MIRANDA AND THE REQUIREMENT OF REWARNING: ANALOGIZING *MOSELY* AND *EDWARDS* TO PROTECT POST-WAIVER DEFENDANTS

JUSTIN SUMRALL[**]

The current safeguards afforded to post-waiver defendants under Miranda leave the vast majority of defendants unprotected. Studies indicate 80% of defendants waive their Miranda rights, but the only safeguards implemented by the Supreme Court are directed at the minority of those that invoke their Miranda rights. Further, this problem, although widely litigated, receives little attention in legal scholarship. The issue of protecting post-waiver defendants from subsequent coercion is lost in the larger context of Miranda. In fact, no article directly addressing this issue has been written for several decades. In addition to being the first article in decades to shed light on this highly litigated issue, this article also contains a full fifty state and federal circuit survey of cases that categorizes each jurisdiction's approach. Though this issue is regularly litigated, each jurisdiction is left to determine its own solution. This has lead to contrasting, and often contradictory, results. However, the Supreme Court's lack of attention to this problem does not include an attendant lack of solutions; solutions exist in current post-invocation safeguards. Further, analogizing these protections is necessary for the equitable treatment of all defendants. Implementing a totality-of-the-circumstances test alongside a bright-line rule provides optimal protection. By ensuring all defendants are protected, the gulf between post-waiver and post-invocation defendants would be bridged, and the tenets of Miranda would be more appropriately realized.

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[**] The author received his Juris Doctor from the University of Mississippi School of Law in 2016 and his Bachelor of Arts degree in History from Mississippi State University in 2013. He served as Executive Editor for Volume 85 of the *Mississippi Law Journal*. The author wishes to thank Professor Jack Wade Nowlin of the University of Mississippi School of Law; his guidance and input was instrumental in writing this Article. He also wishes to thank the editors of the *Dartmouth Law Journal* for their input and assistance with this Article.

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INTRODUCTION

"You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?"[1]

These familiar words are some of the most ubiquitous and recognizable aspects of the criminal justice system, but the profound implications of a defendant's response to these warnings is less obvious.

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[1] *What are your Miranda Rights?*, (Jan. 10, 2015, 3:05 PM), http://www.mirandawarning.org/whatareyourmirandarights.html.

The few who invoke their rights enjoy clear post-invocation safeguards. However, the vast majority of defendants waive these rights, and the procedures following waiver are anything but clear.

Oddly, the issue of post-waiver safeguards is forgotten in legal scholarship. In fact, this issue has not been addressed in any significant fashion in several decades. There are few topics so widely litigated[2] that receive so little attention, and this article attempts to bring this issue, and a proposed solution, to the forefront.[3]

This lack of scholarly attention does not mean this issue is unimportant. This issue is regularly litigated in jurisdictions across the country due to the vast number of criminal defendants who waive their rights. Because the Supreme Court has never directly addressed the issue, though, it has fallen to each state to consider the issue and attempt to formulate a solution. However, shortly after the *Miranda* decision, some federal circuits addressed the issue of post-waive protections. Those decisions lacked both careful thought and thorough analysis, but for decades they have served as the status-quo approach by states.

Further, because this issue is widely litigated at the state level, this article contains the only full case collection[4] from all fifty states where this issue is regularly litigated. This survey shows a clear divide among state judiciaries and proves that this problem needs a clear, implementable solution.

Waiving one's *Miranda* rights raises an essential question: are post-waiver defendants ever entitled to additional *Miranda* warnings?[5] Does waiver of one's *Miranda* rights foreclose any possibility of re-warning?

Consider also the myriad circumstances that may weigh on defendants after receipt of their *Miranda* warnings. What if the charges against the defendant increase, the interrogators change, or the location of subsequent interrogations is entirely different?[6] What if the defendant has an unusually low I.Q.?[7] What if he has been under anesthesia and undergone surgery?[8] What if the defendant is a minor[9] or does not understand English?[10] What if

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[2] *See Appendix* for a survey of this issue across all fifty states and twelve federal circuits.

[3] This issue is tangentially explored and addressed in topics such as the efficacy of waivers, but such a focus misses the point. The question in this topic is not how long waivers maintain efficacy, but rather, at what point does a defendant become entitled to further *Miranda* warnings, and is a singular, initial, Mirandizement sufficient to dispel all future coerciveness? This article says no.

[4] *See Appendix*.

[5] No clear answer exists in current jurisprudence or legal scholarship, and this lack of clarity unwittingly punishes defendants by leaving them unprotected.

[6] People v. Crosby, 91 A.D.2d 20, 29, 457 N.Y.S.2d 831, 837 (App. Div. 1983).

[7] People v. Caruso, 45 A.D.2d 804, 805, 356 N.Y.S.2d 902, 904 (App. Div. 1974).

[8] Mitchell v. State, 982 P.2d 717, 722 (Wyo. 1999).

[9] State v. Stone, 570 So. 2d 78, 80 (La. Ct. App. 1990).

[10] United States v. Nguyen, 608 F.3d 368, 375 (8th Cir. 2010).

the defendant sleeps for several hours prior to questioning,[11] or what if several months[12] have passed since the initial Miranda warnings are given? Unfortunately in many state jurisdictions, once a defendant waives his rights, those subsequent circumstances are irrelevant.

As a solution to this problem, I will argue that post-waiver defendants should be given full *Miranda* warnings again when certain criteria are met. These criteria are drawn directly from current post-invocation safeguards; those safeguards are set forth by the Supreme Court and include a totality-of-the-circumstances test[13] and a bright-line test.[14] Employing a combination of such tests for post-waiver defendants would ensure that defendants experiencing identical circumstances would receive identical safeguards throughout the country.

Part I of this article discusses post-invocation and post-waiver procedural safeguards, and shows that the protections extended to those who waive their rights lack the clarity of protections given to those who invoke their rights. Part II contains a survey of cases across federal and state judiciaries which catalogs the different ways this issue is approached in different jurisdictions. Part III describes my solution to this problem: analogizing post-invocation safeguards to post-waiver defendants. Finally, Part IV argues that improving post-waiver safeguards would benefit both defendants and prosecutors.

I. THE LANDSCAPE OF POST-INVOCATION PROCEDURAL SAFEGUARDS

Before addressing post-waiver protections, we must first consider the protections already in place for those who invoke their *Miranda* rights. The landscape of procedural guidelines for criminal interrogations begins and ends with *Miranda v. Arizona*. *Miranda* applies only to custodial interrogations.[15] As such, post-invocation protections are in play only in those situations where *Miranda* warnings first applied.[16] The Supreme Court has clarified and refined *Miranda* time and again, but post-invocation protections represent a specific subset of cases that address the means and methods of dealing with defendants who invoke their *Miranda* rights. These methods ensure that post-invocation defendants are protected and given the full benefit of that invocation. The Supreme Court has decided

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[11] *Crosby*, 91 A.D.2d 20, 29.
[12] Jackson v. State, 268 Ind. 360, 363, 375 N.E.2d 223, 225 (1978).
[13] *See* Michigan v. Mosley, 423 U.S. 96, 104 (1975).
[14] *See* Edwards v. Arizona, 451 U.S. 477 (1981); Maryland v. Shatzer, 559 U.S. 98, 110 (2010).
[15] Miranda v. Arizona, 384 U.S. 436 (1966).
[16] Since 1966, many cases have reached the Supreme Court which have clarified *Miranda v. Arizona*.

with relative clarity[17] the measures necessary to effectuate proper post-invocation protections.

Miranda v. Arizona represented the Supreme Court's effort to promulgate clear procedural guidelines for custodial interrogations.[18] In *Miranda*, the Court took issue with the coercive tactics employed by interrogators against criminal defendants.[19] A lasting tenet of *Miranda* is that custodial interrogations are inherently coercive.[20] Accordingly, the Court established the now ubiquitous warnings aimed at dispelling this inherent coerciveness and informing defendants of their constitutional rights.[21] These warnings inform defendants of their right to remain silent and to counsel. Defendants may either invoke these rights or they may waive them and cooperate with the interrogation in the absence of counsel.[22]

The Court stressed the importance of *Miranda* warnings regardless of a defendant's past experience (or lack thereof) in the criminal justice system, requiring all defendants to be reminded of their rights at the outset of any custodial interrogation. In so doing, the Court made it clear that an appraisal of one's constitutional rights at the outset is necessary to dispel coerciveness. Accordingly, those who waive their *Miranda* rights and those who invoke them are both in an inherently coercive atmosphere. From the standpoint of coerciveness, then, the Court did not delineate between post-invocation and post-waiver defendants. For the comparatively few who do invoke their *Miranda* rights, the Court has promulgated clear procedural safeguards to protect both the right to silence and to counsel.[23]

A. *MICHIGAN V. MOSLEY – "SCRUPULOUSLY HONORING" THE RIGHTS OF THE DEFENDANT*

In *Michigan v. Mosley*, the Court clarified and established a factor-based analysis to ensure that individuals who invoke their right to silence are protected.[24] First, interrogation must cease immediately upon the

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[17] Relative to post-waiver protections, which are sparse to non-existent, post-invocation protections of the rights to silence and counsel are established with great clarity.
[18] Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 776 (2009); Miranda v. Arizona, 384 U.S. 436 (1966).
[19] *Id*.
[20] *Miranda*, 384 U.S. at 467.
[21] Strauss, *supra* note 18, at 776.
[22] *Id*.; *Miranda*, 384 U.S. at 436.
[23] Strauss, *supra* note 18; *Miranda*, 384 U.S. at 436.
[24] Michigan v. Mosley, 423 U.S. 96, 104 (1975).

invocation of one's right to silence. Although the Court stated that the questioning moratorium does not extend indefinitely, it requires interrogators to "scrupulously honor" a defendant's expressed right to silence.[25]

Determining whether a defendant's right to silence was honored requires a consideration of the totality of that defendant's circumstances,[26] examining the procedure for a post-invocation of that right to silence. Importantly, before further custodial interrogations, post-invocation defendants must be appraised of their *Miranda* rights again, and they must intelligently waive those rights prior to further custodial interrogation. Though the *Mosley* defendants were clearly aware of their rights at the outset of interrogation,[27] dispelling the coercive atmosphere requires full *Miranda* warnings again before further questioning.

B. EDWARDS V. ARIZONA – HONORING THE DEFENDANT'S "CRY FOR HELP"

In similar fashion, in *Edwards v. Arizona* the Supreme Court established a bright-line procedural safeguard for defendants who invoke their right to counsel.[28] Similar to *Mosley*, *Edwards* requires interrogation to cease immediately upon invocation of that right.[29] Yet rather than employing a fact intensive factor test, the procedural safeguard outlined in *Edwards* is a bright-line rule that bars interrogation until counsel is present.[30]

Further, even if counsel is present or the defendant has initiated questioning, interrogators must re-*Mirandize* the defendant and obtain a valid waiver prior to any future interrogation.[31] Like *Mosley*, full re-*Mirandizment* is necessary prior to further custodial interrogation even after complete adherence to all procedural safeguards.

