No. 09-728

IN THE

Supreme Court of the United States

JON A. JENSEN, JANE DOE JENSEN
and the marital community thereof,

Petitioners,

v.

PAUL A. STOOT, SR. and TAMMIE L. STOOT, husband and wife, and as parents and guardians of PAUL A. STOOT II; and PAUL A. STOOT II, a minor child,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the petition, where the Ninth Circuit Court of Appeals correctly held on the record before it that an individual's Fifth Amendment right to not be a witness against himself is violated when a coerced statement is "used" in a criminal case to: (1) form a basis for filing formal charges against the declarant; (2) to determine judicially that the prosecution may proceed; and (3) to impose pretrial restraints on liberty or conditions of release.

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I.

INTRODUCTION

Petitioner has presented no "compelling reasons" in support of his Petition for a Writ of *Certiorari* ("Petition"). See Sup. Ct. R. 10. Specifically, petitioner fails to demonstrate that this matter is ripe for this Court's review or that the Ninth Circuit Court of Appeals' September 18, 2009 Opinion ("Opinion") is in conflict with a decision of this Court.

Petitioner has failed to carry their burden of demonstrating there are any compelling reasons for this court to grant the Petition. The Petition should be denied.

II.

STATEMENT OF THE CASE

This case arose from the interrogation, arrest, and eventual criminal prosecution of Paul A. Stoot II, a thirteen-year-old developmentally delayed African-American boy. (Pet. Brief at 9, Petitioner's Appendix at 53a).

On December 23, 2003, Ms. Nickey Johnson reported Paul had sexually abused her four year old daughter, A.B. (Pet. App. at 4a). Detective Jon Jensen, Petitioner herein, was thereafter assigned the case. (Pet. App. at 5a). Detective Jensen proceeded to interview Ms. Johnson and A.B. (Pet. App. at 5a-7a).

A. *Detective Jensen's Interrogation Coerced Paul to Give A Coerced False Confession*

Based on his interviews with Ms. Johnson and A.B. Detective Jensen interrogated Paul on January 14, 2004. (Pet. App. at 8a). Detective Jensen led Paul into the principal's office, closed the door, and began to interrogate him alone. *Id.* Detective Jensen gave Paul a copy of the Everett Police Department Constitutional Rights form and read Paul the *Miranda* warning. *Id.* Because he was only thirteen, scared, in the principal's office, did not understand his rights, and sitting across the table from a detective, Paul signed the form and indicated that he was willing to talk with the detective. (Pet. App. at 9a).

Detective Jensen did not attempt to explain the *Miranda* rights to Paul, did not inquire to see if Paul actually read or understood the waiver, and he did not explain the process or juvenile justice system to Paul. (Pet. App. at 11a). Paul testified he understood the right to remain silent meant he "couldn't say anything. I had to be quiet and listen to the cop." (Pet. App. at 11a-12a). Paul understood his right to an attorney meant, "after we had the interview, I could appoint an attorney and if I couldn't, then the State will give me one." (Pet. App. at 12a).

As noted by the Ninth Circuit, the parties' descriptions of events during the interrogation are radically different. (Pet. App. at 8a). For two hours or more, Jensen repeatedly accused Paul of inappropriate sexual contact with A.B. (Pet. App. at 10a-11a). Paul testified he did not believe he was allowed to leave. *Id.*

He did not understand that he could stop the interview, or that he could ask to have his father or attorney there. *Id.* Paul repeatedly insisted and pleaded that he had not had any inappropriate contact with A.B., but Jensen's refusal to believe and accept his truthful answers scared him. *Id.*

Paul testified at the CR 3.5 suppression hearing that:

> [Jensen] is not taking no for an answer and I don't know what to do. I don't know what to say besides tell him, yes, I did it. I thought I wasn't going to be able to walk out of that room if I kept telling him no.
>
> So I'm shaking thinking I won't be able to see my family when I get out of the room, and I'm thinking I maybe going straight to jail or going with him somewhere. I thought I wouldn't be able to see my family anymore.
>
> . . . . He said if I say no – that if I keep saying no and denying it, then this could lead to court and you could go to jail for three to five months. He's telling me it could get worse. And if I just said that, yes, that all of this would be over and, this won't lead to court. No charges will be pressed and you won't be going to jail and that I will only have to see a counselor. I would just have to see a counselor for about a month when all of this is over and I won't get in any trouble.

