

# NOTES

## Involuntary Confessions and the Jailhouse Informant: An Examination of *Arizona v. Fulminante*

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### Introduction

Confessions<sup>1</sup> made by crime suspects traditionally have been a part of the American system of criminal law,<sup>2</sup> and “remain a proper element in law enforcement.”<sup>3</sup> For a confession to be admissible at trial, the defendant must make the confession voluntarily.<sup>4</sup> For nearly a century,<sup>5</sup> the United States Supreme Court has prohibited involuntary statements<sup>6</sup> that the government<sup>7</sup> uses at trial in violation of a defendant’s Fifth Amendment privilege against self-incrimination.<sup>8</sup> The Court also has expressed its contempt for involuntary confessions that the government extracts through interrogation techniques “so offensive to a civilized system of justice”<sup>9</sup> that they violate a defendant’s due process rights.<sup>10</sup> The Court’s suspicion of defendant confessions obtained through interroga-

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1. “[I]n order to constitute a confession, a statement of accused must admit guilt, explicitly or implicitly, including all elements of a crime, by statement of details or admission of ultimate fact.” 23 C.J.S. *Criminal Law* § 878 (1989).

2. *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).

3. 23 C.J.S. *Criminal Law* § 878 (1989). See *Rhode Island v. Innis*, 446 U.S. 291 (1980).

4. *Bram v. United States*, 168 U.S. 532 (1897).

5. See *id.*

6. The terms “involuntary statements,” “involuntary confessions,” and “coerced confessions” are used interchangeably for the purposes of this Note.

7. For the purposes of this Note, different terms such as “government,” “state,” “law enforcement agency,” and “police” are all used interchangeably to describe the official government agency against whom the question of state action is measured. See *infra* notes 23-24 and accompanying text.

8. See *Bram*, 168 U.S. 532. See *infra* note 31 and accompanying text for a description of the Fifth Amendment privilege against self-incrimination.

9. *Miller v. Fenton*, 474 U.S. 104, 109-10 (1985).

10. *Id.* See *infra* note 37 and accompanying text for a description of an individual’s due process rights.

tion led to the 1966 decision, *Miranda v. Arizona*.<sup>11</sup> In *Miranda*, the Court opined that the coercive atmosphere inherent in a custodial interrogation could potentially overbear the will of the interrogated suspect and strip the suspect of the suspect's Fifth Amendment privilege against self-incrimination.<sup>12</sup> The *Miranda* decision provided law enforcement agencies with strict guidelines regarding the interrogation of crime suspects.<sup>13</sup> These protections remain in force today.

Although many safeguards<sup>14</sup> have been created to prevent coerced confessions, loopholes remain. The government can elicit incriminating statements against the will of the individual without violating the guidelines set forth in *Miranda*.<sup>15</sup> Unless the government's conduct in extracting the statements is patently in violation of due process, a court may consider the statements voluntary.

One circumstance which may evoke such a statement is the government's use of an undercover jailhouse informant.<sup>16</sup> The informant, acting as an agent for the government, may create or exploit a situation in which the informant is not required to follow the judicially mandated safeguards of *Miranda*.<sup>17</sup> The informant creates pressure so great, however, that the accused's only option is to make an incriminating statement. In *Illinois v. Perkins*,<sup>18</sup> the United States Supreme Court concluded that an undercover agent need not inform an incarcerated suspect of the *Miranda* protections before interrogating the suspect about a crime unrelated to the one for which the suspect is incarcerated.<sup>19</sup> The Court reasoned that "[t]he essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated per-

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11. 384 U.S. 436 (1966).

12. *Id.* at 444-46.

13. *Id.*

14. *Id.* at 444-45.

15. The *Miranda* guidelines are not violated when the government properly invokes the guidelines' use or the situation that exists is one in which the guidelines do not apply. See *infra* part I.D.2 for specific circumstances in which the *Miranda* warnings do not apply.

16. "The term 'informant' refers generically to any person who provides information to a law enforcement agency." Evan Haglund, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1408 (1990). The term "jailhouse informant" traditionally has been used to describe a person who "informs law enforcement officers of 'confessions' made by cellmates." *Id.* at 1409. "Jailhouse informant" will be used in this Note in a limited manner. It will be used to describe a prisoner with an established informant relationship with a law enforcement agency or undercover agents who pose as prisoners. The role of the jailhouse informant is an active one; to gather incriminating evidence from the targeted suspect. If the jailhouse informant is a prisoner who is acting as an informant for the government, then that informant's compensation for the gathered information is monetary compensation, leniency in sentencing, or immunity. The term jailhouse informant is not used in this Note to describe a prisoner who passively overhears a suspect offer incriminating evidence and wishes to exchange this information for some type of compensation. See *infra* note 24.

17. See *infra* part I.D.2.

18. 110 S. Ct. 2394 (1990).

19. *Id.*

son speaks freely to someone that he believes to be a fellow inmate."<sup>20</sup>

A loophole exists where the suspect is not aware of the informant's identity as an undercover agent, yet overwhelming compulsion exists as a result of the informant's presence or actions. The compulsion is present for reasons other than the informant's true identity, such as the subjective fears that the suspect harbors or statements and promises made by the agent.

In the recent United States Supreme Court decision, *Arizona v. Fulminante*,<sup>21</sup> the Court addressed the voluntariness of a confession made by an inmate to an informant posing as a fellow prisoner. This Note examines circumstances in *Fulminante*, and those similar to them, in which an informant may elicit involuntary confessions. This Note also examines how loopholes in a defendant's legal protection may allow a court to find the defendant's confessions admissible, and will finally offer some alternatives to the present use of a jailhouse informant.

Part I examines the historical background of the Supreme Court's test for determining admissibility and voluntariness of a confession. It explores the relationship between involuntary confessions, due process, and the Fifth Amendment privilege against self-incrimination. In addition, Part I sets forth the judicially mandated safeguards that the Supreme Court has provided. Part II, concentrating on the recent Supreme Court case, *Arizona v. Fulminante*,<sup>22</sup> illustrates situations in which the use of an undercover jailhouse informant can overcome the defendant's will and thus result in an involuntary confession. Part III exposes the dangers of using a jailhouse informant and demonstrates how the use of one may contribute to an unreliable confession. This part weighs the problems inherent in eliciting such unreliable confessions against the social policies behind the use of a jailhouse informant as a valuable participant in the effective apprehension of criminals. Part III also offers a resolution to this dilemma of using a jailhouse informant. Part IV summarizes the state of a defendant's protections against involuntary confessions under the current laws and concludes that the recent limitation of the *Miranda* safeguards and the traditional due process protections are an inadequate protection against an incarcerated suspect's involuntary confessions to a jailhouse informant.

This Note assumes that because the jailhouse informant acts as an agent<sup>23</sup> of a law enforcement agency, the police or government participates in the interrogation to a degree sufficient to constitute state action.

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20. *Id.* at 2397.

21. 111 S. Ct. 1246 (1991).

22. *Id.*

23. "The law of agency is based on the Latin maxim, 'Qui facit per alium, facit per se,' which may be translated 'One acting by another is acting for himself.'" 2A C.J.S. *Agency* § 2 (1972). "An agent is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it. He is a

State action is a required element in a due process violation cause of action.<sup>24</sup>

Because this Note examines loophole situations in which a defendant's constitutional rights are left unprotected, the focus of this Note is quite narrow. The core of this Note is the determination of whether a prisoner's confession to a jailhouse informant satisfies the requirements for voluntariness in terms of the Fifth and Fourteenth Amendments. A confession's voluntariness is a two-fold constitutional issue.<sup>25</sup> It is both a Fifth Amendment self-incrimination and Fifth and Fourteenth Amendments due process concern. This Note, however, primarily focuses on voluntariness as a due process concern. As seen by recent decisions, due process is the current focus of the Court<sup>26</sup> in its determination of whether a confession is voluntary.

