CASE NOTES

CONSTITUTIONAL LAW—FAILURE OF POLICE TO INFORM A DEFENDANT OF THE EFFORTS OF AN ATTORNEY TO REACH HIM DOES NOT DEPRIVE THE DEFENDANT OF HIS RIGHT TO COUNSEL OR INVALIDATE HIS WAIVER OF HIS MIRANDA RIGHTS.—*Moran v. Burbine* (U.S. Sup. Ct. 1986).

Brian Burbine was arrested on a charge of breaking and entering by the Cranston, Rhode Island police.[1] Shortly thereafter, the police obtained information implicating him in a Providence, Rhode Island murder.[2] The Cranston police then called the Providence police, who arrived an hour later for purposes of questioning Burbine about the murder.[3]

Burbine's sister, aware only of the arrest for breaking and entering, contacted a public defender on his behalf.[4] The attorney called the police station and stated that she would act as Burbine's counsel in the event of a lineup or questioning.[5] She was told that he would not be questioned further that night.[6] She was not told that he was now a suspect in a murder investigation.[7]

Less than an hour later, the police began interrogating Burbine.[8] Later that evening, he executed a series of waivers of his *Miranda*[9] rights and confessed to the murder.[10] He was unaware of either his sister's efforts to retain counsel for him or the attorney's phone call.[11]

Prior to his trial, Burbine moved to suppress his statements.[12] The motion was denied and he was convicted of first degree murder in a jury trial.[13]

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1. Moran v. Burbine, 106 S. Ct. 1135, 1138 (1986).
2. *Id.*
3. *Id.* at 1138-39.
4. *Id.* at 1139.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Miranda v. Arizona, 384 U.S. 436 (1966). Hereinafter, the terms "*Miranda* rights" and "*Miranda* warnings" will be used to refer to the police procedures mandated by the Court in *Miranda v. Arizona*. *See infra* note 22 and the accompanying text.
10. Moran v. Burbine, 106 S. Ct. at 1139.
11. *Id.*
12. *Id.*
13. *Id.* at 1140.

His conviction was upheld by the Supreme Court of Rhode Island.[14] He then unsuccessfully petitioned the United States District Court for the District of Rhode Island for a writ of habeas corpus.[15] He appealed to the First Circuit Court of Appeals which reversed and ordered issuance of the writ.[16] The United States Supreme Court granted certiorari and *held*, reversed.[17] The failure of the police to inform Burbine of the efforts of an attorney, who had been retained without his knowledge, to reach him did not deprive him of his right to counsel or invalidate his waiver of his *Miranda* rights. *Moran v. Burbine*, 106 S. Ct. 1135 (1986).

The Court first examined Burbine's argument that the admission of his confession was a violation of his fifth amendment privilege[18] against self incrimination.[19] The Court's decision in *Miranda* imposed on the police an obligation to follow certain mandated procedures in their dealings with a suspect in order to counterbalance the "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[20] These pressures are inherent in a custodial interrogation.[21] Thus, police have a duty to inform the suspect of his right to remain silent, that anything he says will be used against him in court, that he has the right to consult with a lawyer and have the lawyer present during interrogation, and that if he is indigent a lawyer will be appointed for him.[22] The police must also respect the suspect's decision to exercise any of these rights.[23]

Burbine did not dispute that the police followed these procedures.[24] He also did not dispute the finding of the Rhode Island courts that he at no time requested a lawyer.[25]

Instead, he argued that the police's failure to inform him of the attorney's call deprived him of information essential to his ability to knowingly waive his fifth amendment rights.[26] Alternatively, he argued that to fully

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14. Moran v. Burbine, 451 A.2d 22, 29 (1982).

15. Moran v. Burbine, 589 F. Supp. 1245 (1984).

16. Burbine v. Moran, 753 F.2d 178 (1985).

17. Moran v. Burbine, 106 S. Ct. 1135, 1140 (1986). Justice O'Connor noted in writing for the majority that certiorari was granted to decide "whether either the conduct of the police or respondent's ignorance of the attorney's efforts to reach him taints the validity of the waivers and therefore requires exclusion of the confessions." *Id.* at 1138.

