Self-Incrimination: Big Changes in the Wind

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Introduction

Like the winds, which do not blow evenly, the number of self-incrimination cases reviewed by the Supreme Court ebbs and flows from year to year. Although the 2003 Court term was relatively quiet, the 2004 Court term has already resulted in the review of four self-incrimination cases. Based on the Court's past practice, this is an unusually high number. This article examines the self-incrimination cases that have been decided by both the Court and the Court of Appeals for the Armed Forces (CAAF) during their 2003 terms. It then examines the four cases for which the Court has granted certiorari in its 2004 term, and discusses some of the big changes that appear to be in the wind for self-incrimination law.

During its 2003 term, the Court reviewed only one case in which self-incrimination was the central issue.[1] Although it was a civil suit, the Court examined the criteria that must be met before courts can find that the government has violated a citizen's Fifth Amendment right against self-incrimination.[2] The 2003 term was also relatively quiet in the area of self-incrimination for the CAAF. The CAAF addressed only two cases involving these protections; one dealing with the sufficiency of Article 31(b) warnings[3] and the other with grants of testimonial immunity.[4]

In its 2004 term, the Court heard arguments on three cases that involved the admissibility of derivative evidence obtained through the use of unwarned statements.[5] The fourth case is from the Ninth Circuit in which the juvenile status[6] of a suspect, and its influence on the *Miranda* "in-custody" determination, is the central issue.[7] As of the date of this article, the Court has decided only one of these four cases.[8]

The Supreme Court's 2003 Term

As mentioned, the Court addressed only one case during its 2003 term in which the right against self-incrimination was the primary issue. The incident giving rise to the civil suit of *Chavez v. Martinez*[9] began when police officers Salinas and Peã were investigating suspected drug activity in a California neighborhood.[10] While questioning an individual, the officers heard a bicycle approaching on a darkened path. They immediately ordered the rider to dismount, spread his legs, and place his hands behind his head. The rider, Oliverio Martinez, complied with the officers' request. As Officer Salinas began conducting a pat-down frisk of Martinez, he discovered a knife in Martinez's waistband.[11] At this point, a struggle erupted between Salinas and Martinez. Officer Salinas claimed that

1. Chavez v. Martinez, 538 U.S. 760 (2003).

2. *Id.*

3. United States v. Pipkin, 58 M.J. 358 (2003).

4. United States v. Mapes, 59 M.J. 60 (2003).

5. *See* Fellers v. United States, 124 S. Ct. 1019 (2004); State v. Seibert, 93 S.W.3d 700 (Mo. 2002), *cert. granted sub nom.*, Missouri v. Seibert, 2003 U.S. LEXIS 3696 (2003); United States v. Patane, 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003).

6. In keeping with the Criminal Law Department's tradition of having each Military Justice Symposium author quote a common source, I will note that Groucho Marx, our chosen source for this year, once said "[a]ge is not a particularly interesting subject. Anyone can get old. All you have to do is live long enough." The Columbia World of Quotations (Robert Andrews, Mary Biggs, & Michael Seidel eds., 1996); Groucho Marx, Groucho and Me ch. 1 (1959) (quoting Groucho Marx (1895–1977), U.S. comic actor).

7. Alvarado v. Hickman, 316 F.3d 841 (9th Cir. 2002), *cert. granted sub nom.*, Yarborough v. Alvarado, 2003 U.S. LEXIS 5428 (Sept. 30, 2003).

8. *See Fellers*, 124 S. Ct. at 1019. The Court decided this case on 26 January 2004. *Id.*

9. 538 U.S. 760 (2003).

10. *Id*. at 763.

11. *Id*.

Martinez grabbed Salinas' pistol during the scuffle and pointed it at him.[12] Officer Salinas immediately yelled, "He's got my gun."[13] In response, Officer Peã drew her weapon and shot Martinez several times. The resulting injuries left Martinez permanently blinded and paralyzed from the waist down.[14] Before the paramedics arrived, the officers placed Martinez under arrest.[15]

A patrol supervisor, petitioner Ben Chavez, arrived at the scene within a few minutes. Officer Chavez then accompanied Martinez and the paramedics to the hospital.[16] While in the emergency room, Chavez began questioning Martinez about the incident. Chavez, however, did not read Martinez his *Miranda*[17] rights before or during the interview.[18] Despite Martinez's responses, which included "I don't know," "I am dying," "I am choking," and "I am not telling you anything until they treat me," Officer Chavez continued questioning Martinez, insisting that he provide answers. The actual interview time lasted approximately ten minutes but was spread out over a forty-five-minute period.[19]

Martinez eventually made several incriminating statements, including the admissions that he used heroin regularly and that he took the weapon from Salinas' holster and pointed it at the officer.[20] Although Martinez was never charged with a crime and his statements were never used against him in a criminal prosecution, he filed a civil suit alleging that the patrol supervisor's actions had violated both his Fifth Amendment and Fourteenth Amendment rights. Martinez hoped to show that Officer Chavez was not entitled to the qualified immunity from civil suit that protects law enforcement officers in the execution of their duties, since Officer Chavez violated a constitutional right of Martinez's that was "clearly established."[21]

In deciding the case, the Court first turned to the plain language of the Fifth Amendment, which states "no person . . . shall be compelled in any criminal case to be a witness against himself."[22] The Court noted that the Fifth Amendment prevents statements that have been compelled during police interrogations from being used against an individual during a *criminal* trial. Therefore, it is not until they are actually used in a criminal proceeding that a violation of the self-incrimination clause occurs.[23]

Petitioner Martinez had asked the Court to rule that the term "criminal case" encompasses the entire criminal investigation process, to include police interrogations.[24] The Court declined to adopt this expansive interpretation.[25] The Court noted that Martinez was never forced to be a witness against himself because his statements were never used in a criminal proceeding against him. Further, the Court found that Martinez's situation was much like that of a reluctant witness who is granted immunity and forced to give testimony. In both instances, the statements cannot be used against the declarant.[26] The Court also noted that *Miranda's* warnings, and exclusionary rule were prophylactic measures designed to prevent violations of the core right granted by the self-incrimination clause—preventing statements obtained through a police-dominated, incommuni-

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12. *Id*.