## I. Historical Background of the Admissibility of Confessions

### A. Early Confession Cases and the Privilege Against Self-Incrimination: *Bram v. United States*

Early confession cases in the United States Supreme Court displayed an intolerance for involuntary confessions, yet "emerged from federal prosecutions and were settled on a nonconstitutional basis."<sup>27</sup> The common-law rule was that "the absence of inducements, promises, and threats made a confession voluntary and admissible."<sup>28</sup> In the 1897 case *Bram v. United States*,<sup>29</sup> the Supreme Court interpreted the Fifth Amendment privilege against self-incrimination to embody the common-law rule against involuntary confessions.<sup>30</sup> The Court held that "[i]n

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substitute, or deputy, appointed by his principal primarily to bring about business relations between the latter and third persons." *Id.* § 4(c).

In *Arizona v. Fulminante*, the principal case discussed in this Note, it was stipulated at a pre-trial hearing on the confession's voluntariness that "Anthony Sarivola was at all times pertinent to this case a paid confidential informant for the F.B.I." Joint Appendix at 10, 30-31, 40, 42-43, *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991) (No. 89-839) [hereinafter Joint Appendix].

24. See *The Civil Rights Cases*, 109 U.S. 3 (1883). This Note does not address situations in which the individual has simply offered the statements without any initiation by law enforcement agencies or their agents. "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). See also *Colorado v. Connelly*, 479 U.S. 157, 164-67 (1986).

25. See *infra* part I.F.

26. See, e.g., *Miller v. Fenton*, 474 U.S. 104; *Colorado v. Connelly*, 479 U.S. 157; *Illinois v. Perkins*, 110 S. Ct. 2394, 2399-400 (1990) (Brennan, J., concurring).

27. *Miranda v. Arizona*, 384 U.S. 436, 506 (1966) (Harlan, J., concurring).

28. *Id.* See *Hopt v. People of Territory of Utah*, 110 U.S. 574 (1884); *Pierce v. United States*, 160 U.S. 355 (1896).

29. 168 U.S. 532 (1897).

30. *Id.* at 542.

criminal trials, . . . wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'<sup>31</sup>

The Court held that confessions must be free and voluntary if they are to be admissible.<sup>32</sup> By combining the common-law test for voluntariness with the Fifth Amendment privilege, the Court expressed concern with the interrogator's conduct. The Court held that the interrogator's conduct was a determinant to the extent that it compelled the defendant to incriminate himself at trial in violation of his Fifth Amendment privilege.<sup>33</sup>

#### B. State Court Development of Involuntary Confessions: *Brown v. Mississippi*

The rule against involuntary confessions set down in *Bram* entailed a Fifth Amendment constitutional privilege. At the time of the *Bram* decision, however, this privilege against self-incrimination applied only in federal courts.<sup>34</sup> The Court had not yet determined that the Fifth Amendment applied to the states.<sup>35</sup> Therefore, the *Bram* decision was not applicable to a state court determination of a confession's voluntariness.

In *Brown v. Mississippi*,<sup>36</sup> however, the United States Supreme Court found state court cases in which the state's coercive conduct to extract a confession was so deplorable that the use of the confession violated the Due Process Clause of the Fourteenth Amendment.<sup>37</sup> In *Brown*, the defendants were subjected to physical torture. The deputy sheriff and a group of citizens hanged and whipped the defendants.<sup>38</sup> The deputy sheriff told the defendants that the whipping would not cease until the defendants confessed.<sup>39</sup> The Court found that the state's conduct was "revolting to the sense of justice."<sup>40</sup> The state's use at trial of the confes-

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31. *Id.*

32. *Id.* at 542-43. To be free and voluntary, confessions "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Id.*

33. *Id.*

34. "[E]xemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution." *Brown v. Mississippi*, 297 U.S. 278, 285 (1936) (quoting *Twining v. New Jersey*, 211 U.S. 78, 114 (1908)).

35. *Brown*, 297 U.S. at 285.

36. 297 U.S. 278 (1936).

37. *Id.* at 285-86. U.S. CONST. amend. XIV, § 1 states that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ."

38. *Brown*, 297 U.S. at 280-81.

39. *Id.* at 281-82.

40. *Id.* at 286.

sions obtained was a clear denial of due process.<sup>41</sup>

Twenty years later in *Payne v. Arkansas*,<sup>42</sup> the Court found that psychological as well as physical coercion violated the Fourteenth Amendment Due Process Clause.<sup>43</sup> In *Payne*, the defendant was held in jail for two days without any charge against him.<sup>44</sup> The defendant was allowed no phone calls or communication with counsel, friends, or family members.<sup>45</sup> On the second day, the police chief told the defendant that there were thirty to forty people waiting outside of the police station for the defendant that wanted to get him. The police chief stated that if the defendant would tell him the truth, the police chief could probably keep the people from coming in and getting the defendant.<sup>46</sup> The Court found that "there is torture of mind as well as body; the will is as much affected by fear as by force . . . ."<sup>47</sup> Such psychological torture violated due process.<sup>48</sup>

One year later in *Spano v. New York*,<sup>49</sup> the Court held that the state also violated due process when an individual's "will was overborne by official pressure, fatigue, and sympathy falsely aroused . . . ."<sup>50</sup> In *Spano*, the defendant confided in an old friend, Bruno, that he had shot the victim.<sup>51</sup> Bruno, a young police officer, "relayed this information to his superiors."<sup>52</sup> The defendant surrendered himself the following day. After questioning the defendant throughout the night, the police instructed Bruno to falsely inform the defendant that Bruno's job was in jeopardy because the defendant refused to confess. Bruno was supposed "to extract sympathy from the defendant for Bruno's pregnant wife and three children."<sup>53</sup> The Court found that such conduct violated due process.<sup>54</sup> By 1959, a defendant's constitutional protection against egregious police conduct was well established.

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41. *Id.*

42. 356 U.S. 560 (1958).

43. *Id.* at 561.

44. *Id.* at 563.

45. *Id.*

46. *Id.* at 564-65.

47. *Id.* at 566.

48. *Id.* at 567.

49. 360 U.S. 315 (1959).

50. *Id.* at 323. See also *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (several officers questioned the defendant for 36 hours without an opportunity for sleep); *Reck v. Pate*, 367 U.S. 433 (1961) (defendant was denied adequate food and medical attention for four days until confession obtained).

51. 360 U.S. at 317.

52. *Id.*

53. *Id.* at 319.

54. *Id.* at 320.

### C. Application of the Fifth Amendment Privilege Against Self-Incrimination to the States: *Malloy v. Hogan*

Although the deplorable tactics described in *Brown* and subsequent cases produced inadmissible confessions that violated Fourteenth Amendment due process, the Fifth Amendment privilege against self-incrimination did not apply in state courts until the 1964 case of *Malloy v. Hogan*.<sup>55</sup> In *Malloy*, the Court stated that “the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions” since *Bram v. United States*.<sup>56</sup> Today, the Fifth Amendment protection against self-incrimination and the Fourteenth Amendment due process protections are interpreted together to prohibit the introduction of involuntary and coerced confessions at trial.<sup>57</sup>

### D. Modern Analysis of Fifth Amendment Self-Incrimination and Judicial Safeguards

#### 1. Background: *Miranda v. Arizona*

In the years following *Malloy*, the United States Supreme Court became increasingly concerned with the prevention of coerced confessions that deny the accused the Fifth Amendment privilege against self-incrimination.<sup>58</sup> The Court’s analysis began to focus more on the police methods of extraction’s effect on the defendant as opposed to the nature of the methods themselves. In 1966, in *Miranda v. Arizona*,<sup>59</sup> the United States Supreme Court broadened the Fifth Amendment privilege against self-incrimination to cover custodial police interrogations.<sup>60</sup> To protect this privilege, the Court enacted mandatory procedural safeguards for law enforcement agencies and courts to follow. In short, the safeguards are as follows: “[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed.”<sup>61</sup> These safeguards were subsequently coined the “*Miranda* warnings” or “*Miranda* rights”<sup>62</sup> and have remained in place up to the present day.

