

# Confessions and the Constitution

## The Remedy for Violating Constitutional Safeguards

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Law enforcement officers investigating criminal activity within the United States have increasing amounts of technology to assist them in identifying those responsible for criminal conduct. Advances in DNA collection and testing, automated fingerprint identification, and a multitude of forensic techniques are only a few examples of the scientific tools available

to the modern criminal investigator.<sup>1</sup> However, despite all of the physical evidence collected in a particular case and all of the scientific analysis used to tie an individual to the commission of a crime, one nonscientific technique continues to play an important role in the investigation and prosecution of criminal activity: the confession. Confessions made to law enforcement officers continue to hold

significant importance within the criminal justice process. Law enforcement officers seek to obtain confessions from individuals suspected of criminal activity even when the physical, scientific, or other evidence against an individual is overwhelming. Criminal defendants, faced with the possibility that their confessions may be used by the prosecution at trial, seek to keep their confessions out of

court through legal challenges. Both parties recognize the continued influence of the words uttered by criminal defendants on a judge or a jury. There is something powerful in the words that describe the particular events, as well as the thoughts, actions, emotions, or motives, that would otherwise remain hidden and undiscovered from any scientific or forensic test. In 1961, U.S. Supreme Court Justice Felix Frankfurter made the following statement about confessions that still rings true today:

Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before

it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.<sup>2</sup>

It is when the police officer “seek[s] out possibly guilty witnesses and ask[s] them questions”<sup>3</sup> that the law surrounding confessions must be considered. Because confessions and interrogations are such a recognized and longstanding tool in law enforcement, articles about all aspects of the topic abound. Less frequently addressed, however, is a discussion of the legal effect of obtaining a confession in violation of constitutional safeguards. Because obtaining a confession can implicate

different constitutional rights, answering this question involves identifying the particular constitutional safeguard involved—typically a right found within the Fourth, Fifth, or Sixth Amendments to the U.S. Constitution—and then understanding the remedy that each provision imposes for a violation.

In recent years, the U.S. Supreme Court decided three cases that involved confessions obtained in violation of constitutional safeguards. And, in each of these cases, the Supreme Court has made one thing clear: the Constitution imposes different remedies for different violations. Law enforcement officers must be aware of these issues and can find guidance in these Supreme Court cases involving confessions. Armed with this information, law enforcement officers can properly understand the implications of obtaining confessions in violation of constitutional safeguards.

#### **The Fourth Amendment**

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....”<sup>4</sup> Expressly contained within its first sentence, the Fourth Amendment’s prohibition against unreasonable searches and seizures are familiar terms to law enforcement



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officers. What is less clear from the text, however, is the remedy the Fourth Amendment imposes for a violation of its protections. While the Fourth Amendment stands silent on this point, the U.S. Supreme Court has not stood mute. Beginning in 1914, the Supreme Court created a remedy for violations of Fourth Amendment rights—the remedy of suppression.<sup>5</sup> This remedy, however, was limited to the federal government and its agents until 1961 when, in *Mapp v. Ohio*,<sup>6</sup> the Supreme Court held that the states were required to suppress evidence obtained in violation of the Fourth Amendment.

### The Suppression Remedy

The judicially created remedy of suppression (also called the exclusionary rule), as defined by the Supreme Court, can be easily stated: evidence obtained in violation of the Fourth Amendment is excluded from use at trial. While there are many exceptions and limits to this general rule<sup>7</sup> (beyond what will be covered within this article), the application of this rule to evidence is well understood in law enforcement circles. And, while the suppression remedy applies more commonly to physical or tangible items, the rule's application clearly encompasses confessions. This became clear in 1963 when the Supreme Court ruled that verbal

evidence obtained in violation of the Fourth Amendment is subject to the remedy of suppression. This rule, established in *Wong Sun v. United States*, has come to be known, and very nearly defined, by the phrase “fruit of the poison tree.”<sup>8</sup> If a proper understanding of the

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Fourth Amendment rule of suppression requires a more formal definition, then *Wong Sun* provided that as well.

We need not hold that all evidence is “fruit of the poisonous tree” simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”<sup>9</sup>

Thus, for purposes of the Fourth Amendment exclusionary rule, suppression is not necessarily automatic: to order the suppression of evidence, including a confession, a court is required to determine if the evidence in question was obtained in violation of the Fourth Amendment and then determine whether anything occurred that may have cleansed the evidence from this violation. The 2003 case of *Kaupp v. Texas*<sup>10</sup> best illustrates the application of the remedy of suppression to a confession.

