus-paper test for constitutionally impermissible interrogation[s] . . . .”\textsuperscript{24} Thus, several factors, analyzed in light of the surrounding circumstances, determine whether a confession is voluntary.\textsuperscript{25}

Soon state courts began achieving inconsistent results, and the Supreme Court realized that the \textit{Culombe} test was ineffective in eliminating coercive interrogations.\textsuperscript{26} The Supreme Court had left state courts with an imprecise standard which invited subjective judicial interpretation of the voluntariness evaluation.\textsuperscript{27} This imprecise standard resulted in the admission of confessions of questionable constitutionality.\textsuperscript{28}

In 1964, the Supreme Court supplemented from the coerced confession doctrine with two decisions based on the Sixth Amendment. In 1964 the Supreme Court in \textit{Massiah v. United States}, recognized a suspect’s sixth amendment right to consult with an attorney after be-

\begin{itemize}
\item \textsuperscript{21} Id. at 603 (the external events and occurrences surrounding the confession must be examined).
\item \textsuperscript{22} Id. (“[B]ecause the concept of ‘voluntariness’ is one which concerns a mental state, there is the imaginative reaction, largely inferential, of internal, ‘psychological’ fact.”).
\item \textsuperscript{23} Id. (psychological facts must be applied to the standards for judgment informed by legal conceptions of rules of law).
\item \textsuperscript{24} Id. at 601.
\item \textsuperscript{25} Id. at 602 (each of the following must be considered: duration and condition of detention, police attitude displayed toward the defendant, defendant’s physical and mental state, any pressures that affect his ability to resist coercion or exert self control).
\item \textsuperscript{26} Kamisar, \textit{A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness, ” Test}, 65 MICH. L. REV. 59, 94–104 (1966) (discusses the weaknesses of the coerced confession doctrine).
\item \textsuperscript{28} See Stone, \textit{The Miranda Doctrine in the Burger Court}, 1977 SUP. CT. REV. 99. The precise reach of \textit{Escobedo} was clouded by language and an express limitation to the facts of that case. This ambiguity resulted in a considerable amount of confusion among state courts. Id. at 103. See also Sonenshein, \textit{Miranda and the Burger Court: Trends and Counter trends}, 13 LOY. U. CHI. L. J. 405, 414 (1982) (To solve the problem of state courts allowing the usage of coerced confessions, the Supreme Court granted certiorari in \textit{Miranda} to provide concrete constitutional guidelines for the courts to follow.).
\end{itemize}
The Supreme Court held that the right to counsel begins at the post indictment stage of a criminal proceeding. Shortly after *Massiah*, the Court's 1964 decision in *Escobedo v. Illinois*, extended the right to counsel to include interrogations conducted before the indictment stage. Although *Escobedo* clearly articulated that "[o]ur Constitution . . . strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against compelled self-incrimination," other factors of the decision were left open to inconsistent interpretation by state and federal courts. It was this difference of interpretation which paved the way for the decision in *Miranda v. Arizona*.

### B. Miranda v. Arizona

In *Miranda v. Arizona*, Ernesto Miranda was arrested at his home and taken to a Phoenix police station for questioning. Without being advised of his right to have counsel present, Miranda responded to the interrogations by executing a written confession. The written confession was admitted into evidence and Miranda was found guilty of kidnapping and rape.

Preceding the decision in *Miranda v. Arizona*, most criminal confessions arose from incommunicado interrogations in police dominated

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29. 377 U.S. 201, 206 (1964) (Court held that Massiah was denied the guarantee of the sixth amendment when statements he made in the absence of counsel were used against him at trial).
30. *Id.* at 205.
31. 378 U.S. 478 (1964). In *Escobedo*, the suspect was brought to the police station to be questioned about the murder of his brother-in-law. The suspect was told that a friend had already implicated him in the murder. *Id.* at 479. Also, the suspect was not allowed to see his lawyer who was waiting in the hall during the interrogations. *Id.* at 481-82. The Supreme Court reversed the conviction noting that the interrogation was not a general questioning but was focused on obtaining a confession. *Id.* at 485-86. The Court determined that the suspect's sixth amendment right to counsel was violated by not allowing him to consult with his lawyer before interrogation. *Id.* at 490-91.
32. *Id.* at 490-91. The Court stated: "no meaningful distinction can be drawn between interrogation of an accused before and after formal indictment." *Id.* at 486 (citing *Massiah v. United States*, 377 U.S. 201, 205 (1964)).
33. *Id.* at 488.
34. See Markman, *Miranda v. Arizona: A Historical Perspective*, 24 AM. CRIM. L. REV. 193, 208 (1987). These factors include at what point the investigation is focused enough on the defendant to require counsel and when does general questioning become actual interrogation.
36. *Id.* at 491-92. The top of the statement contained a paragraph stating that the confession was made voluntarily and with full knowledge of legal rights. Testimony indicated that this paragraph was not read to Miranda until after he had confessed orally. *Id.*
37. *Id.* at 492.
atmospheres. Police overreaching, physical brutality, and psychological coercion were common.\textsuperscript{38} Although the “bright line” rule set forth by \textit{Miranda} is judicially created, its aim is to protect the fifth amendment right against compelled self-incrimination specifically guaranteed by the United States Constitution.\textsuperscript{39}

The Supreme Court in \textit{Miranda v. Arizona} concluded that the process of in-custody interrogation contains inherent pressures which work to undermine the individual’s will to resist, compelling them to speak where they ordinarily would not.\textsuperscript{40} The Court indicated that custodial interrogations create a presumption of coercion and that the “atmosphere carries its own badge of intimidation.”\textsuperscript{41} The \textit{Miranda} Court observed that statements obtained from a defendant cannot truly be a product of free will unless adequate protective measures are taken to dispel the compulsion which is inherent in custodial interrogations.\textsuperscript{42}

