No. 02-1183

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

Petitioner,

— v.—

SAMUEL FRANCIS PATANE,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, AND THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation composed of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 400,000 members. The California Attorneys for Criminal Justice (CACJ), a nonprofit corporation founded in 1972, has over 2,400 dues-paying members. *Amici* are dedicated to ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of American criminal justice systems, and preserving the principles of liberty and equality embodied in the Bill of Rights.

STATEMENT OF THE CASE

Respondent Patane was arrested for harassing and menacing Linda O'Donnell, a former girlfriend. On June 3, 2001, he was released on bond, subject to a temporary restraining order that forbade both in-person and telephonic contact with O'Donnell for 72 hours after his release. On June 6, Detective Benner, a member of a local drug interdiction unit, received a telephone call from a federal agent with the Bureau of Alcohol, Tobacco, and Firearms (ATF). The ATF agent informed Benner of a report that the respondent was a convicted felon and was in possession of a Glock .40 caliber pistol. Benner called O'Donnell, who told him that respondent had the pistol with him at all times.

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1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

At the same time that Benner was calling O'Donnell, Officer Fox arrived at O'Donnell's home. Fox was responding to O'Donnell's claim that respondent had made telephonic contact in violation of the restraining order. O'Donnell told Fox that she was afraid for her safety and made additional allegations about respondent.

After Officer Fox informed Detective Benner that she was planning to arrest respondent for violating the restraining order, Fox and Benner went to respondent's home. Although respondent denied that he had called or otherwise contacted O'Donnell, Officer Fox informed him that he was under arrest and handcuffed him. At this point, Detective Benner approached respondent and began to recite the *Miranda* warnings. Upon being informed of the right to remain silent, respondent asserted that he knew his rights. Detective Benner neglected to complete the requisite admonitions. On appeal, the Government has conceded that this failure to complete the *Miranda* warnings violated the unequivocal mandate that all suspects subject to custodial interrogation be fully warned.

Detective Benner declared that he was interested in the guns respondent owned. Respondent stated that the police already had custody of his .357. When Benner replied that he was "more interested in the Glock," respondent said he was unsure whether to tell Benner about it. Nonetheless, Benner asserted that he needed to know about the weapon, prompting respondent to reply, "The Glock is in my bedroom on a shelf, on the wooden shelf." Upon seeking and receiving permission, Benner immediately entered the home, found the firearm where respondent had said it was located, and took possession of it.

Detective Benner apprised respondent that he would not be arrested for possession of the weapon because Benner wanted to conduct additional investigation. Officer Fox then

transported respondent to the police station, booking him for violation of the restraining order.

Respondent was subsequently indicted for possession of a firearm by a convicted felon, a violation of 18 U.S.C. § 922(g)(1). The district court granted respondent's motion to suppress the gun, ruling that it was the fruit of an arrest made without probable cause. On appeal by the Government, the United States Court of Appeals for the Tenth Circuit disagreed with the district court's probable cause determination, but concluded, nonetheless, that suppression of the firearm was appropriate. *United States v. Patane*, 304 F.3d 1013, 1018-1019 (10th Cir. 2002). The appellate court first recognized that the Government had "correctly concede[d]" that the failure to finish the prescribed warnings violated the dictates of *Miranda*. *Id*. at 1018. The court then concluded that the *Miranda* violation not only rendered the respondent's statements inadmissible, but also required suppression of the gun–"physical evidence that was the fruit of the *Miranda* violation in this case." *Id*. at 1019.

The United States petitioned this Court for a writ of *certiorari* to the United States Court of Appeals for the Tenth Circuit. On April 21, 2003, this Court granted the writ.

SUMMARY OF ARGUMENT

The Fifth Amendment freedom not to be "compelled to be a witness against" oneself prohibits the government from using both an accused's compelled testimony and nontestimonial derivative evidence to secure a conviction. This understanding of the privilege against compulsory self-incrimination, which has endured for well over a century, is reconcilable with the conclusion that the Fifth Amendment permits the government to rely on purely nontestimonial evidence compelled from an accused. The Constitution clearly

distinguishes between permissible incrimination by evidence with no connection to compelled testimony and impermissible incrimination by compelled testimony and evidence derived therefrom.

The Fifth Amendment grants a *right* against both the direct and indirect use of extorted testimony–a *constitutional entitlement to exclusion*. The right to exclude compelled testimony and its products is essential to further the purpose of the privilege–to protect against incrimination by thoughts forced from one's mind. A right encompassing both compelled statements and their products is also essential to preserve the "complex of values" underlying the privilege–our commitment to an accusatorial process, our principles of fair play, our respect for the human personality, an entitlement to the privacy of thoughts, and a concern with untrustworthy evidence that might lead to conviction of the innocent.

The *Miranda* doctrine furnishes "constitutionally required" protection against the "unacceptably great" risks of Fifth Amendment violations inherent in custodial interrogation. The exclusionary safeguard provided by *Miranda* is a critical part of that protection, barring evidence that harbors an intolerable likelihood of constitutionally forbidden compulsion. Although *Miranda*'s shelter may occasionally extend beyond that mandated by the privilege, its marginal overprotection is amply justified. The alternative approach, case-by-case adjudication, would be seriously underprotective, leaving fundamental rights unvindicated.

The exclusion of both statements and derivative evidence is essential to ensure that *Miranda* accomplishes its aims. Like the exclusion of statements, a derivative evidence prohibition deters *Miranda* violations and provides protection against untrustworthiness. Most important, it safeguards a "fundamental trial right," shielding against a constitutionally

cognizable likelihood of compulsory self-incrimination and against serious damage to enduring constitutional values.

Because *Miranda*'s shelter may extend beyond the core protection mandated by the Fifth Amendment, interest balancing is permissible in defining the required scope of *Miranda* exclusion. Limitations on the breadth of exclusion are justified *only* when the ordinarily unacceptable risks of compulsory self-incrimination are diminished or the usual costs of exclusion are heightened. In this case, an inexcusable violation of the clear mandate that *all* suspects be fully warned yielded statements. Official exploitation of those statements led directly and immediately to the weapon at issue. Nothing intervened to weaken the connection between the statements and the discovery of the weapon, and the costs of exclusion were ordinary–the loss of probative evidence of guilt.