13. *Id*.

14. *Id*.

15. *Id*.

16. *Id*.

17. Miranda v. Arizona, 384 U.S. 436 (1966). Once a custodial interrogation triggers *Miranda*, police must inform the subject of his rights: (1) to remain silent; (2) to be informed that any statement he makes made may be used as evidence against him; and (3) to the presence of an attorney. *Id*. at 465.

18. *Chavez*, 538 U.S. 763.

19. *Id*.

20. *Id*.

21. *Id*. at 765.

22. *Id*.

23. *Id*. at 766-67.

24. *Id*.

25. *Id*. at 765.

26. *Id*. at 768-69.

cado, custodial interrogation from being used against the individual in a criminal proceeding. Such prophylactic rules, the Court held, do not extend the scope of the constitutional rights they were designed to protect.[27] Therefore, Officer Chavez's failure to read Martinez his *Miranda* warnings did not by itself give rise to grounds for a civil action.

With regard to the claim that Officer Chavez also violated Martinez's Fourteenth Amendment rights, the Court again turned to the relevant language of the Constitution, which provides that "no person shall be deprived of life, liberty, or property, without due process of law."[28] This clause protects individuals from convictions based on evidence obtained through methods that are "so brutal and so offensive to human dignity" that they "shock the conscience."[29]

The Court concluded that the patrol supervisor's questioning of Martinez was neither "egregious" nor "conscience shocking." The Court relied on the facts that the supervisor did not attempt to harm Martinez by intentionally interfering with his ongoing medical treatment, and that medical personnel were able to treat Martinez throughout the entire interview process.[30] The Court also noted that the supervisor ceased questioning to allow tests and medical procedures to be performed on Martinez and that the supervisor's questioning of Martinez did not exacerbate his existing injuries.[31]

Finally, the Court concluded that there was a justifiable government interest in questioning Martinez—in order to determine if there had been police misconduct—this evidence would have been lost if Martinez had died before giving his version of the events.[32] Since Martinez had failed to prove that Officer Chavez violated either his Fifth Amendment or Fourteenth Amendment rights, the patrol supervisor was entitled to qualified immunity from civil suit. Accordingly, the Court reversed the judgment of the Court of Appeals for the Ninth Circuit.[33]

Analysis of Chavez v. Martinez

As a civil case, *Chavez v. Martinez* offers only limited lessons for military defense counsel. Although a service member cannot be granted relief in either a criminal or civil proceeding[34] for a violation of the individual's *Miranda* rights unless the unwarned statement is used against him in a criminal proceeding, defense counsel should still consider other available avenues to address intentional or egregious violations of a client's constitutional rights by military authorities. If the offending official is a service member, such avenues could include filing a complaint through the chain of command,[35] to the Inspector General,[36] or to the service member's congressional representative. As additional legal support for the argument that military officials have an independent duty to warn service members of their rights against self-incrimination, defense counsel can cite the requirements under the Uniform Code of Military Justice (UCMJ), Article 98, Noncompliance with Procedural Rules.[37]

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27. *Id*. at 770-74.

28. *Id*. at 774.

29. *Id*.

30. *Id*.

31. *Id*.

32. *Id*. at 774-777.

33. *Id*. at 775-76.

34. A service member will likely be barred from financial recovery if the offending official is also a service member. Feres v. United States, 340 U.S. 135 (1950).

35. UCMJ art. 138 (2002).

36. *See generally* U.S. Dep't of Army, Reg. 20-1, Inspector General Activities and Procedures (29 Mar. 2002).

37. UCMJ art. 98. Article 98 states, "Any person subject to this chapter who . . . (2) Knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct." *Id.*

The CAAF's 2003 Term

United States v. Pipkin

The CAAF addressed the adequacy of Article 31(b) warnings[38] in *United States v. Pipkin*.[39] Here, Air Force Office of Special Investigations (OSI) agents interviewed a suspected drug dealer. The drug dealer informed agents that his former roommate, the appellant, had provided him money to purchase his "working stock" of ecstasy.[40] Before interviewing the appellant, the agents read him his rights under Article 31(b), orally informing him that he was suspected of "use, possession and distribution of controlled substances."[41] The appellant declined counsel[42] and agreed to answer questions. At no time did the agents inform the appellant that they suspected him of conspiracy to distribute a controlled substance.

When the agents asked the appellant if he knew why he had been brought in for questioning, he replied that it had to do with his former roommate and that it must be about drugs.[43] After denying any involvement with either the use or purchase of illegal drugs, the appellant agreed to the agent's request to complete a written statement. At this point, the appellant was shown an Air Force Form 1168.[44] This form stated that the appellant was suspected of "wrongful use and possession of a controlled substance"; it did not indicate that the appellant was suspected of either distributing drugs or conspiring to distribute drugs.[45]

While completing his written statement, the OSI agents confronted the appellant with a witness's statement that disputed the appellant's denial. As a result, the appellant recanted his earlier denial and admitted to knowingly providing money for the purchase of illegal drugs. He reduced this subsequent admission to writing.[46] The appellant was eventually charged with use of marijuana, use of ecstasy, and conspiracy to distribute ecstasy.[47] At trial, the appellant's defense counsel unsuccessfully tried to suppress the appellant's oral and written statements regarding the conspiracy.[48]

In upholding the conviction, the CAAF reaffirmed its well-established case law in this area. Discussing the purpose and adequacy of the first of the three Article 31(b) rights warnings, the court referred to language from prior cases that stated, "It is not necessary [for the questioner] to spell out the details" of a suspected offense "with technical nicety";[49] nor, are government agents required to advise a suspect of "each and every possible charge under investigation . . . ."[50] Instead, the goal of this part of the Article 31(b) warnings is to focus the person toward the "circumstances surrounding the event" by informing him of the "general nature of the allegation," to include the "area of suspicion."[51]

In applying these standards to the facts of this case, the CAAF concluded that the appellant was sufficiently focused on an the area of suspicion and to the nature of the accusation through a combination of the agent's verbal warnings and the

38. *Id*. art. 31(b). Article 31(b) states the following:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Id.

39. 58 M.J. 358 (2003).

40. *Id*. at 359.