18. *Id.* at 1141. "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

19. Moran v. Burbine, 106 S. Ct. at 1141.

20. Moran v. Burbine, 106 S. Ct. at 1140 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

21. Moran v. Burbine, 106 S. Ct. at 1140.

22. Miranda v. Arizona, 384 U.S. 436, 468-70 (1966).

23. *Id.* at 473-74.

24. Moran v. Burbine, 106 S. Ct. at 1141.

25. *Id.*

26. *Id.*

protect the fifth amendment rights safeguarded by *Miranda*, the court should extend the *Miranda* decision to condemn the conduct of the Rhode Island police.[27]

In relation to Burbine's first contention, the Court noted that a defendant may waive the rights set out in the *Miranda* warnings "provided the waiver is made voluntarily, knowingly, and intelligently."[28] The record did not indicate that the police physically or psychologically pressured Burbine to sign the statements, and the voluntary nature of the waiver was not at issue.[29]

The crux of the waiver issue was how expansively the term "knowingly" was to be interpreted.[30] The court of appeals agreed with Burbine's contention that the police deprived him of essential information and therefore he could not "knowingly" waive his rights.[31]

The Supreme Court, however, disagreed, stating "events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[32]

According to the Court's method of analysis, if a suspect's decision to waive his rights was not coerced and he at all times knew his rights as set forth in the *Miranda* warnings, "the analysis is complete and the waiver is valid as a matter of law."[33]

The Court also held that the state of mind of the police is irrelevant to the question of the defendant's decision to forego his rights.[34] Deliberate or reckless withholding of information, although termed ethically objectionable by the Court, was considered to be relevant to the constitutional validity of a waiver only if it deprived the defendant of the requisite knowledge essential to the ability to understand the nature of his rights and the consequences of abandoning them.[35] The Court distinguished this case from *Escobedo v. Illinois*[36] where police incorrectly told the *suspect* that his lawyer "didn't want to see him."[37] Here, since the police gave the defendant all of

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27. *Id.*

28. *Id.* The Court noted that "[t]he inquiry has two distinct dimensions." *Id.* (citing Edwards v. Arizona, 451 U.S. 477, 482 (1981), and Brewer v. Williams, 430 U.S. 387, 404 (1977)). First, the waiver of the right must have been voluntary ("the product of a free and deliberate choice rather than intimidation, coercion or deception"). Moran v. Burbine, 106 S. Ct. at 1141. Second, the right must have been relinquished "with full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

29. Moran v. Burbine, 106 S. Ct. at 1141.

30. *Id.* at 1141-42.

31. Burbine v. Moran, 753 F.2d 178, 187 (1985).

32. Moran v. Burbine, 106 S. Ct. at 1141.

33. *Id.* at 1142.

34. *Id.*

35. *Id.*

36. 378 U.S. 478 (1964).

37. Moran v. Burbine, 106 S. Ct. at 1142 (quoting Escobedo v. Illinois, 378 U.S. at 481).

the information required by *Miranda*, and he apparently understood his rights, the waiver was held to be valid.[38]

The Court next discussed Burbine's argument that *Miranda* should be extended to condemn the conduct of the police and to require police to inform a suspect of an attorney's efforts to reach him.[39] This proposal was rejected by the Court for two reasons.[40]

First, the Court said that such a modification "ignores the underlying purposes of the *Miranda* rules . . . ."[41] According to the Supreme Court, that purpose is not to mold police conduct, but to "dissipate the compulsion inherent in custodial interrogation" and thus to protect the suspect's fifth amendment rights.[42] Based on this view of *Miranda*, the Court determined that a rule mandating guidelines in police dealings with attorneys would "ignore both *Miranda's* mission and its only source of legitimacy," since such conduct is, in the view of the Court, not relevant to the degree of compulsion experienced by the defendant during interrogation.[43]

The Court also refused to adopt such a rule on the grounds that it would confuse the issue by raising numerous legal questions in an area where police responsibilities are now fairly clear.[44]

Moreover, the Court was concerned that such a rule would upset the

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In *Escobedo*, the suspect had not been formally charged, but " 'he was in custody' and 'couldn't walk out the door.' " Escobedo v. Illinois, 378 U.S. at 479. He requested to see his lawyer. *Id.* When the lawyer arrived he was refused permission to see the suspect, who was told his lawyer " 'didn't want to see' him." *Id.* at 480-81. The Court held:

> [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment . . . , and . . . no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Escobedo v. Illinois, 378 U.S. at 490-91.

