No. ______

In the Supreme Court of the United States

CARLOS VEGA,
Petitioner,
v.
TERENCE B. TEKOH,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court announced a prophylactic rule protecting the Fifth Amendment right against self-incrimination. That rule generally prohibits criminal trial courts from admitting into evidence against a criminal defendant any self-incriminating statement made by that defendant while he was in custody, unless the defendant first received certain warnings spelled out in *Miranda*. The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a damages remedy for deprivations of any right secured by the Constitution and laws of the United States. The question presented is:

Whether a plaintiff may state a claim for relief against a law enforcement officer under Section 1983 based simply on an officer's failure to provide the warnings prescribed in *Miranda*.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Carlos Vega was a defendant-appellee in the United States Court of Appeals for the Ninth Circuit. The County of Los Angeles and Dennis Stangeland, Sergeant with the Los Angeles County Sheriff's Department, were also defendants-appellees in the U.S. Court of Appeals for the Ninth Circuit, and are not participating in the proceedings in this Court. The Los Angeles County Sheriff's Department and Does 1 to 10, were named as defendants in the United States District Court for the Central District of California.

Respondent Terence B. Tekoh was plaintiff-appellant in the United States Court of Appeals for the Ninth Circuit.

RELATED PROCEEDINGS

Tekoh v. County of Los Angeles, No. 18-56414, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 15, 2021; rehearing denied June 3, 2021.

Tekoh v. County of Los Angeles, No. 2:16-cv-07297-GW-SK, U.S. District Court for the Central District of California, judgments entered November 7, 2017 and October 5, 2018.

People v. Tekoh, No. BA423260, Superior Court of California, County of Los Angeles. Verdict entered March 1, 2016.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The panel decision of the Ninth Circuit (App. 1a-26a) is reported at 985 F.3d 713, and opinions concerning the denial of rehearing en banc (App. 71a-96a) are reported at 997 F.3d 1260. The district court's orders granting a new trial (App. 30a-61a), denying respondent's requested jury instruction (App. 62a-66a), and confirming the judgment (App. 67a-70a) are not published.

JURISDICTION

On January 15, 2021, the Ninth Circuit vacated the judgment on the jury's verdict in petitioner's favor and reversed the judgment of the district court (App. 1a-26a). On June 3, 2021, the Ninth Circuit denied petitioner's timely motion for rehearing en banc (App. 71a-96a). On July 19, 2021, this Court ordered that the time within which to petition for a writ of certiorari is 150 days from, *inter alia*, an order issued before July 19, 2021 denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision is set out in the appendix to this petition. App. 97a.

INTRODUCTION

This case raises an important and recurring question about the scope of civil liability under 42 U.S.C. § 1983 for the violation of rights secured by the Constitution and laws—whether law enforcement officers can be sued for money damages for failing to provide a criminal suspect with the warnings spelled out in *Miranda v. Arizona*, 384 U.S. 436 (1966). In the decision below, the Ninth Circuit answered that question in the affirmative, holding that a plaintiff may bring a Section 1983 claim against an officer solely because the officer took an un-*Mirandized* statement that prosecutors later introduced—and a court admitted—in a criminal case. That ruling compounds an acknowledged conflict in the courts of appeals, is wrong, and will interfere with legitimate policing practices in the nation's largest circuit. The Court should grant certiorari.

This petition warrants review for three reasons. *First*, the Ninth Circuit's decision deepens a 5-4 circuit split on whether a plaintiff may bring a Section 1983 claim against a law enforcement officer in his personal capacity based solely on the use of an un-*Mirandized* statement in a criminal case. In the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, that Section 1983 claim would fail as a matter of law. But in the Third, Fourth, and Seventh Circuits—and now in the Ninth as well—an officer may be held liable under Section 1983 in those exact same circumstances. The courts of appeals, including the Ninth Circuit below, have acknowledged the conflict, as did the seven Ninth Circuit judges who dissented from denial of en banc review. The conflict is entrenched, and only this Court can resolve it.

Second, the Ninth Circuit's decision is wrong and should be overturned. Section 1983 imposes liability for the violation of constitutional "rights," but this Court has long recognized that *Miranda* supplies a "prophylactic rule" that sweeps more broadly than the Fifth Amendment right against self-incrimination, and does not itself create a constitutional right. The constitutional rule set out in *Miranda* is addressed to courts and ultimately concerns the admissibility of statements at a criminal trial. Officers do not violate *Miranda* by taking an unwarned statement; instead, a *Miranda* violation occurs only if a prosecutor introduces and a judge later mistakenly admits that evidence at the defendant's criminal trial.

To be clear, petitioner does not challenge the validity of *Miranda*, which is a valuable constitutional rule designed to protect the right against self-incrimination and to help ensure that statements are voluntary. But neither *Miranda*'s rationale, nor this Court's recognition that it is a constitutional rule, supports extending that doctrine to impose Section 1983 damages on individual law enforcement officers. Such extension would violate the rule's purpose, ignore the superseding decisions of the prosecutor and trial judge to introduce and admit unwarned statements, and impose unacceptably high costs on legitimate law enforcement efforts.

Third, the question presented is important. Officers regularly engage in conversations that do not require *Miranda* warnings, ranging from noncustodial questioning to time-sensitive interrogations that protect public safety. And officers undertaking investigations cannot always know in real time whether the person they are questioning will be criminally prosecuted, whether a prosecutor

will later introduce a suspect's statement in a criminal case against him, or whether a setting will be deemed custodial. The Ninth Circuit's rule threatens to over-deter officers from undertaking basic investigative inquiries—such as the sexual-assault investigation in this case—and it exposes officers (and the States and municipalities that often indemnify them) to monetary liability and litigation burdens. In the circuits where the Ninth Circuit's rule prevails, law enforcement officers and state and local governments are frequently subjected to lawsuits like this one. The question presented has real significance for officers and government entities across the country.

This petition provides an ideal vehicle for resolving that question. Two federal juries have already found that the police questioning at issue—which occurred at the scene of a reported sexual assault of a patient at a public hospital—was not coercive under the totality of the circumstances, and thus did not violate respondent's constitutional rights. This case thus squarely presents the question whether a *Miranda* violation alone can give rise to Section 1983 liability. This Court should grant review to resolve the circuit split and put an end to this mistaken strain of Section 1983 litigation.

STATEMENT OF THE CASE

This Section 1983 case arises from a police investigation into a credible report of sexual assault. Petitioner Carlos Vega, a sheriff's deputy in Los Angeles County, questioned respondent Terence Tekoh at the public hospital where Tekoh worked soon after a patient accused Tekoh of assaulting her. Tekoh quickly confessed to the assault, and later

stood trial, where his confession was admitted into evidence. A jury nevertheless acquitted Tekoh.

Following his criminal acquittal, Tekoh pursued this Section 1983 action against Vega, alleging that Vega fabricated evidence, coerced Tekoh's confession, and violated Tekoh's Fifth Amendment right against self-incrimination. Two different federal juries rejected those arguments, and specifically found that Vega's questioning of Tekoh was not coercive under the totality of the circumstances. But the Ninth Circuit held that Tekoh's Section 1983 claim should be retried yet again, and that Vega may be held liable simply if he failed to provide a *Miranda* warning before receiving Tekoh's confession.

A. The Criminal Case And Finding Of No *Miranda* Violation

In March 2014, Deputy Vega responded to a call from the Los Angeles County/USC Medical Center, a public teaching hospital, to investigate allegations that an employee—Terence Tekoh—had sexually assaulted a patient. App. 2a; 4-ER-756.[1] According to the patient, Tekoh had lifted her gown and made sexual contact while transporting her within the hospital. App. 2a. A forensic sexual assault examination revealed vaginal lacerations consistent with the patient's account. 4-ER-853-54.

After speaking with the patient, Vega encountered Tekoh in the hospital's MRI section. According to Vega, Tekoh quickly admitted that he had "made a

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[1] x-ER-y refers to Excerpts of Record volumes 1-8 filed in No. 18-56414 (9th Cir.). "ECF No." refers to additional documents filed below in No. 18-56414. "Dkt. No." refers to documents filed below in No. 16-cv-7297 (C.D. Cal.).

mistake" and asked to "talk to [Vega] away from [his] co-workers and get a little privacy." App. 4a-5a. The two went to the nearby MRI reading room to talk in private. *Id.* at 5a; 3-ER-624. Vega did not read Tekoh a *Miranda* warning because he believed the interview was non-custodial. App. 5a. Tekoh agreed to write down what happened while Vega called his sergeant, Dennis Stangeland. *Id.* Tekoh then wrote a confession without further prompting. *Id.*

Vega's account was corroborated by Sergeant Stangeland, who arrived on the scene soon after Tekoh said he was willing to talk to the officers. *Id.* According to Stangeland, Vega questioned Tekoh "in a very conversational tone" and Tekoh orally admitted to non-consensual sexual touching of the victim. *Id.* Stangeland testified that Tekoh's demeanor was "contrite," like someone who "regretted what he had done." *Id.*

Tekoh was arrested and charged in state court for unlawful sexual penetration. *Id.* Prosecutors sought to introduce Tekoh's confession into evidence, and the trial court admitted it. But the court ultimately declared a mistrial because of an unrelated evidentiary issue. 7-ER-1817-18. During the retrial before a new judge, the prosecution again introduced Tekoh's confession and the court again admitted the confession—recognizing that Tekoh's statement was not taken in violation of *Miranda* because Tekoh was not in custody when he confessed. *Id.* The jury returned a verdict of not guilty. App. 5a.[2]

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[2] At trial, Tekoh offered a different story about the circumstances surrounding his confession. Tekoh claimed that Vega barred the exit, rested his hand on a firearm, threatened

B. The Civil Action And Jury Verdicts Rejecting Tekoh's Section 1983 Claims

After his acquittal, Tekoh filed a civil damages action under 42 U.S.C. § 1983 against Vega and several other defendants, for violating his Fifth Amendment right against self-incrimination by failing to give a *Miranda* warning. App. 5a-6a. Section 1983 creates a cause of action against state officials who cause a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Among other things, Tekoh claimed that Deputy Vega violated his constitutional "right" to a *Miranda* warning. 1-ER-150.

At the first civil trial, Tekoh asked the district court to instruct the jury that it must find Vega liable on the self-incrimination claim if it determined that Vega took a custodial, un-*Mirandized* statement from Tekoh that was later used at his criminal trial. *See* 2-ER-407-14. The court declined to give this instruction. It reasoned that *Miranda* had announced only a "prophylactic rule," and that a Section 1983 plaintiff like Tekoh could not "use a prophylactic rule to create a violation of a constitutional right," as required to trigger Section 1983 liability. 2-ER-408. Instead, the court instructed the jury to evaluate Tekoh's claim as a Fourteenth Amendment due process claim alleging that Vega used coercive

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to report Tekoh to immigration authorities, and ultimately bullied him into writing a confession. But as noted below, two civil juries rejected Tekoh's account by finding Vega not liable for coercion or any violation of Tekoh's Fifth Amendment rights under the totality of the circumstances. 1-ER-11-14, 68; *infra* at 8.

investigation techniques to fabricate evidence. App. 6a-7a; 1-ER-68. The jury returned a full defense verdict in Vega's favor, rejecting the notion that he had tried to fabricate evidence through his questioning. App. 6a-7a; 1-ER-59.

Following trial, the district court determined it had erred by instructing the jury on a Fourteenth Amendment due process violation rather than a Fifth Amendment self-incrimination violation. App. 7a, 38a-54a. It therefore ordered a new trial on Tekoh's self-incrimination claim. *Id.* at 7a. This time, the court instructed the jury to determine whether Vega had "improperly coerced or compelled" Tekoh's confession under the Fifth Amendment by considering the totality of the circumstances surrounding the questioning—including its location, length, and manner, as well as whether Vega provided a *Miranda* warning. *Id.* at 7a-8a. Once again, the jury rejected Tekoh's claim and returned a verdict for Vega. *Id.* at 8a.

C. The Ninth Circuit's Reversal

Tekoh appealed to the Ninth Circuit. He argued that the district court should have instructed the jury to find Vega liable if the confession introduced at Tekoh's criminal trial had been taken in a custodial setting without *Miranda* warnings—even absent any proof of coercion.

The Ninth Circuit agreed, holding that "the use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a § 1983 claim" against the officer who obtained the statement. App. 18a. In reaching that conclusion, the panel recognized that "merely taking a statement without *Miranda* warnings is

insufficient to give rise to a § 1983 claim," unless the statement is subsequently used in a criminal case. *Id.* at 18a & n.7. It also acknowledged that the Supreme Court has repeatedly "described *Miranda* warnings as mere 'prophylactic rules' or 'procedural safeguards' that were 'not themselves rights protected by the Constitution.'" *Id.* at 12a (collecting cases). But it nevertheless concluded that the Supreme Court changed course in *Dickerson v. United States*, 530 U.S. 428 (2000), which invalidated a federal statute designed to override the evidentiary rule set out in *Miranda*. App. 12a-13a. According to the panel, *Dickerson* "affirmatively backed away from previous decisions . . . that had described *Miranda* warnings as merely prophylactic and 'not themselves rights protected by the Constitution.'" *Id.* at 20a (quoting *Dickerson*, 530 U.S. at 437-39). The panel therefore held that a plaintiff may bring a claim under Section 1983 for deprivation of that "right," so long as the un-*Mirandized* statement was used against the plaintiff at his criminal trial. *Id.* at 13a.

The court stated that this view of *Miranda* "was later muddied" in the Supreme Court's post-*Dickerson* cases, including *Chavez v. Martinez*, 538 U.S. 760 (2003), and *United States v. Patane*, 542 U.S. 630 (2004), App. 13a-14a, but concluded that those cases were too fractured to be binding, *id.* at 13a-23a. It likewise recognized the circuit split on this question and rejected the Eighth Circuit's contrary position as "unpersuasive." *Id.* at 19a-20a.

The Ninth Circuit next turned to causation, concluding that the eventual introduction of Tekoh's confession at trial was attributable to Vega. It reasoned that there was "no question that Deputy Vega 'caused' the introduction of the statements at

Tekoh's criminal trial," even though Vega was not one of the prosecutors or judges involved in admitting it. *Id.* at 21a. In the Ninth Circuit's view, when Vega took Tekoh's confession it was natural and foreseeable that the confession would be improperly admitted at Tekoh's criminal trial. *Id.* at 22a.

The Ninth Circuit therefore reversed the judgment in Vega's favor and remanded the case for a new trial. It directed the district court to instruct the jury that "the introduction of a defendant's un-*Mirandized* statement at his criminal trial during the prosecution's case in chief is alone sufficient to establish a Fifth Amendment violation and give rise to a § 1983 claim for damages." *Id.* at 26a.

D. The Seven-Judge Dissent From Denial Of Rehearing

The Ninth Circuit denied Vega's petition for rehearing en banc, *id.* at 71a-72a, over the vigorous dissent of Judge Bumatay, who was joined by six judges, *id.* at 77a-96a. Judge Bumatay contested the panel's determination that an officer may be subject to Section 1983 liability in this context for simply failing to give a *Miranda* warning.

Reasoning from both the original meaning of the Fifth Amendment and subsequent Supreme Court interpretation of *Miranda*, Judge Bumatay noted that *Miranda* itself described its rules as "*procedural safeguards* effective to secure the privilege against self-incrimination." *Id.* at 84a (Bumatay, J., dissenting from denial of rehearing en banc) (quoting *Miranda*, 384 U.S. at 444). The dissent carefully analyzed this Court's *Miranda* jurisprudence—including its post-*Dickerson* rulings in *Chavez* and *Patane*—and concluded that failure to provide a

Miranda warning cannot give rise to a Section 1983 claim against an officer because that failure, on its own, does not violate any constitutional "right." *Id.* at 90a.

Judge Bumatay explained that *Dickerson* confirmed the "constitutional underpinnings" of *Miranda*, but did not upset "the long line of cases characterizing *Miranda* as a prophylactic rule and not a 'constitutional right.'" *Id.* at 86a-87a, 91a (quoting 530 U.S. at 440 n.5). He further noted that this reading of *Dickerson* was confirmed by the Court's plurality opinion in *Chavez*, 538 U.S. at 763, which Chief Justice Rehnquist—the author of *Dickerson*—joined in full. App. 91a & n.3. In *Chavez*, a plaintiff brought a Section 1983 action against an officer for questioning him without *Miranda* warnings. 538 U.S. at 764-65 (plurality opinion). The four-justice plurality reiterated that *Miranda* is a prophylactic rule and that "a violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case." *Id.* at 770 (emphasis omitted). Because "[r]ules designed to safeguard a constitutional right . . . do not extend the scope of the constitutional right itself," the plurality held that the failure to provide *Miranda* warnings "cannot be grounds for a § 1983 action." *Id.* at 772. Judge Bumatay noted that Chief Justice Rehnquist also joined the plurality opinion in *Patane*, 542 U.S. at 636-39, which further reinforced the prophylactic nature of *Miranda* after *Dickerson*. App. 93a.

Finally, Judge Bumatay observed that the panel's decision set the Ninth Circuit at odds with several other circuits, deepening what he described as a 6-2 circuit split. *Id.* at 95a-96a.

REASONS FOR GRANTING THE WRIT

This petition readily satisfies all the traditional criteria for certiorari. *See* Sup. Ct. R. 10(a). In holding that *Miranda* violations alone may support Section 1983 claims against law enforcement officers, the Ninth Circuit expressly acknowledged that its decision deepens an existing circuit conflict. Judge Bumatay's opinion dissenting from the denial of rehearing en banc further details the disagreement among the courts of appeals. Other courts have also acknowledged the conflict, and respondent has conceded the existence of a circuit split.

Certiorari is also warranted because the decision below incorrectly resolved an important federal question. The Ninth Circuit's decision fundamentally misconstrued the nature of the *Miranda* rule, the scope of Section 1983, and the Fifth Amendment right against self-incrimination. Its ruling not only exposes law enforcement officers to money damages but also risks undermining legitimate policing techniques and investigations.

The question presented is the subject of a longstanding, intractable, and acknowledged circuit split on a frequently recurring and important question of law. The conflict has caused substantial confusion in the application of constitutional law and police practice. Only this Court can clear up that confusion, and this petition provides an ideal vehicle to do so. The petition should be granted.

I. The Ninth Circuit's Holding Conflicts With The Decisions Of Other Circuits And Deepens An Existing Circuit Split

The Ninth Circuit's ruling deepens an entrenched 5-4 split on whether police officers may be held liable

under Section 1983 for failing to give *Miranda* warnings.

1. On one side of the split, two circuits have held—and two others have strongly indicated—that officers who take un-*Mirandized*, self-incriminating statements may be subject to civil liability if those statements are later wrongly introduced at a criminal trial. As Judge Bumatay observed below, the Ninth and Seventh Circuits have squarely adopted that position. App. 95a-96a. Two other circuits—the Third and Fourth—have clearly suggested that they would reach the same conclusion.

The Ninth Circuit's decision below held that when "government officials introduce an un-*Mirandized* statement to prove a criminal charge at a criminal trial against a defendant, a § 1983 claim may lie against the officer who took the statement." App. 23a. Central to the panel's reasoning were two points: (1) that *Dickerson* confirmed *Miranda*'s status as a constitutional "right" giving rise to Section 1983 liability, *see id.* at 13a, 19a-20a; and (2) that an officer "cause[s]" the violation of the right against self-incrimination by failing to offer *Miranda* warnings, because the subsequent use of un-*Mirandized* statements in a criminal trial is the natural and probable consequence of that failure, *see id.* at 20a-21a.

The Ninth Circuit relied heavily on the Seventh Circuit's decision in *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1026-27 (7th Cir. 2006), which held that a police officer's failure to provide a *Miranda* warning can create Section 1983 liability. In *Sornberger*, prosecutors used a suspect's unwarned confession in pretrial proceedings to support charges for assisted bank robbery. *Id.* at 1011-12. The

Seventh Circuit held that when a defendant's unwarned statements were used at a "preliminary hearing . . . to determine whether probable cause existed to allow the case against her to go to trial," the defendant may bring "a suit for damages under § 1983." *Id.* at 1026-27.

Like the Ninth Circuit, the Seventh Circuit relied on *Dickerson* for the proposition that "the *Miranda* warnings themselves have constitutional status," and it distinguished *Chavez*, because the unwarned statement there had not been admitted into *any* criminal proceeding. *Id.* at 1023-25. The *Sornberger* court therefore concluded that the officer who failed to give *Miranda* warnings could be held civilly liable. *Id.* at 1025-27. And the Seventh Circuit has continued applying *Sornberger* to uphold Section 1983 liability in these circumstances. *See, e.g.*, *Johnson v. Winstead*, 900 F.3d 428, 434 (7th Cir. 2018) (reaffirming "that a [Section 1983] claim for violation of the Fifth Amendment right against compulsory self-incrimination" lies against an officer when an un-*Mirandized* statement "is introduced as evidence at trial to convict him of a criminal offense").

As the Ninth Circuit decision below recognized, the Third and Fourth Circuits have indicated that they, too, would hold that a Section 1983 claim lies against an officer who obtains an un-*Mirandized* statement that is later used at trial. *See* App. 19a. Although both of those circuits—unlike the Seventh Circuit—have rejected Section 1983 claims when the un-*Mirandized* statements were used only in *pre*trial proceedings, both have made equally clear that a Section 1983 claim *is* viable when the statement is introduced at trial.

In *Renda v. King*, the Third Circuit reasoned that "questioning a plaintiff in custody without providing *Miranda* warnings is not a basis for a § 1983 claim *as long as* the plaintiff's statements are not used against her *at trial*." 347 F.3d 550, 557-58 (3d Cir. 2003) (emphases added). If, however, such statements are used "during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Id.* at 559.

Similarly, the Fourth Circuit concluded in *Burrell v. Virginia*, that because the Section 1983 plaintiff did "not allege any *trial* action that violated his Fifth Amendment rights; thus, *ipso facto*, his claim fails on the plurality's reasoning [in *Chavez*]." 395 F.3d 508, 514 (4th Cir. 2005). In both cases, the Third and Fourth Circuits indicated that if the unwarned statements had been introduced in evidence *at trial*, the plaintiffs could have stated a claim against the officers under Section 1983.

2. On the other side of the split, the Fifth, Sixth, Eighth, and Tenth Circuits have squarely held that police officers are *not* subject to Section 1983 liability simply because an unwarned statement was used against a defendant at trial. The Eleventh Circuit has also embraced the logic of those decisions.

In *Hannon v. Sanner*, the Eighth Circuit held that "a litigant cannot maintain an action under § 1983 based on a violation of the *Miranda* safeguards." 441 F.3d 635, 636 (8th Cir. 2006). There, officers obtained a murder confession through continued questioning after a criminal suspect had invoked his right to counsel; prosecutors later introduced the confession during his criminal trial. *Id.* at 635-36. The state supreme court overturned the conviction on those grounds, and the criminal defendant brought a

Section 1983 action against the officers who questioned him. *Id.* at 636. The district court granted summary judgment to the officers because the plaintiff's "exclusive remedy was suppression of the statements," and "§ 1983 does not provide a remedy for a violation of *Miranda*." *Id.*

The Eighth Circuit affirmed. Judge Colloton explained for the court that Section 1983 provides a civil action only against persons who, under color of law, cause a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Id.* The court carefully analyzed this Court's decisions in *Dickerson*, *Chavez*, and *Patane* to conclude that, although the prophylactic safeguards announced in *Miranda* reflect a "constitutional rule," they are "'not themselves rights protected by the Constitution,' but instead 'measures to insure that the right against compulsory self-incrimination [is] protected.'" *Id.* at 637 (alteration in original). The proper response to a *Miranda* violation, the court concluded, is not to obtain damages under Section 1983 after the fact. Instead, it is suppression of the unlawfully obtained evidence—which the plaintiff had already achieved through a ruling of the state supreme court. *Id.* at 637-38.

The Sixth Circuit took the same approach in *McKinley v. City of Mansfield*, 404 F.3d 418 (6th Cir. 2005). There, un-*Mirandized* statements were introduced against a defendant in a criminal trial, and the defendant later sued under Section 1983. *Id.* at 432 & n.13. The court rejected the notion that the failure to *Mirandize* could sustain a Section 1983 action, even though "the fruits of the compulsory interview were introduced against McKinley at a trial for those crimes." *Id.* at 432. The court held that an

"action on that basis is squarely foreclosed by the Supreme Court's decision" in *Chavez*. *Id.* at 432 n.13 (citing *Chavez*, 538 U.S. at 772). The Sixth Circuit, like Judge Bumatay, read the plurality opinion in *Chavez* as standing for the proposition that Section 1983 liability cannot lie against an officer who fails to offer *Miranda* warnings, even when the unwarned statement is later introduced at a criminal trial.

The Tenth Circuit's decision in *Bennett v. Passic*, 545 F.2d 1260 (10th Cir. 1976), is in accord. There the Tenth Circuit rejected a Section 1983 claim founded on a *Miranda* violation because, "[e]ven assuming that Bennett's confession should have been excluded from the evidence at his trial, . . . [t]he Constitution and laws of the United States do not guarantee Bennett the right to *Miranda* warnings." *Id.* at 1263. The court emphasized that *Miranda* itself "does not even suggest that police officers who fail to advise an arrested person of his rights are subject to civil liability; it requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence." *Id.* The court could find "[n]o rational argument . . . in support of the notion that the failure to give *Miranda* warnings subjects a police officer to liability under the Civil Rights Act." *Id.* The Tenth Circuit has continued to apply *Bennett*, explaining that "the law in this circuit is clear that the only remedy available for a *Miranda* violation is the suppression of any incriminating evidence. Accordingly, [a plaintiff] may not recover damages" in connection with a claim that his un-*Mirandized* statement was later used against him in criminal proceedings. *Haulman v. Jefferson Cnty. Sheriff Off.*, 15 F. App'x 720, 721 (10th Cir. 2001) (citations omitted).

