MIRANDA: EFFICACY, THE "QUESTION FIRST, WARN LATER" APPROACH, AND SPECIAL POPULATIONS

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I. INTRODUCTION

A murdered woman lay decomposing on a slab of concrete in a wooded area.[1] A man—a black, mentally handicapped town drunk—is taken in for questioning in relation to the homicide.[2] The city they are in, Kaufman, does not have a lie detector, so the officer asks the suspect to come to the city of Mesquite for the questioning.[3] He comes to this "interview" at the request of a police officer—in fact, the police officer, accompanied by a Texas Ranger, gives the suspect a ride (with the suspect in the back seat).[4] While downtown, the inquisitors put the pressure on our suspect—they show him a picture of the murdered woman; they tell him he failed the lie detector test; and they tell him that they know he is guilty.[5] The police officers interrogate the suspect for one hour and fifteen minutes.[6] The suspect, Rodney, begins to cry and confesses that he indeed killed her.[7] Rodney offers no facts of his own—he merely agrees to everything the police say. The police ask Rodney if he would make a written statement at another police station.[8] He agrees and rides along with the officers back to

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[1] Hunt v. State (*Hunt I*), No. 05–07–01408–CR, 2009 WL 659132, at *1 (Tex. App.—Dallas Mar. 16, 2009) (not designated for publication), *vacated*, Hunt v. State (*Hunt II*), No. PD–0995–10, 2011 WL 303815 (Tex. Crim. App. Jan. 26, 2011) (en banc) (not designated for publication).

[2] *Id.* at *3; Brief for Appellant at *4, Hunt v. State (*Hunt III*), No. PD–0152–12, 2013 WL 3282973 (Tex. Crim. App. June 26, 2013) (not designated for publication), 2012 WL 5248405.

[3] *Hunt I*, 2009 WL 659132, at *3.

[4] *Id.*

[5] *Id.*; Brief for Appellant, *supra* note 2, at *14

[6] Brief for Appellant, *supra* note 2, at *8.

[7] *Id.*

[8] *Id.*

the station in Kaufman, Texas.[9] After smoking a cigarette (which the police gave him *permission* to do), Rodney has a panic attack.[10] The paramedics make sure he is fine, and he then agrees to talk.[11] The officer—for the first time—reads the suspect his *Miranda*[12] rights.[13] Rodney resists for a while, maintaining his innocence, but the police refer back to his previous confession 19 times.[14] Finally, he again confesses to the murder.[15] He is later convicted and sentenced to 99 years in prison.[16]

Therein lies the subject matter of this article. What happened to Rodney is known as the "question first, warn later" tactic employed by officers in order to circumvent the efficacy of *Miranda* warnings.[17] Here is how it works: the officer interrogates a suspect before reading him his *Miranda* rights; the suspect then confesses having not been reminded of his rights; a few minutes pass; the officer reads the suspect his *Miranda* rights and then asks the suspect to repeat his confession.[18] One can see the problem here—many suspects feel obliged to repeat their confession since they had just confessed moments earlier to the same officer.[19] After that, the State's job is pretty easy: show the jury the confession, get a conviction, and lock the suspect up. In isolated situations, maybe this issue can be dealt with on a case-by-case basis, but here is the kicker: not only are some police departments *requiring* their officers to do this, but the question-first method is even being promoted by national police training organizations.[20]

This article addresses the "question first, warn later" tactic, its effect on the efficacy of *Miranda*, and its implications to special populations of which our defendant Rodney is arguably a member. Part II will start with a

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

[13] *Hunt I*, No. 05–07–01408–CR, 2009 WL 659132, at *3 (Tex. App.—Dallas Mar. 16, 2009) (not designated for publication), *vacated*, *Hunt II*, No. PD–0995–10, 2011 WL 303815 (Tex. Crim. App. Jan. 26, 2011) (en banc) (not designated for publication).

[14] *Hunt III*, No. PD–0152–12, 2013 WL 3282973, at *1 (Tex. Crim. App. June 26, 2013) (not designated for publication).

[15] *Hunt I*, 2009 WL 659132, at *3.

[16] *Id.* at *1.

[17] *See, e.g.*, Missouri v. Seibert, 542 U.S. 600, 604 (2004).

[18] *Id.* at 609–10.

[19] *See id.* at 613.

[20] *Id.* at 609.

history of *Miranda*, explaining its purpose and goals. Next will be an examination of how courts have struggled with the "question first, warn later" approach. The end of Part II will address the efficacy of *Miranda* and its implications to special populations. In Part III, this article will look at Texas's stance on these issues by examining case law and developments in Rodney's appeal, presenting my own conclusions on the state of the law in Texas. Part IV will be a summary, along with a forecast on what we can expect looking ahead.

II. BACKGROUND

A. History of Miranda

We have all seen it on television—the crook is being handcuffed, and the police officer starts off by saying, "You have the right to remain silent. Anything you say can and will be used against you . . . ." The officer then goes on to say some other stuff that most of us forget. Where did this rehearsed monologue come from? Why do they do it?

In the 1960s, there were several cases addressing a common problem: police officers were interrogating suspects in order to obtain confessions, and the former were not advising the latter of their right to remain silent or consult an attorney.[21] This tactic implicated Fifth Amendment concerns—namely, the privilege against self-incrimination.[22]

These concerns were nothing new, however. In the 1600s, political dissidents in England coined the phrase *Nemo tenetur seipsum accusare* ("No man is bound to accuse himself") in order to rally support in opposition of the Crown's inquisitorial interrogation methods.[23] Slowly but surely, this protection of citizens against arbitrary power—the privilege

[21] Miranda v. Arizona, 384 U.S. 436, 440 (1966).

[22] *See* U.S. CONST. amend. 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.").