41. *Id*.

42. It is interesting to note that although the court's opinion refers to the appellant as having waived his right to counsel after being read his Article 31(b) rights, these rights do not provide a suspect with the right to counsel. *See* UCMJ art. 31(b).

43. *Pipkin*, 58 M.J. at 359.

44. U.S. Dep't of Air Force, AF Form 1168, Statement of Suspect/Witness/Complainant (1 Apr. 1998).

45. *Pipkin*, 58 M.J. at 359.

46. *Id*. at 359-60.

47. *Id*. at 358.

48. *Id*. at 360.

49. *Id*. (quoting United States v. Rice, 29 C.M.R. 340, 342 (C.M.A. 1960)).

50. *Id*. (quoting United States v. Davis, 24 C.M.R. 6, 10 (C.M.A. 1957)).

51. *Id*. (quoting United States v. Rice, 29 C.M.R. 340, 342 (C.M.A. 1960)).

appellant's own admission that he knew he was going to be questioned about his roommate's involvement with drugs.[52] The CAAF quickly disposed of the inconsistency issue between the verbal warnings and the written warnings by stating that such a discrepancy was not enough to conclude that the military judge's finding—that the government had met its burden of establishing compliance with the warning requirements of Article 31(b)—was clearly erroneous.[53]

United States v. Mapes

The CAAF was not as deferential to the government's handling of the self-incrimination issues presented in *United States v. Mapes*,[54] specifically, the complex issue of dual grants of testimonial immunity. In *Mapes*, the appellant, Specialist (SPC) Kenji Mapes, returned from leave in New York City with fourteen or fifteen "dime bags" of heroin. He sold these drugs to Private (PVT) Smoyer, a fellow soldier who eventually became SPC Mapes' co-accused.[55] Private Smoyer divided the contents of a single bag into three lines and SPC Mapes, PVT Smoyer, and SPC Coffin each snorted a line. Private Smoyer then "cooked-up" more heroin and injected it into himself and SPC Coffin.[56] Eventually, SPC Mapes and PVT Smoyer helped SPC Coffin back to his dormitory room and left him there for the night.

The next morning SPC Mapes returned to wake up SPC Coffin, but found him unconscious. The appellant sought PVT Smoyer's assistance but he refused to help. Instead, PVT Smoyer attempted to sanitize SPC Mapes' room of any evidence of drug use.[57] When questioned by responding medical personnel, SPC Mapes kept SPC Coffin's drug use secret and suggested instead that SPC Coffin's condition might be due to food poisoning.[58] Specialist Coffin eventually died of a massive heroin overdose.[59]

Although the initial investigation by the Army's Criminal Investigation Command (CID) revealed circumstantial evidence of SPC Mapes' and PVT Smoyer's involvement in SPC Coffin's death, no direct evidence could be found linking them to the crime.[60] During interviews with the CID, both SPC Mapes and PVT Smoyer continued to deny any involvement in SPC Coffin's death. As the investigation stalled, the staff judge advocate (SJA) recommended that the convening authority grant testimonial immunity to both SPC Mapes and PVT Smoyer to force them to reveal what they knew. In his recommendation to the convening authority, the SJA stated that they needed immunity to establish the charges of distribution and involuntary manslaughter, and he "didn't think [they] were going to get there without grants of immunity to both accuseds."[61] The convening authority agreed and eventually granted testimonial immunity to both SPC Mapes and PVT Smoyer.[62]

In an attempt to prevent the improper use of the immunized statements against their makers, the government formed separate prosecution and investigation teams for each co-accused. They then attempted to erect an informational "Chinese wall" between the two separate investigation and prosecution teams to prevent cross-contamination. Unfortunately, the government allowed the same CID agent to supervise both investigative teams.[63]

Despite the grant of immunity, PVT Smoyer refused to cooperate and on multiple occasions denied any involvement in SPC Coffin's death. Specialist Mapes, however, gave an immunized statement admitting that he, PVT Smoyer, and SPC Coffin each used heroin on the night in question and that PVT

52. *Id.*

53. *Id.*

54. 59 M.J. 60 (2003).

55. *Id.* at 61.

56. *Id.*

57. *Id.* at 62.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

Smoyer injected himself and SPC Coffin with the heroin.[64] The agents again approached PVT Smoyer for an interview but he continued to deny any involvement in SPC Coffin's death. Based on SPC Mapes' statement, the government preferred charges against PVT Smoyer, including the charge of the involuntary manslaughter.[65]

At PVT Smoyer's Article 32 hearing, SPC Mapes testified it was PVT Smoyer who had injected SPC Coffin with the heroin. The following day, PVT Smoyer dropped his denials and provided a statement to CID in which he admitted that he was the one who had injected the heroin into SPC Coffin. His statement also detailed SPC Mapes' involvement in SPC Coffin's death. As a result of PVT Smoyer's cooperation, several charges were later preferred against SPC Mapes, including the charge of the involuntary manslaughter.[66]

Although PVT Smoyer did not testify at SPC Mapes' Article 32 investigation, a CID agent did testify about the investigation, to include repeated references to the statements PVT Smoyer made implicating SPC Mapes in the offenses.[67] After the Article 32 hearing, SPC Mapes signed a pretrial agreement that allowed him to enter into a conditional plea that preserved his right to appeal all adverse determinations resulting from pretrial motions.[68] During a motion to dismiss the charge, PVT Smoyer appeared as a witness for the government and stated that SPC Mapes' appearance as a witness against him at the Article 32 hearing had no impact on his ultimate decision to give a statement implicating SPC Mapes. PVT Smoyer claimed he had determined to "come clean" before his Article 32 testimony so that he could enter into a favorable pretrial agreement.[69] The trial judge ruled that the government had met its burden to show that SPC Mapes' immunized testimony was not used either to persuade PVT Smoyer to testify against SPC Mapes or in the decision to prosecute SPC Mapes. The Army Court of Criminal Appeals agreed with the military judge's ruling and affirmed the case.[70] The CAAF, however, disagreed.