The Eleventh Circuit adopted the same logic as the Eighth, Sixth, and Tenth Circuits in the closely related context of assessing whether a Section 1983 claim is viable when un-*Mirandized* statements are used in *pretrial* proceedings. *Jones v. Cannon*, 174 F.3d 1271, 1290-91 (11th Cir. 1999). Relying on the Tenth Circuit's decision in *Bennett*, the Eleventh Circuit rejected a Section 1983 claim where an officer took an unwarned confession and later helped secure an indictment through testimony before a grand jury. *Id.* The court reasoned that "[v]iolations of the prophylactic *Miranda* procedures do not amount to violations of the Constitution itself." *Id.* at 1291. Under that view, it would make no difference if the statement were admitted at trial, as it was in Tekoh's case, because *Miranda* did not establish a constitutional "right" that may be vindicated under Section 1983.

Finally, the Fifth Circuit likewise categorically rejects Section 1983 liability for law enforcement under these circumstances. *See Murray v. Earle*, 405 F.3d 278, 293 (5th Cir. 2005). Whereas the other circuits reached that conclusion because *Miranda* did not establish a constitutional "right" under Section 1983, the Fifth Circuit instead embraced a proximate causation rationale to arrive at the same result: It held that a fully informed prosecutor or trial court judge's decision to introduce and admit un-*Mirandized* testimony severs the chain of causation, thereby foreclosing Section 1983 liability against the officer. *Id.*

As the Fifth Circuit explained, Section 1983 "require[s] a showing of proximate causation, which is evaluated under a common law standard." *Id.* at 290. Because a prosecutor's decision to introduce

unwarned statements and a judge's decision to admit such statements constitute superseding causes, the court held that an officer "who provides accurate information to a neutral intermediary, such as a trial judge, cannot 'cause' a subsequent Fifth Amendment violation"—"even if a defendant can later demonstrate that his or her statement was made involuntarily while in custody." *Id.* at 293.[3]

3. The cases discussed above make clear that the courts of appeals are intractably divided over the question presented. Although the Ninth Circuit held that Tekoh had a viable claim under Section 1983, that same claim would have failed as a matter of law in the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits. The *Tekoh* panel expressly "reject[ed] the Eighth Circuit's approach in *Hannon*" and acknowledged the existence of a circuit split. App. 19a-20a. So did Tekoh himself, who acknowledged to the Ninth Circuit that "[t]here is indeed a conflict among the circuits." ECF No. 61 at 3; *see also id.* at 5.

Federal constitutional rights—and government officers' exposure to damages claims—should not vary by geography. This conflict in the courts of appeals will not resolve itself, as both sides of the split have reaffirmed their positions in recent decisions. The Court should grant review to settle the dispute.

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[3] Consistent with the plurality opinion in *Chavez*, the Fifth Circuit emphasized that its "analysis does not apply to Fourteenth Amendment claims brought by plaintiffs against officials that attack the lawfulness of the interrogation itself." *Murray*, 405 F.3d at 293 n.52 (citing *Chavez*, 538 U.S. at 773-74, which discusses Chavez's substantive due process claim). The district court here followed that approach by construing Tekoh's Section 1983 claim as a Fourteenth Amendment due process claim. 1-ER-68.

II. The Ninth Circuit's Decision Is Wrong

Certiorari is also warranted because the decision below is plainly mistaken. As the dissenters from the denial of rehearing en banc explained, the majority side of the circuit split has it right: Law enforcement officers are not subject to damages claims under Section 1983 simply because they failed to give a *Miranda* warning. Instead, the proper response to such failure is exclusion of the unwarned statement from any criminal trial.

The Ninth Circuit's decision rested on two related but distinct errors. *First*, the court incorrectly treated *Miranda* as having established a constitutional right related to police conduct, rather than a prophylactic constitutional rule designed to protect the Fifth Amendment right against self-incrimination during a criminal trial. *Second*, the court mistakenly held that an officer who fails to give a *Miranda* warning is the proximate cause of a subsequent violation of a criminal defendant's trial right against self-incrimination, because an officer should expect that prosecutors and judges will improperly admit unwarned statements in criminal trials. Each error independently warrants reversal.

A. *Miranda* Announced A Prophylactic Constitutional Rule Governing Admissibility Of Evidence, Not A Constitutional Right To Police Warnings

1. Section 1983 creates a civil cause of action for deprivation of "any rights . . . secured by the Constitution." 42 U.S.C. § 1983. Here, the constitutional "right" at issue comes from the Fifth Amendment's Self-Incrimination Clause, which states that "[n]o person . . . shall be compelled in any

criminal case to be a witness against himself." U.S. Const. amend. V.

The Self-Incrimination Clause preserves a "fundamental trial right of criminal defendants." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); *see also, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 691 (1993). It "permits a person to refuse to testify against himself at a criminal trial in which he is a defendant." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984); *see also, e.g.*, *Patane*, 542 U.S. at 637 (plurality opinion) ("[T]he core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial." (citing *Chavez*, 538 U.S. at 764-68 (plurality opinion)); *Chavez*, 538 U.S. at 777-79 (Souter, J., concurring in the judgment)).

Because the Self-Incrimination Clause preserves a trial right, a person may be deprived of his Fifth Amendment right against self-incrimination only at trial. *Verdugo-Urquidez*, 494 U.S. at 264 ("Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."). Still, this Court has recognized several "prophylactic rules" designed to prevent later violations of the right during a criminal case. *Patane*, 542 U.S. at 637-39 (plurality opinion) (collecting examples). Such prophylactic rules are designed to *protect* the pre-existing constitutional right; they do not themselves create new constitutional rights.

At issue here is the prophylactic rule adopted in the landmark *Miranda* decision—a decision that has done much good for this country and that is not challenged here. *Miranda* set out a constitutional rule for "determining the admissibility of suspects'

incriminating statements." *Dickerson*, 530 U.S. at 434; *see Miranda*, 384 U.S. at 479. *Miranda* provided that "the admissibility in evidence of any statement given during custodial interrogation of a suspect w[ill] depend on whether the police provided the suspect with four warnings." *Dickerson*, 530 U.S. at 435. These warnings, known as "*Miranda* warnings," are a "set of specific protective guidelines" that "help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost." *Michigan v. Tucker*, 417 U.S. 433, 443 (1974). In other words, *Miranda* recognized a constitutional "prophylactic rule[] designed to safeguard the core constitutional right protected by the Self-Incrimination Clause." *Chavez*, 538 U.S. at 770 (plurality opinion); *see also id.* at 790 (Kennedy, J., concurring in part and dissenting in part) (describing *Miranda* as a constitutional "rule of exclusion"). Two important points follow from this.

First, although *Miranda* warnings have been described "colloquially as '*Miranda* rights,'" *Dickerson*, 530 U.S. at 435, this Court has repeatedly explained that the warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected," *New York v. Quarles*, 467 U.S. 649, 654 (1984) (alterations in original) (quoting *Tucker*, 417 U.S. at 444). The "*Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation." *Oregon v. Elstad*, 470 U.S. 298, 306 (1985); *see also Dickerson*, 530 U.S. at 441; *Patane*, 542 U.S. at 639 (plurality opinion); *Chavez*, 538 U.S. at 770 (plurality opinion). As Judge Bumatay explained,

this Court has called *Miranda* a prophylactic rule more than twenty times—but *never* a constitutional right. App. 80a.[4]

Second, because the Self-Incrimination Clause and the *Miranda* rule designed to protect it focus on "the admissibility of statements" at a criminal trial, they do not "operate[ ] as a direct constraint on police." *Patane*, 542 U.S. at 642 n.3 (plurality opinion). *Miranda* is "not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn." *Id.* at 637.

Rather, *Miranda* ultimately sets forth a constitutional rule of *evidence*: It dictates that (as a general matter), custodial statements obtained from suspects without a warning cannot be admitted at trial. As a result, although an officer's failure to give a *Miranda* warning may have downstream evidentiary repercussions in a criminal case—*i.e.*, exclusion of a confession—there is nothing unlawful about failing to give the warning in and of itself. *See Quarles*, 467 U.S. at 686 (Marshall, J., dissenting) ("[P]olice are free to interrogate suspects without

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[4] *See, e.g.*, *Davis v. United States*, 512 U.S. 452, 458 (1994); *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993); *Withrow*, 507 U.S. at 691; *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *Arizona v. Roberson*, 486 U.S. 675, 681 (1988); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987); *Elstad*, 470 U.S. at 309; *Quarles*, 467 U.S. at 654; *South Dakota v. Neville*, 459 U.S. 553, 564 n.15 (1983); *United States v. Henry*, 447 U.S. 264, 273-74 (1980); *North Carolina v. Butler*, 441 U.S. 369, 374 (1979); *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978); *Brown v. Illinois*, 422 U.S. 590, 600 (1975); *Tucker*, 417 U.S. at 439; *Michigan v. Payne*, 412 U.S. 47, 53 (1973).

advising them of their constitutional rights" because "[a]ll the Fifth Amendment forbids is the introduction of coerced statements at trial.").

It therefore follows that "police cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements." *Patane*, 542 U.S. at 643 (plurality opinion). And because the prophylactic exclusionary rule set forth in *Miranda* does not provide a freestanding "right[] . . . secured by the Constitution," 42 U.S.C. § 1983, a police officer's failure to provide *Miranda* warnings cannot supply the basis for liability under Section 1983. This Court has admonished that "*rights*" must be interpreted strictly in the Section 1983 context and that such rights do not include "broader or vaguer 'benefits' or 'interests.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). Although *Miranda* warnings are an important safeguard of the right against self-incrimination, they are not themselves "rights protected by the Constitution." *Quarles*, 467 U.S. at 654; *see Chavez*, 538 U.S. at 772 (plurality opinion) ("Rules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself . . . ."). A law enforcement officer does not violate anyone's constitutional rights simply by failing to give a *Miranda* warning.

2. The Ninth Circuit reached a contrary conclusion based on its reading of Chief Justice Rehnquist's opinion for this Court in *Dickerson*, which held that "*Miranda* announced a constitutional rule." 530 U.S. at 444. *Dickerson* involved the distinct question of whether Congress may legislatively override *Miranda*. That question turned not on whether *Miranda* established a constitutional "right," but rather whether it established a constitutional-

based rule. In answering that question, *Dickerson* never described *Miranda* warnings as constitutional "rights"; nor did it purport to overturn the Court's prior cases characterizing *Miranda* as a "prophylactic" rule designed to protect the core Fifth Amendment right against self-incrimination. *See supra* note 4. *Dickerson* merely held that Congress "may not legislatively supersede" the Court's constitutional decisions, 530 U.S. at 437, and that *Miranda* was such a "constitutional rule" with "constitutional underpinnings," *id.* at 441, 440 n.5.

Indeed, *Dickerson* recognized and reaffirmed the Court's prior statements that *Miranda*'s procedural safeguards "sweep[] more broadly than the Fifth Amendment itself" and are "not themselves rights protected by the Constitution." *Id.* at 437-38, 441. And faced with the dissent's invitation to "hold that the *Miranda* warnings are required by the Constitution," the Court expressly refused to do so. *Id.* at 442.

As Judge Bumatay explained, *Dickerson*'s recognition of *Miranda*'s constitutional underpinnings did not convert *Miranda* warnings into a constitutional "right" for purposes of Section 1983. *See id.* at 438, 444. This Court trains the same skeptical eye on "whether personal rights exist in the § 1983 context" as it does when "discerning whether personal rights exist in the implied right of action context." *Gonzaga*, 536 U.S. at 285.

This Court's precedent establishes that not all violations of constitutional rules are violations of personal constitutional *rights* providing an actionable Section 1983 claim. *See, e.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989). Like other prophylactic rules of a constitutional

dimension, such as the Fourth Amendment exclusionary rule and the fruit-of-the-poisonous-tree doctrine, *Miranda* is a judicially created rule designed to safeguard the Fifth Amendment right against self-incrimination through its deterrent effect; it does not confer a personal constitutional right to *Miranda* warnings. *Cf. United States v. Calandra*, 414 U.S. 338, 348 (1974) (describing the exclusionary rule derived from the Fourth Amendment as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"). Violation of such prophylactic rules, without more, cannot give rise to Section 1983 claims. *See Townes v. City of New York*, 176 F.3d 138, 145 (2d Cir. 1999) (Jacobs, J.).

This Court's post-*Dickerson* decisions in *Chavez* and *Patane* confirm that *Miranda* does not create a constitutional "right" supporting Section 1983 liability. *See, e.g.*, *Chavez*, 538 F.3d at 772 (plurality holding that "violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person"); *id.* at 777-78 (Souter, J., concurring in the judgment) (concurring that there was no sufficient basis "to expand [*Miranda*'s] protection of the privilege against compelled self-incrimination to the point of civil liability"); *Patane*, 542 U.S. at 641 (plurality explaining that "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights"). Indeed, this Court has called *Miranda* a prophylactic,

procedural rule many times since *Dickerson*—but never once a constitutional "right."[5]

In *Patane*, the plurality warned lower courts that *Dickerson* "does not lessen the need to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it." *Id.* at 643. For that reason, *Miranda*'s broad protection of a defendant's trial rights in the criminal context should not be extended as a sword against officers in the civil context under Section 1983.

The Ninth Circuit's ruling ignores that warning and extends *Miranda* well beyond the Self-Incrimination Clause, and beyond anything this Court ever contemplated or sanctioned. Although *Miranda* creates an irrebuttable presumption in criminal cases that unwarned statements were "compelled" in violation of the Fifth Amendment, the Court has never extended that broad prophylactic rule to presume coercion in a subsequent civil action. As Judge Colloton explained in *Hannon*, "[s]tatements obtained in violation of *Miranda* are not 'compelled.'" 441 F.3d at 637. And as the district court here correctly recognized, the Fifth Amendment right against self-incrimination is violated only when a statement introduced at trial was coerced under the totality of the circumstances. One circumstance relevant to this inquiry is whether a statement was *Mirandized*. But outside the context of a criminal trial, that is only one of several factors in considering whether a statement was actually "compelled." Only

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[5] *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011); *Howes v. Fields*, 565 U.S. 499, 507 (2012); *Florida v. Powell*, 559 U.S. 50, 59 (2010); *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010); *Montejo v. Louisiana*, 556 U.S. 778, 794 (2009).

when a defendant's *compelled* statement is introduced in his criminal trial is the Fifth Amendment's privilege against self-incrimination violated. The decision below can be reversed on that basis alone.

B. Police Officers Do Not Proximately Cause The Improper Admission Of Un-*Mirandized* Statements

Even the Ninth Circuit ultimately recognized that, insofar as *Miranda* implicates a criminal defendant's Fifth Amendment rights, it does so only at trial, where a defendant generally has the right to suppress any unwarned, self-incriminating statement that was provided in custody. For that reason, the Ninth Circuit limited its holding to situations where the Section 1983 plaintiff's un-*Mirandized* statement was improperly introduced into evidence at his criminal trial. App. 21a & n.9. But in upholding liability in such circumstances, the Ninth Circuit made another significant error: It held that the *officer* is the proximate cause of the statement's introduction at trial, while discounting the intervening and superseding roles played by the *prosecutor* and *trial judge*. *See id.* at 20a-23a. The Ninth Circuit's causation analysis is flawed and provides an independent basis for reversal.

Section 1983 authorizes remedial action only against a person who "*subjects*, or *causes to be subjected*, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities, secured by the Constitution." 42 U.S.C. § 1983 (emphasis added). The Court's analysis of Section 1983 follows common-law principles of tort, including the requirement of proximate cause. *See, e.g.*, *Malley*

v. Briggs, 475 U.S. 335, 344 n.7 (1986). "It is a well established principle of [the common] law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause . . . ." *Waters v. Merchants' Louisville Ins. Co.*, 36 U.S. (11 Pet.) 213, 223 (1837) (Story, J.). That "sole requirement" demands "some direct relation between the injury asserted and the injurious conduct alleged," and thus excludes injuries that are "too remote," "purely contingent," or "indirect[]." *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268-69, 271 (1992). Here, because any violation of the Fifth Amendment Self-Incrimination Clause or *Miranda* can "occur[] *only at trial*," *Chavez*, 538 U.S. at 767 (emphasis altered), the question is whether an officer's failure to give the *Miranda* warning proximately causes the subsequent admission of the un-*Mirandized* statement at trial.

The Ninth Circuit found there was "no question that Deputy Vega 'caused' the introduction of the statements at Tekoh's criminal trial," because government officials "are generally responsible for the 'natural' or 'reasonably foreseeable' consequences of their actions." App. 21a. That causation analysis is erroneous.

Officers violate neither the Fifth Amendment nor *Miranda* by taking an unwarned statement, and they are entitled to presume that the prosecutor would decline to introduce evidence obtained in violation of *Miranda*—and that the judge would exclude such evidence. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he presumption of regularity" applies to "prosecutorial decisions," and "courts presume that they have properly discharged their official duties."). An officer should not be held responsible for the failure of these other officials—

whose legal training and knowledge of the *Miranda* doctrine put them in the best position to evaluate admissibility—to discharge their obligations under law.

Imposing liability on officers is especially inapt given how difficult it can be to ascertain whether *Miranda* even applies in any given situation. For example, the duty to give warnings only arises when a suspect is questioned "in custodial surroundings," *Miranda*, 384 U.S. at 458, but that concept is notoriously murky and has led to much confusion, even among members of this Court. *See, e.g.*, *Howes v. Fields*, 565 U.S. 499, 511 (2012); *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010); *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004). In such circumstances, a reasonable officer should be able to rely on prosecutors and judges to correctly determine whether the suspect's statements are admissible. That officer is not the *cause* of any constitutional violation that occurs when those other officials get the law wrong. Indeed, officers often make these determinations in the heat of the moment without time for the reflection of appellate briefing and argument. Here, for example, Officer Vega questioned Tekoh in trying to resolve a report of a serious sexual assault on a patient by an individual working in a public hospital.

Then, too, statements obtained without *Miranda* warnings—so long as they are voluntary—may be used for a wide variety of legitimate law enforcement *and* judicial purposes without violating the Fifth Amendment. Those valid purposes include (1) responding to exigent circumstances; (2) discovering other relevant evidence; and (3) impeaching trial testimony. *See, e.g.*, *Quarles*, 467

U.S. at 655; *Tucker*, 417 U.S. at 438-39; *Elstad*, 470 U.S. at 308; *Oregon v. Hass*, 420 U.S. 714, 723-24 (1975). An officer is entitled to presume that other law enforcement officers, prosecutors, and judges will use unwarned statements in those permissible ways without fear that a different, improper use will eventually subject him to liability. The improper admission of an un-*Mirandized* statement into evidence at trial is neither the "natural" nor "reasonably foreseeable" consequence of taking an unwarned statement.

Under standard, common-law causation principles, when a prosecutor or judge allows statements obtained in violation of *Miranda* to be admitted at trial, their intervening acts qualify as superseding causes that sever the chain of causation for purposes of Section 1983. Many courts have recognized that such intervening decisions break the chain of causation under Section 1983. *See Murray*, 405 F.3d at 292-93 & n.51 (collecting cases); *Townes*, 176 F.3d at 147 (addressing this question in the analogous fruit-of-the-poisonous-tree context); *Evans v. Chalmers*, 703 F.3d 636, 649 (4th Cir. 2012) (malicious prosecution context); *Egervary v. Young*, 366 F.3d 238, 249-50 (3d Cir. 2004) (due process context).

In sum, the act of taking an unwarned statement does not violate *Miranda*, and law enforcement officers may presume that prosecutors and judges will follow *Miranda*'s constitutional rule of evidentiary admissibility. *Miranda* does not create rules of police conduct. Holding officers liable for trial errors would defy the presumption of regularity afforded to prosecutors and judges and unfairly penalize officers

who act lawfully when speaking with criminal suspects.

III. The Question Presented Is Exceptionally Important And Merits Review In This Case

Whether law enforcement officers may be sued under Section 1983 for failure to give *Miranda* warnings is an important and frequently litigated question. Such litigation imposes significant costs and burdens on individual officers, municipalities, and States, "increas[ing] to an intolerable degree interference with the public interest" in effective criminal investigation. *United States v. Blue*, 384 U.S. 251, 255 (1966). The question presented warrants this Court's review now, and this case is an excellent vehicle for resolving it.

1. Real world encounters in which law enforcement officers legitimately seek information about ongoing or potential crimes often present murky situations. It is not always clear whether an encounter will be deemed custodial or non-custodial. An officer in the field has to make on-the-spot judgments about whether *Miranda* is triggered, and does not always know whether a court will later determine that a statement was inadequately warned, or that such statements will be unlawfully introduced based on the subsequent and independent acts of prosecutors or judges.

Under the minority approach embraced by the Ninth Circuit, the consequences of an officer's failure to warn extend not merely to exclusion of valuable evidence at trial (a consequence that is serious enough), but to liability for money damages. For law enforcement officers and the frequently cash-strapped governmental entities that indemnify them,

this risk looms large, and will deter lawful investigations of unlawful conduct.

It is important that this Court reinforce the distinction between official conduct that simply renders a statement inadmissible in a criminal case and official conduct that independently violates the Constitution. That distinction provides the necessary breathing space for law enforcement to investigate imminent threats to the public safety while protecting the civil liberties of those who stand trial for criminal offenses.

2. Whether and how Section 1983 creates a cause of action for *Miranda* violations is often litigated, and this Court should settle the question once and for all. Plaintiffs routinely try to bring Section 1983 claims against law enforcement officers in their personal capacities. As the cases discussed in the circuit split make clear, plaintiffs regularly invoke violations of *Miranda* as a basis for liability. *See supra* at 13-15. Scores of cases now pending in the lower courts confirm as much.[6]

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[6] *See, e.g.*, *Steward v. Dunlap*, No. 3:21-cv-00416-BJD-JRK (M.D. Fla. filed Apr. 16, 2021); *Bass v. Carr*, No. 2:21-cv-00448-RCY-RJK (E.D. Va. filed Mar. 5, 2021); *Smith v. Aims*, No. 2:20-cv-12013-MAG-DRG (E.D. Mich. filed July 14, 2020); *Allen v. O'Neill*, No. 3:20-cv-00854-JAM (D. Conn. filed June 19, 2020); *Carter v. City of Chicago*, No. 1:20-cv-01684 (N.D. Ill. filed Mar. 9, 2020), *appeal docketed sub nom. Carter v. Wrobel*, No. 21-1018 (7th Cir. Jan. 5, 2021); *Green v. Irvington Police Dep't*, No. 2:19-cv-20239-SDW-ESK (D.N.J. filed Nov. 14, 2019); *Lee v. Clark*, No. 2:19-cv-17936-WJM-MF (D.N.J. filed Sept. 12, 2019); *Kelley v. Reyes*, No. 2:19-cv-17911-WJM-MF (D.N.J. filed Sept. 11, 2019); *Gibson v. City of Chicago*, No. 1:19-cv-04152 (N.D. Ill. filed June 20, 2019); *Bollfrass v. City of Phoenix*, No. 2:19-cv-04014-MTL (D. Ariz. filed May 31, 2019); *Sanchez v. Village of*

The Ninth Circuit's decision is already having an impact on the ground by encouraging litigants to bring Section 1983 *Miranda* claims. *See, e.g.*, *Smith v. City of Dalles*, No. 6:16-cv-1771-SI, 2021 WL 1040380, at *11-12 (D. Or. Mar. 17, 2021) (allowing plaintiff to amend Section 1983 complaint to add *Miranda* claim in light of *Tekoh*). Those claims, which should fail as a matter of law, will only proliferate as *Tekoh* takes root in the Ninth Circuit. Meantime, this litigation will impose unnecessary burdens on both law enforcement officers and their employers, distracting them from their ultimate job of protecting the public.

3. Finally, this petition provides an ideal vehicle to resolve the question presented. Because Tekoh's Section 1983 claim was litigated to final judgment, the relevant issues were fully developed in the district court and on appeal. The legal questions surrounding the *Miranda* issue are cleanly teed up, and do not turn on disputed facts.

Indeed, this case is an especially good vehicle because two civil juries have already concluded that Vega did *not* induce Tekoh's confession through coercion. This case therefore does not involve a

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Wheeling, No. 1:19-cv-02437 (N.D. Ill. filed Apr. 10, 2019); *Nunez v. Village of Rockville Centre*, No. 2:18-cv-04249-DRH-SIL (E.D.N.Y. filed July 26, 2018); *Hincapie v. City of New York*, No. 1:18-cv-03432-PAC (S.D.N.Y. filed Apr. 19, 2018); *Monson v. Detroit*, No. 2:18-cv-10638 (E.D. Mich. filed Feb. 23, 2018); *Besedin v. County of Nassau*, No. 2:18-cv-00819-KAM-ST (E.D.N.Y. filed Feb. 7, 2018); *Fulton v. Foley*, No. 1:17-08696 (N.D. Ill. filed Dec. 1, 2017); *Tobias v. City of Los Angeles*, No. 2:17-cv-01076-DSF-AS (C.D. Cal. filed Feb. 9, 2017); *Eames v. Town of East Hampton*, No. 2:15-cv-05539-JMA-AKT (E.D.N.Y. filed Sept. 24, 2015); *Natsis v. Turner*, No. 2:13-cv-07269-JMV-MF (D.N.J. filed Dec. 3, 2013).

violation of the Self-Incrimination Clause's core constitutional right. Rather, Tekoh's claim is viable *only* if Section 1983 provides a remedy for a bare violation of *Miranda*'s prophylactic rule, even when the Section 1983 plaintiff's statements were not coerced in violation of the Fifth Amendment itself.