38. Moran v. Burbine, 106 S. Ct. at 1142.

39. *Id.* at 1143.

40. *Id.* at 1143-44.

41. *Id.* at 1143.

42. *Id.*

43. *Id.*

44. *Id.* The Court commented that "the legal questions it would spawn are legion," and went on to elaborate on some possible issues:

> To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?

Id.

delicate balance between two competing concerns: society's interest in police questioning as an effective law enforcement tool;[45] and the danger that the police will "inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion."[46] In the eyes of the majority, the proposed rule would contribute to the fifth amendment protection of the suspect minimally at best, but would seriously impair "society's legitimate and substantial interest in securing admissions of guilt."[47]

The Court noted that a number of state courts have reached the opposite conclusion,[48] and that the decision is in conflict with the policy recommendations embodied in the American Bar Association Standards of Criminal Justice,[49] but emphasized its duty to independently interpret the Constitution.[50] The Court also pointed out that nothing in the decision prevents states from adopting stricter standards of conduct for state employees

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45. *Id.* at 1144. "Admissions of guilt are more than merely 'desirable,' *United States v. Washington*, 431 U.S. 181, 186 (1977); they are essential to society's compelling interest in finding, convicting and punishing those who violate the law." Moran v. Burbine, 106 S. Ct. at 1144.

46. Moran v. Burbine, 106 S. Ct. at 1144. "[T]he Court has recognized that the interrogation process is 'inherently coercive' . . ." *Id.* (citing New York v. Quarles, 467 U.S. 649, ____, 104 S. Ct. 2626, 2631 (1984)).

According to this court, "*Miranda* attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation." Moran v. Burbine, 106 S. Ct. at 1144.

47. Moran v. Burbine, 106 S. Ct. at 1144.

48. *Id.* The court of appeals noted that all the other state supreme courts which had considered the issue (except that of Rhode Island, which decided this case) "held that the failure to inform a suspect in custody that his attorney or an attorney retained for him was seeking to see him vitiated his waiver of his Fifth Amendment right to assistance of counsel at his questioning." Burbine v. Moran, 753 F.2d 178, 186 (1985). That court went on to describe several such state supreme court decisions. Burbine v. Moran, 753 F.2d at 186-87. *Accord* Commonwealth v. Sherman, 389 Mass. 287, ____, 450 N.E.2d 566, 567 (1983) (request from attorney to be present at questioning not communicated to suspect even though his interrogation took place soon thereafter); State v. Jackson, 303 So. 2d 734, 735-36 (La. 1974) (accused was interrogated without being informed that her retained counsel had called and asked that she not be until he conferred with her); State v. Haynes, 288 Or. 59, 62, 602 P.2d 272, 273 (1979), *cert. denied*, 446 U.S. 945 (1980) (evasive answer given to attorney who requested to see suspect). In *Haynes* the Oregon Supreme Court stated the issue as "whether the prosecution may use against a defendant statements obtained from him while in police custody and after the police, but not the defendant, knew that an attorney sought to consult with him." State v. Haynes, 288 Or. at ____, 602 P.2d at 272-73. The case parallels *Burbine*, in that the issue was identical, and in both cases, the attorney was retained by a relative for the defendant without the defendant's knowledge. The similarity, however, ended with the holdings. The Oregon court held the statements inadmissible. State v. Haynes, 288 Or. at ____, 602 P.2d at 279. It is interesting to note, in light of the present case, that the Supreme Court declined to review the *Haynes* decision. State v. Haynes, 288 Or. 59, 62, 602 P.2d 272, 273 (1979), *cert. denied*, 446 U.S. 945 (1980).

49. Moran v. Burbine, 106 S. Ct. at 1144. *Cf.* ABA STANDARDS FOR CRIMINAL JUSTICE 5-7.1 (2d ed. 1980) (cited in Moran v. Burbine, 106 S. Ct. at 1144).