In *Maryland v. Shatzer*, the Court clarified its holding in *Edwards* and established another bright-line rule with regard to procedural safeguards for

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[25] *Id*.

[26] Strauss, *supra* note 18; *Mosley*, 423 U.S. at 104. This analysis requires cessation of interrogation, the passage of a significant period of time, and additional *Miranda* warnings. 21A Am. Jur. 2d Criminal Law § 920.

[27] These defendants are clearly aware of their rights by virtue of their initial *Miranda* warnings.

[28] *See* Edwards v. Arizona, 451 U.S. 477 (1981).

[29] *Id*. at 482.

[30] *Id*. Unless the defendant initiates contact with police; *See also* Minnick v. Mississippi, 498 U.S. 146 (1990).

[31] *Edwards*, 451 U.S. at 482.

post-invocation of the right to counsel.[32] In *Shatzer*, the Supreme Court held that a defendant may be interrogated again after experiencing a fourteen day break in *Miranda* custody.[33] Of course, this interrogation must follow full re-*Mirandizement,*[34] in order to secure a proper waiver. Though an admittedly arbitrary time frame in that case, the judicial rule eased the burden of application[35] to ensure equal treatment of a defendant in custody.

II. CASE COLLECTION OF POST-WAIVER PROCEDURAL SAFEGUARDS

The Supreme Court has never issued, outlined, promulgated or offered any safeguards similar to *Mosley*, *Edwards*, or *Shatzer* for post-waiver defendants. Accordingly, that mantle has been taken up, with various degrees of intensity and success, by individual state and federal courts. A survey of how individual jurisdictions have implemented procedural safeguards for post-waiver defendants illustrates the void in a consistency of safeguards between post-invocation and post-waiver defendants.

A. FEDERAL CIRCUIT DECISIONS

Federal appellate courts have addressed the issue of post-waiver procedural safeguards and when it is proper to re-*Mirandize* defendants. The overarching focus of those courts has been the time lapse between initial *Miranda* warnings and further interrogation. In 1968, the Ninth Circuit established the status quo model for analyzing this issue in *Maguire v. United States*. In that case, despite a passage of three days after initial *Miranda warnings were issued*, the court held that the post-waiver defendant did not need to be reminded of his *Miranda* rights prior to further custodial interrogations.[36] Passage of time was the entire focus of the Ninth Circuit's analysis, and this method was reaffirmed by that court in 1995.[37] Other federal appellate courts followed suit in their own analyses.

Two years after *Maguire*, for example, the Fifth Circuit was faced with a similar situation and followed *the Maguire* analysis by citing the

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[32] Maryland v. Shatzer, 559 U.S. 98, 110 (2010).
[33] *Id.*
[34] *Id.*
[35] *Id.* ("[It] is certainly unusual . . . to set forth precise time limits governing police action, [but] it is not unheard-of…*f*ailure to say where the line falls short . . . and leaving that for future case-by-case determination, is . . . not at all less arbitrary").
[36] Maguire v. United States, 396 F.2d 327, 331 (9th Cir. 1968).
[37] People of Territory of Guam v. Dela Pena, 72 F.3d 767, 770 (9th Cir. 1995).

lack of a "significant time-lapse" between initial *Miranda* warnings and further custodial interrogation, holding that the post-waiver defendant was not entitled to further warnings.[38] The Fifth Circuit returned to the issue in 1975, and held that ten days was not a significant enough passage of time to warrant a full review of *Miranda*.[39] The Fifth Circuit's analysis of those post-waiver procedural safeguards remained unchanged thirty-five years later in its 2005 decision in *United States v. Clay*.[40] In *Clay* the Fifth Circuit held that a passage of two days did not necessitate fresh *Miranda* warnings as a procedural safeguard prior to further custodial interrogation.

The Seventh Circuit also focused on the passage of time in *United States ex rel. Henne v. Fike,* when it affirmed a passage of nine hours after warnings as adequate.[41] The Eighth Circuit followed suit in 2010 in *United States v. Nguyen*, when it held that the passage of a full day between *Miranda* warnings and further custodial interrogations was permissible.[42] Relying heavily on the Fifth Circuit's analysis,[43] the Eleventh Circuit held that the passage of a full week between initial *Miranda* and further custodial interrogation did not require any further warnings as a procedural safeguard.[44]

The Fourth Circuit dealt with the issue of a post-waiver defendant and passage of time in *United States v. Gordon*,[45] ruling that a short passage of time did not require further *Miranda* warnings. That court reaffirmed the ruling in *United States v. Frankson*.[46] The Sixth Circuit addressed the issue of whether defendants were entitled to be reminded of their rights in *U.S. v. Weekly*, and also framed the issue as one centering on the passage of time.[47]

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[38] United States v. Hopkins, 433 F.2d 1041, 1045 (5th Cir. 1970).

[39] Biddy v. Diamond, 516 F.2d 118, 121 (5th Cir. 1975).

[40] United States v. Clay, 408 F.3d 214, 221 (5th Cir. 2005).

[41] U. S. ex rel. Henne v. Fike, 563 F.2d 809, 814 (7th Cir. 1977). The Seventh Circuit also noted that there was "no authority" upon which to require additional warnings. *Id*. This further supports a new approach implemented by the Supreme Court.

[42] United States v. Nguyen, 608 F.3d 368, 375 (8th Cir. 2010). The Third Circuit admitted that Nguyen's "command of the English language is debatable." *Id*. However, this had no bearing on the outcome of the case.

[43] The Court felt *Biddy* controlled in this case. Martin v. Wainwright, 770 F.2d 918, 930 (11th Cir. 1985) opinion modified on denial of reh'g, 781 F.2d 185 (11th Cir. 1986).

[44] *Id*.

[45] United States v. Gordon, 895 F.2d 932, 938 (4th Cir. 1990).

[46] United States v. Frankson, 83 F.3d 79, 83 (4th Cir. 1996).

[47] United States v. Weekley, 130 F.3d 747, 751 (6th Cir. 1997). At issue here is whether the *Miranda* rights given by the FBI agents to Weekley following his arrest were still in force when the agents interrogated Weekley approximately one hour later. *Id*. "The courts have generally rejected a *per se* rule as to when a suspect must be readvised of his rights after the *passage of time* or a change in questioners." *Id*. (quoting United States v. Andaverde, 64 F.3d 1305, 1312 (9th Cir.1995), *cert. denied,* 516 U.S. 1164, 116 S.Ct. 1055, 134 L.Ed.2d 199 (1996)).

The Third Circuit took a different approach in *United States v. Pruden* and adopted a time-focused two-prong inquiry in determining if full *Miranda* warnings are needed prior to further custodial interrogations.[48] In *Pruden*, the court noted that the passage of about a day constituted a "significant" passage of time and was "at the upper end of the permissible range,"[49] but that it was still permissible despite acknowledging the countervailing factors.[50]

Finally, the First Circuit tangentially addressed the issue of post-waiver procedural safeguards in *Gorman v. United States*.[51] There, the court rejected an automatic requirement for the subsequent reading of *Miranda* rights.[52] Though the case did not deal specifically with the issue of a post-waiver defendant and custodial interrogation, it has nonetheless influenced other jurisdictions dealing with post-waiver defendants.[53]

B. State Judicial Decisions

Many state courts have also addressed the issue of procedural safeguards for post-waiver defendants. Among them are a wider variety of approaches. Some states prefer an analysis framed around the passage of time alone, others look at several factors and default back to time, and some employ a pure factor test. However, there is no general consensus in approach, and the passage of time remains the default focus for judicial analysis. Most state courts follow the lead of the early Ninth and Fifth Circuit decisions[54] discussed above, though some states have been more progressive in altering that approach to post-waiver safeguards. Nonetheless, there are three basic approaches taken by the states as discussed below.

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[48] United States v. Pruden, 398 F.3d 241, 246 (3d Cir. 2005).

[49] *Id*. This is notably in direct contrast to the Fifth Circuit's definition of a significant amount of time (and in Miranda's "substantial" passage of time).

[50] *Id*. at 247.

[51] Gorman v. United States, 380 F.2d 158, 164 (1st Cir. 1967).

[52] Though the context of *Gorman* dealt with a police search, the court nevertheless addressed the issue of *Miranda* reminders. *Id*. "In the first place, advocacy of an automatic second-warning system misunderstands and downgrades the warnings required by Miranda. Their purpose was not to add a perfunctory ritual to police procedures but to be a set of procedural safeguards."

[53] *See* People v. Hill, 39 Ill. 2d 125, 132, 233 N.E.2d 367, 371 (1968). "To adopt an automatic second-warning system would be to add a perfunctory ritual to police procedures rather than providing the meaningful set of procedural safeguards envisioned by Miranda."

[54] One can see the influence of Maguire and Hopkins on many of the early state decisions, and this reliance created a status quo reliance on Time-lapse analyses.

1. A Pure Time-Lapse Approach

The most common approach taken by state courts focuses strictly on the period of time which has transpired between the initial *Miranda* warnings given a defendant and any subsequent interrogations.

Following the lead of the Ninth and Eighth Circuits, Alabama Supreme Court looked at a passage of three days and the lack of "any extraordinary circumstances," in holding that the post-waiver defendant was not entitled to procedural safeguards prior to further custodial interrogation.[55] Nonetheless, Alabama did establish some semblance on an upper limit of time-lapse in *Ex Parte J.D.H.* when it held that a passage of sixteen days exceeded permissible limits.[56] Similarly, the Arizona Supreme Court upheld the passage of twelve and thirty-six hours between initial warnings and later interrogation, as adequate citing a lack of an "unduly extensive" passage of time.[57]

Iowa has also rejected the notion that post-waiver defendants should be entitled to reminders of their *Miranda* rights unless the passage of time is extensive.[58] Accordingly, in *State v. Russell*, the Supreme Court of Iowa upheld the time-lapse of three days between initial warnings and further questioning.[59] Arkansas[60] and California[61] approved the passage of one day,and, in like fashion, Oklahoma upheld the passage of one day by relying on the holding from *Maguire*.[62] Washington also relied heavily on

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[55] Johnson v. State, 56 Ala. App. 583, 588, 324 So. 2d 298, 302 (Crim. App. 1975). However, Alabama also acknowledged "Even so, the reasons that require Miranda warnings before an in-custody interrogation logically apply to an interrogation that takes place such a long period of time after warnings and waiver that under the circumstances it is to be reasonably concluded that defendant was not impressed thereby in making a confession."

[56] *Ex parte* J.D.H., 797 So. 2d 1130, 1132 (Ala. 2001).

[57] State v. Gilreath, 107 Ariz. 318, 319, 487 P.2d 385, 386 (1971). Although this case was decided before Miranda, it is analogized to Miranda. Also, it may be helpful here to note the fact that the actual passages of time may not seem significant in and of themselves, but the problem is the undue focus on this factor. Such a focus detracts from the myriad other factors potentially weighing on post-waiver defendants.

[58] State v. Davis, 261 Iowa 1351, 1354, 157 N.W.2d 907, 909 (1968). "An accused need not be advised of his constitutional rights more than once unless the time of warning and the time of subsequent interrogation are too remote in time from one another."

