

BLAKE R. HILLS*

Self-Incrimination and the Dispute over the Meaning of “Criminal Case”

Introduction	360
I. Historical Background	361
A. Missed Opportunities by the Supreme Court.....	362
II. <i>Chavez v. Martinez</i>	364
III. The Circuit Split.....	367
A. Self-Incrimination Applies Only at Trial.....	367
1. Third Circuit.....	367
2. Fourth Circuit.....	369
3. Fifth Circuit.....	370
4. Sixth Circuit	371
5. Eighth Circuit.....	372
B. Self-Incrimination Applies Outside of Trial	373
1. Second Circuit.....	373
2. Seventh Circuit.....	374
3. Ninth Circuit	375
4. Tenth Circuit	377
IV. The Right Against Self-Incrimination Is a Trial Right	378
A. The Supreme Court’s Precedent for Self-Incrimination	378
B. Text of the Fifth Amendment	381
C. Policy and Practicality	383
Conclusion	386

* Prosecuting Attorney, Summit County, Utah Attorney’s Office. J.D., University of Utah S.J. Quinney College of Law (1998), *Order of the Coif*. The views and opinions expressed in this Article are solely those of the author.

INTRODUCTION

Consider a scenario in which a suspect is arrested and is interviewed by police officers who fail to give him his *Miranda* warnings.¹ Charges are subsequently filed, and the interview is introduced against the suspect in a preliminary hearing. The court then binds the case over for trial based largely on incriminatory information in the suspect's interview. However, the case is eventually dismissed before a trial can take place. The suspect subsequently files suit against the police officers, arguing that they violated his Fifth Amendment right against self-incrimination and that he is entitled to damages for the time he spent incarcerated for the charge that was dismissed.

Is the suspect (now plaintiff) correct that his right against self-incrimination was violated? Would this right have been violated if charges had never been filed? Would it have made a difference if the interview had been introduced in a jury trial?

Unfortunately, the United States Supreme Court has failed to provide clear answers to these questions. Specifically, the Court has failed to give a clear indication about exactly when the right against self-incrimination comes into play. The Court had an opportunity to do so in *Chavez v. Martinez*,² but it did not. This has led to a split between the circuit courts, with some circuits holding that the right against self-incrimination applies only to trials, while other circuits hold that the right applies to stages of criminal proceedings that occur before trial. The resulting system of rules that depends on the location of the court is a significant problem that the Supreme Court should fix.

This Article proceeds in several parts. Part I contains background information on the Fifth Amendment's Self-Incrimination Clause. Part II examines the Supreme Court's failure in *Chavez* to resolve the question of exactly when the right against self-incrimination comes into play. Part III surveys the split of authority among the federal circuit courts as a result of *Chavez*. Finally, Part IV suggests that the Court should clearly indicate that the right against self-incrimination is not violated unless compelled statements are introduced at trial.

¹ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that appropriate procedural safeguards are to be used to protect a suspect's right against self-incrimination and to inform the suspect of the right to counsel).

² 538 U.S. 760 (2003).

I
HISTORICAL BACKGROUND

The right against self-incrimination has been fundamental to societies, even before the American court system adopted it. The earliest form of the privilege against self-incrimination appears to come from the ancient scriptures from Old Testament times.³ Under the Talmud, which reflected ancient teachings about the law of Moses, “an accused had an absolute (and unwaivable) ‘right’ against self-incrimination.”⁴ In addition, there was no distinction between voluntary and compelled confessions because “[n]o statement from the mouth of the accused could be used against him criminally.”⁵

The privilege against self-incrimination took form in England during the late middle ages.⁶ It was originally developed as a “defense against a variety of oaths requiring witnesses and defendants to swear to truthfully answer potentially incriminating questions.”⁷ The privilege gained more traction in the sixteenth and seventeenth centuries when it began to be used by Catholic and Puritan dissidents against oaths used by the Star Chamber and High Commission, which required defendants to respond truthfully to questions before they even knew the charges against them.⁸ English judges of the late seventeenth and early eighteenth centuries continued developing the privilege.⁹

The privilege against self-incrimination did not make an initially smooth transition across the Atlantic to the American Colonies. Indeed, it is “difficult to generalize about the reception of the privilege because of the vast diversity among the colonies.”¹⁰ There are examples during the early colonial period in which the privilege was honored and examples of when it was not, but the privilege gained

³ Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 67 n.22 (1989).