The \textit{Miranda} Court focused on the reoccurring constitutional problems surrounding custodial interrogations while actually deciding four cases: \textit{Miranda v. Arizona},\textsuperscript{43} \textit{Vignera v. New York},\textsuperscript{44} \textit{Westover v. United States},\textsuperscript{45} and \textit{California v. Stewart}.\textsuperscript{46} First addressing the problems inherent in custodial interrogation, the Court developed guidelines requiring a warning and an express waiver before a confession could be admissible. The Court then applied the guidelines to the facts of each case.\textsuperscript{47}

The Court’s focus on the inherent coercion present during custodial interrogations was central to its holding.\textsuperscript{48} The \textit{Miranda} Court recognized that in modern interrogation practices, coercion is

\begin{footnotesize}
\textsuperscript{38} See, e.g., Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (eight or nine hours of sustained interrogation constituted psychological coercion resulting in an involuntary confession); Spano v. New York, 360 U.S. 315, 323 (1959) (confession deemed coerced where foreign suspect was interrogated for eight hours and was repeatedly denied access to counsel); Chambers v. Florida, 309 U.S. 227, 239-40 (1940) (psychological coercion found where suspects were interrogated throughout the night, without food or rest); Brown v. Mississippi, 297 U.S. 278, 286 (1936) (physical torture used by police to obtain confessions rendered confessions inadmissible).

\textsuperscript{39} For text of fifth amendment, see \textit{supra} note 5.

\textsuperscript{40} \textit{Miranda v. Arizona}, 384 U.S. 436, 467 (1966).

\textsuperscript{41} \textit{Id.} at 457.

\textsuperscript{42} \textit{Id.} at 458.

\textsuperscript{43} \textit{Id.} at 491.

\textsuperscript{44} \textit{Id.} at 493.

\textsuperscript{45} \textit{Id.} at 494.

\textsuperscript{46} \textit{Id.} at 497.

\textsuperscript{47} \textit{Id.} at 491-99.

\textsuperscript{48} \textit{Id.} at 461. The Court noted that “[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak.” \textit{Id.}
\end{footnotesize}
rooted in psychological rather than physical influences.\textsuperscript{49} The Court examined various police interrogation manuals and other materials revealing an arsenal of psychological tactics used to elicit confessions from suspects during custodial interrogations.\textsuperscript{50} These manuals suggested that the interrogation be done privately and in the investigator's office, to deprive the suspect of any psychological advantage.\textsuperscript{51} Interrogators were instructed to offer the suspect a legal excuse for the action.\textsuperscript{52} If these tactics failed, interrogators turned to a ploy referred to as a "Mutt and Jeff" act.\textsuperscript{53} Confessions induced through trickery were the end result of a tactic which utilized a line-up.\textsuperscript{54} Finally, if the suspect refused to discuss the matter entirely, or asked for an attorney, the interrogator conceded the right to remain silent.\textsuperscript{55} The Court concluded that the interrogation environment was designed to destroy the will of the suspect and that these incommunicado interrogations are directly opposed to the fifth amendment right against self-incrimination.\textsuperscript{56}

The \textit{Miranda} Court held that a suspect's in-custody statements

\textsuperscript{49} Id. at 448. "[C]oercion can be mental as well as physical, and... the blood of the accused is not the only hallmark of an unconstitutional inquisition." Id.

\textsuperscript{50} See id. at 448-56.

\textsuperscript{51} Id. at 449 (the primary factor leading to a successful interrogation is privacy).

\textsuperscript{52} \textit{Miranda}, 384 U.S. at 451-52. The Court noted an example of this tactic being used on a person suspected of revenge-killing would be:

"Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was, no good. ... [H]e gave some indication that he was about to pull a gun on you, and that's when you had to act to save your own life

\ldots"

\textit{Id.} (quoting F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 40 (1962)).

\textsuperscript{53} Id. at 452. The Mutt and Jeff act involves two agents, one hostile and the other kindhearted. The kindhearted agent attempts to identify with the suspect by disagreeing with the other agent's hard-nosed tactics, and offers to remove him from the case provided the suspect cooperates. The agent notes that he would not be able to hold off his partner for very long. Thus, the suspect is forced into making a quick decision. \textit{Id.}

\textsuperscript{54} Id. at 453. The suspect is put in a line-up and confidently identified by the witness or complainant. The questioning is then resumed with the aura that there is no question of guilt. The reverse line-up is a slight variation on this technique. The accused is placed in a line-up and identified by several fictional witnesses or victims for different offenses. The goal is that the suspect will confess to the questioned offense to escape false accusations related to the other offenses. \textit{Id.} (citing C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 106 (1956)).

\textsuperscript{55} \textit{Miranda}, 384 U.S. at 453-54. After the suspect has been impressed with the apparent fairness of the interrogator, the interrogator points out the incriminating significance of the suspect's refusal to talk.

\textsuperscript{56} Id. at 457-58 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."). \textit{Id.} at 458.

