No. 01-1444

In The
SUPREME COURT OF THE UNITED STATES
September 5, 2002

BEN CHAVEZ,

Petitioner,

vs.

OLIVERIO MARTINEZ,

Respondent.

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

BRIEF OF AMICI CURIAE 50 CALIFORNIA CITIES IN FAVOR OF PETITIONER; AND MOTION OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION TO JOIN IN AMICI CURIAE BRIEF

GIRARD FISHER,*
POLLAK, VIDA, AND FISHER
1801 Century Park East--26th Floor
Los Angeles, CA 90067
(310) 551-3400
* Counsel of Record

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THE AMICI CURIAE 50 CALIFORNIA CITIES

The 50 California Cities, as political subdivisons of a state, file their amici curiae brief without consent or motion pursuant to this Court's Rule 37.4. These are the Cities of:

ALAMEDA	MOUNTAIN VIEW
ALBANY	NATIONAL CITY
AVALON	NOVATO
BAKERSFIELD	ORANGE
BRISBANE	ORINDA
BURBANK	PALM DESERT
CAPITOLA	PALM SPRINGS
CHINO	PIEDMONT
CHULA VISTA	PLEASANT HILL
COACHELLA	REDONDO BEACH
CORTE MADERA	ROSS
COTATI	SACRAMENTO
CULVER CITY	SAN ANSELMO
DEL REY OAKS	SAN DIMAS
DINUBA	SAN LUIS OBISPO
HAYWARD	SAN PABLO
HOLLISTER	SANTA CRUZ
INGLEWOOD	SANTA ROSA
IRWINDALE	SIGNAL HILL
LAGUNA BEACH	SUNNYVALE
LAKEWOOD	S U T T E R CREEK
LODI	TIBURON
LYNWOOD	WALNUT
MARINA	WESTMORLAND
MONTEREY	YREKA

MOTION OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION TO JOIN IN AMICI CURIAE BRIEF

Pursuant to this Court's Rule 37.3(b) the International Municipal Lawyer's Association ("IMLA") respectfully moves this Court for leave to join in the attached Brief of Amici Curiae 50 California Cities in support of the Petitioner. A letter of consent from the Petitioner to the filing of this brief has been filed with the Clerk. However, respondent's counsel, currently on vacation, could not be reached and therefore have not given consent.

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA advocates for the rights and privileges of local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and

appellate courts.

IMLA's specific interest in this case lies in its impact on governments throughout the Nation as a whole. Over 39,000 local governments (counties, towns and municipalities) exist in the United States. Many of these have policing responsibilities that include the questioning of criminal suspects. The Ninth Circuit Court of Appeals decision, holding that taking an involuntary statement from a criminal suspect violates his Fifth and Fourteenth Amendment rights, constrains local government's ability to question criminal suspects and expands its liabilities under Title 42 U.S.C. section 1983. IMLA, as an organization promoting legal issues on behalf of local governments, therefore files this brief on behalf of its members nationwide.

September __, 2002

Respectfully submitted,

GIRARD FISHER
POLLAK, VIDA & FISHER
Counsel for Amici Curiae 50
California Cities and
International Municipal
Lawyers Association

QUESTIONS PRESENTED

1. Whether a police office who takes an involuntary statement from a criminal suspect can be held liable to the suspect under Title 42 U.S.C. section 1983 for a violation of the Fifth Amendment, or under Fourteenth Amendment "involuntariness" jurisprudence, when the suspect is not criminally prosecuted.

2. Whether, in the same circumstances, the officer can be held liable to the suspect under section 1983 for a violation of Fourteenth Amendment substantive due process if the officer did not intend to harm the suspect, did not physically or mentally harm him, and had a legitimate reason for questioning him.

INTEREST OF THE AMICI CURIAE

The Court's decision will affect the ability of local law enforcement authorities to gather information for crime investigation, witness protection, internal review, and other legitimate purposes.

SUMMARY OF ARGUMENT

The Fifth Amendment does not prohibit police from taking an involuntary statement from a suspect before criminal proceedings are initiated against him. The text of the Amendment, its history, and the decisions of this Court establish that government can violate the Fifth Amendment only at the time of trial.