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55. 378 U.S. 1 (1964).

56. *Id.* at 7. See *supra* note 32 and accompanying text.

57. *Mincey v. Arizona*, 437 U.S. 385 (1978).

58. *Miranda v. Arizona*, 384 U.S. 436 (1986).

59. *Id.*

60. *Id.* at 467-68. The Court subsequently interpreted *Miranda* not to apply in custodial interrogations in which the accused does not know that the interrogator is an undercover agent. *Illinois v. Perkins*, 110 S. Ct. 2394 (1990). See *infra* part I.D.3.

61. *Miranda*, 384 U.S. at 444.

62. *Perkins*, 110 S. Ct. at 2399.

The *Miranda* decision prohibited use of confessions obtained during custodial interrogation unless the interrogator first advised the individual of the *Miranda* rights. The Court based its decision on the inherently coercive nature of custodial interrogations. An "individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak."<sup>63</sup> Interestingly, the requirement of advising a suspect of the *Miranda* rights is based on the Fifth Amendment privilege against self-incrimination,<sup>64</sup> yet failure to warn a suspect of the *Miranda* rights is not itself considered a constitutional violation.<sup>65</sup> Rather, it is the use at trial of the resulting unprotected confession that violates the Constitution. Therefore, although a failure to warn a suspect of the *Miranda* rights may lead to an involuntary confession,<sup>66</sup> a "defendant's constitutional rights have been violated [only] if his conviction is based, in whole or in part, on an involuntary confession."<sup>67</sup>

## 2. *Defining Custodial Interrogation*

While the purpose of the *Miranda* warnings is to protect an individual from inherently coercive custodial interrogation that may lead to an involuntary confession, the warnings are required only in certain situations. The police must give the warnings "only in those types of situations in which the concerns that powered the [*Miranda*] decisions are implicated."<sup>68</sup> Thus, the warnings are necessary only during a custodial interrogation, which the Court defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."<sup>69</sup>

Since *Miranda*, the Court has wrestled with the definition of custodial interrogation. The Court has examined the meaning of the words custodial and interrogation. While the *Miranda* warnings were designed to protect against the inherent coerciveness of a police-dominated atmosphere, a coercive atmosphere alone may not be enough to require the *Miranda* warnings. The individual must be under formal arrest or have his or her freedom of movement restrained<sup>70</sup> to the degree that is associ-

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63. *Miranda*, 384 U.S. at 461.

64. *Id.* at 436.

65. "*Miranda* warnings therefore are 'not themselves rights protected by the Constitution, but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" *New York v. Quarles*, 467 U.S. 649, 654 (1983) (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

66. This is exactly what the Court in *Miranda v. Arizona* was trying to prevent. 384 U.S. 436.

67. *Id.* at 464 n.33.

68. *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984).

69. *Miranda*, 384 U.S. at 444.

70. In *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978), the Ninth Circuit stated that "[t]he concept of 'restriction' is significant in the prison setting, for it implies the need for a



ated with formal arrest.<sup>71</sup> The interrogation, however, does not have to be in the form of official questioning. In *Rhode Island v. Innis*,<sup>72</sup> the Court concluded that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."<sup>73</sup> An agent's statements can constitute interrogation if the agent reasonably should have known that the agent's statements or actions were reasonably likely to elicit an incriminating response.<sup>74</sup>

### 3. *Recent Definition of Custodial Interrogation: Illinois v. Perkins*

Of late, the Court has refined its definition of custodial interrogation with respect to the use of an undercover jailhouse informant. In *Illinois v. Perkins*,<sup>75</sup> the Court held that no custodial interrogation exists if an incarcerated suspect is unaware that he is speaking with an agent of the police or government.<sup>76</sup> The Supreme Court decided that because "[c]oercion is determined from the perspective of the suspect,"<sup>77</sup> if the suspect "considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking."<sup>78</sup> In *Perkins*, Charlton, a former fellow inmate of the defendant, informed the police that the defendant had told Charlton in detail about a murder that the defendant claimed to have committed in East St. Louis, Illinois.<sup>79</sup> Acting as undercover informants, Charlton and undercover agent John Parisi, were placed in the defendant's cellblock where they posed as escapees from a work release program. The agents suggested to the defendant that they formulate a plan to escape from the county jail.<sup>80</sup> During a planning session, the defendant stated that he thought his girlfriend could smuggle a gun to them.<sup>81</sup> Agent Parisi then asked the defendant if he had ever "done"<sup>82</sup> anybody.<sup>83</sup> The defendant answered in the affirmative, and described, in lengthy detail, the East St. Louis murder.<sup>84</sup> The state subsequently

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showing that the officers have in some way acted upon the defendant so as to have 'deprived [him] of his freedom of action in any significant way.'" *Id.* at 428 (quoting *Miranda v. Arizona*, 384 U.S. at 444). "In the prison situation, this necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement." 589 F.2d at 428.

71. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

72. 446 U.S. 291 (1980).

73. *Id.* at 300-01.

74. *Id.* at 301.

75. 110 S. Ct. 2394 (1990).

76. *Id.*

77. *Id.* at 2397. See *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

78. *Perkins*, 110 S. Ct. at 2397.

79. *Id.* at 2396.

80. *Id.*

81. *Id.*

82. "Done" means killed in this context.

83. *Perkins*, 110 S. Ct. at 2396.

84. *Id.*

charged the defendant with the East St. Louis murder, and the Supreme Court denied the defendant's motion to suppress the statements made to Agent Parisi. The Court held that the Agent did not violate the defendant's Fifth Amendment privilege against self-incrimination when he failed to give the defendant the *Miranda* warnings because the defendant was not aware of his cell-mates' true identities as undercover agents.<sup>85</sup> In essence, the Court eliminated the *Miranda* procedural safeguards from undercover custodial interrogations without regard for how restrained the custody or how harsh the inquisition of the suspect was.

**E. A Return to Fourteenth Amendment Due Process—The Modern Focus: *Miller v. Fenton***

Although the Court continues to focus its statement admissibility analysis on the Fifth Amendment privilege against self-incrimination, the Fifth Amendment analysis has not completely displaced the Fourteenth Amendment due process analysis for coerced confessions. The Court has "continued to measure [the admissibility of] confessions against the requirements of due process"<sup>86</sup> and "has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment."<sup>87</sup> In *Miller v. Fenton*,<sup>88</sup> the Court spelled out its method<sup>89</sup> for determining the voluntariness of a statement under due process.<sup>90</sup> The Court assessed the voluntariness of a statement under the "totality of the circumstances:"<sup>91</sup> "[T]he Court . . . assessed . . . all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."<sup>92</sup> The *Fenton* case stated that the Court must consider the "possibly vulnerable subjective

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85. *Id.* at 2397.

86. *Miller v. Fenton*, 474 U.S. 104, 110 (1985).

87. *Id.* at 109.

88. 474 U.S. 104 (1985).