For the reasons explained, courts and law enforcement need guidance from this Court on how *Miranda* and Section 1983 intersect. This case—in which the nation's largest circuit has wrongly given its imprimatur to a new class of Section 1983 litigation—presents an ideal opportunity for the Court to provide that guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1, 2021

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UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Terence B. TEKOH, Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; Dennis Stangeland, Sergeant; Carlos Vega, Deputy, Defendants-Appellees,

and

Los Angeles County Sheriff's Department; Does, 1 to 10, Defendants.

No. 18-56414

Argued and Submitted April 27, 2020
Pasadena, California

Filed January 15, 2021

985 F.3d 713

Before: KIM MCLANE WARDLAW, MARY H. MURGUIA, and ERIC D. MILLER, Circuit Judges.

OPINION

WARDLAW, Circuit Judge:

We must decide whether the use of an un-*Mirandized* statement against a defendant in a criminal case is alone sufficient to support a 42 U.S.C. § 1983 action based on the Fifth Amendment violation. The district court concluded that the use of the statement alone was insufficient to demonstrate a violation of the right against self-incrimination and, instead, instructed the jury that the plaintiff had to show that the interrogation that procured the statement was unconstitutionally coercive under the totality of the circumstances, with the *Miranda*

violation only one factor to be considered. Neither the Supreme Court nor our court has directly addressed this precise question. However, in light of the Supreme Court's decision in *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), which held that *Miranda* is a rule of constitutional law that could not be overruled by congressional action, we conclude that where the un-*Mirandized* statement has been used against the defendant in the prosecution's case in chief in a prior criminal proceeding, the defendant has been deprived of his Fifth Amendment right against self-incrimination, and he may assert a claim against the state official who deprived him of that right under § 1983.

I.

A.

Terence Tekoh was working at a Los Angeles medical center when a patient accused him of sexual assault. According to the patient, Tekoh lifted her coversheets and made sexual contact while transporting her within the hospital. Hospital staff reported the allegation to the Los Angeles Sheriff's Department. Deputy Carlos Vega responded to investigate.

Deputy Vega found Tekoh in the MRI section, where he worked transporting patients to and from their MRIs and their rooms, and the two went into a nearby, private room to talk. Though Deputy Vega questioned Tekoh, he did not advise him of his *Miranda* rights. By the end of the questioning, Tekoh had written the following statement:

> To who [sic] it may concern,
>
> This is an honest and regrettable apology from me about what happened a few hours ago. It was I don't know what suddenly came over me, but it was certainly the most weakest moment I've ever been caught up with in my life. I've never ever found myself doing such a despicable act. and I am I don't think this is an excuse but I'm single and currently don't have a girlfriend and became very excited after I first saw her vagina accidently. So after dropping her off, I decided to go further by woking [sic] and spreading her vagina lip for a quick view and then went back to my duty post with the intention of masturbating, which I never did.

How Tekoh came to write this statement is hotly disputed and was the focus of the 42 U.S.C. § 1983 claim against Deputy Vega that gave rise to this appeal.

1. *Tekoh's Account of the Questioning*

In Tekoh's telling, when Deputy Vega first approached him, Vega asked if there was somewhere they could speak in private. Tekoh's co-workers suggested the MRI "reading room,"—a small, windowless, and soundproof room used by doctors to read MRIs. When one of Tekoh's co-workers tried to accompany Tekoh into the reading room, Deputy Vega stopped her and told her the interview was private.

Deputy Vega shut the door and stood in front of it, blocking Tekoh's path to the exit. He then accused Tekoh of touching the patient's vagina. Tekoh adamantly denied the allegation. After about 35 to 40 minutes of questioning during which Tekoh refused to

confess, Deputy Vega told him (falsely) that the assault had been captured on video so he might as well admit to it. Still, Tekoh did not confess.

Tekoh then asked to speak to a lawyer, but Deputy Vega ignored the request. At that point, Tekoh grew frustrated and tried to get up and leave the room. Tekoh testified:

> I made one or two steps, and [Deputy Vega] rushed at me and stepped on my toes, put his hand on his gun and said, "Mr. Jungle Nigger trying to be smart with me. You make any funny move, you're going to regret it. I'm about to put your black ass where it belongs, about to hand you over to deportation services, and you and your entire family will be rounded up and sent back to the jungle . . . . Trust me, I have the power to do it."

According to Tekoh, this outburst left him "shaking" and triggered flashbacks to his experiences with police brutality in Cameroon, where he was from.

Deputy Vega then grabbed a pen and paper, put them in front of Tekoh, and told him to "write what the patient said [he] did." When Tekoh hesitated, Vega put his hand on his gun and said he was not joking. According to Tekoh, Vega then dictated the content of the written confession and Tekoh, who was scared and "ready to write whatever [Vega] wanted," acquiesced and wrote the statement down.

2. *Deputy Vega's Account of the Questioning*

Deputy Vega testified to a much different version of events. According to Vega, when he first arrived at the MRI section, he asked Tekoh what had happened with the patient, and Tekoh said, "I made a mistake."

Tekoh asked if he could "talk to [Vega] away from [his] co-workers and get a little privacy."

After the two went into the MRI reading room, Vega handed Tekoh a sheet of paper and said, "Can you write what happened while I get my sergeant and we can ask you a couple of questions[?]" According to Vega, Tekoh then wrote out the confession himself without further prompting.

Another officer, Sergeant Stangeland, arrived soon after, joining Deputy Vega in the room with Tekoh. According to Stangeland, Tekoh indicated that he was willing to talk to the officers. Deputy Vega then questioned Tekoh in "a very conversational tone," and Tekoh verbally admitted to touching the patient's vagina. Sergeant Stangeland testified that Tekoh's demeanor was "that of a man who was contrite, who truly, you know, regretted what he had done."

B.

Tekoh was arrested and charged in California state court with unlawful sexual penetration in violation of California Penal Code § 289(d). Early on in Tekoh's first criminal trial (before his confession was introduced), a witness for the prosecution revealed evidence that had not been disclosed to the defense, and, with Tekoh's assent, a mistrial was declared. During Tekoh's retrial, the prosecution introduced Tekoh's confession as evidence of his guilt. Also during the retrial, Dr. Iris Blandon-Gitlin, an expert on coerced confessions, testified on Tekoh's behalf. The jury returned a verdict of not guilty.

C.

After his acquittal on the criminal charge, Tekoh filed this action under 42 U.S.C. § 1983 seeking

damages for alleged violations of his constitutional rights. The case began with several claims against multiple defendants, but only one is at issue in this appeal: the claim that Deputy Vega violated Tekoh's Fifth Amendment right against self-incrimination.

Before the first trial in this case, Tekoh asked the district court to instruct the jury that it should find in his favor on the Fifth Amendment claim if it determined that Deputy Vega obtained statements from him in violation of *Miranda* that were used in the criminal case against him. And because the only issue in dispute on this theory was whether Tekoh was "in custody" during the questioning in the MRI reading room such that *Miranda* warnings were required, Tekoh submitted a proposed jury instruction that would have informed jurors of factors to consider on that point. *See Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam) ("*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'").

The district court refused to instruct the jury on Tekoh's theory, reasoning that the Supreme Court's plurality decision in *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003), held that *Miranda* was a mere "prophylactic rule," rather than a "constitutional requirement," and that a § 1983 plaintiff like Tekoh "[could not] use a prophylactic rule to create a constitutional right." Instead, the district court instructed the jury to evaluate Tekoh's claim that Deputy Vega had coerced a confession as if it were a Fourteenth Amendment claim based on

fabrication of evidence.[1] So instructed, the jury returned a verdict in favor of Deputy Vega.

After the trial, however, the district court concluded that it had erred by instructing the jury to evaluate Tekoh's claim as if it were brought under the Fourteenth Amendment instead of as a violation of the Fifth Amendment. *See Hall v. City of Los Angeles*, 697 F.3d 1059, 1068–69 (9th Cir. 2012) (holding that a coerced confession claim must be brought under the Fifth Amendment, not as a Fourteenth Amendment fabrication-of-evidence claim). It therefore ordered a new trial on the coerced confession claim.

The jury instructions were again contested. Ultimately, the district court gave the jury the following instruction on coerced confessions:

> You must consider the objective totality of all the surrounding circumstances. Whether a confession is improperly coerced or compelled depends on the details of the interrogation.
>
> Factors to consider include, but are not limited to:
>
> > (1) The location where the questioning took place (for example at a police station or on a public street), and whether the location was chosen by the person or the officer;
> >
> > (2) Was the person free to go or was the person under arrest or physically restrained;

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[1] This instruction required Tekoh to prove that, at a minimum, "[Deputy] Vega used techniques that were so coercive and abusive that he knew, or was deliberately indifferent, that those techniques would yield false information that was used to criminally charge and prosecute Plaintiff."

(3) Was the length of the questioning oppressive;

(4) What Plaintiff was told at the beginning of the encounter and throughout its duration;

(5) The manner in which the person was questioned—for example: was any actual force or infliction of pain used on the person; was the person (or anyone near or dear to him or her) threatened either physically or psychologically; was the officer's gun drawn; did the officer continually shout at the suspect for an extended period; etc.

(6) If the warnings under the *Miranda* decision (as described below) were required at the time, whether the police advised the person being questioned of his or her right to remain silent and to have a counsel present during the custodial interrogation; and

(7) Any other factors that a reasonable person would find coercive under the circumstances.

Again, the jury returned a verdict in favor of Deputy Vega.[2] Tekoh timely appeals.

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[2] In both civil trials, the district court also excluded testimony from Tekoh's coerced confessions expert, Dr. Blandon-Gitlin, who had testified on Tekoh's behalf at his second criminal trial, which resulted in an acquittal.

II.

We have jurisdiction under 28 U.S.C. § 1291.[3] We review de novo the district court's rejection of Tekoh's proposed jury instruction on his *Miranda* theory on the ground that it was not a correct statement of the law.[4] *Smith v. City & Cnty. of Honolulu*, 887 F.3d 944, 951 (9th Cir. 2018) ("We review a district court's formulation of civil jury instructions for an abuse of discretion, but we consider de novo whether the challenged instruction correctly states the law." (citation omitted)).

III.

Under 42 U.S.C. § 1983, a plaintiff may bring suit for damages against a state official who deprives him

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[3] Deputy Vega briefly argues that we lack jurisdiction to review the district court's refusal to instruct the jury on the *Miranda* theory because Tekoh did not list the orders rejecting his proposed *Miranda* instruction in his notice of appeal. But the district court's pretrial orders regarding the jury instructions merged into the final judgment, so by appealing the judgment, Tekoh "implicitly brought all of the district court's subordinate orders within the jurisdiction of our court." *Hall*, 697 F.3d at 1070.

[4] Deputy Vega's argument that Tekoh failed to preserve his challenge to the jury instruction lacks merit. The propriety of Tekoh's requested jury instruction was extensively litigated in both trials. The district court made clear on several occasions that it understood Tekoh's argument but was not going to change its mind on giving the instruction. In fact, the court specifically told Tekoh that he had preserved his objection to the refusal to give the instruction. This was more than enough to preserve the issue for appeal. *United States ex rel. Reed v. Callahan*, 884 F.2d 1180, 1184 (9th Cir. 1989) (holding that additional objections to the jury instructions are not required "when it is obvious that in the process of settling the jury instructions the court was made fully aware of the objections of the party and the reasons therefor and further objection would be unavailing").

of "any rights, privileges, or immunities secured by the Constitution." Whether the district court should have given Tekoh's proposed *Miranda* instruction turns on whether the introduction of Tekoh's un-*Mirandized* statement at his criminal trial constituted a violation of Tekoh's Fifth Amendment rights.

A.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Miranda v. Arizona*, the Supreme Court implemented this guarantee by setting forth "concrete constitutional guidelines" for officers to follow when conducting custodial interrogations. 384 U.S. 436, 441–42, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *see Chavez*, 538 U.S. at 790, 123 S.Ct. 1994 (Kennedy, J., concurring) (explaining that *Miranda* warnings were "adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause"). Under *Miranda*, before an individual in custody is interrogated, he must be advised "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444, 86 S.Ct. 1602. Thereafter, the officer may proceed with questioning only if the subject of the interrogation agrees to waive these rights. *Id.* at 444–45, 86 S.Ct. 1602; *see Berghuis v. Thompkins*, 560 U.S. 370, 382–85, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).

Miranda marked a significant shift in how courts evaluate the admissibility of confessions. Before *Miranda*, "voluntariness *vel non* was the touchstone of admissibility." *Davis v. United States*, 512 U.S.

452, 464, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (Scalia, J., concurring). In determining whether a confession could be admitted in criminal proceedings, courts looked to "the totality of all the surrounding circumstances" to determine "whether [the] defendant's will was overborne." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). After *Miranda*, however, an officer's failure to provide the requisite *Miranda* warnings or to obtain a valid waiver of the suspect's *Miranda* rights is generally enough, on its own, to "require[ ] exclusion of any statements obtained."[5] *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

In the decades following *Miranda*, there was significant debate about the extent to which *Miranda* warnings were constitutionally required. On the one hand, the *Miranda* opinion itself appeared to contemplate that statements taken from a defendant who was in custody but had not been given *Miranda* warnings were inherently compelled, and thus obtained in violation of the Fifth Amendment. *See Miranda*, 384 U.S. at 458, 86 S.Ct. 1602 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings,

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[5] *Miranda* supplemented, rather than replaced, the traditional voluntariness test. *Dickerson*, 530 U.S. at 444, 120 S.Ct. 2326. Accordingly, a suspect seeking to suppress a confession may show either that it was obtained in violation of *Miranda* or that it was involuntarily given. *Id. But see Berkemer v. McCarty*, 468 U.S. 420, 433 n.20, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.").

no statement obtained from the defendant can truly be the product of his free choice."); *see also Dickerson*, 530 U.S. at 447, 120 S.Ct. 2326 (Scalia, J., dissenting) (acknowledging that the "fairest reading" of *Miranda* is that the use of un-*Mirandized* statements at trial "violates the Constitution"). And *Miranda* involved proceedings in state courts, over which the Supreme Court lacks plenary supervisory control. *See Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

On the other hand, the *Miranda* decision left open the possibility that the specific warnings set out in the opinion might not be necessary if the states or Congress devised other adequate means of protecting against "the inherent compulsions of the interrogation process." 384 U.S. at 467, 86 S.Ct. 1602. And more significantly, in several decisions, the Court described *Miranda* warnings as mere "prophylactic rules" or "procedural safeguards" that were "not themselves rights protected by the Constitution." *New York v. Quarles*, 467 U.S. 649, 653–55, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984); *Michigan v. Tucker*, 417 U.S. 433, 444, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *see also Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) ("The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself.").

The issue came to a head in *Dickerson v. United States*. *Dickerson* concerned a federal statute, enacted in the wake of the Court's *Miranda* decision, that provided that confessions were admissible as long as they were voluntarily made, regardless of

whether *Miranda* warnings had been provided. 530 U.S. at 432, 120 S.Ct. 2326; 18 U.S.C. § 3501. Whether the rule set forth in the statute was constitutionally permissible "turn[ed] on whether the *Miranda* Court [had] announced a constitutional rule"; if it had, Congress could not override that rule by statute. *Dickerson*, 530 U.S. at 437, 120 S.Ct. 2326. The Court acknowledged that language in *Quarles*, *Tucker*, and other post-*Miranda* decisions could be read to support the view that *Miranda* warnings were not constitutionally required. *Id.* at 437–38, 120 S.Ct. 2326. But the *Dickerson* Court ultimately concluded that *Miranda* was "a constitutional decision" that Congress could not overrule. *Id.* at 438–39, 120 S.Ct. 2326; *see also id.* at 440 & n.5, 120 S.Ct. 2326 (describing *Miranda* as "constitutionally based" and as having "constitutional underpinnings"). Accordingly, the *Dickerson* Court invalidated § 3501. *Id.* at 443–44, 120 S.Ct. 2326.

Dickerson strongly supports Tekoh's argument that a plaintiff may bring a § 1983 claim predicated on a *Miranda* violation when the un-*Mirandized* statement is used against him in criminal proceedings. Section 1983 permits suits for damages to vindicate "rights, privileges, or immunities secured by the Constitution." Because *Dickerson* made clear that the right of a criminal defendant against having an un-*Mirandized* statement introduced in the prosecution's case in chief is indeed a right secured by the Constitution, we conclude that Tekoh has a claim that his Fifth Amendment right against self-incrimination was violated.

B.

This clear view of the constitutional nature of *Miranda* warnings was later muddied by *United*

States v. Patane, 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004), and *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003). In *Patane*, the Court held, in a fractured decision, that the Constitution did not require suppression of physical evidence found as a result of an interrogation that violated *Miranda*—*i.e.*, the "physical fruits" of a *Miranda* violation. 542 U.S. at 633–34, 124 S.Ct. 2620. Writing for the four-Justice plurality, Justice Thomas described the *Miranda* rule as "sweep[ing] beyond the actual protections of the Self-Incrimination Clause." *Id*. at 639, 124 S.Ct. 2620. He further concluded that a constitutional violation based on a failure to give *Miranda* warnings could not occur, if at all, until the unwarned statements were admitted at trial, at which point the exclusion of the statements themselves would be a "complete and sufficient remedy" for the violation. *Id*. at 641–42, 124 S.Ct. 2620 (quoting *Chavez*, 538 U.S. at 790, 123 S.Ct. 1994 (Kennedy, J., concurring)). However, Justice Kennedy, joined by Justice O'Connor, concurred in the judgment on narrower grounds, holding only that the suppression of physical evidence was not required by the Fifth Amendment because it "does not run the risk of admitting into trial an accused's coerced incriminating statements against himself." *Id*. at 645, 124 S.Ct. 2620 (Kennedy, J., concurring). Neither justice joined the plurality's broader discussion of *Miranda* as sweeping beyond the protection of the Fifth Amendment.

Previously, in *Chavez*, the Supreme Court had confronted the question of whether a plaintiff could sue under § 1983 for an officer's failure to give *Miranda* warnings when the plaintiff was not charged with a crime, and, therefore, his un-*Mirandized*

statements were never used against him in criminal proceedings. *See* 538 U.S. at 764–65, 123 S.Ct. 1994 (plurality opinion). In a fractured decision consisting of six separate opinions, none of which garnered a majority on anything but the judgment, the Court held that such claims are not viable.

Specifically, Justice Thomas's plurality opinion in *Chavez* concluded that a "criminal case" requires, at the very least, "the initiation of legal proceedings," and that because no proceedings had been brought against the plaintiff, he had not suffered a Fifth Amendment violation. 538 U.S. at 766, 123 S.Ct. 1994. Having reached this conclusion, which alone was enough to resolve the case, the plurality nevertheless continued on to discuss *Miranda*. Citing *Elstad*, *Tucker* and other pre-*Dickerson* cases, the plurality characterized the requirement of *Miranda* warnings as a "prophylactic rule[ ] designed to safeguard the core constitutional right protected by the Self-Incrimination Clause," *id.* at 770, 123 S.Ct. 1994, repeating the points made by Justice Scalia, whose dissent in *Dickerson* was joined by Justice Thomas. 530 U.S. at 447, 120 S.Ct. 2326 (Scalia, J., dissenting). The *Chavez* plurality explained that violations of "judicially crafted prophylactic rules do not violate the constitutional rights of any person" and therefore "cannot be grounds for a § 1983 action." 538 U.S. at 772, 123 S.Ct. 1994.

The specific holding in *Chavez* does not govern Tekoh's case because unlike the plaintiff in *Chavez*, Tekoh's un-*Mirandized* statements were used against him in criminal proceedings. But the district court read Chavez to stand for the broader proposition that a § 1983 claim can never be grounded on a *Miranda* violation. In adopting this reading of *Chavez*, the

district court treated Justice Thomas's plurality opinion of four Justices as supplying the controlling precedent here.

The district court went astray by doing so. In *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016), our court, sitting en banc, examined the question of what rule our court was bound to apply when construing fractured Supreme Court decisions. Addressing the guidelines laid out in *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), we held that a fractured Supreme Court decision "only bind[s] the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other. When no single rationale commands a majority of the Court, only the specific result is binding on lower federal courts." *Davis*, 825 F.3d at 1021–22. In sum, we concluded that "*Marks* instructs us to consider the opinions only of 'those Members who *concurred* in the judgments on the narrowest grounds' when deriving a rule from a fractured Supreme Court decision." *Id.* at 1024 (quoting *Marks*, 430 U.S. at 193, 97 S.Ct. 990).

Applying *Davis* to *Patane* is straightforward. Even though Justice Thomas's plurality opinion spoke broadly about the relationship between *Miranda* and the Fifth Amendment, Justice Kennedy's concurring opinion was both necessary to the judgment and narrowly focused on the distinction between physical evidence and un-*Mirandized* statements. *Patane*, 542 U.S. at 633–45, 124 S.Ct. 2620. Critically, Justice Kennedy's opinion did not echo the plurality's broader discussion of *Miranda*, and it thus controls. *Davis*, 825 F.3d at 1021–22.

While applying *Davis* to *Chavez* is less straightforward, we conclude that none of the six opinions provides a binding rationale. *See Stoot v. City of Everett*, 582 F.3d 910, 923 (9th Cir. 2009). Justice Thomas's plurality opinion, which reasoned in dicta that damages were unavailable for *Miranda* violations, did not command support from five Justices and was based on a rationale significantly broader than those of the concurring Justices. *See Marks*, 430 U.S. at 193, 97 S.Ct. 990. Thus, contrary to the district court's conclusion, the broad principles in Justice Thomas's opinion are not binding here.

None of the other opinions in *Chavez* articulates a principle directly applicable to the facts presented here. Justice Kennedy's opinion was a dissent on the Fifth Amendment claim because he would have affirmed, while the plurality opinion reversed. 538 U.S. at 799, 123 S.Ct. 1994.[6] And while Justice Kennedy's concurring opinion suggests that exclusion "is a complete and sufficient remedy" for *Miranda* violations, it assumes that the exclusion of "unwarned statements" is available as a remedy. 538 U.S. at 790, 123 S.Ct. 1994 (Kennedy, J., concurring). Justice Kennedy's opinion thus does *not* speak to Tekoh's plight, where exclusion is not available as a remedy because the un-*Mirandized* statements were already used against him in his criminal trial. Exclusion, here, is neither complete nor sufficient.

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[6] In *Davis*, we left open the question whether we can consider dissents in applying *Marks*. 825 F.3d at 1025; *see also id.* at 1028–30 (Christen, J., concurring) (five judges concurring in the view that *Marks*, on its face, limits review to "the opinions of 'those Members [of the Court] *who concurred in the judgments*'" (quoting *Marks*, 430 U.S. at 193, 97 S.Ct. 990)).

On the other hand, Justice Souter's concurring opinion, joined by Justice Breyer, expressly noted that "[t]he question whether the absence of *Miranda* warnings may be a basis for a § 1983 action under any circumstance is not before the Court." *Id.* at 779 n.*, 123 S.Ct. 1994 (Souter, J., concurring).

"When, [as in *Chavez*], no 'common denominator of the Court's reasoning' exists, we are bound only by [and only apply] the 'specific result.'" *Davis*, 825 F.3d at 1028. Here, the "specific result" from *Chavez* does not and cannot apply to Tekoh's particular circumstances because his un-*Mirandized* statement was admitted in his criminal trial, obviating exclusion as a remedy. Under our holding in *Davis*, Justice Thomas's plurality in *Chavez* therefore cannot control. Thus, we are left with *Dickerson* for guidance, which, as previously discussed, leads us to conclude that the use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a § 1983 claim.[7]

Our own decisions post-*Patane* and *Chavez* further support this conclusion. In *Stoot*, we held that plaintiffs could bring a § 1983 claim based on an officer's extraction of a coerced confession that was "relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status." 582 F.3d at 925. Although we did not consider the specific *Miranda* question presented

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[7] *Chavez* clearly stands for the proposition that merely taking a statement without *Miranda* warnings is insufficient to give rise to a § 1983 claim. *Chavez*, 538 U.S. at 767, 123 S.Ct. 1994.

here, we examined the various opinions in *Chavez* and interpreted them in a manner consistent with our interpretation here. *See id.* at 922–24; *see also Crowe v. Cty. of San Diego*, 608 F.3d 406, 429–31 (9th Cir. 2010). And in *Jackson v. Barnes*, 749 F.3d 755, 762, 767 (2014), we held that a plaintiff could bring a § 1983 suit against an officer for obtaining an un-*Mirandized* statement that was later used against him at his criminal trial, as well as against a police department for failing to supervise officers who routinely fail to give *Miranda* warnings.