The Fourteenth Amendment due process protection against involuntary statements likewise attaches only at the time of trial. A bulwark against self-incrimination fashioned before this Court applied the Fifth Amendment to states, "involuntary" jurisprudence should not be expanded beyond the scope of the Fifth Amendment itself.

The damages remedy under Title 42 U.S.C. section 1983 for a violation of Fourteenth Amendment substantive due process should apply only when police interrogation tactics "shock the conscience."

Thus, there is a range of police interrogation tactics that entitles a criminal suspect to invoke the Fifth Amendment privilege at trial, but not the section 1983 damages remedy if the tactics do not "shock the conscience." Petitioner Chavez's conduct falls within that permissible range. As explained in the last section of this brief, it is important to acknowledge the existence of that range, because the taking of involuntary statements often serves legitimate state interests without violating suspects' constitutional rights.

FACTS IN BRIEF

These facts, derived from the District Court's Order,[1] are offered to place the Amici Curiae's arguments in context. Amici Curiae defer to the Brief for the Petitioner for a more detailed statement.

During a scuffle with two police officers, Respondent Martinez allegedly grabbed the gun of one and pointed it in a threatening manner at both. The other officer shot Martinez in the temple, abdomen and knee.

After Martinez was taken to the hospital, Petitioner Chavez, also a police officer, questioned Martinez while hospital personnel treated him and prepared him for surgery. Chavez tape-recorded the questioning intermittently over a period of 45 minutes. Because of interruptions for medical treatment, the actual questioning spanned 10 minutes. On tape, Martinez admitted grabbing the gun and pointing it at the officers.

Chavez did not give Martinez the *Miranda* warnings before questioning him. Chavez persisted in the questioning even though Martinez twice asked him to stop. Martinez, yelling in pain and drifting in and out of consciousness, repeatedly told Chavez that he was dying and did not want to talk.

Martinez was never prosecuted for a crime in connection with this incident.

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[1] Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Adjudication ("Order"), entered August 2, 2000.

PROCEDURAL HISTORY

The District Court Proceedings

Respondent Martinez filed a complaint in the District Court against Petitioner Chavez and others. The operative First Amended Complaint alleges, among other things, that Martinez is entitled to damages under Title 42 U.S.C. section 1983 based on the theory that Chavez's interrogation violated Martinez's Fifth and Fourteenth Amendments rights. Although alleging that Martinez's statement was extracted involuntarily, the First Amended Complaint alleges only one kind of damage that resulted from the interrogation: "interfer[ence] with [Martinez's] right to receive medical care and treatment."[2]

Martinez moved for summary adjudication on his Fifth and Fourteenth Amendment claims; and Chavez filed a cross- motion for summary adjudication on his qualified immunity defense. The District Court, finding the facts "remarkably similar to those in *Mincey*,"[3] held that:

> "plaintiff's statement was coerced in clear violation of his constitutional rights. Accordingly, plaintiff is entitled to summary adjudication of his claims for violations of the Fifth and Fourteenth Amendments."[4]

At the same time, the District Court denied Chavez's motion for summary adjudication on the ground of qualified immunity. On that defense, the court emphasized that "the

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2 *Id.* at para. 17, p. 6, ll. 22-23.

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

4 Order, *supra*, pp. 7-8.

law against coerced confessions was clearly established at the time of [respondent's] interview" and that "given the circumstances of the interview and established constitutional boundaries, respondent was not entitled to qualified immunity."[5]

The Circuit Court of Appeals Proceedings

Chavez took an interlocutory appeal of the District Court's denial of his motion for summary adjudication on qualified immunity. The Ninth Circuit affirmed, holding that "Chavez violated the Fourth and Fifth Amendments by subjecting Martinez to a coercive, custodial interrogation while he received treatment for life threatening gunshot wounds inflicted by other police officers."[6] Following its earlier decisions in *Cooper*[7] and *Butts,*[8] the court held it did not matter that Chavez was never prosecuted. Positing that "the Fifth Amendment's purpose is to prevent coercive interrogation practices that are 'destructive of human dignity,'"[9] the court held that "[e]ven though Martinez's statements were not used against him in a criminal proceeding, Chavez's coercive questioning violated Martinez's Fifth Amendment rights," and likewise his

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5 *Id.* at p. 13.