89. The Court stated that "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." *Id.* at 110.

90. "[A] criminal defendant who challenges the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids." *Lego v. Twomey*, 404 U.S. 477, 478 (1972). See *Jackson v. Denno*, 378 U.S. 368 (1964). When a defendant challenges the voluntariness of a confession, the prosecution has the burden of proving that the statement is voluntary. *Lego v. Twomey*, 404 U.S. at 482-87. The Court stated that the minimum showing of proof that the prosecution must meet is a preponderance of the evidence. *Id.* at 489. The Court noted, however, that the States are free to adopt a higher showing of proof for the prosecution. *Id.* Some lower courts have required a showing of beyond a reasonable doubt. *E.g.* *State v. Ragsdale*, 187 So. 2d 427 (La. 1966); *Ralph v. Warden*, 438 F.2d 786, 793 (4th Cir. 1970).

91. 474 U.S. at 111. See *Haynes v. Washington*, 373 U.S. 503 (1963).

92. *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

state” of the individual and the “subtly coercive police questions.”<sup>93</sup> In applying the totality of the circumstances test in the future, the Court’s foremost question should be whether the statement was “the product of an essentially free and unconstrained choice by its maker.”<sup>94</sup>

In addition to the “totality of the circumstances” test, the Court has also held that it must determine whether “coercive police activity” was present when the defendant confessed.<sup>95</sup> “[C]oercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.”<sup>96</sup>

#### F. A Two-Pronged Test for Admissibility: *Illinois v. Perkins*

As the Court stated in *Mincey v. Arizona*,<sup>97</sup> both the Fifth Amendment privilege against self-incrimination and Fourteenth Amendment due process protections safeguard against the introduction of involuntary, coerced confessions.<sup>98</sup> At times, however, the Court only makes an inquiry into the adequacy of the *Miranda* safeguards against self-incrimination.<sup>99</sup> If the Court concludes that the defendant was not given the proper *Miranda* warnings, then it prohibits the introduction of the defendant’s statements. When the Court draws this conclusion, it is unnecessary for the Court to subsequently determine whether the defendant’s statements are actually voluntary. As noted in *Miranda*, the Court concerns itself primarily with providing adequate safeguards in custodial interrogations, and admits that in *Miranda*, the Court “might not [have found] the defendants’ statements to have been involuntary in traditional terms.”<sup>100</sup>

When the Court determines, however, that the *Miranda* warnings are either properly given or unnecessary, it must still make a second inquiry into the voluntariness of the statements under the Due Process Clause before it admits the statements.

In *Illinois v. Perkins*, the Court arguably incorporated its due process inquiry into its determination of whether the *Miranda* warnings applied. The Court held that the coercive atmosphere necessary for a custodial interrogation was lacking because the defendant did not know

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93. *Id.* at 229.

94. “Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.” *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

95. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

96. *Id.*

97. 437 U.S. 385 (1978).

98. *Id.* See *supra* note 57 and accompanying text.

99. See, e.g., *Mathis v. United States*, 391 U.S. 1 (1968).

100. *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

his cell-mates were undercover agents.<sup>101</sup> The Court then concluded that the defendant's statements were voluntary because the defendant "viewed the cellmate-agent as an equal and showed no hint of being intimidated by the atmosphere of the jail."<sup>102</sup> The Court's opinion shows no evidence of a separate determination of the totality of the circumstances surrounding the interrogation.<sup>103</sup> Arguably, the *Perkins* decision incorporated its totality of the circumstances test into its determination of the existence of a custodial interrogation. *Arizona v. Fulminante*, the most recent Supreme Court decision on this subject, however, shows that the totality of the circumstances test for voluntariness remains a separate inquiry from the determination of a custodial interrogation.

## II. *Arizona v. Fulminante*

### A. Background

The *Perkins* decision established that there is no need to give *Miranda* warnings when an undercover agent interrogates an incarcerated suspect about a crime unrelated to that for which the defendant is incarcerated. The decision failed, however, to set forth any guidelines for the determination of whether such an interrogation violates due process in similar surreptitious atmospheres. Recently, the Supreme Court faced this question in *Arizona v. Fulminante*.<sup>104</sup> In *Fulminante*, the Court found that a prisoner's confession to an undercover jailhouse informant was involuntary and in violation of Fourteenth Amendment due process.<sup>105</sup> This decision demonstrates that a thin line exists between those statements that the Court finds acceptable and those that it does not. The resulting lack of guidelines for lower courts and law enforcement agencies is significant because it leaves a large gap in the protection of an individual's due process rights and room for abuse by a jailhouse informant.

### B. Facts of *Arizona v. Fulminante*

In the fall of 1983, Oreste Fulminante was an inmate at Raybrook Federal Correctional Institution in Raybrook, New York.<sup>106</sup> Fulminante

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101. 110 S. Ct. 2394, 2397 (1990).

102. *Id.* at 2398.

103. Justice Brennan concurred in the judgment of the Court "[s]ince the only issue raised at this stage of the litigation [was] the applicability of *Miranda* . . ." *Id.* at 2399 (Brennan, J., concurring). Justice Brennan further held that "[t]his is not to say that [he believed] the Constitution condones the method by which the police extracted the confession in this case." *Id.*

104. 111 S. Ct. 1246 (1991).

105. *Id.* at 1253. The Court also held that the harmless error analysis applies to involuntary confessions, but that the state did not carry its burden of demonstrating that the admission of Fulminante's confession to Sarivola did not contribute to Fulminante's conviction. The issue of harmless error, however, is beyond the scope of this Note.

106. *Id.* at 1250.

was imprisoned following his second conviction of possession of a firearm by a felon.<sup>107</sup> During his time at Raybrook, Fulminante became friends with Anthony Sarivola, a fellow inmate. Sarivola was serving a sixty day sentence for extortion.<sup>108</sup> Unbeknownst to Fulminante, Sarivola was a paid informant for the Federal Bureau of Investigation (FBI).<sup>109</sup> Because Sarivola was once involved with organized crime, "Sarivola masqueraded as an organized crime figure."<sup>110</sup> Sarivola was an associate of the Columbo crime family of New York. While a member of the crime family, Sarivola also performed "police functions" for the Seagate Harbor Police.<sup>111</sup> He was allegedly also a member of a five-person prison commission, which purported to have some control over what went on at Raybrook.<sup>112</sup> Fulminante was aware of Sarivola's involvement in organized crime and membership in the prison commission.<sup>113</sup>

Fulminante and Sarivola became friends at Raybrook during September of 1983, and spent an average of seven hours together each day.<sup>114</sup> During this time, Sarivola heard a rumor that Fulminante was being investigated for the murder of Fulminante's stepdaughter, Jeneane Hunt.<sup>115</sup> Sarivola questioned Fulminante a number of times about the murder, but Fulminante denied having anything to do with it.<sup>116</sup> On occasion, Fulminante would offer various stories as to what he believed happened to his stepdaughter Jeneane.<sup>117</sup> According to Sarivola, as the rumors about Fulminante's culpability spread, "a lot of people were thinking of hurting [Fulminante] . . . and he sort of needed somebody to

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107. *State v. Fulminante*, 778 P.2d 602, 606 (Ariz. 1988). Fulminante had a previous criminal history. In 1965, he had a felony conviction in New Jersey for impairing the morals of a child, and in 1971, he had another conviction in New Jersey for "uttering a check with a forged endorsement." *Id.* He was arrested in 1982 for possession of a firearm by a felon, and received a two year minimum sentence in the Federal Prison in Springfield, Missouri. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Joint Appendix, *supra* note 23, at 103. Sarivola was first associated with the Seagate Harbor Police Department in August 1978 and left its full employment in November 1978. *Id.* at 103.