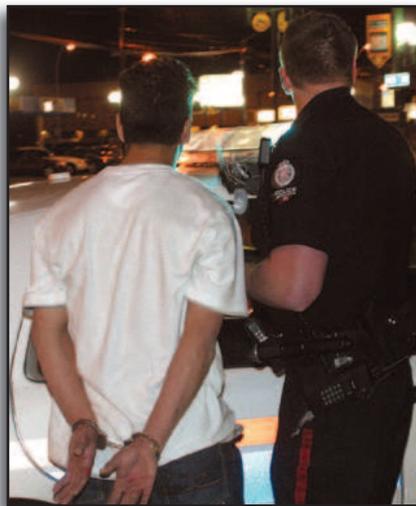
Following the disappearance of 14-year-old Destiny Thetford on January 13, 1999, investigators learned that her 19-year-old half-brother, Nicholas Thetford, had a sexual relationship with her and that both were seen together on the day Destiny went missing. On January 26, 1999, Thetford and Robert Kaupp went to the sheriff's office to be questioned about the disappearance. Kaupp was cooperative during the interview and released. Thetford, after a long interview and failing his third polygraph examination, eventually admitted to stabbing Destiny and hiding her body in a drainage ditch. Thetford also implicated Kaupp in the crime. After obtaining a written statement from Nicholas, detectives sought an arrest warrant for Kaupp. Their request for a warrant was

denied.<sup>11</sup> Undeterred, three detectives and three uniformed officers went to Kaupp's house between 2 and 3 a.m. on the morning of January 27 to "get [Kaupp] in and confront him with what Thetford ha[d] said."<sup>12</sup> Kaupp's father allowed the police officers into the home, and Kaupp was located asleep in his bedroom. Kaupp was told, "we need to go and talk," to which he replied, "OK," before he was handcuffed and escorted from his home into a waiting police car, wearing only boxer shorts and a T-shirt.<sup>13</sup> He then was brought to the scene where Destiny's body was recently located, kept there for between 5 to 10 minutes, driven to the police station, placed in an interview room, unhandcuffed, and read his *Miranda* rights. After initial denials, he admitted his involvement in the crime but denied any role in the murder. Kaupp also provided investigators with a signed statement.<sup>14</sup>

Prior to his trial, Kaupp moved to suppress the oral and written statements he made to investigators on the morning of January 27, claiming that the confession was the result of his unlawful arrest. The trial court denied the motion and ruled that Kaupp was not placed under arrest prior to making the admissions. Kaupp was convicted of murder and sentenced

to 55 years. The Texas Court of Appeals upheld the conviction, and the Court of Criminal Appeals denied review of the case.<sup>15</sup> Kaupp appealed to the U.S. Supreme Court.

According to the Supreme Court, the admissibility of Kaupp's confession turned on the issue of whether Kaupp's



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confession was the product of an illegal arrest. The state did not claim to have probable cause to arrest Kaupp when the officers went to Kaupp's home the morning of January 27, but asserted that Kaupp was not arrested until after he gave the confession. According to the state, Kaupp consented to the encounter with the officers when he said, "OK," and was taken from his bedroom. The facts, however, did not support the state in either position. In essence, the Court held that

the events of the morning of January 27—from being woken up in his bedroom, being handcuffed, being transported to the police station, and being given *Miranda* warnings—led to the conclusion that Kaupp was arrested. According to the Court, no "reasonable person in [Kaupp's] situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed."<sup>16</sup> Because Kaupp was arrested without probable cause to support the arrest, this Fourth Amendment violation required suppression of the product of the unlawful arrest—the confession—unless the state could prove the confession was an "act of free will [sufficient] to purge the primary taint" of the unlawful seizure.<sup>17</sup> In this regard, the Court noted that factors to consider include observance of *Miranda*, the length of time between the arrest and the confession, the presence of intervening circumstances, and the level of misconduct.<sup>18</sup> The Court observed that only one of the above factors was present—the application of *Miranda*—to favor the prosecution.<sup>19</sup> No substantial time passed between the arrest and the confession, and there was no allegation by the state that any significant intervening event occurred between the arrest and confession.<sup>20</sup> The Court determined that

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the application of *Miranda* warnings, standing alone, was insufficient to cleanse Kaupp's statement from the illegal arrest.<sup>21</sup> The Court remanded the case to the state court of appeals. On remand, the state admitted that it was unable to point to any facts that would remove the taint from the unlawful arrest.<sup>22</sup>

