No. 21-499

In The Supreme Court of the United States

CARLOS VEGA,

Petitioner,

v.

TERENCE B. TEKOH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE HISTORIANS OF CRIMINAL PROCEDURE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICI[1]

Amici are all professors of law or history who have published on the history of criminal procedure.

Amici file this brief to alert the Court to the little-known historical basis for this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966).

At least part of the legal controversy about this decision rests upon an incomplete understanding of the historical practice of interrogations that has gone unchallenged. When *Miranda* was decided, one member of this Court concluded that requiring the warnings was "at odds with American and English legal history." *Id*. at 531 (White, J., dissenting). The United States Department of Justice has previously taken the position that *Miranda* was "a decision without a past" having "no basis in history or precedent." U.S. Dep't of Justice, Office of Legal Policy, Report to the Attorney General: The Law of Pre-Trial Interrogation 118 (1986).

With this brief, using recently unearthed archival materials, amici demonstrate that a scheme of warning suspects about the right to silence – and the consequences of waiving that right – was very much a part

[1] Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than amicus, its members, or counsel made a monetary contribution to its preparation or submission.

of the Anglo-American legal tradition of which the Framers would have been aware.

SUMMARY OF ARGUMENT

Miranda v. Arizona, 384 U.S. 436 (1966), resurrected the historical practice of cautioning suspects before questioning.

Decades before the Bill of Rights was ratified, interrogating magistrates had begun to warn suspects that they were not required to answer questions and that answers could be used against the suspects in a criminal prosecution. The first-known warning prior to an interrogation occurred in London in 1748.

Judges in the 1740s began raising concerns about the voluntariness of confessions and expressed concerns about the promises or threats that might have led a suspect to provide a statement. Magistrates, who were conducting interrogations in the 1700s, started to provide these cautions as a way of demonstrating that a prisoner's statement was not the product of any such improper inducement.

By the 1760s, what we now call the voluntariness rule was very often a bar to a confession's admissibility.[2] Eighteenth-century judges very readily excluded

[2] The historic English rule excluding confessions that were the product of an improper inducement was most frequently referred to as the "confessions rule." *see* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 179 (2003), though some contemporaneous records referred to it as the "voluntariness

statements that were the product of a threat or promise of *any kind*. Cautioning a suspect of his right to remain silent, and the consequences of making a statement, however, could demonstrate the confession was not the product of an improper inducement.

The readiness of late eighteenth-century courts to exclude statements was akin to this Court's conclusion that there were inherently coercive pressures present in custodial interrogations. *Miranda*, 384 U.S. at 468. And like this Court, judges of the late eighteenth century found that warnings were sometimes sufficient to demonstrate that the coercive pressure of the interrogation did not produce the defendant's statement.

Post-Framing Era documents confirm that the warning scheme was a very well-established part of interrogation practice. By the early 1800s, treatise writers began to recognize that it was the custom of magistrates to give these warnings. The warning scheme was so well-entrenched as a practice as to be largely uncontroversial in the first half of the nineteenth century. Four American state legislatures, during codification movement of the 1820s and 1830s, formally required warnings to be provided prior to an interrogation. The British Parliament codified the

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rule." LEONARD MACNALLY, THE RULE OF EVIDENCE ON PLEAS OF THE CROWN 38 (London: J. Butterfield & Dublin, J. Cooke 1802). The modern American voluntariness rule for confessions is traced back to this eighteenth-century rule. To avoid confusion, the rule is consistently referred to as the "voluntariness rule."

warnings in Sir John Jervis' Act of 1848, 11 & 12 Vict. ch. 42.

The custom of providing suspects these warnings ended in the second half of the nineteenth century in a process that revealed the intimate connection between the Framing Era voluntariness test and the warnings scheme. Only after courts signaled their willingness to less strictly apply the voluntariness test did interrogators stop providing the warnings. Interestingly, as this Court began to use the voluntariness test in the twentieth century to frequently exclude confessions, the FBI returned to the practice of providing warnings to suspects.

Interrogators were giving these warnings at the time the Fifth Amendment to the United States Constitution was adopted and were doing so because of a voluntariness rule that was then applied in a very strict manner that readily excluded confessions. The rule disappeared only as the Framing Era voluntariness rule was relaxed to make confessions more readily admissible.

This historian's brief is written to help the Court better understand the constitutional basis of *Miranda* warnings. *Miranda*-like warnings were part of the historical practice of interrogations. Under the Framing Era voluntariness test, as a practical matter, warnings were often essential to admit a suspect's confession. As the Court often looks to Framing Era practices to understand the original public meaning of the Constitution, this often-overlooked set of practices provides

considerable historical support for *Miranda* warnings as a constitutional protection.

ARGUMENT

I. Magistrates Began to Warn Suspects of the Right to Silence by the Mid-1700s.

Interrogators in the mid-1700s – magistrates – began to warn suspects they had the right to remain silent and that anything they said could be used against them. The historical record strongly suggests that they did so to demonstrate that the statement was not influenced by an improper inducement. The readiness of eighteenth and early nineteenth century courts to find an improper inducement reveals that the warnings were necessary to overcome the often-existing, if not necessarily inherent, pressures of interrogation.