Sarivola claimed that he made a conscious distinction between his role as a police officer and as a Columbo associate. *Id.* at 105. "[W]hen [he] put on the uniform, [he] enforced the law, but when [he] got off duty, [he] was a gangster." *Id.*

112. *Id.* at 35.

113. *Id.*

114. *Id.* at 80.

115. *Id.* at 81. The child was eleven year old Jeneane Hunt, Fulminante's stepdaughter. She disappeared from Mesa, Arizona in September of 1982. Her body was found on September 16, in the desert outside of Mesa. She had been shot twice in the head. *State v. Fulminante*, 778 P.2d 602, 605 (Ariz. 1988).

116. Joint Appendix, *supra* note 23, at 81.

117. *Arizona v. Fulminante*, 111 S. Ct. 1246, 1250 (1991). "During one conversation, [Fulminante] told Sarivola that Jeneane had been killed by bikers looking for drugs; on another occasion, he said he did not know what had happened." *Id.*

back him up and help him . . . people were starting to avoid him and treat him like shit.”<sup>118</sup> Sarivola said that Fulminante’s “time was running short,”<sup>119</sup> and that if Fulminante had not received some inside protection, Fulminante would have gone out of the prison “horizontally.”<sup>120</sup> Sarivola testified that the other prisoners who were aware of the rumors were plotting against Fulminante. These alleged reactions towards Fulminante were based on the underlying theory that “most organized crime figures and most criminals who have some sort of scruples”<sup>121</sup> believe that “children [are] a very soft point . . . .”<sup>122</sup> Although the prisoners may not react to the death of an adult, they would be disturbed immensely by the murder of a child, especially one as heinous as the murder of Jeneane Hunt.

On approximately October 20, 1983, Anthony Sarivola told his FBI contact, Agent Walter Ticano, of the circulating rumor about Fulminante.<sup>123</sup> In response, Ticano told Sarivola, “I gotta know the whole story. Get me the whole story.”<sup>124</sup> The following day, Sarivola informed Ticano that Fulminante had confidentially confessed to Sarivola that he had killed his stepdaughter.<sup>125</sup> This confession ultimately led to the conviction of Fulminante for first degree murder and imposition of the death sentence.<sup>126</sup>

Sarivola claimed that his conversation with Fulminante occurred during one of Sarivola and Fulminante’s routine walks around the prison walking track.<sup>127</sup> Aware of the circulating rumors and aware that Fulminante had repeatedly denied his involvement with Jeneane’s murder, Sarivola told Fulminante, “If you want my help you’re gonna have to be straight, if you’re not straight, then fuck you.”<sup>128</sup> At this point,

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118. Joint Appendix, *supra* note 23, at 29.

119. *Id.* at 28.

120. *Id.*

121. *Id.*

122. *Id.* at 28-29. Sarivola conceded that “if a fellow prisoner is known to have sexually assaulted and murdered a little child,” he is “ostracized and possibly in danger from the general [prison] population.” *Id.* at 110.

123. *State v. Fulminante*, 778 P.2d 602, 606 (Ariz. 1988). After Sarivola was sentenced for the crime of extortion, yet before he was sent to Raybrook, he contacted Agent Ticano and proposed that he would give him information about organized crime members. Ticano and Sarivola entered into an agreement that was approved by the Federal Bureau of Investigation. Joint Appendix, *supra* note 23, at 134-35.

124. Joint Appendix, *supra* note 23, at 146.

125. *Id.* at 147-48. “Sarivola said that Fulminante said that he did not like his stepdaughter and accused her of causing problems between himself and his wife. Sarivola stated that Fulminante stated that he took his stepdaughter out into the Arizona . . . desert and killed her with a .357 magnum handgun.” *Id.* at 148.

126. *Arizona v. Fulminante*, 111 S. Ct. 1246, 1251 (1991).

127. Joint Appendix, *supra* note 23, at 82-83.

128. *Id.* at 29.

Fulminante told Sarivola that he had “clipped” Jeneane Hunt.<sup>129</sup> Although Sarivola believed that Fulminante did not have a reputation for truthfulness,<sup>130</sup> he thought Fulminante was telling the truth at this point because it was “one of the few times [Fulminante] became serious and [was] not trying to put up a front about [the murder].”<sup>131</sup>

Sarivola claimed that he and Fulminante spoke about the incident a few times after the initial conversation.<sup>132</sup> After Fulminante was released from Raybrook on November 28, 1983,<sup>133</sup> Sarivola and his fiancée, Donna, picked Fulminante up at a local bus terminal. When Donna asked Fulminante “if he had any relatives or friends he wished to see,”<sup>134</sup> Fulminante stated that “he could not return to his home because he had killed a little girl in Arizona.”<sup>135</sup> On September 4, 1984, Fulminante was indicted for first degree murder of Jeneane Hunt.<sup>136</sup>

### C. Court Analysis of *Arizona v. Fulminante*

The United States Supreme Court affirmed the judgment of the Arizona Supreme Court<sup>137</sup> and agreed that Fulminante’s statements to Sarivola were involuntary.<sup>138</sup> Like the United States Supreme Court decision in *Illinois v. Perkins*, the Arizona court held that Fulminante’s statements were not subject to the *Miranda* protections because they were not made during a custodial interrogation.<sup>139</sup> It found that the coercive atmosphere of a custodial interrogation was not present. Unlike their decision in *Illinois v. Perkins*, however, the United States Supreme Court made an extensive inquiry into the “totality of the circumstances” and concluded that “[t]he confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant’s life was in jeopardy . . . .”<sup>140</sup>

In examining the totality of the circumstances, the Court considered various factors to determine whether the defendant’s statement was made voluntarily.<sup>141</sup> Included as factors are mental and emotional characteris-

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129. *Id.* at 83. Fulminante stated that he had taken her to the desert and shot her twice in the head. *Id.*

130. *Id.* at 85.

131. *Id.* at 86.

132. *Id.*

133. Sarivola had been released approximately six months earlier. *State v. Fulminante*, 778 P.2d 602, 606 (Ariz. 1988).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Arizona v. Fulminante*, 111 S. Ct. 1246, 1261 (1991).

138. *Id.*

139. 778 P.2d at 608.

140. 111 S. Ct. at 1252 (citing *Fulminante*, 778 P.2d at 608).

141. *Id.*

tics of the accused.<sup>142</sup> “[A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the ‘voluntariness’ calculus.”<sup>143</sup> The Court found that psychological and emotional characteristics of Fulminante contributed to his compulsion to confess.<sup>144</sup> Fulminante possessed “low average to average intelligence” and “dropped out of school in the fourth grade.”<sup>145</sup> In addition, Fulminante was “short in stature and slight in build.”<sup>146</sup>

Another factor that the Court considered was Fulminante’s experience with incarceration.<sup>147</sup> Fulminante had been convicted of several felonies in the past and had been imprisoned twice before.<sup>148</sup> Although Fulminante appeared to be a hardened criminal with enough experience to take care of himself in jail and around criminals, this was not the case. During an earlier imprisonment, Fulminante experienced difficulty in adapting to the stress of prison life.<sup>149</sup> “At twenty-six, he was so terrified of being in the general prison population, that he was placed in protective custody at his own request. . . . [H]e could not emotionally handle the isolation of protective custody, and with no other alternative, a psychiatrist had Fulminante committed to a psychiatric hospital.”<sup>150</sup> Fulminante remained in the hospital for the duration of his prison sentence.<sup>151</sup> Arguably, the Court concluded that Fulminante’s prior bad experience with protective custody made Fulminante more reluctant to seek safety from the prison officials<sup>152</sup> and more likely to be attracted to Sarivola’s offer of underworld protection.