In its opinion, the CAAF discussed the fact that immunity statutes allow the government to compel its citizens to provide any information they may posses, but at the same time it prevents the government from using that information against the citizen in a criminal prosecution. If the government is challenged in court, it is placed under a "heavy burden" to show that it has not used the immunized testimony against its maker.[71] To do this, the government must affirmatively prove that its evidence "is derived from a legitimate source wholly independent of the compelled testimony" and that the decision to prosecute was not tainted by the immunized testimony.[72]

In deciding whether the government had met its burden, the court considered the four factors previously established to evaluate the propriety of prosecutions based upon immunized testimony.

> 1. Did the accused's immunized statement reveal anything which was not already known to the government by virtue of the accused's own pretrial statement?
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> 2. Was the investigation against the accused completed prior to the immunized statement?
>
> 3. Had the decision to prosecute the accused been made prior to the immunized statement? and,
>
> 4. Did the trial counsel who had been exposed to the immunized testimony participate in the prosecution?[73]

In applying these criteria to the facts of this case, the court noted that SPC Mapes' immunized statement revealed important new information that was not already known to the government. This included information on the degree of culpability of

64. *Id.* at 63.

65. *Id.*

66. *Id.* at 62-63.

67. *Id.* at 64.

68. *Id.* Specialist Mapes' pretrial agreement, stated, in relevant part, that "[t]he government expressly agrees to allow SPC Mapes to enter a conditional plea under Rule for Courts-Martial 910(a)(2) [hereinafter R.C.M.]. This conditional plea preserves SPC Mapes' right to appeal all adverse determinations resulting from pretrial motions." *Id.*

69. *Id.*

70. *Id.* at 64-65.

71. *Id.* at 67.

72. *Id.*

73. *Id.* (citing United States v. England, 33 M.J. 37 (C.M.A. 1991); United States v. Gardner, 22 M.J. 28 (C.M.A. 1986)).

both the appellant and PVT Smoyer, such as, who supplied the heroin and who injected it into SPC Coffin.[74] Secondly, the investigation against the appellant was not complete, and in fact had reached an impasse, in which the command believed the only way to make progress in the case was to grant immunized testimony to both the appellant and PVT Smoyer.[75] Thirdly, the decision to prosecute had not been made despite the government's assertions to the contrary. The charges against SPC Mapes were not preferred until months after immunity had been granted. Although the government may have desired to prosecute the appellant for involuntary manslaughter, it was not until they were able to secure an immunized statement from him and use it to prosecute PVT Smoyer, that they were able to obtain PVT Smoyer's statement and thereby substantiate the charges against the appellant.[76]

Lastly, the court concluded that the appellant's own immunized statement tainted the government's decision to prosecute. Although the government attempted to construct a "Chinese wall" to prevent the taint from affecting the two prosecution and investigation teams, the court found that the convening authority, the SJA, and the supervising investigator all had knowledge of both investigations.[77]

In addressing the case's most important aspect, whether it was SPC Mapes' immunized statement that persuaded PVT Smoyer to testify against the appellant, the court was unconvinced by PVT Smoyer's assertions that his motivation for coming forward was that he wanted to "come clean" and to secure a favorable pretrial agreement. The court noted that PVT Smoyer provided several conflicting and untruthful statements that undermined his credibility. Additionally, his claims were not supported by the factual record or chronology of events. The court noted that although PVT Smoyer had plenty of opportunities to come forward and disclose what he knew under the grant of immunity, he had refused to do so until the appellant testified against him at the Article 32 hearing.[78]

Accordingly, the court dismissed all charges in which the decision to prosecute was tainted, and set aside the sentence. The two remaining charges were returned to the Judge Advocate General of the Army for submission to a new convening authority.[79]

Analysis of the CAAF' s 2003 Term Cases

There are lessons counsel can learn from both *Pipkin* and *Mapes*. First, although the *Pipkin* case does not signal a shift in Article 31(b) law, it does take existing law and apply it to a new set of facts, specifically, the conspiracy to distribute drugs. Trial counsel should not limit their use of the *Pipkin* opinion to cases involving a conspiracy to distribute drugs only. Instead, they should feel confident in using the case as persuasive authority any time government agents properly warn a suspect of the underlying offense, but fail to warn of an associated theory of accomplice liability.[80] When doing so, trial counsel should cite the court's refusal to require that government agents inform a suspect of "each possible theory of accomplice liability a prosecutor might later pursue."[81]

The *Mapes* case also provides valuable lessons, especially for trial counsel and SJAs that are considering recommending testimonial immunity for co-accuseds. The fact that the government in *Mapes* was aware in advance of the potential pitfalls in granting such immunity and tried to take precautionary measures, yet still failed, shows how difficult this legal procedure is to manage effectively. Before moving ahead with grants of immunity, trial counsel should first carefully read the *Mapes* opinion and its predecessors to extract the lessons learned.

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74. *Id*. at 68.

75. *Id*.

76. *Id*.

77. *Id*.

78. *Id*. at 70.

79. *Id*. at 71-72.

80. *Id*. For theories of accomplice liability see UCMJ art. 77, which states:

> Any person punishable under this chapter who—
>
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
>
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.

UCMJ art. 77 (2002).

81. *Id*.

In its *Mapes* opinion, the CAAF provided precautionary clues that the government should take before giving such grants of immunity to avoid cross-contamination of separate investigations and prosecutions. Specifically, the court addressed the importance of ensuring completely separate investigation and prosecution teams. This includes making sure not only the trial counsel and investigators are separate, but also that the supervisors for each team are different and that they exercise influence over one case only.[82] One possible resolution is to have one of the investigative teams' CID supervisor assigned from a different post. Likewise, one of the prosecution teams could facilitate the jurisdictional transfer of a case to a separate general court-martial convening authority (GCMCA). The SJA of that GCMCA would then supervise this separate prosecution team.

Additionally, the government must exercise great caution to ensure that it does not use immunized testimony in its possession to procure derivative evidence for use against the immunized declarant, including statements from co-accuseds. The *Mapes* case demonstrates that the government runs a heightened risk of creating reversible error if they confront an uncooperative suspect with the accusations of an immunized co-conspirator. Courts have shown that they will carefully scrutinize any admissions gained through the use of these tactics to determine whether the admissions "were 'directly or indirectly derived' from immunized testimony."[83] The safer course of action for the government would be to restrict the use of such immunized testimony to the court-martial venue, and not use it against a co-accused during the investigative or pretrial stages.