Several of our sister circuits have also distinguished *Chavez*, agreeing that the use of statements obtained in violation of the Fifth Amendment against a defendant at his criminal trial may give rise to a § 1983 claim. *See Sornberger v. City of Knoxville*, 434 F.3d 1006, 1023–27 (7th Cir. 2006); *Burrell v. Virginia*, 395 F.3d 508, 513–14 (4th Cir. 2005) (holding that the plaintiff's failure to "allege any *trial* action that violated his Fifth Amendment rights" barred recovery under § 1983) (emphasis added); *Murray v. Earle*, 405 F.3d 278, 285 & n.11 (5th Cir. 2005); *id.* at 289–90 (holding that the use of an "involuntary statement" against a criminal defendant at trial could give rise to a § 1983 action); *Renda v. King*, 347 F.3d 550, 552, 557–59 (3d Cir. 2003) (recognizing that *Chavez* "leaves open the issue of when a statement is used at a criminal proceeding").

We therefore also reject the Eighth Circuit's approach in *Hannon v. Sanner*, in which the court interpreted *Dickerson* together with *Chavez* to hold that a *Miranda* violation cannot form the basis of a § 1983 claim because "the *Miranda* procedural safeguards are 'not themselves rights protected by the

Constitution.'" 441 F.3d 635, 636–38 (8th Cir. 2006) (quoting *Tucker*, 417 U.S. at 444, 94 S.Ct. 2357). In *Hannon*, the court described *Dickerson* as "maintaining the status quo of the *Miranda* doctrine," such that it remained bound by pre-*Dickerson* circuit precedent that treated *Miranda* as a prophylactic rule that swept more broadly than the Fifth Amendment. *Id*. at 636–37 (citing *Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir. 1989) (en banc) and *Brock v. Logan Cty. Sheriff's Dep't*, 3 F.3d 1215, 1217 (8th Cir. 1993) (per curiam)). In light of *Dickerson's* express holding, however, this cannot be correct. In *Dickerson*, the Supreme Court in no way maintained the status quo; in fact, it affirmatively backed away from previous decisions like *Quarles* and *Tucker* that had described *Miranda* warnings as merely prophylactic and "not themselves rights protected by the Constitution," the very cases *Hannon* relied upon. 530 U.S. at 437–39, 120 S.Ct. 2326 (quoting *Tucker*, 417 U.S. at 444, 94 S.Ct. 2357). Finding *Hannon* unpersuasive, we conclude that the use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a § 1983 claim.

C.

To hold Deputy Vega liable under § 1983 for violating Tekoh's Fifth Amendment rights, Tekoh must also prove that his un-*Mirandized* statements were used against him and that Deputy Vega caused the violation of his right against self-incrimination. While the question of liability is ultimately for the jury to decide, we conclude that Tekoh sufficiently demonstrated a Fifth Amendment violation caused by Deputy Vega under § 1983, such that the district

court erred by failing to instruct the jury on this claim.[8]

Here, there is no question that Tekoh's statement was used against him. The statement was introduced into evidence in the failed state criminal prosecution of him. *See Stoot*, 582 F.3d at 914–16; *see also Sornberger*, 434 F.3d at 1026–27 (holding that where "a suspect's criminal prosecution was . . . commenced *because* of her allegedly un-warned confession, the 'criminal case' contemplated by the Self-Incrimination Clause has begun").[9]

There is also no question that Deputy Vega "caused" the introduction of the statements at Tekoh's criminal trial even though Vega himself was not the prosecutor. In *Stoot*, we held that a plaintiff may assert a Fifth Amendment violation against the officer who interrogated him and then included the coerced statements in the police report. 582 F.3d at 926. We explained that "government officials, like other defendants, are generally responsible for the 'natural' or 'reasonably foreseeable' consequences of their actions." *Id.* (quoting *Higazy v. Templeton*, 505 F.3d 161, 175 (2d Cir. 2007)). Joining other circuits, we held that, absent unusual circumstances, such as evidence that the officer "attempted to prevent the

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[8] A district court errs "when it rejects proposed jury instructions that are properly supported by the law and the evidence." *Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009) (citing *Dang v. Cross*, 422 F.3d 800, 804–05 (9th Cir. 2005)).

[9] Because we do not address the circumstances present in *Sornberger*, where an un-*Mirandized* statement was used against the defendant in the commencement of her criminal prosecution but where charges were dropped prior to trial, we do not decide whether such facts could give rise to a claim for damages under § 1983. *Id.*

use of the allegedly incriminating statements . . . or that he never turned the statements over to the prosecutor in the first place," *id*. at 926 (quoting *McKinley v. City of Mansfield*, 404 F.3d 418, 439 (6th Cir. 2005)), a police officer who elicits incriminating statements from a criminal suspect can reasonably foresee that the statements will be used against the suspect in a criminal case, *id*. (citing *Higazy*, 505 F.3d at 177); *see also id*. at 927 ("[O]rdinarily, 'in actions brought under § 1983 for alleged violations of [the Fifth Amendment], it is the person who wrongfully coerces or otherwise induces the involuntary statement who causes the violation of the [Fifth Amendment] privilege.'" (quoting *McKinley*, 404 F.3d at 439)).

Similarly, here, although it was the prosecutors who used Tekoh's statements at his criminal trial, it was Deputy Vega who interrogated Tekoh, prepared the incident report, and personally signed the probable cause declaration. In those documents, Vega stated that Tekoh was a suspect, that he arrested Tekoh for the charge of "Sexual Penetration by Foreign Object," and that Tekoh's incriminating statements were the basis for the report and the probable cause determination. As a result, a jury could infer that the subsequent introduction of the statements in Tekoh's criminal trial was the reasonably foreseeable consequence of Deputy Vega's conduct. *See Stoot*, 582 F.3d at 926 ("[A] jury could infer that the subsequent uses of the statements to file criminal charges against [the suspect] and to set conditions for his release at arraignment were reasonably foreseeable consequences of [the interrogating officer's] conduct.").

We do not hold that taking an *un-Mirandized* statement always gives rise to a § 1983 action. We hold only that where government officials introduce an un-*Mirandized* statement to prove a criminal charge at a criminal trial against a defendant, a § 1983 claim may lie against the officer who took the statement.[10] By contrast, in cases like *Chavez*, where the suspect was never charged, or where police coerce a statement but do not rely on that statement to file formal charges, the Fifth Amendment is not implicated. *See Stoot,* 582 F.3d at 925 n.15 (citing *Chavez*, 538 U.S. at 778–79, 123 S.Ct. 1994).

D.

Therefore, the district court erred by giving the coerced confession instruction, rather than instructing on the *Miranda* violation alone.[11] The giving of solely the coerced confession instruction was not harmless. "[W]e 'presume prejudice where civil

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[10] This holding is not inconsistent with our prior holding in *Fortson v. L.A. City Atty's Office*, 852 F.3d 1190, 1192, 1194–95 (9th Cir. 2017). In *Fortson*, we cited *Chavez* for the proposition that "failure to give *Miranda* warnings does not create liability in a civil rights action." *Id.* at 1194–95. This reliance on *Chavez*, however, is limited to *Chavez*'s binding result that a mere failure to read *Miranda* warnings does not give rise to a claim under § 1983. *See id.* at 1192 (explaining that Fortson's *Miranda* claim was based on the defendants' failure to read him his *Miranda* warnings, but nothing more). The plaintiff's situation in *Fortson*, like in *Chavez*, is distinguishable from Tekoh's claim because there was no indication that the *Fortson* plaintiff's un-*Mirandized* statements were used against him in a subsequent criminal case.

[11] Of course, if the jury believes Deputy Vega's version of events, it could conclude that Tekoh was not "in custody," and thus *Miranda* warnings were not required, in which case Deputy Vega would prevail.

trial error is concerned.'" *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (quoting *Dang v. Cross*, 422 F.3d 800, 811 (9th Cir. 2005)). Deputy Vega bears the burden of demonstrating "that it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *Id.* Deputy Vega has not met that burden.

First, to establish a *Miranda* violation, Tekoh need only demonstrate that he was "in custody" when he was questioned by Deputy Vega without *Miranda* warnings. *Miranda*, 384 U.S. at 445, 86 S.Ct. 1602. The district court instead required Tekoh to prove "that the confession or statement was improperly coerced and not voluntary" and that Vega "acted intentionally in obtaining that coerced confession or statement,"—a more difficult showing that effectively added two elements to Tekoh's claim. We have previously recognized that when a court improperly requires an extra element for a plaintiff's burden of proof, the error is unlikely to be harmless. *Clem*, 566 F.3d at 1182 (quoting *Caballero v. City of Concord*, 956 F.2d 204, 207 (9th Cir. 1992)).

Second, we cannot presume that the jury would have found that Tekoh was not in custody if it had been properly instructed on Tekoh's *Miranda* claim. As Deputy Vega concedes, whether Tekoh was in custody involved a disputed question of fact that turned on "credibility determinations that an appellate court is in no position to make." *Caballero*, 956 F.2d at 207; *see also id.* ("In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor[.]").

Furthermore, we simply do not—and cannot—know what the jury found as to the question of

custody. The district court erroneously instructed the jury to assess whether Tekoh was coerced under a totality-of-the-circumstances test, under which the *Miranda* violation was one of seven factors. Thus, it was entirely possible for the jury to find that Tekoh was in custody for *Miranda* violation purposes, but still ultimately conclude that Deputy Vega's questioning did not rise to the level of coercion—a significantly higher standard. *See*, *e.g., Pollard v. Galaza*, 290 F.3d 1030, 1035 (9th Cir. 2002) (holding that the detective's questioning of the defendant violated *Miranda* but "did not amount to coercion or compulsion"); Carpenter *v. Chappell*, No. C 00-3706 MMC, 2013 WL 4605362, at *15–16 (N.D. Cal. Aug. 26, 2013) (same); *United States v. Betters*, 229 F. Supp. 2d 1103, 1108 (D. Or. 2002) (same). Indeed, Deputy Vega's testimony supported Tekoh's claim that he was not free to leave during the interrogation.

Therefore, we cannot conclude "that it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *Clem*, 566 F.3d at 1182 (citation omitted). Because we do not believe that Deputy Vega has made such a showing, the error was not harmless. We thus vacate the judgment on the jury's verdict and remand the case for a new trial, in which the jury must be properly instructed that the introduction of a defendant's un-*Mirandized* statement at his criminal trial during the prosecution's case in chief alone is sufficient to establish a Fifth Amendment violation.

IV.

Because we remand for a new trial, we need not reach the question of whether the district court abused its discretion by excluding the testimony of Tekoh's coerced confession expert, Dr. Blandon-

Gitlin. On remand, we leave it to the district court to consider whether the expert should be permitted to testify given the questions that remain.

V.

We vacate the judgment on the jury's verdict, reverse the district court's judgment as to Tekoh's requested jury instruction, and remand the case for a new trial, in which the jury must be properly instructed that the introduction of a defendant's un-*Mirandized* statement at his criminal trial during the prosecution's case in chief is alone sufficient to establish a Fifth Amendment violation and give rise to a § 1983 claim for damages. The parties shall bear their own costs of appeal.

VACATED; REVERSED AND REMANDED

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TERENCE B. TEKOH, Plaintiff vs. COUNTY OF LOS ANGELES, a municipal entity, DEPUTY CARLOS VEGA, an individual and DOES 1 through 10, inclusive Defendants	))))))))))))))))	Case No.: CV 16-7297-GW(SKx) [Hon. George H. Wu, Courtroom 9D] **JUDGMENT** Complaint Filed: October 25, 2016 FSC Date: August 31, 2017 Trial Date: October 10, 2017 Closing Date: October 17, 2017

1. This case came on regularly for trial on October 10, 2017 to October 17, 2017 in Department 9D of this Court, the Honorable George H. Wu presiding; the

Plaintiff appearing by Attorney John Burton from LAW OFFICE OF JOHN BURTON and Maria Cavalluzzi of CAVALLUZZI & CAVALLUZZI, and Defendants appearing by Attorneys Rickey Ivie and Antonio K. Kizzie from IVIE, MCNEILL & WYATT.

2. A jury of 8 persons was regularly impaneled and placed under oath. Witnesses were placed under oath and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its special verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to wit:

"WE, THE JURY in the above-entitled action, unanimously find as follows on the questions submitted to us:

QUESTION # 1

Did Plaintiff prove by a preponderance of the evidence that Defendant Carlos Vega violated Plaintiff's rights by arresting Plaintiff without probable cause?

Answer: Yes_____ No__X__

QUESTION # 3

Did Plaintiff prove by a preponderance of the evidence that Defendant Vega violated Plaintiff's rights by deliberately fabricating evidence or using techniques that were so coercive and abusive that he knew, or was deliberately indifferent, that those techniques would yield false information that was used to criminally charge or prosecute Plaintiff?

Answer: Yes_____ No__X__

QUESTION #5

Did Plaintiff prove by a preponderance of the evidence that Defendant Stangeland violated Plaintiff's rights by deliberately fabricating evidence or using techniques that were so coercive and abusive that he knew, or was deliberately indifferent, that those techniques would yield false information that was used to criminally charge or prosecute Plaintiff?

Answer: Yes_____ No__X__

It appearing by reason of said special verdict that: Defendant **SGT. CARLOS VEGA and SGT. DENNIS STANGELAND** are entitled to judgment against the plaintiff **TERENCE B. TEKOH**.

Now, therefore, it is **ORDERED, ADJUDGED, AND DECREED** that said Plaintiff **TERENCE B. TEKOH** shall recover nothing by reason of the complaint, and that defendants shall recover costs from said plaintiff **TERENCE B. TEKOH** pursuant to Federal Rule of Civil Procedure 54(d)(1). The cost bill will be submitted directly to this Court for its review and determination.

Dated: November 7, 2017 /s/ George H. Wu

GEORGE H. WU,
U.S. District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 16-7297-GW(SKx) Date March 8, 2018
Title *Terence B. Tekoh v. County of Los Angeles, et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: IN CHAMBERS – RULING ON PLAINTIFF'S MOTION FOR A NEW TRIAL [199]

Attached hereto is the Court's Final Ruling on Plaintiff's Motion for a New Trial. The Court would GRANT the Motion for a New Trial but only as to Plaintiff's Fifth Amendment claim and only as to Defendant Vega.

The Court sets a scheduling conference for March 12, 2018 at 9:00 a.m.

Terence Tekoh v. County of Los Angeles, et al.;
Case No. 2:16-cv-07297-GW-(SKx)
Final Ruling on Motion for New Trial

I. Background

Plaintiff Terence Tekoh sued Defendants County of Los Angeles, Los Angeles County Sherriff's Department ("LACSD") Sergeant Carlos Vega, and LACSD Sergeant Dennis Stangeland for violations of his civil rights. *See generally* First Amended Complaint ("FAC"), Docket No. 37. Plaintiff alleged that Sergeant Vega took him into custody, failed to give the required *Miranda* advisal, and then – by use of threats and coercion – caused him to hand-write a false confession to sexually assaulting a patient at the Los Angeles County/USC Medical Center. *See id.* ¶¶ 47(a)-(c). Additionally, Plaintiff alleged that both Sergeants Vega and Stangeland fabricated reports that were later used to form the basis of a criminal prosecution for sexual assault. *See id.* ¶¶ 47(e), 48. Plaintiff was ultimately acquitted of the offense and thereafter filed this action under 42 U.S.C. § 1983 against the Defendants. *See id.* ¶ 43.

The matter was tried to a jury in October of 2017, resulting in a unanimous verdict for Defendants. *See generally* Docket No. 182. Plaintiff now moves for a new trial, arguing that: 1) the Court erred in excluding Plaintiff's proposed expert on false confessions; 2) the Court erroneously failed to give two of Plaintiff's proposed jury instructions; and 3) defense counsel's persistent misconduct permeated the proceedings and deprived Plaintiff of a fair trial. *See generally* Motion for a New Trial ("Motion"), Docket No. 202.[1] In support of the Motion, Plaintiff

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[1] Plaintiff's Motion was first filed at Docket No. 201. Docket No. 202 corrects – what Plaintiff terms – "drafting errors that can be distracting." *See* Notice of Errata, Docket No. 202 at 1 of 33.

provides the Court with two portions of the trial transcript, *i.e.* defense counsel's opening statement and closing argument. *See generally* Declaration of Matt Sahak, Docket No. 200, Ex. A ("Defs.' Opening") and Ex. B ("Defs.' Closing"). Defendants oppose the Motion. *See generally* Opposition to Motion ("Opp'n"), Docket No. 203.

Additionally, Defendants, as prevailing parties, filed an Application to the Clerk to Tax Costs. *See generally* Docket No. 196. Plaintiff objected to a number of the proposed costs. *See generally* Objection to Cost Bill, Docket No. 198. If the Court were to order a new trial the Defendants' application would become moot. Accordingly, the Court will first consider the Motion and then address Defendants' application.

II. Legal Standard

Federal Rule of Civil Procedure ("Rule") 59(a)(1)(A) permits a court, after a jury trial, to grant a new trial on all or some of the issues "for any reason for which a new trial has heretofore been granted in an action at law in federal court." "Rule 59 recognizes the common-law principle that it is the duty of a judge who is not satisfied with the verdict of a jury to set the verdict aside and grant a new trial." 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2801 (3d ed. 2017) ("*Federal Practice and Procedure*"). "[T]he burden of proof on a motion for a new trial is on the moving party, and the court should not lightly disturb a plausible jury verdict." *Anglo-American General Agents v. Jackson Nat'l Life Ins. Co.*, 83 F.R.D. 41, 43 (N.D. Cal. 1979).

Rule 61 provides that "[u]nless justice requires otherwise, no error in admitting or excluding evidence

– or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Accordingly, a court will only grant a new trial if a party's "substantial rights" have been affected. *See also United States v. 99.66 Acres of Land*, 970 F.2d 651, 658 (9th Cir. 1992) (stating that a new trial will only be warranted on the basis of an incorrect evidentiary ruling if a party was "substantially prejudiced").

Additionally, "erroneous jury instructions, as well as the failure to give adequate instructions, are . . . bases for a new trial." *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990). Nevertheless, only prejudicial error in the formulation of jury instructions will warrant a new trial. *See Dang v. Cross*, 422 F.3d 800, 805 (9th Cir. 2005). "[P]rejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered." *Id.* (citing *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001) (alteration in original)).

Finally, a new trial is warranted based on counsel's misconduct "where the 'flavor of misconduct . . . sufficiently permeates[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" *Settlegoode v. Portland Public School*s, 371 F.3d 503, 516-17 (9th Cir. 2004) (quoting *Kehr v. Smith Barney*, 736 F.2d 1283, 1286 (9th Cir. 1984) (alteration in original)).

III. Discussion

A. Exclusion of Plaintiff's Proffered Expert

Plaintiff first argues that the Court erroneously excluded his proposed expert on the topic of coerced confessions, *i.e.* Dr. Iris Blandon-Gitlin. *See* Motion at 1-5. Prior to trial, Defendants moved to exclude Dr. Blandon-Giltin from testifying on the basis that her proposed testimony failed to meet the *Daubert* standard of admissibility. *See generally* Defs.' Motion in Limine No. 9, Docket No. 86. Plaintiff opposed in writing and, after considering the papers and hearing argument, the Court granted Defendants' Motion in Limine No. 9. *See* Order, Docket No. 150, at 2. Plaintiff argues that he was prejudiced by this evidentiary ruling. *See* Motion at 4.

To prevail here in securing a new trial, Plaintiff must demonstrate both that ruling was erroneous *and* that he was substantially prejudiced. *See 99.66 Acres of Land*, 970 F.2d at 658. A trial court's decision as to whether to admit or exclude expert testimony is reviewed under an abuse of discretion standard. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc).

Plaintiff contends that the Court's ruling prevented Dr. Blandon-Giltin from being able "to explain, based on studies and scientific data, how innocent people can be coerced to confess to crimes they did not commit. Dr. Blandon-Gitlin's testimony on the science of confessions, how it applies to Defendants' interrogation of Plaintiff, and why Plaintiff's statement read the way it did, contributed to the criminal jury's rejection of the confession." Motion at 4. As a preliminary matter, the Court

would observe that the relevant issue here is *not* an abstract one as to why an innocent person would confess to a crime he or she did not commit. Nor it is what did or did not contribute to the criminal jury's conclusions and verdict. Rather, at the trial in this case, Plaintiff expressly explained in his testimony as to why he wrote and signed the confession. And if one were to believe his version of the events, the confession was indeed coerced.

Plaintiff cites a concurring opinion in a Ninth Circuit case for the proposition that expert testimony was required here because the Court should not "naively assume[] that a jury would be easily persuaded - that an innocent person would confess to a crime they [sic] did not commit - by the confessor's testimony alone." *Lunbery v. Hornbeak*, 605 F.3d 754, 765 (9th Cir. 2010) (Hawkins, J., concurring). In that case, the criminal defendant (Kristi Lunbery) confessed in December 2001 to a murder committed in 1992.[2] *Id.* at 758. However, the actual holding in

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[2] The Circuit Court describes the interrogation that gave rise to the purported false confession as follows:

> For the first hour and one half, the detectives' approach was low-key, touching on various aspects of Kristi's life with [the decedent] and the events of April 17, 1992. Kristi was providing care to Jim, a man with severe mental retardation and epilepsy, and at various points in the interview his interruptions and inarticulate noises may be heard. Kristi's children were not home.
>
> The interview became intense when the detectives showed her a FBI profile of the case and told her that a secret witness had inculpated her. Detective Grashoff then said, "Kristi, we think you did it." She denied it. The detectives said they knew she had done it and only

that case was that it was error at the criminal trial to have precluded the defendant from presenting testimony that another individual had admitted to the murder and the circumstances surrounding it. *Id.* at 760-61. As to the issue of allowing expert testimony as to coerced confessions, the majority opinion did not even reach that question. Instead, the majority's focus (as well as Judge Hawkins's concurrence) was on whether the defendant's counsel were ineffective because they failed to call at trial an expert in regards to false confessions or to further investigate the validity of defendant's confession. *Id.* at 760. Even then, the majority opinion merely held that it needed live testimony from the attorneys before it could decide the ineffective assistance of counsel issue. *Id.*

The facts here are entirely inapposite to those in *Lunbery*. Plaintiff's proposed expert's (*i.e.* Dr. Blandon-Gitlin's) basic opinion was that: "In the current case, as evaluated from a scientific perspective *and assuming the veracity of Mr. Tekoh's accounts of events*, it is my opinion that Mr. Tekoh's written confession was coerced and highly unreliable." *See* Exhibit C to Defendants' Motion in Limine No. 9 to Exclude Dr. Iris Blandon-Gitlin [sic] Improper and Inadmissible Expert Opinions (which is in Dr. Blandon-Gitlin's June 14, 2017 report), Docket No. 86-1 at 15-16 of 42. This Court found that her opinion was unnecessary and problematic because: (1)

> wanted to know why. Was it because he was abusive? "For God's sake, tell the truth," Grashoff urged.
>
> Eventually, Grashoff asked, "Did you shoot Charlie?" She answered, "Yes."

Id. at 757-58.

if the jury believed Mr. Tekoh's version of the events, his confession was clearly coerced and highly unreliable and her opinion added nothing of substance, (2) Plaintiff appeared to be trying to use Dr. Blandon-Gitlin to simply vouch for his version of the events, but she was not a percipient witness, and (3) her report included studies and contentions which were irrelevant to the case.

Plaintiff here testified that Defendant Vega browbeat him both physically and verbally, threatened to deport not only him but also his family, used racial epithets, denied him access to counsel, lied to him regarding the evidence against him, and put a piece of paper in front of him and forced him to write a confession which Vega dictated. A reasonable juror would not need the assistance of a person with specialized knowledge to understand that those conditions, if true, would give rise to a false and coerced confession. Accordingly, the proposed testimony would not have sufficiently helped the jury "to understand the evidence or to determine a fact in issue" to warrant its admission. *See* Federal Rule of Evidence 702. As such, the Court's ruling on Defendant's Motion in Limine No. 9 was not erroneous. *See generally United States v. Redlightning*, 624 F.3d 1090, 1111-12 (9th Cir. 2010).

Furthermore, given the evidence presented at trial, assuming arguendo that the Court ought to have permitted Dr. Blandon-Gitlin to testify, its refusal to do so did not amount to substantial prejudice that would warrant relief and retrial. *See 99.66 Acres of Land*, 970 F. 2d at 658. The jury heard hours of conflicting testimony from Plaintiff plus his witnesses and both individual defendants. Plaintiff testified that Sergeant Vega displayed overt racial animus and

threatened and coerced him into writing out a false confession. Sergeant Vega vehemently denied this. Thus, in the end, this matter came down to a question of credibility.[3] Whatever information Plaintiff's proposed expert might have brought to bear, she would not have been permitted to vouch for Plaintiff's credibility. *See United States v. Candoli*, 870 F. 2d 496, 506 (9th Cir. 1989) ("An expert witness is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility."). In *Mullen v. Barnes*, No. 2:13–cv–0165–MCE–EFB, 2015 WL 2000764, at *17-19 (E.D. Ca. April 30, 2015), it was held that the trial court's decision to exclude the testimony of an expert on false confessions was not erroneous because the circumstances surrounding the confession was explored in depth by both sides. Additionally, the court held that even if it was error to have excluded the testimony, that error was not prejudicial because the proposed expert testimony in this regard would not have altered appreciably the jury's perception of the confession.

In sum, the Court would not find that its refusal to permit Dr. Blandon-Gitlin to testify was incorrect or that it substantially prejudiced Plaintiff.