In addition to Fulminante’s character, his physical stature, and his experience with crime, the Court examined Sarivola’s actions as an undercover informant.<sup>153</sup> Fulminante believed that Sarivola was an organ-

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142. *Id.* See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1990).

143. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986).

144. 111 S. Ct. at 1252 n.2.

145. *Id.* at 1252. Fulminante “has low average to average intelligence and no formal education past the fourth grade.” Respondent’s Brief on the Merits at 22, *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991) (No. 89-839) [hereinafter Respondent’s Brief].

146. 111 S. Ct. at 1252 n.2. Fulminante was 5’3” tall, 42 years old, and weighed 118 pounds. Respondent’s Brief, *supra* note 145, at 18.

147. 111 S. Ct. at 1252 n.2. The Court has also considered an individual’s experience with crime and crime detection. See *Reck v. Pate*, 367 U.S. 433 (1961). One factor the Court considered when deciding that Reck’s statement was compelled is that “he had no prior criminal record or experience with the police.” *Id.* at 441.

148. See *supra* note 107.

149. Respondent’s Brief, *supra* note 145, at 19.

150. *Id.* at 4. Fulminante “was admitted to a psychiatric hospital because of his emotional condition and extreme fear of other inmates.” *Id.*

151. *Id.*

152. *Id.* at 5. Fulminante also knew that he could not seek protection from sources outside the prison because he was already a prime suspect in Jeneane’s murder. *Id.*

153. *Arizona v. Fulminante*, 111 S. Ct. 1246, 1252 (1991).



ized crime member<sup>154</sup> and an influential person in the prison community.<sup>155</sup> Sarivola knew that Fulminante was threatened with danger from the other inmates and had received rough treatment.<sup>156</sup> "Using his knowledge of these threats, Sarivola offered to protect Fulminante in exchange for a confession to Jeneane's murder . . . and 'in response to Sarivola's offer of protection, [Fulminante] confessed.'"<sup>157</sup>

**D. Critique of *Arizona v. Fulminante*: The Roles of Subjective Fear and Informant Conduct in the Court's Due Process Analysis after *Arizona v. Fulminante***

*Arizona v. Fulminante* demonstrates how the state can surreptitiously elicit coerced confessions through the use of a jailhouse informant. Like *Illinois v. Perkins*, the circumstances surrounding the confession may not meet the custodial requirements for the *Miranda* warnings. At first glance, the confession might appear to simply be an inmate speaking or bragging to a fellow inmate. In *Illinois v. Perkins*, the Court stated that "*Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates."<sup>158</sup> Yet in reality, the state created environment may exact enough pressure to elicit an involuntary confession for reasons *other than* the fact that a jailhouse informant is an undercover agent. A jailhouse informant like Sarivola, with a reputation for violence or organized crime connection, may exploit his position. By seeking out and questioning the prisoner, an informant may make the prisoner fear for his life. The prison atmosphere is especially conducive to creating fear and intimidation.<sup>159</sup> Because of the situation, an individual may be-

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154. *Id.* at 1250. The Court suggested that not only Sarivola's role as an organized crime member, but "[his] position as Fulminante's friend, might well have made [Fulminante] particularly susceptible to the former's entreaties." *Id.* at 1252 n.2.

155. *See supra* note 113 and accompanying text.

156. *See supra* notes 118-22 and accompanying text.

157. 111 S. Ct. at 1252 (quoting *Arizona v. Fulminante*, 778 P.2d at 609). While it appears as though fear was the compelling force behind Fulminante's confession, he may have had another reason for making the statements. As his friend, Fulminante knew that Sarivola had organized crime contacts. *See supra* notes 110-13 and accompanying text. He commented to Sarivola and his future wife, Donna, that he "wanted to make some money. He [wanted] to get a nice car like [Sarivola's]. He wanted to know what was going on in the street . . ." Joint Appendix, *supra* note 23, at 167. One may argue that by befriending Sarivola, a known organized crime figure, Fulminante was attempting to further his future connections with organized crime, and Fulminante's statements to Sarivola were simply a part of that plan.

158. *Illinois v. Perkins*, 110 S. Ct. 2394, 2398 (1990).

159. "A unique sub-culture and hierarchy exists within the prison system, which gives rise to a number of coercive techniques that inmates regularly utilize against their peers. The prison environment has been referred to as a 'controlled war' in which physical, psychological, economic, and social victimization runs rampant." Martine Beamon, *Illinois v. Perkins: Has Our Criminal Justice System Turned from "Accusatorial" to "Inquisitorial?"*, 52 U. PITT. L. REV. 669, 681 (1991) (quoting LEE BOWKER, *Victimizers and Victims in American Correc-*

come frightened, defensive, and highly susceptible to persuasion. A jailhouse informant can easily capitalize on an individual's pre-existing fears.

After *Arizona v. Fulminante*, and in light of *Illinois v. Perkins*, lower courts and law enforcement agencies are left with little insight into what factors are critical to the Court's totality of the circumstances determination, specifically, the relationship between the defendant's subjective fear and the informant's conduct. In *Illinois v. Perkins*, the Court concluded that the defendant's statements were voluntary because the coercive element found in a police-dominated atmosphere was lacking.<sup>160</sup> The *Perkins* Court held that the defendant was "motivated solely by the desire to impress his fellow inmates" and that "[h]e spoke at his own peril."<sup>161</sup> The Court did not, however, set forth the specific factors it examined in making its determination of whether the statements were voluntary. Rather, the Court made an objective determination of whether the defendant was compelled to speak against his will.<sup>162</sup> The Court did not examine the circumstances present to determine whether the defendant harbored any subjective fear of the informants. In *Arizona v. Fulminante*, however, the Court adhered to the traditional "totality of the circumstances" test for voluntariness. The Court presented numerous subjective factors, including evidence of the defendant's pre-existing fears, that compelled the Court to find the defendant's statements involuntary. The Court, however, failed to offer insight into the weight that it gave each contributing factor in its determination.

Arguably, the defendant in *Perkins* was not compelled to speak for fear of his own life. Rather, he was motivated by his desire to assure his fellow inmates that he was a worthwhile part of their plan to escape from jail. His "fear" was that his cell mates would distrust his capabilities as a member of their scheme.

In other circumstances, a jailhouse informant interrogation may result in "fear" in a defendant that is more serious than that in *Illinois v. Perkins*. The "fear," however, may be of a lesser degree than the life or death fear in *Arizona v. Fulminante*, and therefore not viewed by a court as a significant factor in its due process determination. Like Sarivola, a jailhouse informant with a reputation for violence may exploit that reputation or the fears implicit in the prison setting as part of the undercover role. In reaction, a prisoner may create stories of past criminal violence to boost his or her own standing.<sup>163</sup>

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*tional Institutions*, in *THE PAINS OF IMPRISONMENT* 63 (Robert Johnson & Hans Toch eds., 1982)).

160. *Perkins*, 110 S. Ct. at 2399.

161. *Id.* at 2398.

162. See *supra* notes 76-85 and accompanying text.

163. Kathryn Young-Sook Kim, Comment, *Self-Incrimination, Compulsion, and the Undercover Agent*, 66 WASH. L. REV. 605, 618 (1991).

