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UNITED STATES V. PATANE: THE BEGINNING OF THE END OF MIRANDA?

*Bryce Chauncey Loveland**

I. INTRODUCTION

One of the best reflections of a functional democracy is the government's treatment of its lawbreakers. No country in the world takes this point more seriously than the United States; the rights written in the United States Constitution protect its citizens from a potentially tyrannical government. These rights include the freedoms of speech, religion and assembly, and criminal rights such as due process and protection against self-incrimination. This Note focuses on the right against self-incrimination. Balanced with this right is the duty the United States government has to its law abiding citizens to protect them from criminal activity. The Supreme Court often rules on these issues, particularly after it substantially extended the right against self-incrimination in *Miranda v. Arizona*.¹

The Supreme Court's decision in *United States v. Patane*,² marks the forty-eighth ruling on *Miranda* since its creation.³ Clearly,

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¹ 384 U.S. 436 (1966).

² 542 U.S. 630, 124 S. Ct. 2620 (2004).

³ See LEXIS Shepard's Report Restrictions on *Miranda v. Arizona*, 384 U.S. 436

the Supreme Court continues to grapple with *Miranda*'s holding. In *Miranda*, the Court went beyond its Article III mandate to interpret the Constitution and stepped into Congress' territory when it created laws that protect the Fifth Amendment right against self-incrimination. After thirty-nine years of *Miranda*, the Court is now seriously considering a stricter interpretation of the Fifth Amendment text. Because of this stricter reading, the Court is beginning to recognize that the Self-Incrimination Clause has little to do with day-to-day police interrogations; rather, the Clause only applies to self-incrimination at criminal trial.

In *Patane*, the divided Court reached the precarious decision that even though un-Mirandized voluntary and involuntary testimony given during interrogations shall not be used at trial, physical evidence derived from un-Mirandized voluntary interrogations may be used for incrimination purposes. In other words, incriminating testimony cannot be used when that testimony is derived from a suspect that has not been read his *Miranda* rights, but physical evidence derived from that testimony could be used to incriminate.

The *Patane* holding contradicts prior *Miranda* case law and will be criticized. With *Patane*, the Supreme Court removed another pillar from the artificial edifice of law created in *Miranda* that must eventually collapse. The Supreme Court's crooked path of

(1966): Analysis (Followed, Criticized, Distinguished, Limited, Superseded, Conflict. Authority, Explained, Harmonized, Quest. Precedent) Jurisdictions (U.S. Supreme Court) (as of October 25, 2004) (This has not changed as of August 17, 2005). *Cf. Dickerson v. United States*, 530 U.S. 428, 463 (2000) (Scalia & Thomas, JJ. dissenting). Justice Scalia opined that the Supreme Court "has been called upon to decide nearly 60 cases involving a host of *Miranda* issues." *Id.*

jurisprudence on the Self-Incrimination Clause illustrates that sometimes it is easier for the Court to go around bad law with contradictory cases, than to overrule that law. Nevertheless, the Court should have overruled *Miranda* in *United States v. Patane*, giving a clearer holding on the self-incrimination issue and much needed direction to lower courts and law enforcement officials.

To understand where the Court has strayed from its authority in relation to the Self-Incrimination Clause, we must first understand the purpose for the creation of the Clause, the Court's actions to protect the Clause with the *Miranda* test, and Congress' response with the voluntariness test. After that historical background, this Note will explain the Supreme Court's actions since Congress' enactment of the voluntariness test, which will bring us to the principal case, *United States v. Patane*.⁴ After discussion of the Tenth Circuit Court of Appeals and Supreme Court *Patane* holdings, this Note will illustrate where those courts ruled correctly and incorrectly in the principal case. Finally, this Note will discuss the implications for post-*Patane* case law and how the Supreme Court should rule in future cases to eliminate Fifth Amendment interpretation problems by lower courts and law enforcement.

⁴ 542 U.S. 630, 124 S. Ct. 2620 (2004).

II. HISTORICAL DEVELOPMENT

A. The History of the Privilege⁵

The Fifth Amendment to the United States Constitution states: “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.”⁶ The right to plead the Fifth is viewed as a cornerstone of American criminal procedure and a fundamental constitutional right.⁷ However, the broad privilege that Americans see as a fundamental aspect of our culture⁸ did, in fact, develop out of much more limited circumstances than exist today.⁹

The colonists included the privilege in the Bill of Rights’ first draft out of fear of giving too much power to a “new and untried sovereignty.”¹⁰ Additional policies and intentions behind the privilege are:

[T]o prevent individuals from being subjected to the “cruel trilemma of self-accusation, perjury or contempt.” . . . [To] prevent[] physical and psychological abuse by government officials. . . . [To] reflect[] society’s “respect for the inviolability of the human personality and the right of each individual to a

⁵ Throughout this Note, the phrase “the privilege” refers to the Fifth Amendment’s privilege against self-incrimination.

⁶ U.S. CONST. amend. V.

⁷ See Michael Edmund O’Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2445 (2002).

⁸ See Donald Dripps, *Miranda Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19, 23 (2000).

⁹ See Mary A. Shein, *The Privilege Against Self-Incrimination Under Siege: Asherman v. Meachum*, 59 BROOK. L. REV. 503, 508 (1993).

¹⁰ *Id.* (quoting R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 789 (1935)).

private enclave where he may lead a private life.¹¹

Based on these intentions, the Supreme Court has interpreted the language of the privilege broadly even though the Fifth Amendment language provides only that a person shall not be compelled to be a witness against himself in any criminal case. Examples of modern privilege protection include any evidence that is personal, testimonial, or potentially incriminating.¹² In addition, the protection does not cease upon conviction of a crime and extends to questions asked in any other proceeding where the answer has a possibility of incriminating the individual.¹³

B. The Supreme Court's Response: *Miranda v. Arizona*¹⁴

Like the Self-Incrimination Clause, *Miranda* warnings are also a part of American culture.¹⁵ However, *Miranda* warnings were created recently and their purpose is not as well known. Before *Miranda* was decided in 1966, courts struggled with different methods to determine whether statements from suspects in custodial interrogation were voluntarily or involuntarily made.¹⁶ Police violated the privilege if statements were involuntarily obtained. This standard was simple but ambiguous. Many felt that the

¹¹ *Id.* at 509-11.

¹² *See id.* at 529-30.

¹³ *See id.* at 530.

¹⁴ 384 U.S. 436 (1966).

¹⁵ *See Dripps, supra* note 8, at 23.

¹⁶ *See Kirsten Lela Ambach, Miranda's Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived from an Unwarned Statement*, 78 WASH. L. REV. 757, 763

“voluntariness” test could not safeguard against the risk that a suspect’s Fifth Amendment privilege would not always be protected, simply because of the nature of police interrogations and custodial surroundings.¹⁷

To resolve this issue, the Supreme Court created four requirements in *Miranda* for administration to suspects in custodial interrogation.¹⁸ There, custodial interrogation was defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”¹⁹ These four requirements, now commonly known as *Miranda* warnings are: “that [the person in custody] has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed.”²⁰ These warnings acted as procedural safeguards to protect the privilege and to give suspects the opportunity to intelligently waive their rights to answer questions or make statements.²¹ Furthermore, the Supreme Court created a broad exclusionary rule that prohibits all evidence obtained in violation of

(2003).

¹⁷ *See id.*

¹⁸ *See Miranda*, 384 U.S. at 479.

¹⁹ *Id.* at 444. Determining what is “custodial interrogation” is still a divisive issue as shown in *Yarborough v. Alvarado*, 541 U.S. 652, 661, 664 (2004), where the Supreme Court split five to four in determining whether a suspect was in “custody” sufficient to need *Mirandization*. *See id.* at 664 (holding that the suspect, who admittedly never felt coerced or threatened to talk but was nevertheless a minor “interviewed” by a detective for two hours in the middle of the night without his parents present, was not in “custody;” therefore, *Miranda* could not suppress the evidence from his criminal trial).