[23] Brown v. Walker, 161 U.S. 591, 596 (1896).

against self-incrimination—became "firmly embedded in English, as well as American jurisprudence."[24]

So we know that Americans have the right to avoid self-incrimination, but how do we make sure that right is protected? What is to stop the police from violating our rights? Does this right only apply in court proceedings? The Constitution is just paper, so there is always the concern that "[r]ights declared in words might be lost in reality."[25] Without enforcement and protection, the Constitution would just be a "form of words" with no actual firmness—our rights would become empty promises.[26] Therefore, America needed it to be spelled out, and that is what the Supreme Court did in *Miranda*.[27]

In order to give guidance to law enforcement and the American people, the Supreme Court stated, "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[28] Therefore the right does not only apply in court—it also applies to interrogations. This requirement has a built-in remedy: if the statements were obtained by violating this right, the prosecution may not use them—it's an exclusionary remedy.[29] A "custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[30] The Supreme Court goes on to give the specifics so that law enforcement will be in line with constitutional requirements:

> Prior to any questioning, the person must be warned 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. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner

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[24] *Miranda*, 384 U.S. at 443 (quoting *Brown*, 161 U.S. at 596–97).

[25] Weems v. United States, 217 U.S. 349, 373 (1910).

[26] *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391–92 (1920).

[27] *See generally Miranda*, 384 U.S. 436.

[28] *Id.* at 444.

[29] *See id.*

[30] *Id.*

> and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[31]

There are many reasons for these requirements: they keep law enforcement from violating the laws it is supposed to uphold, they lower the likelihood of false confessions, they raise the esteem of the judicial system, and they incentivize law enforcement to zealously search for objective evidence.[32]

The *Miranda* Court hints that even more is required when the suspect is a member of a special population.[33] The Court points out that one defendant was a "seriously disturbed" indigent, and another was a man "who had dropped out of school in sixth grade."[34] "[T]he records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice."[35] Therefore, even though the police did not use any obvious coercion, there is still a question as to whether the suspects freely confessed.[36] Further, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[37] Even if the Court does not say it explicitly, basic logic would dictate that a person with a low level of

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[31] *Id.* at 444–45.

[32] *See id.* at 447–48.

[33] *See id.* at 457.

[34] *Id.*

[35] *Id.*

[36] *See id.*

[37] *Id.* at 475.

intelligence might need more instruction in order to *intelligently* waive his privileges.[38]

Fifty years later, *Miranda* is alive and well. It poses a barrier between Americans and the arbitrary abuse of governmental power.[39] The seminal case has provided us with the classic "*Miranda* Warnings" that we have all come to know (at least the first part).[40] One would think (and hope) that such specificity from the Supreme Court would clear up any questions that might have existed. That does not seem to be the case—police are learning new tactics that virtually allow them to circumvent the efficacy of *Miranda*.[41] One of those tactics is the "question first, warn later" method.[42]

B. The "Question First, Warn Later" Method

As stated in Part I, the "question first, warn later" ("question-first") method is a tactic employed by many police officers as a way to bypass the object of *Miranda* warnings.[43] The object of *Miranda* warnings is apparent: to advise the suspect of his rights in order to reduce the risk of coerced confessions.[44] Using the question-first technique, there is an unwarned confession that is followed by a warned confession.[45] The idea is that the suspect will feel compelled to reiterate what he or she had said just moments ago.[46] The goal is to get a confession that would normally not be given had the suspect been advised of his rights.[47] The prosecution wants to use that warned confession at trial, but there are some constitutional implications that need to be addressed in order to determine whether the

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[38] *See id.*

[39] *See id.* at 442.

[40] *See id.* at 444–45.

[41] Kit Kinports, *The Supreme Court's Love–Hate Relationship with* Miranda, 101 J. CRIM. L. & CRIMINOLOGY 375, 376, 379 (2011) (stating the Supreme Court "has resisted blatant attempts to subvert *Miranda*"); *see* Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1016–20 (2001) (explaining "police . . . avoid, circumvent, nullify or simply violate *Miranda*").

[42] Missouri v. Seibert, 542 U.S. 600, 610–11 (2004).

[43] *Id.*

[44] *Id.* at 617.

[45] *Id.* at 609–10.

[46] *See id.* at 613.

[47] *Id.*

confession may be used.[48] The leading case on this issue is *Missouri v. Seibert*.[49]

1. *Seibert*

The facts of *Seibert* are disturbing. Seibert's son died in his sleep—Seibert was worried she would be accused of neglect, so her other two sons devised a plan to burn down the family trailer with the dead son in it.[50] The family left Donald, a mentally ill boy, in the trailer to make it seem like Donald was looking after the dead son.[51] One of Seibert's sons started the fire, and Donald was killed.[52]

The police arrested Seibert five days later.[53] She was left alone in the interrogation room for about 20 minutes, and then she was questioned for about 40 minutes.[54] She was not given her *Miranda* warnings until she confessed to the murder of Donald.[55] After her confession, Seibert took a 20-minute cigarette-and-coffee break.[56] When she came back, the police turned on a recorder, read her the *Miranda* warnings, and resumed questioning—even mentioning statements she had made in their previous, unwarned discussion.[57] Seibert, of course, repeated her confession and was subsequently charged with first-degree murder.[58]

The trial court suppressed the pre-warning statements but admitted the post-warning statements (even though the officer admitted he withheld the warnings intentionally), and Seibert was convicted of second-degree murder.[59] Eventually the case came to the Missouri Supreme Court, which reversed due to the continuous nature of the interrogation.[60]

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[48] *Id.* at 611–12.
[49] *See id.*
[50] *Id.* at 604.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 604–05.
[55] *Id.* at 605.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 605–06.
[60] *Id.* at 606.