50. Moran v. Burbine, 106 S. Ct. at 1144.

and officials as a matter of state law.[51]

Burbine also argued that his signed confessions must be excluded from evidence based on sixth amendment principles.[52] Absent a valid waiver, a suspect has a right to the presence of an attorney during any interrogation, once the sixth amendment right to counsel attaches.[53] Once the right has attached, the police may not interfere with the attorney's efforts to act as a "medium" between the suspect and the state during interrogation.[54]

According to the Court's interpretation, however, the right to have counsel present at interrogation doesn't attach until after the first formal charging procedure.[55] The Court reasoned that since Burbine's confessions were obtained during interrogation sessions which preceded "the initiation of 'adversary judicial proceedings' ", the right to have counsel present had not yet attached.[56]

Burbine, relying primarily on *Miranda* and *Escobedo*,[57] contended that, in at least some circumstances, the sixth amendment "protects the integrity of the attorney-client relationship[58] regardless of whether the prosecution has in fact [formally] commenced. . . ."[59] As the Court stated in *Escobedo*:

> [t]he right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for

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51. *Id.* at 1145.

52. *Id.*

53. *Id.* "In all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

54. Moran v. Burbine, 106 S. Ct. at 1145.

55. *Id.*

56. *Id.*

57. Escobedo v. Illinois, 378 U.S. 478 (1964).

58. Moran v. Burbine, 106 S. Ct. at 1145. This contention, of course, raises the question of whether or not an attorney-client relationship existed in this case, since defendant did not contact the attorney himself and was unaware of her efforts to reach him. Moran v. Burbine, 106 S. Ct. at 1139. The Court noted that the Rhode Island Supreme Court found that no attorney-client relationship existed, in *State v. Burbine*, 451 A.2d 22, 29 (1982). Moran v. Burbine, 106 S. Ct. at 1145 n.3. The State since conceded that such a relationship existed, however, and asked that the sixth amendment issue be decided on that basis. Moran v. Burbine, 106 S. Ct. at 1145 n.3. The Court noted that a litigant's concession cannot be used to circumvent a state court's interpretation of state law, and then went on to circumvent the question of the existence of the relationship in this case. *Id.*

> Respondent's argument, however, does not focus on whether an attorney-client relationship actually existed as a formal matter of state law. He argues instead that, on the particular facts of this case, the Sixth Amendment right to counsel has been violated. In any event, even if the existence of an attorney-client relationship could somehow independently trigger the Sixth Amendment right to counsel, a position we reject, the type of circumstances that would give rise to the right would certainly have a federal definition.

Id.

59. Moran v. Burbine, 106 S. Ct. at 1145.

legal advice.[60]

Burbine argued that other "critical stage" cases determined only "the narrow question of when the right *to* counsel—that is, to the appointment or presence of counsel—attaches."[61] Thus, they are not to be read as negating the right asserted by the defendant "to noninterference with an attorney's dealings with a criminal suspect. . .[which] arises the moment that the relationship is formed, or, at the very least, once the defendant is placed in custodial interrogation."[62]

The Court refused to follow this line of reasoning, saying that neither *Miranda* nor *Escobedo* supported defendant's argument, since *Miranda's* holding was based solely on the fifth amendment, and *Escobedo's* sixth amendment analysis was merely dicta which has been disavowed by subsequent cases.[63]

The Court went on to say that the interpretation of the sixth amendment by the defendant "misconceives the underlying purpose of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor."[64] According to the Court, the amendment was limited by its terms to apply "only when the government's role shifts from investigation to accusation."[65]

The court also cited *Maine v. Moulton*,[66] decided in the same term as this case, as a precedent affirming that "looking to the initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel."[67]

Burbine argued that this rule should not apply in a custodial interrogation setting, since confessions obtained during such questioning often deter-

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60. Escobedo v. Illinois, 378 U.S. at 488.

61. Moran v. Burbine, 106 S. Ct. at 1145. *Cf.* United States v. Gouvia, 467 U.S. 180 (1984) (the respondents were inmates in federal prison and were held in administrative detention during the investigation of the murder of another inmate for approximately nineteen months without benefit of counsel before their indictment. *Held*: Respondents were not constitutionally entitled to have counsel appointed while they were in administrative detention and before any adversary judicial proceedings were initiated).