[59] State v. Russell, 261 N.W.2d 490, 495 (Iowa 1978). "[W]hen defendant responded to the questions asked of him at the second interrogation, he was fully apprised of his right to remain silent and thus had intelligently waived his right. No second warnings were required."

[60] Sossamon v. State, 245 Ark. 306, 308, 432 S.W.2d 469, 471 (1968).

[61] People v. Long, 263 Cal. App. 2d 540, 545, 69 Cal. Rptr. 698, 701 (Ct. App. 1968). This approval came despite allegations that he was drunk and deprived of food.

[62] Moreno v. State, 1972 OK CR 361, 504 P.2d 1241, 1243. *See also* Maguire v. United States, 396 F.2d 327, 331 (9th Cir. 1968).

Maguire in upholding a passage of four days.[63] Finally, Wyoming upheld a passage of eleven hours in like manner.[64]

While other states have grappled with time lapses of several hours and several days between warnings and further questioning, the Supreme Court of Indiana upheld a time lapse of several months as adequate between *Miranda* warnings and further interrogation.[65] In reaching its conclusion, the court held that the defendant's waivers in October and November preserved the admissibility of statements later received in the middle of January.[66] While the length of that extensive time lapse is an outlier, the court adopted an approach that did not take into account any factors aside from time lapse.

By contrast, the Court of Criminal Appeals in Tennessee held that passage of four months would likely necessitate repeated *Miranda* warnings.[67]

Further, the Supreme Court of Illinois looked exclusively at the time lapse between initial *Miranda* warnings and further questioning in upholding a confession.[68] In reaching its decision, the court relied on the reasoning from the First Circuit's decision in *Gorman,* which had rejected an automatic repeat of those warnings.[69] Similarly, the Supreme Court of Kansas followed the reasoning from *Gorman* in rejecting the notion that *Miranda* warnings must be repeated at the onset of subsequent custodial interrogations.[70]

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[63] State v. Blanchey, 75 Wash. 2d 926, 931, 454 P.2d 841, 845 (1969). This decision is despite the fact that defendant had travelled to Canada. *See also Maguire*, 396 F.2d at 331.

[64] Mitchell v. State, 982 P.2d 717, 722 (Wyo. 1999). This decision was reached despite the fact that the defendant underwent surgery in the time between initial warnings and subsequent interrogation.

[65] Jackson v. State, 268 Ind. 360, 363, 375 N.E.2d 223, 225 (1978).

[66] *Id*. "On January 16, the defendant was visited by his girl friend, under the supervision of a police detective. . . . He had been advised of his rights in October, at which time he executed a written waiver, and three times in November, at which times he made statements to the police." *Id*.

[67] State v. Walker, 729 S.W.2d 272, 274 (Tenn. Crim. App. 1986). While this admission was held to violate the Fifth Amendment, the Court felt the error was harmless. *Id*.

[68] People v. Hill, 39 Ill. 2d 125, 132, 233 N.E.2d 367, 371 (1968). "To adopt an automatic second-warning system would be to add a perfunctory ritual to police procedures rather than providing the meaningful set of procedural safeguards envisioned by Miranda." *Id*.

[69] *Id*. This case illustrates how dependence on *Gorman* is harmful because *Gorman* stands in opposition to procedural safeguards for post-waiver defendants.

[70] State v. Boyle, 207 Kan. 833, 841, 486 P.2d 849, 855-56 (1971).

> . . . [O]nce the mandate of Miranda is complied with at the threshold of the interrogation . . . the warnings need not be repeated at the beginning of each successive interview. To adopt an automatic second warning system would be to add a perfunctory ritual to police procedures rather than provide the meaningful set of procedural safeguards envisioned by Miranda.

Like these states, Louisiana rejects an automatic requirement of repeated *Miranda* warnings, fearing that such reminders would "denigrate into a formalistic ritual."[71] Nonetheless, when faced specifically with the issue of procedural safeguards afforded to post-waiver defendants, Louisiana also defaulted to a time-lapse consideration.[72]

The Supreme Court of Montana similarly defaulted to a pure time-lapse analysis when determining if a defendant was entitled to a re-warning.[73] Mississippi has reached this same conclusion, as has New York,[74] despite the presence of several factors that are pertinent in other jurisdictions.[75]

2. A Factor Test with Time-Lapse

(Quoting Gorman v. United States, 380 F.2d 158, 164 (1st Cir. 1967).

[71] State v. Harvill, 403 So. 2d 706, 709 (La. 1981). "Absent some significant break in the interrogation process . . . repetition of these warnings prior to the taping of defendant's statement is not required. A requirement that the Miranda warnings be repeated before each separate interrogation period would quickly degenerate into a formalistic ritual."

However, I think a case can be made that Miranda itself is a "formalistic ritual" insomuch as it is one of the most recognizable and quoted tenets of criminal law. Nonetheless, this sentiment has been echoed elsewhere. "It is divorced from reality to suppose that the defendant . . . had forgotten over the weekend the Miranda warnings administered late on the previous Friday. It is equally implausible that the conduct of the defendant . . . would have been influenced by a repetition of the Miranda warnings." Com. v. Doe, 37 Mass. App. Ct. 30, 37, 636 N.E.2d 308, 312 (1994).

[72] State v. Stone, 570 So. 2d 78, 80 (La. Ct. App. 1990). "In view of the fact that this was only a short break following the detailed discussion of defendant's Miranda rights we are not persuaded by this argument. Demma was not required to start all over again and repeat all that he had previously covered with him." *Id*. In this case, there was no relevance given to the fact the defendant was a minor.

[73] State v. Lenon, 174 Mont. 264, 274, 570 P.2d 901, 907 (1977) abrogated by State v. Cope, 250 Mont. 387, 819 P.2d 1280 (1991). In this case, the time between the first verbal Miranda warning and the confession was less than nine hours. Such a brief Time-lapse between the verbal warning and the confession did not by itself, under the facts of this case, create a duty to verbally repeat those warnings.

[74] *See* People v. Manley, 40 A.D.2d 907, 907, 337 N.Y.S.2d 759, 760 (App. Div. 1972); People v. Caruso, 45 A.D.2d 804, 805, 356 N.Y.S.2d 902, 904 (App. Div. 1974) ("There is no requirement that Miranda warnings be repeated immediately prior to questioning. Here, the warnings were given within an hour of the commencement of the interrogation and any claim that defendant forgot them in that brief interval is incredible.") (citation omitted) *Id*.; People v. Crosby, 91 A.D.2d 20, 29, 457 N.Y.S.2d 831, 837 (App. Div. 1983) ("Nor is there any requirement that the *Miranda* warnings be intoned every single time a suspect in custody is subjected to separate series of questioning within a short time interval.") *Id*.

[75] *Caruso*, 45 A.D.2d at 805. ("The other factors advanced by the defendant in support of his contention that the confession was involuntary are the failure of the police to reissue Miranda warnings immediately prior to questioning and the low I.Q. (87) of the defendant and his ninth grade education."); *Crosby*, 91 A.D.2d at 29.

Beyond looking exclusively at the lapse of time between the initial *Miranda* warnings and subsequent interrogations, some states acknowledge a "totality of the circumstances" approach or other specific factors to indicate that *Miranda* warnings might need to be repeated before ultimately deferring to a time-lapse analysis alone. When it comes to analyzing the issue, these states tend to treat the time factor as dispositive. Accordingly, despite the presence of other pertinent factors, the issue is resolved so long as these courts deem the passage of time acceptable.

Though the Supreme Judicial Court of Maine cites several factors to consider in determining whether post-waiver defendants are entitled to further procedural safeguards,[76] the court upheld the passage of seventeen hours as permissible between *Miranda* warnings and subsequent interrogation.[77] This period was deemed permissible despite the presence of the delineated factors,[78] and the court focused on time lapse alone when the passage of time was shorter.[79]

Similarly, like the Sixth Circuit, the Supreme Court of Missouri framed the issue of re-*Mirandizing* post-waiver defendants as one of adequate time lapse.[80] Despite discussing other relevant factors, the Missouri Court of Appeals ultimately focused on time lapse and relied on *Maguire* in upholding the passage of two days.[81]

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[76] State v. Myers, 345 A.2d 500, 502 (Me. 1975).

> Several objective indicia are significant in determining when an accused must be reinformed of his constitutional rights. They are: (1) the Time-lapse between the last Miranda warnings and the accused's statements; (2) interruptions in the continuity of the interrogation; (3) whether there was a change of location between the place where the last Miranda warnings were given and the place where the accused's statement was made; (4) whether the same officer who gave the warnings also conducted the interrogation resulting in the accused's statement; and (5) whether the statement elicited during the complained of interrogation differed significantly from other statements which had been preceded by Miranda warnings.

(quoting Commonwealth v. Wideman, from Pennsylvania).

[77] *Id*.

[78] *Id*. In *Myers* the defendant spent the night in jail and his subsequent statement was far different than that initial post-waiver statement.

[79] State v. Peterson, 366 A.2d 525, 528 (Me. 1976). "We conclude that the evidence supports the conclusion . . . that defendant effectively waived his Miranda rights at the time Officer Phillibrown informed him of those rights, and this waiver continued effective, despite the lapse of three hours, to the time of Detective Ames' conversation with the defendant." *Id*. However, the Court here does not seem to be disturbed with the defendant's possible intoxication or impairment.

[80] State v. Groves, 646 S.W.2d 82, 85 (Mo. 1983). "The mere *lapse of time* between the receipt of *Miranda* warning and the giving of inculpatory statements does not require the exclusion of the statements." (emphasis added). *See also* Com. v. Silanskas, 433 Mass. 678, 687, 746 N.E.2d 445, 456 (2001). It seems from *Silanaskas* that Massachusetts framed the issue around time-lapse.

[81] State v. Brown, 601 S.W.2d 311, 313 (Mo. Ct. App. 1980).

The Appeals Court of Massachusetts did not explicitly list factors to consider in determining the need for post-waiver procedural safeguards, but it nonetheless found that warnings should have been repeated to the defendant following the passage of three days.[82] A similar approach has been adopted in New Hampshire as well.[83]

The issue of a factor-based analysis was also addressed by the Supreme Court of Nevada, and that court explicitly stated that time was "certainly the most relevant factor."[84] Nonetheless, despite the passage of time being the most relevant factor in Nevada, and despite the court acknowledging that the longest analogous case they were aware of involved the passage of seven days, it upheld the passage of twelve days as permissible,[85] despite the presence of other pertinent factors as well.[86]

Another common approach is exemplified by the Supreme Court of Minnesota's analysis of the post-waiver issue. Despite framing the analysis around the "totality of the circumstances," that court upheld the passage of seven days as not requiring a re-warning without actually considering any other relevant circumstances.[87]

3. A Pure Factor Test

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[82] Com. v. Doe, 37 Mass. App. Ct. 30, 35, 636 N.E.2d 308, 311 (1994).

> The original warnings, on Friday evening, were insufficient to carry over to the interrogation by Detective Bianchi on Monday morning … and the period between the warning and the resumption of interrogation exceeded by far those Time-lapses which have been found insignificant for purposes of determining the validity of the defendant's knowing, voluntary, and intelligent waiver of his rights.