When the causal connection is strong, as in this case, derivative evidence poses threats to Fifth Amendment rights identical to those posed by statements obtained in violation of *Miranda*. Consequently, unless the price of suppression is atypically high, the balance of interests heavily favors a derivative evidence principle–a rebuttable presumption of exclusion. Derivative evidence should be admissible *only* when the government shows "attenuation" of the connection between the statements and the evidence.

The view that derivative evidence is *never* subject to exclusion reflects a skewed balance that is irreconcilable with the Court's consistent approach to delineating *Miranda*'s reach. *Miranda*, *Dickerson*, and the exclusionary rulings in *Harris*, *Tucker*, and *Elstad* confirm that the Court has avoided extreme answers to *Miranda* questions, and has consistently struck balances that fairly accommodate both constitutional rights and law enforcement interests. The proposed approach–a rebuttable presumption of derivative evidence

exclusion–is consonant with this pattern, does not result in exclusion as broad as that mandated by the Fifth Amendment itself, and finds additional support from the Court's recent conclusion that *in-court* protection against conviction based on compelled testimony is the essence of the Fifth Amendment privilege. The excessive tolerance for derivative evidence advocated by the government would evince disrespect for an invaluable constitutional liberty, undermine the vital roles *Miranda*'s constitutionally required safeguards play in preserving that liberty, and send an unfortunate message to the people and to law enforcement.

ARGUMENT

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION ERECTS A BAR TO INCULPATORY, NONTESTIMONIAL EVIDENCE THAT IS THE PRODUCT OF COMPELLED TESTIMONIAL ADMISSIONS

The question in this case is whether nontestimonial evidence derived from statements secured in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), is subject to exclusion. Because *Miranda* "is of constitutional origin," *Dickerson v. United States*, 530 U.S. 428, 439 n.3 (2000), rooted firmly in the Fifth Amendment, an examination of that guarantee's treatment of derivative evidence is indispensable. The Fifth Amendment's intolerance of convictions based on the products of testimonial compulsion provides vital support for a presumptive rule of suppression in *Miranda* contexts.

A. The Court's Precedents Uniformly Recognize A Prohibition On Incrimination By Any Evidence Derived From Compelled Testimony

Starting over a century ago, *see Counselman v. Hitchcock*, 142 U.S. 547 (1892), and consistently since then, the Court has interpreted the privilege against compulsory self-incrimination to provide protection against the government's use of compelled testimonial admissions *and* any evidence, whether testimonial or not, derived from compelled testimony. *See Kastigar v. United States*, 406 U.S. 441, 459 (1972) (protection against "use and derivative use . . . is the degree of protection that the Constitution requires"); *Doe v. United States*, 487 U.S. 201, 208 n.6 (1988) (Fifth Amendment includes a "prohibition of derivative use" of compelled testimony). The cases endorsing this principle have all been concerned with the extent of "immunity" constitutionally required when formal, judicial compulsion is used to extract a statement. The governing principle, however, is broad enough to forbid the use of nontestimonial evidence derived from testimonial admissions produced by informal, extra-judicial compulsion. *See Kastigar v. United States*, 406 U.S. at 461-62 (confessions coerced by the authorities and "evidence derived" therefrom are "inadmissible" under the Fifth Amendment).[2]

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2. *See also Chavez v. Martinez*, 123 S.Ct. 1994, 2002 (2003) (Opinion of Thomas, J.)(victims of "coercive police interrogations have an *automatic* protection" against the use of derivative evidence); *Dickerson v. United States*, 530 U.S. at 452 (Scalia, J., dissenting)(if a statement is "obtained in violation of the Fifth Amendment, the statement and its fruits [are] excluded"); *Oregon v. Elstad*, 470 U.S. 298, 351 (1985)(Brennan, J., dissenting)(the introduction of physical evidence and other "fruits" of a compelled statement "at trial would violate the Self-Incrimination Clause just as surely as if the original confession itself were introduced").

The bar to nontestimonial derivative evidence is entirely consistent with the conclusion that the Fifth Amendment permits the government to introduce nontestimonial evidence compelled from an accused. *See Schmerber v. California*, 384 U.S. 757 (1966); *see also Dionisio v. United States*, 410 U.S. 1 (1973). The Constitution allows convictions based on "real or physical" evidence forced from the defendant. *See Pennsylvania v.*

(continued...)

This constitutional ban on compelled testimony and its evidentiary products is no mere "exclusionary rule" and "poisonous fruits" doctrine. It is the substance, the very essence of the freedom not to be "compelled to be a witness" against oneself. The Fifth Amendment privilege is violated *not* by out-of-court compulsion itself, but *only* by the *use* of the products of that compulsion to incriminate. *See Chavez v. Martinez*, 123 S. Ct. at 2001 (Opinion of Thomas, J.); *id*. at 2006 (Souter, J., concurring in the judgment); *id*. at 2008 (Scalia, J., concurring in part in the judgment). Thus, the exclusion of extorted testimony and evidence derived therefrom is an integral part of the fundamental liberty promised by the Self-Incrimination Clause.[3]

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2. (...continued)
Muniz, 496 U.S. 582, 590 (1990). It does not permit the authorities to rely on or exploit "testimony"–"knowledge of facts" or "thoughts and beliefs"–forced from an accused's mind. *See Doe v. United States*, 487 U.S. 201, 210-212 (1988). The bold constitutional line is *not* between testimonial and nontestimonial evidence. Rather, it is situated between admissible nontestimonial evidence *with no connection to* compelled thoughts and inadmissible nontestimonial evidence *derived from* compelled testimonial revelations. *See id*., 487 U.S. at 211 n. 10 (the distinction is "between the suspect's being compelled himself to serve as evidence and the suspect's *being compelled to disclose or communicate information or facts that might* serve as or *lead to* incriminating evidence")(emphasis added). The determinative question is whether "'compelled testimony'" is a "'link in the chain of evidence.'" *Id*. at 208 n.6.