Beginning in the early 1740s, English judges began to express concerns about the methods that were being used to obtain confessions. LANGBEIN, *supra* at 221; J.M. BEATTIE, CRIME AND COURTS IN ENGLAND 1600-1800, at 365 (1986). Though there is at least one reported instance of judicial concern about physical pressure to confess in the 1740s, confessions that troubled judges in the 1700s almost always involved statements prompted by promises of leniency. LANGBEIN, *supra* at 221.

The historical record reveals that beginning in the 1740s, there was substantial uncertainty about the admissibility of confessions. A promise of leniency prompted some judges in the 1740s to exclude the confession. Other judges cautioned juries to be skeptical of confessions prompted by such promises. Still other judges ignored claims that suspects were given guarantees of immunity. By the 1760s, criminal court judges would reach a consensus that confessions induced by a threat or promise would be inadmissible, but in the 1740s there was a range of judicial opinion on whether this was a problem at all and, if so, what to do about it. *Id.*

In the face of this uncertainty, magistrates began to caution suspects that they had the right to remain silent and that their statements could be used against them. Magistrates since 1555 had been charged with the task of interrogating those arrested and charged with a crime, a practice that continued through the mid-1800s. *Crawford v. Washington*, 541 U.S. 36, 53 (2004); Paul G. Kauper, *Judicial Examinations of the Accused – A Remedy for the Third Degree*, 30 MICH. L. REV. 1231-35 (1932). Unlike a present-day "neutral and detached magistrate," *Johnson v. United States*, 333 U.S. 10, 14 (1948), magistrates in the 1700s had a clear law-enforcement role of gathering and preserving evidence against the accused. The decision of eighteenth-century magistrates to alert suspects to the dangers of confessing therefore can be interpreted as necessary, in the minds of these magistrates, to ensure the admissibility of statements they were obtaining.

A. Old Bailey Records of *Miranda*-Like Warnings

Records of proceedings in London's Old Bailey Central Criminal Court have provided a treasure trove for understanding criminal practice in between 1674 and 1913. Though far from complete, these records reveal that the practice of alerting a suspect to the right to remain silent – and the consequences of speaking – was established well before the drafting of the American Bill of Rights.

The earliest reference to a *Miranda*-style warning occurred in an Old Bailey case in 1748. The defendants, Samuel Shorer and Richard Shaw, were charged with highway robbery. One of the witnesses called against them was the magistrate who took their confessions after they were arrested. His testimony about the process of the interrogation strongly suggests that this was not the first case in which a magistrate testified to cautioning a suspect prior to questioning.

> Justice Paulson. On Sunday the 25th of September, the prisoners were brought before me, and they were charged by that man for robbing on the highway, as he has related; my clerk was not home, and I took their confessions myself, here are the confessions; I asked them if they were free and ready to do it [i.e., make a statement], and they said that they were free and ready to do it; there was no compulsion, and I did not say any thing to them to induce them to do it; and this is the hand of Richard Shaw, and this is the mark of Samuel Shorer, and they are both signed by me.

> Q. Were they read to them, *and were they asked whether they understood what they were going to do, and the consequences of it*?
>
> Justice Paulson. Yes, and I told them *that they were not compelled to do it*, and they said they did it freely.[3]

The question posed to the magistrate in this exchange assumes that magistrate was aware of a practice of cautioning suspects, even if the custom was of recent vintage. When the prosecuting attorney asked the magistrate whether the prisoners "understood what they were doing, and the consequences of it," the magistrate was not taken by surprise. His response was not only in the affirmative, he also volunteered that he had further instructed the prisoners that "they were not compelled" to provide a statement. The language of this exchange suggests this was not the first time a magistrate provided this caution, it clearly reflects a custom, well prior to the ratification of the American Bill of Rights, of alerting suspects that they may remain silent and that their statements may be used against them.

The fact that a caution was reported to have been given in Daniel Blake's murder case is particularly good evidence of a custom of warnings. Blake was examined by Sir John Fielding and two other magistrates in 1763. Fielding, who provided the warnings, has been described as "the leading magistrate in

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[3] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 27 March 2022), October 1748, trial of Samuel Shorer, Richard Shaw (t17481012-30) (emphasis added).

Westminster" during this period. J.M. Beattie, *Sir John Fielding and Public Justice: The Bow Street Magistrates' Court, 1754-1780*, 25 LAW & HIST. REV. 61, 61 (2007). One would not suspect a renowned magistrate to provide unnecessary warnings that could inhibit his ability to obtain evidence. Additionally, one would expect magistrates to follow the practice of this esteemed official.

In the opening statement, the prosecutor in Blake's case observed that the defendant was taken before a Magistrate who "repeated warning to be catious what he said . . . [*sic*]" The defendant, the prosecutor continued, "after being told that all admissions might be used as evidence against his own life" confessed to the crime.[4]

The idea of cautioning suspects prior to confessions was so thoroughly a part of the legal culture that even private citizens who recounted confessions were asked if they warned the defendant. In the trial of Thomas Haycock in 1780 for being a part of a mob that destroyed the Newgate prison, a prosecution witness – who was suspected of testifying for a reward – claimed the defendant confessed to him. Defense counsel asked the prosecution witness on cross-examination, "Did you caution him while you were talking with him; 'take care, you are confessing you have been guilty of a felony?' "[5]

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[4] *Id.* at February 1763, trial of Daniel Blake (t17630223-19).