Id. Further, though this was the decision of an intermediate Court, the Supreme Court of Massachusetts cited it in support. Jones v. State, 119 S.W.3d 766, 799 (Tex. Crim. App. 2003) (footnote 55). *See also Silanskas*, 433 Mass. at 687. It seems from *Silanaskas* that Massachusetts framed the issue around time-lapse.

[83] State v. Monroe, 142 N.H. 857, 868, 711 A.2d 878, 886 (1998). "Rather, the need for an additional warning is determined by the totality of the circumstances."

[84] Koger v. State, 117 Nev. 138, 142, 17 P.3d 428, 431 (2001). "Certainly, *the most relevant factor* in analyzing whether a former *Miranda* admonition has diminished *is the amount of time elapsed* between the first reading and the subsequent interview. Most courts addressing the time factor have considered instances involving only a few hours." (emphasis added) *Id*.

[85] *Id*. at 143. Thus, the longest period allowed in the cases fairly analogous to the instant matter is one week as discussed in *Martin*. (citing Martin v. Wainwright, 770 F.2d 918, 930 (11th Cir. 1985) opinion modified on denial of reh'g, 781 F.2d 185 (11th Cir. 1986).

[86] Koger v. State, 117 Nev. 138, 144, 17 P.3d 428, 432 (2001).

[87] State v. Ganpat, 732 N.W.2d 232, 241 (Minn. 2007). *See also* United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988). In this federal case, the defendant was seasick, the temperature was uncomfortable, he was subjected to seven interrogations, he did not speak English well, he had been injured, and he had been medicated. *Id*. Nonetheless, despite all this, the defendant was evidently not entitled to additional warnings. *Id*.

Despite the preceding categories, there are a number of states that adopt specific factors for analysis and attempt to give those factors relatively equal importance in determining whether to re-*Mirandize* defendants. While the results do not always favor defendants, these states provide the most progressive procedural safeguards for post-waiver protections. Accordingly, they represent a departure from time-lapse focused analyses and provide a framework of safeguards that resemble the framework of post-invocation *Miranda* safeguards.

Pennsylvania represents a notable departure from the status quo of states focusing on time passage alone, by employing a factor-based analysis. The Supreme Court of Pennsylvania adopted a full factor test in determining whether post-waiver defendants are entitled to repeated *Miranda* warnings.[88] In *Commonwealth v. Wideman* that court invalidated incriminatory statements upon consideration of the enumerated factors.[89] New Jersey implemented a similar analysis that accounts for a "totality of the circumstances."[90]

In *Ledda v. State*, the Supreme Court of Delaware employed a factor-based analysis that took account of various factors weighing on the defendant.[91] This approach was affirmed and clarified in *DeJesus v. State*.[92]

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[88] *See* Com. v. Ferguson, 444 Pa. 478, 481-82, 282 A.2d 378, 379 (1971). *See also* Com. v. Wideman, 460 Pa. 699, 706-07, 334 A.2d 594, 598 (1975)

> [W]e have considered (1) the Time-lapse between the last Miranda warnings and the accused's statement; (2) interruptions in the continuity of the interrogation; (3) whether there was a change of location between the place where the last Miranda warnings were given and the place where the accused's statement was made; (4) whether the same officer who gave the warnings also conducted the interrogation resulting in the accused's statement; and (5) whether the statement elicited during the complained of interrogation differed significantly from other statements which had been preceded by Miranda warnings.

Id.

[89] *Wideman*, 460 Pa. at 706-07.

[90] State v. Dispoto, 189 N.J. 108, 124, 913 A.2d 791, 800 (2007). "We reject that bright-line approach and retain instead the more measured and traditional standard that allows for a totality-of-the-circumstances assessment."

[91] Ledda v. State, 564 A.2d 1125, 1130 (Del. 1989). ("Several factors must be considered when determining whether *Miranda* warnings, once given, must be readministered, including the Time-lapse since prior warnings, change of location, interruptions in interrogation, whether the same officer who gave the warning also interrogated, and significant differences of statements.") *Id*. Further, though the Court found against the post-waiver defendant in *Ledda*, the factor test employed by the Court represents an actual procedural safeguard, as opposed to a simple analysis of time-lapse.

[92] DeJesus v. State, 655 A.2d 1180, 1195 (Del. 1995).

> This Court has adopted a five-part test to determine whether police are obligated to repeat once-administered *Miranda* warnings. These factors include: (1) the Time-lapse between the last *Miranda* warnings and the accused's statements; (2) interruptions in the

where Rhode Island employed an analysis that considered several pertinent factors in considering the need to remind a post-waiver defendant of his rights.[93] Maryland followed a similar path in holding that incriminating statements were not admissible because the pertinent factors weighed in favor of the post-waiver defendant.[94] North Carolina has also advocated the use of a somewhat similar analysis,[95] and Ohio,[96] South Carolina,[97] South Dakota,[98] and Connecticut[99] have followed suit as well. In fact, North Carolina invalidated a passage of nineteen hours after considering all the relevant circumstances. However, states that do not consider all relevant circumstances uphold much long passages of time.[100] Though it seemed to

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> continuity of the interrogation; (3) whether there was a change of location between the place where the last *Miranda* warnings were given and the place where the accused's statement was made; (4) whether the same officer who gave the warnings is also conducting the interrogation resulting in the accused's statement; and
> (5) whether there is a significant difference between statement elicited during the interrogation being challenged and other preceding statements.

Id.
[93] State v. Beaulieu, 116 R.I. 575, 584, 359 A.2d 689, 693-94 (1976) abrogated by State v. Lamoureux, 623 A.2d 9 (R.I. 1993).
[94] Brown v. State, 6 Md. App. 564, 570, 252 A.2d 272, 276 (1969).

> We think the circumstances in the case at bar did not justify the trial judge's implicit finding that Brown knowingly and intelligently relinquished his constitutional rights. We point to (1) the Time-lapse, (2) the distance to the location of the second interrogation, (3) the difference in interrogators and (4) to the difference in the statements obtained.

Id.
[95] State v. McZorn, 288 N.C. 417, 433, 219 S.E.2d 201, 212 (1975) *vacated in part*, 428 U.S. 904, (1976).
[96] State v. Lester, 126 Ohio App. 3d 1, 6, 709 N.E.2d 853, 856 (1998).
[97] State v. Smith, 259 S.C. 496, 499, 192 S.E.2d 870, 872 (1972). "The above cases soundly hold that a confession is not necessarily invalid because the Miranda warnings are not repeated at each state of the interrogation process, but look to the circumstances of each case to determine whether the defendant, having been once warned, voluntarily and intelligently waived his rights."
[98] State v. Frazier, 2001 S.D. 19, ¶ 17, 622 N.W.2d 246, 254.
[99] State v. Burge, 195 Conn. 232, 249, 487 A.2d 532, 543 (1985).

> [T]he defendant was continuously in the company of the police, was questioned on the same subject by the same officers throughout that time, and confessed within four hours of . . . the warnings. The defendant's mental condition was not shown to have so affected his memory . . . to render the earlier warnings ineffective.

Id.
[100] State v. Stokes, 150 N.C. App. 211, 223, 565 S.E.2d 196, 204 (2002) *rev'd*, 357 N.C. 220, 581 S.E.2d 51 (2003). "In this case . . . the passage of nineteen hours diluted the first and only warning given to defendant. Defendant's waiver on 1 April 1998 was invalid as to [the] . . . custodial interrogation of defendant on 2 April 1998 and the statements arising from that interrogation."

focus slightly on time-lapse,[101] the Court of Criminal Appeals in Texas employed a factor-based analysis.[102]

The most stringent procedural safeguard afforded to post-waiver defendants comes from the Supreme Court of Appeals for West Virginia, in the form of a full factor test with an attendant bright-line time limit as well.[103] In *State v. DeWeese*, that state adopted a factor test similar in form to the tests used in Pennsylvania, Rhode Island, and Texas.[104] However, as a matter of public policy, West Virginia went further by adopting a bright line rule of seven days after which post-waiver defendants must be given renewed *Miranda* warnings prior to further custodial interrogation.[105]

III. POST-WAIVER SAFEGUARDS SHOULD BE ENHANCED TO MIRROR POST-INVOCATION SAFEGUARDS

A. *JUSTIFICATIONS FOR PROPORTIONAL PROCEDURAL SAFEGUARDS*

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[101] Jones v. State, 119 S.W.3d 766, 800 (Tex. Crim. App. 2003).
[102] *Id.*

While these are considerations, the point is that the various courts have used a totality of the circumstances analysis, in which these are just factors to be weighed. By treating these factors as dispositive, the Court seems to reject the totality of the circumstances analysis employed by other courts. While there are factual differences between this case and those cited, some of the facts in this case compare favorably to the others.

Id.
[103] State v. DeWeese, 213 W. Va. 339, 352, 582 S.E.2d 786 (2003).
[104] *Id.*

> [W]e hold that in determining whether the initial *Miranda* warnings become so stale as to dilute their effectiveness so that renewed warnings should have been given due to a lapse in the process of interrogation, the following totality-of-the-circumstances criteria should be considered: (1) the length of time between the giving of the first warnings and subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the subsequent statement differed from any previous statements; and (5) the apparent intellectual and emotional state of the suspect.

Id.
[105] *Id.* ("As a matter of public policy in West Virginia, a lapse of seven days between an initial waiver of the rights enunciated in the *Miranda* warnings and a subsequent interrogation requires renewed warnings before the subsequent interrogation may occur.") *Id.*

There is a profound discrepancy among courts between post-invocation protections and post-waiver protections, though logic dictates that similar guidelines would be in place for both. This assumption rightfully rests on *Miranda*'s tenet that custodial interrogations are inherently coercive as to all defendants,[106] and that a decision made in one interrogation should not profoundly change the protection surrounding further interrogations.

Post-waiver defendants are not entitled to any delineated safeguards. Further, while post-invocation protections receive more attention from courts and legal scholarship in general, this does not diminish the need to address and enhance post-waiver protections. Under the current system, if post-waiver defendants receive safeguards, they are typically scattered and unclear.

Comparatively, once a defendant invokes his *Miranda* rights, clear safeguards and guidelines govern when additional interrogations may occur.[107] Within the invocation of *Miranda* rights, there is delineation between the right to counsel and the right to silence.[108] Those who invoke their right to counsel receive the most stringent and bright-line protections.[109] Those who invoke their right to silence receive somewhat similar protections, but there is greater leniency with regard to re-interrogation.[110] This leniency has prompted several legal scholars to conclude that defendants who invoke their right to silence should receive constitutional protection equal to those who invoke their right to counsel.[111] However, if defendants who invoke their right to silence are entitled to greater protection, those who waive those important rights are doubly entitled to it.