²⁰ *Miranda*, 384 U.S. at 444.

²¹ *See id.* at 479.

Miranda from use against the suspect.²²

Although the *Miranda* Court described its decision as authoritatively binding, it did leave itself open to changes by Congress with language such as, “unless other fully effective means are adopted to notify the person of his right of silence.”²³ As a result, Congress created its own rules to protect the privilege only two years after *Miranda* in Title II of the Omnibus Crime Control and Safe Streets Act of 1968.²⁴

²² See *id.*; see also Ambach, *supra* note 16, at 764 (quoting *Miranda*, 384 U.S. at 444).

²³ *Miranda*, 384 U.S. at 444, 479.

²⁴ 18 U.S.C. § 3501 (1968).

C. Congress' Response: The Voluntariness Test²⁵

²⁵ Throughout this article reference to the "voluntariness test" refers to the test used to determine the voluntariness of confessions prior to *Miranda* and later codified two years after *Miranda* in 18 U.S.C. § 3501. The statute is quoted here in full for reference purposes:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

Congress' voluntariness test was a more flexible approach to protecting the privilege than the *Miranda* Court requirements. The test provided that any statement was admissible if it was made voluntarily.²⁶ The test gave the trial judge several factors to determine voluntariness of confessions, including whether the defendant had knowledge of the privilege and his right to counsel at the time of questioning.²⁷ In addition, the statute required that no evidence could be barred if obtained from someone not under arrest or other detention.²⁸ Congress created this flexible test to overthrow the Supreme Court's more rigid test from *Miranda*. After reviewing evidence of lower numbers of confessions and higher crime statistics, Congress determined that "there [was] a need for legislation to offset the harmful effects of the Court decisions."²⁹ Congress felt that *Miranda* caused, and would continue to cause, guilty criminals to be released on mere technicalities, despite the fact that they had voluntarily confessed their crimes.³⁰ They also agreed that *Miranda* had a "demoralizing effect on law enforcement officials whose

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

18 U.S.C. § 3501 (1968).

²⁶ See § 3501(a).

²⁷ See § 3501(b).

²⁸ See § 3501(d).

²⁹ S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2127.

³⁰ See *id.* at 2123, 2127, 2132.

efforts to investigate crimes and interrogate suspects ha[d] been stymied by the technical roadblocks thrown up wby [sic] the Court.”³¹

Congress, in siding with the four dissenting justices³² in *Miranda*, concluded that the rigid and inflexible restrictions of *Miranda* lacked a constitutional basis.³³ Even those members of Congress who thought *Miranda* might be constitutional supported § 3501 in the hope that the Court would reconsider or reverse its poor ruling in *Miranda*.³⁴ Furthermore, most of Congress felt that it was constitutionally permissible “to formulate a test of admissibility different from that adopted by the Court,” because the Court had not explicitly held that it had attempted to change constitutional theory with *Miranda*.³⁵ In addition, Congress concluded that the “overwhelming weight of judicial opinion . . . is that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right.”³⁶

Despite Congressional efforts to repeal *Miranda*, the hesitancy of law enforcement officials³⁷ and the courts³⁸ to depart

³¹ *Id.* at 2127.

³² The dissenting justices in *Miranda* were Justices Clark, Harlan, Stewart and White. *See Miranda*, 384 U.S. at 499-540.

³³ *See* 1968 U.S.C.C.A.N. at 2132.

³⁴ *See* Daniel Gandara, *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts*, 63 GEO. L.J. 305, 307 (1974) (citing S. REP. NO. 90-1097, at 41-42, 46-51).

³⁵ 1968 U.S.C.C.A.N. at 2150.

³⁶ *Id.* at 2138.

³⁷ *See generally* Gandara, *supra* note 34, at 311-13 (for examples of varying federal and state law enforcement officials' early decisions regarding implementation of § 3501).

³⁸ *See* Gandara, *supra* note 34, at 313.

from *Miranda* had in effect nullified Congress' voluntariness test.³⁹ This hesitancy was primarily because the courts and law enforcement officials "were reluctant to risk reversals and jeopardize convictions by invoking section 3501 as the basis for the admissibility of confessions."⁴⁰

Additionally, most law review commentators concluded that the voluntariness test was unconstitutional.⁴¹ One such commentator argued that Congress made the mistake in § 3501 of "making the pre-*Miranda* voluntariness test the sole test for the admissibility of confessions," instead of choosing to replace the *Miranda* warnings with a credible substitute.⁴² Furthermore, commentators argued that Congress had its priorities wrong. They argued that the proponents of the voluntariness test "did not believe the privilege should have any bearing on the admissibility of confessions."⁴³ This belief missed the whole point of *Miranda*, which was the idea that the privilege should apply to "informal compulsion exerted by law enforcement officers during in-custody questioning."⁴⁴

As we shall see, for the above-mentioned reasons and others, the Court for the first time officially invalidated Congress'

³⁹ See *Missouri v. Seibert*, 540 U.S. 600 (2004) (plurality opinion); 9A Fed. Proc., L. Ed. § 22:1397 (1993); Gandara, *supra* note 34, at 321.

⁴⁰ Gandara, *supra* note 34, at 321.

⁴¹ See 2 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE, § 6.5(e), n.70 (West ed. 1992).

⁴² Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 951 (2000).

⁴³ *Id.* at 927.

⁴⁴ *Id.* at 951 (quoting *Miranda*, 384 U.S. at 461).

voluntariness test in 2000 with *Dickerson v. United States*.⁴⁵ There, the Court expressly held that *Miranda* was a *constitutional* decision of the Court, and could “not be in effect overruled by an Act of Congress.”⁴⁶

D. Miranda’s Progeny

Since *Miranda*’s inception, its holding has been used to suppress evidence in countless cases throughout the country. Nevertheless, the Court has carved out several exceptions. After quickly illustrating the major exceptions, I will discuss how the Court is overrunning the rule in *Miranda*.

1. Exceptions to *Miranda*

Exceptions to *Miranda* include a “public safety exception” to the requirement that *Miranda* warnings be given when “police officers ask questions reasonably prompted by a concern for the public safety.”⁴⁷ Another exception includes the “derivative evidence exceptions” found in *Michigan v. Tucker*⁴⁸ and *Oregon v. Elstad*.⁴⁹ In addition, “[i]mpeachment exceptions” exist for unwarned suspects,⁵⁰ as well as for suspects who have been warned and have invoked the privilege to contact an attorney.⁵¹ Finally, some would go so far as to say that an exception exists for all civil

⁴⁵ 530 U.S. 428 (2000); see also *Seibert*, 124 S. Ct. at 2608.

⁴⁶ *Dickerson*, 530 U.S. at 432.

⁴⁷ See *New York v. Quarles*, 467 U.S. 649, 656 (1984).

⁴⁸ 417 U.S. 433 (1974).

⁴⁹ 470 U.S. 298 (1985).

⁵⁰ See *Harris v. New York*, 401 U.S. 222, 225-26 (1971).

⁵¹ See *Oregon v. Hass*, 420 U.S. 714, 715, 721-22 (1975).

cases since the Court's 2003 case, *Chavez v. Martinez*.⁵² However, *Chavez* was a recent plurality opinion, which does not seem to have a clear holding on the privilege.⁵³ All of these exceptions, except *Chavez* which will be addressed in more detail later in this Note, were created under the rationale that the *Miranda* warnings were prophylactic rather than constitutionally based, allowing the Court to simply chisel away at *Miranda*'s safeguards.⁵⁴

2. *Dickerson v. United States: Miranda is a Constitutional Rule*

Since the exceptions to *Miranda* were created, some have argued that *Miranda* is constitutionally vulnerable and has become ineffective in protecting suspects' privilege against self-incrimination.⁵⁵ However, in *Dickerson*, the Court set out to resolve this issue, noting that if *Miranda* was a prophylactic ruling, then Congress has the authority to supersede it with the voluntariness test. *Dickerson* consequently held that *Miranda* created a constitutional

⁵² 538 U.S. 760 (2003).