[5] *Id*. at June 1780, trial of Thomas Haycock (t17800628-34).

In a murder trial in 1786, the prosecution called a witness to testify that the magistrate who questioned one of the defendants had first given him the warnings. After reading the confession, a witness, one Freeman, testified to the procedure the magistrate used in obtaining the confession.

> Court to Freeman. Was anything said by the Justice to lead the man to hope that if he did sign this confession, he should receive favor? – I will tell you what was said, my Lord: Mr. Walker says to the prisoner, you have heard the charge against you, if you have any thing to say now is your time to say it; but let me give you this caution, do not say any thing without you like it; you are not bound to say any thing unless you like it.

The trial judge, in summarizing the case to the jury, observed that the magistrate who took the defendant Walker's statement had been "very careful in warning him not to say anything that might affect him."[6]

The Old Bailey Session Papers provide another example of the warnings being given to suspects a decade later. In a criminal proceeding against Robert Davidson in 1796 for felonious stealing, the magistrate who took his statement was called to testify. The language of the introductory questions asked of this magistrate, and the answers he provided, suggest that testimony about the warnings was a foundation

[6] *Id*. at December 1786, trial of Michael Walker, Richard Payne, John Cox (t17861215-1).

commonly laid for the admission of a confession. The exchange with the magistrate follows:

> PATRICK COLQUHOUN, ESQ. sworn. – Examined by Mr. Knapp.
>
> Q. You are a Magistrate for the Country [*sic*] of Middlesex?
>
> A. Yes
>
> Q. The prisoner and Keene were both examined before you?
>
> A. They were.
>
> Q. You took down some examination of the prisoner Davidson, on what day was that?
>
> A. On the 20th of October.
>
> Q. Before you took that examination, did you apprise the prisoner of the consequences of making any confession?
>
> A. I have the minute in my book in these words – [7]

At this point, defense counsel interrupted the exchange between the prosecuting attorney and the magistrate to direct a question to the complaining witness about assurances of leniency he gave the prisoner. The nature of the questions and answers suggests that it was a common practice to alert the prisoner to the consequences of confessing. This record further reveals that this magistrate deemed the precise words of the

[7] *Id*. at November 1796, trial of Robert Davidson (t17961130-61).

warnings worthy of recording. Unfortunately, the magistrate's notes appear to have been lost to history as a result of defense counsel's interruption of the exchange.

Even though the reports of these proceedings reveal that there was a custom of giving these warnings, it is not surprising that only these examples of *Miranda*-like warnings have been discovered in the Old Bailey Session Papers. The depth of coverage varied widely from 8 words to 320 pages depending on the public's perceived interest in a case.[8] The Session Papers were not verbatim transcripts of proceedings and were not written for a legal audience. They were a true-crime entertainment publication, sold to a general audience for a profit, serving much the same role as the television show *Dateline* or *48 Hours* in our own era. Though historians have praised the accuracy of reporting, the commercial motivations of the publisher often led details about legal procedures to be omitted.[9]

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[8] Tim Hitchcock & William J. Turkel, *The Old Bailey Proceedings, 1674-1913: Text Mining for Evidence of Court Behavior*, 34 LAW & HIST. REV. 929, 929 (2016).

[9] Robert B. Shoemaker, *The Old Bailey Session Proceedings and the Representation of Crime and Criminal Justice in Eighteenth-Century London*, 47 J. BRIT. STUD. 559, 563, 571 (2008) (describing motives of publisher and tendency of reports to omit certain aspects of proceedings); LANGBEIN, *supra* at 185 (where available comparisons between Old Bailey Session Papers and other independent sources revealed that "nothing in the reports had been fabricated"); T.P. Gallinis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 553 (1999) (describing nature and quality of Old Bailey Session Papers as archival records).

The presence of any instances of warnings in the transcripts is therefore significant. The Old Bailey Session Papers provide compelling evidence of a practice of warning suspects that they had right to remain silent and to the fact their statement would be used against them. This evidence would then be corroborated by early nineteenth century records documenting the custom of giving the warnings.

B. Treatises Confirm Practice of Giving Warnings

Treatise writers in the early 1800s would confirm that the evidence in the Old Bailey records indicated a practice of providing suspects *Miranda*-like warnings. They reveal that the references to magistrates' cautions in the 1700s were not isolated incidents. They further confirm the logical inference that the warnings were given to demonstrate that confessions were not obtained by improper inducements.

Few, if any, treatises on criminal law or evidence or manuals for magistrates, were published between 1748, the first-known reference to *Miranda*-like warnings, and the turn of the nineteenth century. In the early nineteenth century, however, a variety of new treatises began to appear in England and the United States, observing either the custom of magistrates to

give *Miranda*-like warnings or their duty to give them.[10]

William Dickinson's treatise appears to be the earliest of these to comment on the warnings and noted:

> The excessive mildness usual in the exercise of English jurisprudence, renders it the duty of the magistrate to apprise the prisoner that his examination may be produced at trial, and to give him a reasonable caution, that he is not required to criminate himself.