3. *See Kastigar v. United States*, 406 U.S. at 453 (Fifth Amendment privilege protects against "evidence derived directly and indirectly" from compelled testimony because it "prohibits the prosecutorial authorities from using . . . compelled testimony in *any* respect"); *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 79 (1964) ("to implement" the privilege, the government "must be prohibited from making . . . use of compelled testimony and its fruits"); *see also New York v. Quarles*, 467 U.S. 649, 658 n.7 (1984)(exclusion of compelled statements is a "constitutional imperative").

B. The Values Underlying The Fifth Amendment Privilege Provide Compelling Support For The Prohibition On Nontestimonial Derivative Evidence

The constitutional barrier to all derivative evidence promotes the objectives of and preserves the values that underlie the Fifth Amendment privilege. A contrary view would undermine those objectives and jeopardize those values. The Fifth Amendment "assures that a citizen [will] not [be] compelled to incriminate himself by his own testimony." *Kastigar v. United States*, 406 U.S. at 461. The guarantee's "sole concern is to afford protection against being 'forced to give testimony leading to the infliction'" of punishment. *Id*. at 453. Consequently, shelter against "evidence derived directly and indirectly" from compelled testimony, *id*., is necessary to combat "the dangers against which the privilege protects." *Id*. at 449.

According to the Fifth Amendment, the government must "establish guilt by evidence independently and freely secured," and "may not by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The privilege embodies "the recognition that the American system of criminal prosecution is accusatorial, not inquisitorial," *id*. at 7, and "reflects a complex of our fundamental values and aspirations." *Kastigar v. United States*, 406 U.S. at 444. Among those values and aspirations is "*our sense of fair play* which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; *our respect for the inviolability of the human personality* and of the *right* of each individual '*to a private enclave* where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection

to the innocent.'" *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964)(emphasis added; citations omitted).

The use of nontestimonial evidence derived from compelled admissions imperils these values. Derivative evidence is no more "independently and freely secured" than the admissions themselves. When the prosecution uses it to convict, it surely has "by coercion prove[n] a charge against an accused out of his own mouth." The result is an "inquisitorial" process in which extorted contents of an accused's mind have "led to the infliction of punishment." Whether compelled thoughts are used directly or exploited to acquire the evidence used to incriminate, the "sense of fair play," the "respect for the inviolability of the human personality," and the entitlement to a "private enclave" preserved in the Fifth Amendment are offended.[4] The trial afforded is not the one guaranteed by the

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4. As with many Bill of Rights liberties, a concern with risks of unreliability is *among* the "complex of values" underlying the privilege. *See Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. at 55 (citing "distrust of self-deprecatory statements" and a "realization that the privilege" often protects "the innocent"). Physical evidence derived from compelled testimony is not *always* unqualifiedly reliable. For example, under official pressure, an individual might lead officers to contraband. Although the contraband belongs to others, the surrounding circumstances could erroneously suggest that the individual who provided the lead was guilty of possession. An unjustified conviction could result.

More important, even if derivative evidence is ordinarily more trustworthy than "self-deprecatory statements," there is ample reason for constitutional concern. For good reason, unreliability is not a necessary predicate for Fifth Amendment exclusion. *See Michigan v. Tucker*, 417 U.S. 433, 448 n.23 (1974)(coerced statements are not rendered admissible by their truthfulness); *see also Spano v. New York*, 360 U.S. 315, 320 (1959)("[t]he abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness"); Yale Kamisar, *On the "Fruits" of* Miranda *Violations*, *Coerced Confessions, and Compelled*

(continued...)

Framers.

In sum, the core Fifth Amendment objectives necessitate protection against incrimination by derivative, nontestimonial evidence. Exclusion is an indispensable element of the right not to be compelled to be a witness against oneself.

II. *MIRANDA*'S FIFTH AMENDMENT FOUNDATIONS AND THE CONSTITUTIONAL JUSTIFICATIONS FOR EXCLUDING EVIDENCE UNDER THE *MIRANDA* DOCTRINE DICTATE A PRESUMPTION OF EXCLUSION FOR DERIVATIVE EVIDENCE

Because *Miranda*'s constitutionally-rooted protections may extend, in a particular case, beyond the mandates of the Fifth Amendment, that provision's bar to derivative evidence does not conclusively answer the question before the Court: whether a presumption of exclusion governs evidence derived from *Miranda* violations.[5] Nonetheless, the privilege's

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4. (...continued)
Testimony, 93 Mich. L. Rev. 929, 936-40 (1995) (concern with unreliability is not the primary basis for exclusion of coerced confessions). Whether derivative evidence is trustworthy or not, its use violates accusatorial system principles of fair play and breaches the constitutional compact between state and citizen. It has never been suggested that constitutional shelter is limited to instances in which *every* Fifth Amendment value is at risk. If that were the case, then trustworthy extorted *statements* would also be admissible.

5. Whether *Miranda* doctrine includes a derivative evidence principle is a genuinely unsettled question. In *Michigan v. Tucker*, 417 U.S. at 447, the Court refused to "resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded," choosing to "place [its] holding on a narrower ground." *See Patterson v. United States*, 485 U.S. 922 (1988) (White, J., dissenting from (continued...)

hostility to derivative evidence, coupled with other critical factors, militates strongly in favor of a presumption of exclusion under *Miranda*.

A. *Miranda* Provides "Constitutionally Required" Protection Against "Unacceptably Great" Risks of Fifth Amendment Violations

In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court explained how the Fifth Amendment premises that have always been the foundation of *Miranda* are reconcilable with the decisions denying that *Miranda*'s protections are constitutional rights and characterizing *Miranda*'s dictates as prophylactic standards or procedural safeguards. *See Dickerson v. United States*, 530 U.S. at 437-41. The *Miranda* requirements–warnings, waiver, and the additional safeguards triggered by assertion of the entitlements to silence or counsel–are not constitutional rights that belong to suspects subjected to custodial interrogation. *See Michigan v. Tucker*, 417 U.S. 433, 444 (1974). Nor is the exclusion of evidence secured in violation of these requirements a Fifth Amendment right. *See New York v. Quarles*, 467 U.S. 649, 658 n.7 (1984). Instead, *Miranda*'s safeguards are "constitutional requirement[s] adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause." *Chavez v. Martinez*, 123 S.Ct. 1994, 2013 (2003)(Kennedy, J., concurring in part and dissenting in part). "[T]he protections