⁴ *Id.*

⁵ *Id.* “According to Maimonides, who codified the rule in the twelfth century, the principle that an accused could not be convicted upon his own admission was a ‘divine decree.’” *Id.* (citing LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 433–41 (1968)).

⁶ Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 315 (1998).

⁷ *Id.*

⁸ *Id.* at 315–16.

⁹ Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right” in Chavez v. Martinez*, 70 TENN. L. REV. 987, 1001 (2003).

¹⁰ Benner, *supra* note 3, at 84.

general acceptance as the colonies matured.¹¹ In fact, “[t]he state declarations of rights adopted prior to the federal Bill of Rights routinely included a protection against self-incrimination.”¹²

Against this backdrop the Founding Fathers created the Fifth Amendment. In its final form, the Fifth Amendment states in pertinent part that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”¹³ The meaning of “criminal case” is not intuitively obvious, and this has led to differing opinions over the years.

A. Missed Opportunities by the Supreme Court

The Supreme Court touched on the meaning of “criminal case” a number of times before the Court really delved into the issue in *Chavez*, but not in a definitive way. For instance, the Court addressed the privilege against self-incrimination in the grand jury context in the 1892 case of *Counselman v. Hitchcock*.¹⁴ In that case, the Court rejected the contention that a person could invoke the privilege only in a criminal case against himself.¹⁵ In holding that Counselman could not be held in contempt for invoking his privilege in front of the grand jury, the Court stated: “If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was, therefore, a criminal case.”¹⁶

The Supreme Court again dealt with the question of whether someone could be held in contempt for invoking the privilege against self-incrimination in a grand jury proceeding in *Kastigar v. United States*.¹⁷ In addressing the question, the Court stated that the privilege “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a

¹¹ *Id.* at 85.

¹² Davies, *supra* note 9, at 998 & n.62 (“Twelve of the initial fourteen states (counting Vermont) adopted a state constitution prior to the adoption of the federal Bill of Rights (Connecticut and Rhode Island continued to operate under their colonial charters); eight of the twelve adopted a declaration of rights as part of their state constitutions, and each of those declarations contained a provision constitutionalizing the right against self-accusation.”).

¹³ U.S. CONST. amend. V.

¹⁴ 142 U.S. 547 (1892), *overruled in part by* *Kastigar v. United States*, 406 U.S. 441 (1972).

¹⁵ *Id.* at 562.

¹⁶ *Id.*

¹⁷ 406 U.S. 441 (1972).

criminal prosecution or could lead to other evidence that might be so used."¹⁸ However, the Court held that testimony can be compelled under a grant of immunity from the prosecution.¹⁹

The Supreme Court subsequently addressed the question of whether a probationer can invoke the privilege against self-incrimination in *Minnesota v. Murphy*.²⁰ The Court answered the question in the affirmative, stating,

A defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted.²¹

In addition, the Court stated,

It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."²²

Thus, the question for the Court was whether the privilege was "violated by the admission into evidence at his trial for another crime of the prior statements made by him to his probation officer."²³

The question of whether a sentencing hearing was part of a "criminal case" was addressed by the Court in *Mitchell v. United States*.²⁴ The Court began by stating that a guilty plea does not extinguish the privilege against self-incrimination.²⁵ The Court explained that "[i]t is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege," but "[w]here the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony."²⁶ Significantly, the Court held "[t]he Fifth Amendment by its terms prevents a person from being 'compelled in any criminal case to be a witness against

¹⁸ *Id.* at 444–45.

¹⁹ *Id.* at 448.

²⁰ 465 U.S. 420 (1984).

²¹ *Id.* at 426.

²² *Id.* (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

²³ *Id.*

²⁴ 526 U.S. 314 (1999).

²⁵ *Id.* at 324.

²⁶ *Id.* at 326.

himself.’ To maintain that sentencing proceedings are not part of ‘any criminal case’ is contrary to the law and to common sense.”²⁷

Although these cases addressed what “criminal case” means with regard to when someone can invoke the privilege against self-incrimination, they did not clearly indicate what “criminal case” means when it comes to the prosecution introducing previously compelled testimony against a criminal defendant. That question remained unanswered.