1. The rights at risk in post-invocation and post-waiver interrogations are equally important

Although *Miranda* stands for all defendants being protected from coercion at all times during all interrogations, clear safeguards are afforded only to post-invocation defendants, while few to no articulated safeguards are afforded to post-waiver defendants. This discrepancy does not comport with the protections inherent in *Miranda*. The rights involved in both post-

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[106] Miranda v. Arizona, 384 U.S. 436 at 515 (1966).
[107] *See supra* notes 27-35 and accompanying text.
[108] *Miranda*, 384 U.S. at 470.
[109] *See supra* notes 21-35.
[110] *See supra* note 29 and accompanying text.
[111] Christopher S. Thrutchley, *Minnick v. Mississippi: Rationale of Right to Counsel Ruling Necessitates Reversal of Michigan v. Mosley's Right to Silence Ruling*, 27 TULSA L.J. 181, 199 (1991).

invocation and post-waiver scenarios includes the constitutional right against self-incrimination.[112] Even if a criminal defendant waives those rights and cooperates with interrogators initially, the fundamental right against self-incrimination is still in full force and may be invoked at any point.[113] In fact, the opening paragraphs of the *Miranda* decision support the idea that the protected rights are in force despite waiver of *Miranda* rights.[114] The sentence immediately following enumeration of the *Miranda* rights themselves states that defendants may waive "*effectuation*" of these rights,[115] meaning that they simply waive the fruition or effect of the *Miranda* rights themselves and not the overarching right against self-incrimination.[116] That right remains in full force throughout the entire custodial process and may be asserted at any time.

The gap between safeguards for post-waiver and post-invocation defendants makes little sense, and the lack of safeguards for post-waiver defendants means that their fundamental right against self-incrimination is not being protected. The *Miranda* Court explicitly states that "the Fifth Amendment privilege . . . serves to protect persons in *all* settings in which their freedom of action is curtailed in any significant way … ."[117] This quote is poignant when viewed in the following context from the *Miranda* Court: "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces . . . cannot be otherwise than under compulsion to speak . . . . [T]he compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."[118]

Following the reasoning of *Miranda*, then, post-waiver defendants must be entitled to safeguards because of their ever-present privilege against self-incrimination, and because those subjected to further custodial interrogation are constantly under a "compulsion to speak."[119] Moreover, a lack of safeguards would leave post-waiver defendants vulnerable to all of the coercive pressures described in *Miranda*. Post-waiver safeguards must be increased to check any further unrestrained coerciveness.

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[112] *Miranda*, 384 U.S. at 440.
[113] *Id*. at 445 (1966).
[114] *Id*.
[115] *Id*.
[116] *Id*.
[117] *Id*. ("Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.") *Id*.
[118] *Id*.
[119] *Id*.

Accordingly, the current void of post-waiver safeguards fails to sufficiently protect post-waiver defendants. Therefore, post-waiver defendants deserve, and in fact must have, increased protections. *Miranda* warnings never give defendants an indication of how long their waiver will maintain viability.

Absent additional safeguards, current procedures - in direct contradiction to *Miranda* – seem to falsely impute to defendants the knowledge that they may invoke their rights at any point during any interrogation. Courts are comfortable imputing the implicit knowledge of *Miranda* rights to post-waiver defendants, despite the passage of time and other factors.[120] However, the *Miranda* Court refused to "pause to inquire in individual cases whether the defendant was aware of his rights."[121]

2. Post-waiver safeguards are important because the vast majority of criminal defendants initially waive

Studies show 80% of criminal defendants waive their *Miranda* rights during initial questioning.[122] Further, of those who waive their rights initially, less than 4% ever invoke their *Miranda* rights at a later time.[123] Because the number of criminal defendants who waive their rights is so high, guidelines protecting those who waive their rights implicates the majority of criminal defendants in all jurisdictions. While the rights to silence and counsel both enjoy very clear protections and protocols, and have attracted sizable attention from legal scholars, the cases appealing this issue represent 20% of criminal defendants. Accordingly, addressing those who waive their rights without appeal will have a profound effect on the criminal justice system. Furthermore, studies show that the conviction rate for those who waived their rights is 10% higher than the same rate for those who invoked their rights.[124] Because the majority of criminal defendants

[120] *See* State v. Blanchey, 75 Wash. 2d 926, 931, 454 P.2d 841, 845 (1969) ("Rather, it is undisputed that defendant was properly advised of his rights while in Canada and was still aware of these rights 4 days later at the beginning of the trip back to Seattle.") *Id*.; United States v. Hopkins, 433 F.2d 1041, 1045 (5th Cir. 1970) ("Hopkins was fully aware of his rights by virtue of the prior conversation with Agent Hanley.") *Id*.; State v. Groves, 646 S.W.2d 82, 85 (Mo. 1983) ("[W]e can also assume defendant was fully aware of his rights at the time of questioning and that the missing element in the second set of warnings was not fatal.") *Id*.; United States v. Pruden, 398 F.3d 241, 243 (3d Cir. 2005) ("Although some twenty hours passed between the time that Pruden was read his rights . . . and the questioning that led to his confession, we conclude that Pruden was clearly aware of his rights . . .") *Id*.

[121] *Miranda*, 384 U.S. at 440.

[122] Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda,* 43 UCLA L. REV. 839, 859 (1996); Richard A. Leo, *Inside The Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996).

[123] *Id*.

[124] *Id*.

who waive their rights vastly outweighs the number of defendants who invoke their rights, and because those who waive their rights are more likely to be convicted, ensuring that proper protections are in place for those that waive them would have widespread effect on the most commonly encountered and convicted defendants.[125]

A. MIRRORING POST-WAIVER AND POST-INVOCATION SAFEGUARDS

The current post-invocation protection guidelines provide a perfectly analogous framework for mirroring them to post-waiver protections, since post-waiver and post-invocation defendants' experiences mirror one another. Both post-waiver and post-invocation defendants are subjected to coercive pressures, they are entitled to the same rights, and they experience similar intervening circumstances. Protections for post-waiver and post-invocation defendants should likewise mirror one another.

The United States Supreme Court has handed down decisions that articulate post-invocation protections, and these protections should be directly applicable to post-waiver defendants as well. These decisions include the right to silence protections articulated in *Michigan v. Mosley* and the right to counsel protections articulated in *Edwards v. Arizona* and *Maryland v. Shatzer*. The protections in both lines of cases can be mirrored and applied to post-waiver defendants. Further, these protections should be extended in order to address the void in protections currently acknowledged to post-waiver and post-invocation defendants.

1. The Mosley correlative for post-waiver safeguards

The "totality of the circumstances" test from *Mosley* offers superior protection than the time-lapse protection now afforded those who initially waived their *Miranda* rights.. And by holding that such an invocation may be overcome by the presence of these circumstances, the Court provided a correlative justification for a waiver being overcome by the same exact circumstances.[126] The reason for superiority is clear: there are many factors, coercive and non-coercive, that weigh on criminal defendants in custody.[127] The *Mosley* Court understood this and provided for those myriad factors. These factors indicate whether an invocation may be overcome, and whether further interrogation may take place after fully repeated *Miranda*

[125] *Id.*
[126] Michigan v. Mosley, 423 U.S. 96, 104-05 (1975).
[127] *Id.*

warnings.[128] The *Mosley* Court believed that post-invocation defendants are entitled to a full reminder of their rights under certain circumstances. Surely defendants who have waived and experienced similar circumstances are entitled to be reminded of those same rights.

Further, in *Wyrick v. Field*, the Court advocated a "totality of the circumstances" approach in determining whether to repeat *Miranda* warnings after a polygraph examination. This proves that the Supreme Court understands that many circumstances may be simultaneously weighing on defendants, and that those circumstances may necessitate repeated *Miranda* warnings.[129] Mirroring the *Mosley* correlative to post-waiver defendants will account for all circumstances that a post-waiver defendant experiences.

a. A multi-factor analysis is needed to ensure that post-waiver defendants are properly protected

Although passage of time is easily quantifiable, many other circumstances should be considered in determining whether repeated *Miranda* warnings are needed. Simply assessing the passage of time between *Miranda* warnings fails to account for myriad other circumstances that weigh on criminal defendants. Along with passage of time, circumstances such as a change in the location of interrogation, a change in interrogators, an increase in charges, and the emotional state of the defendant all indicate that repeated *Miranda* warnings are needed.[130]

Moreover, focusing only on time fails to take into account whether the defendant was mentally handicapped,[131] the defendant underwent surgery between initial warnings and subsequent interrogations,[132] the defendant had since travelled outside the country,[133] the defendant was a minor,[134] the defendant struggled understanding and speaking English,[135] the prosecutor selectively informed the defendant of only some of his rights,[136] or if the defendant slept for hours between warnings and interrogation.[137] Defendants who have experienced any combination of these factors should be entitled to repeated *Miranda* warnings and the attendant opportunity to invoke those rights and enjoy greater protections.

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[128] *Id*.
[129] Wyrick v. Fields, 459 U.S. 42, 48, 103 S. Ct. 394, 397, 74 L. Ed. 2d 214 (1982).
[130] *See supra* note 105.
[131] People v. Caruso, 45 A.D.2d 804, 805, 356 N.Y.S.2d 902, 904 (App. Div. 1974)
[132] Mitchell v. State, 982 P.2d 717, 722 (Wyo. 1999).
[133] State v. Blanchey, 75 Wash. 2d 926, 931, 454 P.2d 841, 845 (1969).
[134] State v. Stone, 570 So. 2d 78, 80 (La. Ct. App. 1990).
[135] United States v. Nguyen, 608 F.3d 368, 375 (8th Cir. 2010).
[136] Com. v. Doe, 37 Mass. App. Ct. 30, 37, 636 N.E.2d 308, 312 (1994).
[137] People v. Crosby, 91 A.D.2d 20, 29, 457 N.Y.S.2d 831, 837 (App. Div. 1983).

Furthermore, time alone is an inadequate consideration because of the large discrepancy, and oftentimes contradiction, among various jurisdictions on what is an acceptable passage of time. First, it is important to note that in *Michigan v. Mosley* the high court viewed the passage of *two hours* between warning and subsequent interrogation as "a significant period of time."[138] However, it is evident that the federal circuit courts and state courts do not always follow the lead of the United States Supreme Court in this regard. In *Hopkins,* the Fifth Circuit based its decision on the lack of a significant time-lapse,[139] and subsequently upheld a passage of at least ten days in *Biddy*.[140] Therefore, both the Supreme Court and the Fifth Circuit specifically referenced "significant" passages of time, but the Supreme Court held that two hours was significant, while the Fifth Circuit held that ten days was not significant. In those decisions, what was deemed "significant" was inconsistent at best.