The U.S. Supreme Court granted certiorari in an attempt to resolve a split among the Courts of Appeals.[61] The privilege against self-incrimination does not only protect a defendant from federal transgressions: "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement . . . ."[62] Therefore, the basic requirements for the privilege against self-incrimination are the same in federal and state courts, and the *Seibert* Court went on to say what *Miranda* requires in regard to the question-first technique.[63]

The Court stated that the threshold issue is whether it would be reasonable to find that the warnings functioned effectively despite the question-first technique.[64] There are a few factors to consider in determining whether the warnings were effective: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.[65] This includes whether the officer referred back to the first interrogation in the second.[66] We look to see whether the subsequent questioning is a "mere continuation" based on these factors.[67] Considering all relevant factors and circumstances, the question is whether a reasonable person in the suspect's shoes would have understood the warnings to convey the message that he retained a choice about continuing to talk.[68]

In the end, the Court found that Seibert's confession was not admissible because the unwarned interrogation was at the police station; the

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[61] *Compare* United States v. Gale, 952 F.2d 1412, 1418 (D.C. Cir. 1992) (while a "deliberate 'end run' around *Miranda*" would provide cause for suppression, the case involved no conduct of that order), *and* United States v. Carter, 884 F.2d 368, 373 (8th Cir. 1989) ("*Elstad* did not go so far as to fashion a rule permitting this sort of end run around *Miranda*."), *with* United States v. Orso, 266 F.3d 1030, 1034–38 (9th Cir. 2001) (rejecting argument that "tainted fruit" analysis applies because deliberate withholding of *Miranda* warnings constitutes an "improper tactic"), *abrogated by Seibert*, 542 U.S. 600, *and* United States v. Esquilin, 208 F.3d 315, 319–21 (1st Cir. 2000) (similar), *abrogated by* 542 U.S. 600.

[62] Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[63] *Seibert*, 542 U.S. at 607–08.

[64] *Id.* at 611.

[65] *Id.* at 615.

[66] *Id.* at 616.

[67] *Id.*

[68] *Id.* at 617.

questioning was systematic and exhaustive in the unwarned interrogation; there was little, if any, incriminating information left unsaid after the unwarned interrogation; there was only a 20-minute pause before the warned interrogation; the warned interrogation was in the same location as the unwarned interrogation; the officer reading the warnings (who was the same officer who did the first interrogation) said nothing to counter the misimpression that the suspect's previous statements were admissible (e.g. "anything you say can and will be used"—she would assume that includes her first confession); no one dispelled or explained the oddity of warning her after the first interrogation; her uncertainty of whether she could stop talking about things previously discussed was aggravated by the fact that the officers said things like "We've been talking about what happened on Wednesday"; and, during the warned interrogation, the officers frequently referred back to the unwarned interrogation/confession.[69] In short, these circumstances challenged "the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk."[70] The *Seibert* concurrences are discussed below in Part II.B.3.

2. Permissible Question-First Techniques

When does the question-first technique *not* violate the Constitution? The Court in *Seibert* distinguished that case from *Oregon v. Elstad*,[71] in which the confession was found to be admissible.[72] In *Elstad*, the police went to the suspect's house to take him into custody on a burglary charge.[73] Before the arrest, one officer spoke with the suspect's mother, while the other one joined the suspect in a "brief stop in the living room," where the officer said he "felt" the young man was involved in a burglary.[74] The suspect admitted to being at the scene.[75] The Supreme Court said the purpose of the brief stop "was not to interrogate the suspect but to notify his mother of the reason for his arrest," and described the ordeal as having "none of the earmarks of

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[69] *Id.* at 616.

[70] *Id.* at 617.

[71] Oregon v. Elstad, 470 U.S. 298 (1985).

[72] *Siebert*, 542 U.S. at 615–16.

[73] *Elstad*, 470 U.S. at 300.

[74] *Id.* at 300–01, 315.

[75] *Id.* at 301.

coercion."[76] The Court believed this failure to warn was just an oversight.[77] At the later/real interrogation, the suspect was given *Miranda* warnings and made a full confession.[78] "[H]olding the second statement admissible and voluntary, [the Court] rejected the 'cat out of the bag' theory that any short, earlier admission, obtained in arguably innocent neglect of *Miranda*, determined the character of the later, warned confession . . . ."[79] On the facts of that case, the Court thought any causal connection between the first and second responses to the police was "speculative and attenuated."[80] The Court stated:

> Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally.[81]

Elstad was on the other end of the spectrum compared to *Seibert*, so it was very easy for the *Seibert* Court to distinguish the two.[82] Since the *Seibert* opinion, there have been many other "close cases" in which courts struggle in applying the *Seibert* inquiry.[83]

3. How Other Courts Have Struggled With *Seibert*

It is important to note that *Seibert* was a plurality opinion.[84] A plurality opinion is one in which no one opinion gets a majority vote (usually five votes for Supreme Court cases). The main opinion (the "plurality opinion") is the one that received the most votes. In *Siebert*, it was Souter's opinion.[85] The Court was trying to clear up the confusion related to the question-first technique, but it backfired.

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[76] *Id.* at 315–16.

[77] *Id.* at 316.

[78] *Id.* at 314–15.

[79] Missouri v. Seibert, 542 U.S 600, 614–15 (2004) (citing *Elstad*, 470 U.S. at 314–15).

[80] *Id.* at 615 (quoting *Elstad*, 470 U.S. at 313).

[81] *Id.* (quoting *Elstad*, 470 U.S. at 313).

[82] *Id.* at 615–16.

[83] *See, e.g.*, United States v. Williams, 435 F.3d 1148, 1153–62 (9th Cir. 2006).