II

CHAVEZ V. MARTINEZ

The Supreme Court finally dealt with the issue of whether the Fifth Amendment is violated when the prosecution uses a compelled statement before trial in its plurality opinion in *Chavez v. Martinez*.²⁸ In that case, Martinez encountered police officers who were investigating suspected narcotics activity in a vacant lot.²⁹ The police performed a pat down search of Martinez, and they found a knife on his person.³⁰ This led to an altercation during which Martinez was shot several times, leaving him permanently blind and paralyzed from the waist down.³¹

When Martinez was taken to a local hospital for emergency medical treatment, officer Chavez questioned him for ten minutes total over a forty-five-minute period without giving him *Miranda* warnings.³² Martinez told Chavez that he would not say anything until he received medical attention, but Chavez continued the interrogation.³³ During the questioning, Martinez admitted that he took a gun from an officer’s holster and pointed it at the police, and he admitted that he was a heroin user.³⁴

Martinez survived the ordeal but was never prosecuted, so his statements were never used against him in a criminal proceeding.³⁵ However, he filed a civil suit in federal court, “maintaining that Chavez’s actions violated his Fifth Amendment right not to be

²⁷ *Id.* at 327 (citation omitted).

²⁸ 538 U.S. 760 (2003).

²⁹ *Id.* at 763.

³⁰ *Id.* at 763–64.

³¹ *Id.* at 764.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

‘compelled in any criminal case to be a witness against himself,’ as well as his Fourteenth Amendment substantive due process right to be free from coercive questioning.”³⁶ The district court granted summary judgment against Chavez on his qualified immunity defense.³⁷ Chavez appealed to the Ninth Circuit Court of Appeals, which held that “Chavez’s ‘coercive questioning’ of Martinez violated his Fifth Amendment rights, ‘[e]ven though Martinez’s statements were not used against him in a criminal proceeding.’”³⁸ In a fractured Supreme Court opinion, six Justices held that no violation of Martinez’s Fifth Amendment right occurred that would support a finding of civil liability under § 1983.³⁹

Justice Thomas authored an opinion announcing the judgment of the Court, joined by Chief Justice Rehnquist and Justices O’Connor and Scalia.⁴⁰ Thomas began his reasoning by stating,

The Fifth Amendment, made applicable to the States by the Fourteenth Amendment, requires that “[n]o person . . . shall be compelled *in any criminal case* to be a *witness* against himself.” We fail to see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case.⁴¹

Thomas then addressed the contention that “criminal case” should be defined as the entire criminal process, including police investigations.⁴² Thomas rejected that contention and stated that “[i]n our view, a ‘criminal case’ at the very least requires the initiation of legal proceedings.”⁴³

Justice Thomas then stated that the Court “need not decide today the precise moment when a ‘criminal case’ commences.”⁴⁴ However, “[s]tatements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs.”⁴⁵ Thomas then made the crucial statement that has been the source of the

³⁶ *Id.* at 764–65.

³⁷ *Id.* at 765.

³⁸ *Id.* (alteration in original) (citation omitted).

³⁹ *Id.* at 766–73, 777–79.

⁴⁰ *Id.* at 766–73.

⁴¹ *Id.* at 766 (alteration in original) (citations omitted).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 767.

⁴⁵ *Id.* (citations omitted).

debate in the circuit courts: “Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*”⁴⁶

For Justice Thomas, there is a distinction between the privilege against self-incrimination and the core Fifth Amendment right itself.⁴⁷ Specifically, Thomas stated that

[a]lthough our cases have permitted the Fifth Amendment’s self-incrimination privilege to be asserted in noncriminal cases, that does not alter our conclusion 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.⁴⁸

Because Martinez was never prosecuted, he was never compelled to be a witness against himself.⁴⁹ That did not mean

that police torture or other abuse that results in a confession is constitutionally permissible *so long as the statements are not used at trial*; it simply mean[t] that the Fourteenth Amendment’s Due Process Clause, rather than the Fifth Amendment’s Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.⁵⁰

In a separate opinion, Justice Souter, joined by Justice Breyer, agreed with Thomas that “the text of the Fifth Amendment . . . focuses on courtroom use of a criminal defendant’s compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence.”⁵¹ However, Souter believed that the Court’s ruling “requires a degree of discretionary judgment greater than Justice Thomas acknowledges.”⁵² Ultimately, Souter concluded that Martinez’s claim for monetary damages should be rejected because the claim was “well outside the core of Fifth Amendment protection” and Martinez did not demonstrate the “powerful showing” needed to justify expanding protection of the core Fifth Amendment right to include civil liability.⁵³ Although the Court in *Chavez* addressed whether the Fifth Amendment is violated when the prosecution uses a compelled statement before trial, the Court

⁴⁶ *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)).

⁴⁷ *See id.* at 770–73.