B. Plaintiff's Proposed Instructions

Plaintiff next contends that the Court erred in failing to give two of his proposed jury instructions. *See* Motion at 5-13. Both sides agreed on giving the

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[3] In arguing for a new trial on the basis of defense counsel's persistent misconduct, Plaintiff concedes this point. *See* Motion at 21 ("Plaintiff's case fundamentally hinged on whether the jury believed [Plaintiff's] account of what happened . . . , or whether they believed Defendants.").

Ninth Circuit Model Jury Instruction 9.33 on "deliberate fabrication of evidence" (*see* proposed Joint Jury Instructions, Docket No. 142 at 25 of 37). Plaintiff only asked for further relevant instructions on: (1) a "Fifth-Amendment *Miranda* Claim" (*see* Plaintiff's Proposed Jury Instruction ("PJI") No. 19A), and (2) a "Fourteenth-Amendment Coercive Interrogation Claim" (PJI No. 19B). *See* Docket No. 143.

As stated in *Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009):

> "'[J]ury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading.'" *Dang*, 422 F.3d at 804 (quoting *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002)). Each party is therefore" 'entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence.'" *Id*. at 804-05 (quoting *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002)). A district court therefore commits error when it rejects proposed jury instructions that are properly supported by the law and the evidence. *Id*. "If, however, the error in the jury instruction is harmless, it does not warrant reversal." *Id*. at 805 (citing *Tritchler v. County of Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004)).

1. Miranda Instruction

Plaintiff's PJI No. 19A stated:

> Plaintiff contends that Defendant Carlos Vega deprived him of rights guaranteed by

the Fifth Amendment to the United States Constitution by interrogating him while in custody without advising him of his rights to remain silent and to consult an attorney. These rights were established by *Miranda v. Arizona*, and are referred to by that case name.

Defendant Vega denies that Plaintiff was in custody for *Miranda* purposes. To determine whether Plaintiff was in custody, and was therefore entitled to *Miranda* admonitions, you should focus on the objective circumstances, not the subjective views of the officer or the individual being questioned. The ultimate question is whether the officer created a setting from which a reasonable person would believe that he or she was not free to leave.

The following factors are among those likely to be relevant to deciding that question:

(1) The language used to summon the individual;

(2) The extent to which the individual being questioned is confronted with evidence of guilt;

(3) The physical surroundings;

(4) The duration of the detention; and

(5) The degree of pressure applied to detain the individual.

In order to establish his Fifth-Amendment claim, Plaintiff must prove by a preponderance of the evidence that Defendant Carlos Vega obtained one or

> more statements from him in violation of *Miranda* that were subsequently used in the criminal case against Plaintiff.

See Docket No. 143 at 2. Plaintiff argues that his "main liability theory [was] that Defendants interrogated him in violation of *Miranda*, and fruit of the illegal interrogation was used against him in a criminal case, a violation of the Fifth Amendment actionable under § 1983." Motion at 6. By failing to give the proposed instruction, the Court supposedly "obliterated" Plaintiff's Fifth Amendment claim to the point that it "did not exist" as far as the jurors were concerned. *Id.* at 10.

However, in the operative FAC as to his Fifth Amendment claim (as opposed to those based on the Fourth or Fourteenth Amendment), Plaintiff alleged that:

> Defendant Vega subjected Plaintiff, while in custody for Fifth Amendment purposes, to a coercive and illegal interrogation, in violation of *Miranda*, generating an involuntary and false confession, which caused Plaintiff to be prosecuted for a sexual assault that he did not commit, an independent violation of the Fifth Amendment, and proximately causing all the damages alleged above.

FAC ¶ 47(b). Notwithstanding Plaintiff's arguments here, his theory was not simply that Defendant Vega was liable for failing to give a *Miranda* advisal prior to questioning Plaintiff. To the contrary, Plaintiff's theory of liability, as clearly detailed in the FAC, was that Defendant Vega "generat[ed] an involuntary and false confession." *Id.*

Plaintiff's PJI No. 19A makes no mention of coercion and it would have permitted the jury to find Defendant Vega liable *per se* under § 1983 merely for obtaining Plaintiff's confession in violation of *Miranda* but without any showing of improper force or duress. Plaintiff's Motion (and PJI No. 19A) would allow the mere failure to advise a suspect in accordance with *Miranda* prior to questioning in a custody situation to be actionable under § 1983, provided that his statement is later used in a criminal proceeding.[4] *See* Motion at 9 (Plaintiff "was 'in custody,' and entitled to *Miranda* admonitions. The statement was used against [Plaintiff] in a criminal case. These facts establish Plaintiff's Fifth-Amendment claim.").

Plaintiff cites no authority for this proposition, as the case he relies upon does not address a mere technical *Miranda* violation but instead deals with a coerced confession/fabrication of evidence situation. *See Hall v. City of Los Angeles*, 697 F.3d 1059, 1068 (9th Cir. 2012). A review of relevant authorities strongly suggests that § 1983 liability will not attach to a technical violation of *Miranda*. As stated in the

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4 It would be noted that, in certain situations, a statement taken in violation of the *Miranda* requirements can lawfully be admitted in a criminal case. *See e.g. Chavez v. Martinez*, 538 U.S. 760, 790 (2003) ("statements secured in violation of *Miranda* are admissible in some instances."); *United States v. Patane*, 542 U.S. 630, 639 (2004) ("statements taken without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant's testimony at trial . . . , though the fruits of actually compelled testimony cannot . . . . [citations omitted]").

plurality opinion in *Chavez v. Martinez*, 538 U.S. 760, 772 (2003)[5]:

> [The officer's] failure to read *Miranda* warnings to [the defendant] did not violate [the defendant's] constitutional rights and cannot be grounds for a § 1983 action. *See Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (*Miranda's* warning requirement is "not itself required by the Fifth Amendment . . . but is instead justified only by reference to its prophylactic purpose"); [*Michigan v.*] *Tucker*, 417 U.S. [433,] 444 [(1974)] (*Miranda's* safeguards "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected").

See also Arden v. Kastell, No. 10-cv-00436 NC, 2012 WL 12893958, at *5 n.4 (N.D. Cal. Sept. 28, 2012) ("Violation of *Miranda* warnings, however, cannot be grounds for a § 1983 action as a matter of law."); *see c.f. Park v. Thompson*, 851 F.3d 910, 926 (9th Cir. 2017) (noting that, in *Chavez*, "a plurality of the Supreme Court said that an officer's failure to read

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[5] The quoted portion of Justice Thomas's plurality opinion had the agreement of Justices Rehnquist, O'Connor and Scalia. However, a majority of the other justices were in agreement with the basic proposition. *See* concurrence in part and dissent in part of Justice Kennedy: "I agree with Justice Thomas that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues." 538 U.S. at 789. The remaining issue (where the justices could not agree) was the extent to which the scenario gave rise to the specter of a violation of the Self-incrimination Clause.

Miranda warnings to a defendant before interrogation violates only 'judicially crafted prophylactic rules' and, for that reason, was not actionable under Section 1983."); *United States v. Patane*, 542 U.S. 630, 641 (2004) ("a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule.").

Given the above cited law, it was not error for the Court to have refused to give Plaintiff's PJI No. 19A.

2. Coerced Confession Instruction

Plaintiff's PJI No. 19B stated:

> Plaintiff contends that Defendant Carlos Vega deprived him of rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution by coercing an involuntary confession.
>
> Plaintiff must prove by a preponderance of the evidence that his will was overborne by the circumstances surrounding the giving of a confession.
>
> The due process test takes into consideration the totality of all the surrounding circumstances, including both the characteristics of the person being questioned and the details of the interrogation. These include factors such as the length of the questioning, the use of fear to break a suspect, and whether the police advised the person being questioned of his rights to remain silent and to have counsel present during a custodial interrogation.

> The basic question is whether the confession is the product of an essentially free and unconstrained choice by its maker. If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

See Docket No. 143 at 3. The Court declined to give this instruction and instead gave the jury the mutually agreed upon Ninth Circuit Model Jury Instruction No. 9.33: Particular Rights - Fourteenth Amendment - Due Process - Deliberate Fabrication of Evidence as follows:

> As previously explained, Plaintiff has the burden of proving that the acts of the Defendants Vega and Stangeland deprived him of particular rights under the United States Constitution. The Fourteenth Amendment protects against being subjected to criminal charges on the basis of false evidence that was deliberately fabricated by a defendant. In this case, Plaintiff alleges the Defendants deprived him of rights under the Fourteenth Amendment to the Constitution when they filed false reports stating that the alleged victim identified Plaintiff as the perpetrator and that Plaintiff confessed to the crime.
>
> For Plaintiff to prevail on his claim of deliberate fabrication of evidence, he must prove at least one of the following elements by a preponderance of the evidence:

(1) Defendant Carlos Vega and/or Dennis Stangeland deliberately fabricated evidence that was used to criminally charge and prosecute Plaintiff; or

(2) Defendant Vega used techniques that were so coercive and abusive that he knew, or was deliberately indifferent, that those techniques would yield false information that was used to criminally charge and prosecute Plaintiff.

"Deliberate indifference" is the conscious or reckless disregard of the consequences of one's acts or omissions.

If Plaintiff proves that a defendant deliberately fabricated evidence that was used to criminally charge and prosecute him, then Plaintiff is not required to prove that the Defendants knew Plaintiff was innocent or was deliberately indifferent to the Plaintiff's innocence.

Not all inaccuracies in an investigative report give rise to a constitutional claim. Errors concerning trivial or unimportant matters is insufficient. Further, mere carelessness or negligence is also insufficient.

Officers are not obligated to further investigate or accept a suspect's versions of the facts or claim of innocence if they otherwise have reasonable suspicion to detain or probable cause to arrest based on other credible information known to them. A mere mistake of fact or refusal to believe

> a suspect's innocent explanation will not automatically make an arrest illegal.

See Final Jury Instructions, Docket No. 181, at 7. Plaintiff argues that the Court erred in refusing to give his PJI No. 19B because "[w]hile the Court's final jury instructions informed the jury on how to evaluate Plaintiff's fabricated-reports claim, it failed to inform the jury on Plaintiff's distinct coerced-confession claim." Motion at 11. The Court finds that Plaintiff has raised an interesting issue.

Following oral argument at the hearing on the present motion and upon further reflection and research, the Court concludes that it *was* error not to have given a *separate* jury instruction that the use of improper coercion to elicit information from a suspect (where the information is later used in a criminal case) is a violation of the Fifth Amendment and can give rise to a claim under § 1983. In reaching that conclusion, the Court examined the precise language of the referenced amendments and the Ninth Circuit's decision in *Hall*, 697 F.3d at 1067-69.

The Fifth Amendment has five clauses referring to concepts covering: (1) Grand Jury, (2) Double Jeopardy, (3) Self-incrimination, (4) Due Process, and (5) Takings without Just Compensation. As relates to this case, the two germane clauses are the third and fourth which provide respectively that: "No person . . . shall be compelled in any criminal case to be a witness against himself;" and "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." The relevant portion of the Fourteenth Amendment only covers the application of due process to the States and delineates that "nor shall any State

deprive any person of life, liberty, or property, without due process of law . . . ."

As discussed by the Ninth Circuit in *Hall*, "[u]sing a coerced confession against the accused in a criminal proceeding implicates [the] Fifth Amendment . . . ." 697 F.3d at 1068. While there is a Fourteenth Amendment due process claim that arises when government agents use "investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information" which is later employed to bring charges against a defendant (*id.*), "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing such a claim." *Id.* (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994)). Thus, a deliberate fabrication of evidence claim (even if it is based on the use of coercive techniques to obtain the evidence) is separate and distinct from a claim resting solely on the improper application of coercion to obtain a statement from a suspect. The former is governed by Fourteenth Amendment's due process provision[6] whereas the latter is controlled by the Fifth Amendment's Self-incrimination Clause. *Id.* ("Here,

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[6] In *Hall*, the Circuit explained that the Fourteenth Amendment due process claim is based upon ". . . 'a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government' . . . . We derived this right from the Supreme Court's holding in *Pyle v. Kansas*, 317 U.S. 213, 216 (1942), that 'the knowing use by the prosecution of perjured testimony in order to secure a criminal conviction violates the Constitution. [citations omitted]." 697 F.3d at 1068.

Hall claims that the detectives coerced his confession and then used that confession to secure his conviction. Thus, the Fifth Amendment is the explicit constitutional provision that governs Hall's claim.").[7]

Additionally, the Circuit in *Hall* briefly surveyed its caselaw in the area of deliberate falsification of evidence claims, and concluded those cases which had

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[7] The facts in *Hall* are illustrative. In *Hall*, the plaintiff raised his § 1983 coerced confession claim solely under the Fourteenth Amendment. The district court held that Fifth Amendment's self-incrimination clause was the appropriate constitutional basis for such a claim rather than the "more generalized substantive due process provision of the Fourteenth Amendment." *See Hall v. City of Los Angeles*, 710 F. Supp. 2d 984, 992-93 (C.D. Cal. 2010). Noting the plaintiff's failure to allege any claim under the Fifth Amendment, it granted summary judgment as to the Fourteenth Amendment-based § 1983 claim stating that: "Plaintiff cannot remedy his inadequate pleading now by repackaging a Fifth Amendment coerced interrogation claim as one for deliberate fabrication of evidence arising under the Fourteenth Amendment." *Id.* at 993. The court went on to observe that, even if plaintiff's claim were cognizable under the Fourteenth Amendment, his case would still be unsuccessful because: (1) under Ninth Circuit law, the standard for showing a Fourteenth Amendment substantive due process violation in this context is quite demanding ("a Fourteenth Amendment claim of this type is cognizable only if the alleged abuse of power 'shocks the conscience' and 'violates the decencies of civilized conduct,'" citing to *Stoot v. City of Everett*, 582 F.3d 910, 928 (9th Cir. 2009)); (2) the standard required more than showing coercion (*i.e.* it requires that the interrogation techniques be so coercive and abusive that the officers knew or should have known that those techniques would yield false information; and (3) plaintiff's allegations as to defendant officers' improper conduct (*i.e.* their threat to remove his protective status as an informant − whereby he would be subjected to possible violence from other inmates, his being interrogated for several hours, and the denial of his request to speak with his attorney) was insufficient. *Id.* at 995-97.

held that the government agents – who had used abusive or coercive techniques to obtain such evidence – had done so as to *third party* witnesses and not as to the suspects/defendants themselves. *Id.* at 1069. It then went on to state that "Hall's coerced confession claim falls within the explicit language of the Fifth Amendment and does not arise as a subset of the substantive due process right set forth in *Devereaux* prong (2)."[8]

In finding the aforesaid error on its part, the Court notes that it did not err in rejecting Plaintiff's PJI No. 19B *as worded*. First, PJI No. 19B makes the same mistake the Court made which was to view the coerced statement issue solely as within ambit of the Fourteenth Amendment due process clause, rather than the Fifth Amendment self-incrimination clause.[9]

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[8] The "*Devereaux* prong (2)" is a reference to the Circuit's holding in *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc), which held that defendants enjoy a constitutional right to be free from prosecution based on deliberately fabricated evidence. *See Hall*, 697 F.3d at 1066. In *Devereaux*, the Circuit stated that a plaintiff can establish a deliberate fabrication of evidence claim by providing evidence that either: "(1) [the government employee] Defendants continued their investigation of [the suspect] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." 263 F.3d at 1076.

[9] PJI No. 19B starts out by stating that: "Plaintiff contends that Defendant Carlos Vega deprived him of rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution by coercing an involuntary confession." Additionally, as argued by Plaintiff, "[t]he Court's instructions do not address Plaintiff's Fourteenth-Amendment coerced-confession claim. Plaintiff presented

Second, PJI No. 19B's focus on the eliciting of a confession from him actually is too restrictive in the present context as to the scope of the Fifth Amendment's constitutional protection which covers the use of personal compulsion to extract *any* evidence from the suspect (not merely a false confession).[10] *See generally Couch v. United States*, 409 U.S. 322, 327-28 (1973).[11] Third, the Court would not find that PJI No. 19B is entirely a correct statement of the law. For example, it states that: "The basic question is whether the confession is the product of an essentially

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evidence to support finding that his confession was involuntary. There is binding Ninth Circuit precedent to support Plaintiff's theory. The jury was not given law to make that determination." *See* Motion at 12.

[10] Actually, one might have been able to construct a correct jury instruction by taking the correct portions of PJI No. 19A and No. 19B and leaving out the references that the constitutional violation was based upon the Fourteenth Amendment or the Supreme Court's decision in *Miranda.*

[11] In *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964), the Supreme Court articulated the policies and purposes of the Self-incrimination Clause as follows:

> Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load," . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." [Citations omitted.]

free and unconstrained choice by its maker." That statement is incorrect – or at least inaccurate – in the Fifth Amendment context herein. Finally, as to the issue of coerced confessions for purposes of the Fourteenth Amendment, the Court had already approved (and gave) the Ninth Circuit's Model Jury Instruction No. 9.33, which adequately covered that topic.

Having concluded that the failure to give a separate instruction on Plaintiff's Fifth Amendment's Self-incrimination Clause claim was in error, the Court next considers whether that mistake was prejudicial. It concludes that it was.

As stated in *Dang*, the Ninth Circuit has emphasized that:

> We have stressed that "jury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading." . . . . Further, "[a] party is entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence" . . . . We also have noted that the "use of a model jury instruction does not preclude a finding of error" . . . . If, however, the error in the jury instruction is harmless, it does not warrant reversal . . . . "In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered."

422 F.3d at 804-05 (citations omitted). As noted above, in the FAC, Plaintiff does indicate that his first claim for relief against Defendant Vega is pursuant to

42 U.S.C. § 1983 for a violation of his rights under the Fourth, Fifth and Fourteenth Amendments. *See* Docket No. 37 at 14 of 17. In particular, it is charged that: "Defendant Vega subjected Plaintiff, while in custody for Fifth-Amendment purposes, to a coercive and illegal interrogation, in violation of *Miranda*, generating an involuntary and false confession, which caused Plaintiff to be prosecuted for a sexual assault that he did not commit, an independent violation of the Fifth Amendment . . . ." *Id.*

Looking at the instructions as a whole, Plaintiff's Fifth Amendment Self-incrimination claim was not fairly and correctly covered by the instructions which the Court gave to the jury. Although his Fourteenth Amendment claim was adequately dealt with in the Ninth Circuit's Model Instruction No. 9.33, the criteria for a finding of a Fourteenth Amendment due process violation are not the same as for a Fifth Amendment Self-incrimination claim. Indeed, it has been held that "due process violations under the Fourteenth Amendment occur only when official conduct 'shocks the conscience'. . . ." *See, e.g., Gantt v. City of Los Angeles*, 717 F.3d 702, 707 (9th Cir. 2013). As held by the district court in the *Hall* case, mere coercion is not a sufficient basis for a finding of a substantive due process violation under the Fourteenth Amendment. *See* 710 F. Supp. 2d at 995-96. The tactics used must "shock the conscience" such that the interrogation itself constitutes a due process violation.[12] *Id.* Further, as held by the Ninth Circuit

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[12] As stated in *Stoot v. City of Everett*, 582 F.3d 910, 928 (9th Cir. 2009):

> The standard for showing a Fourteenth Amendment substantive due process violation, however, is quite

in *Hall*, "Hall's coerced confession claim falls within the explicit language of the Fifth Amendment and does not arise as a subset of the substantive due process right set forth in *Devereaux* prong (2)." 697 F.3d at 1069.

In sum, the Court's failure to include a coerced confession jury instruction under the Fifth Amendment separate and apart from the instruction as to the deliberate fabrication of false evidence was erroneous *and* prejudicial. Hence, it would grant a new trial on that basis which would only cover the Fifth Amendment claim against Defendant Vega.

C. Defense Counsel's Misconduct

Finally, Plaintiff argues that "[d]efense counsel made myriad statements during trial that were improper, prejudicial, and fundamentally unfair. These statements permeated the trial, prejudiced the Plaintiff and affected the fairness and integrity of the proceedings." *See* Motion at 13. The specific

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demanding. *Chavez* refers to "police torture or other abuse" as actionable under the Fourteenth Amendment, 538 U.S. at 773, and Justice Kennedy's opinion states that "a constitutional right is traduced the moment torture or its close equivalents are brought to bear." *Id.* at 789. Such language is consistent with the general rule that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'" and therefore a violation of substantive due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)). More specifically, a Fourteenth Amendment claim of this type is cognizable only if the alleged abuse of power "shocks the conscience" and "violates the decencies of civilized conduct." *Id.* at 846 (internal quotations omitted).

statements cited by Plaintiff are contained in defense counsel's opening statement and closing argument. The Court finds that defense counsel's opening statement (until it was cut-off by the Court) was rife with improper comments, such as:

> Defense Counsel: The evidence will show that in all of [Sergeant Vega's] years with the department, this is his first lawsuit ever.
>
> Plaintiff's Counsel: Objection, Your Honor.
>
> The Court: I will sustain the objection.
>
> Plaintiff's Counsel: Move to strike.
>
> The Court: I don't have to strike because I have already instructed the jury that opening statement is not evidence.
>
> Defense Counsel: Thank you. You can have a seat, Sergeant Vega. Now, Sergeant Stangeland has been with the department 20 years. He is a devout Christian, and has never had case like this claimed against him.
>
> The Court: Counsel, let me have you on sidebar.
>
> (Sidebar begins.)
>
> Defense Counsel: I'm done with the introduction
>
> The Court: You know that that is improper. And if you don't, you are crazy. And now I have to decide whether or not the Plaintiff is going to ask to go through all of the prior complaints against him, things of that sort.

> Plaintiff's Counsel: There was an instruction not to answer when I asked about it.
>
> The Court: No, no. The problem is that he can't get away with that type of stuff. I mean, if you want to, I will give the jury an instruction because he can't – you know, I would not have allowed past conduct to be offered in this case anyway. So, this is not proper. You should know that.
>
> Defense Counsel: All right.
>
> The Court: So if the plaintiff thinks of something, a pound of flesh you want to extract, let me know, and I will consider it.
>
> (Sidebar ends.)

Defs.' Opening at 88:21-90:5. Moments later, defense counsel stated that "the evidence will show that this case isn't about justice or race. It's about capitalizing off an acquittal and about credibility." *Id.* at 90:19-21. At that point, the Court had enough and provided defense counsel one minute to finish up opening statement because, as the Court described it in the presence of the jury, defense counsel had "squandered the opportunity." *Id.* at 90:23-24. Later, outside the presence of the jury, defense counsel asked the Court to be permitted to complete his opening statement. The Court denied the request stating: "The answer is no. You are not going to be allowed to have an opportunity to complete your opening statement, because again, if you do it . . . if you are given an opportunity and you interject things that are clearly in this Court's opinion improper, this is the consequence." *Id.* at 160:23-161:2.

In addition to the defense counsel's opening statement, Plaintiff points to many statements made during defense counsel's closing argument. As a preliminary matter, the Court notes that Plaintiff failed to object to most of these statements. *See, e.g.*, Defs.' Closing at 6:6-11 (plaintiff's counsel did not object when defense counsel asked the jury "[i]f there was a shred of evidence that Sergeant Vega called Mr. Tekoh a jungle N-word, do you think we would be here? I didn't become the first attorney in my family to defend alleged crooked cops."[13]); *but see, e.g.*, Motion at 16 (arguing that this statement amounted to improper vouching).

"A party will not be allowed to speculate with the court by letting error go without any comment and then seek a new trial on the basis of the error if the outcome of the case is unfavorable." *Federal Practice and Procedure* § 2472. "This principle has been employed in many cases and applies to . . . the content of various arguments of counsel for either side . . . ." *Id.* Plaintiff contends that his counsel did not object because he "was cognizant of the rule that 'constant objections are certainly not required, as they could antagonize the jury.'" *See* Motion at 23 (citing *Kehr*, 736 F.2d at 1286). Plaintiff gives unfairly short shrift to *Kehr*. There, the Ninth Circuit held that the district court did not abuse its discretion in denying a motion for a new trial, stating that "while constant objections are certainly not required, as they could antagonize the jury, we note that opposing counsel here never objected during the closing argument or moved for a mistrial." *Id.* (internal citation omitted). Thus, rather than standing for the proposition that

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[13] It is noted that defense counsel is Black.

counsel may purposefully fail to object during argument and then seek a new trial after an unfavorable verdict, *Kehr* lends supports the general principle that a party must timely object to improper argument or live with the consequences. Accordingly, the Court will not consider statements made by defense counsel that elicited no objection in evaluating Plaintiff's arguments here. The Court is thus left with two statements made by defense counsel in the closing argument that elicited an objection at trial and are now addressed in the Motion.

During his closing argument, defense counsel sought to have the jurors consider the case from the perspective of the alleged victim of Plaintiff's sexual assault: "[i]f you were to tell one of these marshals that a barista downstairs around lunch time sexually assaulted you, male, black, mid 20's, thin build. And they go find a male, black, mid 20's, thin build barista around 12 [sic] fitting the description and they arrest him and they get sued just because he beat the case . . . ." Defs.' Closing at 21:13-18. Plaintiff objected and the Court sustained the objection and admonished defense counsel that the argument was improper. *See id.* at 21:19-22. Notwithstanding the admonishment, defense counsel returned to the theme at the end of his closing, pleading with the jury not to disappoint Plaintiff's alleged victim: when she "calls me and asks me what happened, don't make me . . . ." *Id.* at 44:17-18. Plaintiff objected and the Court sustained the objection and once again admonished defense counsel that the argument was improper. *See id.* at 44:19-21.