[84] *Seibert*, 542 U.S. at 603.

[85] *Id.*

So how do courts in subsequent cases use a Supreme Court plurality opinion? "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[86] Therefore, other courts should look for the concurrence that bases its decision upon the narrowest grounds, and then they should treat that concurrence as the holding of the Supreme Court. In regard to *Seibert*, most courts have agreed that the narrowest grounds were the ones suggested in Kennedy's concurrence.[87] This section will illustrate how courts have applied Kennedy's concurrence.

The court in *California v. Rios* provides a good discussion of the various concurrences from *Seibert*.[88] In Justice Breyer's concurrence, he devised a simple test: courts should exclude "fruits" of the unwarned confession—there must be a lapse in time, a change in location, a change in the interrogating officer, or a shift in the focus of the questioning in order to comply with *Miranda*.[89] Justice Kennedy, in his own concurrence, points out a few practical exceptions to *Miranda*: unwarned statements may be used for impeachment purposes,[90] public safety concerns may warrant an unwarned interrogation,[91] and physical evidence obtained through unwarned statements is still admissible.[92] Kennedy agreed with the result,

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[86] Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

[87] *Williams*, 435 F.3d at 1157–58; United States v. Kiam, 432 F.3d 524, 532 (3d Cir. 2006) (stating that the Third Circuit "applies the *Seibert* plurality opinion as narrowed by Justice Kennedy"); United States v. Briones, 390 F.3d 610, 613–14 (8th Cir. 2004) (explaining that the "first step" in Justice Kennedy's narrower test is "to determine whether a [two-step] interrogation process was used as a deliberate strategy"); United States v. Stewart, 388 F.3d 1079, 1090 (7th Cir. 2004) ("Justice Kennedy thus provided a fifth vote to depart from *Elstad*, but only where the police set out deliberately to withhold *Miranda* warnings until after a confession has been secured.").

[88] 101 Cal. Rptr. 3d 713, 720–22 (Cal. Ct. App. 2009).

[89] *Seibert*, 542 U.S at 617 (Breyer, J., concurring); *Rios*, 101 Cal. Rptr. 3d. at 720.

[90] *Seibert*, 542 U.S. at 619 (Kennedy, J., concurring); Harris v. New York, 401 U.S. 222, 225–26 (1971); *Rios*, 101 Cal. Rptr. 3d. at 721.

[91] *Seibert*, 542 U.S. at 619 (Kennedy, J., concurring); New York v. Quarles, 467 U.S. 649, 659–60 (1984); *Rios*, 101 Cal. Rptr. 3d. at 721.

[92] *Seibert*, 542 U.S. at 619 (Kennedy, J., concurring); United States v. Patane, 542 U.S. 630, 639 (2004); *Rios*, 101 Cal. Rptr. 3d. at 721.

but he felt the scope of the plurality opinion was too broad.[93] He argues that the *Elstad* principles should govern unless the question-first technique was used deliberately.[94] If it was used deliberately, the confessions should not be admissible unless curative measures are taken before the postwarning statement is made.[95] He explains:

> Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient.[96]

Basically, the first inquiry is whether the use of the question-first tactic was deliberate.[97] If it was not, we fall back on *Elstad*, which says that a warned confession may be admissible so long as the confession was voluntary, even if there was a previous unwarned confession (absent other coercion or object to undermine the suspect's free will).[98] If the use of the tactic was deliberate, then the confessions are inadmissible unless there are certain curative measures taken—namely, a substantial break or a warning that explains the inadmissibility of the prewarning statements.[99] Kennedy's test is virtually the same as the plurality's. The only difference is that Kennedy's test only applies when the question-first tactic was used deliberately.[100] The *Rios* court adopts the Kennedy test but then says it is

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[93] *Seibert*, 542 U.S. at 621–22 (Kennedy, J., concurring); *Rios*, 101 Cal. Rptr. 3d. at 722.

[94] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring); *Rios*, 101 Cal. Rptr. 3d. at 722.

[95] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring); *Rios*, 101 Cal. Rptr. 3d. at 722.

[96] *Rios*, 101 Cal. Rptr. 3d. at 722 (citation omitted) (quoting *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring)).

[97] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

[98] *Id.*; Oregon v. Elstad, 470 U.S. 298, 309 (1985).

[99] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

[100] *Id.*

not applicable to this defendant's defense because Kennedy does not mention implied waiver.[101]

In *United States v. Cordova*, the court declined to extend *Seibert* because the police did not use the question-first technique in a calculated way to circumvent *Miranda*.[102] Further, in *Cordova*, the interrogations were over a period of three days, so they were not continuous.[103] Thus, using the Kennedy concurrence from *Seibert*, the court did not need to get into the factors because this was not a deliberate use of the question-first technique.[104]

In *United States v. Williams*, the court noted that the test used must synthesize and meet the requirements of both *Seibert*'s plurality opinion with Kennedy's concurrence.[105] In short, "a trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream *Miranda* warning—in light of facts and circumstances—did not effectively apprise the suspect of his rights."[106] Kennedy never defined "deliberate," so the court makes its own test: since most officers will not admit they used the tactic deliberately, courts should consider whether objective and subjective evidence supports an inference that the tactic was used to undermine *Miranda*.[107] "Such objective evidence would include the timing, setting, and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and post-warning statements."[108]

Upon a finding of deliberateness, the *Williams* court goes on to say that *Seibert* requires a court to evaluate the effectiveness of the midstream warnings.[109] "The court must determine, based on objective evidence, whether the midstream warning adequately and effectively apprised the suspect that he had a 'genuine choice whether to follow up on [his] earlier admission.'"[110] In this effectiveness inquiry, the court must consider several factors:

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[101] *Rios*, 101 Cal. Rptr. 3d. at 723.