⁴⁸ *Id.* at 770 (citations omitted).

⁴⁹ *Id.* at 767.

⁵⁰ *Id.* at 773 (emphasis added).

⁵¹ *Id.* at 777.

⁵² *Id.*

⁵³ *Id.* at 777–79.

ultimately failed to resolve the question of when a “criminal case” begins.

III THE CIRCUIT SPLIT

The Supreme Court’s failure in *Chavez* to declare when a “criminal case” begins has led to a split between the circuit courts on that issue. The Third, Fourth, Fifth, Sixth, and Eighth Circuits have held that the right against self-incrimination applies only at trial, while the Second, Seventh, Ninth, and Tenth Circuits have held that certain pretrial uses of compelled statements violate the Fifth Amendment.

A. Self-Incrimination Applies Only at Trial

1. Third Circuit

The Third Circuit addressed the meaning of “criminal case” in *Renda v. King*.⁵⁴ That case began when Renda got into a domestic dispute with her boyfriend, took their son, and left the residence.⁵⁵ The boyfriend called the police to report that Renda had abducted their son in violation of a custody order.⁵⁶ This led Trooper King to contact Renda by telephone.⁵⁷ Renda told King that her boyfriend had assaulted her, but she did not want to make a statement and wanted to be left alone.⁵⁸

Despite this request, King conducted an in-person interview of Renda the next day, without providing Renda her *Miranda* warnings.⁵⁹ Renda provided a written statement during the interview, but the statement did not mention the assault by her boyfriend.⁶⁰ King subsequently claimed that Renda said she did not mention the assault in the written statement because she had lied when she said it had occurred.⁶¹ Renda later claimed that she never said she had lied. She instead claimed that she did not mention the assault in the written statement because she did not want to file a complaint against her

⁵⁴ 347 F.3d 550 (3d Cir. 2003).

⁵⁵ *Id.* at 552.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

boyfriend and that she provided the written statement only because King had threatened her.⁶²

King subsequently filed a charge of giving a false report against Renda, and Renda was arrested.⁶³ The trial court suppressed Renda's statements from the in-person interview because she was not given her *Miranda* warnings prior to the custodial interview.⁶⁴ This led to the prosecutor dismissing the case.⁶⁵ Renda subsequently filed suit against King and others under § 1983, alleging, among other things, that King had violated her constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments by subjecting her to a coercive interrogation and interrogating her without giving her the *Miranda* warnings.⁶⁶ The district court subsequently dismissed the claim related to *Miranda*, and Renda appealed.⁶⁷

The Third Circuit upheld the dismissal of the *Miranda* claim based on the reasoning of *Chavez*.⁶⁸ Specifically, the court held that under *Chavez*, "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."⁶⁹ The court did note that there was a difference between the facts in *Chavez* and the instant case since no criminal charges were ever filed against Martinez, but "Renda's statement was used in a criminal case in one sense (i.e., to develop probable cause sufficient to charge her)."⁷⁰ However, the Third Circuit concluded that this distinction was unimportant because "it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution."⁷¹ Because the charges against Renda were dropped before trial, her constitutional right against self-incrimination was not violated.⁷²

⁶² *Id.* at 552–53.

⁶³ *Id.* at 553.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 557–58.

⁶⁹ *Id.*

⁷⁰ *Id.* at 558–59.

⁷¹ *Id.* at 559.

⁷² *Id.*

2. Fourth Circuit

The Fourth Circuit addressed the meaning of “criminal case” in *Burrell v. Virginia*.⁷³ The case began when Burrell was involved in a traffic accident and refused an officer’s request to produce insurance documents by asserting his privilege against self-incrimination.⁷⁴ The officer told Burrell that he would be arrested for obstruction of justice if he did not comply.⁷⁵ Burrell continued to refuse to comply, and he was charged with obstruction of justice and was convicted of that charge in traffic court.⁷⁶ However, the obstruction of justice charge was subsequently dismissed.⁷⁷ Burrell then filed suit against numerous defendants seeking \$10,000,000 in damages for numerous alleged violations of his rights, including his Fifth Amendment privilege against self-incrimination.⁷⁸ The district court dismissed that claim after finding that the Fifth Amendment had not been violated.⁷⁹