The Court would not find that defense counsel's short opening statement, alone or coupled with the

two specified improper arguments during closing, prejudiced Plaintiff to the point that a new trial is warranted. First, the Court sustained Plaintiff's objections and admonished defense counsel repeatedly in the presence of the jury. To the extent that either side was prejudiced by defense counsel's conduct, the Court would find it more likely that the Defendants were harmed as the Court was not coy about its view of the improper portions of defense counsel's opening statement or closing argument in front of the jury. Beyond that, however, the Court notes that Plaintiff's Motion uses four pages to describe the prejudicial effect of defense counsel's conduct. *See* Motion at 21-24. In those four pages, Plaintiff makes no mention of the two arguments defense counsel made during closing that the Court considers here. As for defense counsel's short opening statement, Plaintiff argues only that by suggesting that neither Sergeant Vega nor Stangeland had ever been alleged to commit similar misconduct, Plaintiff was left in an untenable position of being unable to rebut the inference. *See id.* at 22-23. However, at side bar, the Court unambiguously offered Plaintiff relief: "if the plaintiff thinks of something, a pound of flesh you want to extract, let me know, and I will consider it." Defs.' Opening at 90:2-4. Plaintiff did not seek a mistrial, an instruction, or any other remedy, draconian or otherwise, at trial. The Court provided an opportunity but the time for that is now gone – the Court will not permit Plaintiff to seek a remedy after an unfavorable verdict has been rendered. Additionally, the jury was specifically instructed at the start of trial and again at the close of the evidentiary portion of the trial (before closing arguments) that:

> Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they will say in their opening statements, their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence.

See Docket No. 180 at 3 of 6 and No. 181 at 3 of 12. A jury is presumed to follow the instructions which are given. *Blueford v. Arkansas*, 566 U.S. 599, 606 (2012).

Finally, the Court is mindful that a new trial is warranted based on counsel's misconduct only "where the flavor of misconduct . . . sufficiently permeates[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Settlegoode*, 371 F.3d at 516-17. Considering the evidence presented in this case, the Court is not convinced that the jury was influenced by passion and prejudice. To the contrary, the Court would find that the jury found in Defendants' favor despite defense counsel's misconduct, not because of it.[14]

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[14] The Court notes that, after the jury verdict was returned and the jury had been excused – and in response to an inquiry by defense counsel as to his trial performance, the Court did inform him that "he had made a couple of statements in his closing argument that, if they had been said by a prosecutor to a jury in a closing in a criminal case, would have been grounds for a defendant's seeking to overturn a jury's return of a guilty verdict on appeal." *See* Docket No. 192 at 3 of 4. The reason for that viewpoint is that a prosecutor's statement to the jury "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *See United States v. Young*, 470 U.S. 1, 18-19 (1985). Thus, a prosecutor may not make a statement that imports the power of the government behind a

IV. Defendants' Application to Tax Costs

Having determined that a new trial is warranted, the Court will not consider Defendants' application to tax costs against Plaintiff at this point. *See* Docket No. 196.

V. Conclusion

Based on the foregoing discussion, this Court would GRANT the Motion for a New Trial but only as to Plaintiff's Fifth Amendment claim and only as to Defendant Vega.

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witness (even if it was an inference based on the evidence) – *see United Sates v. Weatherspoon*, 410 F.3d 1142, 1147 (9th Cir. 2005). However, here, defense counsel was not a prosecutor.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

HONORABLE GEORGE WU

UNITED STATES DISTRICT JUDGE PRESIDING

Terence Tekoh, PLAINTIFF, VS. County of Los Angeles, et al., DEFENDANT,	)))))))))	NO. CV 16-7297 GW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

THURSDAY, SEPTEMBER 20, 2018

* * *

[12] [MR. BURTON:] And it is not what the officer kept saying on the stand at the last trial, which is handcuffs. In fact, in United States versus Kim, where they did find her to be in custody, she was not handcuffed.

THE COURT: Again, I am not saying that I would not give that type of instruction because I do think that -- you know, again, whether or not he was Mirandized I think is a relevant factor.

Conversely, however, the fact that he wasn't Mirandized -- and that fact is not disputed in this case

-- but if the situation did not call for a Miranda warning, then even though the jury can consider that as a factor, obviously that won't be much of a factor because it wasn't required at that point in time.

But if it is required at that point in time and if it wasn't given, that fact does not establish a coerced confession. And I would include that in the instruction, but it is a factor that can be considered by the jury insofar as whether or not a confession was coerced.

MR. BURTON: We differ with the Court on whether the failure to Mirandize when it was required would establish our claim by itself. But we understand the Court's position on that.

THE COURT: Well, let me put it this way. I **[13]** understand that the plaintiff disagrees, but you are also disagreeing with a line of cases, including a plurality opinion from the supreme court and the Ninth Circuit cases, which say a violation of Miranda in and of itself does not give rise to a 1983 action.

MR. BURTON: Well, just to answer that point, those cases, Chavez versus Martinez and its progeny, did not find a Fifth Amendment violation for failure to Mirandize because the statement was not used in a subsequent criminal case.

THE COURT: That is not true. There are cases that say it does not give rise to it period.

MR. BURTON: I read Stued(Phon.) and I read Crowe differently than the Court. I want to move the discussion forward. I just did not want to --

THE COURT: Let's put it this way. That matter has already been resolved for all intents and purposes here because I made a ruling. I do understand the

plaintiff is reserving its objection to that ruling. So that is not a problem.

* * *

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

HONORABLE GEORGE WU

UNITED STATES DISTRICT JUDGE PRESIDING

Terence Tekoh, PLAINTIFF, VS. County of Los Angeles, et al., DEFENDANT,	)))))))))	NO. CV 16-7297 GW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, SEPTEMBER 24, 2018

* * *

[12]

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MR. KIZZIE: And just for the record, on factor No. 6 regarding if warnings under the Miranda decision were required, just for the record, as indicated in the supplemental brief as well as the supplemental instructions offered, defendant objects to any instructions discussing or weighing factors of Miranda, for the reasons stated therein. But aside from that, your Honor, nothing else on page 6 from defendant.

MR. BURTON: This might be a good time for us also to reiterate an objection for the record on this exact point.

We tendered an instruction with a note that we know the Court has already ruled and will not give it that we think that if he was in custody, he was not Mirandized, that that constitutes a sufficient violation of the Fifth Amendment to obtain damages in this case.

And so I am just reiterating that for the record.

THE COURT: Well, as I indicated, I agree. I already ruled that a pure failure to Mirandize will not give rise to a 1983 action, for reasons I have already stated.

* * *

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TERENCE B. TEKOH, Plaintiff vs. SGT. CARLOS VEGA, Defendants	))))))))))))))))	Case No.: CV 16-7297-GW(SKx) [Hon. George H. Wu, Courtroom 9D] **JUDGMENT** Complaint Filed: October 25, 2016 FSC Date: September 24, 2018 Trial Date: September 25, 2018 Closing Date: October 2, 2018

1. This case came on regularly for trial on September 25, 2018 to October 2, 2018 in Department 9D of this Court, the Honorable George H. Wu presiding; the Plaintiff appearing by Attorneys John Burton and

Matthew Sahak from LAW OFFICE OF JOHN BURTON and Maria Cavalluzzi of CAVALLUZZI & CAVALLUZZI, and Defendants appearing by Attorneys Rickey Ivie and Antonio K. Kizzie from IVIE, MCNEILL & WYATT, APLC.

2. A jury of 8 persons was regularly impaneled and placed under oath. Witnesses were placed under oath and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into Court with its special verdict consisting of the special issues submitted to the jury, each member was polled as to their vote, and the answers given thereto by the jury, which said verdict was in words and figures as follows, to wit:

"WE, THE JURY in the above-entitled action, unanimously find as follows on the questions submitted to us:

QUESTION # 1

Did Plaintiff prove by a preponderance of the evidence that Defendant Carlos Vega violated Plaintiff's constitutional rights by unlawfully coercing an involuntary confession from him that was later used against him in a criminal case?

Answer: Yes_____ No__X__

If you answered "YES" to Question # 1, please answer Question # 2. If you answered "NO," STOP here, answer no further questions, have your presiding juror date and sign the verdict and inform the bailiff that you have reached a decision.

QUESTION # 2

Did Plaintiff prove by a preponderance of the evidence that Defendant Carlos Vega's violation of Plaintiff's constitutional rights by unlawfully coercing an involuntary confession from him that was later used against him in a criminal trial was the moving force (a substantial factor) in causing the injuries now claimed by Plaintiff?

Answer: Yes_____ No_____

If you answered "YES" to Question # 2, please answer Question # 3. If you answered "NO," STOP here, answer no further questions, have your presiding juror date and sign the verdict and inform the bailiff that you have reached a decision.

QUESTION #3

What Plaintiff's damages, if any?

1) Past economic losses such as lost earning, not including legal and bail expenses:

   $____________________

2) Legal and Bail Expenses:

   $____________________

3) Future economic losses such as lost earnings and lost earning capacity:

   $____________________

4) Past and future non-economic losses such as pain and mental suffering, loss of reputation:

   $____________________

Please answer Question # 4.

QUESTION NO. 4

Has Plaintiff proven by a preponderance of the evidence that Defendant Vega acted with malice, oppression or reckless disregard of Plaintiff's rights?

Answer: YES_______ NO_______

If your answer to Question # 4 is "Yes," please go to Question # 5. If your answer is "No," please STOP here, answer no further questions, have your presiding juror date and sign the verdict and inform the bailiff that you have reached a decision.

QUESTION # 5:

What is the total amount of punitive damages, if any, that you award to Plaintiff against Defendant Vega? $____________________

It appearing by reason of said special verdict that: Defendant **SGT. CARLOS VEGA** is entitled to judgment against the plaintiff **TERENCE B. TEKOH**.

Now, therefore, it is **ORDERED, ADJUDGED, AND DECREED** that said Plaintiff **TERENCE B. TEKOH** shall recover nothing by reason of the complaint, and that defendants shall recover costs from said plaintiff **TERENCE B. TEKOH** pursuant to Federal Rule of Civil Procedure 54(d)(1). The cost bill will be submitted directly to this Court for its review and determination.

Dated: October 5, 2018

/s/ George H. Wu
GEORGE H. WU,
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Terence B. TEKOH, Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES;
Dennis Stangeland, Sergeant; Carlos Vega, Deputy, Defendants-Appellees,

and

Los Angeles County Sheriff's Department;
Does, 1 to 10, Defendants.

No. 18-56414

Filed June 3, 2021

997 F.3d 1260

Before: KIM MCLANE WARDLAW, MARY H. MURGUIA, and Eric D. Miller, Circuit Judges.

Order;

Concurrence by Judge MILLER;

Dissent by Judge BUMATAY

ORDER

Judges Wardlaw, Murguia, and Miller have voted to deny the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**. A concurrence in the denial by Judge Miller and a dissent from the denial by Judge Bumatay are filed

concurrently with this order. No further petitions for rehearing or rehearing en banc will be entertained.

Judge Collins did not participate in the consideration of the petition for rehearing en banc.

IT IS SO ORDERED.

MILLER, Circuit Judge, with whom WARDLAW and MURGUIA, Circuit Judges, join, concurring in the denial of rehearing en banc:

The issue here is whether the right guaranteed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is among the "rights, privileges, or immunities secured by the Constitution and laws," so that 42 U.S.C. § 1983 provides a remedy when the prosecution introduces a defendant's un-*Mirandized* statement in its case in chief at his criminal trial. The Supreme Court's cases—most importantly, its reaffirmation of *Miranda* in *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)—make clear that the answer is yes.

Today's dissenters invoke the history of the Fifth Amendment in arguing that the answer should be no. They also find support for their position in Supreme Court cases that use language that is arguably in tension with the holding of *Dickerson*. But even if we were to sit en banc, we would remain judges of a "[t]ribunal[ ] inferior to the [S]upreme Court." U.S. Const. art. I, § 8, cl. 9. As such, we lack authority to resolve contradictions in the Supreme Court's precedents. To the contrary, we have repeatedly been admonished that "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls." *Rodriguez de Quijas v.*

Shearson/Am. Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *accord Tenet v. Doe*, 544 U.S. 1, 10–11, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005); *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997).

For more than 50 years, there has been a robust debate about the conceptual underpinnings of *Miranda*. It is neither necessary nor appropriate for us to try to resolve that debate. In particular, the "text and history of the Fifth Amendment" (Dissent at 1265–66) and the "long history of the common law right" that preceded it (Dissent at 1269) are irrelevant to the question before us. That is not to deny that text and history are important to constitutional interpretation—they surely are. It is merely to recognize that the Supreme Court has already done the necessary constitutional interpretation. Like it or not, *Miranda* was not an originalist decision. That is one of the reasons why Justice Scalia criticized it—in a phrase echoed by today's dissenters—as "a milestone of judicial overreaching." *Dickerson*, 530 U.S. at 465, 120 S.Ct. 2326 (Scalia, J., dissenting); *cf.* Dissent at 1264–66. But we are not dissenting Supreme Court Justices. As individuals, we are free to criticize *Miranda*, but as a court, our task is simply to interpret and apply it.

It is true that the Supreme Court has described *Miranda* as a "prophylactic" rule, and that the prophylactic nature of *Miranda* has been important to many of the Court's decisions narrowing *Miranda*'s scope. For example, the Court has held that a statement obtained in violation of *Miranda* may be introduced for impeachment purposes, *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); that there is a "public safety" exception to the

warning requirement, *New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984); and that *Miranda* does not bar the introduction of a post-warning confession obtained as the fruit of an earlier un-*Mirandized* statement, *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). Surveying those decisions in his *Dickerson* dissent, Justice Scalia argued that "it is simply no longer possible for the Court to conclude . . . that a violation of *Miranda*'s rules is a violation of the Constitution." 530 U.S. at 454, 120 S.Ct. 2326. But as he went on to say, "that is what is required before the Court may disregard a law of Congress governing the admissibility of evidence in federal court"—which is precisely what the Court did. *Id.*

Justice Scalia's arguments in *Dickerson* highlight a tension in the Court's jurisprudence. As today's dissent demonstrates, one can begin with the cases treating *Miranda* as a prophylactic rule and reason to the conclusion that the doctrine must not be required by the Constitution. But if that were so, then Congress would be able to alter it, and *Dickerson* would have come out the other way. The dissenters evidently agree with Justice Scalia's reasoning, and some of us, or at least one of us, find it compelling as well, but it is not up to this court to resolve the tension he identified. Instead, we must "follow the case which directly controls." *Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. 1917. Here, that case is *Dickerson*, which proves that *Miranda* announced a constitutional rule. We know that not just because of what the Court said—"*Miranda* announced a constitutional rule," 530 U.S. at 444, 120 S.Ct. 2326—but because of what it did: strike down an Act of Congress purporting to abolish *Miranda*. If *Miranda*

is not "secured by the Constitution," 42 U.S.C. § 1983, then why is Congress not allowed to dispense with it?

If further proof were needed, we supply it every time we review a *Miranda* claim in a habeas challenge to a state conviction. *See Withrow v. Williams*, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). In language strikingly similar to that of section 1983, the habeas statute makes relief available to state prisoners only if they are in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). No one thinks *Miranda* comes from a treaty, so a *Miranda* violation must be a "violation of the Constitution or laws." The *Miranda* right, therefore, must be one of those rights "secured by the Constitution and laws." 42 U.S.C. § 1983.

It will not do to say that *Miranda* is merely a "rule," as if that were different from a "right," "privilege," or "immunity." To be sure, the Supreme Court has held that section 1983 is not available to a plaintiff who complains of the violation of a statute that creates abstract interests but not "individually enforceable private rights." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 290, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). Those cases do not apply here because *Miranda* indisputably creates individual legal rights that are judicially enforceable. (Any prosecutor who doubts this can try to introduce an un-*Mirandized* confession and then watch what happens.) The Supreme Court observed in *Withrow* that *Miranda* "differs from" the Fourth Amendment exclusionary rule precisely because that rule, unlike *Miranda*, "is not a personal constitutional right." 507 U.S. at 691, 113 S.Ct. 1745 (quoting *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)). *Miranda* therefore fits comfortably within the ordinary

understanding of a "right." *See id.* (" 'Prophylactic' though it may be, . . . *Miranda* safeguards 'a fundamental trial right.'" (emphasis omitted) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990))).

The Supreme Court's cases since *Dickerson* do not alter this analysis. Applying the rule of *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), to the fractured decisions in *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003), and *United States v. Patane*, 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004), yields no holding that unsettles *Dickerson*. While the decisions might be taken to have "persuasive force" (Dissent at 1271–72) as indications of how to count votes and predict how the Supreme Court will someday rule, making such predictions is the role of academics and journalists, not circuit judges. Our duty is to follow what the Supreme Court has done, not forecast what it might do.

Finally, even if everything I have said so far is wrong, it would not mean that this case "involves a question of exceptional importance" warranting rehearing en banc. Fed. R. App. P. 35(a)(2). The circuit split is not nearly as lopsided as the dissenters assert. They make it appear so only by counting three circuits' worth of unpublished decisions and, for good measure, throwing in decisions that preceded *Dickerson* or that did not involve the introduction of un-*Mirandized* statements at trial but instead involved only the failure to give warnings—an issue the panel expressly declined to address. *See Tekoh v. County of Los Angeles*, 985 F.3d 713, 724 (9th Cir. 2021) ("We do not hold that taking an un-*Mirandized* statement always gives rise to a § 1983 action. We

hold only that where government officials introduce an un-*Mirandized* statement to prove a criminal charge at a criminal trial against a defendant, a § 1983 claim may lie against the officer who took the statement."); *see also Chavez*, 538 U.S. at 769, 123 S.Ct. 1994 (plurality opinion); *Elstad*, 470 U.S. at 306 n.1, 105 S.Ct. 1285. As the panel explained, our decision is aligned with most of the circuits that have considered the issue after *Dickerson* and *Chavez*. *See Tekoh*, 985 F.3d at 723. But more importantly, whatever the tally of circuits, everyone agrees that we are not alone (Dissent at 1272), so granting rehearing en banc would not eliminate the conflict but at most would simply move us from one side to the other. Nor do the dissenters suggest that the panel's decision, the product of a quirky set of facts that required us to confront this issue for the first time in the five decades since *Miranda* was decided, threatens to bury the district courts of the western United States beneath an avalanche of section 1983 *Miranda* litigation.

There remains only the objection that "our interpretation of the Self-Incrimination Clause is detached from text and history." (Dissent at 1272). That is a complaint about *Miranda* and *Dickerson*, not the decision here. Perhaps the defendants will find it helpful in preparing a petition for a writ of certiorari, but it is a poor reason to grant rehearing en banc.

BUMATAY, Circuit Judge, joined by CALLAHAN, IKUTA, BENNETT, R. NELSON, BRESS, and VANDYKE, dissenting from the denial of rehearing en banc:

Most Americans can likely recite the *Miranda* warnings by heart: the right to remain silent, that any statements given can be used against you, the right to

an attorney during questioning, and the right to have an attorney appointed. Many also know that the Supreme Court announced these warnings in the watershed case, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). But few, I venture to guess, can identify the origin and nature of the warnings. Is *Miranda* a right mandated by the Fifth Amendment's Self-Incrimination Clause? Or are the warnings prophylactic rules created by judges to safeguard the people's rights?

Terence Tekoh asks us to resolve these questions. A police officer questioned him about a crime committed at the hospital where he worked. Tekoh agreed to speak with the officer, but the officer never gave him the *Miranda* warnings. Tekoh eventually confessed to the crime. He was charged, tried, and acquitted—even after the introduction of his confession at trial.

Following his acquittal, Tekoh sued the officer under 42 U.S.C. § 1983, alleging a violation of his Fifth Amendment right. At trial, Tekoh argued that it was enough for him to prevail if he proved that the officer obtained his confession without providing him *Miranda* warnings. The district court disagreed, instructing the jury that the officer violated Tekoh's Fifth Amendment right only if the officer coerced Tekoh into confessing under the totality of the circumstances. In other words, the district court determined that the lack of *Miranda* warnings was a factor for a Fifth Amendment violation, but it did not violate the right in and of itself. The jury returned a full defense verdict, and Tekoh appealed.

The central issue in this case, therefore, is whether *Miranda* warnings amount to a constitutional right. The question is important

because § 1983 only provides a cause of action for violating "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Section 1983 won't support liability for violating anything less than a "right"—like prophylactic rules.

Before reaching this question, we should have heeded what the Supreme Court has said about the matter. Many times, the Court has discussed the nature of *Miranda*. And the answer could not be clearer:

Supreme Court cases referring to *Miranda* warnings as "prophylaclic"	**Supreme Court cases referring to *Miranda* warnings as a "constitutional right"**
Michigan v. Payne, 412 U.S. 47, 53 (1973) • *Michigan v Tucker*, 417 U.S. 433, 439 (1979) • *Brown v. Illinois*, 422 U.S. 590, 600 (1975) • *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) • *North Carolina v. Butler*, 441 U.S. 369, 374 (1979) • *United States v. Henry*, 447 U.S. 264, 274 (1980) • *South Dakota v Neville*, 459 U.S. 553, 564 n.15 (1983) • *New York v. Quarles*, 467 U.S. 649, 654 (1984) • *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) •	

Supreme Court cases referring to *Miranda* warnings as "prophylaclic"	**Supreme Court cases referring to *Miranda* warnings as a "constitutional right"**
Connecticut v. Barret, 479 U.S. 523, 528 (1987) • *Arizona v Roberson*, 486 U.S 675, 681 (1988) • *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) • *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) • *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991) • *Withrow v. Williams*, 507 U.S. 680, 691 (1993) • *Brecht v Abrahamson*, 507 U.S. 619, 629 (1993) • *Davis v. United States*, 512 U.S. 452, 458 (1994) • *Montejo v Louisiana*, 556 U.S. 778, 794 (2009) • *Maryland v Shatzer*, 559 U.S. 98, 103 (2010) • *J.D.B. v North Carolina*, 564 U.S. 261, 269 (2011) • *Howes v. Fields*, 565 U.S. 499, 507 (2012)	

The Court has described *Miranda* warnings as "prophylactic" at least 21 times and called them a "constitutional right" zero times.

With this background, this should have been a straightforward case. Under Supreme Court precedent, a *Miranda* warning is not a constitutional

right, and we should have affirmed the judgment accordingly. But that is not what happened. Our court reversed, holding that Tekoh need only show that his confession was taken in violation of *Miranda* and later used against him in a criminal proceeding to prove his § 1983 claim. That is because, we said, *Miranda* was indeed a "right secured by the Constitution." *Tekoh v. County of Los Angeles*, 985 F.3d 713, 720 (9th Cir. 2021).

Rather than following the overwhelming weight of Supreme Court authority, we justify our decision with cherry-picked lines from a few cases—though none (save the Seventh Circuit) directly hold as we do today. In doing so, we also place ourselves at direct odds with six of our fellow circuit courts. And so yet again, our court embarks on brazen judicial overreach.

To be clear, this case has nothing to do with whether *Miranda* warnings are required before custodial interrogation—they are. Neither does it deal with whether un-*Mirandized* statements must be excluded from the government's case-in-chief—Supreme Court case law says they should be. Nor does this case ask whether Tekoh was coerced into confessing—our court deemed coercion irrelevant. Instead, the narrow question before the court was whether the introduction of an un-*Mirandized* statement at trial *alone* constitutes the violation of a "right" secured by the Constitution. Our court's answer? Yes, the lack of *Miranda* warnings violates the Fifth Amendment even if subsequent statements were freely and voluntarily given. In adopting this novel reading of *Miranda*, our court contravenes the text and history of the Fifth Amendment and the undeniable weight of precedent. Along the way, our

court's decision pushes us further than others in rewriting the Fifth Amendment.

For this reason, I respectfully dissent from the denial of rehearing en banc.

I.

A.

The Fifth Amendment's Self-Incrimination Clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The text of the Amendment does not provide for a right to receive warnings before interrogation by a law enforcement officer, as envisioned by *Miranda*. Rather, the Fifth Amendment enshrined the "ancient" English common law right against self-incrimination known as *nemo tenetur seipsum prodere* ("no man shall be compelled to criminate himself"). *See* John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 Harv. L. Rev. 71, 71 (1891); *Brown v. Walker*, 161 U.S. 591, 596–97, 16 S.Ct. 644, 40 L.Ed. 819 (1896). Under that maxim, "a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." *R v. Warickshall* (1783), 168 Eng. Rep. 234, 235; 1 Leach 263, 263–64.

What originated in the old world quickly made its way over the Atlantic. By the Founding, "the principle of the *nemo tenetur* maxim was simply taken for granted and so deeply accepted that its constitutional expression had the mechanical quality of a ritualistic gesture in favor of a self-evident truth needing no explanation." Leonard W. Levy, *Origins of the Fifth Amendment* 430 (1968). Well before the

Constitution was ratified, the right was ubiquitous: each of the eight states that had a separate bill of rights prohibited compelled self-incrimination. *Id.* at 412. Among the first proposed amendments to the federal Constitution was the right against self-incrimination. *See id.* at 422–23; *see also Brown*, 161 U.S. at 597, 16 S.Ct. 644 (noting that the maxim, "which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment"). Justice Story confirmed that the Self-Incrimination Clause was "but an affirmance of a common law privilege." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1782, at 660 (Boston, Hilliard, Gray & Co. 1833).