Id. After two hours of intense interrogation and denying the allegations, Paul testified that he changed his answer and falsely confessed only minutes after Jensen made impermissible threats and promises. (Pet. App. at 10a-11a). Paul stated,

> "I had never been so scared in my life as when he said he didn't believe me when I told the truth. I wanted my mom or dad or a teacher there, but I thought I just had to sit there and do what he said. He just kept drilling me saying he did not believe me again and again. . . . I felt I had to lie and tell him what he wanted to get out of that room."

Id.

Paul eventually wrote out a statement but did not sign it. (Pet. App. at 53a). Detective Jensen stated that "[P]aul wrote out the text of the statement without any direction from me." (Pet. App. at 10a, fn. 3). The Ninth Circuit, in its Opinion noted that this statement contradicted Detective Jensen's police report which stated "I reviewed [Paul's written statement]. I found where he said he touched A.B. one time on her vagina. It had been my recollection he said he touch her three times on her bare skin. . . . I asked him to clarify this by adding a sentence to the end of his statement." *Id.*

Detective Jensen did not make video or audio recordings of his interrogation of Paul, he did not permit a witness, and he destroyed his notes. (Pet. App. at 8a, fn. 2).

B. *Paul's Coerced False Confession was used at Every Pre-Trial Stage of the Criminal Proceeding.*

Paul was charged in the Juvenile Court on July 2, 2004 with child molestation in the first degree. (Pet. App. at 12a). The Affidavit of Probable Cause relied, in large part, on Paul's confession. *Id.* At Paul's arraignment, a Judge, relying on the Affidavit of Probable Cause, found "probable cause exists for the charge". *Id.* Also relying on Paul's statements, the Judge released Paul and set conditions for release including that he "always be supervised by an adult who is aware of the charge." *Id.*

Three months later, the Juvenile Court held a hearing pursuant to Washington Criminal Rule 3.5.[1] (Pet. App. at 12a-14a). At that hearing, Paul testified under oath and was confronted by his coerced confession. (Pet. App. at 12a-13a). The Juvenile Court Judge found, among other things, that Paul "susceptible to being manipulated and would not be the type that would question authority figures." (Pet. App. at 54a). Further, the Juvenile court Judge found that Paul's statements "were the product of impermissible coercion" and found them inadmissible. (Pet. App. at 14a).

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[1] CrR 3.5 is the Washington State Criminal rule that allows for an evidentiary hearing, before the trial judge, to determine admissibility of a defendant's statements. As this was a juvenile criminal case, under RCW 13.04.021(2), Paul could not request a jury, meaning that a judge would rule on the admissibility of his statements and also be responsible for determining Paul's guilt. *See also* Pet. App. at 12a, fn 5.

The case then proceeded to trial and after argument on preliminary motions, the Juvenile Court Judge determined A.B. was incompetent as a witness and excluded her testimony. *Id.*

Following exclusion of Paul's statement and the testimony of A.B., the court granted Paul's motion to dismiss the charges against him with prejudice. *Id.*

C. *Proceedings Below*

After dismissal of the criminal charges against Paul, the Stoot family commenced a lawsuit against the City of Everett, and Detective Jensen alleging federal constitutional claims under 42 U.S.C. § 1983 for violations of Paul's Fourth, Fifth, Sixth, and Fourteenth Amendment rights, as well a state law claim of outrage. (Pet. App. at 15a).

On December 28, 2006, Defendants City of Everett and Detective Jensen moved for summary judgment on all claims. (Pet. App. at 15a).