6 *Martinez v. City of Oxnard,* 270 F.3d 852, 856 (9th Cir. 2001).

7 *Cooper v. Dupnik,* 963 F.2d 1220 (9th Cir. 1992).

8 *Butts v. California Attorneys for Criminal Justice,* 195 F.3d 1039 (9th Cir. 1999).

9 *Martinez v. City of Oxnard, supra,* 270 F.3d at 857, quoting *Cooper, supra,* 963 F.2d at 1239 and (in internal quotes) *Miranda v. Arizona,* 386 U.S. 436, 457-58 (1966).

Fourteenth Amendment rights.[10] The court concluded that in light of the "extreme circumstances of [the] case," a reasonable police officer in Chavez's position could not have believed that the interrogation of Martinez comported with the Fifth and Fourteenth Amendments. On that basis, the court held that the qualified immunity was not available to Chavez.[11]

What The District Court and Court of Appeals Did *Not* Find

The District Court's order and Court of Appeal's decision are noteworthy for what they did *not* find. Neither court found that Chavez's interrogation tactics "shocked the conscience" or amounted to a "deliberate indifference" to respondent's well-being. Neither found that Chavez denied or interfered with respondent's medical treatment – indeed the District Court found that there was insufficient evidence to establish that Chavez interfered with Martinez's medical treatment.[12] The District Court did not find that Chavez's interrogation was intended to cause severe emotional distress – or that Martinez did in fact suffer any such distress as the result of the interrogation. On this point the Court of Appeals merely speculated that, even though Martinez was never prosecuted, a person in Martinez's position could reasonably believe that his statements might be used in a criminal prosecution or lead to other evidence that might be used

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[10] *Martinez v. City of Oxnard, supra,* 270 F.3d at 857.

[11] *Id.* at 859.

[12] Order, *supra,* at p. 8.

against him.[13]

Finally, neither court evaluated whether there was a legitimate state interest in pressing ahead with Martinez's questioning at the hospital, although the District Court noted that both Chavez and Martinez may have been under the impression that Martinez was dying; and that Chavez wanted to obtain information about his fellow officers' possible culpability for the shooting.[14]

THE SCOPE OF REVIEW

Amici Curiae request this court to address, not just the qualified immunity, but also the validity of the respondent's underlying Fifth and Fourteenth Amendment claims. This Court can and should undertake that inquiry. "[I]n any action under [Title 42 U.S.C. section 1983], the first step is to identify the exact contours of the underlying right said to have been violated."[15] Here that step would enable this Court to clarify fundamental questions about whether police officers may be held liable under the Fifth and Fourteenth Amendments for taking involuntary statements from criminal suspects.

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[13] *Martinez v. City of Oxnard, supra*, 270 F.3d at 857 (citing *Miranda, supra,* 484 U.S. at 1243, and *Kastigar v. United States,* 406 U.S. 441, 445 (1972).

[14] Order, *supra*, p. 13.

[15] *Lewis v. County of Sacramento,* 523 U.S. 833, 840 n.5 (1998).

ARGUMENT

The Fifth Amendment Attaches Only When Incriminating Statements Are Introduced at Trial

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself." (Emphasis added.) The text plainly means that a criminal defendant may invoke a privilege against self incrimination in the course of a trial. But there are no textual or historical reasons that lead one to conclude that the drafters meant more, and that they intended the Fifth Amendment to prohibit government from taking an involuntary statement from a suspect before criminal proceedings are initiated against him.

The Text

There is no such text – an interrogation of a suspect before initiation of criminal proceedings is not part of the "case." One need only compare the words of the Fourth and Fifth Amendments to see that the Bill of Rights treats other investigatory intrusions differently from the privilege against giving testimony against oneself. The Fourth, acknowledging that criminal investigations involve matters of degree, proscribes only "unreasonable" searches – whether before or during the "case"; whereas the Fifth declares an absolute prohibition against taking testimonial evidence from the accused in the limited circumstance of a "case."

Reasonableness is a logical guiding principle for criminal investigations; but when the Fourth and Fifth Amendments are read together, the absolute prohibition of the Fifth makes sense only as a protection accorded to a defendant at trial. Had the drafters also intended to prohibit the taking of involuntary statements from suspects in custody, presumably

they would have done so in the same way that they regulated the taking of physical and documentary evidence: broadly to cover all circumstances under a "reasonableness" standard as in the Fourth; not narrowly as a absolute prohibition in the Fifth. Any other interpretation renders the phrase "in any criminal case" meaningless.