⁵³ Compare *id.* at 772-73 ("[T]he absence of a 'criminal case' in which Martinez was compelled to be a 'witness' against himself defeats his core Fifth Amendment claim.") (Rehnquist, C.J., O'Connor, Thomas & Scalia, JJ., plurality) (emphasis omitted), with *id.* at 793 ("The conclusion that the Self-Incrimination Clause is not violated until the government seeks to use a statement in some later criminal proceeding strips the Clause of an essential part of its force and meaning.") (Stevens, Kennedy & Ginsburg, JJ., concurring in part and dissenting in part).

⁵⁴ See Benjamin D. Cunningham, *A Deep Breath Before the Plunge: Undoing Miranda's Failure Before It's Too Late*, 55 MERCER L. REV. 1375, 1387, 1397 (2004).

⁵⁵ See *id.* at 1404-08 (citing several studies that show that modern law enforcement interrogation methods have largely circumvented *Miranda* and that *Miranda* actually enables coercive interrogation practices "because courts routinely stop their inquiry after discovering that the suspect was warned, thus allowing the police to have their way with the suspect after a waiver").

ruling that Congress could not supersede.⁵⁶

Although *Dickerson* undermined the rationale for *Tucker* and *Elstad*, the Court did not overrule those cases.⁵⁷ Instead, the Court found that *Tucker*, *Elstad*, and other exceptions to *Miranda*'s exclusionary rule illustrate the principle that "no constitutional rule is immutable."⁵⁸ In other words, courts cannot possibly foresee every circumstance in which a general rule will be applied, and therefore it is necessary for courts to be able to modify such rules as it has with exceptions to *Miranda*.⁵⁹

3. *Splitting and Flip-Flopping: The Courts of Appeals and the Supreme Court*

Since *Dickerson*, the Circuit Courts of Appeals have split on the issue of whether a new exception exists for physical derivative evidence, but have continued to agree that unwarned statements should be excluded from evidence.⁶⁰ Following the holdings from *Tucker* and *Elstad*, the Third and Fourth Circuits found that physical derivative evidence from a *Miranda* violation is admissible.⁶¹ The First Circuit, however, held that physical derivative evidence obtained from willful and malicious *Miranda* violations should be

⁵⁶ *Dickerson*, 530 U.S. at 444; see also Ambach, *supra* note 16, at 771-73 (for a more detailed explanation of *Dickerson*).

⁵⁷ *Dickerson*, 530 U.S. at 432.

⁵⁸ *Id.* at 441.

⁵⁹ See Ambach, *supra* note 16, at 773.

⁶⁰ See *United States v. Patane*, 304 F.3d 1013, 1023 (10th Cir. 2002) *cert. granted*, 538 U.S. 976 (2003), *and rev'd*, 542 U.S. 630, 124 S. Ct. 2620 (2004); see also Ambach, *supra* note 16, at 773-75 (listing the circuit courts that have ruled on this issue).

⁶¹ See *United States v. Sterling*, 283 F.3d 216 (4th Cir. 2002); *United States v. DeSumma*, 272 F.3d 176 (3d Cir. 2001); see also *Patane*, 304 F.3d at 1023-24; Ambach, *supra* note 16, at 776.

excluded because there is a strong need for deterrence of willful and malicious violations, and there is the chance that evidence obtained from these kinds of violations may be untrustworthy.⁶² The First Circuit drew the line at intentional *Miranda* violations by holding that no exclusion should apply to negligent violations.⁶³

Also since *Dickerson*, the Supreme Court has waffled on the issue of whether *Miranda* is a prophylactic rule or a constitutional right. In *Chavez v. Martinez*,⁶⁴ a plurality opinion determined that *Miranda* is a prophylactic measure to protect the privilege. Therefore, in any situation besides using compelled statements in a criminal case against the defendant, neither the privilege nor *Miranda* is violated.⁶⁵ However, three dissenting Justices held that the privilege protects individuals not just from statements being used against them at a criminal trial, but also as a “substantive constraint on the conduct of the government” in all cases when the answers *might* give rise to criminal liability in the future.⁶⁶ Only two Justices mentioned *Dickerson* and affirmed its holding that the *Miranda* warning is a constitutional requirement, and noted that the *Miranda* rule is “well settled.”⁶⁷ However, despite their insistence that the rule is settled, those Justices were in the minority in *Chavez* and just one year later a different plurality reversed the *Chavez* plurality in

⁶² See *United States v. Faulkingham*, 295 F.3d 85, 93 (1st Cir. 2002); see also *Patane*, 304 F.3d at 1027; Ambach, *supra* note 16, at 776.

⁶³ See *Faulkingham*, 295 F.3d at 93-94; see also *Patane*, 304 F.3d at 1027; Ambach, *supra* note 16, at 776.

⁶⁴ 538 U.S. 760 (2003).

⁶⁵ See *id.* at 769, 772 (Rehnquist, C.J., O'Connor, Scalia & Thomas, JJ., plurality).

⁶⁶ *Id.* at 791 (Kennedy, Stevens & Ginsburg, JJ., concurring in part and dissenting in part).

holding that *Miranda* is constitutional.⁶⁸

Thus, since *Dickerson*, the Circuit Courts of Appeals have split on the issue of whether a new exception exists for physical derivative evidence, and the Supreme Court has seemingly reversed itself on the issue of whether *Miranda* is a prophylactic rule or a constitutional right. Both of these issues come together in our principal case, *United States v. Patane*.⁶⁹

III. THE PRINCIPAL CASE: UNITED STATES V. PATANE

A. The Facts

A police officer arrested and handcuffed Samuel Francis Patane outside of his home for violation of a restraining order.⁷⁰ Shortly thereafter, a detective began advising Mr. Patane of his *Miranda* rights, but only got so far as “the right to remain silent,” at which point Mr. Patane said he knew his rights.⁷¹ No further *Miranda* warnings were given.⁷² Upon questioning, Mr. Patane admitted he had a gun in his bedroom that led immediately to its seizure.⁷³ It was illegal for Mr. Patane to own or possess a firearm because he had a prior felony conviction.⁷⁴ Nevertheless, the district

⁶⁷ *Id.* at 790.

⁶⁸ *See Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 2608 (2004) (Souter, Stevens, Ginsburg & Breyer, JJ., plurality).

⁶⁹ *United States v. Patane*, 542 U.S. 630, 124 S. Ct. 2620 (2004).

⁷⁰ *See United States v. Patane*, 304 F.3d 1013, 1015 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003), *and rev'd*, 542 U.S. 630, 124 S. Ct. 2620 (2004).

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See id.* at 1018.

⁷⁴ *See id.*

court granted Mr. Patane's motion to suppress on the rationale that there was insufficient evidence to establish probable cause for his arrest.⁷⁵

On appeal, the Tenth Circuit held that the district court was incorrect in finding that probable cause did not exist for Mr. Patane's arrest. However, the appellate court affirmed the lower court's order to suppress the gun because the gun was discovered and seized as a result of a *Miranda* violation.⁷⁶

B. Miranda's Exclusionary Rule Should Include Derivative Evidence

The Tenth Circuit based its ruling on two independent prongs.⁷⁷ First, even though *Tucker* and *Elstad* declined to suppress derivative evidence from an un-Mirandized confession, both cases were predicated upon the rationale that the *Miranda* rule was prophylactic rather than constitutional.⁷⁸ Thus, *Dickerson* "undermined the logic" of *Tucker* and *Elstad* by declaring the rule constitutional and neither *Tucker* nor *Elstad* should be followed.⁷⁹

Second, *Tucker* and *Elstad* are factually distinctive from *Patane*.⁸⁰ In *Tucker*, the interrogation took place prior to the *Miranda* decision.⁸¹ Furthermore, the Court specifically did not rule on the derivative evidence issue when they stated that its holding was

⁷⁵ See *Patane*, 304 F.3d at 1014.