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would be admissible only if the prosecution established that the proper warnings had been given, and the suspect had voluntarily, knowingly, and intelligently waived his rights.\textsuperscript{57} The Court noted that any evidence of trickery will indicate that the suspect did not voluntarily waive the privilege.\textsuperscript{58} However, the Court extended its examination of coercion to provide that lengthy interrogation or incommunicado incarceration prior to a confession, provides evidence that the accused did not validly waive their rights.\textsuperscript{59}

\textit{Miranda} required that suspects be advised of their right to remain silent and to be informed that any statement they make may be used against them. In addition, the Court required that suspects be informed of the right to have their own attorney, or to have one appointed if they could not afford one.\textsuperscript{60} The Court held that a suspect must be clearly informed of the right to have an attorney present before answering questions.\textsuperscript{61} The Court noted that a mere warning administered by the interrogators is not sufficient to insure an uncoerced choice between silence and speech.\textsuperscript{62}

The \textit{Miranda} Court found that having counsel present at the interrogation is beneficial in several respects. Counsel can mitigate the danger of untrustworthiness if a suspect decides to talk to the interrogators.\textsuperscript{63} Also, the likelihood of coercion is reduced by having counsel present.\textsuperscript{64} Moreover, if coercion is implemented, the lawyer can testify to it in court.\textsuperscript{65} Finally, a lawyer can also guarantee the statement was accurately given to the police and accurately reported at trial.\textsuperscript{66}

The Court also laid out a procedural framework to be followed if suspects exercise their right to remain silent or requests to speak with an attorney. If suspects exercise their right to remain silent, “interrogation must cease.”\textsuperscript{67} If the suspect requests assistance of counsel, “the interrogation must cease until an attorney is

\textsuperscript{57} See id. at 444–45, 476, 479.
\textsuperscript{58} \textit{Id.} at 476 (“[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.”).
\textsuperscript{59} \textit{Id.} “[T]he fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights.” \textit{Id.}
\textsuperscript{60} \textit{Id.} at 444.
\textsuperscript{61} \textit{Id.} at 472.
\textsuperscript{62} \textit{Id.} at 469–70. “The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators.” \textit{Id.} at 469.
\textsuperscript{63} \textit{Id.} at 470.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.} at 473–74.
The decision in *Miranda*, however, does not mandate that volunteered confessions be barred by the fifth amendment. The Court recognized that confessions need to remain an essential element in law enforcement, so long as they are given freely and voluntarily, without any compelling influence. The Court noted, however, that a suspect's waiver of the right to remain silent or to have an attorney present during interrogation, would be subject to close scrutiny. The Court also added that implying a waiver from a suspect's mere silence would not pass constitutional muster. Thus, the *Miranda* decision did not completely bar the use of volunteered statements as a tool of law enforcement.

In dissenting opinions, Justices Clark, Harlan, White, and Stewart objected to the requirements imposed on law enforcement officials by the majority. Justice Clark argued that the totality of the circumstances test utilizing the due process clauses of the fifth and fourteenth amendments, provides the best alternative for judicial review because of its flexibility. Justice Harlan, also advocating use of the totality of the circumstances test, argued that balancing society's need for effective law enforcement against individual constitutional rights is more appropriately done through the totality of the circumstances test. Justice White argued that the bright-line rules created by the majority saddled law enforcement with rigid guidelines that would interfere with effective investigation and prosecution. Despite the dissent's arguments, the 5-4 majority concluded that a bright-line rule was necessary to combat over-zealous police interrogations.

C. Post *Miranda*: Narrowing the Doctrine

From the time it was handed down in 1966, the *Miranda* decision

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68. *Id.* at 474.
69. *Id.* at 478. The *Miranda* Court pointed out that its decision does not bar the confession of a person "who enters a police station and states that he wishes to confess to a crime." *Id.*
70. *Id.* at 475–76. "If the interrogation continues without the presence of an attorney... a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475.
71. *Id.* at 475.
72. See Note, *Miranda and the Rehnquist Court*, 30 B.C.L. REV. 523, 539 (1989) (noting that confessions gained during interrogation are only admissible if preceded by a warning of the accused's rights and a knowing and intelligent waiver).
74. *Id.* at 503 (Clark, J., dissenting).
75. *Id.* at 516–17 (Harlan, J., dissenting).
76. *Id.* at 544–45 (White, J., dissenting).
77. *Id.* at 467–69.
has been surrounded by controversy and debate.78 A key reason behind the Warren Court’s decision in *Miranda* was the dissatisfaction with the traditional due process/voluntariness test as the guarantee against unfair interrogation practices.79 Thus, the Court granted certiorari in *Miranda*, to lay down “concrete constitutional guidelines for law enforcement agencies to follow.”80

Advocating individual rights as opposed to balancing them with society’s interests, the Warren Court adopted the philosophy that individual rights under the Constitution were absolute and could not be abridged by a societal interest.81 The Warren Court’s application of the totality of the circumstances test, did not abolish it; it simply focused the test on a determination of the voluntariness of a suspect’s waiver.82 Subsequently, the Burger and Rehnquist Courts have used the totality of the circumstances test to broadly interpret the voluntariness of a suspect’s waiver.83 Essentially, the Burger and Rehnquist Courts have modified the applicability of the rules set forth in *Miranda* by balancing society’s interest in law enforcement with individuals’ rights.84 The cases that follow serve to illustrate the Supreme Court’s struggle in applying the bright-line rule set forth in *Miranda*.