Finally, before granting immunity, the government should collect any evidence they have in their possession, catalogue it, and list it in a memorandum.[84] The government failed to do this in the *Mapes* case.[85] The memorandum should also list the charges they plan to pursue at that time.[86] This will help ensure that the subsequent statements of the co-accuseds cannot be alleged to have influenced the investigation or prosecution of the other. The government must always remember that they carry a "heavy burden" to prove that there has been no taint between the two investigations or prosecutions.[87] The steps listed above should help the government meet this burden.

The Supreme Court's 2004 Term

Overview

Three of the four cases for which the Court has granted certiorari this term involve the admissibility of derivative evidence gained through the use of an unwarned statement. In two of these cases, the derivative evidence is a subsequent warned statement while the third case involves physical evidence. The fourth case is completely unique from the other three cases, in that it involves the appropriateness of considering a suspect's juvenile status when determining whether he is "in-custody" for *Miranda* warnings purposes. This section of the article first examines the three derivative evidence cases and then discusses the juvenile status case.

Derivative Evidence: Overview of the Issue

Although the Fifth Amendment's protection against compelled self-incrimination[88] has been in existence since the inception of the Bill of Rights, its familiar procedural protections were not crafted until 1966, when the Court issued its opinion in the landmark case of *Miranda v. Arizona*.[89] The *Miranda* Court sought to establish procedural safeguards that would protect individuals from giving compelled confessions when they were subjected to the inherently coercive environment of a police-dominated, incommunicado interrogation. Failure to give *Miranda* warnings before a "custodial interrogation" makes any resulting confession per se involuntary and subject to suppression.[90] The two reasons the Court enunciated for suppressing such unwarned statements were to deter police misconduct and to avoid the risk of admitting unreliable confessions.[91]

82. *Id.* at 68.

83. *Id.* at 69 (citing United States v. Boyd, 27 M.J. 82, 86 (C.M.A. 1988) (citing United States v. Kurzer, 534 F.2d 511, 517 (2d Cir. 1976), *on remand*, 422 F. Supp. 487, 489 (S.D.N.Y. 1976))).

84. *Id.* at 69.

85. *Id.*

86. *Id.*

87. *Id.* at 67.

88. U.S. CONST. amend. V. The Fifth Amendment states, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." *Id.*

89. 384 U.S. 436 (1966).

90. *Id.*

91. *See Miranda*, 384 U.S. at 442-48.

To date, however, the Court has been unwilling to extend the range of judicial suppression to encompass derivative evidence gained through the use of an unwarned statement. Before the Court's 2000 term, many legal scholars hypothesized the reason for this reluctance was because *Miranda's* warnings were "prophylactic" in nature, as opposed to being constitutionally required.[92] The Court, however, eviscerated this argument with their opinion in *United States v. Dickerson*.[93] As a result, the debate over the admissibility of derivative evidence has been revived among both legal scholars and lower courts.

The Court used the *Dickerson* case to examine whether 18 U.S.C. § 3501,[94] a statute Congress passed as a challenge to the *Miranda* decision, violated the Constitution. Under this statute, a police officer's failure to provide a suspect *Miranda* warnings did not make any statement obtained presumptively involuntary. Instead, *Miranda* warnings were just one of several factors a trial judge must consider when determining the voluntariness of a suspect's statement.[95] In *Dickerson*, the Court specifically reaffirmed the warning requirements of *Miranda* and declared it a "constitutional rule," one Congress was not empowered to legislate away.[96] Additionally, the Court took special care to pronounce that *Miranda's* progeny cases also remained viable and unaltered by the *Dickerson* decision.[97]

Miranda's progeny include cases that carved out exceptions to the warning requirement. Consequently, an unwarned statement might be admissible if it was obtained out of a concern for public safety,[98] or if the statement is introduced only to impeach the testimony of the defendant.[99] Additionally, certain derivative evidence that is the product of an initial unwarned statement, such as a subsequent warned statement[100] or the identification of a prosecution witness,[101] may still be admissible.

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92. *See generally* David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805 (1992).

93. 530 U.S. 428 (2000).

94. 18 U.S.C. § 3501 (2000). The law regarding the admissibility of confessions is as follows:

> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including
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> (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.

Id.

95. *Id.*

96. *Id.* at 431, 439, 441, 444. The Court also described the *Miranda* decision as being "constitutionally based," as having a "constitutional basis," as being a "constitutional decision," and as having "constitutional underpinnings," and called *Miranda*'s warnings, "constitutional guidelines." *Id.*

97. *Id.* at 441.

98. New York v. Quarles, 467 U.S. 649 (1984).

99. Harris v. New York, 401 U.S. 222 (1971).

100. Oregon v. Elstad, 470 U.S. 298 (1985) (holding that the exclusionary rule does not apply to a voluntary, warned confession obtained after an earlier voluntary confession was obtained in violation of *Miranda*).

101. Michigan v. Tucker, 417 U.S. 433 (1974).

The confusion over the admissibility of derivative evidence was the natural and predictable consequence of the *Dickerson* opinion.[102] The reason for this confusion among legal scholars[103] and lower courts[104] revolves around the perceived logical inconsistency between *Miranda's* "constitutional" status versus the continued viability of post-*Miranda* cases that allow the admission of derivative evidence from unwarned statements. Those believing that the rationale of the *Dickerson* opinion now requires the suppression of derivative evidence argue that if *Miranda* is indeed a constitutional decision, then derivative evidence obtained in violation of its requirements should be treated the same way as other derivative evidence obtained from violations of other constitutional requirements—suppressed as "fruit of the poisonous tree."[105]

Those holding a contrary view cite the Court's language in *Dickerson*. This language claims the reason the *Elstad* Court did not extend the "fruits" doctrine to *Miranda* violations was not because *Miranda* was "a nonconstitutional decision," but because "unreasonable searches under the Fourth Amendment are different from unwarned interrogations under the Fifth Amendment."[106] The Court, however, did not clarify these differences in their opinion. These disparate interpretations of the *Dickerson* opinion have led lower courts to reach diametrically opposed results on the admissibility of derivative evidence.[107] How lower courts have ruled on this issue since *Dickerson* has depended on several factors, including: their interpretation of *Dickerson's* meaning and impact; whether the derivative evidence in question is physical or is a subsequent warned statement; and whether the government's failure to give *Miranda* warnings was intentional or negligent.[108]

In an apparent effort to add clarity in this area, the Court granted certiorari to three cases involving the admissibility of derivative evidence gained from an unwarned statement. As of the date of this article, the Court has only decided *United States v. Fellers*.[109] Here, the Court addressed the issue of whether a statement taken in compliance with *Miranda* should be suppressed if it was tainted by an earlier unwarned statement in violation of the right to counsel under the Sixth Amendment.