⁷⁶ See *id.*

⁷⁷ See *id.* at 1019-20.

⁷⁸ See *id.* at 1019.

⁷⁹ See *id.*

⁸⁰ See *Patane*, 304 F.3d at 1019.

⁸¹ See *id.* at 1019-20.

on a “narrower ground.”⁸² In *Elstad*, the defendant made incriminating statements prior to and after the issuance of *Miranda* warnings.⁸³ The Court held that statements made after the issuance of *Miranda* warnings should not be suppressed even though those statements derived from incriminating statements made prior to the warnings.⁸⁴

The rationale for this ruling went back to the voluntariness test.⁸⁵ A subsequent confession is “the product of ‘volition,’ willingly offered up by a defendant who . . . [knew] his *Miranda* rights.”⁸⁶ This is unlike physical derivative evidence obtained from unwarned statements because it is not the product of volition even after a suspect had been properly made aware of his *Miranda* rights.⁸⁷ Thus, although the holding from *Elstad* did not establish that derivative evidence from *Miranda* violations must be suppressed, “*Elstad* does not definitively establish the contrary rule.”⁸⁸

⁸² See *id.* at 1020 (quoting *Michigan v. Tucker*, 417 U.S. 433, 435 (1974)).

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *Patane*, 304 F.3d at 1021; see also *supra* Part II.C para. 1 (description of the voluntariness test).

⁸⁶ *Patane*, 304 F.3d at 1021 (quoting *Oregon v. Elstad*, 470 U.S. 298, 308 (1985)).

⁸⁷ See *id.*

⁸⁸ *Id.* at 1022.

C. Post-Dickerson Circuit Split⁸⁹

The Tenth Circuit had two main criticisms of the Third and Fourth Circuit rulings since *Dickerson*.⁹⁰ First, although the Tenth Circuit agreed that the holdings of *Tucker* and *Elstad* survive *Dickerson*, neither *Tucker* nor *Elstad* involved “physical” derivative evidence from a *Miranda* violation.⁹¹ Second, the language from *Dickerson* used by the Third and Fourth Circuits to justify extending *Elstad*’s holding to physical derivative evidence is that “unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.”⁹² While *Dickerson* did not explain how searches are different, *Elstad* did by noting that Fourth Amendment violations mandate a broad application of the exclusionary rule.⁹³ Thus, the court concluded that by implication *Miranda* violations mandate a narrower application of the rule under the Fifth Amendment.⁹⁴ The Third and Fourth Circuits found that a narrower application excludes derivative physical evidence from the *Miranda* exclusionary rule.⁹⁵ The Tenth Circuit disagreed with this

⁸⁹ Prior to the Tenth Circuit’s *Patane* decision but after the Supreme Court’s decision in *Dickerson*, the First, Third and Fourth Circuits split on the issue of physical derivative evidence in *United States v. Faulkingham*, 295 F.3d 85 (1st Cir. 2002), *United States v. DeSumma*, 272 F.3d 176 (3d Cir. 2001) and *United States v. Sterling*, 283 F.3d 216 (4th Cir. 2002). Since the Tenth Circuit’s decision in *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002), *rev’d*, 542 U.S. 630, 124 S. Ct. 2620 (2004), the Fifth, Seventh, Eighth and Ninth Circuits also ruled on the issue in *Burgess v. Dretke*, 350 F.3d 461 (5th Cir. 2003), *United States v. Abdulla*, 294 F.3d 830 (7th Cir. 2002), *United States v. Villalba-Alvarado*, 385 F.3d 1007 (8th Cir. 2003) and *United States v. Patzer*, 277 F.3d 1080 (9th Cir. 2002).

⁹⁰ *Patane*, 304 F.3d at 1024.

⁹¹ *See id.*

⁹² *See id.* at 1025 (quoting *Dickerson v. United States*, 530 U.S. 428, 441 (2000)).

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See Patane*, 304 F.3d at 1025.

rationale because there were already a number of recognized exceptions to the pure rule, which serve to narrow its application.⁹⁶

The Tenth Circuit agreed with the First Circuit's holding that suppression of physical derivative evidence is required to effectuate *Miranda*'s deterrent purpose.⁹⁷ Even so, disagreement exists in applying this rule.⁹⁸ The Tenth Circuit gave three reasons for its conclusion that the First Circuit's view of deterrence for only intentional *Miranda* violations led to an erroneous conclusion regarding negligent *Miranda* violations.⁹⁹ First, the suppression of a statement alone does not provide deterrence sufficient to protect a citizen's constitutional privilege.¹⁰⁰ Second, there is a strong need for deterrence even when an officer's actions are merely negligent because the privilege is violated just as surely by a negligent failure to administer *Miranda* warnings as a deliberate one.¹⁰¹ Finally, obtaining evidence of deliberate violations would be difficult, if not impossible, and puts courts back into a pre-*Miranda* status where voluntariness inquiries were made on a case-by-case basis.¹⁰²

Consequently, the Tenth Circuit held that physical derivative evidence from *Miranda* violations must be suppressed in addition to the normal suppression of statements from *Miranda* violations.¹⁰³

⁹⁶ *See id.*

⁹⁷ *See id.* at 1027.

⁹⁸ *See id.*

⁹⁹ *See id.* at 1028.

¹⁰⁰ *See Patane*, 304 F.3d at 1028 ("We do not believe that the role of deterrence becomes less primary once the statement itself has been suppressed.") (footnote omitted).

¹⁰¹ *See id.* ("Nor do we share [the] view that there is a strong need for deterrence only where the officer's actions were deliberate rather than negligent.").

¹⁰² *See id.* at 1029.

¹⁰³ *See id.*

The Court felt that this rule well serves its purpose to protect the interests of “citizens, officers, and judicial efficiency.”¹⁰⁴

D. The Supreme Court’s Ruling¹⁰⁵

On appeal to the Supreme Court, a divided judiciary held that physical derivative evidence is beyond the protections of the privilege. The Court declared that prophylactic rules like the *Miranda* rule “sweep beyond the actual protections of the Self-Incrimination Clause,” and therefore “any further extension of these [prophylactic] rules must be justified . . . [to protect] . . . the actual right against compelled self-incrimination.”¹⁰⁶ The Court applied a close textual interpretation of the Constitution arguing that the “closest possible fit” should exist between the privilege and “any judge-made rule designed to protect it.”¹⁰⁷ The Court concluded that there was no fit in this case because the nontestimonial fruit of a voluntary statement presents no risk that a defendant’s *statements* will be used against the defendant at a criminal trial.¹⁰⁸ Thus, there was no need to extend *Miranda* to physical fruits because they were

¹⁰⁴ *Id.*

¹⁰⁵ *United States v. Patane*, 542 U.S. 630, 124 S. Ct. 2620 (2004) (5-4 decision). Justice Thomas, announced the judgment of the Court and delivered an opinion joined by Chief Justice Rehnquist and Justice Scalia. Justice Kennedy filed a brief concurring judgment which Justice O’Connor joined, agreeing with the plurality for all intensive purposes. Justice Souter, filed a dissenting opinion joined by Justices Stevens & Ginsburg. Justice Breyer filed a separate dissenting opinion.

¹⁰⁶ *Id.* at 2627 (citation omitted).

¹⁰⁷ *Id.* at 2629-30.