1 WILLIAM DICKINSON, A PRACTICAL EXPOSITION OF THE LAW RELATIVE TO THE OFFICE AND DUTIES OF A JUSTICE OF THE PEACE 457 (London: Reed and Hunter, 1813)

Joseph Chitty in 1816 observed the common practice of providing the warnings.

> In practice, when the party is brought before the magistrate, he is generally cautioned that he is not bound to accuse himself, and that

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[10] There simply were not that many treatises published in the 1700s, especially when compared to the following century – and certainly not treatises that found their way into colonial libraries. *See* HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES, 1700-1799 (1978). It was only in the 1800s that treatises "became the typical form of legal writing" in the United States and Britain. A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 633 (1981). Treatises in the United States did not emerge until well into the first half of the nineteenth century. Amanda Bolles Watson, *"The Report of My Death Was an Exaggeration" – The Legal Treatise*, 50 J. L. EDUC. 256, 260-63 (2021).

> any admission may be produced against him at his trial.

1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW AND EVIDENCE (London: A. J. Valpy 2d ed. 1816)

Jeremy Bentham, though highly critical of the practice, recognized the custom of providing these warnings to suspects.

> In England, for his protection against legal accusation, the faculty of mendacity, with its attendant, non-responsion, is . . . carefully reserved to him . . . In putting questions to a defendant under examination, it is a sort of fashion to give him a warning that he is at liberty to answer them or not as he thinks fit . . .

2 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 311 (London: Hunt & Clark, 1827).

Bentham was not alone in his criticism, nor was he alone, even among critics of the warnings, in recognizing the long-standing practice of providing them. One of the mid-nineteenth century criticisms of the warnings appears in the eighth edition of Phillips and Amos' 1839 treatise, which questioned the continuation of the practice on policy not historical grounds.

> It does not appear necessary, in order to render the examination of a prisoner admissible in evidence against him, that he should be cautioned by the magistrate, not to expect any favour from making a confession, or, if anyone has told him it would be better for him to confess, or worse if he does not, that he must pay

> no attention to it, and that any thing said by him against himself will be used against him at his trial. *It has, indeed, been frequently said, that it is the duty of the magistrate to use such cautions*; but the propriety and expediency of such a course may be open to considerable question. It is at all events improper in the magistrate to dissuade a prisoner from making a voluntary confession.

S. MARCH PHILLIPS & ANDREW AMOS, TREATISE ON THE LAW OF EVIDENCE 387-88 (Boston: Elisha G. Hammond 8th ed. 1839) (emphasis added).

C. Sources in the Early 1800s Confirm Warnings Overcame Improper Influences

Cases and commentators in the 1800s also confirm the logical inference that the warnings developed in the mid-1700s, given by law enforcement officers, were provided to demonstrate that confessions were not the product of an improper influence and thus admissible. To draw the analogy to modern law, these sources demonstrate that the Framing Era warning was often necessary to overcome the frequently coercive nature of a custodial interrogation. *Cf. Miranda*, 384 U.S. at 468 ("such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.").

An English case, *Rex v. Lingate* (Derby Lent Assize 1815)[11] was widely cited in nineteenth-century British and American treatises for the proposition that a magistrate's caution could overcome the influence of a promise or threat previously made to the suspect and allow the statement to be admitted. A person assisting the constable in arresting Lingate told him that it "would be better for him to confess." Courts by the 1780s had made it clear that even the slightest promise or favor would jeopardize the admissibility of a confession. *The King v. Cass* (1784) 1 Leach 293. Numerous courts in the early 1800s announced that a statement should be excluded if the suspect was told it would be better for him to confess.[12] *Lingate* was a critical decision for those attempting to ensure the admissibility of confessions they were taking from suspects, a significance recognized by numerous treatise writers.[13]

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[11] *Lingate* was extensively abstracted in CHARLES PETERSDORFF, A PRACTICAL AND ELEMENTARY ABRIDGMENT OF THE CASES ARGUED AND DETERMINED IN THE COURTS OF KING'S BENCH, COMMON PLEAS, EXCHEQUER, AND AT NISI PRIUS 84 (London: Baldwin, Cradock & Joy 1827).

[12] *See* citations at *infra* n. 18.