[102] 829 F. Supp. 2d 1342, 1355 (N.D. Ga. 2011).

[103] *Id.*

[104] *See id.*

[105] 435 F.3d 1148, 1157–58 (9th Cir. 2006).

[106] *Id.* at 1157.

[107] *Id.* at 1158 (citing Missouri v. Seibert, 542 U.S 600, 617 (2004)).

[108] *Id.* at 1159 (citing *Siebert*, 542 U.S. at 615, 621).

[109] *Id.* at 1160 (citing *Siebert*, 542 U.S. at 615).

[110] *Id.* (quoting *Seibert*, 542 U.S. at 616).

> (1) the completeness and detail of the prewarning interrogation[;] (2) the overlapping content of the two rounds of interrogation[;] (3) the timing and circumstances of both interrogations[;] (4) the continuity of police personnel; (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first[;] and (6) whether any curative measures were taken.[111]

In regard to the fifth factor (continuity), Kennedy uses the "substantial break" test: "a substantial break in time and circumstances" would, in most circumstances, let the accused distinguish the two contexts and appreciate that the interrogation had taken a new turn.[112] In the end, the *Williams* case was remanded for deliberateness and effectiveness determinations.[113]

As an aside, the *Williams* court went on to point out that "the government's commission of a constitutional error requires reversal of a conviction unless the government proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[114] Thus, constitutional errors such as these are treated very seriously, and the government has a heavy burden to overcome in order to avoid reversal.[115]

C. Efficacy and Special Populations

"Efficacy" is a noun that means the "power to produce effects."[116] In regards to the efficacy of *Miranda*, many courts call it the "object of *Miranda*" warnings.[117] Put simply, the object (desired result) of *Miranda* warnings is to provide an individual—who is being interrogated—with "'a free and rational choice' about speaking."[118] Further, this individual must be "adequately and effectively" advised of this choice.[119] This object of *Miranda* is in direct conflict with the object of the question-first technique,

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[111] *Id.* (citing *Siebert*, 542 U.S. at 615, 622).

[112] *Seibert*, 542 U.S. at 622.

[113] *Williams*, 435 F.3d at 1161–62.

[114] *Id.* at 1162 (quoting United States v. Garibay, 143 F.3d 534, 539 (9th Cir. 1998) (quoting Chapman v. California, 386 U.S. 18, 24 (1967))).

[115] *See id.*

[116] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 368 (10th ed. 1993).

[117] *See, e.g.*, *Seibert*, 542 U.S. at 611.

[118] *Id.* at 611 (quoting Miranda v. Arizona, 384 U.S. 436, 464–65 (1966)).

[119] *Miranda*, 348 U.S. at 467; *Seibert*, 542 U.S. at 611.

which is to render *Miranda* warnings ineffective by giving them at an opportune time—after the suspect has confessed.[120] This problem is exacerbated when dealing with special populations—people who might not understand *Miranda* warnings even without use of the question-first technique.

The *Seibert* court hints at this problem: "Just as 'no talismanic incantation [is] required to satisfy [*Miranda's*] strictures,' it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance."[121] Therefore, the Supreme Court has said that there are situations in which more than reciting the warnings is required.[122] "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'"[123] "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires."[124] As logic dictates, what reasonably conveys a suspect his rights will vary from suspect to suspect.[125] "[T]elling a suspect that 'anything you say can and will be used against you,' without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail."[126] When dealing with a suspect who is a member of a special population, even more should be required in order to help him understand his rights, *especially* when the question-first method is used.[127] As the *Seibert* Court points out, most suspects would be bewildered and perplexed by the mid-stream warnings after having confessed.[128] This bewilderment and perplexity would only be increased if the suspect were a member of a special population. If a suspect of average intelligence would be confused, a special-population suspect would be even more confused. In any event, more is required to reasonably convey the rights to a suspect who is a member of a special population because "it would be absurd to think that

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[120] *Seibert*, 542 U.S. at 611.

[121] *Id.* (citation omitted) (quoting California v. Prysock, 453 U.S. 355, 359 (1981)).

[122] *Id.* at 612.

[123] *Id.* at 611 (quoting Duckworth v. Eagan, 492 U.S. 195, 203 (1989)).

[124] *Id.* at 611–12.

[125] *See id.* at 611.

[126] *Id.* at 613.

[127] *See* Miranda v. Arizona, 384 U.S. 436, 457 (1966); *see supra* Part II.A.

[128] *Seibert*, 542 U.S. at 613.

mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance."[129] It is an individual/defendant-specific inquiry—we look to see whether this particular suspect was reasonably conveyed his rights.[130]

The Supreme Court has held that a person's waiver of his *Miranda* rights is valid if the totality of the circumstances indicates that the person understood the nature of the rights and the consequences of waiving those rights, and further, that the statement was freely and voluntarily made.[131] In other words, we look at the totality of the circumstances and decide whether the defendant voluntarily, knowingly, and *intelligently* waived his rights.[132] One cannot intelligently waive his rights if he is unaware of them in the first place.[133] Construing these statements made by the Supreme Court, a defendant cannot waive his *Miranda* rights unless he understood the rights and the consequences of waiving those rights.[134] This, again, has implications to special populations—it might take more to make a member of a special population understand his rights and consequences of waiving those rights. The fact that the defendant is mentally disabled or a member of some other special population should be considered in the totality of the circumstances.

The Supreme Court has not said much about special populations in regard to *Miranda*; but based on what it has said, more should be required to apprise these defendants of their rights. This is especially evident when the question-first tactic is used—a tactic that confuses even the most intelligent of suspects.