Consistent with the above, this Court has previously "recognize[d] that unreasonable searches under the Fourth Amendment are different from unwanted interrogation under the Fifth Amendment,"[16] and that the Fifth Amendment's "strictures, unlike the Fourth's are not removed by a showing of reasonableness."[17] Further, this Court has assumed, without explicitly deciding, that a constitutional violation of the Fifth occurs only at trial; whereas a violation of the Fourth is "fully accomplished" at the time of an unreasonable governmental intrusion.[18] Unlike the Fourth Amendment, the Fifth Amendment provides a fundamental *trial* right.[19]

The Historical Background

There are no historical underpinnings for a theory that the drafters of the Bill of Rights intended to prohibit government from taking involuntary statements from criminal suspects. Colonial Americans did not recognize a free-standing "human

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[16] *Dickerson v. United States*, 530 U.S. 428, 441 (2000), citing *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

[17] *New York v. Quarles,* 467 U.S. 649, 653 n.3 (1984).

[18] *United States v. Verdugo-Urquidez,* 494 U.S. 259, 264 (1990), citing *Kastigar v. United States*, *supra*, 406 U.S. at 453 as to the Fifth Amendment, and quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974) as to the Fourth Amendment.

[19] *Withrow v. Williams*, 507 U.S. 680, 691 (1993).

right" against self-incrimination.[20] Protection against coerced confessions existed primarily to safeguard a liberty of more pressing importance – the right to a fair jury trial.[21] In that vein, colonial provisions against coercive self-incrimination sought not to expand, but merely to preserve values embedded in the English common law.[22] James Madison's original draft of the Bill of Rights may have implied a more all-encompassing protection: "No person . . . shall be compelled to be a witness against himself."[23] Significantly, however, the phrase was objected to as a "general declaration in some degree contrary to laws passed" in the First Congress, and the narrowing language "in a criminal case" was added.

The limitations imposed by Congress suggest that the purpose of Fifth Amendment was to safeguard the truth-seeking function of the jury trial, not to regulate pretrial interrogation of criminal suspects. The obvious inference is that police compulsion does not violate the Amendment unless compelled statements are brought before the jury. Commentators acknowledged the exclusionary nature of the rule as early as 1819: "No man shall be compelled to give evidence against himself. Hence it is held that if a criminal be sworn to his incrimination taken before a justice, *it shall*

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[20] *See* Moglen, *Taking the Fifth: Reconstructing the Origins of the Constitutional Privelege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1112 (1994).

[21] *Id*. at 1113.

[22] *Id.* at 1121.

[23] United States Congress, Debates and Proceedings in the Congress of the United States 434 (Washington D.C. 1834).

not be read against him."[24]

Recent scholarship demonstrates that the Fifth Amendment afforded no protection against the taking of the unsworn statement itself. At the time the states adopted the Bill of Rights, routine criminal process required justices of the peace to take unsworn statements from criminal suspects. As the study by Eben Moglen concludes:

> "American criminal procedure in the colonial period, like the English model it closely followed, assumed the testimonial availability of the defendant at the crucial pretrial stage of the prosecution and freely made use of the defendant's admissions at trial."[25]

And as explained by Albert W. Alschuler:

> "What the Fifth Amendment privilege did not prohibit is in fact clearer than what it did. The privilege did not prohibit the forceful incriminating interrogation of suspects by judges and magistrates so long as the suspects remained unsworn."[26]

Those interrogations served as the basis for the summary disposition of lesser offenses and as evidence in criminal trials. That procedure endured well into the Nineteenth Century; and neither the courts nor practitioners regarded it

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[24] Moglen*, supra,* at 1128, quoting William W. Hening, *The New Virginia Justice, Compromising the Office and Authority of a Justice of the Peace* 132 (Richmond, Va. T. Nicolson 1795). (Emphasis added.)

[25] *Id.* at 1129.