The Fourth Circuit began its analysis by stating that *Chavez* “precludes a section 1983 suit in the circumstances of this case, regardless of whether the Fifth Amendment would bar admission in court of insurance information produced under compulsion.”⁸⁰ The court noted that nothing in the record indicated that the prosecution had sought to introduce evidence of Burrell’s failure to respond into the trial and that Burrell’s counsel affirmed in oral argument that Burrell “*only* claims that his constitutional rights were violated at the time the summonses were issued, not at the time of trial.”⁸¹ Thus, the court held that “Burrell’s Fifth Amendment section 1983 claim fail[ed] to state a claim” because he did “not allege any *trial* action that violated his Fifth Amendment rights.”⁸² In addition, the court stated that “[e]ven if a refusal to provide insurance information *in a criminal case* is protected by the Fifth Amendment (a question we do not reach), Burrell’s refusal *outside* the context of a criminal trial was not an exercise of his ‘core Fifth Amendment right.’”⁸³

⁷³ 395 F.3d 508 (4th Cir. 2005).

⁷⁴ *Id.* at 510.

⁷⁵ *Id.*

⁷⁶ *Id.* at 511.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 513 (citing *Chavez v. Martinez*, 538 U.S. 760 (2003)).

⁸¹ *Id.* at 513 n.4.

⁸² *Id.* at 514.

⁸³ *Id.* at 515 (citing *Chavez*, 538 U.S. at 768–69).

3. Fifth Circuit

The Fifth Circuit addressed the meaning of “criminal case” in *Murray v. Earle*.⁸⁴ In that case, a two-year-old child died from a severe liver injury that was caused by blunt force trauma.⁸⁵ The police removed the other children in the home for their own safety, including eleven-year-old L.M.⁸⁶ Shortly thereafter, the police began to suspect that L.M. had killed the two-year-old.⁸⁷ The police then interviewed L.M. after giving her *Miranda* warnings but without getting the approval of a magistrate as required by state law.⁸⁸ During the interview, L.M. confessed that she had dropped the child and kicked her.⁸⁹

L.M. was charged with capital murder and was convicted of negligent homicide and injury to a child after her confession was introduced in the jury trial.⁹⁰ The juvenile court subsequently vacated the conviction and ordered a new trial, and L.M. was convicted of injury to a child after her confession was admitted in the second trial.⁹¹ Three years later, the state appellate court reversed the conviction after ruling that the confession was inadmissible because the police had not taken L.M. to a magistrate before interviewing her.⁹²

After her conviction was reversed on appeal, L.M. brought suit against multiple individuals, alleging that they had violated a number of her constitutional rights.⁹³ The district court dismissed all the complaints on summary judgment except for the alleged violation of the Fifth Amendment right against self-incrimination and state law civil conspiracy.⁹⁴

The Fifth Circuit began its analysis by stating that the Fifth Amendment privilege against self-incrimination applies in juvenile court proceedings, and the court noted that even greater care should be taken to protect juveniles against compelled confessions.⁹⁵ In addition,

⁸⁴ 405 F.3d 278 (5th Cir. 2005).

⁸⁵ *Id.* at 283.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 283–84.

⁸⁹ *Id.* at 284.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 285 (citing *In re Gault*, 387 U.S. 1, 30–31, 55 (1967)).

the court stated that “[t]he Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right.”⁹⁶ The court noted that L.M.’s case was distinguishable from *Chavez* because her compelled confession was actually used at trial.⁹⁷ However, the court ultimately held that the defendants were entitled to qualified immunity because the decision of the state judge who presided over the trials to admit the confession into evidence constituted a superseding cause of injury to L.M.⁹⁸

4. Sixth Circuit

The Sixth Circuit addressed the meaning of “criminal case” in *Smith v. Patterson*.⁹⁹ That case began with the arrest of Plummer and three other teenagers for a gang-related murder.¹⁰⁰ The police interviewed Plummer two different times within a period of several hours, and Plummer eventually stated that he had fired the shot that killed the victim.¹⁰¹ Charges were filed against Plummer and a second teenager, but the charges were dismissed two weeks later when gunshot residue tests were inconclusive.¹⁰² All four teenagers filed separate lawsuits against the police after two other individuals were convicted of the murder.¹⁰³ One of Plummer’s allegations was that a detective violated his due process rights by forcing him to make a false confession.¹⁰⁴

The Sixth Circuit began its analysis by stating that these sorts of claims often involve the Fifth Amendment privilege against self-incrimination.¹⁰⁵ However, the court cited *Chavez* for the proposition that “when the government does not try to admit the confession at a criminal trial, the Fifth Amendment plays no role.”¹⁰⁶ Plummer could not base a claim on a violation of the privilege against self-incrimination because his statement was not introduced against him at trial. Instead, he had to argue that the detective’s conduct violated his

⁹⁶ *Id.* (citing *Chavez v. Martinez*, 538 U.S. 760, 767 (2003)).