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102. *Id*. at 455. As part of his dissent, Justice Scalia predicted the legal conundrum that the majority's decision would create:

> And if confessions procured in violation of *Miranda* are confessions "compelled" in violation of the Constitution, the post-*Miranda* decisions I have discussed do not make sense. The only reasoned basis for their outcome was that a violation of Miranda is not a violation of the Constitution. If, for example, as the Court acknowledges was the holding in Elstad, "the traditional 'fruits' doctrine developed in Fourth Amendment cases" (that the fruits of evidence obtained unconstitutionally must be excluded from trial) does not apply to the fruits of Miranda violations . . . ; and if the reason for the difference is *not* that Miranda violations are not constitutional violations (which is plainly and flatly what *Elstad* said); then the Court must come up with some *other* explanation for the difference.

Id.

103. *See generally* Kirsten Lela Ambach, *Miranda's Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived from an Unwarned Statement*, 78 WASH. L. REV 757 (2002); Jeffrey Standen, *Policy at the Intersection of Law and Politics*, 12 CORNELL J.L. & PUB. POL'Y 555, 563-64 (2003).

104. The Third and Fourth Circuits have ruled that the physical fruits of a Miranda violation are never subject to suppression. United States v. DeSumma, 272 F.3d 176, 180-81 (3d Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002); United States v. Sterling, 283 F.3d 216, 218-19 (4th Cir. 2002), *cert. denied*, 536 U.S. 931 (2002). The First Circuit excludes the fruits of a *Miranda* violation only when there is a "strong need for deterrence," such as intentional violations of *Miranda*. United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002). The Tenth Circuit ruled that suppression of physical evidence is appropriate regardless of whether the violation by police is intentional or unintentional. United States v. Patane, 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003). The Eighth Circuit ruled that derivative physical evidence and subsequent incriminating statements are both admissible. United States v. Villalba-Alvarado, 345 F.3d 1007 (8th Cir. 2003). In ruling on a habeas corpus petition, the Fifth Circuit refused to overturn a state court's ruling as a violation of "clearly established" court jurisprudence when the state court admitted both derivative physical evidence and subsequent incriminating statements. Burgess v. Dretke, 350 F.3d 461 (5th Cir. 2003). The Missouri Supreme Court suppressed a warned subsequent confession in which police intentionally withheld warnings before obtaining the first incriminating statement. State v. Seibert, 93 S.W.3d 700 (Mo. 2002), *cert. granted sub nom.*, Missouri v. Seibert, 2003 U.S. LEXIS 3696 (2003). The Supreme Court of Wisconsin ruled that intentional violations of *Miranda* require suppression of physical derivative evidence. Wisconsin v. Knapp, 666 N.W.2d 881 (Wis. 2003).

105. For suppression of derivative evidence gained through violations of the Fourth Amendment's protections against unreasonable searches and seizure, see *Wong Sun v. United States*, 371 U.S. 471 (1963). "Fruit of the poisonous tree" is the term the Court used to describe evidence derived directly from a violation of one's constitutional rights. *Id.* For suppression of derivative evidence gained through violations of the Fifth Amendment's protection against self-incrimination, see *Kastigar v. United States*, 406 U.S. 441 (1972) (holding that a grant of testimonial immunity bars the government's use of the resulting compelled testimony and any derivative evidence gained from it). For suppression of derivative evidence gained through violations of the Sixth Amendment's right to counsel, see *United States v. Wade*, 388 U.S. 218 (1967) (holding the government could not use the results of a post-indictment line-up in which the defendant was identified, since they never secured a waiver of the defendant's right to counsel.); *see also* Nix v. Williams, 467 U.S. 431 (1984) (applying an inevitable discovery exception to the Sixth Amendment's exclusionary rule).

106. *Nix*, 467 U.S. at 431.

107. *See generally supra* note 105.

108. *See generally id.*

109. 285 F.3d 721 (8th Cir. 2002), *cert. granted*, 538 U.S. 905 (2003).

Derivative Statement Evidence

United States v. Fellers

In *Fellers*, based upon an indictment, two police officers went to Feller's home to arrest him for conspiracy to distribute drugs.[110] Once there, the officers informed Fellers that they wanted to speak with him about his involvement with methamphetamines and his associations with certain individuals. Fellers informed the officers that he had used methamphetamines and that he had associated with the individuals in question.[111]

At no time before or during this conversation did officers read Fellers his *Miranda* rights. The officers then arrested Fellers and took him to the police station. The officers read Fellers his *Miranda* warnings at the police station, which he waived. During the subsequent interrogation, Fellers reiterated his earlier incriminating admissions.[112] Fellers sought to suppress his second statement as "fruit of the poisonous tree" of his first unwarned statement.[113]

The Court of Appeals for the Eighth Circuit, citing the Fifth Amendment case of *Oregon v. Elstad*,[114] concluded that Feller's *Mirandized* statement at the police station was not coerced and that he knowingly and voluntarily waived his rights. Additionally, in a cursory, two-line opinion, the Eighth Circuit found no violation of Feller's Sixth Amendment right to counsel since the officers did not "interrogate" him at his home.[115] The Court disagreed.