Recently a California Superior Court in Napa County considered a situation in which the defendant manufactured his confession as a result of his fear for the jailhouse informant.<sup>164</sup> On January 24, 1988, Robert Torres<sup>165</sup> wrote a letter to the Napa Police Department, alleging that Richard Hammond told him that he had committed a contract murder of someone named "Bruce" on May 13, 1986, and had put Bruce's naked body in the Napa River.<sup>166</sup> Torres stated that Hammond feared going into the prison yard, even after Torres offered to get him a weapon.<sup>167</sup> Torres believed that Hammond told him the story either because of who Torres was, what he represented, or just to impress him.<sup>168</sup> Hammond knew that Torres was an organized crime member with a reputation for ordering and committing murders.<sup>169</sup> The police paid Torres \$500 and arranged for him to go to Folsom Prison to interrogate Hammond.<sup>170</sup> The police gave Torres specific questions to ask Hammond, and Hammond subsequently gave Torres a detailed, but incorrect description of the death of Bruce Wayne Birdsong.<sup>171</sup> Nevertheless, Hammond was tried for the murder of Birdsong.<sup>172</sup>

In *People v. Hammond*, the causal connection between Hammond's state of mind and his reasons for making the statements to Torres was Hammond's subjective fear of Torres and the prison surroundings. Hammond feared Torres' reputation and the prison community. Torres and the police knew about this fear and used it to their advantage to elicit a confession from Hammond. Hammond's statement ultimately proved to be unreliable, yet he was arrested and tried based solely upon the contents of his confession.

The *Hammond* case demonstrates that an incarcerated suspect may be compelled to speak for reasons other than the awareness that the suspect is in a police-dominated atmosphere. The fear and intimidation inherent in a prison atmosphere may force an individual such as Fulminante to exchange incriminating statements for protection from the informant. The reputation of the informant or threats or promises made during interrogation may instill a fear in the individual that compels him or her to offer a confession to the informant. In *Arizona v. Fulminante*,

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164. *People v. Hammond*, No. 86-02755-03 (Napa Co. Sup. Ct. 1990).

165. Torres was a Mexican Mafia member who was trying to quit organized crime with the help of the federal authorities. He occupied a cell next to defendant, Richard Hammond, who was serving a sentence for a burglary conviction. Telephone interview with David Murray, Attorney for Richard Hammond (Feb. 28, 1991).

166. *Id.* On May 20, 1986, a naked body was found floating in the Napa River and was later identified as Bruce Wayne Birdsong. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Hammond was acquitted of the murder. *Id.*

the Court gave very little guidance to future determinations of whether or not a defendant's will is overcome by a jailhouse informant interrogation. While the Court's analysis adhered to the traditional "totality of the circumstances test" for voluntariness under Fourteenth Amendment due process, it failed to offer any insight into the weight it gives each factor in its determination. In addition, *Fulminante* did not provide limitations for a jailhouse informant's conduct *before* the informant interrogates an individual. This lack of guidance in using a jailhouse informant contributes to the dangers inherent in that informant's role in law enforcement and adds weight to the argument in favor of limiting the use of a jailhouse informant.

### III. The Use of Jailhouse Informants

#### A. Background

Use of informants by law enforcement agencies has become a standard practice,<sup>173</sup> and is an "invaluable [source] of information for every law enforcement agency . . . ."<sup>174</sup> Because a jailhouse informant acts as an agent of the state, an informant's conduct is equivalent to conduct by the state and is subject to constitutional limitations.<sup>175</sup> Due to the nature of the compensation and incentive system for a jailhouse informant, however, there is a wide potential for abuse of the informant's position and violation of constitutional rights. Therefore, the utility of the role of the jailhouse informant in criminal law must be examined closely.

#### B. Compensation and Unreliability of Confessions

A law enforcement agency may compensate an informant for information in a variety of ways. The agent may give the informant "direct financial remuneration"<sup>176</sup> or "leniency regarding charges pending."<sup>177</sup> In other circumstances, the informant may be an ordinary citizen who has "observed and reported an item of significance."<sup>178</sup> When the agency compensates the informant, the informant's actions may be based on a personal gain. This gain may outweigh the legitimate desire of a just conviction. The desire for personal gain makes the reliability of the information questionable.

In the past few years, commentators have criticized rewarding all informant cooperation with money or other methods.<sup>179</sup> Critics have

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173. Haglund, *supra* note 16, at 1407.

174. *Id.*

175. *See supra* note 23 and accompanying text.

176. Haglund, *supra* note 16, at 1408-09.

177. *Id.* at 1409.

178. *Id.*

179. *See* Haglund, *supra* note 16; Jana Winograde, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 CAL. L. REV. 755 (1990).

argued for limitations on the use of criminal jailhouse informants.<sup>180</sup> The rationale of limiting the use of informants is mainly due to the unreliability of the information received.<sup>181</sup> One opponent of informant compensation has stated: "If you have to give . . . jail-house [informants] something to get them to testify, then their testimony is worthless. You've bought their testimony."<sup>182</sup>

To reinforce the argument that jailhouse informants are unreliable, commentators cite the case of Los Angeles County jailhouse informant, Leslie White. White admitted that "he could create a confession by a jail inmate he had never met,"<sup>183</sup> and "had committed perjury 'in one or more cases . . . in [his] capacity as an informant for the district attorney's office.'"<sup>184</sup>

*Arizona v. Fulminante* demonstrates how use of a jailhouse informant may result not only in a coerced confession, but an unreliable one as well. Sarivola worked for the FBI while serving his sentence and, in exchange, received immunity from prosecution by the government.<sup>185</sup> Sarivola also received payment from the FBI for his services. This payment varied according to the quality of the information he provided.<sup>186</sup> Although the FBI did not pay Sarivola for any of the information connected with the *Fulminante* case, the Mesa, Arizona Police Department subsequently compensated Sarivola for providing the information.<sup>187</sup>

From Sarivola's standpoint, a denial of murder would not result in as much compensation for Sarivola as would Fulminante's confession. Although there is no evidence that this factor motivated Sarivola,<sup>188</sup> it demonstrates the pressure on an informant to create a situation in which the outcome is most favorable to her.

### C. Improper Techniques

In addition to opposing the use of a jailhouse informant because of the unreliability of the extracted statements, commentators have claimed that the information may be the product of improper techniques. To

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180. Hallye Jordan, *Bill Introduced To Limit use of Jailhouse Informants*, L.A. DAILY J., Mar. 17, 1989 at 1.

181. Haglund, *supra* note 16, at 1415.

182. Jordan, *supra* note 180, at 1.

183. *Tall Tales*, L.A. DAILY J., Dec. 22, 1988, at 6.

184. Haglund, *supra* note 16, at 1416 (quoting L.A. TIMES, Dec. 1, 1988, pt. II, at 1).

185. Agent Ticano claimed that as "long as he's [Sarivola] admitted criminal activity in the past, he'll not be prosecuted for it." Joint Appendix, *supra* note 23, at 157. It was further agreed that if Sarivola was prosecuted for any other violation of the law by any other law enforcement authorities, the FBI "[would] bring to the attention of those prosecuting authorities the cooperation which [Sarivola] furnished in connection with [the above] agreement." *Id.*

186. *Id.* at 79.

187. *Id.* at 88.

188. Note that Sarivola had been found guilty of forging tape recorded conversations in other situations. *Arizona v. Fulminante*, 111 S. Ct. 1246, 1259 n.2 (1991).

gather the information that will make a confession appear plausible, informants have employed a variety of techniques that range from the artful to the crude.<sup>189</sup> "They have conned fellow prisoners, even those who have insisted on their innocence . . . ."<sup>190</sup>

One improper technique is the use or threat of violence. *Arizona v. Fulminante* shows how an informant may use the threat of violence to compel a defendant to speak. In *Fulminante*, however, the threat of violence was two-fold. Fulminante was in danger of violence from the other inmates.<sup>191</sup> Sarivola used this threat of violence against Fulminante. He offered Fulminante protection if Fulminante would tell him the truth. Second, Sarivola's reputation emitted an air of violence. Sarivola was a member of the Columbo crime family<sup>192</sup> and had been convicted of crimes involving the "use [of] force or the threat of physical force in the collection of shylarking debts."<sup>193</sup> Arguably, Fulminante feared that if he did not cooperate with Sarivola, either the prison inmates or Sarivola himself would hurt Fulminante. Through this twofold threat of violence, Sarivola was able to take advantage of Fulminante and elicit a confession by using improper techniques.