The *Kaupp* case provides a simple example of the application of the suppression remedy. Kaupp was seized in violation of the Fourth Amendment when he was arrested without probable cause. The product of that unlawful seizure was the confession that Kaupp gave following his unlawful arrest. Because there was insufficient evidence that any events intervened between the unlawful seizure of Kaupp and the confession made by Kaupp to cleanse the statement from the Fourth Amendment violation, the confession was inadmissible.<sup>23</sup>

### The Fifth Amendment

The Fifth Amendment to the U.S. Constitution, as it relates to the taking of confessions, provides that "no person...shall be compelled in any criminal case to be a witness against himself."<sup>24</sup> In *Miranda v. Arizona*,<sup>25</sup> the Supreme Court held that the environment present in the setting of a custodial interrogation was so coercive that confessions obtained

from a person under these circumstances were presumed to be coerced unless specific warnings were provided and a waiver was obtained. This rule was developed primarily to protect the person's Fifth Amendment privilege against self-incrimination. According to *Miranda*,

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if the warning and waiving procedures are not followed when a person is in custody and subject to interrogation, any statement obtained is inadmissible in the prosecution's case in chief. Thus,

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation, unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.<sup>26</sup>

If a statement obtained in violation of *Miranda* procedures cannot be used by the prosecution in its direct case, what is

the effect on physical evidence located as a result of such a statement? The Supreme Court answered this question in 2004.

Samuel Patane came to the attention of a police officer and a detective who were investigating Patane for separate offenses. Both law enforcement officers went to Patane's home together, the police officer to investigate Patane's violation of a temporary order of protection and the detective to investigate whether Patane, a convicted felon, illegally possessed a pistol. After arriving at the residence and speaking to him, Patane was arrested for violating the order of protection. The detective began advising him of his *Miranda* rights, but did not get past the right to remain silent because Patane interrupted him, claiming that he knew his rights. The advice of rights was never completed.<sup>27</sup> The detective then questioned Patane about the pistol, and, though initially reluctant to discuss the gun, Patane said, "I am not sure I should tell you anything about the [handgun] because I don't want you to take it away from me."<sup>28</sup> The detective persisted in light of this response. Patane admitted that the pistol was in his bedroom and gave the detective permission to take the gun. The detective found and seized the pistol. After his indictment charging him



as a felon in possession, Patane sought suppression of the pistol.<sup>29</sup>

The district court suppressed the gun,<sup>30</sup> determining that the officers lacked probable cause for the arrest and the pistol was a fruit of the unlawful arrest. The Tenth Circuit Court of Appeals, while reversing the district court on the issue of probable cause, suppressed the gun on the grounds that it was the fruit of Patane's unwarned statement.<sup>31</sup> The case was then appealed to the U.S. Supreme Court.

The issue before the Supreme Court was "whether a failure to give a suspect the warnings prescribed by *Miranda v. Arizona* requires suppression of the physical fruits of the suspect's unwarned but voluntary statements."<sup>32</sup> To resolve the question of the admissibility of the gun and whether its

suppression was required by the exclusionary rule, the Court first determined what constitutional right was implicated. Because the circuit court of appeals held that Patane was lawfully arrested based on probable cause, there was no Fourth Amendment violation. What was clear to the Supreme Court, however, based on the uncontested facts, was that the detective obtained Patane's statements without properly advising Patane of his rights pursuant to *Miranda v. Arizona*. Thus, the legal issue for the Supreme Court focused on the application of the Fifth Amendment to the statements Patane made while in custody.

According to Justice Thomas, writing for the majority of the Supreme Court, the core protection of the Fifth Amendment is its prohibition of "compelling a criminal defendant to testify against himself

at trial," and the Fifth Amendment "cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements."<sup>33</sup> There was no claim that Patane's statements about the pistol were made involuntarily in violation of the Fifth Amendment. But, the Court has provided protection of Fifth Amendment rights beyond the core protections. In this regard, Justice Thomas noted that the Supreme Court has created certain rules designed to protect the Fifth Amendment's privilege against self-incrimination, including the procedures set forth in the *Miranda* decision. According to Justice Thomas,

...in *Miranda*, the Court concluded that the possibility of coercion inherent in custodial interrogations unacceptably raises the risk that the suspect's privilege against self-incrimination might be violated. To protect against this danger, the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief.<sup>34</sup>

Because the *Miranda* rule provides protections that go beyond the "actual protections of the Self-Incrimination Clause," the Court noted that statements obtained without compliance