In 1974, in *Michigan v. Tucker*, the Burger Court faced the issue of whether a suspect could waive constitutional rights after a less than full *Miranda* warning.85 In *Tucker* the defendant was brought to the station for questioning in connection with a rape and beating of a

78. See Sonenshein, supra note 28, at 405-34 (noting the dismay with which *Miranda* was received by “law-and-order” politicians and prosecutors and subsequent liberties taken with the *Miranda* precedent in post-*Miranda* decisions).
79. Id. at 413.
81. Id. at 479. See also, Note, supra note 72, at 553 (the author argues that the trend is to move away from this liberal idea as the Court becomes more conservative).
82. *Miranda*, 384 U.S. at 475-76.
83. See Note, supra note 72, at 554 (arguing that this broad analysis reviews the “totality of the circumstances” test rejected in *Miranda*). For other Supreme Court cases addressing some aspect of the rights set forth by *Miranda* see Colorado v. Spring, 479 U.S. 564 (1987) (holding that a suspect’s awareness of all crimes about which the suspect may be questioned is not relevant in determining validity of waiver); Colorado v. Connelly, 479 U.S. 157 (1986) (holding that the state needs to prove waiver of *Miranda* rights by a preponderance of the evidence); Moran v. Burbine, 475 U.S. 412 (1986) (holding that *Miranda* does not require reversal where police fail to inform an accused of attorney’s telephone call since the level of police culpability in this regard had no bearing on validity of waiver); Edwards v. Arizona, 451 U.S. 477 (1981) (holding that police-initiated interrogation is not valid after the accused exercises the accused’s *Miranda* rights, even if police read the *Miranda* rights a second time).
84. See Note, supra note 72, at 554.
woman. 86 Prior to interrogation police read the suspect his rights, but omitted the portion informing him of his right to appointed counsel. 87 The United States Supreme Court reversed the Sixth Circuit Court of Appeals holding that police had not denied the suspect his privilege against self-incrimination. 88 The Tucker Court noted that the purpose of the fifth amendment is to prevent governmental influence on a suspect's decision to confess. 89 Also instrumental to the Court's decision was its return to balancing law enforcement and societal interest with individual rights. 90

Justice Douglas argued in his dissenting opinion that the Miranda decision required both a full warning and a valid waiver in order to protect the fifth amendment right. 91 Justice Douglas argued that because Tucker had not been given a complete warning, his confession should have been inadmissible. 92

In Rhode Island v. Innis, 93 the Court addressed the problem of defining what constitutes interrogation. Specifically, the Court was deciding whether any conversation, apart from direct questioning, could be termed part of interrogation for Miranda purposes. 94 In Innis, the suspect was arrested for robbing a cab driver at gunpoint. 95 Before being put in a police car for the ride to the station, the suspect was informed of his Miranda rights and indicated that he wanted to speak to a lawyer. 96 During the ride and in front of the suspect, three officers discussed the danger of many handicapped children in the area, and the possibility that one might find the suspect's hidden shotgun. 97 The suspect then interrupted and volunteered to show the officers where the gun was located. 98 The Supreme Court reversed the Rhode Island Supreme Court holding

86. Id. at 435-36. A dog was found in the home of a raped and beaten woman. The dog was later followed to the defendant's home by police and further connected with the defendant by a neighbor. Id.
87. Id. at 436.
88. Id. at 437-38.
89. Id. at 439-40. See also Comment, Waiving Miranda Goodbye?, 21 CREIGHTON L. REV. 239, 253 (1987) (critical of the idea that no official intervention equals involuntary statements that arose in the Colorado v. Connelly and Colorado v. Spring holdings).
90. Tucker, 417 U.S. at 450.
91. Id. at 462 (Douglas J., dissenting).
92. Id. at 463 (Douglas J., dissenting).
94. See Sonenshein, supra note 28, at 435.
95. Innis, 446 U.S. at 293-94. The cab driver noticed a picture of his assailant on a police bulletin board while waiting to make a statement. Id. at 293.
96. Id. at 294.
97. Id. at 294-95. An officer stated: "'there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.' " Id. (quoting Patrolman Gleckman's testimony).
98. Id. at 295.
that the shotgun and testimony relating to it, were not products of interrogation.99

The Innis Court noted that Miranda applies whenever a suspect in custody is exposed to "direct questioning or its functional equivalent."100 Further defining the rule, the Court stated that police practices which are reasonably likely to invoke incriminating responses from a suspect, will be deemed interrogation.101

Ten years later the Supreme Court affirmed Tucker in New York v. Quarles, holding that an absence of warnings did not require a presumption that compulsion in violation of the fifth amendment had taken place.102 In Quarles, a woman approached a patrol car and informed police officers that she had just been raped.103 After describing her assailant, she told the officers that he had gone into a nearby grocery store and was carrying a gun.104 Before formally arresting the suspect and reading him a Miranda warning, the officers noticed the suspect's shoulder holster was empty and inquired as to the whereabouts of his gun.105 The suspect nodded toward some empty cartons and responded, "the gun is over there."106 The United States Supreme Court reversed the Appellate Division of the New York Supreme Court, and the New York Court of Appeals, holding that the gun and statement were admissible and not in violation of Miranda.107

Creating a public safety exception to Miranda, the Court stated that "a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."108 Examining Miranda's doctrinal underpinnings, the Court reasoned that Miranda need not be applied in full force to a situation where officers ask questions reasonably grounded in concern for public safety.109 The Court pointed out that instead, the warnings required by Miranda are largely based on an attempt to reduce the likelihood of unconstitutional interrogation practices used in the "presumptively coercive environment of the station house."110

99. Id. at 302.
100. Id. at 300–01.
101. Id. at 301.
103. Id. at 651.
104. Id. at 651–52.
105. Id. at 652.
106. Id.
107. Id. at 653.
108. Id. at 657. The Court argued that if police were required to recite warnings where there was an immediate necessity for information, suspects might well be deterred from answering and thus a danger to public safety may be allowed to exist. Id.
109. Id. at 656 (1984).
110. Id.
Thus, the Quarles Court balanced the need for public safety against individual rights, the very thing that Miranda had abolished.