¹⁰⁸ *See id.* at 2630.

not statements.¹⁰⁹

Furthermore, by clearly holding that the *Miranda* rule is prophylactic the Court essentially overruled *Dickerson*, thus retracting the constitutionality of *Miranda* once again. Although the Court first mentioned *Dickerson* in *Patane*, the *Miranda* rules were declared prophylactic by the Supreme Court one year before *Patane*, in *Chavez*, which was a plurality opinion applied in a civil, not a criminal context. Nevertheless, the Court used the reasoning in *Chavez* to support its holding in *Patane*. In *Chavez*, the Court also emphasized a close textual application of the Fifth Amendment requirement that the suspect must be “compelled in [a] criminal case to be a witness against himself” to invoke the privilege afforded by the Self-Incrimination Clause.¹¹⁰

Even so, the *Patane* Court went further than *Chavez*, declaring that a negligent or even deliberate failure to provide the criminal suspect “with the full panoply of warnings prescribed by *Miranda*” does not result in a constitutional violation.¹¹¹ The violation only occurs upon “the admission of unwarned statements into evidence at trial” because the *Miranda* rule protects “a fundamental trial right” that follows “from the nature of the right protected by the Self-Incrimination Clause.”¹¹²

¹⁰⁹ See *id.* at 2626.

¹¹⁰ *Chavez v. Martinez*, 538 U.S. 760, 766-67 (2003).

¹¹¹ *Patane*, 124 S. Ct. at 2628-29.

¹¹² *Id.* at 2628.

IV. ANALYSIS

The Tenth Circuit's holding in *United States v. Patane*, which suppressed physical derivative evidence from unwarned statements created a rule easily understood and administered by law enforcement agencies. The Tenth Circuit did the best it could without breaching *stare decisis* by overturning *Dickerson* or other post-*Miranda* cases. On the other hand, the Supreme Court's holding in *Patane* of non-suppression of "nontestimonial fruit of a voluntary statement" overrules *Dickerson* and other *Miranda* case law to some extent, thereby eliminating some of the problems created by *Miranda* case law. At the same time, the Supreme Court's holding created a rule that will be criticized for causing more misunderstanding, abuse, and litigation.

The Supreme Court's holding in *Patane* is yet another exception to *Miranda* that should ultimately lead the Court to overturning *Miranda* in an attempt to return to the Constitution and bring criminal procedure back to the voluntariness test. If *Miranda* were reversed, then juries and judges would determine whether custodial statements were made involuntarily, rather than having mechanical judge-made rules filled with exceptions to govern the privilege as we have now.

A. The Tenth Circuit's Patane Ruling: This Was Good Law

Despite the current overextension of judicial authority, the Tenth Circuit kept within the law as dictated by stare decisis.¹¹³ The Tenth Circuit noted that the Supreme Court “has consistently recognized that deterrence of police misconduct, whether deliberate or negligent, is the fundamental justification” for the exclusionary rule.¹¹⁴ Indeed, since *Miranda*, the Supreme Court has held un-Mirandized statements admissible in only five cases.¹¹⁵ The Tenth Circuit explains away these exceptions to *Miranda*, specifically taking on the exceptions from *Tucker* and *Elstad*.¹¹⁶

1. The Tenth Circuit's Ruling Does Not Follow the Tucker or Elstad Exceptions

The Tenth Circuit based its decision on two independent theories of the *Tucker* and *Elstad* exceptions.¹¹⁷ First, that *Tucker* and *Elstad* should not be followed because *Dickerson* “undermined the logic” of those cases by declaring *Miranda* a constitutional rule.¹¹⁸ This theory is incorrect. It is akin to saying that *Dickerson*

¹¹³ See discussion *infra* Part IV.A.1 para. 2. But see discussion *infra* Part IV.A.1 para. 1. See generally *infra* note 117 and accompanying text (stating that *Patane*'s two theories for *Miranda* exceptions independently arrive at the same conclusion; therefore, *Patane*'s holding is good law based on the second theory alone).

¹¹⁴ *United States v. Patane*, 304 F.3d 1013, 1026 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003), *and rev'd*, 542 U.S. 630, 124 S. Ct. 2620 (2004).

¹¹⁵ See *New York v. Quarles*, 467 U.S. 649, 655-56 (1984); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Oregon v. Elstad*, 470 U.S. 298 (1985); *Harris v. New York*, 401 U.S. 222, 225-26 (1971); *Oregon v. Hass*, 420 U.S. 714, 715, 721-22 (1975); see also *supra* Part II.D.1 for a quick discussion of these cases; *Dripps*, *supra* note 8, at 21-22 (for a longer discussion of these cases).

¹¹⁶ See *Patane*, 304 F.3d at 1019-23.

¹¹⁷ See *id.* at 1019.

¹¹⁸ See *id.*

overruled *Tucker* and *Elstad*, which it clearly did not.¹¹⁹ On the contrary, *Dickerson* incorporated these cases into its holding using the rationale that “no constitutional rule is immutable.”¹²⁰

Unlike the Tenth Circuit’s first theory, its second theory correctly articulated why *Tucker* and *Elstad* should not be followed by illustrating distinctions between those cases and the *Patane* case.¹²¹ As already mentioned, the Tenth Circuit explained there is no reason to find an exception in *Patane* like there was in *Tucker*, because the *Tucker* holding was on a “narrower ground” than the derivative evidence issue.¹²² Additionally, the Tenth Circuit declined to follow *Elstad* because it too was not on point.¹²³ Specifically, the Court explained that “*Elstad* does not definitively establish” that physical derivative evidence is an exception to the *Miranda* exclusionary rule.¹²⁴ As for the other *Miranda* exceptions, the Tenth Circuit should have emphasized the rationale from *Dickerson* that “no constitutional rule is immutable.”¹²⁵ Nevertheless, none of the other *Miranda* exceptions are applicable to Mr. Patane’s case therefore the Tenth Circuit correctly followed stare decisis in its final holding.

¹¹⁹ See *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

¹²⁰ See *id.* at 441.

¹²¹ See *Patane*, 304 F.3d at 1019.

¹²² See *supra* note 82 and accompanying text.

¹²³ See *Patane*, 304 F.3d at 1021-23.

¹²⁴ See *id.* at 1022.

¹²⁵ See *supra* text accompanying note 58; see also *supra* notes 57-59 and accompanying

2. *The Tenth Circuit Follows Holdings from Supreme Court Cases but Disregards Some Dicta*

Some would argue that *Miranda* case law is “dysfunctionally incoherent,”¹²⁶ because *Dickerson* concluded that *Miranda* announced a constitutional rule¹²⁷ while other Supreme Court cases have stated that the *Miranda* rule is prophylactic and not constitutionally protected.¹²⁸ However, before lower courts overturn existing law, they should first labor long and hard to save it.¹²⁹ The Tenth Circuit’s second theory¹³⁰ in *Patane* is a coherent synthesis of *Miranda* case law, because it maintains the holdings from *Tucker* and *Elstad*, while dismissing their dicta.¹³¹ Although the prophylactic language and other dicta from Supreme Court cases are persuasive, “the Court [should] prefer to maintain its holdings rather than its dicta.”¹³²

In *Patane*, the Tenth Circuit upheld the holdings from prior Supreme Court cases while disregarding inconsistent dicta. Although the Tenth Circuit ignored some Supreme Court dicta, to hold otherwise would have defied the holdings of a dozen Supreme Court cases.¹³³ The Tenth Circuit should have been upheld on certiorari for

¹²⁶ See Dripps, *supra* note 8, at 46.

¹²⁷ See *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

¹²⁸ See cases cited *supra* note 115.

¹²⁹ See Dripps, *supra* note 8, at 46.