62. *Id.*

63. Moran v. Burbine, 106 S. Ct. at 1145-46.

64. *Id.* at 1146.

65. *Id.*

66. Maine v. Moulton, 106 S. Ct. 477 (1985).

67. Moran v. Burbine, 106 S. Ct. at 1146. *Moulton* involved an investigation which yielded evidence pertaining to several crimes. Maine v. Moulton, 106 S. Ct. 477, 480-82 (1985). The defendant had been indicted for only one of them. *Id.* at 480. He had an attorney, but incriminating statements were elicited without the attorney being present. *Id.* at 481-82. The Court held that the statements were not admissible evidence regarding the crime for which he had been indicted. *Id.* at 489-90. The Court indicated, however, that the evidence would be admissible as evidence in a trial limited to the charges for which he had not yet been indicted. *Id.* at 490 n.16.

mine the outcome of a case, and thus the need for an attorney and the right to non-interference with that relationship are at their greatest.[68]

The Court summarily rejected this argument.[69] "For any interrogation, no more or less than for any other 'critical' pre-trial event, the possibility that the encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel."[70]

Burbine's final argument was "that the conduct of the police was so offensive as to deprive him of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment."[71] Without analyzing or reviewing the circumstances of the alleged deception of defendant's attorney by the police in relation to this argument, the Court held that "on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States."[72]

Justice Stevens wrote a vehement dissent to Justice O'Connor's majority opinion.[73] He was joined in the dissent by Justices Brennan and Marshall.[74] He viewed the decision as a "startling departure" from the premise that "ours is an accusatorial and not an inquisitorial system."[75] Justice Stevens summarized the majority decision as follows:

> [t]he court concludes that the police may deceive an attorney by giving her false information about whether her client will be questioned, and that the police may deceive a suspect by failing to inform him of his attorney's communications and efforts to represent him. For the majority, this conclusion, though "distaste[ful]," *ante*, at 1143, is not even debatable. The deception of the attorney is irrelevant because the attorney has no right to information, accuracy, honesty, or fairness in the police response to her questions about her client. The deception of the client is acceptable, because, although the information would affect the client's assertion of his rights, the client's actions in ignorance of the availability of his attorney are voluntary, knowing, and intelligent; additionally, society's interest in apprehending, prosecuting, and punishing criminals outweighs the suspect's interest in information regarding his attorney's ef-

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68. Moran v. Burbine, 106 S. Ct. at 1146-47.

69. *Id.* at 1147.

70.. *Id.*

71. *Id.* "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

72. Moran v. Burbine, 106 S. Ct. at 1148. The Court noted Justice Stevens' dissent and made clear that its holding was limited to the facts of this case. *Id.* at 1147. "We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation." *Id.*

73. Moran v. Burbine, 106 S. Ct. at 1148 (Stevens, J., dissenting).

74. *Id.*

75. Moran v. Burbine, 106 S. Ct. at 1148 (Stevens, J., dissenting) (quoting Miller v. Fenton, 474 U.S. ___, ___, 106 S. Ct. 445, 449 (1985), *cert. denied sub nom.* after remand, Miller v. Neubert, 107 S. Ct. 585 (1986)).

> forts to communicate with him. Finally, even mendacious police interference in the communications between a suspect and his lawyer does not violate any notion of fundamental fairness because it does not shock the conscience of the majority.[76]

He then elaborated on the facts of the case.[77] Mary Jo Hickey was found unconscious and severely beaten in a Providence, Rhode Island parking lot.[78] She was "lying in a pool of blood, with semen on her clothes, her dentures broken, and [there was] a piece of heavy, blood-stained metal nearby."[79] Several days later, Brian Burbine went to Maine and stayed with friends.[80] He told them about a night out with Hickey which ended with a violent episode in which he hit her several times and threw her out of the car.[81] Three weeks later, Hickey died.[82] Three months later, after the 21 hours detention period in which he confessed, Burbine was charged with the murder and eventually convicted.[83]

"The murder of Mary Jo Hickey was a vicious crime, fully meriting a sense of outrage and a desire to find and prosecute the perpetrator swiftly and effectively."[84] By the time of Burbine's arrest, a local television special had been aired about the murder.[85] The police detective who "broke" the case was later awarded a commendation for his work.[86]