The District Court granted defendant's motion for summary judgment finding no violation of Paul's Fifth Amendment rights, no violation of Paul's Fourteenth Amendment right, and no basis for a claim of outrage or § 1983 liability against the City of Everett. (Pet. App. at 16a). The District Court further found qualified immunity for Detective Jensen on Paul's claims for violation of his Fourth Amendment rights. *Id.*

The Ninth Circuit Court of Appeals, in a decision issued by a three Judge panel, affirmed the District

Court's Order in part, but reversed the District Court's order granting summary judgment regarding the Stoots' Fifth Amendment claim. (Pet. App. at 46a). The Ninth Circuit Court of Appeals held that an individual's Fifth Amendment right to not be a witness against himself is violated when a coerced statement is "used" in a criminal case to form a basis for filing formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status.

D. *Proceedings In This Court*

Jon and Jane Doe Jensen filed a Petition for Writ of Certiorari in this court on December 17, 2009. The case was placed on the docket December 22, 2009.

III.

REASONS FOR DENYING THE PETITION

The Fifth Amendment of the United States Constitution provides in relevant part:

> "No person . . . shall be compelled *in any criminal case* to be a witness against himself."

(Emphasis added)

Respondents' cause of action was brought under 42 U.S.C. § 1983 which provides in relevant part:

> "Every person, who under color of statute, ordinance, regulation, custom, or usage, of any

> state . . . subjects or causes to be subjected, any citizen of the United States . . . to deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. . . ."

Respondents' claim alleges petitioner violated Paul's Fifth Amendment right against self-incrimination by coercing a confession during the interrogation at Paul's school.

The Ninth Circuit Court of Appeals concluded that an individual's Fifth Amendment right to not be a witness against himself is violated when a coerced statement is "used" in a criminal case to form a basis for filing formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status.

Petitioner and the amici argue that this Court should grant Certiorari in this case. Petitioner attempts to support his argument by relying: first, on an alleged split among the circuits and, second, by arguing there will be a "chilling effect" on law enforcement officers if the Ninth Circuit decision stands. (Brief of Petitioner at 14-15).

As will be shown below, the court should deny the Petition because (1) the alleged split between the Courts of Appeal is not sufficiently mature to warrant this Court's attention at this time; (2) this claim is an inappropriate vehicle for resolving the question

presented; (3) the Ninth Circuit's decision is supported by the long legal history of the Fifth Amendment and is consistent with this Court's holding in *Chavez v. Martinez*, 538 U.S. 760 (2005); and (4) petitioner overstates his claim that the Ninth Circuit's decision will have a "chilling effect" on law enforcement activities and that assertion is not supported by fact or law.

A. *The Alleged Split between the Courts of Appeal is Not Sufficiently Mature to Warrant this Court's Attention at this Time.*

First, Petitioner argues this Court's grant of Certiorari is necessary to resolve an alleged conflict between the Courts of Appeal. (Brief of Pet. at 15). Petitioner attempts to support their argument that a split exists by relying on decisions from three circuits, the Third, Fourth, and Fifth Circuits.

The decisions by the Third, Fourth and Fifth Circuit Courts of Appeal do not present a fully developed conflict among the circuits that should warrant this Court's attention.

The decision of the Third Circuit Court of Appeals relies on a distinguishable pre-*Chavez* decision and fails to set forth any detailed analysis to support its conclusion that a Fifth Amendment violation occurs only when a statement has been used at trial.

Further, the decisions of the Fourth and Fifth Circuits are factually distinguishable from the case before the Court. As set forth more fully below, the discussions regarding whether a Fifth Amendment

violation occurs at trial or some previous time in the decisions by Fourth and Fifth Circuits were dicta. They would not be binding on future decisions in those circuits and it is unclear whether those circuits would hold differently given the facts of this case.