¹³⁰ See *United States v. Patane*, 304 F.3d 1013, 1019 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003), *and rev’d*, 542 U.S. 630, 124 S. Ct. 2620 (2004); see also discussion *supra* Part IV.A.1 para. 2.

¹³¹ See Dripps, *supra* note 8, at 44-45.

¹³² *Id.* at 45.

¹³³ See *id.* at 46.

following stare decisis¹³⁴ as the Supreme Court did in *Dickerson*.¹³⁵

3. *The Tenth Circuit's Holding Positively Affects Judicial Efficiency*

Although there are negative aspects to upholding *Miranda*, the Tenth Circuit illustrates clear and positive reasons for maintaining stare decisis that counter those problems.¹³⁶ The Tenth Circuit's rule in *Patane* is clear: un-Mirandized self-incriminating custodial statements and physical evidence derived from those statements should be suppressed.¹³⁷ This rule leaves no doubt as to what police officers should do and what can or cannot be used as evidence.¹³⁸ It terminates the "endless case-by-case voluntariness inquiries that *Miranda* was designed to prevent," which many courts have become embroiled in since *Dickerson*.¹³⁹ This rule "provides certainty in application and clarity for the officers charged with operating under it, [which] better serves the interests of citizens, officers, and judicial efficiency."¹⁴⁰

¹³⁴ See *supra* note 113.

¹³⁵ See *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

¹³⁶ See *Patane*, 304 F.3d at 1026-29.

¹³⁷ See *id.* at 1029. But see *id.* at 1025 (allowing of course, for a few exceptions to this "pure rule"). Specifically, the exceptions include the emergency exception, and the exception for derivative evidence from *Elstad*, where the Court "declin[ed] to apply the fruits exclusion to a subsequent voluntary confession rendered after the *Miranda* warnings are given;" but the exceptions do not include "*Tucker's* narrowing . . . because it appeared to establish an exception only for questioning that pre-dated *Miranda* itself." *Id.* at 1026 n.8.

¹³⁸ See *id.*

¹³⁹ *Patane*, 304 F.3d at 1029 (quoting *United States v. Carter*, 884 F.2d 368, 374 (8th Cir. 1989)).

¹⁴⁰ *Id.*

4. *The Tenth Circuit's Holding Protects the Privilege*

Another positive aspect of the Tenth Circuit's holding centers on the original purpose of instituting *Miranda* warnings into police officer training: deterrence from police abuse.¹⁴¹ The Tenth Circuit argued that "[u]nless the courts bar the use of the often-valuable evidence derived from an inadmissible confession, as well as the confession itself, there will remain a strong incentive to resort to forbidden interrogation methods."¹⁴² Merely barring direct testimony will not prevent police abuse against self-incrimination; rather, all physical derivative evidence must be barred to insure protection of the privilege.¹⁴³ Indeed, many would argue that it is better to err on the side of protection of the privilege, which is easily done by the simple administration of *Miranda* warnings, than to keep incriminating evidence.¹⁴⁴

The Tenth Circuit held that all self-incriminating derivative physical evidence from un-Mirandized statements made by suspects in custodial interrogation should be suppressed.¹⁴⁵ This rule is easily administrable and judicially efficient.¹⁴⁶ Although there are inconsistencies in *Miranda* case law,¹⁴⁷ particularly in the Supreme

¹⁴¹ See *id.* at 1026-29.

¹⁴² *Id.* at 1026 (quoting Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 98 MICH. L. REV. 929, 933 (1995)).

¹⁴³ See *id.* at 1026-27.

¹⁴⁴ See *Patane*, 304 F.3d at 1026-27.

¹⁴⁵ See *id.* at 1029.

¹⁴⁶ See *id.*

¹⁴⁷ See, e.g., *supra* text accompanying notes 126-28.

Court's assertion of constitutionality in *Dickerson*,¹⁴⁸ lower courts cannot overrule binding authority.¹⁴⁹ Only the Supreme Court can overrule *Miranda* and it has chosen not to because of "the principles of stare decisis."¹⁵⁰

The Supreme Court had the opportunity to overrule *Miranda* on certiorari for *Patane*,¹⁵¹ but chose instead to create another exception to *Miranda* case law. After describing some of the major problems with *Miranda* case law, I will delve into an analysis of the recent Supreme Court ruling of *United States v. Patane*.¹⁵²

B. Patane Highlights Miranda Case Law Problems

1. *Miranda Lacks Common Sense and Has Become Unreasonably Extended*

The circuit split involving suppression of physical derivative evidence does more than illustrate the current problems with *Dickerson's* interpretation of *Miranda*; it highlights problems that originated with *Miranda*. The requirement to issue *Miranda* warnings lacks common sense and has become unreasonably extended.

If the voluntariness test had been used for this case, Mr. Patane would not have won his motion to suppress. Patane was given

¹⁴⁸ *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

¹⁴⁹ *See Dripps, supra* note 8, at 46.

¹⁵⁰ *See Dickerson*, 530 U.S. at 443-44.

¹⁵¹ *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003), *and rev'd*, 542 U.S. 630, 124 S. Ct. 2620 (2004).

¹⁵² 542 U.S. 630, 124 S. Ct. 2620 (2004).

the warning that he “had the right to remain silent” and he stopped the detective from a further reading of his rights when he said that he knew them.¹⁵³ Despite Patane’s voluntary admission that he knew his rights, and the fact that the detective told him that “he had the right to remain silent,” the court ruled that there was a *Miranda* violation here.

The court’s ruling is slightly incorrect; the Tenth Circuit did not have to make the determination that there was a *Miranda* violation because the Government conceded that the detective’s behavior resulted in a violation.¹⁵⁴ The Government did not try to contest this issue because of the mechanical nature of *Miranda*. They knew that not reading Patane all of his rights, no matter what circumstances surrounded the interrogation, was a *Miranda* violation.

It was clear from the facts of the case that Patane knew his *Miranda* rights and waived them when he expressly told the detective that he knew them. Why then did the government concede that there was a *Miranda* violation here? Because they knew that the courts in days past had strictly interpreted *Miranda* as a hard and fast rule, and since *Dickerson* there would be no way around it. Such an inflexible and mechanical reading of the rule not only stymies police work but it also lacks common sense.

Patane also illustrates the extension of *Miranda*’s holding since 1966. In *Miranda*, the issue was whether custodial interrogation rendered the defendant’s statements inadmissible as

¹⁵³ *Id.* at 2625.

evidence.¹⁵⁵ At that time custodial interrogation meant “(1) [the] suspect was in custody; (2) [the] suspect was questioned in [a] police-dominated atmosphere of an interrogation room; (3) [the] suspect was run through police interrogation procedures; and (4) [the suspect was not] informed of the privilege against self-incrimination.”¹⁵⁶

Mr. Patane was arrested and handcuffed outside of his home when the detective informed him of his right to remain silent.¹⁵⁷ Although he was “in custody,” questioning did not occur in an interrogation room, he was not run through police interrogation procedures, and he was informed of his privilege against self-incrimination. Thus, *Patane* illustrates how *Miranda*’s holding has extended to include any suspect under arrest without regard to the other factors that led to the original *Miranda* decision.

2. *Miranda*’s “Constitutionality” in *Dickerson* Creates Separation of Powers Problems

Dovetailed within *Miranda*’s extension problem is the more severe problem of separation of powers. Justice Scalia wrote in his dissenting opinion in *Dickerson* that by holding that *Miranda* is a constitutional principle and consequently disregarding statutes from Congress, “this Court has the power, not merely to apply the Constitution but to expand it . . . [which] is an immense and

¹⁵⁴ See *Patane*, 304 F.3d at 1015.

¹⁵⁵ See Ambach, *supra* note 16, at 763.

¹⁵⁶ See Ambach, *supra* note 16, at 763; *supra* note 19.