According to Justice Stevens, in spite of the brutality of the crime and the community's understandable sense of outrage, "recognition that ours is an accusatorial, and not an inquisitorial system" makes it imperative that the government "respect those liberties and rights that distinguish this society from most others."[87] Justice Stevens observed that these "safeguards of liberty have been forged in controversies involving not very nice people."[88] He also quoted Macaulay's comment, nearly a century and a half old, regarding the conviction of a guilty man by improper means: "[t]hat Oates was a bad man is not a sufficient excuse; for the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent."[89]

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76. Moran v. Burbine, 106 S. Ct. at 1148-49 (Stevens, J., dissenting).
77. *Id.* at 1149 (Stevens, J., dissenting).
78. *Id.* (Stevens, J., dissenting).
79. *Id.* (Stevens, J., dissenting).
80. *Id.* (Stevens, J., dissenting).
81. *Id.* (Stevens, J., dissenting).
82. *Id.* (Stevens, J., dissenting).
83. *Id.* (Stevens, J., dissenting).
84. *Id.* (Stevens, J., dissenting).
85. *Id.* (Stevens, J., dissenting).
86. *Id.* (Stevens, J., dissenting).
87. *Id.* (Stevens, J., dissenting).
88. *Id.* at 1149-50 (Stevens, J., dissenting) (quoting United States v. Rabinowitz, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting)).
89. Moran v. Burbine, 106 S. Ct. at 1150 (Stevens, J., dissenting) (quoting 1 T. MACAULAY, THE HISTORY OF ENGLAND 482 (1968 ed.)).

In his dissent, Justice Stevens was highly critical of the analysis the majority applied to the police conduct during the interrogation period before charges were filed.[90] He argued that a contrary result should have been reached based both on "the near consensus of state courts and the legal profession's Standards" regarding the question.[91] He also noted that in past decisions, incommunicado questioning was "viewed with the strictest scrutiny."[92] "[T]oday, incommunicado questioning is embraced as a societal goal of the highest order that justifies police deception of the shabbiest kind."[93]

In relation to the validity of Burbine's waiver of his rights, Justice Stevens noted:

> the burden of proving the validity of a waiver of constitutional rights is always on the *government*. When such a waiver occurs in a custodial setting, that burden is an especially heavy one because custodial interrogation is inherently coercive, because disinterested witnesses are seldom available to describe what actually happened, and because history has taught us that the danger of overreaching during incommunicado interrogation is so real.[94]

In some such circumstances there are "strict presumptions against the validity of a waiver."[95] For example, if a suspect waives his rights without being given the *Miranda* warnings, or the police initiate questioning after he has requested an attorney, his waiver is invalid as a matter of law, regardless of whether his decision was uncoerced and he was aware of his rights.[96] According to the dissenters, the majority was "simply wrong" when it concluded that the "waiver is valid as a matter of law" where both a lack of coercion and the giving of the *Miranda* warnings have been proven.[97] *Miranda* establishes that "proof that the required warnings have been given is a necessary, but by no means sufficient, condition for establishing a valid waiver."[98]

In the present case, there was no question that Burbine's waiver would have been invalid if the detectives had "threatened, tricked, or cajoled" him during the interrogation, even though he apparently understood his rights.[99] According to Justice Stevens, "there can be no constitutional distinction

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90. Moran v. Burbine, 106 S. Ct. at 1150-53 (Stevens, J., dissenting).

91. *Id.* at 1152. (Stevens, J., dissenting).

92. *Id.* at 1150-51. (Stevens, J., dissenting). Several cases were cited to support this proposition. *Id.* at 1150 n.9. *See, e.g.*, Miranda v. Arizona, 384 U.S. at 475 (state has "heavy burden" in proving validity of waiver of rights in "incommunicado interrogation").

93. Moran v. Burbine, 106 S. Ct. at 1151 (Stevens, J., dissenting).

94. *Id.* at 1157.

95. *Id.*

96. *Id.* (Stevens, J., dissenting).

97. *Id.* (Stevens, J., dissenting).

98. *Id.* at 1158 (Stevens, J., dissenting).

99. *Id.* (Stevens, J., dissenting). Here, the majority would agree. *See supra* note 28.