[26] Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2653 (1996).

as violating the Fifth Amendment prohibition against compelled testimony – the reason being that only *sworn* testimony fell within the concept of undue coercion.[27]

This historical background shows that the drafters of the Bill of Rights could not have intended the Fifth Amendment to prohibit the taking of the unsworn testimony from a criminal suspect. "A more promising hypothesis is that the Framers saw no tension between their courtroom procedures [allowing the use of unsworn statements] and the principles that they declared in the Constitution."[28]

The historical background suggests that today there is a gap in the protections afforded by the Fourth and Fifth Amendments that the drafters of the Bill of Rights did not perceive. That gap is the lack of an explicit standard applicable to statements taken from a criminal suspect *before* the institution of criminal proceedings. That gap exists because for a considerable period of time – spanning the colonial period, the drafting of the Bill of Rights, and early Nineteenth Century criminal procedure – unsworn statements, even if resulting from forceful interrogation, were not considered to be the result of unacceptable compulsion.

Should this Court nonetheless assume that the absolute prohibitions of the Fifth logically extend to the taking of an involuntary statement from a criminal suspect before the initiation of criminal proceedings? Apart from the undesirability of writing new text into the Constitution, the differences between the Fourth and Fifth Amendments demonstrate that such an extension of the Fifth Amendment

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[27] *Id.* at 2659-2660.

[28] *Id.* at 2657.

would be seriously mistaken. As already discussed, when the drafters clearly addressed procedures that might occur *before* the initiation of criminal proceedings – *i.e.* searches – they imposed a "reasonableness" standard. If inclined to indulge in extrapolations about how the drafters would have approached the question of interrogations of criminal suspects, one must conclude that the Fourth Amendment provides better clues than the Fifth.

Legal Precedent Holds That The Fifth Amendment Does Not Bar Involuntary Statements

Although this Court has not squarely addressed whether police violate the Fifth Amendment when they compel an involuntary statement, it has decided that government may compel such statements in other contexts. For example, the "Immunity Doctrine" holds that the government can force witnesses to testify to self-incriminating acts as long as it grants them immunity.[29] Despite the protections of the Fifth Amendment, immunized witnesses who refuse to testify can be jailed.[30] The Immunity Doctrine clarifies that it is the *use* of compelled statements, as opposed to the compulsion itself, that violates the Fifth Amendment.

Similarly, the "Penalty Cases" demonstrate that the government may also use economic sanctions to compel witnesses to testify to potentially self-incriminating acts.[31] Thus, government may lawfully fire employees for refusing

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[29] *See Kastigar v. United States*, *supra*, 406 U.S. 441.

[30] Steven D. Clymer, *Are Police Free to Disregard Miranda,* 112 Yale L.J. ___, ___ (forthcoming December 2002) (Section I.A.2).

[31] *Id.* at ___ (section I.A.3).

to answer incriminating questions about their official duties.[32]

The overwhelming majority of Circuit Courts of Appeal have applied this principle[33] to police interrogations:

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[32] *Leftkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *Gardner v. Broderick,* 392 U.S. 273, 278 (1968).

[33] Announcing a single "principle" is an oversimplification, because the courts have addressed four different circumstances in which an involuntary statement may have been taken. In ascending order of coercive pressure, they are:

1. *Failure to Mirandize*: Police fail to give the *Miranda* warning to a suspect before taking a statement, but do not exert physical or psychological pressure to make him speak. An irrebuttable presumption of compulsion for purposes of admission of evidence arises. *See Oregon v. Elstad, supra*, 470 U.S. 298.

2. *Compelled Statement*: Government forces potential witness to speak by threatening contempt of court or job termination. *See* the "Immunity" and "Penalty Cases" discussed in the text. Courts use a categorical approach to determine whether the statement was compelled, focusing on the nature of the official pressure generally. *See* Clymer, *supra* note 17, at section III.B.1; *Garrity v. New Jersey*, 385 U.S. 493 (1967).

3. *Coerced Statement*: Police unlawfully exert pressure on a suspect to such a degree that his will is overborne. *Colorado v. Connelly*, 479 U.S. 157 (1986). Courts use a case by case approach when determining if coercion was used, taking into account the totality of all the surrounding circumstances. *Schnecklothe v. Bustamonte*, 412 U.S. 218 (1973).