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5. (...continued)
denial of certiorari). Although *dicta* in *Oregon v. Elstad*, 470 U.S. 298 (1985), intimated one possible answer to the broader question, the *Elstad* holding focused narrowly on second confessions following compliance with *Miranda*. *See Patterson v. United States*, 485 U.S. at 923. In the only case presenting a clear opportunity to provide closure, an evenly divided Court failed to resolve the issue. *See Massachusetts v. White*, 439 U.S. 280 (1978). Thus, an answer must be found not in precedent, but in the constitutional principles that undergird and justify *Miranda*.

announced in *Miranda*"–both the constraints on custodial interrogation and the courtroom bar to statements–are "constitutionally required," *Dickerson v. United States*, 530 U.S. at 438, and "'necessary to assure compliance with the dictates of the . . . Constitution." *Id*. at 439 (quoting *Harris v. Rivera*, 454 U.S. 339, 344-345 (1981). *Miranda* prescribes essential "constitutional standards for protection of the privilege" against compulsory self-incrimination and furnishes necessary shelter against "unacceptably great" risks that Fifth Amendment rights will otherwise be lost. *Id*. at 440, 442.

The *Miranda* safeguards diminish the constitutionally unacceptable risks by dispelling the compulsion *inherent* in custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 458, 467 (1966). The *Miranda* exclusionary doctrine provides even more critical protection against those risks. The failure to honor *Miranda*'s dictates gives rise to a constitutionally cognizable "likelihood" that any statements made have been compelled.[6] *Miranda*-based exclusion erects an essential barrier at the courtroom door, screening out statements that pose "unacceptably great" risks of violating the fundamental right not to be compelled to be a witness against oneself.[7]

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6. *See New York v. Quarles*, 467 U.S. 649, 656 (1984)(*Miranda* requirements counter the "likelihood" of victimization by "constitutionally impermissible practices"). By reducing the "likelihood" of official compulsion, *Miranda*'s constraints on custodial interrogation prevent the generation of evidence that would jeopardize Fifth Amendment rights if introduced at trial. *See Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) (*Miranda* provides "particular and systemic assurances that coercive pressures of custody are not the inducing cause" of statements).

7. *See Chavez v. Martinez*, 123 S.Ct. at 2004 (Opinion of Thomas, J.)(*Miranda* exclusion is "a prophylactic measure to prevent violations of the . . . Self-Incrimination Clause"); *id*. at 2007 (Souter, J., concurring in the judgment)(*Miranda* reflects a judgment that the "core" Fifth Amendment "guarantee . . . would be at . . . risk" without the protections it affords).

In some cases, *Miranda*'s shelter may extend beyond the precise commands of the Fifth Amendment. Despite the inherent "likelihood" of official pressure to speak, a particular custodial interrogation might not generate actual compulsion. The *Miranda* scheme still applies, instructing officers to abide by the safeguards needed to combat the pressures that are ordinarily present. Moreover, *Miranda*'s exclusionary rule mandates the suppression of statements made without those safeguards. If officers have failed to follow the *Miranda* rules, but there is no additional proof of compulsion to speak, a confession that "'*might* be voluntary'" will be barred from trial. *See Minnick v. Mississippi*, 498 U.S. at 151 (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)(emphasis added)); *see also Oregon v. Elstad*, 470 U.S. at 307.

In a perfect world, judges could accurately and efficiently ascertain whether each suspect subjected to custodial interrogation was compelled to speak. The marginal overprotection of core constitutional rights that results from *Miranda*'s bright lines would not be necessary to preserve the Fifth Amendment privilege. The Court's long experience with police practices and resulting confessions–both before and since *Miranda*–has provided convincing evidence that such perfection is simply unattainable. The choice, therefore, is between case-by-case adjudication that fails to identify compelled statements and uniform, general standards that inaccurately classify some voluntary statements. The case-by-case approach would seriously *underprotect* Fifth Amendment rights, permitting an intolerable amount of unconstitutional compulsory self-incrimination–*i.e.*, it would leave constitutional rights unvindicated far too often. While the *Miranda* approach may overprotect those fundamental rights, occasionally preventing the government from proving its case with acceptable evidence, it reflects a firmly-grounded judgment that the severe constitutional damage that would otherwise result offsets the limited number of instances in

which suppression blocks legitimate convictions.[8] For these reasons, the *Miranda* rules and exclusionary doctrine, or fully effective equivalents, qualify as "constitutional requirement[s]" essential "to implement the Self-Incrimination Clause." *Chavez v. Martinez*, 123 S.Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part).

B. The Exclusion Of Both Statements Secured In Violation of *Miranda* And Evidence Derived From Those Statements Safeguards Fundamental Fifth Amendment Values

The exclusion of statements obtained in violation of *Miranda* rests, in part, on deterrence and trustworthiness premises. *See Oregon v. Elstad*, 470 U.S. at 308; *Michigan v. Tucker*, 417 U.S. at 446-49.[9] In *Withrow v. Williams*, 507 U.S. 680 (1993), however, the Court made it clear that these "twin rationales," *Oregon v. Elstad*, 470 U.S. at 308, are *not the sole justifications* for *Miranda*'s exclusionary doctrine. By forbidding statements that entail "unacceptably great" risks of

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8. The number of cases in which *Miranda* exclusion overprotects by barring probative, voluntary statements is relatively small for at least two reasons. First, the inherent risk of compulsion due to custodial interrogation is high. When compulsion is present, exclusion is not overprotective. In addition, it is easy to comply with *Miranda*'s safeguards. *See Withrow v. Williams*, 507 U.S. at 695 (observing that there is "little reason to believe that the police today are unable . . . to satisfy *Miranda*'s requirements"). Officers can reduce the risk of having confessions excluded by complying with the requirements of *Miranda*. Many warned suspects choose to waive the *Miranda* protections and make admissible statements.