⁹⁷ *Id.* at 285 n.11.

⁹⁸ *Id.* at 293.

⁹⁹ 430 F. App’x 438 (6th Cir. 2011).

¹⁰⁰ *Id.* at 439.

¹⁰¹ *Id.* at 439–40.

¹⁰² *Id.* at 440.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 441.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing *Chavez v. Martinez*, 538 U.S. 760, 772–73, 778–79 (2003)).

Fourteenth Amendment due process rights by using interview techniques that “shocked the conscience.”¹⁰⁷ The court held that the detective’s techniques did not rise to that level.¹⁰⁸

5. Eighth Circuit

The Eighth Circuit briefly addressed the meaning of “criminal case” in *Winslow v. Smith*.¹⁰⁹ In that case, the four plaintiffs had pleaded guilty or no contest to various charges related to the murder of a Nebraska woman.¹¹⁰ Approximately nineteen years later, DNA testing revealed that blood and semen collected from the scene matched someone wholly unconnected to the plaintiffs.¹¹¹ As a result, the Nebraska Pardons Board granted full pardons to the four plaintiffs.¹¹²

After their pardons, the plaintiffs filed a § 1983 suit against various individuals involved in the investigation and prosecution of the murder.¹¹³ The suit alleged that the defendants had violated the plaintiffs’ Fifth and Fourteenth Amendment rights by recklessly investigating the case and by coercing the plaintiffs to plead guilty.¹¹⁴ The district court granted the defendants’ motion for summary judgment and dismissed the claims based on qualified and absolute immunity.¹¹⁵

The Eighth Circuit concluded that the district court erred by failing to grant all reasonable inferences to the plaintiffs and that it should have allowed some claims to go forward.¹¹⁶ However, the Eighth Circuit stated that, as to a claim that the right against self-incrimination was violated, “[s]uch a claim fails . . . because Plaintiffs did not proceed to a criminal trial.”¹¹⁷ As support for this conclusion, the court cited *Chavez* for the proposition that “[s]tatements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs.”¹¹⁸

¹⁰⁷ *Id.* at 441–42.

¹⁰⁸ *Id.* at 442.

¹⁰⁹ 696 F.3d 716 (8th Cir. 2012).

¹¹⁰ *Id.* at 730.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 721.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 731 n.4.

¹¹⁸ *Id.* (quoting *Chavez v. Martinez*, 538 U.S. 760, 767 (2003)).

B. Self-Incrimination Applies Outside of Trial

1. Second Circuit

The Second Circuit addressed the meaning of “criminal case” in *Higazy v. Templeton*.¹¹⁹ In that case, Higazy was staying in a hotel across the street from the World Trade Center when it was destroyed by terrorists on September 11, 2001.¹²⁰ Higazy and the other guests were evacuated, and the hotel employees subsequently performed an inventory of guest property.¹²¹ One of the employees found a radio and other items of Higazy’s that he considered to be “sinister,” so he contacted the FBI.¹²² Higazy was interviewed by the FBI, and he denied owning the radio.¹²³

Based on the interview, the FBI arrested Higazy and detained him as a material witness.¹²⁴ Higazy was brought before a magistrate the next day on the material witness warrant.¹²⁵ The magistrate denied bail and ruled that Higazy would be detained for at least ten more days.¹²⁶ Higazy’s attorney told the court that Higazy wanted to take a polygraph test to prove his innocence, and a test was scheduled.¹²⁷

Nine days later, Templeton, an FBI agent, conducted a polygraph examination of Higazy.¹²⁸ During the test, Higazy asked to stop because he was experiencing pain, but Templeton called him a “baby” and continued the test.¹²⁹ Higazy ended up providing a number of contradictory and incriminating statements that Templeton did not contest were given under coercion.¹³⁰ The statements were used in a bail hearing the next day, and the magistrate ordered Higazy to remain in detention.¹³¹ Shortly thereafter, the FBI filed a criminal complaint against Higazy for making false statements, and the magistrate ordered Higazy to be detained without bail.¹³² However, the

¹¹⁹ 505 F.3d 161 (2d Cir. 2007).

¹²⁰ *Id.* at 164.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 164–65.

¹²⁴ *Id.* at 165.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 166.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 166–67.