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with *Miranda*, unlike statements that actually violate the Fifth Amendment, can be used in certain situations because they do not violate the Fifth Amendment.<sup>35</sup> For example, “statements taken without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant’s testimony at trial.”<sup>36</sup> According to the Court, the failure to give *Miranda* warnings by itself does not violate a suspect’s Fifth Amendment rights. A violation of *Miranda* may occur only when the suspect’s unwarned statement is introduced at trial, and the proper remedy for such a violation is the exclusion of the unwarned statement.<sup>37</sup> Accordingly, “the nontestimonial fruit of a voluntary statement... does not implicate the Self-Incrimination Clause” because the “admission of such fruit presents no risk that a defendant’s coerced statements (however defined) will be used against him at a criminal trial.”<sup>38</sup> Finally, the Court determined that there was no reason to apply the remedy of suppression to the pistol by noting that it had previously decided not to apply suppression to mere failures to give *Miranda* warnings.<sup>39</sup> Finding that the Glock pistol should not be suppressed, the Supreme Court reversed the decision of the court of appeals.<sup>40</sup>

The *Patane* case provides a straightforward application

of the *Miranda* rule to statements and also highlights the distinction between the Fifth Amendment and *Miranda*. In the case, there was no argument that Patane’s statement was involuntary or coerced—which would have been a violation of the Fifth Amendment. Neither the officer nor the detective compelled Patane to make a statement about the pistol. Their only omission was in

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questioning Patane without finishing the required warnings and obtaining a waiver. Patane’s statement—unwarned but otherwise voluntary—was not obtained in violation of the Fifth Amendment. According to the Court in *Patane*, the full and complete remedy for the unwarned statement is the exclusion of the statement from the prosecution’s direct case. The exclusion of the statement fully protected Patane’s Fifth Amendment rights. The nontestimonial evidence—the pistol—obtained as result of Patane’s unwarned statement was not the product of

a constitutional violation and, therefore, was admissible.

### **The Sixth Amendment**

The Sixth Amendment to the U.S. Constitution guarantees that “[i]n all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence.”<sup>41</sup> To protect this right, the Supreme Court has held that a defendant is entitled to have counsel present at certain critical stages, including postindictment interactions between the defendant and the government.<sup>42</sup> The Sixth Amendment protections only apply at certain critical stages—after the filing of a formal charge (in federal procedure an Indictment of Information) or after a court appearance on the charge. And, because the right applies to the crimes that are the subject of the formal charges or court appearance, it is said to be crime specific.<sup>43</sup> Once the Sixth Amendment right to counsel attaches to the defendant on a particular charge, statements deliberately elicited from a defendant by the government may not be used at trial unless counsel was present when the statement was made or unless the defendant properly waived his Sixth Amendment right. But, does a Sixth Amendment violation prohibit the prosecution from using a defendant’s statements for impeachment

purposes? The Supreme Court answered this question in 2009.

In January 2004, Rhonda Theel and Donnie Ray Ventris went to the home of Ernest Hicks likely because they learned that Hicks carried large amounts of cash. One or both killed Hicks, took \$300 and his cell phone, and fled in his pickup truck.<sup>44</sup> Theel and Ventris were arrested and charged with various crimes for these acts. Theel pleaded guilty to robbery and agreed to testify against Ventris. Prior to his trial, a police informant was placed in the holding cell with Ventris. After the informant engaged Ventris in conversation by telling Ventris that he looked like he had “something more serious weighing on his mind,” Ventris confessed to the informant that he had “shot this man in his head and chest” and stolen some property from him as well.<sup>45</sup> At his trial, Ventris took the stand and blamed Theel for both the robbery and murder.<sup>46</sup> The prosecution, over the defendant’s objection, was permitted to call the cell-mate informant to testify to the prior statement Ventris made about the murder. The jury acquitted Ventris of murder, but convicted him of burglary and robbery charges. Ventris appealed his conviction. The Kansas Supreme Court held that the statement made by Ventris to the cell-mate informant was not admissible at

trial for any reason, including impeachment, and reversed the conviction.<sup>47</sup> The state appealed to the U.S. Supreme Court.

The Supreme Court agreed to hear the appeal to determine “whether a defendant’s incriminating statement to a jailhouse informant, concededly elicited in violation of Sixth Amendment strictures, is admissible at



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trial to impeach the defendant’s conflicting statement.”<sup>48</sup> The Court began the opinion by noting that while the Sixth Amendment’s core protection is “the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial,”<sup>49</sup> the right extends further. Also included in the Sixth Amendment is the right to have an attorney at certain “critical interactions between the defendant and the State,” including “the deliberate elicitation by law enforcement officers