9. By deterring unregulated custodial interrogation, suppression diminishes the risks that compelled testimonial evidence will be generated. If such evidence never comes into existence, it cannot incriminate an accused. Moreover, the exclusion of untrustworthy admissions prevents unreliable convictions–one of the Fifth Amendment's objectives. *See Withrow v. Williams*, 507 U.S. 680, 692 (1993).

compulsion, "*Miranda* safeguards 'a fundamental *trial* right.' *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added)." *Withrow v. Williams*, 507 U.S. at 691. Thus, exclusion under *Miranda* is *much more* than a mere deterrent or shield against untrustworthiness. The *Miranda* bar furnishes critical protection for core Fifth Amendment values. By preventing actual deprivations of constitutional rights, exclusion promotes our preference for an accusatorial justice system, protects against inhumane treatment, enforces our dedication to principles of fair play that insist on balance between the state and individuals and require the government to carry its burden of proof without relying on thoughts forced from the mind of the accused, ensures respect for human dignity, and safeguards the entitlement to preserve the privacy of thoughts. *See Withrow v. Williams*, 507 U.S. at 692.[10]

A prohibition on derivative evidence is equally necessary to safeguard the Fifth Amendment "trial right" and prevent unwarranted erosion of the values underlying the privilege.[11] If statements are excluded because unrestrained custodial interrogation engenders "unacceptably great" risks of compulsion and because conviction based on those statements endangers the "complex of values" underlying the privilege, then evidence that is the fruit of those identical risks poses unquestionable, indeed identical, constitutional perils.

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10. *See* discussion *supra*, section I.B. Because the out-of-court conduct deterred by *Miranda* exclusion does not actually violate the Fifth Amendment, in one sense, the *Miranda* exclusionary rule accomplishes *less* than the Fourth Amendment rule. *See Oregon v. Elstad*, 470 U.S. at 305-06. On the other hand, because *Miranda* exclusion *actually prevents the violation of a fundamental right at trial*, it accomplishes considerably *more* in the courtroom than the nonremedial, purely deterrent Fourth Amendment rule. *See Withrow v. Williams*, 507 U.S. at 691-92.

11. The exclusion of derivative evidence also deters *Miranda* violations and can guard against untrustworthiness, as well.

Evidence derived from disclosures that are likely to have been forced from an accused's mind can render a trial process inquisitorial and violate revered principles of fair play, decent treatment, and privacy. The rationales for *Miranda* exclusion recognized in *Withrow* surely extend to derivative evidence.

C. The Balance of Interests Tips Decidedly In Favor Of A *Miranda* Derivative Evidence Principle That Justifies Exclusion In This Case

If *Miranda*-based exclusion were coextensive with the constitutional prohibition of compulsory self-incrimination, there would be no occasion to balance interests. The categorical Fifth Amendment barrier to compelled testimony and its products would govern. Evidence secured in violation of *Miranda*, however, is not barred because admission is *certain* to violate the Fifth Amendment. Exclusion is constitutionally required because the *risks* of a Fifth Amendment violation are "unacceptably great." *Dickerson v. United States*, 530 U.S. at 442. A prohibition on trial use "reduce[s]" those risks and "implement[s]" the core–indeed, the *sole*–protection furnished by the privilege. *See Chavez v. Martinez*, 123 S.Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part). Although the trial shield that *Miranda* affords is not a personal "right," it is nonetheless "'necessary to ensure compliance with the . . . Constitution.'" *Dickerson v. United States*, 530 U.S. at 439.

Because the *Miranda* exclusionary doctrine is a constitutionally required "extension" of the core Fifth Amendment guarantee, *see Chavez v. Martinez*, 123 S.Ct. at 2007 (Souter, J., concurring in the judgment), the Court has balanced interests to determine the scope of suppression that is necessary. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680 (1993); *Oregon v. Elstad*, 470 U.S. 298 (1985); *Harris v. New York*, 401 U.S. 222 (1971). Limitations on the breadth of

exclusion are justified only when the circumstances demonstrate either diminished threats to Fifth Amendment values or elevated costs of exclusion. The relevant balance of interests tips decidedly in favor of a presumptive ban on the products of *Miranda* violations. Derivative evidence should be admissible only if the government establishes either that the connection between the presumptively compelled admissions and the evidence acquired as a result is demonstrably weakened or that the costs of exclusion are especially weighty.

The precedents concerned with *Miranda* exclusion strongly support this conclusion. In *Harris v. New York*, 401 U.S. 222 (1971), the Court held that statements secured in violation of *Miranda* could be used to impeach an accused who testifies. In the Court's view, the balance of interests favored admissibility for several reasons. First, the statements could not be used to prove guilt, but only to cast doubt on the credibility of a testifying defendant. *Id*. at 223-25. Thus, the potential for compelled self-*incrimination* was lower and the corresponding peril to Fifth Amendment values at trial was less severe. Moreover, the Court thought it unlikely that impeachment use would create a substantial incentive to ignore *Miranda*. *Id*. at 225. Finally, the costs of having to allow perjury without refutation were thought to be intolerably high. *Id*. at 225-26. Limited incrimination, reduced deterrent value, and elevated costs significantly altered the usual balance.

In *Michigan v. Tucker*, 417 U.S. 433 (1974), two factors favored the admission of derivative evidence secured in violation of *Miranda*. First, because the interrogation in *Tucker* took place *before* the *Miranda* decision, the officers' good faith was unquestionable. They could hardly have anticipated the yet-to-be-announced constitutional safeguards. Consequently, there was virtually no deterrent justification for

excluding the evidence.[12] In addition, the evidence at issue was third-party testimony discovered from leads provided by the accused's statements. The time and the witness's free will that intervened between the *Miranda* violation and the acquisition of the testimony attenuated the link between the presumptively compelled admissions and the evidence, further weakening any deterrent basis for exclusion *and* lowering the risks that Fifth Amendment rights would be violated at trial. The balance in *Tucker* was markedly altered by factors that all but eliminated deterrence as a justification *and* diminished the perils to constitutional values at trial.