¹⁵⁷ *Patane*, 304 F.3d at 1015.

frightening antidemocratic power [that] does not exist.”¹⁵⁸ He points out that the Court cannot conclude, even if it wants to, “that a violation of *Miranda*’s rules is a violation of the Constitution.”¹⁵⁹ “By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people.”¹⁶⁰ The Tenth Circuit’s holding in *Patane* illustrates the effects of the Supreme Court’s overextension of authority in typical cases.

3. *Chavez v. Martinez: Miranda is Constitutional and Prophylactic*

As we have seen, a major problem with *Miranda* case law is determining whether *Miranda* is constitutional or prophylactic. The Supreme Court continues to seesaw on this issue causing judicial confusion at all levels and unnecessary delay in proper adjudication. Prior to *Dickerson*, *Miranda* was a prophylactic rule. This changed with *Dickerson*, which ruled that *Miranda* is constitutional. Three years later, in *Chavez*, this seemingly hard and fast rule changed again.

Viewing the “fractured set of opinions”¹⁶¹ from *Chavez*,

¹⁵⁸ *Dickerson v. United States*, 530 U.S. 428, 446 (2000) (Scalia & Thomas, JJ., dissenting).

¹⁵⁹ *Id.* at 454.

¹⁶⁰ *Id.*

¹⁶¹ David Viens, *Say No More: Police Coercion of Self-Incriminating Statements Alone Not Violative of Self-Incrimination Clause*, 38 SUFFOLK U. L. REV. 223, 228 (2004).

Miranda seemingly takes on amorphous qualities of being both prophylactic and constitutional. Prophylactic, in that most of the time, *Miranda* is merely a set of guidelines. Constitutional, in that un-Mirandized statements used against a criminal defendant are a constitutional violation when a criminal case ripens into a legal proceeding. Thus, *Chavez* declares that *Miranda* is both prophylactic and constitutional. In *Patane*, this determination changed again just one year later, and with that decision the Court continues to upset *Miranda* jurisprudence.

C. Analysis of the Supreme Court's Holding in *Patane*

The Supreme Court's holding in *Patane* overrules *Dickerson* and *Chavez* by declaring that *Miranda* is prophylactic and not a constitutional rule. This eliminates some of the separation of powers problems we saw in *Dickerson* and lends credence to the old saw that "today's dissent will be tomorrow's majority." *Patane* also brings the Court back to a voluntariness test with respect to nontestimonial fruits, thus creating one more exception to the clear and simple rule from *Miranda*. Although the holding in *Patane* eliminates some of the problems created by *Miranda* case law such as no common sense and invasion of the separation of powers, this rule brings the Court one step closer to overturning *Miranda* entirely and will be criticized.

1. The Supreme Court's Holding Will Be Criticized

Justice Souter wrote in the *Patane* dissent that "[t]here is no way to read [the majority opinion] except as an . . . invitation to law enforcement officers to flout *Miranda* when there may be physical

evidence to be gained.”¹⁶² The *Patane* rule flouts *Miranda* by creating another exception to the clear rule created by *Miranda* and upheld in the Tenth Circuit opinion. It also creates incentives for law enforcement to omit *Miranda* warnings with suspects who are known to have nontestimonial evidence, because compelled statements made about physical derivative evidence will not be suppressed under this rule.¹⁶³

The *Patane* holding will create more misunderstandings among law enforcement as they continue to grapple with questions such as when do they need to Mirandize, how often do they need to Mirandize, and who do they need to Mirandize, if at all. Lower courts will likewise interpret the *Patane* rule inconsistently, causing more litigation surrounding *Miranda* issues. A case-by-case determination and the review of the voluntariness of nontestimonial fruits will test the judiciary capacity.¹⁶⁴

Further criticism of the *Patane* decision is that the Court circumvented *Dickerson*. This is not to say that the Court ignored *Dickerson* entirely. Although the Court acknowledged *Dickerson* and even repeated its holding that *Miranda* announced a constitutional rule, the Court erroneously concluded without analysis that nothing in *Dickerson* affected the Court’s insistence on the close fit requirement.¹⁶⁵ The Court further circumvented *Dickerson* by

¹⁶² United States v. *Patane*, 542 U.S. 630, 124 S. Ct. 2620, 2632 (2004) (Stevens, Souter & Ginsburg, JJ., dissenting). Justice Breyer dissented separately for similar reasons. *Id.* at 2632.

¹⁶³ See *id.*

¹⁶⁴ See Kamisar, *supra* note 42, at 946.

¹⁶⁵ See *Patane*, 124 S. Ct. at 2628.

using pre-*Dickerson* and post-*Dickerson* cases that hold that a *Miranda* violation is not a constitutional violation without specifically addressing the *Dickerson* holding itself.¹⁶⁶

Justice Kennedy's concurring opinion similarly engaged in incorrect reasoning by stating that *Dickerson* cited cases such as *Oregon v. Elstad* and *New York v. Quarles* and therefore *Dickerson* did not undermine those cases.¹⁶⁷ This reasoning is incomplete and incorrect because even though the Court cited those cases in support of its decision in *Dickerson*, that does not change the *Dickerson* holding which was different from those cases in declaring *Miranda* constitutional.

Clearly, the Supreme Court punted on the *Dickerson* issue of constitutionality in *Patane*. The Court needed to reckon with the *Dickerson* issue so lower courts and law enforcement could have some much-needed guidance on the issue. The Court's "continued lack of candor and logic in self-incrimination jurisprudence" is evidenced in *Patane*.¹⁶⁸ Indeed, the only hint that the Court has ruled differently on this issue of constitutionality in prior cases is reserved to a footnote that also craftily ignored the issue of constitutionality in the prior cases it cited, which were by no means exhaustive.¹⁶⁹

Finally, the greatest criticism of *Patane* arises out of its strict textual interpretation of the Fifth Amendment. The "closest possible fit" requirement between the Self-Incrimination Clause and

¹⁶⁶ See *id.* at 2628-29.

¹⁶⁷ See *id.* at 2630-31 (O'Connor & Kennedy, JJ., concurring).

¹⁶⁸ Leading Case, *Fifth Amendment - Testimonial Fruits*, 118 HARV. L. REV. 296, 297 (2004).

*Miranda*¹⁷⁰ misses the major purpose of *Miranda* to deter law enforcement from compulsion in interrogations. Consequently, some would contend that *Patane* deprives the Self-Incrimination Clause of its true purpose as a “substantive constraint” on government and replaces that purpose with a mere “evidentiary rule” governing the courts.¹⁷¹

In *Chavez*, Justice Kennedy critiqued this rule when he remarked that this strict view creates a rule where “in all instances a violation of the Self-Incrimination Clause simply does not occur unless and until a statement is introduced at trial.”¹⁷² Thus, a Fifth Amendment violation does not occur “no matter how severe the pain or how direct and commanding the official compulsion used to extract [the self-incriminating statement].”¹⁷³

However, despite the need to constrain law enforcement from malicious activity, I feel that the *Patane* Court got it right when the *Patane* plurality correctly identified *Miranda* as a judge-made rule designed to protect the Self-Incrimination Clause.¹⁷⁴ Because *Miranda* is a judge-made rule, it stands to reason that *Miranda* is prophylactic and need only be thought of as a set of guidelines for law enforcement.

The *Patane* plurality is correct; it is not the Court’s role to create new law that does not fit closely with the Constitution. It is

¹⁶⁹ *Patane*, 124 S. Ct. at 2629 n.3.

¹⁷⁰ *See id.* at 2629-30.

¹⁷¹ *Chavez v. Martinez*, 538 U.S. 760, 791 (2003) (Stevens, Kennedy & Ginsburg, JJ., concurring in part and dissenting in part).

¹⁷² *Id.* at 790.