The right's focus on voluntariness remained throughout the transition from English to American common law. An early American treatise explained that "a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." 2 William Oldnall Russell & Charles Sprengel Greaves, *A Treatise on Crimes and Misdemeanors* 826 (5th Am. ed., 1845) (emphasis omitted).

Early precedent confirmed the basic common law understanding of the Clause—that its lodestar is voluntariness, not prophylaxis. According to Chief Justice Marshall, it was "a settled maxim of law that no man is bound to criminate himself," and that if a person's answer to a question might incriminate him, "it must rest with himself, who alone can tell what it would be, to answer the question or not." *United States v. Burr*, 25 F. Cas. 38, 39–40 (C.C.D. Va. 1807).

While legitimate debate may remain around its scope, as a matter of history, the right against self-incrimination did not include the right to be given particular warnings before custodial interrogation may begin. From the Fifth Amendment's ratification to the mid-20th century, neither the text nor the common law right was understood to require law enforcement officers to give such warnings.

B.

It was not until almost 200 years after our Founding that the Supreme Court announced the requirement of *Miranda* warnings in 1966. *Miranda*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. That decision, however, does not suggest that *Miranda* warnings are part of the Fifth Amendment. Instead, the opinion explicitly refers to the *Miranda* rules, not as a constitutional right, but as "*procedural safeguards* effective to secure the privilege against self-incrimination." *Id.* at 444, 86 S.Ct. 1602 (emphasis added). Thus, *Miranda* itself offers no reason to conclude that it announced a constitutional right.

In *Miranda*, the Supreme Court began by raising concerns with the police tactics used to obtain confessions from those in custody. *Id.* at 445–55, 86 S.Ct. 1602. Recounting the various psychological measures employed, the Court was alarmed that police regularly "persuade, trick, or cajole [those in custody] out of exercising [their] constitutional rights." *Id.* at 455, 86 S.Ct. 1602. The Court decried the "interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner." *Id.* at 457, 86 S.Ct. 1602. To counter these tactics, the Court warned that "adequate protective devices" are necessary to

counter "the compulsion inherent in custodial surroundings" and to ensure that statements made in custody are "truly" the product of "free choice." *Id.* at 458, 86 S.Ct. 1602.

The Court thus adopted the requirement of the *Miranda* warnings as "proper safeguards" to "combat the[ ] [inherently compelling] pressures" of custodial interrogation and to "permit a full opportunity to exercise the privilege against self-incrimination." *Id.* at 467, 86 S.Ct. 1602. The Court was concerned that, without such warnings, the accused would be "compel[led] . . . to speak where he would not otherwise do so freely." *Id.*

Importantly, the Court did not state that the *Miranda* warnings were anything more than prophylactic. It even refused to say that "the Constitution necessarily requires adherence to any particular" pre-interrogation procedures. *Id.* Instead, the Court was open to federal and state governments devising "potential alternatives for protecting the privilege" outside of *Miranda* warnings. *Id.* Indeed, the Court clarified that its "decision in no way creates a constitutional straitjacket." *Id.* Nothing in *Miranda* itself, therefore, can be said to constitutionalize its eponymous warnings.

This understanding of *Miranda* as prophylactic continued in the decades that followed. For example, in *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Court described the *Miranda* warnings as merely a "supplement" to constitutional doctrine, not doctrine itself. *Id.* at 443, 94 S.Ct. 2357. The Court noted that *Miranda* "established a set of specific protective guidelines" that would "help police officers conduct interrogations without facing a

continued risk that valuable evidence would be lost." *Id.* And it distinguished between police conduct that deprives a person of their "privilege against compulsory self-incrimination" and police conduct that failed to provide "the full measure of procedural safeguards associated with that right." *Id.* at 444, 94 S.Ct. 2357. So, even though the suspect in *Tucker* did not receive the entire complement of *Miranda* warnings, the Court refused to exclude his statements since his interrogation was not coercive. *Id.* at 445, 452, 94 S.Ct. 2357.

The Court emphasized this same understanding of *Miranda* in *New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984). In that case, an officer asked a suspect where he disposed of a firearm before formally placing the suspect under arrest and before administering *Miranda* warnings. *Id.* at 652, 104 S.Ct. 2626. Holding the suspect's answer admissible, the Court explained that "absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Id.* at 654, 104 S.Ct. 2626 (simplified); *see id.* at 659, 104 S.Ct. 2626. The Court then reaffirmed that *Miranda*'s prophylactic warnings are "not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination is protected." *Id.* at 654, 104 S.Ct. 2626 (simplified). Rather than being a constitutional right, *Miranda* warnings provide mere "practical reinforcement for the Fifth Amendment right." *Id.* (simplified). With no coercion in the case, the Court created the "public safety" exception to *Miranda* warnings. *Id.* at 655–56, 104 S.Ct. 2626. It explained that in some situations, "a threat to the public safety outweighs the

need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657, 104 S.Ct. 2626.

A few years later in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the Court held that, without coercion, an initial failure to administer *Miranda* warnings did not taint a suspect's subsequent, *Mirandized* admission. *Id.* at 312–14, 105 S.Ct. 1285. As before, the Court reiterated that the *Miranda* rule "serves the Fifth Amendment," but "sweeps more broadly than the Fifth Amendment itself." *Id.* at 306, 105 S.Ct. 1285. "It may be triggered even in the absence of a Fifth Amendment violation," because the Amendment itself is concerned only with *compelled* testimony. *Id.* at 306–07, 105 S.Ct. 1285. As a result, the Court explained, "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *Id.* at 307, 105 S.Ct. 1285.

Supreme Court precedent, then, has uniformly recognized *Miranda* rules as prophylactic safeguards of the Fifth Amendment right—not a constitutional right in and of itself. And contrary to this court's holding, *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), did not change that analysis. That case involved a congressional enactment to effectively overrule *Miranda*. *Id*. at 436, 120 S.Ct. 2326 (noting that 18 U.S.C. § 3501 made "voluntariness" the "touchstone of admissibility" without regard for *Miranda* warnings). The question in *Dickerson* was whether Congress could supersede *Miranda*. *Id.* at 437, 120 S.Ct. 2326. In answering "no," the Court held that Congress could not legislatively override a "constitutional rule," *id.* at 441, 120 S.Ct. 2326, and described *Miranda* as a

"constitutional decision" with "constitutional underpinnings," *id*. at 438, 440 n.5, 120 S.Ct. 2326. Because "Congress may not legislatively supersede [the Court's] decisions interpreting and applying the Constitution," the Court struck down the law as unconstitutional. *Id.* at 437, 444, 120 S.Ct. 2326.

Nowhere in the opinion, however, did the Court say that the introduction at trial of an un-*Mirandized*, yet voluntary, confession violates the Fifth Amendment by itself. In other words, it never described *Miranda* as a constitutional "right," but called it something different—a "constitutional rule." Critically, the Court recognized just this: the dissent invited the *Dickerson* majority to "hold that the *Miranda* warnings are required by the Constitution" to avoid "judicial overreach[ ]." *Id.* at 442, 120 S.Ct. 2326.[1] But the majority expressly declined that invitation and simply denied that it was overreaching, responding, "we need not go further than *Miranda* to decide this case." *Id.* The Court thus acknowledged that holding that the Constitution itself required pre-interrogation warnings would go *further* than *Miranda*, and it refused to do so.

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[1] In dissent, Justice Scalia accused the majority of exercising "an immense and frightening antidemocratic power" by striking down an Act of Congress for violating a "constitutional rule." *Dickerson*, 530 U.S. at 445–46, 120 S.Ct. 2326 (Scalia, J., dissenting). Justice Scalia invited the majority to take the opinion "out of the realm of power-judging and into the mainstream of legal reasoning" by simply declaring that *Miranda* was in fact a constitutional right. *Id*. at 446, 120 S.Ct. 2326. He observed that the majority "cannot say that, because a majority of the Court does not believe it." *Id*. In his view, since the Court can only nullify statutes in contravention of the Constitution, the *Dickerson* majority acted "in plain violation of the Constitution." *Id*.

C.

Given the text and history of the Self-Incrimination Clause and the overwhelming weight of Supreme Court precedent, our court was wrong to rule that the lack of *Miranda* warnings by itself violates the Constitution for purposes of § 1983. That section provides a civil action against state officials who cause a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. *Miranda* warnings are neither "rights, privileges, [n]or immunities" under the Constitution; so a violation of *Miranda* alone cannot sustain money damages under § 1983.

To begin, the text of the Fifth Amendment in no way leads to our court's contrary reading—it says nothing about a pre-interrogation right to be advised of the right against self-incrimination. The long history of the common law right likewise provides no support for a fundamental right *to be warned*. Instead, the text and history show that the Self-Incrimination Clause protects against coerced or compelled confessions, and mandates that any statement used against an accused at trial be freely and voluntarily given.

And by the plain terms of the *Miranda* decision and at least 21 other Supreme Court cases interpreting it,[2] the absence of its warnings cannot sustain a claim for money damages. These cases all describe the *Miranda* warnings as "prophylactic," *Quarles*, 467 U.S. at 654, 104 S.Ct. 2626, "procedural safeguards," *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602, or "protective guidelines," *Tucker*, 417 U.S. at 443, 94

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[2] *See* chart, *supra*.

S.Ct. 2357. Not one of them describes *Miranda* warnings as a "constitutional right."

This distinction is important because § 1983 only affords a cause of action for "the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997); *see also Carey v. Piphus*, 435 U.S. 247, 254, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (explaining that the "basic purpose of a § 1983" claim is "to compensate persons for injuries caused by the deprivation of constitutional rights"). The Court has been clear that "rights" are to be interpreted strictly in the § 1983 context; they don't include "broader or vaguer 'benefits' or 'interests.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). They certainly don't include "judicially created prophylactic rules." *Chavez v. Martinez*, 538 U.S. 760, 780, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (Scalia, J., concurring in part in the judgment).

So the central question for the jury on Tekoh's claim was whether the confession admitted at trial was improperly coerced, not merely whether *Miranda* was violated. Of course, as the district court recognized, whether *Miranda* warnings were given is a factor—but only *a factor*—in determining the voluntariness of Tekoh's confession under the totality of the circumstances.

Dickerson did not change this understanding. In that case, the Court expressly affirmed that it was not going beyond *Miranda*. 530 U.S. at 442, 120 S.Ct. 2326 ("[W]e need not go further than *Miranda* to decide this case."). Indeed, *Dickerson* quotes *Tucker*'s language, without qualification, that *Miranda*'s procedural safeguards are "not themselves rights protected by the Constitution." *Id*. at 438, 120 S.Ct.

2326 (quoting *Tucker,* 417 U.S. at 444, 94 S.Ct. 2357). To be sure, *Dickerson* announces that *Miranda* is a "constitutional rule." *Id.* at 428, 120 S.Ct. 2326. But that is a far cry from elevating it to a "constitutional right"—a promotion that the Court explicitly declined to allow. *Id.* at 442, 120 S.Ct. 2326. Accordingly, the best reading of *Dickerson* is that it does not undermine the long line of cases characterizing *Miranda* as a prophylactic rule and not a "constitutional right."

The Court confirmed this understanding in *Chavez*. In that case, a plaintiff brought a § 1983 action against an officer for questioning him without *Miranda* warnings—much like this case except that his admissions were never used against him in criminal proceedings. 538 U.S. at 764–65, 123 S.Ct. 1994 (plurality opinion). A plurality of four Justices reiterated that *Miranda* remained a prophylactic rule and was not a constitutional right. *Id.* at 772, 123 S.Ct. 1994. The plurality explained that "a violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case." *Id.* at 770, 123 S.Ct. 1994 (emphasis omitted). But "[r]ules designed to safeguard a constitutional right . . . do not extend the scope of the constitutional right itself." *Id.* at 772, 123 S.Ct. 1994. As a result, "violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person." *Id.* Because *Miranda* is not a constitutional right, the plurality concluded that the failure to provide *Miranda* warnings "cannot be grounds for a § 1983 action." *Id.*[3]

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[3] Notably, Chief Justice Rehnquist, the author of *Dickerson*, joined Justice Thomas's plurality opinion in full. 538

Justice Souter, joined by Justice Breyer, likewise concurred in denying relief under § 1983 for violating *Miranda*. *See id.* at 777, 123 S.Ct. 1994 (Souter, J., concurring in the judgment). He agreed that *Miranda* warnings are solely a "complementary protection" to and "outside the core" of the Fifth Amendment. *Id.* at 777–78, 123 S.Ct. 1994. While noting that the "absence of *Miranda* warnings" as "a basis for a § 1983 action *under any circumstance*" was not before the Court, Justice Souter questioned the need for civil liability when certain non-core Fifth Amendment violations occurred, like "whenever the police fail to honor *Miranda*." *Id.* at 778–79, 779 n.*, 123 S.Ct. 1994 (emphasis added). He noted that "[r]ecognizing an action for damages in [such a case] not only would revolutionize Fifth . . . Amendment law," but would have to be justified as "necessary in aid of the basic guarantee." *Id.* at 779, 123 S.Ct. 1994. But there was "no reason to believe" an extension of § 1983 to *Miranda* was necessary, because existing measures such as "excluding testimonial admissions" had been sufficient. *Id.* While there was "no failure of efficacy infecting . . . Fifth Amendment law" requiring an extension of § 1983, Justice Souter departed from the plurality and suggested that the particular "outrageous conduct" by the police in *Chavez* could give rise to a separate § 1983 claim under substantive due process (a separate claim Tekoh did not raise). *Id.*

Chavez thus removes any doubt over whether Tekoh can bring a § 1983 action for violating *Miranda*. After *Chavez*, "it is now clear that there is

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U.S. at 763 n.*, 123 S.Ct. 1994. So, our court's use of *Dickerson* to announce a sea-change in *Miranda* jurisprudence would be lost on the author of that opinion himself.

no cause of action for money damages for violations of *Miranda*." Erwin Chemerinsky, *Federal Jurisdiction* § 8.9, at 631–32 (8th ed. 2021); *see also Renda v. King*, 347 F.3d 550, 558 (3d Cir. 2003) ("[S]ix Justices (Chief Justice Rehnquist, together with Justices Thomas, O'Connor, Scalia, Souter, and Breyer) agreed that mere custodial interrogation absent *Miranda* warnings is not a basis for a § 1983 claim.").

The year after *Chavez*, the Court again reinforced the "prophylactic" nature of *Miranda* post-*Dickerson*. *See United States v. Patane*, 542 U.S. 630, 636, 639, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004) (plurality opinion). At issue was whether physical evidence obtained as the fruit of an unwarned, but voluntary, statement was admissible. *Id*. at 633–34, 124 S.Ct. 2620. A plurality of three Justices explained that "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights." *Id.* at 641, 124 S.Ct. 2620. According to the plurality, this was "evident in many of [the Court's] pre-*Dickerson* cases," and the Court has "adhered to this view since Dickerson." *Id.* The plurality noted that "*Dickerson*'s characterization of *Miranda* as a constitutional rule does not lessen the need to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it." *Id*. at 643, 124 S.Ct. 2620. And admitting evidence that is the fruit of a *Miranda* violation without more "presents no risk that a defendant's coerced statements . . . will be used against him at a criminal trial." *Id*.

Justice Kennedy, joined by Justice O'Connor, concurred and agreed with the majority that *Dickerson* "did not undermine" the Court's precedents like *Elstad* and *Quarles*. *Id*. at 644–45, 124 S.Ct. 2620

(Kennedy, J., concurring in the judgment). Justice Kennedy only differed from the plurality in concluding that it was unnecessary to characterize the statements at issue as taken in violation of *Miranda*. *Id*. at 645, 124 S.Ct. 2620.

Contrary to the panel's holding, then, *Chavez* and *Patane* add to the overwhelming precedent that a *Miranda* violation itself does not violate a constitutional right.[4] Rather than find every which way to distinguish or limit these cases, *see Tekoh*, 985 F.3d at 720–23, our court should have accepted their persuasive force and rejected Tekoh's theory of § 1983 liability.

Throughout its history, the Fifth Amendment's watchword has been "voluntariness." Our court's decision substitutes that word with "warnings." That

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[4] Those two cases are not alone in calling *Miranda* prophylactic after *Dickerson*. *See Montejo v. Louisiana*, 556 U.S. 778, 794, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (describing *Miranda* as "prophylactic protection of the right against compelled self-incrimination"); *Maryland v. Shatzer*, 559 U.S. 98, 103, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010) ("In [*Miranda*], the Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the 'inherently compelling pressures' of custodial interrogation." (citation omitted)); *Florida v. Powell*, 559 U.S. 50, 59, 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010) (describing *Miranda* warnings as "procedural safeguards" (simplified)); *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (describing *Miranda* warnings as "a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination"); *Howes v. Fields*, 565 U.S. 499, 507, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012) ("*Miranda* adopted a set of prophylactic measures designed to ward off the inherently compelling pressures of custodial interrogation . . . ." (simplified)).

is simply incorrect, as a matter of text, history, and precedent.

D.

The court's decision today puts us at odds with six other circuit courts. The Second, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits hold, as I would, that *Miranda* is a procedural safeguard and the remedy for its violation is exclusion, not a § 1983 action. *See Dalessio v. City of Bristol*, 763 F. App'x 126, 127 (2d Cir. 2019) (unpublished) ("Dalessio cannot state a Fifth Amendment claim because 'the failure to give *Miranda* warnings does not create liability under § 1983.'" (quoting *Neighbour v. Covert*, 68 F.3d 1508, 1510 (2d Cir. 1995)) (per curiam)); *Foster v. Carroll County*, 502 F. App'x 356, 358 (5th Cir. 2012) (unpublished) ("Violations of the prophylactic *Miranda* procedures do not amount to violations of the Constitution itself and, as such, fail to raise a cause of action under § 1983."); *McKinley v. City of Mansfield*, 404 F.3d 418, 432 n.13 (6th Cir. 2005) ("McKinley also argues that Fortney's failure to read him the *Miranda* warnings at the outset of the second interview is actionable under § 1983. On the contrary, a § 1983 action on that basis is squarely foreclosed by the Supreme Court's decision two terms ago in *Chavez*."); *Hannon v. Sanner*, 441 F.3d 635, 637 (8th Cir. 2006) (affirming that "*Miranda* procedural safeguards are not themselves rights protected by the Constitution," even after *Dickerson* (simplified)); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1165 n.6 (10th Cir. 2003) (explaining that "violations of *Miranda* rights do not subject police officers to liability under § 1983" (citing *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976))); *Lloyd v. Marshall*, 525 F. App'x 889, 892 (11th Cir. 2013) (unpublished)

("[F]ailing to follow *Miranda* procedures . . . does not violate any substantive Fifth Amendment right such that a cause of action for money damages under § 1983 is created." (quoting *Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999))). Even post-*Dickerson*, these cases remain the law. As a result, our court's expansive reading of that case is wrong.

Contrary to the panel's position, it appears that the *only* out-of-circuit support for the panel's decision comes from the Seventh Circuit. *See Sornberger v. City of Knoxville*, 434 F.3d 1006, 1026–27 (7th Cir. 2006). In that case, the court permitted a § 1983 claim based on the use of un-*Mirandized* statements in probable cause and bail hearings. *Id.* at 1027. Even though the court found the police interrogation coercive, it also seemed to allow a stand-alone § 1983 claim for the absence of *Miranda* warnings. *Id.*

In short, our court is out of step with Supreme Court precedent and the vast majority of circuit courts around the country.

II.

Our decision here sets us apart from others in elevating *Miranda* warnings to the level of a constitutional right. By seizing on a few lines from a single case, we willfully ignore the mountain of Supreme Court precedent to the contrary. Worse yet, our interpretation of the Self-Incrimination Clause is detached from text and history. Given the clear weight of authority against us, we should not have been so bold.

I respectfully dissent.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

HONORABLE GEORGE WU

UNITED STATES DISTRICT JUDGE PRESIDING

Terence Tekoh, PLAINTIFF, VS. County of Los Angeles, et al., DEFENDANT,	))))))))	NO. CV 16-7297 GW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

THURSDAY, AUGUST 27, 2018

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THE COURT: Yes. Including causation as to damages so it would just be in terms of liability. And, again, there is also something I wanted to address with the parties. I handed you out that Soot, SOOT, case, and there are actually two constitutional amendments that could potentially be applied. The first is the Fifth Amendment, and the second one is the Fourteenth **[16]** Amendment. But the Fourteenth

Amendment requires a shocking to the conscience type of standard. It is extremely high.

Is the plaintiff intending to to go forward under both sections or just under the Fifth Amendment?

MR. BURTON: We understood the court's initial ruling to be that we are going only under the Fifth Amendment standard. I think the Fifth Amendment standard is a lower standard.

THE COURT: It definitely is a lower standard but that is the point is that originally when it was presented, you know, because one of the problems I had was that the plaintiff in the proposed jury instructions had, you know, one as to Miranda violation, supposedly, and then another one as to what it referred to as the Fourteenth Amendment violation. And then the other one was as to use of false evidence.

And so the false evidence aspect I used the Ninth Circuit standard instruction, and the Fifth Amendment violation based on Miranda, I said Miranda violations don't give rise to a constitutional 1983 action. And I cited cases for that proposition.

But the middle one was the Fourteenth Amendment, and the problem that I had was the standard that you were giving me in that instruction really wasn't **[17]** applicable to the Fourteenth Amendment because it shocks the conscience is the criteria. The one that you had under the Fourteenth Amendment was actually more one that was a propos for the Fifth Amendment.

And so the question is is the plaintiff at this point in time only attempting to go under the Fifth Amendment, or does the plaintiff want to go under both the Fifth and the Fourteenth. But the problem

is if youwant to go under the Fourteenth Amendment, the criteria is so much higher.

MR. BURTON: Right. The whole way we prepared it and the way that we have submitted our jury instructions in our case is that it is a Fifth Amendment violation.

THE COURT: All right.

MR. BURTON: But we do think just in terms of the Miranda --

THE COURT: I think the failure to give a Miranda warning can be part of a consideration as to whether or not a confession was coerced. But it would have to be a situation where a Miranda warning was required because if it wasn't a situation where a Miranda warning was required, then it doesn't necessarily preclude the existence of a coerced confession, but one of the factors would not be whether or not the person should have been given an advisal or a warning.

[18] But let me just ask this however: Well, is it a dispute as to whether the, I guess it is in dispute as to whether or not a Miranda warning should have been given because the defense position is that he was not in custody being questioned in custody. Or is it?

MR. BURTON: If I could be heard, your Honor, briefly on that.

THE COURT: Let the defense answer it first.

MR. KIZZIE: If I could respond to the court's question first.

MR. KIZZIE: Thank you.

Thank you, your Honor. Yeah. It is the defendant's position that this was not a custodial interrogation requiring a Miranda warning. Further, even so Miranda is a prophylactic rule. It is not a

constitutional violation which I think was one of the reasons why it wasn't brought up in the first trial.

THE COURT: But whether or not a confession is coerced, the absence of a Miranda warning is a factor that can be taken into account by a jury.

MR. KIZZIE: I think I got to disagree with the court, your Honor, based on some of the cases that I read. But, in terms of that, you know, your Honor, it is our position that this wasn't, even so, it wasn't a custodial interrogation authorizing Miranda.

[19] THE COURT: Well, let's put it this way, I think I would instruct them on whether or not a Miranda warning was required, and if the jury finds that it was required, then, the absence of such a warning is a fact that the jury can take into consideration.

MR. KIZZIE: Thank you. For the record, we would object and disagree with such an instruction, but it is understood.

THE COURT: Okay. Let me hear from the plaintiff's counsel.

MR. BURTON: Thank you, your Honor. Well, first, I think it is settled. I think it is the Dickerson case if I am not mistaken that, in fact, Miranda is a constitutional rule not a prophylactic rule.

What the Martinez --

THE COURT: Let me stop you. I don't agree with your characterization. In other words, I think the Supreme Court in Chavez makes it clear that the extent to which it is what it is.

MR. BURTON: Well, I was just going to address Chavez, and I was cocounsel on that case. In that case, there was a custodial interrogation which was

not Mirandized of a gentleman who had just been shot.

THE COURT: Let me stop you. We are all familiar with the facts of Chavez.

[20] MR. BURTON: So the statement was never used in a criminal case. So that is why there was no Fifth Amendment violation. I mean, that was a very fractured court, but everybody reads it to say that the Fifth Amendment violation doesn't occur when there is a Miranda-less interrogation. It occurs when the Miranda-less interrogation statement is used in a subsequent criminal case.

Then the issue arose, does that mean in a trial or in any post trial, criminal prosecution. And that case was very much up in the air in California. In fact, I had a case that turned on that issue in front of Judge Cooper at that time and was up on an interlocutory appeal when the Stoot case came down. And what Stoot held was that the use element of a Fifth Amendment violation is satisfied if it is used in any proceeding. It doesn't have to be a trial.

Now, in this case, since it was used at the trial, that is really not an issue. But so the Fifth Amendment violation occurs when a statement is taken in violation of the Fifth Amendment which we contend means when a Miranda warning should have been given but wasn't and, then, it is used in a subsequent criminal proceeding.

That is when the violation occurred. So that **[21]** is why it is not the Miranda-less questioning itself that is a Fifth Amendment violation. It is the use of the Miranda-less statement.

In terms of whether the Miranda warning had to be given, the parties do not dispute that no

Miranda admonition was given in this case. The parties dispute whether Mr. Tekoh was, quote, in custody, unquote, for the purpose of triggering the obligation to give a Miranda warning.