The Court further modified the application of Miranda in Duckworth v. Eagan. In Duckworth, the Court addressed the issue of whether a departure from the precise language of the warning set forth in Miranda adequately informed the suspect of his fifth amendment rights. Duckworth involved a suspect being questioned on two occasions in connection with a stabbing. Prior to the first round of questioning, the suspect was informed that he had the right to talk to a lawyer, and to have that person present before and during questioning. The warning also included that the police had no way of giving the suspect a lawyer, but that one would be appointed if and when the suspect went to trial. After spending approximately twenty-nine hours in lockup, the suspect was given another warning informing him that an attorney would be provided if he did not hire one. Following the second warning and subsequent questioning, the suspect confessed to the stabbing and led officers to the scene where they recovered the knife used in the crime.

Reversing the Seventh Circuit Court of Appeals, the Supreme Court held that the Miranda warnings given to the suspect sufficiently informed him of his fifth amendment right, and thus the statements and evidence were admissible. The Court pointed out that the decision in Miranda in no way requires that a warning be given in the identical form mandated in Miranda v. Arizona. The Duckworth Court concluded the

112. Id. at 2876–78.
113. Id. at 2877.
114. Id. The warning provided: “You have [a] right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.” Id.
115. Id. at 2877–78.
116. Id. at 2878.
117. Id. The seventh circuit court held that the “if and when you go to court” language included in the first warning, was ‘constitutionally defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation’ and ‘link[s] an indigent’s right to counsel before interrogation with a future event.’” Id. (quoting Duckworth v. Eagan, 843 F.2d 1554, 1557 (1988)).
118. Id. at 2878–79.
119. Id. at 2879. “‘[T]he “rigidity” of Miranda [does not] exten[d] to the precise formulation of the warnings given a criminal defendant,’ and that ‘no talismatic incantation [is] required to satisfy its structures.’” Id. (quoting California v. Prysock, 453 U.S. 355, 359 (1981)).
120. Id. at 2880.
question is, whether the warnings reasonably convey the rights as required by *Miranda*,\textsuperscript{121} and not whether the warnings are technically correct.

Justices Marshall, Brennan, Blackmun and Stevens dissented.\textsuperscript{122} The Justices argued that "[a] clear and unequivocal offer to provide appointed counsel prior to questioning is . . . an 'absolute prerequisite to interrogation.'"\textsuperscript{123} The dissent also argued that the "if and when" caveat may give the accused the impression that only those who can afford an attorney have the right to have one present prior to questioning; and those less fortunate must wait until trial.\textsuperscript{124} The dissent concluded that the warning linked the appointment of counsel to some point in the future, and thus did not clearly advise the suspect of his right to appointed counsel before and during interrogation.\textsuperscript{125}

The preceding cases illustrate how the Burger and Rehnquist Courts have continually modified the application of *Miranda*. The Court's broad interpretation of constitutionally permissible law enforcement action limits application of *Miranda*'s bright-line rules. Law enforcement conduct which might not have satisfied *Miranda* under a totality of circumstances analysis during the Warren Court years, may pass constitutional muster today.

II. *Butzin v. Wood*

A. Facts

David Leon Butzin was convicted of second-degree murder for the deaths of his wife, Melody, and his eighteen month-old son, Alex.\textsuperscript{126} On August 14, 1985, the bodies of Melody and Alex were recovered from Cat Creek in Wadena, Minnesota. Autopsies revealed that the cause of the deaths was drowning, and the sheriff believed the deaths were accidental. However, two days after the bodies were recovered, a local insurance man informed the sheriff that David Butzin had purchased a substantial amount of insurance on his wife just before her death. Further investigation revealed that Butzin had insured his wife's life for a total of $239,000 and his son's life for $6,000, leaving himself as the sole beneficiary.\textsuperscript{127}

Two weeks after discovering the bodies, a Wadena County Deputy

\begin{footnotes}
\item[121.] *Id.*
\item[122.] *Id.* at 2885-93.
\item[123.] *Id.* at 2886 (Marshall, J., dissenting) (quoting *Miranda v. Arizona*, 384 U.S. 436, 471 (1966)).
\item[124.] *Id.* at 2886-87.
\item[125.] *Id.*
\item[126.] *Butzin v. Wood*, 886 F.2d 1016, 1017 (8th Cir. 1989).
\item[127.] *Id.*
\end{footnotes}
requested that Butzin come to the law enforcement center. Upon arrival, Butzin was informed that he was to be questioned regarding the deaths of his wife and son. Butzin and the deputy entered a private office and Butzin was read the following warning: "[Y]ou have the right to remain silent. Anything you say can be used against you in court. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you at no cost." The warning omitted language indicating the right to have counsel present during questioning. Unaware of this omission Butzin answered the questions put to him by the Wadena County Chief Deputy Sheriff and a retired Minnesota Bureau of Criminal Apprehension Agent. During the one hour interview Butzin stated he was unaware when his wife and son had died.