[13] *See* JOHN JERVIS, FREDERICK ARCHBOLD & WILLIAM NEWLAND WELSBY, ARCHBOLD'S PLEADING AND EVIDENCE IN CRIMINAL CASES 192-93 (London: S. Sweet, U. R. Stevens & G. S. Gordon, 1853); RICHARD MATTHEWS, A DIGEST OF THE LAW RELATING TO OFFENSES PUNISHABLE BY INDICTMENT, AND BY INFORMATION 159 (London: W. Crofts, A. Maxwell; Dublin: R. Milliken & Sons, 1833); 2 WILLIAM OLDNALL RUSSELL ET AL., A TREATISE AND INDICTABLE MISDEMEANORS 645 (Philadelphia: T. & J.W. Johnson, 2d ed. 1841); 1 RICHARD BURN ET AL., THE JUSTICE OF THE PEACE AND PARISH OFFICER 1082 (London: T. Cadell, 1836); 1 WILLIAM

Simon Greenleaf, then the Royall Professor of Evidence at Harvard Law School, also cited *Lingate* in his treatise. He further specifically observed the virtue of the warnings to law enforcement in his 1842 treatise:

> [A]lthough an original confession may have been obtained by improper means, yet subsequent confessions of the same or like facts may be admitted, if the Court believes from the length of time intervening, *or from proper warning of the consequences of confession*, or from other circumstances that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. . . . Accordingly, where an inducement has been held out by an officer, or a prosecutor, but the prisoner is subsequently warned by the magistrate, that what he may say will be evidence against himself, or that a confession will be of no benefit to him, or he is simply cautioned by the magistrate not to say any thing against himself, his confession, afterwards made, will be received as a voluntary confession.

SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 257-58 (Boston: Charles C. Little & James Brown, 1842) (emphasis added).

An American contemporary of Greenleaf's similarly observed that an "improper influence once exerted may yet be countervailed by a subsequent influence [such

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DICKINSON, A PRACTICAL TREATISE OF THE LAW: RELATIVE TO THE OFFICES AND DUTIES OF A JUSTICE OF THE PEACE (London: Baldwin, Craddock & Joy, 2d ed. 1822).

as a caution], so as to make an after confession receivable." 1 ESEK COWEN, NOTES TO PHILLIPS' TREATISE ON THE LAW OF EVIDENCE 430 (New York: Banks, Gould & Co. 3d ed. 1850).

D. Political Response to Warnings Further Demonstrate Their Consistency with Rights of the Accused in the Framing Era

Events in the nineteenth century reveal that the scheme of warnings was accepted as an appropriate procedural requirement in the process of interrogation.[14] Neither the judicial nor the political reaction to the warnings in the first half of the nineteenth century gave any indication that the English practice of giving these warnings was in any way inconsistent with the new republic's understanding of the rights of the accused. As part of the codification movement of the 1820s and 1830s, four state legislatures expanded the warnings to include the right to counsel at the magistrate's interrogation.[15] Codifiers claimed to be merely

[14] The warnings became part of popular culture in the nineteenth century. *See* Simon Stern, *Literary Analysis of Law, in* MARKUS D. DUBBER & CHRISTOPHER TOMLINS (EDS.), THE OXFORD HANDBOOK OF LEGAL HISTORY (2018) (describing other American and British novels referencing the warnings). Examples of warnings in the 1800s are remarkably not limited to literature in jurisdictions that are part of the Anglo-American legal tradition. *See* FYODOR DOSTOVESKY, THE BROTHERS KARAMAZOV 468, 479 (1879-1880) (New York: Everyman's Library, 1992) (translated by Richard Pevear & Larissa Volokhonsky).

[15] *See* George C. Thomas, III & Amy Jane Agnew, *Happy Birthday Miranda and How Old Are You, Really?*, 43 N. KY. L.

reducing existing law to a rational, easily-discoverable format, suggesting that in the first-half of the nineteenth century, robust warnings prior to interrogation seemed very much a part of the existing common law.[16]

Great Britain in 1848 similarly codified the requirement of cautions prior to an interrogation. The experience of the UK is particularly noteworthy as the public – and certainly members of Parliament – would have been aware that a very high-profile defendant had recently been given the warnings prior to his interrogation. Daniel McNaughten, whose case is most famous for the legal definition of insanity it would produce, attempted to assassinate Prime Minister Robert Peel, but instead shot and killed Peel's private secretary, Edward Drummond. At his examination in 1843, he was informed of his right to silence and the risk he took if he chose to offer a statement. Despite such potential loss of evidence, Parliament enacted Sir John Jervis' Act in 1848, codifying the requirement of a warning prior to interrogation.[17]

REV. 301, 301 (2016) (citing *Revised Statutes of New York*, Volume II, Part IV, Title II, §§ 13-19 (Albany: Packard & Van Benthuysen, 1829); *Revised Statutes of Missouri*, Art. II, § 15 (1835); *Revised Statutes of Arkansas*, c. 45 (1838)); *Revised Statutes of Massachusetts*, part IV, tit. II, ch. 135, § 13 (1836).

[16] *See* Perry Miller, *The Common Law and Codification in Jacksonian America*, 103 PROC. AM. PHILOSOPHICAL SOC. 463, 464 (1958) (describing rationale for codification movement).

[17] McNaughten's trial, including the magistrate's examination, was covered extensively. *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 04 April 2022), February 1843, trial of Daniel McNaughten (t18430227-874). Sir John

II. Warnings Necessary in Framing Era to Overcome Improper Inducements Often Inherent in Custodial Interrogations

This Court regards *Miranda* warnings as essential to overcome the inherently coercive nature of a custodial interrogation. *Miranda*, 384 U.S. at 468. Similarly, judges in the second half of the 1700s and early 1800s, often determined, on a case-by-case basis, that confessions were obtained by improper inducements. The readiness of judges to exclude unwarned confessions in the Framing Era made the warnings – with the hope of admissibility that accompanied them – a practical necessity.