4. *"Shock the Conscience"*: Police methods to obtain evidence from the suspect are so extreme that they "offend those canons of decency and fairness which express the notions of justice." *Rochin v. California*, 342 U.S. 165, 169 (1952).

Appendix "A" shows the position of this Court and the Circuit Courts of Appeals on whether any of these four levels of involuntary statements violates the Fifth or Fourteenth Amendments. The decisions cited in notes

The Second Circuit:

> "Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding."[34]

The Third Circuit:

> The Ninth Circuit *Cooper* decision broke new ground when it held that substantive violation of Fifth Amendment rights could occur absent use of statements against defendant. Thus, interrogating officers are entitled to qualified immunity.[35]

The Fourth Circuit:

> "Most courts refuse to find a Fifth Amendment violation even where statements were made, but were not actually used in a criminal proceeding."[36]

The Seventh Circuit:

> "The Fifth Amendment does not forbid the forcible extraction of information but only the

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29, 32, and 34-43 are the basis for the Appendix.

[34] *DeShawn v. Safir*, 156 F.3d 340, 346-37 (2nd Cir. 1998).

[35] *Guiffre v. Bissell*, 31 F.3d 1241, 1256 (3rd Cir. 1994).

[36] *Riley v. Dorton*, 115 F.3d 1159, 1164 (7th Cir. 1997).

> use of information so extracted as evidence in a criminal case."[37]

The Eighth Circuit:

> "Remedy for a *Miranda* violation is the exclusion from evidence of any compelled self-incrimination, not a section 1983 action."[38]

The Tenth Circuit:

> No rational argument can be made that failure to read *Miranda* rights triggers Sec. 1983 liability, where statements are not introduced at trial.[39]

The Eleventh Circuit:

> Continued interrogation after defendant requests an attorney does not create a cause of action for Section 1983 damages when statement is not used at trial; the *Cooper* majority departed from the clear requirements of Sec. 1983.[40]

The Ninth Circuit swims alone against this tide of legal

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37 *Wilkins v. May*, 872 F.2d 190, 194 (5th Cir. 1989).

38 *Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir. 1989).

39 *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976).

40 *Jones v. Cannon*, 174 F.3d 1271, 1290-91 (11th Cir. 1999).

authority in *Cooper*,[41] *Butts*,[42] and the decision now under review, Martinez.[43] For all the reasons stated above, the Ninth Circuit is wrong in holding that police can violate the Fifth Amendment during the interrogation of a criminal suspect. This Court should overrule the Ninth Circuit on this point.

The Fourteenth Amendment "Involuntariness" Jurisprudence Should Not Be Confused with "Substantive Due Process"

Cooper notes that the Due Process Clause of the Fourteenth Amendment protects against two types of self-incrimination.[44] One is the use of "involuntary" statements at the time of trial. The line of authority in support of this protection holds that any criminal trial use of defendant's involuntary statement is a denial of due process.[45] It applies the Due Process Clause to "prevent fundamental unfairness in the *use* of evidence, whether true or false."[46] "If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to *convict* a defendant."[47] This line of authority defines an involuntary

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41 *Cooper v. Dupnik*, *supra*, 963 F.2d 1220.

42 *California Attorneys for Criminal Justice v. Butts*, *supra*, 195 F.3d 1039.

43 *Martinez v. City of Oxnard*, *supra*, 270 F.3d 852.

44 963 F.2d at 1245, 1249.

45 *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

46 *Lisenba v. California,* 314 U.S. 219, 236 (1941) (Emphasis added).

47 *Malinski v. New York*, 324 U.S. 401, 404 (1945) (Emphasis added).

statement as one that results from "police overreaching"[48] or that is not a "product of a rational intellect and a free will."[49]

Until the Ninth Circuit's decision in *Cooper,* courts used "involuntariness" jurisprudence only to preclude use of involuntary statements *at trial*. No other Circuit has used this "involunariness" jurisprudence to fashion a damages remedy under Title 42 U.S.C. section 1983, although the Second Circuit suggested in *DeShawn* that such a remedy might exist if the taking of involuntary testimony "amounts to actual coercion based on outrageous government conduct."[50]

It is important to trace the provenance of this "traditional 'test of voluntariness.'"[51] It developed before this Court made the Fifth Amendment applicable to the states in *Malloy*.[52] In the absence of a Fifth Amendment protection against the admission of involuntary statements, this Court provided an equivalent protection through the Due Process Clause.[53] And as noted, like the Fifth Amendment, that protection attached *only* at the time of trial.