III. TEXAS

Part III will focus on the question-first technique in Texas specifically, looking at the *Martinez* case, other Texas case law, Rodney's appeal, and conclusions on what the state of the law is in Texas.

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[129] *Id.* at 611.

[130] *See id.*

[131] Moran v. Burbine, 475 U.S. 412, 421 (1986).

[132] *Id.*; *see Miranda*, 348 U.S. at 444.

[133] *Moran*, 475 U.S. at 421; *see Miranda*, 348 U.S. at 444.

[134] *Moran*, 475 U.S. at 421; *see Miranda*, 348 U.S. at 444.

A. Martinez

Martinez v. State was a case that involved Texas's application of *Seibert*.[135] It began with a murder.[136] A few months later, Martinez was arrested and questioned without being given his *Miranda* warnings.[137] Martinez denied any knowledge of the murder, and he was given a polygraph test.[138] The officers told Martinez that he had failed the test, which is not something officers do customarily (usually they will say that "deception was indicated").[139] Shortly thereafter, Martinez was read his *Miranda* rights.[140] Martinez gave a warned confession, stating that he had become aware of certain facts from the polygraph examiner.[141] He maintained that he was merely the "lookout" man, and he moved to suppress his confession before trial because he was not given his *Miranda* rights until after the first interrogation and polygraph test.[142] The trial court determined that Martinez knowingly and voluntarily waived his right to remain silent, so the confession was admitted.[143] The Court of Appeals affirmed, and the sole issue in front of the Court of Criminal Appeals was whether the Court of Appeals correctly applied the standards set out in *Seibert*.[144]

For reasons discussed above, Texas used the Kennedy concurrence from *Seibert*.[145] The court set out the facts in the *Martinez* case: (1) Martinez was in custody; (2) the arresting officer did not give Martinez *Miranda* warnings at the time of his arrest; (3) two officers questioned Martinez about the crime at the police station without giving him *Miranda* warnings; (4) Martinez did not receive *Miranda* warnings before taking the polygraph test; (5) the identity of the polygrapher and his questions are not in the record; and (6) a magistrate read Martinez his rights only after the first

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[135] 272 S.W.3d 615, 617 (Tex. Crim. App. 2008).

[136] *Id.*

[137] *Id.* at 617–18.

[138] *Id.* at 618.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 619.

[144] *Id.*

[145] *See supra* Part II.

round of interrogation and the polygraph.[146] Based on these facts, the court determined that the question-first technique was "used in a calculated way to undermine . . . *Miranda* . . . ."[147] The mere fact that Martinez was in custody while being questioned indicated that the absence of *Miranda* warnings was not a mistake.[148] This triggered an inquiry as to whether the confession is admissible.[149]

Knocking down the state's arguments, the court stated that the prosecution has the burden of proving admissibility when a *Miranda* violation is found.[150] Thus, the fact that the record was incomplete did not harm Martinez—the state wanted to use the confession, so the state had to prove the confession's admissibility.[151] Further, the state had exclusive control over the polygrapher's identity, the questions that were asked during the polygraph test, and the questions asked during the first interrogation.[152] The court pointed out that it was immaterial whether incriminating statements were made in the unwarned interrogation—a defendant's rights are protected regardless.[153]

The state's next argument was that the interrogation was not continuous because there was a substantial break between the two interrogations.[154] The court said the correct inquiry was to consider all the events that transpired between the unwarned and warned statements, not just the amount of time.[155] Throughout the entire day, Martinez was either with police, police department personnel, or detained in a police facility.[156] The presence of police personnel was uninterrupted, so there was no substantial break in time and circumstances between the unwarned and warned statements.[157] Further, the officers treated the second interrogation as a continuation of the

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[146] *Martinez*, 272 S.W.3d at 622–23.

[147] *Id.* at 623 (quoting Missouri v. Siebert, 542 U.S. 600, 621 (2004) (Kennedy, J., concurring)).

[148] *Id.* at 624.

[149] *Id.*

[150] *Id.* at 623; Creager v. State, 952 S.W.2d 852, 860 n.2 (Tex. Crim. App. 1997) (en banc); Alvarado v. State, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995) (en banc).

[151] *Martinez*, 272 S.W.3d at 623.

[152] *Id.* at 623–24.

[153] *Id.* at 624.

[154] *Id.* at 624–25.

[155] *Id.* at 625.

[156] *Id.*

[157] *Id.*

first—they referred back to the first interrogation and reminded Martinez of things that were said.[158] Therefore, Martinez could have reasonably assumed that the second interrogation was a mere continuation of the first.[159]

The court also noted that the officers did not tell Martinez that the prior, unwarned statements could not be used against him.[160] This implied that officers needed to do this in order to apprise a suspect of his rights in a question-first scenario. In addition, in Texas, any references to a polygraph test or its results are inadmissible for all purposes, and the officers must inform the suspect that these are not admissible at trial.[161] All these things together were likely to create a belief in Martinez's mind that he was compelled to discuss matters from the first interrogation in the second.[162]

When the question-first technique is used deliberately to undermine *Miranda*, the confessions must be excluded unless curative measures are taken.[163] Examples of appropriate curative measures are:

> (1) a substantial break in time and circumstances between the unwarned statement and the *Miranda* warning; (2) explaining to the defendant that the unwarned statements, taken while in custody, are likely inadmissible; (3) informing the suspect that, although he previously gave incriminating information, he is not obligated to repeat it; (4) the interrogating officers refrain from referring to the unwarned statement unless the defendant refers to it first; or (5) if the defendant does refer to the pre-*Miranda* statement, the interrogating officer states that the defendant is not obligated to discuss the content of the first statement.[164]

In Martinez's case, none of these curative measures were taken.[165] The actions and omissions of these officers were "not likely 'to ensure that a

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[158] *Id.*

[159] *Id.* at 625–26.