¹³² *Id.* at 167.

government withdrew its complaint several days later after discovering that someone else had owned the radio and brought it to the hotel.¹³³ Higazy subsequently filed suit against Templeton for violating a number of his constitutional rights, but the district court dismissed the claims after finding that Templeton had qualified immunity and that some of the claims were not actionable.¹³⁴

The Second Circuit began its analysis by stating that, under *Chavez*, “the privilege [against self-incrimination] may be invoked in any proceeding, [but] a violation of the constitutional right ‘occurs only if one has been compelled to be a witness against himself in a criminal case.’”¹³⁵ The court also noted that *Chavez* does not address when a “criminal case” commences.¹³⁶ The court then held that Higazy’s Fifth Amendment right against self-incrimination was violated when his coerced statements were used against him in the bail hearing that occurred after the criminal complaint had been filed.¹³⁷ Specifically, the court held that “[t]he status of bail hearings under other constitutional provisions supports the conclusion that such a hearing is part of a criminal case against an individual against whom charges are pending.”¹³⁸ Thus, the court concluded that the district court erred when it dismissed the Fifth Amendment claim relating to the use of coerced statements at the bail hearing that occurred after the criminal complaint was filed.¹³⁹

2. Seventh Circuit

The Seventh Circuit addressed the meaning of “criminal case” in *Best v. City of Portland*.¹⁴⁰ Best had been charged in state court with various drug-related crimes based on evidence found during the search of two homes.¹⁴¹ Best moved to suppress the evidence, arguing that the searches violated the Fourth Amendment.¹⁴² The trial court denied the motion, and Best appealed.¹⁴³ The state appellate court upheld the trial

¹³³ *Id.*

¹³⁴ *Id.* at 168.

¹³⁵ *Id.* at 171 (quoting *Chavez v. Martinez*, 538 U.S. 760, 770 (2003)).

¹³⁶ *Id.*

¹³⁷ *Id.* at 171–73.

¹³⁸ *Id.* at 172.

¹³⁹ *Id.* at 179.

¹⁴⁰ 554 F.3d 698 (7th Cir. 2009).

¹⁴¹ *Id.* at 699.

¹⁴² *Id.*

¹⁴³ *Id.*

court, but the prosecutor dropped the charges against Best before trial.¹⁴⁴

Best sued the police officers involved and stated various claims.¹⁴⁵ For instance, Best alleged that “his Fifth Amendment rights were violated because statements elicited from him in violation of *Miranda v. Arizona* were used against him at the suppression hearing, which led to his continued confinement awaiting trial.”¹⁴⁶ The district court dismissed the claim because the case was dismissed before it went to trial.¹⁴⁷

The Seventh Circuit rejected what it called “the narrow view that use [of coerced statements] in a ‘criminal case’ means ‘at trial.’”¹⁴⁸ Instead, the court held that because “Best alleges that statements he made were used [at a suppression hearing] in violation of the Fifth Amendment long after charges were initiated against him . . . that is enough to allege that the statements were used in a ‘criminal case’ in violation of the Fifth Amendment.”¹⁴⁹ Thus, the court held that the claim should not have been dismissed solely on the grounds that there had been no trial.¹⁵⁰

3. Ninth Circuit

The Ninth Circuit addressed the meaning of “criminal case” in *Stoot v. City of Everett*.¹⁵¹ This case began when a mother told the police to report that her daughter had described being sexually abused by a fourteen-year-old named Stoot.¹⁵² A detective subsequently interviewed Stoot, and he confessed.¹⁵³ Thereafter, charges were filed against Stoot based at least partially on the confession.¹⁵⁴ The trial court subsequently held a hearing and concluded that Stoot’s waiver of his *Miranda* rights in the interview was invalid and that his statements in the interview “‘were the product of impermissible coercion,’ and

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 700.

¹⁴⁶ *Id.* at 702 (citation omitted).

¹⁴⁷ *Id.* at 700.

¹⁴⁸ *Id.* at 702 (citing *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1026–27 (7th Cir. 2006)).

¹⁴⁹ *Id.* at 702–03.

¹⁵⁰ *Id.* at 703.

¹⁵¹ 582 F.3d 910 (9th Cir. 2009).

¹⁵² *Id.* at 912–13.

¹⁵³ *Id.* at 915–16.