After *Malloy*, retention of "involuntariness" jurisprudence became optional. This Court observed that "[w]e have never abandoned this due process jurisprudence . . . but our decisions in *Malloy* and *Miranda* changed the focus of much

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48 *Colorado v. Connelly*, *supra*, 479 U.S. at 163-64.

49 *Mincey v. Arizona, supra*, 437 U.S. at 398.

50 *DeShawn v. Safir, supra,* 156 F.3d at 346-37.

51 *Martinez v. City of Oxnard, supra,* 963 F.3d at 1248.

52 *Malloy v. Hogan*, 378 U.S. 1 (1964).

53 See cases cited at notes 45-48.

of the inquiry [to the Fifth Amendment]."[54] Although "involuntariness" jurisprudence has not been abandoned, there is no reason to believe that it should be extended beyond the Fifth Amendment rule of exclusion to create a civil damages remedy under Title 42 U.S.C. section 1983 for a violation of the Fourteenth Amendment Due Process Clause. Only the Ninth Circuit assumes so.

The second type of due process violation occurs when government extracts evidence not only involuntarily, but in a manner that "shock[s] the conscience," including physical torture[55] and bodily intrusion.[56] Until *Cooper*, no case had found a defendant liable for *damages* under section 1983 for extracting testimony in a manner that "shock[s] the conscience," although in one case government agents were found criminally liable under section 20 of the Criminal Code [now Title 18 U.S.C. 242] – the criminal code analog of 42 U.S.C. section 1983 – for beating suspects to extract a confession.[57] There government agents engaged in a "brutal deprivation[] of constitutional rights."[58]

Certainly there is no principled objection to finding that a violation of due process occurs at the time an involuntary statement is *taken* if government's tactics in extracting the statement "shock the conscience." Indeed, the circumstances that the Second Circuit hypothesized in *DeShawn, supra*,

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[54] *Dickerson, supra*, 530 U.S. at 434.

[55] *Brown v. Mississippi*, 297 U.S. 278 (1936).

[56] *Rochin v. California*, *supra*, 342 U.S. 165.

[57] *Williams v. United States,* 341 U.S. 97 (1951).

[58] *Id.* at 104.

would seem to fall within this category.

Cooper, however, found that the police officers' conduct in that case violated *both* the "involuntariness" jurisprudence and "shocks the conscience" standards, and predicated civil liability on both. Assuming for the moment that the Ninth Circuit correctly decided that the officers' aggressive interrogation of the "Prime Time Rapist" suspect "shocks the conscience," and that they could be held liable on that basis, it nevertheless erroneously assumed that they might also be held liable merely because they continued to interrogate the suspect after he had asked them to stop and to provide him with an opportunity to speak with his attorney. In that regard, the Ninth Circuit impermissibly confused the traditional "involuntariness" jurisprudence and "shocks the conscience" standard, with the end result that *both* have become the basis for section 1983 liability in the Ninth Circuit. This confusion is of no small moment, because in *Butts*[59] and *Martinez*[60] there were no findings that the police interrogations "shocks the conscience."

The clear implication is that police who take involuntary statements will *always* be liable for violating the Fifth and Fourteenth Amendments, regardless of whether the suspect is criminally prosecuted and regardless of the circumstances surrounding the interrogation. The chilling impact of such a rule on police investigations should be obvious. At a minimum, this Court should hold that no liability can arise merely as the result of taking an involuntary statement. And, as argued in the next section, this court should go a step further, and acknowledge that there are many situations –

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[59] *California Attorneys for Criminal Justice v. Butts*, *supra*, 195 F.3d 1039.

[60] *Martinez v. City of Oxnard*, *supra,* 270 F.3d 852.

including the Martinez shooting incident – where the state has a legitimate interest in taking an involuntary statement.

Respectfully submitted,

September __, 2002

GIRARD FISHER
POLLAK, VIDA & FISHER
1801 Century Park East
26th Floor
Los Angeles, CA 90067
(310) 551-3400

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