Federal courts have upheld the acceptable passage of time as anywhere from nine hours[141] to several days.[142] The same is true of state courts. The time range upheld by the states runs the gamut between several hours[143] and several months.[144] The point is that there is no consistent approach to a time-lapse analysis. As a result, defendants suffer because there is a lack of authority to justify overturning those cases.[145] Accordingly, a time-lapse consideration alone is neither sufficient nor efficient in analyzing the adequacy of post-waiver safeguards.

b. Factors indicate a new interrogation

An implicit principle of *Mosley* is that the "totality of the circumstances" analysis often indicates that an entirely new interrogation is taking place. This new interrogation allows interrogators to re-*Mirandize* and re-interrogate defendants who invoked their rights in a previous interrogation.[146] In fact, the Court reasons that if the interrogation is in a new location, with different interrogators, or regarding a different offense, then the post-invocation defendants can be interrogated because it is an

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[138] Michigan v. Mosley, 423 U.S. 96, 106, 96 S. Ct. 321, 327, 46 L. Ed. 2d 313 (1975)(" . . . [R]esumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings . . . .") *Id*.
[139] United States v. Hopkins, 433 F.2d 1041, 1045 (5th Cir. 1970).
[140] Biddy v. Diamond, 516 F.2d 118, 121 (5th Cir. 1975).
[141] U. S. *ex rel*. Henne v. Fike, 563 F.2d 809, 814 (7th Cir. 1977).
[142] *Biddy*, 516 F.2d 118, 121 (5th Cir. 1975); Maguire v. United States, 396 F.2d 327, 331 (9th Cir. 1968).
[143] Mitchell v. State, 982 P.2d 717, 722 (Wyo. 1999).
[144] Jackson v. State, 268 Ind. 360, 363, 375 N.E.2d 223, 225 (1978).
[145] *Fike*, 563 F.2d at 814.
[146] Michigan v. Mosley, 423 U.S. 96, 114-15 (1975).

entirely new interrogation.[147] Accordingly, because these factors indicate a new interrogation, it follows logically that procedures for initial interrogations should be followed because the defendant is being subjected to an entirely separate interrogation from the one in which their initial waiver of rights was obtained.

Furthermore, the *Miranda* decision stands for the notification of such warnings at the outset of every interrogation. The *Miranda* Court states that any person subjected to any interrogation "must first be informed in clear and unequivocal terms" of his *Miranda* rights at the "outset" of the interrogation.[148] Therefore, the distinction that post-waiver defendants are being subjected to a second, separate interrogation is important. If a post-waiver defendant is being subjected to a separate interrogation, then he is entitled to *Miranda* warnings because they are "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."[149]

c. Factors indicate an increase in coerciveness

Furthermore, a fundamental tenet of *Miranda* is that custodial interrogations are coercive to the point of necessitating *Miranda* warnings, so factors indicating a new interrogation must also indicate an increase in an interrogation's attendant coerciveness. If the inherent coerciveness of such interrogation mandates full *Miranda* warnings for all criminal defendants, then defendants experiencing a new interrogation are entitled to repeated *Miranda* warnings. Custodial interrogations are the nucleus of the *Miranda* decision,[150] and it is clear that *Miranda* warnings are needed to dispel the coerciveness of such interrogation. The *Miranda* Court stated that when "an individual [is] swept from familiar surrounding into police custody [and] surrounded by antagonistic forces" then he is clearly under compulsion to speak.[151] These pressures quickly mount on defendants, and the Court held that a "once stated warning" is not sufficient to overcome the coerciveness of all interrogations.[152] Accordingly, it can be inferred that if one warning is not sufficient, subsequent warnings are clearly necessary to dispel the coerciveness of subsequent interrogations.

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[147] *Id*. ("After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. He was given full and complete Miranda warnings at the outset of the second interrogation.") *Id*.
[148] Miranda v. Arizona, 384 U.S. 436 (1966). ("prior to any questioning . . . .") *Id*.
[149] *Id*.
[150] *Id*. ("[S]uch a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.") *Id*.
[151] *Id*.
[152] *Id*.

d. *Current post-waiver safeguards fall short of the Mosley safeguards*

The most glaring justification for embracing a *Mosley* correlative for post-waiver defendants is the fact that defendants experiencing similar circumstances now receive entirely different treatment and protections. A pure time-lapse analysis is a fatally impotent test as compared with *Mosley*, because a lapse in time alone does not account for the myriad circumstances facing defendants.[153] Courts merely paying lip service to a "circumstances" analysis also employ a less rigorous one. This is clearly evident in many cases, but perhaps most evident in *People v. Crosby*.[154]

In *Crosby*, the defendant experienced a change in location, a change in interrogators, a change in charges, and he slept for only five hours after he initially waived his *Miranda* warnings.[155] Under *Mosley*, a post-invocation defendant under those *exact* circumstances would be given repeated *Miranda* warnings.[156] Therefore, if a defendant had initially invoked his right to silence and subsequently experienced a change in venue, interrogators, or an increase in charges, he would be reminded of his rights and afforded greater protections.[157] Accordingly, the initial decision to waive one's *Miranda* rights has a profound impact on subsequent protections and causes defendants under identical circumstances to receive markedly different protections – a scenario which must change.

2. The *Edwards* correlative for post-waiver safeguards

Further, a bright-line protection in the vein of *Edwards* would elegantly alleviate any potential strain on judicial resources and would simplify enforcement by prosecutors and police interrogators. *Edwards* requires interrogators to cease interrogation immediately upon invocation of the right to counsel. The Supreme Court has noted that the benefit of *Edwards* is in its clarity and the ease by which it can be enforced.[158] This

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[153] *See supra* notes 131-38.
[154] People v. Crosby, 91 A.D.2d 20, 29, 457 N.Y.S.2d 831, 837 (App. Div. 1983).
[155] *Id*.
[156] Compare the circumstances experienced by the defendant in Michigan v. Mosley, 423 U.S. 96, 104-05, 96 S. Ct. 321, 326-27, 46 L. Ed. 2d 313 (1975) with the defendant in People v. Crosby, 91 A.D.2d 20, 29, 457 N.Y.S.2d 831, 837 (App. Div. 1983).
[157] These are the factors employed in Pennsylvania, Rhode Island, and West Virginia. *See supra* notes 89-105 and accompanying text. Such factors would certainly come into the purview of the totality test from *Mosley*.
[158] Maryland v. Shatzer, 559 U.S. 98, 111, 130 S. Ct. 1213, 1223, 175 L. Ed. 2d 1045 (2010) ("To be sure, we have said that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application.") *Id*.

clarity helps to ease the judicial burden of adjudicating cases falling under the *Edwards* rule.[159]

The correlative of *Edwards* to post-waiver defendants is the benefit of implementing a bright-line rule that would provide clarity in applying post-waiver protections. Such a bright-line rule applied alongside a *Mosley*-like analysis would provide optimal protection.[160] Where the *Mosley* correlative accounts for all circumstances and provides exhaustive protections, an *Edwards* correlative would provide an elegant bright-line rule. Within *Edwards'* progeny is *Maryland v. Shatzer*, and it provides an easily analogized rule.

a. Post-waiver safeguards should include a bright-line rule analogous to Maryland v. Shatzer

The bright-line time limit of *Shatzer* should be analogized to post-waiver defendants by setting a bright-line time limit after which all defendants must be given repeated *Miranda* warnings. Although *Shatzer's* fourteen-day rule necessarily draws an arbitrary line, it provides clarity for enforcement. According to the Supreme Court's holding, it takes fourteen-days to "shake off any residual coercive effects of his prior custody,"[161] and within that time limit defendants are clearly subjected to residual coercive pressures. Further, though time-lapse alone is an incomplete consideration, it is already widely applied by courts. Implementing a bright-line time limit provides clarity and alleviates the need for other fact-intensive analyses.[162]

Further, simultaneously employing a *Mosley* correlative alongside a bright-line time limit has already been employed by the West Virginia Supreme Court[163] and, in addition to its clarity, it also provides an additional safeguard for post-waiver defendants. Though any bright-line limit is arbitrary to an extent,[164] it would provide valuable guidance to law

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[159] *Id*.
[160] This is exactly what West Virginia did.
[161] *Id*.
[162] *Id*.
[163] State v. DeWeese, 213 W. Va. 339, 351-52, 582 S.E.2d 786, 799 (2003) ("As a matter of public policy in West Virginia, a lapse of seven days between an initial waiver of the rights enunciated in the *Miranda* warnings and a subsequent interrogation requires renewed warnings before the subsequent interrogation may occur.") *Id*.
[164] *Shatzer*, 559 U.S. 98, 110, 130 S. Ct. 1213, 1223, 175 L. Ed. 2d 1045 (2010)

> And while it is certainly unusual for this Court to set forth precise time limits governing police action, it is not unheard-of. . . . [W]e specified 48 hours as the time within which the police must comply with the requirement . . . that a person arrested without a warrant be brought before a magistrate to establish probable cause for continued detention.

Id.

enforcement officials and would alleviate the need for fact-intensive determinations in cases that extend beyond the bright-line limit.[165]

b. Courts should analogize Shatzer to post-waiver safeguards by requiring repeated Miranda warnings after at most seven days

The limit imposed by West Virginia after which post-waiver defendants must be given repeated *Miranda* warnings is seven days[166] and, while this certainly falls within the period of residual coercion identified in *Shatzer*, it is with the purview of states to impose even stricter bright-line limits.[167] Further, after seven days it is likely that defendants will have experienced many, if not all, of the circumstances described in *Mosley*.[168]

Because it is within the purview of states to implement stricter protections, courts that resist a *Mosley* correlative but embrace a time-lapse analysis could increase protections by implementing a bright-line limit shorter than seven days. Implementation of such a limit would easily comport with the already widespread analysis of time lapse. However, a resistance to implementing this factor test should be met with an attendant decrease in the number of days required to necessitate repeated *Miranda* warnings. Therefore, while the *Edwards* correlative could be implemented on its own, an approach implementing both the *Mosley* correlative alongside an *Edwards* correlative would provide optimal protection.

A. ENHANCEMENT OF POST-WAIVER SAFEGUARDS SHOULD COME IN THE FORM OF FULL MIRANDA WARNINGS

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[165] *Id.*

> The concurrence criticizes our use of 14 days as arbitrary and unexplained. . . . But in fact that rests upon the same basis as the concurrence's own approval of a 2 ½-year break in custody: how much time will justify "treating the second interrogation as no more coercive than the first." Failure to say where the line falls short of 2 ½ years, and leaving that for future case-by-case determination, is certainly less helpful, but not at all less arbitrary.

Id.

[166] *DeWeese*, 213 W. Va. 339, 351-52, 582 S.E.2d 786, 799 (2003).

[167] Michigan v. Mosley, 423 U.S. 96, 120, 96 S. Ct. 321, 334, 46 L. Ed. 2d 313 (1975) ("In light of today's erosion of Miranda standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law . . . .") *Id.*

[168] *See supra* notes 54-105 for a litany of cases where defendants experienced all manner of circumstances. Note that very few of the cases dealt with time passages greater than seven days.

In both *Mosley* and *Edwards,* post-invocation defendants must be given repeated *Miranda* warnings prior to further interrogation. Likewise, the same constitutional protections should require full *Miranda* warnings to post-waiver defendants. Those warnings are the surest way to inform defendants of their rights and to rid interrogations of their inherent coerciveness.[169] Simple reminders of *Miranda*, or "*Miranda*-Lite,"[170] may retain a semblance of full *Miranda* warnings, but they are insufficient to completely dispel coerciveness and they may lead to further complications.