. . . between a deceptive misstatement and the concealment by the police of the critical fact that any attorney retained by the accused or his family has offered assistance. . . ."[100] Based on this analysis, there was simply an error of omission rather than one of commission—the result should be the same.

Justice Stevens agreed with the majority that the next question is "whether the deceptive police conduct 'deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' "[101] Predictably, however, he disagreed with the majority's answer and observed that the majority's decision "ignores the prevailing views of the state courts that have considered this issue."[102] He noted that, "[u]nlike the majority, the state courts have realized that attorney communication to the police about the client is an event that has a direct 'bearing' on the knowing and intelligent waiver of constitutional rights."[103] He then quoted the Oregon Supreme Court which addressed the issue but reached a different result than the majority here:

> To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second.[104]

Justice Stevens was particularly distressed by the court's conclusion "that requiring police to inform a suspect of his attorney's communications . . . is not required because it would upset the careful 'balance' of *Miranda*."[105] He called this approach "profoundly misguided" and observed, "[t]he cost of suppressing evidence of guilt will always make the value of a procedural safeguard appear 'minimal,' 'marginal,' or 'incremental'. . . . The individual interest in procedural safeguards that minimize the risk of error is easily discounted when the fact of guilt appears certain beyond doubt."[106]

The dissenters acknowledged that there is a cost in the procedure advocated by Burbine, in that it would undoubtedly result in fewer confessions being obtained during custodial interrogations.[107] This, however, "is the same cost that this Court has repeatedly found necessary to preserve the character of our free society. . . ."[108]

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100. *Id.* (Stevens, J., dissenting).

101. *Id.* (Stevens, J., dissenting).

102. *Id.* at 1159 (Stevens, J., dissenting). *See supra* note 48.

103. *Id.* (Stevens, J., dissenting).

104. *Id.* (Stevens, J., dissenting) (quoting State v. Haynes, 288 Or. 59, 72, 602 P.2d 272, 278 (1979), *cert. denied*, 446 U.S. 945 (1980)).

105. Moran v. Burbine, 106 S. Ct. at 1160 (Stevens, J., dissenting) (referring to Miranda v. Arizona, 384 U.S. 436 (1966)).

106. Moran v. Burbine, 106 S. Ct. at 1160 (Stevens, J., dissenting).

107. *Id.* (Stevens, J., dissenting).

108. *Id.* (Stevens, J., dissenting). *Cf.* Escobedo v. Illinois, 378 U.S. 478 (1963) (confession was excluded when the defendant had not been permitted to consult with his lawyer, who had

> There is only a difference in degree between a presumption that advice about the immediate availability of a lawyer would not affect the voluntariness of a decision to confess, and a presumption that every citizen knows that he has a right to remain silent and therefore no warnings of any kind are needed.[109]

Justice Stevens also addressed the majority's argument that a finding for the defendant would "undermine the 'clarity' of the rule of the *Miranda* case."[110] He noted that the court made no reference to the experience of states which have adopted such a rule, and looks to "clarity" only from the vantage point of the police.[111]

He then proceeded to answer the "quite simple questions" which the majority feared the requested rule would raise.[112] The majority first questioned the extent to which "the police [should] be held accountable for knowing that the accused has counsel."[113] Justice Stevens responded that "police should be held accountable to the extent that the attorney or the suspect informs the police of the representation."[114]

The majority next raised the issue of whether it is "enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect?"[115] According to Justice Stevens, "police should be held responsible for getting a message of this importance from one officer to another."[116]

Finally, the majority asked, "Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?"[117] The dissenters answered this question in the affirmative.[118]

Justice Stevens also advanced an agency argument, claiming that "[u]nder ordinary principles of agency law the deliberate deception of [the public defender] was tantamount to deliberate deception of her client."[119] He reasoned that such deception "constituted a violation of Burbine's right to have an attorney present during the questioning that began shortly there-

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not been permitted to see the defendant); Miranda v. Arizona, 384 U.S. 436 (1966) (individual has right to refuse to respond to police interrogation and to have the assistance of counsel during questioning); Dunaway v. New York, 442 U.S. 200 (1979) (police may not take suspect into custody for questioning without having probable cause for arrest).