Third Circuit Court of Appeals

In *Renda v. King*, 347 F.3d 550, 553 (3rd Cir. 2003), plaintiff was charged with giving false reports to law enforcement authorities. The Court of Common Pleas suppressed plaintiff's statements due to *Miranda* violations and the case was *nolle prossed* by the District Attorney for lack of evidence. *Id.* Plaintiff filed an action pursuant to 42 U.S.C. § 1983 alleging, among other things, a violation of her Fifth Amendment rights. The Third Circuit held that plaintiff's Fifth Amendment rights were not violated because the statements of plaintiff were not used against her at trial. *Id.* at 559.

The Third Circuit Court of Appeals, however, failed to engage in any substantive analysis of the issue now presented before the Court. The decision simply states on this issue:

> ". . . our prior decision in *Giuffre* compels the conclusion that it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution."

No further analysis of the issue was undertaken by the court.

Giuffre v. Bissell, 31 F.3d 1241 (3rd Cir. 1994), upon which *Renda* relied, was a pre-*Chavez* case. In addition, as noted by the Seventh Circuit Court of Appeals in *Sornberger v. City of Knoxville, Ill*, 434 F.3d 1006 (7th Cir. 2006), *Giuffre* was "decided before the Supreme Court determined in *Dickerson v. United States*, 530 U.S. 428 (2000), that the *Miranda* warnings themselves have constitutional status." *Id.* at 1025. The Seventh Circuit stated that that "little weight" should be placed on the holding in *Giuffre*. *Id.*

Further, *Giuffre* was factually similar to *Chavez* in that officers obtained a statement from plaintiff during an allegedly coerced interrogation but the charges were later dropped prior to filing. *Id.* at 1244. The plaintiff in *Giuffre* "was never formally charged . . . and his only appearance in court resulted in a postponement to allow him time to retain counsel." *Id.* at 1257.

The court in *Giuffre*, denied the Fifth Amendment claim and, similar to *Chavez*, engaged in no substantive analysis of the question presented in this matter due to the fact that there was not even the initiation of court proceedings.

In short, the *Renda* decision relied on a distinguishable decision and failed to set forth any detailed analysis to support its conclusion that a Fifth Amendment violation occurs only when a statement has been used at trial. Accordingly, the Third Circuit's decision does not present a split among the circuits that is sufficiently mature to warrant this Court's attention.

Fourth Circuit Court of Appeals

In *Burrell v. Virgina*, 395 F.3d 508, 510 (4th Cir. 2005), an officer approached plaintiff at a traffic accident scene. Plaintiff refused to answer any of the officer's questions. *Id.* Plaintiff was charged for obstruction of justice and operating an uninsured motor vehicle without paying an uninsured motorist fee. *Id.* at 511. Plaintiff was convicted for obstructing justice and, thereafter, the charge was dismissed on appeal. *Id.*

Plaintiff brought suit pursuant to 42 U.S.C. § 1983 alleging, among other things, his Fifth Amendment rights were violated by the state compelling him, by summons, to produce evidence of insurance. *Id.*

The Fourth Circuit Court of Appeals analyzed plaintiff's claim under *Chavez* noting "A four-member plurality of the Court concluded that 'a violation of the constitutional right of self-incrimination occurs *only* if one has been compelled to be a witness against himself in a criminal case'." *Id.* at 513, citing *Chavez v. Martinez*, 538 U.S. 760, 770 (2005) (emphasis in original). The court relied on Justices Souter and Breyer's concurrence in *Chavez* that focused on a violation requiring "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony. . . ." *Id.* citing *Chavez*, 538 U.S. at 777 (emphasis in original).

Based on that reasoning the court held "[Plaintiff] does not allege any *trial* action that violated his Fifth Amendment rights: thus, *ipso facto,* his claim fails on the plurality's reasoning." The statement regarding a requirement of "trial" action, however, is dicta. Plaintiff

did not allege any "courtroom use" of statements since he only alleged that a violation occurred at the time summonses were issued by the state. *Id.* The holding, as it related to the question presented by this case, went beyond the facts before the court, and would not be binding on subsequent cases.