Evidence scholar John Henry Wigmore concluded that the English bench of this era held "a general suspicion of all confessions, a prejudice against them as such, and an inclination to repudiate them upon the slightest pretext." JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 820, at 927 (Boston: Little, Brown, & Co. 1904).

American law has frequently noted that the English voluntariness rule, at the time the Bill of Rights was ratified, forbade the admission of a confession that was obtained through a threat or promise. *See*, *e.g.*, *Hopt v. Utah*, 110 U.S. 574, 584-85 (1884). The Framers

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Jervis' Act required a magistrate to say to the person about to be interrogated, "Having heard the Evidence, do you wish to say any thing in answer to the Charge? you are not obliged to say any thing unless you desire to do so, but whatever you say will be taken down in Writing, and may be given in Evidence against you upon your Trial." 11 & 12 Vict. ch. 42.

would have been very familiar the deep concern British courts had about methods of obtaining confessions.

The Old Bailey Session Papers reveal that in the 1760s the common law voluntariness rule, forbidding the admission of statement induced by promises or threats of any kind, had come to be well-established in practice. LANGBEIN, *supra* at 222. The rule, however, is typically traced to *The King v. Warickshall* (1783) 1 Leach 262, 168 Eng. Rep. 234, a decision reported in *Leach's Crown Cases* two decades later. *See Hopt*, 110 U.S. at 584-85.

One year after *Warickshall*, another formulation of the confessions rule was announced that, with unmistakable clarity, signaled the difficulty of admitting confessions. In *The King v. Cass* (1784) 1 Leach 293, the court directed a verdict for the defendant, concluding that when "the slightest hope of mercy" is held out to a prisoner, any resulting confession is inadmissible.

Warickshall and *Cass* – and decades of unreported trial court decisions that preceded them – cast a large shadow over interrogations. Even a suggestion of a threat or promise prevented the use of a confession. Numerous cases following this very strict version of the voluntariness rule held that merely telling a suspect that it would be "better" for him to confess would render his statement inadmissible.[18]

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[18] *See*, *e.g.*, *State v. Absolom*, 2 Del. Cas. 32 (Del. Quarter Sessions of Peace 1808) (recognizing British precedent required exclusion of confession if suspect told it would be "better" to confess but distinguishing facts); *State v. Aaron*, 4 N.J.L. 231, 240

The 1813 version of William Dickinson's manual for justices of the peace not only instructed magistrates to give the warnings to suspects, it also alerted magistrates to the readiness of courts to exclude improperly induced confessions. "Threats and promises, even the most distant hopes, are strictly forbidden to be held out; so strictly, that any declaration extorted by the former, or elicited by the latter, will defeat every purpose for which it was obtained, for it cannot be given in evidence." 1 DICKINSON, *supra* at 457.

Those who drafted and ratified the Fifth Amendment to the Constitution lived in a world that afforded very strong protections to those who were interrogated while in custody. Though it was not a universally accepted proposition, one English judge in the early 1800s concluded that a magistrate had created an impermissibly coercive atmosphere when he asked the prisoner questions rather than merely offering him a chance to make any statement he chose. *Rex v. Wilson* (1817) 7 Holt 596, 171 Eng. Rep. 353, 353.

Far from retreating from this strict interpretation of the voluntariness rule, the young American Republic doubled down. In the first half of the 1800s, American

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(N.J. 1818); *United States v. Charles*, 25 F. Cas. 409, 409 (D.C. Cir. 1813) (No. 14,786); *People v. Robertson*, 1 Wheel. Crim. Cas. 66, 68 (N.Y. Gen. Term 1822); *Rex v. Thomas* (1834) 6 Car. & P. 352, 172 Eng. Rep. 1273, 1273; *Rex v. Enoch* (1833) 6 Car. & P. 539, 172 Eng. Rep. 1089, 1089. *See also* HENRY HOLMES JOY, ON THE ADMISSIBILITY OF CONFESSIONS AND CHALLENGES OF JURORS IN CRIMINAL CASES IN ENGLAND AND IRELAND 7-13, 23 (Dublin: A. Milliken 1842); JAMES PEARCE, A TREATISE ON THE ABUSES OF THE LAWS 122-23 (James Pearce 1814).

authorities added more limitations to the strictly interpreted voluntariness rule. Threats and promises were still absolutely forbidden and a new prohibition was added. Efforts at trickery, however slight, now jeopardized the admissibility of confessions.[19]

Though clearly many of the cases applying this very strict interpretation of the voluntariness rule were reported after 1791, they inform how a late eighteenth-century lawyer would have understood the common law voluntariness test. They also demonstrate that pre-1791 decisions were not outliers quickly dismissed once other judges contemplated the appropriate limits on interrogations. American and English law at the turn of the nineteenth century was very quick to exclude a confession that was anything other than an unprompted utterance by the prisoner. As warnings provided interrogators a chance of preserving confessions despite an improper inducement, magistrates in the Framing Era would have regarded warnings as a required prophylactic measure to prevent losing evidence by application of the voluntariness rule. *Cf. Dickerson v. United States*, 530 U.S. 428, 437-38 (2000)