#### D. Balancing the Dangers of Using Jailhouse Informants with Social Policies Favoring Their Use

Inherent in a system that compensates and rewards jailhouse informants is the potential that an informant will abuse his position and violate an individual's constitutional rights. Arguably, however, this flaw in the role of a jailhouse informant is secondary in importance to an informant's function of ultimately placing information about criminal activity in the hands those able to use it to protect society. Therefore, the arguments in favor of protecting the constitutional rights of a confessor by opposing the use of a jailhouse informant must be balanced against the social utility of employing an informant.

A police jailhouse informant provides a valuable tool for the effective apprehension of violent criminals.<sup>194</sup> Informants are now indispensable to agencies that investigate 'victimless' crimes.<sup>195</sup> "The use of informants is now part and parcel of law enforcement work. Informants

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189. Haglund, *supra* note 16, at 1416 n.59.

190. *Id.*

191. *See supra* note 159 and accompanying text.

192. Agent Ticano was the case agent responsible for the initial arrest of Sarivola. Joint Appendix, *supra* note 23, at 155.

193. *Id.* at 158. Shylarking is a term used to describe an extortionate credit transaction, the crime for which Sarivola was originally arrested. *Id.*

194. *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); Haglund, *supra* note 16, at 1410.

195. Narcotics, gambling, prostitution, and tax-evasion are examples of victimless crimes. Haglund, *supra* note 16, at 1411.

are invaluable sources of information for every law enforcement agency . . . .”<sup>196</sup>

Of equal value, however, is the belief that the criminal law should not be used as an instrument of unfairness.<sup>197</sup> Arguably, protecting the constitutional rights of a confessor outweighs the needs of society and protective law enforcement. This idea stems from the deep-rooted feeling that “in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.”<sup>198</sup>

The Court’s decision in *Arizona v. Fulminante* strengthens the belief that the dangers in using a jailhouse informant outweigh societal needs for an informant in effective law enforcement. The Court concluded that the acceptability of a confession made to a jailhouse informant turns on a subjective factor—the “totality of the circumstances” involved in making the confession.<sup>199</sup> A case-by-case subjective analysis makes it very difficult for law enforcement agencies to determine in advance if a specific interrogation will be considered improper. Only after statements are made during the interrogation, however, will the Court determine whether the statements were voluntary. But the Court will determine whether or not the defendant’s constitutional rights were violated.

The Court has also made it difficult to determine when a jailhouse informant is using “strategic deception by taking advantage of [the] suspect’s misplaced trust in one he supposes to be a fellow prisoner”<sup>200</sup> and when an informant is using coercion to obtain a confession. When the jailhouse informant intentionally creates a situation, he may be exploiting the prisoner’s latent fears of the informant and the surroundings, a seemingly amicable atmosphere turning into one of intense pressure. On judicial review of the totality of the circumstances surrounding the interrogation, the intensity of the defendant’s fears of the jailhouse interrogation and compulsion to speak may not be apparent to the reviewer. Because of the intimidating atmosphere that is unique to the prison environment, “even the most innocuous police tactics could have a coercive effect.”<sup>201</sup>

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196. *Id.* at 1407. “In one recent year alone, the FBI reported using 2,800 informants. During the previous year, the FBI reported paying . . . 1.5 million dollars to informants, resulting in 2,600 arrests.” *Id.* at 1411.

197. *Schneekloth*, 412 U.S. at 226. *See also* *Spano v. New York*, 360 U.S. 315, 320 (1959).

198. *Spano*, 360 U.S. at 321.

199. *See supra* notes 91-95 and accompanying text.

200. *Illinois v. Perkins*, 110 S. Ct. 2394, 2397 (1990).

201. *Beamon*, *supra* note 159, at 682.

#### IV. Proposal

After *Illinois v. Perkins* and *Arizona v. Fulminante*, the notion that there is room for government abuse in interrogating incarcerated suspects at the expense of the suspect's due process rights remains a predicament. Minimal guidelines, however, on the use of a jailhouse informant, may provide protection of a prisoner's constitutional rights while aiding law enforcement.

Eliminating tangible incentives may help to reduce the likelihood that the jailhouse informant will abuse her privilege to improperly seek information and provide unreliable statements. Intangible incentives such as promoting justice or seeking revenge will still exist, but the major opportunities for informant abuse will be eliminated. A jailhouse informant will be less likely to fabricate or misrepresent a suspect's statements when that informant's personal interest and expectations in eliciting the information are reduced.

Moreover, restricting the jailhouse informant to a passive role may help to avoid coercion. As previously noted,<sup>202</sup> if the jailhouse informant merely overhears a free and voluntary confession, the issue of coercive interrogation is not present. The informant does not confront the incarcerated suspect and the suspect is not subjected to answering seemingly pressing questions. In addition, a passive jailhouse informant is not *intentionally* placed in the suspect's environment. Therefore, the intimidating pressure a suspect may encounter with an informant's intentional and unsolicited invasion of the suspect's place in the prison setting is avoided.

While these minimal guidelines may help to reduce the likelihood that a jailhouse informant will abuse his role, guidelines alone are not complete safeguards against the possible violation of a defendant's constitutional rights. Courts should also give great weight to the fact that an interrogation takes place in a prison community and is not extracted from the defendant by a law enforcement officer, but by another criminal. Where the government follows adequate guidelines in its use of jailhouse informants, and where courts consider the unique setting of a prison community, the social utility of a jailhouse informant should, in theory, outweigh the danger the informant poses to the constitutional rights of a suspect.

#### Conclusion

As a result of *Illinois v. Perkins* and *Arizona v. Fulminante*, an incarcerated suspect's Fifth Amendment privilege against self-incrimination and due process protection against coerced confessions to a jailhouse informant have been restricted. Because the suspect is not aware that he or she is speaking to law enforcement agents, the requisite coercive atmos-

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202. See *supra* note 24.



phere for custodial interrogation is not present. Thus, the jailhouse informant is not required to inform the suspect of the *Miranda* warnings before the informant questions the suspect. While *Arizona v. Fulminante* decided that the Court will continue to examine the totality of the circumstances of the interrogation, *Fulminante* does not provide sufficient insight into what specific factors a lower court must consider and how much weight should be accorded each element. Furthermore, it fails to offer any guidelines to law enforcement agencies before using a jailhouse informant to interrogate a suspect.

Because of the *Fulminante* decision, a jailhouse informant is given wide latitude in his conduct. Inherent in the agency relationship between the informant and the government is the danger of the informant's personal motives to influence the informant's behavior. As a result, an informant may offer unreliable information. In addition, an informant may employ improper, coercive techniques in eliciting a suspect's statements. Such techniques, alone or in combination with a suspect's personal fears, may overcome the will of the suspect and violate due process.

In sum, the *Fulminante* decision and the inherent nature of the position of the jailhouse informant weigh strongly in favor of limiting or prohibiting an informant's role in prison interrogations. Although an informant's utility in contributing to effective law enforcement is strong, the potential abuse present in using the informant in the unique prison atmosphere outweighs the informant's social value. Therefore, use of the jailhouse informant in prison interrogations of incarcerated suspects should be sharply curtailed.