In fact, the Seventh Circuit Court of Appeals in *Sornberger v. City of Knoxville, Ill*, 434 F.3d 1006, 1027 (7th Cir., 2006), which came to the same conclusion as the Ninth Circuit in this case, noted that there was no conflict between its holding and the Fourth Circuit in *Burrell*. *Sornberger* held a violation of an individual's Fifth Amendment right to not be a witness against himself is violated when a coerced statement is used at a probable cause hearing, a bail hearing and an arraignment. *Id.* at 1027. The Seventh Circuit stated with regard to any conflict between its decision and *Burrell*,

> We do not see conflict between our holding today and that of our sister circuit in *Burrell*. There, Burrell claimed that his constitutional rights were violated when the police issued him an obstruction of justice summons for invoking his right to remain silent. The Fourth Circuit held that the issuance of a summons was not a "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony," and therefore Burrell failed to state a claim under § 1983 for violation of his right against self-incrimination. Here, by contrast, Teresa's confession was used at a preliminary hearing to find probable cause to

> indict, to arraign and to set her bail. More than the mere issuance of a summons, failure to administer Teresa *Miranda* warnings led to three distinct "courtroom uses" of her unwarned statements."

Id. at 1027.

Therefore, it is entirely unclear whether the Fourth Circuit would hold differently given the facts of this case. Here, the coerced statement was used against Paul to form the basis for filing formal charges against him, was used to determine judicially that the prosecution could proceed, was used to determine Paul's pretrial custody status, and used against him in cross-examination at the CR 3.5 hearing. The "courtroom use" of the statement that was entirely lacking in *Burrell v. Virgina*, was fully present in the case before the Ninth Circuit Court of Appeals.

Accordingly, the Fourth Circuit's decision in *Burrell* does not present a split among the circuits, *arguendo* and to the extent it does, that split is not sufficiently mature to warrant this Court's attention.

Fifth Circuit Court of Appeals

In *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), plaintiff, a juvenile, was charged with capital murder and injury to a child. Plaintiff's statements, obtained without taking her before a magistrate or notifying her parents or an attorney as required by Texas law, were used against her during two different trials leading to her conviction. *Id.* at 284. The Texas Court of Appeals

reversed plaintiff's convictions due to improperly acquired statements. *Id.* Plaintiff brought an action pursuant to 42 U.S.C. § 1983 alleging, among other things, a violation of her Fifth Amendment rights. *Id.* The Fifth Circuit Court of Appeals stated,

> "The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right."

Id. at 285.

The court in *Murray* provides no analysis regarding the question presented in this case. As in *Burrell v. Virginia, supra*, the court's statement was dicta given the fact that the plaintiff's confession had been used two different times against her at trial. *Murray* was decided on a finding of qualified immunity and not on whether the statements were used at trial. *Murray*, 405 F.3d at 293. The court's holding went beyond the facts before the court and any statement that a violation of one's Fifth Amendment rights required the use of such statements at "trial" would not be binding on subsequent cases that were distinguishable on the facts.

Due to the significantly distinguishable facts present in the case before the Court, it is unclear whether the Fifth Circuit would hold differently if presented with the facts in this case. The Fifth Circuit's decision does not present a split among the circuits that is sufficiently mature to warrant this Court's attention.

Based on the analysis above, the alleged circuit split has yet to be fully developed with only, arguably, the

Third Circuit having any firm holding on the question presented in this case. In addition, only half of the circuits have addressed this question and further decisions of the circuits may persuade the Third, Fourth and Fifth Circuits and assist in fully addressing this issue.

There is no need for the court to resolve the question at this time. The court should deny the Petition.

B. *This claim is an inappropriate vehicle for resolving the question presented.*

This case does not present an appropriate vehicle for deciding the question presented. Paul's confession formed the basis for not only his arrest, but the filing of criminal charges, determining judicially that the case could proceed and setting conditions of release at the bail hearing. As the case proceeded to trial, Paul was confronted with his own coerced confession while under oath during a pretrial evidentiary hearing used to determine the admissibility of his coerced confession.