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[19] GEORGE C. EDWARDS, A TREATISE ON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE AND TOWN OFFICERS IN THE STATE OF NEW YORK 209 (Bath: David Rumsey 1830) ("No improper influence, either by threat, promise, or misrepresentation should be employed by the magistrate, or permitted by him . . . "); RHODOM A. GREENE AND JOHN W. LUMPKIN, THE GEORGIA JUSTICE: BEING A CONVENIENT DIRECTORY FOR JUSTICES OF THE PEACE 100 (Milledgeville: P.L. & B.H. Robinson, 1835) ("no improper influence, either by threat, promise, or misrepresentation should be employed, for however slight the inducement may have been, a confession so obtained cannot be received in evidence.").

(referring to *Miranda* warnings as "prophylactic" to prevent involuntary confession); *New York v. Quarles*, 467 U.S. 649, 653 (1984) (same).

III. Interrogators Cease and Resume Warnings as Courts Apply Common Law Voluntariness Test Less Then More Strictly

Evidence that warnings prior to interrogation were a function of the common law voluntariness test can be further illustrated by the disappearance and reappearance of the warnings. As courts began to less strictly interpret the voluntariness test in the mid-nineteenth century, interrogators – police officers at this point in history – no longer found them as essential. As neither legislatures nor treatise writers foresaw police taking over the role of interrogations from magistrates, nothing specifically instructed police officers to provide the warnings. Left to decide for themselves whether to provide the warnings, these new interrogators ended the practice of warnings in the mid-1800s as courts less strictly interpreted the common law voluntariness test – and resumed the warnings in the mid-twentieth century as this Court more strictly applied the test.

The end of pre-interrogation warnings can be observed through changes in practices in the New York City Police in the second half of the nineteenth century. Police forces were first created in America's largest cities in the mid-nineteenth century – Boston, New York, and Philadelphia. The history of these organizations

has proven difficult to unearth due to the lack of contemporaneous record-keeping and poor preservation of the records that were created. Of these early departments, the records of the New York City Police Department appear to be the most extensive.[20] So far, our window on the disappearance of pre-interrogation warnings has been limited to this jurisdiction.

These new police departments were formed, in part, to conduct investigations. Unsolved high-profile crimes had been an impetus for these new departments. Unlike part-time eighteenth-century constables, full-time officers now advanced in their careers by solving crimes. With this new incentive, officers began to question suspects, something eighteenth-century officers usually left to magistrates.

Initially, the New York City Police Department reported that it was providing suspects with the same warnings that they would receive before being questioned by magistrates. A committee of the New York State Legislature in 1856, frequently referred to as the Lexow Commission, examined the practices and alleged abuses of the department. One member of the committee asked James Nesbit, a police clerk, if suspects were ever questioned by members of the police department

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[20] The history of the New York Police Department provides perhaps the best source of information about the historical practice because of its archival records. The City boasts that its "criminal justice records 1684-1966 are the largest and most comprehensive collection of their type in the English-speaking world." New York City Department of Public Records, https://www.familysearch.org/en/wiki/New_York_City_Department_of_Records.

outside the presence of a magistrate. The officer stated that he was familiar with that practice. A member of the committee asked how prisoners would learn of the rights they would traditionally learn from a magistrate prior to questioning. Nesbit responded that it was not his understanding that a prisoner had a right to be informed of his rights but he testified that police generally provided the warnings.[21]

Case law in at least one other American jurisdictions at the time of James Nesbit's testimony had recognized that police officers, unlike magistrates, were not required to warn suspects prior to questioning them. *Commonwealth v. Mosler*, 4 Pa. 264 (1846). The issue was far from settled, however, as there was English precedent excluding the unwarned product of an officer's questions. *Regina v. Berriman* (1854) 6 Cox C.C. 388, 388. *See also* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 323-24 (1998) (discussing English cases expressing concern about all police interrogation and especially police interrogations without first warning suspects).

Whether the NYPD was violating a provision of the state's Revised Statutes in failing to provide warnings prior to questioning was, in many ways, beside the point. The police would have been interested in the

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[21] Report of the Joint Committee on Police Matters in the City and County of New-York, and County of Kings, S. Rep. No. 97, at 75-76 (1856).

consequences of not providing the warning. A New York trial court concluded in 1859, somewhat remarkably, that there had never been a claim that the coercion inherent in a magistrate's examination necessitated warnings. *People v. Hartung*, 17 How. Pr. 151, 152-53 (N.Y. Sup. Ct. 1859).[22]

Hartung, even if from the state's highest court, would not have been sufficient to have made the new officer-interrogators entirely comfortable in foregoing warnings. Officers were not merely interested in complying with a pre-requisite to admissibility, they wanted to ensure that the statements they extracted would be regarded as voluntary. The voluntariness rule, as it formulated since 1760s, left interrogators to believe that even the slightest statement could be construed as a threat or promise forbidding the statement's use. Warnings historically assisted in demonstrating voluntariness, and therefore seemingly would have been useful to the young police department even if they were not required.