In a unanimous opinion, the Court concluded that the agents had violated the petitioner's Sixth Amendment rights when they "deliberately elicited" information from him after he had been indicted and without having secured a waiver of counsel.[116] Writing for the Court, Justice O'Connor reiterated that the test for violations of the Sixth Amendment was separate and distinct from those for the Fifth Amendment. Whereas Fifth Amendment analysis applies a "custodial-interrogation" standard,[117] the Sixth Amendment applies a "deliberate elicitation" standard.[118] Government agents violate the Sixth Amendment when they "deliberately elicit" information from an individual against whom judicial proceedings have been initiated.[119]

The Court found that the Eighth Circuit erred when it incorrectly applied the Fifth Amendment's "interrogation" standard, instead of the Sixth Amendment's "deliberate-elicitation" standard.[120] The Eighth Circuit compounded this error when they evaluated the petitioner's subsequent warned statement—given at the jail house—under the standards set forth in *Oregon v. Elstad,* a Fifth Amendment based case.[121]

In remanding the case, the Court acknowledged that they had never decided the issue of whether the rationale of *Elstad* also applies to cases in which there has been an initial violation of a suspect's Sixth Amendment right to counsel, in which a suspect makes an incriminating statement following a knowing and voluntary waiver of counsel.[122] No matter how the Eighth Circuit decides this issue of first impression, it is likely the Court will again review the Eighth Circuit's opinion.

The *Fellers* case serves as a reminder to practitioners of the importance of carefully identifying and applying the correct legal standards to any issues they either argue or decide. This is especially true in the complex and esoteric area of self-incrimination law within the military, in which a statement by a suspect can involve protections of the Fifth Amendment, Sixth Amendment, Article 31 of the UCMJ, and the voluntariness doctrine. What further complicates this area is that these sources of protection are not mutually exclusive and can over-

110. *Id.* at 723.

111. *Id.*

112. *Id.*

113. *Id.*

114. 470 U.S. 298 (1985).

115. *Fellers*, 285 F.3d at 724.

116. Fellers v. United States, 124 S. Ct. 1019, 1023 (2004).

117. *Id.*

118. *Id.* at 1022.

119. *Id.*

120. *Id.* at 1023.

121. *Id.*

122. *Id.*

lap and interplay in any given situation. In *Fellers*, the Court has once again made it clear that the standards for each self-incrimination protection are separate and distinct, and that failure to identify or apply them correctly can constitute reversible error.

State v. Seibert

The Supreme Court of Missouri also grappled with the derivative evidence issue in *State v. Seibert.*[123] In this case, Patrice Seibert conspired with two of her teenaged sons and two of their friends to set fire to Seibert's mobile home in the hopes of covering up the death of Jonathan, her severely handicapped son. Although Jonathan had died in his sleep the previous night, Seibert was concerned that authorities would conclude he died of neglect, since he was covered with bedsores.[124] To make it appear that she had not left her son alone, Patrice Seibert arranged to have Donald, a mentally handicapped teenager who was living with her, also die during the fire.[125]

Five days after the fire and murder of Donald, officers arrested Seibert and took her to the police station for questioning. Before questioning Seibert, the officers decided to intentionally withhold *Miranda* warnings from her.[126] As one of the officers questioned Seibert, he repeatedly squeezed her arm and accused her of intentionally killing Donald. Seibert eventually admitted to Donald's murder, after which, the officer gave her a twenty-minute break for coffee and a cigarette.[127]

When the officer resumed the interrogation, he turned on a tape recorder and advised Seibert of her *Miranda* rights, which she waived. During the second interview, the officer referred back to the admissions she made during the unwarned interview. Seibert repeated her earlier admissions on tape.[128] These admissions were offered against her at trial where she was convicted of second-degree murder.[129] The officer later testified he intentionally withheld *Miranda* warnings in the hopes that he could "get an admission of guilt" from Seibert.[130] The officer also testified that he learned this procedure during his interrogation training and that it was standard procedure at his police department.[131]

The Missouri Supreme Court reversed the judgment against Seibert, ruling that the warned confession should have been suppressed,[132] since the officer's tactic of deliberately withholding *Miranda* warnings elicited "a confession that was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights."[133] Concluding that Seibert was subjected to "a nearly continuous period of interrogation,"[134] the Court gave little weight to the fact that Seibert had signed a waiver of her *Miranda* rights before her second confession.[135] Finally, the Court made clear its disapproval of the tactic of deliberately withholding *Miranda* warnings by calling it an intentional "end run" around the protections afforded under *Miranda*.[136]

Derivative Physical Evidence

Like the Missouri Supreme Court, the United States Court of Appeals for the Tenth Circuit also wrestled with its own derivative evidence issue in *United States v. Patane*.[137] The key difference, in *Patane*, was the admissibility of physical evidence

123. 93 S.W.3d 700 (Mo. 2002), *cert. granted sub nom.*, Missouri v. Seibert, 2003 U.S. LEXIS 3696 (2003).

124. *Id.* at 701.

125. *Id.* at 702.

126. *Id*.

127. *Id*.

128. *Id*.

129. *Id.* at 701.

130. *Id.* at 702.

131. *Id*.

132. *Id.* at 707.

133. *Id.* at 705.

134. *Id.* at 705-06.

135. *Id*. at 705.

136. *Id.* at 704.

137. 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 538 U.S. 976 (2003).

as opposed to a subsequent statement. In *Patane*, two police officers went to Patane's house to arrest him for violating a restraining order and for possessing a firearm as a convicted felon. Once there, officers placed Patane under arrest and handcuffed him. As one of the officers began advising Patane of his *Miranda* rights, Patane interrupted and stated that he already knew his rights.[138] The officer did not give Patane the rest of his warnings, which the government admits on appeal was a violation of *Miranda*.[139] The officers then told Patane they were interested in the "Glock" pistol that Patane possessed. After some initial reluctance, Patane told the officers the pistol was located in his bedroom on a wooden shelf, and then, per their request, gave the officers permission to enter his home and seize it.[140]

In deciding that the gun should be suppressed, the Tenth Circuit reasoned that since *Dickerson* conclusively established *Miranda* as a constitutional rule, derivative evidence was now controlled by *Wong Sun v. United States*,[141] which requires the suppression of the "fruits" from unconstitutional governmental conduct.[142] The court distinguished this case from *Elstad* (a subsequent warned statement) and *Tucker* (identification of a witness), observing that neither of those cases involved physical evidence.[143] Specifically, the court noted that *Elstad* involved a subsequent confession after an initial unwarned confession, and that this second confession was the product of a voluntary decision by the declarant after *Miranda* warnings were properly administered. This situation differed from the present case, since the physical fruits of a *Miranda* violation do not involve a voluntary decision by the suspect to provide derivative evidence.[144]