[160] *Id.* at 626.

[161] *Id.*; Nesbit v. State, 227 S.W.3d 64, 66 n.4 (Tex. Crim. App. 2007) (quoting Nethery v. State, 692 S.W.2d 686, 700 (Tex. Crim. App. 1985)).

[162] *Martinez*, 272 S.W.3d at 626.

[163] *Id.* (citing Missouri v. Seibert, 542 U.S. 600, 619 (2004) (Kennedy, J., concurring)).

[164] *Id.* at 626–27.

[165] *Id.* at 627.

reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver.'"[166] Therefore, Martinez's confession should have been excluded.[167]

B. Other Texas Case Law

Since *Martinez*, many Texas courts have addressed the two-step problem.[168] In Carter v. State, the Criminal Court of Appeals made it clear that Texas follows the Kennedy concurrence from *Seibert*.[169] In *Carter*, the court found that the two-step technique was not used deliberately because the questioning only lasted ten seconds, and the officer immediately stopped and read the suspect his rights when the suspect started making incriminating statements.[170] Since there was no deliberateness, the court falls back on *Elstad* as the Kennedy concurrence in *Seibert* requires.[171]

In Vasquez v. State, the Court of Appeals follows *Carter* and *Martinez*, again pointing out that the state must prove admissibility of the statements.[172] After finding error, the court determines whether this is reversible error.[173] The court states that this type of error is constitutional error, and the case must be reversed "unless [it] determine[s] beyond a reasonable doubt that the error did not contribute to [the] appellant's conviction."[174] If there is a reasonable likelihood that the error materially affected the jury's deliberation, then the error is not harmless beyond a reasonable doubt.[175]

Several other Texas courts have examined and addressed the two-step/question-first issue. All seem to dutifully follow what has been spelled out in *Seibert*, *Martinez*, and *Carter*.[176]

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[166] *Id.* (quoting *Seibert*, 542 U.S. at 622).

[167] *Id.*

[168] *E.g.*, Carter v. State, 309 S.W.3d 31, 32 (Tex. Crim. App. 2010).

[169] *Id.* at 38.

[170] *Id.* at 40–41.

[171] *Id.* at 41.

[172] Vasquez v. State, 397 S.W.3d 850, 854 (Tex. App.—Houston [14th Dist.] 2013), *vacated*, No. PD–0497–13, 2013 WL 5729828 (Tex. Crim. App. Oct. 23, 2013).

[173] *Id.* at 858.

[174] *Id.*

[175] *Id.* at 859.

[176] *See* Olvera-Garza v. State, No. 09–11–00073–CR, 2013 WL 1790679, at *9–10 (Tex. App.—Beaumont Apr. 24. 2013, pet. ref'd) (mem. op., not designated for publication); McCulley v. State, 352 S.W.3d 107, 117 (Tex. App.—Fort Worth 2011, pet. ref'd); Ervin v. State, 333

C. Rodney's Appeal

Back to our defendant, Rodney. Rodney's case was argued in front of the Criminal Court of Appeals, and we are currently waiting for their opinion. Using the tests provided in the case law discussed, we can forecast a possible outcome for Rodney.

It was already conceded that Rodney was in custody, so this was a custodial interrogation.[177] Thus, the first issue is the deliberateness determination.[178] It might be difficult to examine the subjective states of mind of the officers, but the *Martinez* court said that the fact that the unwarned interrogation occurred while in police custody was enough to show deliberateness.[179] This means that since Rodney was given an unwarned interrogation while in police custody, the police used the question-first technique deliberately.[180] Provided the court agrees with itself, the confession must be excluded unless curative measures were taken.[181]

The first curative measure that the state could (and did) argue is that there was a substantial break in time and circumstances between the unwarned statement and the *Miranda* warning.[182] This argument is likely to fail. Rodney was in police custody at all times.[183] The paramedics came to the police station to see him, so he was still in custody at that time.[184] Even when he took a smoke break, he had to ask permission.[185] This is very similar to *Martinez*, in which the Court held that no substantial break occurred because Martinez was always with police, police department personnel, or was detained in a police facility.[186] In any event, it seems that

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S.W.3d 187, 212 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd); Santee v. State, No. 01–09–00412–CR, 2010 WL 1492596, at *3–4 (Tex. App.—Houston [1st Dist.] Apr. 15, 2010, pet. ref'd) (mem. op.).

[177] *See Hunt I*, No. 05–07–01408–CR, 2009 WL 659132, at *6 (Tex. App.—Dallas Mar. 16, 2009) (not designated for publication), *vacated*, *Hunt II*, No. PD–0995–10, 2011 WL 303815 (Tex. Crim. App. Jan. 26, 2011) (en banc) (not designated for publication).

[178] Brief for Appellant, *supra* note 2, at *8–10.

[179] *See* Martinez v. State, 272 S.W.3d 615, 624 (Tex. Crim. App. 2008).

[180] *Compare id. with Hunt I*, 2009 WL 659132, at *6.

[181] *See Martinez*, 272 S.W.3d at 626.

[182] Brief for Appellant, *supra* note 2, at *12–14.

[183] *Id.* at *12.

[184] *Id.*

[185] *Id.*

[186] *Martinez*, 272 S.W.3d at 625.

the case will turn on this issue—whether or not there was a substantial break.

The state's second option is to show the Court that the police officers explained to Rodney that his unwarned statements were likely inadmissible.[187] There is no evidence that this happened.

Next, the state could show that the officers explained to Rodney he was not obligated to repeat his previous, unwarned statements.[188] Similarly, there is no evidence that this occurred either.