Butzin was then interviewed one-half to one hour by a private investigator hired by Wadena County to help with the investigation. After the private investigator left the office the first two interrogators returned. They resumed the questioning for approximately fifteen to twenty minutes and then left. The private investigator then returned to the office, and found Butzin crying with his head in his hands. The private investigator said, "David, you're in a world of hurt, aren't you? ... 'Why don't you tell me what happened out there at Cat Creek, David?' Butzin answered, 'I lied, I was there.' Butzin stated that his wife and son fell into the water and that he panicked and ran away. The private investigator left the office and told the deputy and the retired agent what Butzin had said. They returned to the office. Butzin confessed that what he had said was only partially true "because he had bumped [his wife and son] into the creek and then watched [them] both float down the stream." He also stated that he had unsuccessfully attempted to rescue them. Butzin signed a written statement to this effect and was then arrested. After spending the night in jail, and following breakfast the next day, Butzin requested to speak with the deputy. Butzin then confessed that he had "not been totally honest [with the deputy] the day before." The deputy asked him if he remembered his rights from the day before and Butzin stated that he did. The deputy then inquired about Butzin's dishonesty. Butzin responded that his wife's death was not accidental; "he had pushed her into the creek because he wanted her to die and ... he knew she could not swim."

128. Id.
129. Id.
130. Id.
131. Id.
132. Id.
133. Id.
134. Id.
135. Id. at 1017–18.
Butzin contended that admission of his statements was contrary to the mandates of *Miranda* because he was not informed of his right to have counsel present during the interrogation. The United States District Court for the District of Minnesota denied Butzin’s petition for writ of habeas corpus.

B. Majority’s Opinion

In affirming the district court, the Eighth Circuit focused on the admissibility of the second confession by separating it from Butzin’s confession made the previous day and determining that the second confession was not the product of interrogation. The court also reiterated the fact that *Miranda* warnings are required only when a suspect is to be subjected to in-custody interrogation. The Eighth Circuit Court held the second confession to be volunteered and admissible because Butzin initiated the conversation with Deputy Young. The *Butzin* court cited *United States v. Rhodes* for the proposition that “‘a spontaneous admission made under circumstances not induced by the investigating officers, or during a conversation not initiated by the officers,’” will not be protected by *Miranda*. The court reasoned that because Butzin had already made a statement, and was under no pressure from the authorities to say anything more, he voluntarily gave the amended confession. The *Butzin* court noted that an officer’s attempt to clarify an ambiguous statement is generally not construed as interrogation under *Miranda* “if the question does not enhance the defend-

136. Id. at 1018.
137. Id. at 1016.
138. Id. at 1018. The court stated, “[w]e do not believe that Butzin’s ultimate confession, although he was unquestionably in custody at the time he made it, was the product of interrogation.” *Id.*
139. *Id.* (citing Rhode Island v. Innis, 446 U.S. 291, 300 (1980) (procedural safeguards outlined in *Miranda* are only required when a suspect in custody is subjected to an interrogation, not simply when suspect is taken into custody)).
140. *Id.* “The state court’s factual determinations are entitled to a presumption of correctness in a habeas proceeding, and we presume that Butzin initiated the conversation . . . .” *Id.* (citations omitted).
141. 779 F.2d 1019 (4th Cir. 1985). In *Rhodes*, an officer picked up a notebook while executing a search warrant. The suspect responded by saying, “[y]ou can’t take that” and the officer replied, “[w]hy?” The suspect answered “I can’t run my business without that.” The court held the statements admissible because they were spontaneously volunteered and were not made in the course of interrogation. *Id.* at 1032.
142. *Butzin*, 886 F.2d at 1018 (quoting *Rhodes*, 779 F.2d at 1032).
143. *Butzin*, 886 F.2d at 1018. The court assumed, “[a]pparently for his own reasons he wanted to give an honest account of the events leading to the deaths of his wife and child.” *Id.*
ant’s guilt or raise the offense to a higher degree.”

Additionally, the court relied on the Supreme Court’s decision in *Oregon v. Elstad*. In *Elstad*, the Supreme Court pointed out that all voluntary confessions proffered after a prior unwarned statement are not necessarily inadmissible. Thus, the *Butzin* court concluded that because the second confession was voluntary and more prejudicial, admission of both confessions was proper regardless of whether or not the first confession was preceded by an adequate *Miranda* warning.

The majority then turned to the admissibility of the first confession to determine whether the statement was a product of interrogation and made in a custodial setting. However, the court found it unnecessary to reach the custodial interrogation question because it determined any error in admission of the first confession “would be harmless beyond a reasonable doubt.” The court noted that *Butzin*’s appellate brief characterized his first confession as an accidental disclosure. The majority also noted that *Butzin*’s first confession was a “manslaughter-type confession” and certainly not what convicted him.

The *Butzin* court butressed the harmless error determination with three other pieces of evidence. The majority noted that *Butzin* had made two other inculpatory statements which were admitted at trial. In the first statement, *Butzin* told his wife’s father that he was responsible for her going into the water. In the second statement, *Butzin* told a deputy while being transported to court, “I know that I am guilty and that I have done wrong, but I have to go to court to beat it. It’s the best chance I have.” The court also noted the jury had heard evidence of the insurance coverage *Butzin* had purchased on his wife a couple of weeks before her death.

An interesting question is raised by the strength of these three pieces of evidence. If the interrogation did in fact turn custodial when *Butzin* rendered his first confession, would *Butzin*’s lies leading up to and including the first confession, coupled with evidence of the insurance policy, the statement made to his wife’s father and the statement made on the way to court, provide sufficient basis to up-

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144. *Id.* (quoting W. LaFave & J. Israel, Criminal Procedure § 6.7, at 301 (1985)).
147. *Butzin*, 886 F.2d at 1018.
148. *Id.* at 1019 (citing Chapman v. California, 386 U.S. 18, 24 (1967); Howard v. Pung, 862 F.2d 1348, 1351–52 (8th Cir. 1988)).
149. *Id.*
150. *Id.* This admission of guilt came after *Butzin* had inquired about the strength of the case against him, and had received an answer from the deputy. The deputy told *Butzin* that he believed the case against *Butzin* was strong. *Id.*
hold the conviction? Arguably so, but one can only speculate why the Eighth Circuit majority did not employ this analysis.