(and their agents) of statements pertaining to the charge.”<sup>50</sup> According to the Court, which assumed that Ventris’s Sixth Amendment right was violated when he engaged in a conversation by the cell-mate informant, the question is the scope of the remedy to be imposed for the violation. Here, the Court noted that “excluding tainted evidence for impeachment purposes is not worth the candle.”<sup>51</sup> This is so because the interests safeguarded by excluding the evidence for impeachment purposes are “outweighed by the need to prevent perjury and to assure the integrity of the trial process.”<sup>52</sup> Thus, while the violation should prevent the state from using the evidence affirmatively, it should not shield the defendant from his contradictions or untruths.<sup>53</sup>

The Court considered the possibility that because the unlawfully obtained statement could be used for impeachment purposes, there is incentive for police officers to obtain the statement in violation of the Sixth Amendment. To this end, the Court believed that police officers have significant incentive to comply with the Constitution because “statements lawfully obtained can be used for all purposes....” Even though there may be some incentive to try to obtain impeachment material, the Court finds that this potential benefit is too speculative and not weighty enough to

overcome the cost of permitting a defendant to commit perjury unchallenged.<sup>54</sup> Accordingly, the Court held that the “informant’s testimony, concededly elicited in violation of the Sixth Amendment, was admissible to challenge Ventris’s inconsistent testimony at trial” and reversed the judgment of the Kansas Supreme Court.<sup>55</sup>

The *Ventris* case also provides a clear application of the Sixth Amendment to a confession obtained in violation of its protections. It is important to note here that the Court accepted the premise that the comments by the jailhouse informant amounted to an interrogation of Ventris. Because Ventris’s Sixth Amendment rights had attached by virtue of his indictment, no statement about the pending charge could be deliberately elicited from Ventris unless he had counsel present or if he was advised of his Sixth Amendment rights and voluntarily waived them. Because the questioning by the cell-mate informant was assumed to amount to deliberate elicitation and because Ventris’s counsel was not present at that time and Ventris had not waived his Sixth Amendment rights, the statement was taken in violation of the Sixth Amendment, and the informant was prohibited from testifying during the prosecution’s direct case. However, once Ventris took the witness

stand and testified in contradiction to the statements he made to the informant, the prosecution was entitled to use the statements to impeach Ventris’s testimony. If Ventris did not take the witness stand, the prosecution would not have been able to introduce the testimony of the informant.

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### Conclusion

The cases discussed in this article describe the different costs imposed for obtaining a confession in violation of the safeguards found within the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution. In light of the continued importance of confessions to the successful prosecution of criminals, investigators should ensure that confessions obtained comply with the Constitution’s demands. In doing so, investigators can ensure that confessions obtained can be fully and affirmatively used to their fullest potential by the prosecution. ♦

### Endnotes

<sup>1</sup> Jim Markey, “After the Match: Dealing with the New Era of DNA,” *FBI Law Enforcement Bulletin*, October 2007, 1-4.

<sup>2</sup> *Culombe v. Connecticut*, 367 U.S. 568 (1961).

<sup>3</sup> *Id.*

<sup>4</sup> U.S. CONST. Amend IV.

<sup>5</sup> *Weeks v. United States*, 232 U.S. 383 (1913).

<sup>6</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>7</sup> Exceptions and limitations to the application of the suppression remedy include standing (*Rakas v. Illinois*, 439 U.S. 128 1978); good faith reliance on a search warrant (*United States v. Leon*, 468 U.S. 897 (1984); attenuation (*Wong Sun v. United States*, 371 U.S. 471 (1963); and independent source and inevitable discovery (*Murray v. U.S.*, 487 U.S. 533 (1988). See also *Hudson v. Michigan*, 547 U.S. 546 (2006) (Suppression not required for when search warrant executed in violation of knock and announce rule); and *Virginia v. Moore*, 553 U.S. 164 (2008) (Suppression not required for an arrest made in violation of state statute but constitutionally permissible).

<sup>8</sup> 371 U.S. 471 (1963).

<sup>9</sup> *Id.* at 487, 488.

<sup>10</sup> 538 U.S. 626 (2003).

<sup>11</sup> *Kaupp v. State of Texas*, 2001 WL 619119 (Tex. App.- Hous. (14 Dist.)) (Unpublished opinion).

<sup>12</sup> *Kaupp v. Texas*, 538 U.S. 626, 628 (2003).

<sup>13</sup> *Id.* at 629.

<sup>14</sup> *Id.* at 628, 629.

<sup>15</sup> *Id.* at 629.

<sup>16</sup> *Id.* at 632.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 633.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Kaupp v. State of Texas*, 2004 WL 114979 (Tex.App.Hous. (14 Dist.)) (Unpublished opinion).

<sup>23</sup> Events that a court should consider in this regard are set forth in *Brown v. Illinois*, 422 U.S. 590 (1975).