In *Oregon v. Elstad*, 470 U.S. 298 (1985), a suspect confessed without *Miranda* warnings. The disputed evidence was a second confession given after officers issued warnings and obtained a voluntary waiver. The compliance with *Miranda* and the suspect's voluntary choice to make a second statement led the majority to conclude that any connection between the suspect's first and second confessions was "speculative and attenuated at best." *Id*. at 313-14. In other words, the causal link between the presumptively compelled statement and the statement that followed complete warnings and a voluntary waiver was seen as inherently weak. As a result, there was minimal risk of harm to Fifth Amendment values when the second statement was introduced. For the same reason, the deterrent effect of suppression was thought to

12. Because an officer's "good faith" neither decreases the risks of compelled self-incrimination at trial nor increases the cost of excluding a particular item of evidence, it does not bear on whether exclusion is necessary to serve the exclusionary rule objective recognized by the *Withrow* Court–to provide essential protection for the fundamental Fifth Amendment trial right. The officers' good faith was relevant in *Tucker* only insofar as it undermined the *deterrent* rationale for *Miranda*-based exclusion.

be inconsequential. *See id*. at 308-09.[13] Thus, the balance of interests in *Elstad* was significantly altered by the intervening voluntary cooperation of the suspect after officers complied with *Miranda*.[14]

In the instant case, Detective Benner failed to issue warnings in clear violation of the never-questioned command that admonitions be given to every suspect subjected to custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 468-69 (1966).[15] A suspect's assertion that he knows the warnings has never excused the failure to warn, and it would be objectively unreasonable to believe that such an exception exists. In addition, the gun sought to be introduced was found immediately in precisely the location revealed by the

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13. The *Elstad* majority dismissed the "cat-out-of-the-bag" presumption–the notion that a defendant who has once confessed will again confess *because* he is aware that he has little left to lose. *See Oregon v. Elstad*, 470 U.S. at 312-14. In this case, the causal connection between the statement and the weapon is clear and does *not* depend on "cat-out-of-the-bag" reasoning.

14. Although *New York v. Quarles*, 467 U.S. 649 (1984), is not an "exclusionary rule" opinion, but, instead, addresses the character of the protections provided by *Miranda*, the decision to create a "public safety" exception to the *Miranda* warnings requirement was rooted in reasoning quite similar to that in *Harris*, *Tucker*, and *Elstad*. In *Quarles*, the Court concluded that the ordinary balance was substantially altered, indeed tipped, by the critical interest in preventing serious threats to the public. The cost side of the balance was markedly heavier than in the ordinary case.

15. The rigid requirement that warnings be recited to all suspects–even those who assert awareness–serves three vital functions. It provides clear guidance to officers, plays an important role in dispelling the compulsion inherent in custodial interrogation, and saves judicial resources.

respondent.[16] No significant time period elapsed, no compliance with *Miranda* and free-willed choice intervened, and no other circumstances lowered the risks that the weapon was the product of compelled testimonial self-incrimination. Furthermore, the cost of excluding the gun was not extraordinary, but was comparable to the cost of excluding the defendant's statements. There was no need to tolerate courtroom lies, no compelling public safety concern at stake, no cost other than the one ordinarily imposed by *Miranda* exclusion–the loss of evidence of illegal firearm possession.

When the connection between statements and derivative evidence is so close, the likelihood of compulsory self-incrimination and infidelity to Fifth Amendment values, "unacceptably great" with respect to the statements, is unmitigated. Because of the proximity of the statements to the derivative evidence, the constitutional interests threatened by use of the statements are equally endangered by introduction of the fruits. To exclude incriminating admissions, but not evidence derived directly from those admissions, would be to authorize constitutional sleights-of-hand and to ignore intolerable risks of conviction based on the extorted contents of an accused's mind. An exclusionary doctrine confined to statements would provide woefully insufficient shelter for the "fundamental trial right" that *Miranda* safeguards.

The balance of interests heavily favors a derivative evidence principle–a presumption that evidence yielded by *Miranda* violations is subject to exclusion. In an ordinary case such as this, with no special counterweights to the revered values furthered by exclusion, derivative evidence should be admissible *only* when the government establishes that the

16. "The questioning led Patane to admit that he possessed a gun in his bedroom, which admission in turn led immediately to the seizure of the gun." *United States v. Patane*, 304 F.3d 1013, 1018 (10th Cir. 2002).

connection between a statement and derivative evidence has been weakened in ways that lessen the "unacceptable" Fifth Amendment risks spawned by unregulated custodial interrogation. Because no attenuation showing was made in this case, exclusion of the gun was clearly proper.[17]

III. A DERIVATIVE EVIDENCE PRINCIPLE COMPORTS WITH THE COURT'S APPROACH TO DEFINING *MIRANDA*'S SCOPE AND WILL PROMOTE RESPECT FOR THE FIFTH AMENDMENT PRIVILEGE AND FOR THE ROLES *MIRANDA* PLAYS IN SAFEGUARDING A FUNDAMENTAL LIBERTY

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17. The Fourth Amendment exclusionary rule is primarily a deterrent to *future* violations. Because the "character" of a particular transgression (*e.g.*, whether it is purposeful and flagrant or merely technical) bears upon the need for or desirability of a deterrent sanction, that factor influences Fourth Amendment "attenuation" determinations. *See Brown v. Illinois*, 422 U.S. 590, 604 (1975). *Miranda* exclusion, however, serves not only to deter future misconduct, but also to prevent *present* Fifth Amendment violations. *See Withrow v. Williams*, 507 U.S. at 691. Because the "character" of a *Miranda* violation does not diminish the risks of compulsory self-incrimination at trial or increase the costs of excluding derivative evidence, it cannot alter the balance of interests that should dictate the scope of *Miranda* exclusion. Consequently, that factor should be deemed irrelevant to "attenuation" analysis under *Miranda*. Only intervening circumstances that significantly weaken the causal connection–*e.g.*, substantial periods of time, an accused's or a third-party's free will, or other noteworthy events–should be taken into account in deciding whether the presumption of exclusion has been rebutted.

The reasoning and holding in *Michigan v. Tucker* are not to the contrary. The good faith nature of the officers' failure to give *Miranda* warnings was relevant *only* insofar as it bore on whether exclusion was needed *to deter* future failures. More important, the officers' lack of fault was not the *only* factor that supported admission of the testimony of the witness found in violation of *Miranda*. The causal chain in *Tucker* was weakened by the intervention of time and free will. Those factors diminished the risk of compelled self-incrimination at trial.

The government's extreme position–that exclusion *never* extends beyond statements obtained in violation of *Miranda*–advocates a meat-axe-like approach to interpretation of a vital safeguard. That approach is wholly out of line with the Court's balanced resolutions of questions involving the reach of *Miranda*, betrays insufficient reverence for a fundamental Fifth Amendment liberty, and would undermine the important roles *Miranda* plays.