Finally, the majority rejected Butzin's claim that his confessions were not voluntary. The court noted the record failed to indicate improper conduct on the part of the police while interrogating Butzin. Thus, the Eighth Circuit affirmed the district court's conviction of Butzin for second-degree murder.

C. Chief Judge Lay's Dissenting Opinion

Chief Judge Lay asserted that the Butzin majority failed to address the main issue of the appeal. Instead of focusing on the critical issue of whether Butzin was given an adequate warning under Miranda v. Arizona,\textsuperscript{151} the majority failed to reach the Miranda question by speculating that the confession made on the second day of incarceration was voluntary and concluding it was more prejudicial than the previously rendered confession.\textsuperscript{152}

The Supreme Court in Miranda enumerated several procedural safeguards to be employed by law enforcement authorities.\textsuperscript{153} The Miranda decision specifically mandates that a suspect held for interrogation clearly be informed of the right to consult with a lawyer before interrogation, and to have the lawyer present during interrogation.\textsuperscript{154}

\textsuperscript{151} 384 U.S. 436 (1966).

\textsuperscript{152} Butzin v. Wood, 886 F.2d 1016, 1020 (8th Cir. 1989) (Lay, C.J., dissenting).

\textsuperscript{153} Miranda, 384 U.S. at 444-45. The Court held:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated; the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

\textsuperscript{154} Id. at 471. The Court stated: “we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today.” Id. The Court further noted three reasons for its decision in Escobedo v. Illinois, 378 U.S. 478 (1963), which required the right to have coun-
Chief Judge Lay argued the Supreme Court decision in *California v. Prysock* reaffirms the *Miranda* requirement that a warning must clearly inform a suspect of the right to counsel before and during interrogation. Even though the Court in *Prysock* held that no talismanic incantation is required to satisfy the requirements of *Miranda*, the decision in no way "erode[s] the necessity for a [suspect] to be clearly informed of [their] right to speak with a lawyer before and during . . . interrogation." The *Butzin* majority's application of *Prysock* suggests that *Prysock* allows law enforcement officials to omit portions of the warning, as well as tailor the manner in which the warning is given. The *Prysock* Court held that warnings need not be given in the exact form mandated by *Miranda v. Arizona*, so long as the warnings convey all of the enumerated rights. The majority reasoning in *Butzin* not only obviates the need for "talismanic incantations," but also eliminates the necessity of a complete *Miranda* warning.

In *Duckworth v. Eagan*, the Supreme Court again affirmed the principal that a suspect must be informed of the right to have a lawyer present at the time of interrogation. Although in a close 5-4 decision the Court found the *Miranda* warning in *Duckworth* adequate, it pointed out that warnings which fail to " 'apprise the accused of [their] right to have an attorney present if [they] [choose] to answer questions' " will be inadequate. The Court went on to say that " '[t]he warnings in this case did not suffer from that defect.' "

The warnings in *Butzin v. Wood* clearly suffer from this defect because *Butzin* was not informed at any time of the right to have counsel present if he chose to answer questions.

The Eighth Circuit majority disposed of the right to have counsel present during interrogation: (1) to insure police interrogation conforms to the right against self-incrimination, (2) to insure the statements made are not a product of compulsion, and (3) to enhance the integrity of the fact finding process in court. *Id.* at 466.

156. *Id.* at 359. The Court reasoned that the decision in *Miranda* requires either the *Miranda* warnings themselves, or their functional equivalent. *Id.* at 359–60.
157. *Butzin v. Wood*, 886 F.2d 1016, 1021 (8th Cir. 1989) (Lay, C.J., dissenting). Chief Judge Lay noted that many cases support this position. See, e.g., United States v. Noti, 731 F.2d 610 (9th Cir. 1984) (*Miranda* warning held incomplete where defendant was not informed of right to counsel during interrogation, as well as before); South Dakota v. Long, 465 F.2d 65 (8th Cir. 1972), cert. denied, 409 U.S. 1130 (1973) (warnings held inadequate where defendant was not advised that he had the right to the presence of an appointed attorney prior to questioning).
160. *Id.* at 1021 (Lay, C.J., dissenting) (quoting *Duckworth*, 109 S. Ct. 2875, 2881).
161. *Id.* at 1022 (Lay, C.J., dissenting).
present by conceding that Butzin was in custody, but that his second confession was not a product of interrogation and was volunteered.162 Chief Judge Lay noted the majority opinion implicitly assumed Butzin's rights were violated by the incomplete warning. However, the Butzin majority determined the error of admitting the first confession was harmless beyond a reasonable doubt because while in custody, Butzin came forward and volunteered a more incriminating statement.163

The heart of Chief Judge Lay's argument asserted that to say Butzin's second statement was not in response to the previous day's interrogation is unrealistic. By focusing on the second confession, the majority failed to realize Butzin's second confession may have been a product of the first confession. Had a proper Miranda warning been given on the first day, before the interrogation, it is uncertain whether Butzin, knowing he had right to counsel before or during interrogation, would have rendered the first incriminating statement or volunteered another the following day.164

Chief Judge Lay disagreed with the Eighth Circuit majority's reliance on the Supreme Court decision of Oregon v. Elstad.165 In Elstad, the defendant received a full and proper Miranda warning between a first and second confession.166 The Chief Judge noted the separation of two incriminating statements in Elstad was proper because Elstad had received a full Miranda warning before he made the second statement and waived his fifth amendment right.167

Butzin, however, involves facts clearly distinguishable from those in Elstad. Butzin was never properly informed of his fifth amendment rights. The deputy warned Butzin, "[y]ou have the right to remain silent. Anything you say can be used against you in court. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you at no cost."168 This warning, given to Butzin before the initial interrogation, failed to inform him of his right to consult with a lawyer before questioning and to have the lawyer present during interrogation.169 Unlike Elstad, Butzin was not given the opportunity to intelligently waive his fifth amendment right because he was never completely informed of his Miranda rights.