The Ninth Circuit Court of Appeals broadened its holding to provide that an individual's Fifth Amendment right to not be a witness against himself is violated when a coerced statement is "used" in a criminal case to form a basis for filing formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status. Such a broad holding was unnecessary because Paul had been confronted and cross-examined with his confession under oath during the evidentiary hearing. Even under a narrow view of the Fifth Amendment, confrontation

with one's own coerced statements while under oath must be considered a violation of the Fifth Amendment. *See, e.g., Chavez v. Martinez*, 538 U.S. 760, 765 (2003).

This case is also an inappropriate vehicle for resolving the question presented in this case because it involved a minor who was charged through the juvenile court. The juvenile court system faces special problems in addressing coerced testimony.

> "We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique-but not in principle-depending upon the age of the child and the presence and competence of parents . . . the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."

387 U.S. 1, 55 (1967).

In addition, as noted by the Petitioner, this case involved a developmentally delayed young man. Pet. Brief at 9-10. Therefore, the problems typically associated with juveniles were compounded due to Paul's mental capacity issues.

Finally, this case is an inappropriate vehicle for resolving the question presented because it proceeded under the Washington State Juvenile Court Rules

(JuCR), which present vastly different procedural rules compared to a typical adult criminal case.

The most important differences, for purposes of this case, is that there is no right to a jury or a "trial" under the Washington State Juvenile Court Rules. See JuCR 7.11[2]; Rev. Code Wash. 13.04.021(2) ("Cases in the juvenile court shall be tried without a jury."). The Court rule provides for an "Adjudicatory Hearing" only where the Judge is the sole trier of fact. *Id.* Paul's charges were was dismissed after days of testimony and hearings regarding preliminary evidentiary issues including child witness capacity to testify, by the same judge sitting as

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[2] Washington State JuCR 7.11 provides "(a) Burden of Proof. The court shall hold an adjudicatory hearing on the allegations in the information. The prosecution must prove the allegations in the information beyond a reasonable doubt.

(b) Evidence. The Rules of Evidence shall apply to the hearing, except to the extent modified by RCW 13.40.140(7) and (8). All parties to the hearing shall have the rights enumerated in RCW 13.40.140(7).

(c) Decision on the Record. The juvenile shall be found guilty or not guilty. The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.

(d) Written Findings and Conclusions on Appeal. The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal."

the trier of fact. The same testimony would have been considered by the same judge on the ultimate issues had he not dismissed the case, and accordingly this case is an inappropriate vehicle for the court to decide the question presented.

Since, Paul was not entitled to a "trial", this case is an inappropriate vehicle for this Court to decide the question presented.

The broad holding of the Ninth Circuit Court of Appeals, the "special problems" inherent in addressing a juvenile case, and the factual issues involved in this case make it an inappropriate vehicle for resolving the question presented.

C. *The Ninth Circuit's decision is consistent with and supported by the long legal history of the Fifth Amendment and is consistent with this Court's holding in Chavez.*

The Ninth Circuit's reasoning is consistent with and supported by this Court's own case law that makes clear that the Self-Incrimination Clause of the Fifth Amendment is a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts. The Clause protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future.

This Court has stated that the Fifth Amendment Right against self-incrimination, ". . . can be asserted in *any proceeding*, civil or criminal, administrative or

judicial, *investigatory or adjudicatory*; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U. S. 441, 444-445 (1972) (footnotes omitted) (emphasis added).

The principle extends to forbid policies which exert official compulsion that might induce a person into forfeiting his rights under the Clause. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) ("These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized"); accord, *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of City of New York*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273, 279 (1968).

In *Michigan v. Tucker*, 417 U.S. 433 (1974), this Court specifically stated that the Fifth Amendment's protections are not limited to trial alone; but, rather, are applicable in proceedings outside of trial.