¹⁷³ *Id.*

Congress' duty to create new laws that will protect United States citizens from police abuses. Congress attempted to do this with 18 U.S.C. § 3501, but *Miranda* and her progeny overran it. The *Patane* Court should not have stopped short of overturning *Dickerson* and *Miranda* by balking on the constitutionality issue.

2. *The Supreme Court's Holding is One Step Closer to Overturning Miranda*

Although the *Patane* Court stopped short of overturning *Miranda*, the Court's holding brings it one step closer to overturning *Miranda* by joining other exceptions to *Miranda* with the *Patane* physical derivative exception. The exceptions are so numerous that they overrun the rule, and *Miranda* has little effect on law enforcement mechanisms now.¹⁷⁵

However, what is most important is not whether *Miranda* is overrun, the deeper issue is whether the privilege is protected. Although there are several reasons for keeping *Miranda* as the cornerstone of criminal procedure,¹⁷⁶ as we have seen in post-*Miranda* jurisprudence, a clear reading of the Fifth Amendment demands a return to the voluntariness test. The Supreme Court's decision in *Patane* swings one step closer to the voluntariness test and the clear language of the Fifth Amendment by requiring the non-suppression of nontestimonial fruits.

¹⁷⁴ See *Patane*, 124 S. Ct. at 2628-30.

¹⁷⁵ See Cunningham, *supra* note 54, at 1404-08; *supra* note 55.

¹⁷⁶ Yale Kamisar, *From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 890-92 (2001). (Kamisar writes in a foreword to a symposium titled, *Miranda After Dickerson: The Future of Confession Law*, giving a few reasons why *Miranda* should not be

Some have argued that *Miranda* should not be overturned because it would wipe out “more than three decades” of jurisprudence.¹⁷⁷ However, *Miranda*’s progeny has been anything but clear, as the Court has seesawed on this issue of constitutionality. The Court only has its dignity to lose by handing this issue over to Congress, as it should have done when the voluntariness test was enacted in 1968.

Others argue that law enforcement officials “now live with [*Miranda*] quite comfortably” so *Miranda* should not be overturned.¹⁷⁸ However, this argument avoids the issue entirely and is incorrect. Although law enforcement has adapted to live with *Miranda* jurisprudence comfortably, that does not mean that law enforcement could not live just as comfortably without *Miranda*. Indeed, it would be quite simple for law enforcement to merely follow the voluntariness standards created in § 3501, which give the four *Miranda* rights as guidelines to ensure the voluntariness of interrogations.¹⁷⁹

Thus, it would be expected that for the most part, law enforcement officials would still give *Miranda* warnings to suspects in custody prior to interrogation because the same *Miranda* warnings are in § 3501 and act like a safe-harbor for law enforcement. Then law enforcement would have the flexibility to skip a full Mirandization in particular situations that would make it unnecessary

overturned. I will address and dispute these reasons and others).

¹⁷⁷ *Id.* at 890-91.

¹⁷⁸ *Id.*

¹⁷⁹ See 18 U.S.C. § 3501(b) (1968).

because the *Miranda* warnings are guidelines under the statute, not a constitutional mandate. This flexibility would be useful in situations such as Patane's, where he interrupted the detective in the middle of the reading of his rights because he said he knew them already. Thereby, good evidence would not have been suppressed on a mere technicality as it was in *Patane*.

In addition, law enforcement would not have to continue to suffer under the confusing obligations of changing its procedures every year the Supreme Court reverses itself on this issue. Indeed, the three decades of *Miranda* jurisprudence have confused law enforcement and lulled them into thinking they protect constitutional rights by issuing the *Miranda* warnings, only to be told later by a new Court that the method they used to issue warnings was improper.

Others argue that overturning *Miranda* would cause confusion for the American people by upsetting their "settled expectations" which are "closely linked to the Court's legitimacy in public opinion and in public perceptions."¹⁸⁰ This argument ignores the whole purpose of the Supreme Court, which is they do not hold their fingers up in the political winds to determine how to rule on a difficult decision. Judges are bound by the law, not by the whims of the plebiscite. Besides, this change would not have been the first time the Court has confused the American people, or upset their expectations.

Still others have argued that overturning *Miranda* would

¹⁸⁰ Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 618 (2002).

cause confusion for the courts and law enforcement, contending that the voluntariness test would be “ever-changing.”¹⁸¹ This is a weak argument and misses the point. The point of the voluntariness test is its flexibility, thus this argument implicitly highlights the problems with *Miranda*. That is, *Miranda* is too mechanical, keeping out voluntary criminal confessions on mere technicalities.

Furthermore, *Miranda* does not protect suspects throughout the interrogation process because the judicial scrutiny of interrogation procedures usually ends after Mirandization. Indeed, a proper Mirandization of a suspect often has the effect of ending “the scrutiny applied to post-waiver interrogation practices.”¹⁸² Thus, *Miranda* only protects a suspect before he has heard his rights and waived them by speaking with the police. Therefore, one of the strongest elements of the voluntariness test is that it applies throughout an interrogation, creating a long-lasting protection of the privilege, which *Miranda* does not offer.

Finally, power struggles exist between the Supreme Court and Congress. By upholding *Miranda*, this allows “the Court to maintain its power against Congress.”¹⁸³ Some argue that Southern senators in particular, still stinging from the desegregation decision of 1954, created the voluntariness standard to put the Court in its place.¹⁸⁴ However, whether or not this was Congress’ reason for the codification of the voluntariness standard, that allegation is now

¹⁸¹ See Kamisar, *supra* note 176, at 891.

¹⁸² Kamisar, *supra* note 176, at 892.

¹⁸³ Kamisar, *supra* note 176, at 892.

¹⁸⁴ See Kamisar, *supra* note 176, at 881.

moot. The Court is not in a position to reject the statute simply because speculation asserts the possibility that some senators were biased, nor does the Court maintain power over Congress by creating new law and continuing to uphold that law. The Court maintains power by reviewing and rejecting unconstitutional laws created by Congress.

The Court failed in *Patane* by creating the rule that *Miranda* is merely prophylactic; it should have gone further by overturning *Miranda* entirely. Overruling *Miranda* would have given Congress the opportunity to exercise its powers of legislation in either amending the voluntariness test, or keeping it substantially similar and implementing the voluntariness test with courts and law enforcement.¹⁸⁵ In this way, Congress could address the question of “what kind of police and criminal justice power is consistent with a free and civil society,”¹⁸⁶ something the Supreme Court has ineptly done despite another opportunity in *United States v. Patane*.

V. CONCLUSION

The Supreme Court has overturned many decisions in the past and should not hesitate to do so presently with *Miranda*. A return to the voluntariness standard codified by Congress would admittedly cause confusion, but no more than we have seen with *Miranda* case

¹⁸⁵ Of course, § 3501 would have to be amended to apply to the admissibility of confessions in state courts and not only “criminal prosecutions brought by the United States or by the District of Columbia” as it does now. See Gandara, *supra* note 34, at 308 (quoting 18 U.S.C. § 3501(a) (1968)).

¹⁸⁶ Thomas Y. Davies, *Farther and Farther From the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right” In Chavez v. Martinez*, 70 TENN. L. REV. 987, 1044 (2003).

law. A return to the voluntariness test would protect suspects by ensuring that courts scrutinize the voluntariness of interrogations throughout the time a suspect is in custody. It would protect the public by admitting perfectly voluntary evidence of criminal confessions that *Miranda* keeps out on mere technicalities. It would restore the balance of power between the Legislative Branch and the Judiciary.

The Court's decision in *United States v. Patane* marks a departure from the overextension of *Miranda* that has become a regular part of criminal procedure since *Miranda's* creation. It marks a recent shift by the Supreme Court to strictly interpret the Constitution with regards to self-incrimination issues. It marks the beginning of the end of *Miranda*.