The fourth possible curative measure is a showing that the officers refrained from referring to the unwarned statements unless the defendant mentioned them first.[189] This is not what happened in Rodney's case—the officers referred back to the unwarned interrogation 19 times, saying things like "that's not what you said before" and "we're going to finish this."[190]

The fifth and final curative measure is if the defendant does refer to the pre-*Miranda* statement, the interrogating officer must state that the defendant is not obligated to discuss the content of the first statement.[191] Again, this is not what happened.[192] The officers referred to the unwarned statements on their own accord.[193] Even if Rodney had referred to the unwarned statements, there is no evidence that the officers told him he was not obligated to discuss the content of those unwarned statements.[194] Remember, the burden is on the state to show that the confession is admissible.[195]

While Rodney does not need a special exception to win his case, it is still important to discuss the fact that he is arguably a member of a special population. He is mentally disabled, although there was no specific finding as to his IQ.[196] The *Martinez* Court wrote: "We agree that curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning

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[187] *See id.* at 626–27.

[188] *See id.*

[189] *See id.*

[190] Brief for Appellant, *supra* note 2, at *10.

[191] *Martinez*, 272 S.W.3d at 626–27.

[192] Brief for Appellant, *supra* note 2, at *17.

[193] *Id.*

[194] *Id.*

[195] *Martinez*, 272 S.W.3d at 623.

[196] Brief for Appellant, *supra* note 2, at *18 n.18.

and of the *Miranda* waiver."[197] This gives rise to the question: Do we use a reasonable person standard, or does this reasonable person take on the defendant's cognitive abilities/disabilities (thus "in the suspect's situation")? If the object of *Miranda* is to notify the accused of his rights, it seems clear that a member of a special population should get a better explanation of his rights.[198] Thus, even if the state were successful in showing curative measures had been taken, maybe Rodney could still win his appeal because he deserves more protection and explanation of his rights than your average citizen. In any event, there was no valid waiver, even if we use a reasonable-person standard.[199]

With no valid waiver and no curative measures taken, the court will determine whether the admission of the confession was harmless beyond a reasonable doubt.[200] The confession was basically the state's entire case, so this would be virtually impossible to show. There was no definite cause of death, no witnesses, and no physical evidence.[201] Needless to say, the state will not be able to prove that this error was harmless beyond a reasonable doubt—it definitely contributed to Rodney's conviction. With this in mind, the Court of Criminal Appeals must reverse Rodney's conviction.

D. The State of the Law in Texas

With or without the opinion from the Court of Criminal Appeals for Rodney's case, the state of the law in Texas is pretty clear.[202] If it is determined that the police deliberately employed the question-first/two-step technique in order to circumvent *Miranda*, the statements will be inadmissible unless at least one of the five curative measures are taken.[203] If curative measures are taken, the statements may be admissible.[204] If they are not taken, the court will determine whether this constitutional error was

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[197] *Martinez*, 272 S.W.3d at 626.

[198] Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

[199] *See supra* Part II.C.

[200] *See* Vasquez v. State, 397 S.W.3d 850, 858 (Tex. App.—Houston [14th Dist.] 2013), *vacated*, No. PD–0497–13, 2013 WL 5729828 (Tex. Crim. App. Oct. 23, 2013).

[201] *See Hunt I*, No. 05–07–01408–CR, 2009 WL 659132, at *4–5 (Tex. App.—Dallas Mar. 16, 2009) (not designated for publication), *vacated*, *Hunt II*, No. PD–0995–10, 2011 WL 303815 (Tex. Crim. App. Jan. 26, 2011) (en banc) (not designated for publication).

[202] *See supra* Part III.A.

[203] Martinez v. State, 272 S.W.3d 615, 626 (Tex. Crim. App. 2008) (citing Missouri v. Seibert, 542 U.S. 600, 619 (2004) (Kennedy, J., concurring)).

[204] *Id.*

harmless beyond a reasonable doubt.[205] If the error was not harmless beyond a reasonable doubt, the court must reverse the conviction.[206]

A question still remains as to how this all applies to special populations, of which Rodney is possibly a member. Based on what the Criminal Court of Appeals and the U.S. Supreme Court have said, members of special populations should be given more protections to meet the requirements of *Miranda*.[207] Remember, a defendant may waive these rights only if he can do so voluntarily, knowingly, and *intelligently*.[208] Confusing a mentally disabled defendant with this question-first technique and then subsequently reading him his rights hardly gives him the opportunity to *intelligently* waive those rights.

IV. CONCLUSION

This article has addressed the "question first, warn later" tactic, its effect on the efficacy of *Miranda*, and its implications to special populations. Looking ahead, I think we will see a lot more case law involving *Miranda* and special populations. Whether or not the question-first technique will be involved does not matter—if more protections are given to special populations, they will apply in all *Miranda* contexts.

Hopefully, police departments will do away with the question-first tactic. It helps the officers minimally, and it creates huge problems on appeal. The only reason to employ this tactic is because the police have a weak case. If the police have a weak case, maybe they should consider whether the suspect is actually guilty. There are other ways to convict criminals—ways that do not involve violating the Constitution.

In the end, this isn't about Rodney—it's about all of us. It's about protecting our constitutional rights. One of the great things about this country is the way we treat our accused, and it is sad to see officers of the law attempting to circumvent the rights we hold so dearly. That is the tension all law students learn about in Intro to Criminal Law: the constant tension between our rights and the government's desire to punish criminals. Living in a civilized society, we all run the risk of standing accused, and it is up to us to make sure we afford the accused the rights that we would want for ourselves.

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[205] *Vasquez*, 397 S.W.3d at 858.

[206] *Id.*

[207] *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966); *Martinez*, 272 S.W.3d at 626.

[208] *See Miranda*, 384 U.S. at 444; *Martinez*, 272 S.W.3d at 626.