Chief Judge Lay asserted that by labeling the first confession harmless, the majority "misconceives and misunderstands the
message of Miranda." The judicially created rights of Miranda are aimed at protecting the fifth amendment right against compulsory self-incrimination. The applicability of Miranda does not turn on the degree of guilt which the statements reveal. Nor does it matter whether the statements are of an inculpatory or exculpatory nature. The Eighth Circuit majority noted that Butzin's first statement was not very incriminating and that the first confession was "'not the stuff of premeditated murder, rather, arguably it's [a] manslaughter type confession and was certainly not what convicted him. The second statement * * * provided the proof of intent.' " Butzin's admission of being at the scene of the crime, which he denied before, was intended to be exculpatory, but was inculpatory. Nowhere in the Miranda decision does it allude to the necessity of evaluating the prejudicial nature of a statement. Miranda prevents admission of unwarned statements whether they are slightly incriminating or not incriminating at all.

Chief Judge Lay argued the majority's application of Elstad to this critical issue failed to recognize the two confessions cannot be separated. Upon request, Butzin voluntarily went to the sheriff's office. After making a somewhat incriminating confession, he was arrested and taken into custody. The following day, while still in custody, Butzin rendered an additional statement. The Chief Judge cited Westover v. United States, arguing the proposition that two confessions obtained through multiple interrogations spanning a two-day period cannot be separated because the interrogations appear to the suspect as a "continuous period of questioning." Because Butzin was interrogated, arrested and held overnight in the compelling atmosphere of the law enforcement center, it is difficult to determine exactly when he no longer felt the effects of the custodial interrogation. Thus, it is extremely difficult to determine whether Butzin's second confession was truly voluntary.

Chief Judge Lay indicated the majority's use of the harmless error rule short circuits Miranda by eliminating the need to examine the interrogation. If an interrogation is custodial, suspects are entitled

170. Id. at 1022.
172. Id.
173. Butzin, 886 F.2d at 1022 (Chief Justice Lay quoted the majority which was relying on arguments raised by Butzin's attorney).
174. Id. (citing Miranda, 384 U.S. at 444).
175. Id. at 1022 (Lay, C.J., dissenting).
177. Butzin, 886 F.2d at 1022. In Westover, the Court found a defendant could not have waived his fifth amendment rights subsequent to receiving a Miranda warning after a fourteen hour, two day interrogation, because to the defendant it was a continuous period of questioning. Miranda, 384 U.S. at 496.
to be informed of their *Miranda* rights.\(^{178}\)

In *Butzin*, the interrogation should have been deemed custodial. After the first interrogation, a private investigator hired by the county questioned Butzin. Shortly thereafter, two officers again interrogated Butzin for about fifteen to twenty minutes. After the two officers left, the private investigator re-entered the room and obtained Butzin's remark: "I lied, I was there." The private investigator told the two officers of Butzin's statement and they returned to the interrogation room. The deputies undoubtedly returned intending to elicit further incriminating statements from Butzin. Although Butzin went to the station voluntarily, and had not yet admitted to a role in the crime itself, the interrogation had become custodial because the deputies would likely have restricted Butzin's liberty had he tried to leave. Thus, a custodial interrogation commenced at this stage, if not before.\(^{179}\)

**CONCLUSION**

The *Butzin* majority end runs the rights laid down in *Miranda* by beginning the analysis with the second confession and thus eliminating the need to examine the *Miranda* warnings. Even if Butzin's second confession was volunteered, the majority could at best, only speculate whether Butzin would have rendered the more incriminating second confession had a proper *Miranda* warning been issued before the first confession. Similar to the majority's analysis, Chief Judge Lay's dissent also engages in speculation. However, common sense indicates that Butzin would probably not have given the second confession if he had not made the first admission the day before. To say the second confession is totally independent of the first is unrealistic.

Alternatively, the *Butzin* majority could have upheld the conviction by excluding the written portion of Butzin's first confession and his second confession. Because Butzin went to the law enforcement center voluntarily, the need for a *Miranda* warning was not triggered until Butzin contradicted his previous statements and admitted having been at the crime scene. Butzin admitted, "I lied, I was there." Conventional wisdom suggests that Butzin was no longer free to leave. At that point, probable cause existed to arrest him and an adequate *Miranda* warning was necessary.

Arguably, the evidence up to and including Butzin's oral admission of being at the crime scene, coupled with the evidence of insurance policies, the admissions made to his wife's father and to the deputy on the way to court, provides a sufficient basis to render ad-

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mission of the written portion of the first confession and the second confession harmless error. This analysis is consistant with *Miranda*.

The Eighth Circuit's decision in *Butzin v. Wood* reflects the clash between preservation of individual fifth amendment rights and society's interest in protecting the public from crime. The *Butzin* decision arouses differing reactions from two separate schools of thought. Those who subscribe to the idea that society's greatest threat derives from the unbridled masses and advocate criminal apprehension at virtually all costs, should find solace in the *Butzin* decision. Conversely, the *Butzin* decision should also strike fear in the hearts of those who feel strongly about individual rights and believe society's greater threat arises from organized government.

Robert T. Brabbit