1. Full *Miranda* warnings offer defendants a chance to invoke and take advantage of post-invocation safeguards

Full *Miranda* warnings are significant because they give post-waiver defendants a chance to invoke their *Miranda* rights and take advantage of all attendant post-invocation protections. Defendants may invoke their rights at any time during any interrogation, and courts must not impute this knowledge to defendants. Justification against such imputation can be found in the requirement that all criminal defendants be "*Mirandized*" prior to custodial interrogations regardless of prior experience in the criminal justice system.[171] Courts do not impute the knowledge of *Miranda* to defendants upon subsequent arrests for subsequent crimes. Accordingly, we should not impute to post-waiver defendants the knowledge that they may invoke their rights at any future time. Full *Miranda* warnings prevent the need for such imputation.[172]

2. *Miranda*-Lite warnings do not satisfy initial warning requirement

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[169] Miranda v. Arizona, 384 U.S. 436 (1966) ("More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.") *Id*.

[170] *Miranda*-Lite is a term I coined to describe the manner of *Miranda* reminders that fall short of full *Miranda* warnings. Reminders simply allude back to previous warnings and the exact aspects of *Miranda* that the defendant is reminded of can be cherry-picked by interrogators. For instance, an interrogator might remind defendants that they are entitled to an attorney, but they might not remind defendants that they can terminate questioning at any point. Such a reminder is *Miranda*-Lite.

[171] Miranda v. Arizona, 384 U.S. 436 (1966)

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation.

Id.

[172] *Id*.

Generalized recitations of *Miranda* rights, or *Miranda*-Lite warnings, do not satisfy the initial *Miranda* requirement and should not suffice to protect post-waiver defendants from being subjected to new interrogations.[173] Such short-hand reminders might include a reminder of one aspect of *Miranda*, such as the right to an attorney, but may fail to inform defendants that they may terminate questioning at any point.[174]

Since *Miranda*-Lite reminders are insufficient to initially inform a defendant of his rights, they must also be insufficient in a new interrogation or in order to fully dispel the residual or inherent coerciveness of questioning.[175] The Supreme Court cautions against single warnings or reminders because defendants must be aware of all their rights throughout the entire interrogation process.[176] Further, only explicit statements of rights ensure that defendants are guaranteed the ability to exercise those rights.[177]

3. *Miranda*-Lite leaves discretion to coercive parties

Requiring full *Miranda* warnings both alleviates the possibility of subtle coerciveness and saves courts from having to inquire into the validity or sufficiency of each individual *Miranda*-Lite warning in each specific case.[178] Another pointed problem with *Miranda*-Lite warnings is the discretion given to coercive parties. Discretion in *Miranda*-Lite warnings only increases the chances of coercion since those warnings may or may not include specific reminders that defendants may invoke all rights at any time or that they have the right to have an attorney present.[179]

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[173] *Id*. ("In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process.")

[174] *See* State v. Dupont, 659 So.2d 405, 407 (1995).

[175] *Id*. at 407 ("We find that Detective Davis's statement to DuPont, that his *Miranda* rights still applied, was not a proper *Miranda* warning.").

[176] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

> Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end.

[177] *Id*. ("As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it").

[178] Com. v. Coplin, 34 Mass. App. Ct. 478, 481-82, 612 N.E.2d 1188, 1190 (1993).

[179] *Id*. ("As the case has been presented, there is no disagreement that the warning about the possible consequences of forgoing the privilege to remain silent was omitted from the second round of Miranda warnings at the station house").

In each specific case, leaving out a portion of *Miranda* may in itself be a form of coercion, and safeguards would be rendered impotent if the very agents of coercion are vested with the discretion to make generalized reminders of *Miranda*.[180] The Supreme Court has noted that fully informing a defendant of his rights is the quickest and clearest way to fully ensure that the defendant is aware at all times of his fundamental rights and, because those rights are fundamental, warnings that fall short of full recitation are needlessly ineffective.[181]

IV. ENHANCING POST-WAIVER SAFEGUARDS WOULD BENEFIT PROSECUTORS AND DEFENDANTS

Protecting post-waiver defendants and ensuring that post-waiver defendants are given repeated *Miranda* warnings benefits both prosecutors and defendants.

A. CLEAR GUIDELINES PRESERVE ADMISSIBILITY OF INCRIMINATING STATEMENTS

Ensuring that defendants are aware of their rights also benefits prosecutors by preserving the admissibility of incriminating statements made by those defendants.[182] Therefore, if measures are taken to ensure that defendants are aware of their rights throughout, it is unlikely that those same defendants can get their statements suppressed at trial or cases reversed on appeal on *Miranda* grounds.[183] Accordingly, if prosecutors are transparently proactive about ensuring that defendants are aware of their rights, it is much more likely that courts will side with prosecutors in holding that any statements obtained are admissible.[184]

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[180] *Id*.

> The question . . . reduces to whether the complete set of warnings given at the time of arrest carried over to the events relatively soon after at the station house. . . . Into consideration of that question we must weave the principle that the government always bears a heavy burden in establishing . . . waiver of the right to remain silent.

[181] Miranda v. Arizona, 384 U.S. 436 (1966).

[182] *Id*. at 476-77. ("The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant").

[183] *Id*.

[184] *Peterka v. State*, 640 So. 2d 59, 67 (Fla. 1994). In this case, the defendant was given his *Miranda* warnings on several occasions, and the court was satisfied that he was fully aware of his rights at all times.

In addition, prosecutors will also benefit from the implementation of a bright-line rule indicating when to repeat *Miranda* warnings because the current system is inconsistent and unclear.[185] If jurisdictions adopt a bright-line limit on when it is proper to remind a defendant of his *Miranda* rights, then it will make the actual implementation of those safeguards much more practical.[186]

Finally, though there may be a fear that repeated warnings might hamper the criminal justice system, it is important to note that more than eighty percent of criminal defendants initially waive their *Miranda* rights.[187] Those same statistics indicate that fewer than two percent of those who waived their rights then changed their mind and invoked them.[188] Therefore, simply ensuring that defendants are aware of their fundamental rights throughout interrogation will not necessarily result in an attendant exponential increase in those defendants actually invoking them.

B. THE NUMBER OF PEOPLE WHO WAIVE MAGNIFIES BENEFITS TO DEFENDANTS

Additionally, because the majority of defendants waive their *Miranda* rights, an increase in post-waiver protections would have widespread positive impact across all jurisdictions. Clear protections for post-waiver defendants allows the opportunity for them to invoke their rights at a later time, and ensures awareness of their right to invoke greater protections at any time.

Further, defendants who invoke rights are less likely to be convicted,[189] so there is a profound benefit to post-waiver defendants if they are allowed the opportunity to invoke. However, this would only be the case for post-waiver defendants who change their minds and decide to invoke later on.[190] Given that the overwhelming majority of defendants waive *Miranda* rights, it is unlikely that they would change their minds en masse, but in the aggregate and across all jurisdictions the small percentage is not without significance. Accordingly, enhanced protections for post-waiver defendants are less likely to have a profound impact on convictions rates than they are to simply ensure that defendants are aware of and have an opportunity to invoke their rights.

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[185] *See supra* notes 139-41.
[186] *See supra* note 35.
[187] *See supra* notes 123-26.
[188] *Id*.
[189] *Id*.
[190] *Id*. The prevalence of this is around 1%.

Moreover, while this measure might have the consequence of increasing litigation over the protections granted post-waiver defendants, clear guidelines would also eliminate litigation stemming from vague protections.[191] Therefore, the increase in post-waiver safeguards should not unduly burden prosecutors, law enforcement agencies and judiciaries.[192] Clarity in the protections themselves would prevent additional litigation from being too burdensome at the outset.[193]

CONCLUSION

Currently there is no clear answer to when, or if, a post-waiver defendant is ever entitled to additional *Miranda* warnings. Meanwhile, this problem is continually litigated and addressed in all fifty states and every federal circuit. However, the Supreme Court has offered no clear guidance to consolidate the vastly different approaches undertaken by the various judiciaries. Accordingly, the current inconsistent landscape of post-waiver safeguards has left the vast majority of criminal defendants unprotected. Fortunately, current post-invocation safeguards can be easily analogized to those now granted to post-waiver defendants. By implementing a factor test akin to *Mosley,* and a bright-line rule akin to *Edwards* and *Shatzer*, post-waiver defendants can be protected in equal proportion to their post-invocation counterparts.

As evidenced in the fifty-state and twelve-circuit survey referenced above, a few states have adopted a factor test to protect post-waiver defendants, and one state has adopted such a test alongside a bright-line

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[191] *See supra* note 35.

[192] *See* Miranda v. Arizona, 10 Ohio Misc. 9, 86 S. Ct. 1602, 1631, 16 L. Ed. 2d 694 (1966).

> If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

[193] *See* Maryland v. Shatzer, 559 U.S. 98, 116-17, 130 S. Ct. 1213, 1226, 175 L. Ed. 2d 1045 (2010) ("The concurrence criticizes our use of 14 days as arbitrary and unexplained . . . [but] [f]ailure to say where the line falls short . . . and leaving that for future case-by-case determination, is certainly less helpful, but not at all less arbitrary").

rule to provide optimal post-waiver safeguards. Nonetheless, many states and almost all of the federal circuits rely solely on the time which has lapsed between initial *Miranda* warnings and further interrogation. However, this is an incomplete analysis and leaves the majority of defendants with only vague and inconsistent safeguards. Luckily, the solution to this problem has been implemented in at least one jurisdiction, and by analogizing the post-invocation safeguards already in place in all jurisdictions, consistent post-waiver safeguards can easily be applied to the benefit of both prosecutors and defendants. In so doing, the multitude of defendants who have been left without clear protection would enjoy safeguards that reflect the original intent of *Miranda*.

APPENDIX

This appendix categorizes the manner in which all fifty states and twelve federal circuits (I was unable to locate a relevant case for the Federal Circuit) analyze the issue of post-waiver protections and whether post-waiver defendants are entitled to repeated *Miranda* warnings as of January 2015. The approaches can be summarized into three basic categories: Pure Time-Lapse, Factor Test With Time-Lapse Emphasis, and Pure Factor Test.

There are some cases that do not fit perfectly in a single category, but they have all been categorized according to the predominate approach in analyzing this issue. It is important to note that a few jurisdictions simply offer an outright rejection of repeated *Miranda* warnings without offering any analysis whatsoever, and these jurisdictions have been categorized as "Pure Time-Lapse" jurisdictions because they neglect any meaningful analysis of relevant factors. South Dakota is considered a "Pure Factor Test" for the purposes of this table, but their analysis focuses on whether the interrogation was custodial. Such an analysis considers all relevant factors. Nonetheless, for this reason South Dakota has been marked with an asterisk.

Finally, I have determined that this information is expressed most effectively in a table. Furthermore, some jurisdictions have more than one case that give particular insight into its analysis, and in those jurisdictions I have included multiple case citation.