In the second half of the nineteenth century, New York courts began to soften its approach to the confessions rule. A New York treatise writer in 1842 had observed that confessions could not be obtained by

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[22] The lack of foresight in this opinion is obviously shocking. One proposed remedy to third-degree tactics that came to light during the 1920s was to require all questioning of suspects to be by magistrates because of the public nature of these examinations. Paul G. Kauper, *Judicial Examination of the Accused – A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

promises, threats, or misrepresentation.[23] The New York Court of Appeals in *People v. Wentz*, 37 N.Y. 303 (1867) reached out in dicta to conclude that "a confession is admissible, although it is . . . obtained by artifice or deception."

Wentz was part of a broader trend to lessen the strictures of the voluntariness rule. An American edition of Francis Wharton's treatise recognized in 1857 that courts appeared much less ready to exclude statements on the grounds that they were the product of an improper inducement.

> [The voluntariness rule] was at one time carried to a great length by the English courts. Thus, confessions have been held inadmissible when they were obtained by saying, "Tell me where the things are" or "You had better say where you got the property" or "It would be better for you if you had told at first", or "You had better tell all you know; if you will not, of course we can do nothing." Any advice to a prisoner by a person in authority, telling him it would be better or worse for him if he confesses, vitiates it was said, a confession induced by it. *Lately, however, this has been greatly qualified, and it is now held that there must be a positive promise by a person in*

[23] GEORGE C. EDWARDS, A TREATISE ON THE POWER AND DUTIES OF JUSTICES OF THE PEACE 217 (Ithaca: Mack, Andrus & Woodruff 4th ed. 1840).

> *authority to justify the judge in the exclusion of the confession.*

2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 686, 377 (Philadelphia: Kay & Brother, 4th rev. ed. 1857) (emphasis added).

Eight years after the *Wentz* decision, the documentary record allows another glimpse into the NYPD's interrogation practices. In 1875, former New York City Mayor Oakey Hall, then in private practice, brought a complaint against the New York Police Superintendent George Walling for interrogating his client without first apprising him of his right to silence and counsel. Walling offered the following defense at the proceedings against him, "I don't think it is the duty of the Police to warn prisoners not to make any statements that might be used against them, there is no statute that makes it the duty of the Police to do so."[24]

Twenty years earlier, the police clerk James Nesbit had testified that he did not believe that police were required to warn suspects but quickly followed up that it was the practice of the police to provide those warnings. In 1875, the New York Chief of Police boldly declared that he had no intention of complying with a statute that on its face applied to interrogation by magistrates.

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[24] Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations and Miranda-Like Warnings in the Nineteenth Century*, 81 TUL. L. REV. 777, 810-28 (2007).

The modifications in the voluntariness rule in the mid-nineteenth century made warnings less essential to ensuring the admissibility of confessions. Superintendent Walling therefore no longer wished to run the risk that the warnings would close the lips of suspects.

Superintendent Walling's world was not the world in which the Bill of Rights was drafted. The Framers operated in a legal landscape in which these warnings were essential for the admission of a statement. Magistrates, treatise writers, and legislators from the Founding Era to the mid-nineteenth century assumed that warnings were an essential part of ensuring that a confession was not the product of an improper inducement.

Police departments were willing to depart from the practices magistrates had observed – indeed been required by law to observe – only when courts signaled their willingness to retreat from the strict version of voluntariness rule that existed in the Framing Era.

Law enforcement officers in the 1700s had introduced the warnings into interrogations as courts began to strictly apply the voluntariness rule. As courts expressed a willingness in the mid-1800s to allow previously questionable interrogation tactics, interrogators had less need for the rule.

In the twentieth century, law enforcement would again find the warnings important even before they were legally required. Between 1936 and 1966, this Court frequently considered cases involving confessions, most often concluding that the statements had been

involuntarily obtained. With this Court's frequent finding the confessions were involuntarily obtained in the twentieth century, law enforcement officers reintroduced the scheme of warnings into American law.[25] (observing that this Court found confessions involuntary twice as often as it found them voluntary prior to *Miranda*). Much as magistrates had done in the eighteenth century when courts demonstrated a readiness to classify confessions involuntary, the FBI began providing warnings to suspects, alerting them that they were not required to answer questions.[26]

The warnings have phased in and out and back in as courts have been more and less strict in their interpretation of the voluntariness test. The warnings have accompanied stricter interpretations of the voluntariness test and were abandoned when courts were less inclined to deem a confession involuntary.

The authors of the Bill of Rights were acquainted with a voluntariness test that was interpreted with such extraordinary strictness that the warnings were often essential to ensure the admissibility of a confession given to a law enforcement officer. The *Miranda* scheme is very consistent with the world the Framers knew.

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[25] Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2202 (1996).

[26] J. Edgar Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 IOWA L. REV. 175, 177-182 (1952) (describing FBI practice of warning suspects prior to interrogation).

CONCLUSION

For the foregoing reasons, your amici urge this Court to find that *Miranda v. Arizona*, 384 U.S. 436 (1966), is a constitutionally compelled decision, supported by centuries of Anglo-American law, and affirm the decision of the lower court.

Respectfully submitted,

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