109. Moran v. Burbine, 106 S. Ct. at 1161 (Stevens, J., dissenting).
110. *Id.* at 1162 (Stevens, J., dissenting).
111. *Id.* (Stevens, J., dissenting).
112. *Id.* (Stevens, J., dissenting). *See supra* note 44.
113. *Id.* at 1143 (Stevens, J., dissenting).
114. *Id.* at 1162 n. 46 (Stevens, J., dissenting).
115. *Id.* at 1143 (Stevens, J., dissenting).
116. *Id.* at 1162 n. 46 (Stevens, J., dissenting).
117. *Id.* at 1143.
118. *Id.* at 1162 n. 46 (Stevens, J., dissenting).
119. *Id.* at 1163 (Stevens, J., dissenting).

after."[120] Since the existence of the right is "undisputed"[121] it makes no difference whether it is derived from the fifth or sixth amendment.[122] "The only pertinent question is whether police deception of the attorney is utterly irrelevant to that right."[123] Given the nature of the attorney-client relationship, he concluded that the answer to this question is no, at least in a custodial interrogation setting.[124]

The majority briefly mentioned Burbine's due process argument, stated a "shock the conscience" test should be applied, and decided its conscience was troubled, but not shocked.[125] In the view of the minority, "the police deception disclosed by this record plainly does rise to that level."[126] This difference of perception aside, the dissenters rejected the Court's application of the "shock the conscience" test at the outset.[127] Referring to prior decisions where "more thoughtful consideration" has been given,[128] Justice Stevens instead espoused "the principle that due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections."[129] In his judgment, police interference in the attorney-client relationship is just "the type of governmental misconduct . . . that the Due Process Clause prohibits,"[130] since it "violates the due process requirement of fundamental fairness."[131]

By holding that Burbine's confession was valid in spite of the fact that he waived his right to counsel without being told an attorney was seeking to represent him, the Court has taken a step backward in the protection of individual constitutional rights in favor of easing the procedural safeguards required of law enforcement authorities. "[T]he decision leaves the door open to abuse by failing to put police on notice that the Constitution won't

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120. *Id.* (Stevens, J., dissenting).

121. *Id.* (Stevens, J., dissenting). Justice Stevens based this assertion on *Miranda* and commented that in a dissent in that case, "Justice Harlan correctly noted that the Court had held that a person in custody 'has a right to have present an attorney during the questioning, and that if indigent he has the right to a lawyer without charge.' " *Id.* at 1163 n. 51 (Stevens, J., dissenting) (quoting Miranda v. Arizona, 384 U.S. at 504 (Harlan, J., dissenting)).

122. *Id.* at 1163 (Stevens, J., dissenting).

123. *Id.* (Stevens, J., dissenting).

124. *Id.* at 1164 (Stevens, J., dissenting).

125. *Id.* at 1165 (Stevens, J., dissenting).

126. *Id.* at 1166 (Stevens, J., dissenting).

127. *Id.* at 1165 (Stevens, J., dissenting).

128. *Id.* (Stevens, J., dissenting). *See* Wainwright v. Greenfield, 474 U.S. ____, ____, 106 S. Ct. 634, 641 (1986) (Use of a suspect's silence against him after he has invoked *Miranda* "violates the due process requirement of fundamental fairness because such use breaches an implicit promise that 'silence will carry no penalty.' ").

129. Moran v. Burbine, 106 S. Ct. at 1165 (Stevens, J., dissenting). "Indeed, we have emphasized that analysis of the 'voluntariness' of a confession is frequently a 'convenient shorthand' for reviewing objectionable police methods under the rubric of the due process requirement of fundamental fairness." *Id.* (Stevens, J., dissenting).

130. *Id.* at 1165 (Stevens, J., dissenting).

131. *Id.* at 1166 (Stevens, J., dissenting).

tolerate interference with a lawyer's efforts to reach a client in police custody."[132]

As Justice Stevens concluded in his dissent:

> This case turns on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers . . . then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights . . . then today's decision makes no sense at all.[133]

Alice Eastman Helle

132. *Letting Police Deceive*, The Des Moines Reg., Apr. 8, 1986, § A, at 8, col. 1.
133. Moran v. Burbine, 106 S. Ct. at 1166 (Stevens, J., dissenting).