STATE-BY-STATE SURVEY OF POST-WAIVER PROTECTIONS		
State	Approach	Case Citation(s)
Alabama	Pure Time-lapse	1. Johnson v. State, 56 Ala. App. 583, 588, 324 So. 2d 298, 302 (Crim. App. 1975) 2. *Ex parte* J.D.H., 797 So. 2d 1130, 1132 (Ala. 2001).
Alaska	Pure Time-lapse	1. Kalolo v. State, No. 3875, 1998 WL 950971 (Alaska Ct. App. Aug. 26, 1998).
Arizona	Pure Time-lapse	1. State v. Gilreath, 107 Ariz. 318, 319, 487 P.2d 385, 386 (1971).
Arkansas	Factor Test With Time Emphasis	1. Sossamon v. State, 245 Ark. 306, 308, 432 S.W.2d 469, 471 (1968). 2. Barnes v. State, 281 Ark. 489, 492, 665 S.W.2d 263, 265 (1984) 3. Upton v. State, 343 Ark. 543, 550, 36 S.W.3d 740, 743 (2001)
California	Factor Test with Time Emphasis	1. People v. Williams, 49 Cal. 4th 405, 435, 233 P.3d 1000, 1024 (2010).
Colorado	Pure Time-lapse	1. People v. Hopkins, 774 P.2d 849, 853 (Colo. 1989).
Connecticut	Pure Factor	1. State v. Burge, 195 Conn. 232, 248, 487 A.2d 532, 543 (1985).
Delaware	Pure Factor Test	1. Ledda v. State, 564 A.2d 1125, 1130 (Del. 1989). 2. DeJesus v. State, 655 A.2d 1180, 1195 (Del. 1995).
Florida	Pure Time-lapse	1. Franklin v. State, 324 So. 2d 187, 188 (Fla. Dist. Ct. App. 1975).

		2. Sanders v. State, 378 So. 2d 880, 881 (Fla. Dist. Ct. App. 1979). 3. State v. Jones, 763 So. 2d 1180, 1180 (Fla. Dist. Ct. App. 2000).
Georgia	Pure Time-lapse	1. Gardner v. State, 172 Ga. App. 677, 679, 324 S.E.2d 535, 538 (1984). 2. Sosniak v. State, 287 Ga. 279, 285, 695 S.E.2d 604, 609 (2010). 3. Walker v. State, 296 Ga. 161, 766 S.E.2d 28, 37 (2014).
Hawaii	Pure Time-lapse	1. State v. Ramones, 69 Haw. 398, 405, 744 P.2d 514, 518 (1987).
Idaho	Pure Time-lapse	1. State v. Mitchell, 104 Idaho 493, 497, 660 P.2d 1336, 1340 (1983).
Illinois	Pure Time-lapse	1. People v. Hill, 39 Ill. 2d 125, 132, 233 N.E.2d 367, 371 (1968).
Indiana	Pure Time-lapse	1. Jackson v. State, 268 Ind. 360, 363, 375 N.E.2d 223, 225 (1978).
Iowa	Pure Time-lapse	1. State v. Davis, 261 Iowa 1351, 1354, 157 N.W.2d 907, 909 (1968). 2. State v. Russell, 261 N.W.2d 490, 495 (Iowa 1978).
Kansas	Pure Time-lapse	1. State v. Boyle, 207 Kan. 833, 841, 486 P.2d 849, 855-56 (1971).
Kentucky	Pure Time-lapse	1. Hill v. Com., No. 2013-CA-001026-MR, 2014 WL 2536983, at *6 (Ky. Ct. App. June 6, 2014).
Louisiana	Pure Time-lapse	1. State v. Harvill, 403 So. 2d 706,

		709 (La. 1981). 2. State v. Stone, 570 So. 2d 78, 80 (La. Ct. App. 1990).
Maine	Factor Test with Time Emphasis	1. State v. Myers, 345 A.2d 500, 502 (Me. 1975). 2. State v. Peterson, 366 A.2d 525, 528 (Me. 1976).
Maryland	Pure Factor Test	1. Brown v. State, 6 Md. App. 564, 570, 252 A.2d 272, 276 (1969).
Massachusetts	Factor Test with Time Emphasis	1. Com. v. Doe, 37 Mass. App. Ct. 30, 35, 636 N.E.2d 308, 311 (1994) 2. Com. v. Silanskas, 433 Mass. 678, 687, 746 N.E.2d 445, 456 (2001).
Michigan	Factor Test with Time Emphasis	1. People v. Maleski, No. 234112, 2002 WL 31058324, at *4 (Mich. Ct. App. Sept. 13, 2002).
Minnesota	Factor Test with Time Emphasis	1. State v. Ganpat, 732 N.W.2d 232, 241 (Minn. 2007).
Mississippi	Pure Time-lapse	1. Anderson v. State, 50 So. 3d 1015, 1025 (Miss. Ct. App. 2010). 2. Adams v. State, 62 So. 3d 432, 438 (Miss. Ct. App. 2011).
Missouri	Factor Test with Time Emphasis	1. State v. Groves, 646 S.W.2d 82, 85 (Mo. 1983). 2. State v. Brown, 601 S.W.2d 311, 313 (Mo. Ct. App. 1980).
Montana	Pure Time-lapse	1. State v. Lenon, 174 Mont. 264, 274, 570 P.2d 901, 907 (1977).
Nebraska	Pure Time-lapse	1. State v. Haywood, 232 Neb. 97, 104, 439 N.W.2d 511, 515 (1989).
Nevada	Factor Test with	1. Koger v. State, 117 Nev. 138,

	Time Emphasis	142, 17 P.3d 428, 431 (2001).
New Hampshire	Factor Test with Time Emphasis	1. State v. Monroe, 142 N.H. 857, 868, 711 A.2d 878, 886 (1998).
New Jersey	Pure Factor Test	1. State v. Dispoto, 189 N.J. 108, 124, 913 A.2d 791, 800 (2007).
New Mexico	Pure Time-lapse	1. State v. Gilbert, 1982-NMSC-095, 98 N.M. 530, 533, 650 P.2d 814, 818.
New York	Pure Time-lapse	1. People v. Manley, 40 A.D.2d 907, 907, 337 N.Y.S.2d 759, 760 (App. Div. 1972) 2. People v. Caruso, 45 A.D.2d 804, 805, 356 N.Y.S.2d 902, 904 (App. Div. 1974) 3. People v. Crosby, 91 A.D.2d 20, 29, 457 N.Y.S.2d 831, 837 (App. Div. 1983) 4. People v. Gause, 38 A.D.3d 999, 1000, 830 N.Y.S.2d 859, 861 (2007).
North Carolina	Pure Factor Test	1. State v. McZorn, 288 N.C. 417, 433, 219 S.E.2d 201, 212 (1975). 2. State v. Stokes, 150 N.C. App. 211, 223, 565 S.E.2d 196, 204 (2002).
North Dakota	Pure Factor Test*	1. State v. Golden, 2009 ND 108, ¶ 9, 766 N.W.2d 473, 475.
Ohio	Pure Factor Test	1. State v. Lester, 126 Ohio App. 3d 1, 6, 709 N.E.2d 853, 856 (1998).
Oklahoma	Pure Time-lapse	1. Moreno v. State, 1972 OK CR 361, 504 P.2d 1241, 1243.
Oregon	Factor Test with Time Emphasis	1. State v. Hurtado-Navarrete, 258 Or. App. 503, 511, 309 P.3d 1128, 1133 review denied, 354 Or. 656, 318 P.3d 1144 (2013).

Pennsylvania	Pure Factor Test	1. Com. v. Ferguson, 444 Pa. 478, 481-82, 282 A.2d 378, 379 (1971). 2. Com. v. Wideman, 460 Pa. 699, 706-07, 334 A.2d 594, 598 (1975).
Rhode Island	Pure Factor Test	1. State v. Beaulieu, 116 R.I. 575, 584, 359 A.2d 689, 693-94 (1976).
South Carolina	Pure Factor Test	1. State v. Smith, 259 S.C. 496, 499, 192 S.E.2d 870, 872 (1972).
South Dakota	Pure Factor Test	1. State v. Frazier, 2001 S.D. 19, ¶ 17, 622 N.W.2d 246, 254.
Tennessee	Pure Time-lapse	1. State v. Walker, 729 S.W.2d 272, 274 (Tenn. Crim. App. 1986).
Texas	Pure Factor Test	1. Jones v. State, 119 S.W.3d 766, 800 (Tex. Crim. App. 2003).
Utah	Factor Test with Time Emphasis	1. State v. Streeter, 900 P.2d 1097, 1104 (Utah Ct. App. 1995).
Vermont	Pure Time-lapse	1. State v. Jeffreys, 165 Vt. 579, 581, 682 A.2d 951, 953-54 (1996).
Virginia	Pure Time-lapse	1. Washington v. Com., 228 Va. 535, 548-49, 323 S.E.2d 577, 586 (1984).
Washington	Pure Time-lapse	1. State v. Blanchey, 75 Wash. 2d 926, 931, 454 P.2d 841, 845 (1969).
West Virginia	Pure Factor Test	1. State v. DeWeese, 213 W. Va. 339, 352, 582 S.E.2d 786 (2003).
Wisconsin	Pure Time-lapse	1. State v. Hoeft, 2007 WI App 110, ¶ 7, 300 Wis. 2d 580, 730

		N.W.2d 461.
Wyoming	Pure Time-lapse	1. Mitchell v. State, 982 P.2d 717, 722 (Wyo. 1999).

FEDERAL CIRCUIT SURVEY OF POST-WAIVER PROTECTIONS		
Circuit	**Approach**	**Case Citation(s)**
First	Pure Time-lapse	1. Gorman v. United States, 380 F.2d 158 (1st Cir. 1967).
Second	Pure Time-lapse	1. United States v. Banner, 356 F.3d 478 (2nd Cir. 2004).
Third	Factor Test with Time Emphasis	1. United States v. Pruden, 398 F.3d 241 (3rd Cir. 2005).
Fourth	Pure Time-Lapse	1. United States v. Frankson, 83 F.3d 79 (4th Cir. 1996). 2. United States v. Gordon, 895 F.2d 932 (4th Cir. 1990).
Fifth	Pure Time-Lapse	1. United States v. Hopkins, 433 F.2d 1041 (5th Cir. 1970). 2. Biddy v. Diamond, 516 F.2d 118 (5th Cir. 1970). 3. United States v. Clay, 408 F.3d 214 (5th Cir. 2005).
Sixth	Factor Test with Time Emphasis	1. United States v. Weekley, 130 F.3d 747 (6th Cir. 1997).
Seventh	Pure Time-Lapse	1. United States *ex rel*. Henne v. Fike, 563, F.2d 809 (7th Cir. 1977).
Eighth	Factor Test With Time Emphasis	1. United States v. Nguyen, 608 F.3d 368 (8th Cir. 2010).
Ninth	Pure Time-lapse	1. Maguire v. United States, 396 F.2d 327 (9th Cir. 1968), 2. People of Territory of Guam v.

		Dela Pena, 72 F.3d 767 (9th Cir. 1995).
Tenth	Factor Test with Time Emphasis	1. Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001).
Eleventh	Pure Time-lapse	1. United States v. Barner, 572 F.3d 1239 (11th Cir. 2009).
D.C.	Factor Test with Time Emphasis	1. United States v. Hackley, 636 F.2d 493 (D.C. Cir. 1980). 2. United States v. Yunis, 859 F.2d 953, (D.C. Cir. 1988).