> Where there has been genuine compulsion of testimony, the right has been given broad scope. Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited. The right has been held applicable to proceedings before a grand jury, *Counselman v. Hitchcock*,

> *supra;* to civil proceedings, *McCarthy v. Arndstein*, 266 U.S. 34 (1924); to congressional investigations, *Watkins v. United States*, 354 U.S. 178 (1957); to juvenile proceedings, *In re Gault*, 387 U.S. 1 (1967); and to other statutory inquiries, *Mallow v. Hogan*, 378 U.S. 1 (1964).

Id. at 440

More recently, in *U.S. v. Hubbel*, 530 U.S. 27 (2000), this Court's decision, again, supports the Ninth Circuit's decision that the Fifth Amendment's protections encompass more than just the trial,

> "Finally, the phrase 'in any criminal case' in the text of the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence."

Id. at , 37-38, citing *Hoffman v. United States,* 341 U.S. 479, 486 (1951).

Further, In reaching its Opinion in this case, The Ninth Circuit relied on this Court's plurality opinion, *Chavez v. Martinez*, 538 U.S. 760, 765 (2003), concluding

that the § 1983 claim for a Fifth Amendment violation required the use of coerced statements in "criminal case." However, this Court specifically declined to define "criminal case," as used in the Fifth Amendment:

> In our view, a "criminal case" at the very least requires *the initiation of legal proceedings.* See *Blyew v. United States*, 13 Wall. 581, 595 (1872) ("The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning *a proceeding in court, a suit, or action*" (emphasis added)); Black's Law Dictionary 215 (6th ed. 1990) (defining "[c]ase" as "[a] general term for an action, cause, suit, or controversy at law . . . a question contested *before a court of justice*" (emphasis added)). We need not decide today the precise moment when a "criminal case" commences. . . .

Id. In denying the plaintiff's claim in *Chavez*, this Court noted specifically that

> [Martinez] was never made to be a "witness" against himself in violation of the Fifth Amendment's Self-Incrimination Clause because his *statements were never admitted as testimony against him in a criminal case. Nor was he ever placed under oath and exposed to* " *'the cruel trilemma of self-accusation, perjury or contempt.'* " *Michigan v. Tucker*, 417 U.S. 433, 445 (1974) (quoting *Murphy v. Waterfront Comm'n of N. Y. Harbor*, 378 U.S. 52, 55 (1964)) (emphasis added).

Id.

Unlike *Chavez*, where the plaintiff was never charged with a crime and his answers were never used against him in *any* criminal prosecution, Paul's confession formed the basis not only for his arrest, but also the filing of criminal charges and he was forced to confront his own coerced statements when the court set pre-trial release conditions at the bail hearing, and again at the evidentiary hearing while under oath.

In addition, the Ninth Circuit's Opinion made every effort to harmonize its holding with the mandates of this Court in *Chavez*. The court specifically responded to Justice Souter's concern in *Chavez* that there was "no limiting principle or reason to foresee a stopping place short of liability in all [cases involving coerced statements]." (Pet. App. at 34a, fn 15) citing, 538 U.S. 760, 778-779 (2003). The Ninth Circuit, therefore, stated that "The rule we adopt today, holding that the Fifth Amendment has been violated only when government officials use an incriminating statement to initiate or prove a criminal charge, provides a sensible 'stopping place.'" *Id.*

The Ninth Circuit's Opinion in this case is supported by the long legal history of the Fifth Amendment and is consistent with this Court's holding in *Chavez*. Accordingly, the Petition for a Writ of *Certiorari* fails to demonstrate a conflict between the Ninth Circuit's Opinion and this Court's precedent. The Petition should be denied.