A. Wholesale Rejection Of A Derivative Evidence Principle Is Extreme And Entirely Inconsistent With The Court's Moderate, Balanced Interpretations Of *Miranda* Doctrine

Two of the possible answers to the question before the Court lie at opposite ends of the spectrum. The government advocates one of those extremes, contending that *no evidence* derived from statements secured in violation of *Miranda* should *ever* be excluded no matter how closely it is connected in fact and in character to those statements. At the other end of the spectrum is another extreme–that all evidence with even the most tenuous causal link to *Miranda* violations must always be barred from trial. The answer proposed here–that derivative evidence should presumptively be excluded, but may be admissible if sufficiently attenuated–is balanced and consistent with the Court's prior decisions.[18] A presumption of exclusion whenever risks of compulsion are "unacceptably great" ensures that the freedom not to be convicted directly or indirectly by evidence forced from one's mind receives the constitutionally required protection that *Miranda* contemplates. It is based on the entirely rational view that if

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18. The government's position–that evidence derived from *Miranda* violations is *never* subject to exclusion–reflects an unacceptable balance of interests. It is exceedingly generous toward law enforcement and poses much too serious threats to Fifth Amendment rights.

statements themselves pose "unacceptably great" constitutional risks, then closely connected evidence which is often equally, if not more, incriminating, can pose comparable, and equally intolerable, risks.[19] On the other hand, by permitting a showing that the connection is sufficiently attenuated to diminish the likelihood of constitutional harm, the proposed approach prevents unjustified harm to societal interests in law enforcement.

The proposed derivative evidence principle is also consistent with the Court's jurisprudence insofar as it provides less protection for *Miranda* violations than the Fifth Amendment affords in cases of "actual compulsion." When an accused establishes that he was forced to divulge his thoughts, those thoughts and all fruits are barred. Subsequently acquired evidence is admissible *only* when derived from an "'independent, legitimate source.'"[20] The government must show more than a "weakened" connection; it must show that there is *no* causal link to the compulsion and, consequently, *no*

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19. Just as it does not matter that the product of compelled testimony is nontestimonial for purposes of the Fifth Amendment itself, it should make no difference that the evidence derived from a *Miranda* violation is nontestimonial in character. It would be illogical not to adhere to that Fifth Amendment principle when defining *Miranda*'s Fifth Amendment-based doctrine.

20. *Kastigar v. United States*, 406 U.S. at 460; *see also id*. at 457 n. 43; *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. at 79 n.18. This showing is analogous to that required by the "independent source" exception to the Fourth Amendment exclusionary rule. *See Murray v. United States*, 487 U.S. 533 (1988). The showing needed to avoid exclusion under *Miranda* has similarities to the less onerous showing necessary to invoke the "attenuation" exception to the Fourth Amendment rule. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

chance of Fifth Amendment damage in court.[21]

Unlike the government's extreme, a presumptive derivative evidence principle is fully consistent with precedents delineating *Miranda*'s reach. Both those prescribing the scope of exclusion and those defining the constraints on custodial interrogation have eschewed extreme answers that strike skewed balances between governmental interests and the core constitutional guarantee.

Miranda v. Arizona, 384 U.S. 436 (1966), was itself an exercise in balance and moderation. The Court could have left then-widespread custodial interrogation practices unregulated by the Fifth Amendment privilege, but rejected that approach because core values were seriously imperiled and the judiciary had been unable to prevent those perils. *See id*. at 447-48, 457-58; *see also Chavez v. Martinez*, 123 S.Ct. at 2007 (Souter, J., concurring in the judgment). On the other hand, the Court could have imposed much more restrictive constraints on custodial interrogation, such as mandatory stationhouse counsel, a bar to waiver without counsel, or a refusal to allow substitutes for the prescribed safeguards. Instead, the Court devised constitutional protections that allowed, and continue to allow, ample breathing space for custodial interrogation and the societal interests it serves.

Dickerson v. United States, 530 U.S. 428 (2000), also graphically illustrates the Court's moderation. Rejecting the radical contention that *Miranda* lacks constitutional roots and

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21. Thus, under the proposed approach, a *Miranda* violation will "not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Oregon v. Elstad*, 470 U.S. at 309. Because the proposed presumption is rebuttable, evidence found subsequent to or by virtue of a *Miranda* violation is not "irretrievably lost." *See id*. at 312 (evincing concern that confessions would be "irretrievably lost").

could be supplanted by a congressional enactment, the Court declared that *Miranda*'s safeguards–or fully effective equivalents–are "constitutionally required" and "necessary to ensure compliance with the . . . Constitution." *Id*. at 438-39. On the other hand, the majority did not endorse an interpretation of *Miranda* that some deem most faithful to its origins–that when *Miranda*'s safeguards are not honored the Fifth Amendment erects an absolute bar to all evidence acquired. *See id*. at 447 (Scalia, J., dissenting). That interpretation would have undermined a number of post-*Miranda* rulings accommodating constitutional rights and governmental interests, decisions that the Court found compatible with the moderate balance struck by *Miranda*. *See Dickerson v. United States*, 530 U.S. at 441.

The exclusionary doctrine rulings fit and confirm the pattern. *Harris v. New York*, 401 U.S. 222 (1971), authorized narrow use of statements *only* for impeachment of an accused who elects to testify and *only* for the doubt cast on credibility. Use in the government's case-in-chief remains forbidden. In *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court exhibited typical caution and restraint, confining its holding to violations predating *Miranda* and specifically refusing to address the broad question of the admissibility of fruits. *See id*. at 447. In *Oregon v. Elstad*, 470 U.S. 298 (1985), despite speculative *dicta* directed toward the derivative evidence question, the Court ultimately addressed *only* the admissibility of second confessions following complete warnings and proper waivers. *Id*. at 318. And, finally, *Withrow v. Williams*, 507 U.S. 680 (1993), rejected a claim that the precious rights safeguarded by *Miranda* exclusion should rarely be vindicated on collateral review. The suspension of Fifth Amendment protection at that stage was too extreme to attract a majority.