We, the plaintiff say that the --

THE COURT: Let me stop you. That stuff is going to be allowed to be presented to the jury, in otherwords, the factual situation that was in existence at the time that the officer was questioning Mr. Tekoh. And so all that stuff is going to be able to come in. So I don't think either side is arguing about that issue.

And as I have indicated to both sides, I don't think that a failure to Mirandize when Miranda was required is a separate 1983-- you can't use it for purposes of 1983, and that is the case that I cited in my decision at docket No. 205 which stands for that proposition.

But, conversely, however, I do agree that since if we are going to, if the jury is going to consider the issue of whether or not there was a coerced **[22]** confession in violation of the Fifth Amendment, obviously, whether or not he was in custody is an issue, what he was told, whether or not -- because, clearly, if he was advised of his constitutional rights, that would have been a factor. And if he wasn't advised of it, that is another factor that the jury can consider. Not that it establishes a violation of the Fifth Amendment, but it is part and parcel of whether or not there was a confession coerced from him. So I agree with that.

MR. BURTON: Could I make two brief points, your Honor. The first is that for the first trial, and I think for this trial too, we tendered an instruction

based on United States versus Kim which is we believe the controlling Ninth Circuit authority on whether a person is, quote, in custody or not for Miranda purposes.

In that case, it was a woman. Their store was being raided. She was sat down at a table I think for 45 minutes. Not allowed to leave. She was not handcuffed. And they found, they went through the Kim factors that have been cited repeatedly.

We think the jury should be instructed on what the Kim factors are for whether or not there is, quote, in custody for the purpose of triggering Miranda because that is the law, clearly established law in the Ninth Circuit.

[23] Second, and we had this problem several times during the first trial, Deputy Vega, now Sergeant Vega, took the stand and said, well, we didn't have to Mirandize him because we didn't handcuff him. I mean, that is not the law. And they shouldn't be testifying as to legal conclusions like that to the jury. We think that is the court's obligation.

THE COURT: Put it this way, I don't think that they testified to that, and if they testified to that, if my memory serves me, I did instruct them on when somebody was, you know, the types of encounters you could have. You could have a voluntary discussion with a law enforcement officer. An officer can briefly detain like a Terry stop. My recollection is I advised them on all that.

MR. BURTON: Yes. But I mean, you did not instruct -- the jury was not instructed on, here, over our objection, the instruction was not given that we took directly from United States versus Kim.

THE COURT: Let me put it this way. I do agree with you. I will take another look at your proposed instruction based on Kim. And I do agree that a lot of the factors, if my memory serves me well, that are factors, are factors in consideration as to whether or not a confession is coerced, for example, whether or not **[24]** the person was in a locked area or an open area.

I mean there is a lot of factors that can be considered in that regard. So I have no problem with instructing the jury in that regard. The exact wording of it is something that we have to decide at some point in time but the concept, I don't have a problem.

MR. BURTON: Thank you, your Honor.

THE COURT: Okay. Why don't you guys spend --

MR. KIZZIE: Your Honor, before we take that break, can I just briefly be heard on that point, please.

THE COURT: All right.

MR. KIZZIE: Well, I can just address the court from here if that is okay. Your Honor, our issue really, setting aside the Miranda constitutionality, is that as the court is I believe of the same opinion, it is inappropriate and should not be permitted to be argued that an alleged violation of Miranda, whatever the factors are, is de facto a Fifth Amendment coerced violation as well. That is our position.

THE COURT: Let me stop you. I agree with that, and I won't allow the plaintiff to make the argument that a violation of Miranda establishes a coerced confession. In other words, I don't think you need to reference Miranda because you just need to reference whether or not these factors -- in other words, was he advised of his **[25]** constitutional rights, of his right to

remain silent, and et cetera. And the answer to that is either "yes" or "no".

MR. KIZZIE: And, also, your Honor, regarding some of the other issues that we are supposed to touch base on today at some point, does the court want to take them up now or after lunch?

THE COURT: First of all, I want you to spend 10 minutes to decide whether or not the trial is going to be bifurcated between liability and damages.

MR. KIZZIE: The issue, your Honor, is that causation is inherent to liability, not necessarily damages. So, for example, the first question as in the first trial could be did Sergeant Vega arrest him without probable cause. If the jury decided yes, they would still have to decide whether his arrest without probable cause was a substantial factor.

THE COURT: But the problem is that those aspects are problematic in the sense that a lot of the difficulties we have with the proposed evidence arises at that point in time. So we could decide whether or not the elements of a coerced confession were present because the answer to that question is either "yes" or "no", and, then, thereafter, you can decide the issue as to whether or not the violation, if it occurred, caused damages and, **[26]** if so, what damages they caused. So I don't see a problem with bifurcating at that point in time, and it is often the case where liability is bifurcated from causation, then we don't do the causation aspects in the first stage. We do it in the second stage. But I will leave you guys to talk about it for 10 minutes.

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UNITED STATES DISTRICT COURT
DISTRICT OF CALIFORNIA

TERENCE B. TEKOH, Plaintiff, v. SGT CARLOS VEGA Defendant	Case No.: 16-cv-7297 GW(SKx) **[PROPOSED] SUPPLEMENTAL JURY INSTRUCTIONS RE: FIFTH AMENDMENT, MIRANDA AND DAMAGES** Pretrial Conference: September 24, 2018 Trial: September 25, 2018

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SUPPLEMENTAL JURY INSTRUCTION NO. 3
[Dkt. 257, No. 22]

In order to establish that the acts or failures to act of the defendant police officer deprived the plaintiff of his particular rights under the laws of the United States or the United States Constitution as explained in later instructions, the plaintiff must prove by a preponderance of the evidence that the acts or failures to act were so closely related to the deprivation of the plaintiff's rights as to be the moving force that caused the ultimate injury.

Source:

Ninth Circuit Model Jury Instruction No. 9.2

SUPPLEMENTAL PROPOSED JURY INSTRUCTION NO. 4

Plaintiff contends that Defendant Carlos Vega violated his rights guaranteed by the Fifth Amendment to the United States Constitution by **coercing**/*compelling*[2] an *involuntary* confession from

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[2] Defendant contends that the most accurate and appropriate language should use the word "compel" versus "coerce" because such is the actual language of the Constitution of the United States Amendment V *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"*

him that was later used against him in a criminal trial.

Defendant Vega denies that he **coerced**/*compelled* Plaintiff's confession.

A confession is **coerced**/*compelled* if the police use *illegal*[3] physical or psychological coercion to undermine a person's ability to exercise his free will. You must consider the objective totality of all the surrounding circumstances. A **coerced**/*compelled* confession depends on the details of the interrogation.

Factors to consider include, but are not limited to:

(1) The length of the questioning;

(2) The physical environment in which the statement was given;

(3) The manner in which the person was questioned;

(4) **Whether the police advised the person being questioned of his rights to remain silent and to have a counsel present during a custodial interrogation**/*If Miranda warnings were legally required due to the circumstances, whether the officer*

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3 As the Court indicated, the analysis is objective and anyone could find merely being the presence of a police officer to be coercive/compelling, but not in violation of the Fifth Amendment. Further, the jury found Plaintiff was lawfully arrested and it was not based on fabricated evidence. **Docket No. 177 and 193.** Accordingly, "[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Thus, it must be clear that *illegal* physical or psychological coercion is the standard.

advised Plaintiff of his Miranda rights and Plaintiff unequivocally invoked those rights.[4]

(5) **The use of fear to break a suspect**[5]

(6) **Threats or promises relating to one's children or family**[6]

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[4] Defendant entirely objects to this and any language discussing *Miranda*. Two separate judges already found no *Miranda* violation and, thus, is an issue of res judicata or, at least, another basis to grant qualified immunity or entirely break the chain of causation as to Plaintiff's claimed damages stemming therefrom as to Defendant Vega. Dkt. 42-3 Decl. of DDA Jane Creighton ¶ 7-8. Further, the failure of police to administer *Miranda* warnings *does not* create a cause of action for money damages under the 5th amendment here. A violation of Miranda is not enough to sustain a claim under § 1983 because there is no constitutional right to Miranda warnings themselves and their purpose is to merely supply practical reinforcement for the Fifth Amendment right against self-incrimination. *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Oregon v. Elstad*, 470 U.S. 298, 310 (1985); *Veilleux v. Perschau*, 101 F.3d 1, 1-3 (1st Cir. 1996)(*en banc*); *Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999). Inserting this *Miranda* issue is irrelevant, misleading and confusing to the jury resulting in unfair prejudice to Defendant. Defendant only supplies this language if the Court overrules Defendant's objection and insists that *Miranda* should be considered.

[5] Defendant contends that this factor is vague, argumentative, and unnecessarily duplicative of factor No. 3, "The manner in which the person was questioned."

[6] Defendant contends that this factor is vague, argumentative, and unnecessarily duplicative of factor No. 3, "The manner in which the person was questioned."

(7) **The tone of voice used and the promises or representations made by the questioner**[7]

(8) **Tactics designed to generate a feeling of helplessness**[8]

(9) Whether the officer's conduct and investigative techniques were objectively **coercive**/*compelling*[9].

PLAINTIFF'S PROPOSED INSTRUCTION RE: MIRANDA NO. 4A

If Defendant Vega interrogated Plaintiff while in custody without advising him of his rights to remain silent and to consult an attorney, you may consider that in determining whether the confession was voluntary. These rights were established by *Miranda v. Arizona*, and are referred to by that case name.

Defendant Vega denies that Plaintiff was in custody for *Miranda* purposes, and therefore he was not required to advise Plaintiff of his rights to remain silent and to consult an attorney.

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[7] Defendant contends that this factor is vague, argumentative, and unnecessarily duplicative of factor No. 3, "The manner in which the person was questioned."

[8] Defendant contends that this factor is vague, argumentative, and unnecessarily duplicative of factor No. 3, "The manner in which the person was questioned."

[9] To coerce/compel a confession, the officer must logically first engage in objectively compelling or coercive investigative conduct. *Cunningham v. City of Wenatchee*, 345 F.3d 802, 811 (9th Cir. 2003) ("Further, Cunningham's mental disorder cannot invalidate his confession because he has not first shown that Perez used coercive tactics"); *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

If Plaintiff was "in custody" for *Miranda* purposes, and Defendant Vega did not inform Plaintiff of his rights, it would weigh in favor of a determination that the confession was involuntary.

To determine whether Plaintiff was in custody, and was therefore entitled to *Miranda* admonitions, you should focus on the objective circumstances, not the subjective views of the officer or the individual being questioned. The ultimate question is whether the officer created a setting from which a reasonable person would believe that he or she was not free to leave.

The following factors are among those likely to be relevant to deciding that question:

(1) The language used to summon the individual;

(2) The extent to which the individual being questioned is confronted with evidence of guilt;

(3) The physical surroundings;

(4) The duration of the detention, and;

(5) The degree of pressure applied to detain the individual.

Handcuffing is not required for a person to be "in custody."

United States v. Kim, 292 F.3d 969, 973-74 (9th Cir. 2002); *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009), *cert. denied sub nom. Jensen v. Stoot*, 559 U.S. 1057 (2010).

DEFENDANTS' PROPOSED INSTRUCTION RE: MIRANDA No. 4B[10]

Whether or not the circumstances legally required Miranda rights and Plaintiff was informed of those rights is only one factor among the objective totality of the circumstances you may consider to determine whether Plaintiff's confession was illegally compelled. However, whether or not Plaintiff was provided Miranda rights is not solely determinative of whether Plaintiff's confession was illegally compelled in and of itself, and you must consider and weigh all previously mentioned factors in your decision.

Miranda rights are only required if Plaintiff proves by a preponderance of the evidence that:

1) The Plaintiff was in legal custody by Deputy Vega; and
2) The Plaintiff was interrogated by Deputy Vega while in custody.

The custody determination is objective, and is not based on the subjective views of the officers or the individual being questioned. In determining whether a suspect is in custody for purposes of Miranda, you are to consider what objective circumstances surrounded the interrogation. Second, you are to decide whether a reasonable person in those circumstances would have felt he or she was in custody and not at liberty to terminate the interrogation and leave.

Relevant factors to consider in determining whether a suspect is in custody for purposes of

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[10] Defendant entirely objects to any language discussing *Miranda,* and only submits this instruction should the Court overrule Defendant's objection. Please see fn. 5.

Miranda are the location of the interrogation, the length and manner of the questioning, indicia of arrest, whether the suspect was handcuffed, whether the officers let the suspect know they have focused the investigation on him, and whether Plaintiff was informed of his arrest prior to the questioning. Handcuffs are normally among the main indicia of custody.

Source:
United States v. Bassignani, 575 F.3d 879, 883 (9th Cir. 2009); J*.D.B. v. North Carolina*, —— U.S. ——, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011); *Yarborough v. Alvarado*, 541 U.S. 652, 662–63, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004); *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995); *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994); *Winter v. Scribner*, No. CIV S-05-543 KJM EFB, 2012 WL 1189482, at *18 (E.D. Cal. Apr. 9, 2012), subsequently aff'd, 577 F. App'x 651 (9th Cir. 2014); *People v. Ochoa* (1998) 19 Cal.4th 353, 401–402, 79 Cal.Rptr.2d 408, 966 P.2d 442.); *People v. Boyer* (1989) 48 Cal.3d 247, 272, 256 Cal.Rptr. 96, 768 P.2d 610 [as clarified by Stansbury].; *Meridith v. Erath*, 324 F.3d 1057, 1062 (9th Cir. 2003)

PLAINTIFF'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 5

When a police officer questions a suspect, he knows that any statement the suspect gives may be used to prosecute that suspect. Moreover, he knows that an obtained confession will almost certainly be used to prosecute. Thus, while the officer may not

actually introduce the statement into court, coercing the confession sets in motion a series of acts by others which the officer knows or reasonably should know would cause the statement to be introduced.

Crowe v. Cty. of San Diego, 608 F.3d 406, 430 (9th Cir. 2010)

PLAINTIFF'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 6

A confession is like no other evidence. A confession is among the most damaging evidence that can be admitted against a person.

Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

PLAINTIFF'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 7[11]

Plaintiff contends that Defendant Carlos Vega deprived him of rights guaranteed by the Fifth Amendment to the United States Constitution by interrogating him while in custody without advising him of his rights to remain silent and to consult an attorney. These rights were established by *Miranda v. Arizona,* and are referred to by that case name.

Defendant Vega denies that Plaintiff was in custody for *Miranda* purposes.

To determine whether Plaintiff was in custody, and was therefore entitled to *Miranda* admonitions,

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[11] Plaintiff proposed this instruction as an alternative to Plaintiff's Proposed Supplemental Instruction No. 4 & 4A to preserve the record for appeal

you should focus on the objective circumstances, not the subjective views of the officer or the individual being questioned. The ultimate question is whether the officer created a setting from which a reasonable person would believe that he or she was not free to leave.

The following factors are among those likely to be relevant to deciding that question:

(1) The language used to summon the individual;

(2) The extent to which the individual being questioned is confronted with evidence of guilt;

(3) The physical surroundings;

(4) The duration of the detention; and

(5) The degree of pressure applied to detain the individual, although handcuffing is not required for a person to be "in custody."

In order to establish his Fifth-Amendment claim, Plaintiff must prove by a preponderance of the evidence that Defendant Carlos Vega obtained one or more statements from him in violation of *j\1iranda* that were subsequently used in the criminal case against Plaintiff.

United States v. Kim, 292 F.3d 969, 973-74 (9th Cir. 2002); *Stoot v. City of Everett,* 582 F.3d 27 910, 925 (9th Cir. 2009), *cert. denied sub nom. Jensen v. Stoot,* 559 U.S. 1057 (2010).

* * *

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TERENCE B. TEKOH, Plaintiff v. DEPUTY CARLOS VEGA, Defendants	))))))))))	No.: CV 16-7297-GW(SKx) **FINAL JURY INSTRUCTIONS**

FINAL JURY INSTRUCTIONS

* * *

II. Plaintiff's Claim: 42 U.S.C. § 1983 - Violation of Constitutional Right

Plaintiff brings his claim under the federal statute, 42 U.S.C. § 1983, which provides that any person or persons who, under color of state law, deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States shall be liable to the injured party.

In order to prevail on his § 1983 claim against the Defendant, Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the Defendant acted under color of law; and

2. the acts of that Defendant deprived the Plaintiff of his particular rights under the United States Constitution as explained in later instructions.

A person acts "under color of law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation.

The parties have stipulated that Defendant Vega was acting under color of law at the time of the incident.

If you find Plaintiff has proved each of those elements, and if you find that the Plaintiff has proved all the elements he is required to prove under the following instructions that deal with the particular constitutional right, your verdict should be for the Plaintiff. If, on the other hand, Plaintiff has failed to prove any one or more of the elements in the following instructions, your verdict should be for the Defendant.

In order to establish that the acts or failures to act of a defendant police officer deprived the Plaintiff of his particular right under the United States Constitution as explained in later instructions, the Plaintiff must prove by a preponderance of the evidence that the acts or failures to act of the Defendant were so closely related to the deprivation of the Plaintiff's rights as to be the moving force that caused the ultimate injury.

Plaintiff contends that Defendant Vega violated his rights guaranteed by the Fifth Amendment to the United States Constitution by improperly coercing or

compelling an involuntary confession from him that was later used against him in a criminal trial.

Defendant Vega denies that he improperly coerced or compelled Plaintiff's confession.

In order to prove that Defendant Vega violated his Fifth Amendment right against self-incrimination, Plaintiff must prove by a preponderance of the evidence that:

(1) Defendant Vega obtained a confession or incriminating statement from Plaintiff that was used in a criminal trial or proceeding against him;

(2) that the confession or statement was improperly coerced and not voluntary; and

(3) Defendant acted intentionally in obtaining that coerced confession or statement.

A police officer acts "intentionally" when the officer acts with a conscious objective to engage in particular conduct. It is not enough to prove that the officer negligently or accidentally engaged in the improper action. But while the Plaintiff must prove that the Defendant intended to act, the Plaintiff need not prove that the Defendant intended to violate the Plaintiff's Fifth Amendment right against self-incrimination.

A confession is improperly coerced or compelled under the Fifth Amendment if a police officer uses physical or psychological force or threats not permitted by law to undermine a person's ability to exercise his or her free will.

You must consider the objective totality of all the surrounding circumstances. Whether a confession is

improperly coerced or compelled depends on the details of the interrogation.

Factors to consider include, but are not limited to:

(1) The location where the questioning took place (for example at a police station or on a public street), and whether the location was chosen by the person or the officer;

(2) Was the person free to go or was the person under arrest or physically restrained;

(3) Was the length of the questioning oppressive;

(4) What Plaintiff was told at the beginning of the encounter and throughout its duration;

(5) The manner in which the person was questioned – for example: was any actual force or infliction of pain used on the person; was the person (or anyone near or dear to him or her) threatened either physically or psychologically; was the officer's gun drawn; did the officer continually shout at the suspect for an extended period; etc.

(6) If the warnings under the *Miranda* decision (as described below) were required at the time, whether the police advised the person being questioned of his or her right to remain silent and to have a counsel present during the custodial interrogation; and

(7) Any other factors that a reasonable person would find coercive under the circumstances.

Generally, in deciding whether a particular action taken by a police officer in the situation was coercive, you should consider whether a reasonable person under those circumstances would have found that action to be coercive or compelling. In other words,

one looks objectively at the actions and language utilized by the police officer to determine whether that action and language would overcome a reasonable person's ability to exercise his or her free will.

Normally, this will mean that a particular suspect's personal characteristics and subjective reactions are not relevant, with the following exception. Should the officer be aware that the suspect has a personal sensitivity (such as the suspect's age or medical condition) which would render him or her to be abnormally susceptible to coercion through the application of physical or psychological force in that area, you can consider whether the officer knowingly and improperly used that sensitivity to coerce a confession.

For example, the fact that an officer insists on conducting the interrogation of a suspect in an open field where the crime allegedly occurred would not be coercive. However, if the officer is aware that the suspect is agoraphobic (that is, he or she has an abnormal fear of being in open places), the officer's continued insistence on keeping the suspect at that location for an extended period of time could be considered by the jury as a factor which demonstrates that the officer was attempting to undermine the suspect's exercise of his or her free will.

Additionally, where certain of the officer's actions are permitted by law, those actions by themselves cannot be considered coercive.

The following instruction is provided to assist you in understanding the ways in which a police officer can lawfully question a person.

Voluntarily Answering Police Questions: There is nothing in the Constitution which prevents or forbids a policeman from addressing questions to anyone the officer encounters at a public place. Absent special circumstances, the person approached may not be detained (that is, forced to remain at the location or be frisked); and the person may refuse to cooperate and go on his or her way.

Investigatory Stops: The Fourth Amendment of the Constitution permits brief investigatory stops of an individual by a law enforcement officer when the officer has a "reasonable suspicion" of a crime, that is a particularized and objective basis for suspecting that the individual has been or is involved with criminal activity. Although the individual can be "seized" (that is detained against his or her will) by the officer while pertinent questions are directed to him or her, such an investigatory stop is not an arrest. The person detained is not obliged to answer the questions; answers may not be compelled; and a refusal to answer furnishes no basis for an arrest – although it may alert the officer to the need for continued observation.

Arrests: Generally, an arrest occurs when, after considering the entire situation, the conduct (that is the words and actions) of the officer would cause an innocent person to reasonably believe that he or she will not be free (or permitted) to leave after a period of questioning but that he or she is going to be held in police custody for an indefinite period.

A law enforcement officer may lawfully arrest an individual where the officer has "probable cause" to believe that the individual has committed a crime. Probable cause exists where the facts and circumstances known by the officer at the time of the

arrest are sufficient to warrant a reasonable person to believe that there is a fair probability the individual (to be arrested) has committed a particular crime. Probable cause does not require a preponderance of the evidence.

Under the Supreme Court's decision in *Miranda v. Arizona,* 384 U.S. 436 (1966), in certain situations, a suspect must be advised of his or her constitutional rights (these are referred to as *Miranda* warnings and they include the suspect's right to remain silent and the right to have counsel present at the interrogation) before the police can lawfully engage in questioning him or her. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him or her to be held "in custody." The "ultimate inquiry" underlying the question of custody is simply whether there was either a formal arrest or a restraint on the person's freedom of movement to the degree associated with a formal arrest. To determine whether the suspect is "in custody," one looks to the totality of the circumstances that might affect how a reasonable person in the suspect's position would perceive his or her freedom to leave. The custody determination is objective and is not based upon the subjective views of the interrogating officer or the individual being questioned.

In determining whether the Plaintiff was "in custody" and thus required the *Miranda* warnings to be given, you are to consider all of the circumstances surrounding the interrogation – including, but not limited to:

(1) the language used at the time of the initial contact between the Defendant Vega and Plaintiff; for example did Vega order Plaintiff to do something or did Vega merely make a request;

(2) whether Plaintiff voluntarily approached or accompanied the officer understanding that questioning would ensue;

(3) who chose the location of the interrogation;

(4) the physical surroundings of the interrogation – for example, was the questioning done at a police station; how large was the room where the interrogation was conducted; were the door(s) opened or closed, etc.;

(5) was any form of force, threat of force, or physical restraints used during the interrogation;

(6) the extent to which Plaintiff was confronted with evidence of guilt (although mere accusations or misrepresentations linking a suspect to a crime or statements which inflate the extent of evidence against a suspect do not necessarily render a confession involuntary);

(7) was the duration of the detention ***while the Plaintiff was being questioned*** excessive or unjustified;

(8) whether Plaintiff was ever told that he was not free to leave during the interrogation; or whether he was told that he was under arrest prior to his making any incriminating statement, and

(9) the degree of pressure (if any) applied by Vega to detain the Plaintiff.

The circumstances surrounding an interrogation can change over time, such that an initial encounter which would not be found to be "custodial" in nature

can develop into an arrest or an equivalent "in custody" situation following certain actions or statements by the officer.

Additionally, merely because a suspect confesses during an interrogation does not necessarily mean that he or she was in custody at the time he or she confessed to a crime.

Under California Penal Code § 289(d), it is a felony for a person to commit an act of sexual penetration on a victim when the victim is, at the time, unconscious of the nature of the act and this is known to the person committing the act. "Unconscious of the nature of the act" means incapable of resisting because the victim was unconscious or asleep or was not aware, knowing, perceiving, or cognizant that the act occurred.

Evidence was offered at trial that Plaintiff was acquitted of the sexual assault charge in a criminal trial. However, the validity of the arrest does not depend on whether the suspect actually committed a crime. Where probable cause exists at the time of an arrest, the arrest does not violate the Constitution even if charges are later dropped or the person arrested is subsequently acquitted. The probable cause standard requires far lesser evidence and facts than "guilt beyond a reasonable doubt" standard which is the criterion used in criminal trials.

Finally, the jury is reminded that the sole claim before You is whether Defendant Vega unlawfully coerced an involuntary confession from the Plaintiff in violation of his Fifth Amendment right against self-incrimination. You are not to consider any other possible claims. For example, it has been established

that Defendant Vega did not violate Plaintiff's rights or cause Plaintiff's injuries by arresting him without probable cause. Additionally, it has been established that Defendant Vega did not violate Plaintiff's rights or cause Plaintiff's injuries by deliberately fabricating evidence that was used to criminally charge or to prosecute him.

Plaintiff was found not guilty in his criminal trial. You are not here to re-try that criminal case or to determine his guilt or innocence. If any witness questioned the verdict in the criminal case, you must disregard that particular portion of the testimony.

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