The Tenth Circuit held the *Tucker* case could also be distinguished since it involved pre-*Miranda* conduct. Therefore, the same prophylactic concern in deterring police misconduct was not an issue for the *Tucker* court.[145] The Tenth Circuit also reasoned that since *Miranda* was now a constitutional rule, lower courts were no longer free to expand the already judicially established exceptions to *Miranda's* suppression requirement.[146]

As to whether negligent failures to give *Miranda* warnings should be treated differently than intentional failures, the court found that the deterrent effect of suppressing negligent violations also, would help ensure that officers were properly trained to protect this important constitutional right of its citizens.[147] Finally, the court reasoned that the policy of only suppressing evidence in cases of intentional violations would be too difficult to implement, since it would require courts to determine the subjective motivations of the offending police officers.[148]

Juvenile Status

In *Alvarado v. Hickman*,[149] during an investigation into a murder that occurred at a shopping mall, police contacted Michael Alvarado's mother and asked to speak with her seventeen-year-old son. She agreed and, along with Alvarado's father, accompanied their son to the police station. Once there, Alvarado's parents asked to be present during the interview. The police denied their request.[150]

During the initial phase of the questioning, Alvarado denied any involvement in the shopping mall death. In response to this exculpatory account, the interviewing officer expressed disbelief at Alvarado's story and stated that she had a witness who gave a contrary account of the events. Alvarado then made several incriminating admissions that were used against him at his

138. *Id.* at 1015.

139. *Id.*

140. *Id.*

141. 371 U.S. 471 (1963).

142. *Patane*, 304 F.3d at 1019.

143. *Id.* at 1024.

144. *Id.* at 1020-21.

145. *Id.* at 1019-20.

146. *Id.* at 1024-25.

147. *Id.* at 1028.

148. *Id.* at 1029.

149. 316 F.3d 841 (9th Cir. 2002), *cert. granted sub nom.*, Yarborough v. Alvarado, 2003 U.S. LEXIS 5428 (Sept. 30, 2003).

150. *Id.* at 844.

trial. He was eventually convicted of second-degree murder and attempted robbery.[151] At no time before or during the two-hour interview did police ever give Alvarado his *Miranda* warnings.[152]

The Ninth Circuit reversed the lower court's denial of Alvarado's petition for a writ of habeas corpus.[153] The Ninth Circuit concluded the lower court committed "clear error"[154] when it failed to evaluate whether Alvarado's juvenile status affected the "in-custody" determination in its *Miranda* analysis.[155] After conducting a de novo review, the Ninth Circuit concluded Alvarado was "in custody" for *Miranda* warnings purposes.[156]

The Ninth Circuit rested its determination on the fact that Alvarado was only seventeen-years old at the time of his interrogation,[157] and his lack of a prior criminal history made him inexperienced in dealing with the police.[158] The court also noted that to get Alvarado to the station for questioning, police used his parents both to arrange the interview and to transport him, never obtaining Alvarado's direct consent for the interview.[159] Additionally, the police refused the parents' request to be present during the interrogation.[160]

The court also found that Alvarado would not have felt free to leave since, at no point before or during the interview at the police station, did the police ever inform him that he was not under arrest.[161] Additional facts the court found significant included the length of the interrogation, which lasted two hours, and the officer's expressed repeated disbelief and reference to witnesses who had provided contrary accounts of the murder when Alvarado expressed his innocence.[162] Having decided that juvenile status is a factor that must be considered when determining whether a suspect is in custody for *Miranda* purposes, the Ninth Circuit has set the stage for the Supreme Court to provide clear guidance to other lower courts who must address this issue.[163]

Regardless of how the Court decides this case, it will have little impact on military justice, since the vast majority of service members are over the age of eighteen. Even if the Court agrees with the Ninth Circuit and holds that a suspect's juvenile status must be taken into consideration, it potentially could have little impact even for those few service members who are seventeen-years old, especially if the Court adopts a sliding scale-based test (e.g., the younger a suspect, the more likely he will perceive himself as being in custody.) Under such a test, a seventeen-year-old suspect will likely not be treated much differently than an eighteen-year-old suspect.

Conclusion

Although the cases from the CAAF do not establish new law, trial practitioners should still be familiar with their facts and holdings to effectively use them in motions practice. Specifically, the *Mapes* case provides helpful tips to the wary trial counsel who does not want to taint evidence gained from immunized statements, thereby creating the potential for reversible error.

Although the Supreme Court's 2003 term was a relatively quiet one for self-incrimination law, the Court's 2004 term promises far more excitement. While the *Alvarado* case provides an interesting issue on how a suspect's age affects the "in-custody" determination for *Miranda* warnings, the real issue this term will be the rulings the Court makes on the admissibility of derivative evidence from unwarned statements. Unfortunately, practitioners who were looking for clear guidance in this

151. *Id.*

152. *Id.*

153. *Id.* at 857.

154. *Id.* at 855.

155. *Id.* at 844-45.

156. *Id.* at 851.

157. *Id.* at 850.

158. *Id.* at 846.

159. *Id.* at 854.

160. *Id.* at 851.

161. *Id.*

162. *Id.* at 850.

163. After the Court had granted certiorari to the *Alvarado* case, the Seventh Circuit also ruled that a suspect's juvenile status is a relevant factor for the "in-custody" determination when it decided *A.M., a minor, v. Jerry Butler*, 2004 U.S. App. LEXIS 7912 (7th Cir. Apr. 22, 2004). Although factually similar to *Alvarado* in many aspects, one significant difference is that the suspect in *Butler* was only eleven-years old when the police questioned him.

area were disappointed by the *Fellers* opinion. One can only hope that the Court's pending opinions in *Patane* and *Seibert* will provide answers to the questions created by the split of circuit and state court opinions. Regardless of whether these two opinions serve as the oracles for which many are hoping, all criminal law practitioners should look for their publication, since they have the potential of being harbingers of big change in the wind for derivative evidence.