Significantly, all four opinions struck balances reflecting concern for *both* effective law enforcement *and*

constitutional values. In the first three, an appreciation of *Miranda*'s role in preserving those values prompted the Court to shun extremes and to cautiously trim the scope of exclusion. In *Withrow*, that same appreciation led the Court to reject a severe, dangerous constriction of *Miranda*'s vital courtroom safeguard. *See Withrow v. Williams*, 507 U.S. at 691-92.[22]

Finally, *Chavez v. Martinez*, 123 S.Ct. 1994 (2003), counsels against the suffocating limitation sought by the government and provides potent support for a presumption of exclusion. The majority's announcement that the privilege cannot be violated by official compulsion alone because the essence of that provision is shelter against *incrimination* at trial means that the focus must be upon the use of evidence in court. Just as actual compulsion is *not* the most significant event for Fifth Amendment purposes, a failure to honor *Miranda*'s dictates is *not* the most significant stage for *Miranda* doctrine purposes. *Chavez* instructs that constitutional rights are at "unacceptably great" risk *only* when the products of custodial interrogation enter the courtroom, making it all the more critical to maintain adequate protection at that pivotal stage. *Miranda*'s constitutionally necessary shelter for a fundamental

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22. Although the discussion has focused on *Miranda*, *Dickerson*, and the exclusionary rule opinions, a cursory examination of just a few decisions defining the safeguards applicable to custodial interrogation confirms the Court's balanced attitude toward *Miranda*. *See, e.g.*, *Minnick v. Mississippi*, 498 U.S. 146 (1990) (rejecting the view that *any* consultation with an attorney removes the impediment to waiver erected by a request for counsel's assistance, but not endorsing the view that after a request for assistance waiver is impossible without counsel); *Rhode Island v. Innis*, 446 U.S. 291 (1980)(eschewing both the view that *only* express questioning can constitute interrogation and the notion that *any* words or actions by the police in a suspect's presence constitutes "interrogation"); *Michigan v. Mosley*, 423 U.S. 96 (1975)(shunning both the "absurd" contention that questioning follow an assertion of silence may resume after a "momentary respite" and the suggestion that questioning may never resume).

"trial right" must remain capacious enough to preserve the values underlying the Fifth Amendment. *See Withrow v. Williams*, 507 U.S. at 691-92.

B. The Extreme View That Evidence Derived From *Miranda* Violations Is Never Barred Shows Insufficient Respect For The Fifth Amendment And For *Miranda*'s Vital Constitutional Roles

The privilege against compulsory self-incrimination "registers an important advance in the development of our liberty–'one of the great landmarks in man's struggle to make himself civilized.'" *Ullman v. United States*, 350 U.S. 422, 426 (1956)(quoting Griswold, The Fifth Amendment Today (1955), 7). To "view" the privilege "with disfavor" and to "constrict[its] application . . . is to disrespect the Constitution." *Id*. at 428-29. To show adequate respect for the Framers' wisdom and for the liberty they prized, the privilege "must not be interpreted in a hostile or niggardly spirit," *id*. at 426, but, instead, must remain "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

Because *Miranda* is rooted in the Fifth Amendment and furnishes "constitutionally required" protection "'necessary to insure compliance with the . . . Constitution,'" *Dickerson v. United States*, 530 U.S. at 438-39, "hostile or niggardly" interpretations of *Miranda* can also betray disrespect for the Constitution itself.[23] The Fifth Amendment privilege plays a "fundamental role in our legal system," *Chavez v. Martinez*, 123 S.Ct. at 2016 (Kennedy, J., concurring in part and

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23. *See Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) ("Vagaries" in *Miranda* protection can "lead to a . . . loss of respect for the underlying constitutional principle"); *Oregon v. Elstad*, 470 U.S. at 365 (Stevens, J., dissenting)(exceptions to *Miranda*'s exclusionary rule can "denigrate[] the importance of . . . [a] core constitutional right[]").

dissenting in part), and the courtroom bar to evidence obtained in violation of *Miranda* provides essential protection against government practices endangering that role. The denial of any protection against derivative evidence–an excessively permissive approach that eliminates a significant part of *Miranda*'s constitutionally required shelter–"can only diminish a celebrated provision in the Bill of Rights." *Id*. at 2015.[24]

Finally, "*Miranda* has . . . become part of our national culture." *Dickerson v. United States*, 530 U.S. at 443. The doctrine plays a significant symbolic role, proclaiming that in our free society law enforcement is constrained in its laudable efforts to convict the guilty. *Miranda* also plays a vital pragmatic role in our criminal justice system, safeguarding the core Fifth Amendment entitlement not to be compelled to incriminate oneself. For these reasons, *Miranda*'s "requirements . . . merit . . . respect." *Withrow v. Williams*, 507 U.S. at 695. Adoption of the view that the courtroom shield begins and ends with the presumptively compelled statements would demonstrate palpable disrespect for *Miranda*'s vital roles, sending an unfortunate message to the people and to law enforcement. Such an indefensibly stingy interpretation would suggest that the reaffirmation of *Miranda*'s constitutional status in *Dickerson* was disingenuous and would invite a new era of

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24. Dissenting from the *Chavez* majority's decision to confine Fifth Amendment protection to the courtroom, Justice Kennedy warned that a "Constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles which preserve their freedom. Today's decision undermines one of those respected precepts." *Chavez v. Martinez*, 123 S.Ct. at 2015 (Kennedy, J., concurring in part and dissenting in part). These words would apply with equal force to a decision holding that *Miranda*'s "constitutional standards for protection of the privilege," *Dickerson v. United States*, 530 U.S. at 440, provide absolutely no shelter against the use of incriminating derivative evidence.

confusion over the nature and status of *Miranda* protections.[25] Moreover, it would announce that *Miranda*'s constitutional limitations are easily circumvented. Respect for the priceless right that *Miranda* safeguards would surely be the casualty.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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25. In contrast, adoption of a rebuttable derivative evidence presumption will reinforce the *Dickerson* majority's view that "the Constitution *does . . . require* a procedure that is effective in securing Fifth Amendment rights," *Dickerson v. United States*, 530 U.S. at 441 n.6 (emphasis added), further clarifying *Miranda*'s constitutional character and eliminating some of the post-*Dickerson* confusion in the lower courts.