D. *Petitioner's Claim that the Ninth Circuit's decision will have a "chilling effect" on law enforcement activities is not supported by fact or law.*

Petitioner argues the Ninth Circuit's Opinion will have a "chilling effect" on law enforcement activities. Specifically, petitioner argues the Ninth Circuit's Opinion "creates an unworkable standard that will expose law enforcement officers to unnecessary lawsuits and liability." (Brief of Pet. at 21). Petitioner also argues the Ninth Circuit's Opinion will "discourage legitimate law enforcement activities" because "the only way an officer can assure that he will not face a §1983 claim is to not conduct the interrogation." *Id.* at 21-22.

Petitioner's argument, however, presupposes that law enforcement officers do not have to follow rules applicable to interrogations and that if they do not there will be no consequences. To the contrary, Supreme Court precedent begun by *Miranda* and continuing to the present day sets forth the requirements for a proper interrogation. A law enforcement officer must follow the rules laid out by this Court in interrogating a witness or suspect and the decision to follow the rules should not and can not be dependent on whether civil liability may attach at the time of filing charges, trial, or some other time.

Therefore, the result of petitioner's position is that an individual may be subject to all of the evils of intentional psychological coercion and deprivation of human dignity that concerned this Court so greatly in *Miranda* and its progeny and not have any remedy for that violation other than mere suppression.

This is not the law. In petitioner's world a statement may be psychologically coerced from a suspect, as was the case with Paul Stoot II, and *Miranda* may be ignored without fear of liability. The legal history of the Fifth Amendment does not support this view, but, rather, supports the Ninth Circuit's Opinion that the Fifth Amendment provides broader protections and remedies than those proposed by petitioner.

Petitioner argues that the protection and remedy for a violation of the Fifth Amendment is solely suppression, as happened here. That argument is contrary to 42 U.S.C. § 1983, *Chavez*, and Supreme Court precedent as detailed above. That argument is also contrary to reality. The reality is that over 90% of criminal felony and misdemeanor cases are not tried and are resolved by plea bargain.[3] Of those that do go to trial, exclusionary procedures are invoked in a miniscule number of cases. *Id.* Exclusion at trial cannot effectively protect the Fifth Amendment rights of individuals. If exclusion is the sole remedy there is no effective deterrent from law enforcement officers intentionally coercing statements from individuals who should have full access to their constitutional rights.

In addition, when a coerced statement is relied upon for purposes of filing charges, determining judicially whether the prosecution may proceed and determining pretrial status, there is significant harm to the defendant. That harm includes being cast as a criminal in society and social groups, especially where

[3] *See* Stephanos Bibas, *How Apprendi Affects Institutional Allocations of Power*, 87 Iowa L. Rev, 465 n.6 (2002).

there is a juvenile involved. There can also be significant attorney's fees in defending a criminal case even through an evidentiary hearing. There is also the very real possibility of incarceration pending and evidentiary hearing and other pre-trial restraints on the defendant's liberty.[4]

Unless there is some deterrence other than suppression, an officer, in the discharge of his duties, has a clear incentive to violate *Miranda* and obtain a "useful" statement even though it may be unconstitutional, even though it may later be suppressed. The lack of a deterrence mechanism "signal[s] police departments that they are free to disregard *Miranda* if they are willing to pay the price of exclusion. Because the *Miranda* exclusionary sanction is a mild one, that message likely will lead to increased, and perhaps widespread, police noncompliance with the *Miranda* rules." Steven D. Clymer, *Are the Police Free to Disregard* Miranda?, 112 Yale L.J. 447, 452 (2002).

A civil suit under 42 U.S.C. §1983 is the mechanism in place to deter misconduct and intentional violations of an individual's Fifth Amendment rights.

Accordingly, petitioner presents no "compelling reasons" that his Petition for Writ of Certiorari should be granted. His position that there will be a "chilling

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[4] Such as here, Paul was released pending trial, but the Judge imposed several conditions of release including that he "always be supervised by an adult who is aware of the charge." (Pet. App. at 12a).

effect" on the lawful actions of law enforcement officers is unsupported by fact or law. Law enforcement officers still have to follow this Court's mandates and the law in conducting interrogations no matter where they find themselves.

IV.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. For the foregoing reasons Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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