¹⁵⁴ *Id.* at 912.

were therefore inadmissible.”¹⁵⁵ The charges were eventually dismissed before trial.¹⁵⁶

After the charges were dismissed, Stoot and his parents filed suit against the detective and the city pursuant to § 1983.¹⁵⁷ The district court dismissed the complaints and specifically found that “the Stoots ‘failed to make out a cognizable § 1983 claim for violation of [Stoot’s] Fifth Amendment privilege against compelled self-incrimination’ because [Stoot]’s statements were never used against him in a criminal trial.”¹⁵⁸

The Ninth Circuit began its analysis by stating that “*Chavez* poses but does not decide the issue we face, as the Court had no occasion to explicate the sort of ‘use’ in a ‘criminal case’ that gives rise to a Fifth Amendment violation.”¹⁵⁹ The court distinguished Stoot’s case from *Chavez* by stating,

[Stoot]’s statements were used against him in (1) the Affidavit filed in support of the Information charging him with child molestation; (2) a pretrial arraignment and bail hearing; and (3) a pretrial evidentiary hearing to determine the admissibility of his confession. The question is whether these forms of reliance on [Stoot]’s statements constitute “use” in a “criminal case” under *Chavez*. We conclude that (1) and (2) above do constitute such “use.”¹⁶⁰

After examining the circuit split, the Ninth Circuit adopted the rule that “[a] coerced statement has been ‘used’ in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status.”¹⁶¹ According to the court, this is because “[s]uch uses impose precisely the burden precluded by the Fifth Amendment: namely, they make the declarant a witness against himself in a criminal proceeding.”¹⁶²

¹⁵⁵ *Id.* at 916–17.

¹⁵⁶ *Id.* at 917.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 923.

¹⁶⁰ *Id.* at 923–24 (citations omitted).

¹⁶¹ *Id.* at 925.

¹⁶² *Id.*

4. Tenth Circuit

The Tenth Circuit addressed the meaning of “criminal case” in *Vogt v. City of Hays*.¹⁶³ Vogt, who was employed as a police officer for the City of Hays, had applied for a position in the police department of another city.¹⁶⁴ As part of the hiring process, Vogt disclosed that he had retained possession of a knife he received as a Hays police officer.¹⁶⁵ The hiring city then told Vogt that it could hire him only if he reported the knife and returned the knife to Hays.¹⁶⁶ Vogt returned the knife, and the Hays police chief ordered him to submit a written report about keeping the knife.¹⁶⁷ This led to an internal investigation that required Vogt to give a more detailed statement in order to keep his job with the Hays department.¹⁶⁸

This activity led to a larger investigation that resulted in Vogt being charged with two felony crimes in state court.¹⁶⁹ However, the charges were dismissed after the judge determined that probable cause was lacking.¹⁷⁰ Vogt then filed suit, alleging that his right against self-incrimination was violated when his statements were used “(1) to start an investigation leading to the discovery of additional evidence concerning the knife, (2) to initiate a criminal investigation, (3) to bring criminal charges, and (4) to support the prosecution during the probable cause hearing.”¹⁷¹ The district court dismissed all the claims based on its reasoning that “the right against self-incrimination is only a trial right and Mr. Vogt’s statements were used in pretrial proceedings, but not in a trial.”¹⁷²

The Tenth Circuit began its analysis by stating that the Supreme Court had failed to conclusively define the meaning of “criminal case,” and this had led to the circuit split.¹⁷³ The Tenth Circuit then looked at the text of the Fifth Amendment and concluded that “the term ‘criminal case’ is broader than the term ‘criminal prosecution,’” and “on its face, the term ‘criminal case’ appears to encompass all of the proceedings

¹⁶³ 844 F.3d 1235 (10th Cir. 2017).

¹⁶⁴ *Id.* at 1238.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 1237.

¹⁷³ *Id.* at 1239–40.

involved in a ‘criminal prosecution.’”¹⁷⁴ The court then referred to the dictionary definition that existed at the time of the Founders. At that time, “case” meant “[a] cause or suit in court.”¹⁷⁵ Thus, “the term ‘case’ suggests that the Fifth Amendment encompasses more than the trial itself.”¹⁷⁶ Based on this reasoning, the court held “Mr. Vogt alleged that his compelled statements had been used in a probable cause hearing. As a result, we conclude that Mr. Vogt has adequately pleaded a Fifth Amendment violation consisting of the use of his statements in a criminal case.”¹⁷⁷ The court did, however, decline to “decide whether uses before the probable cause hearing would have constituted additional violations of the Fifth Amendment.”¹⁷⁸

IV

THE RIGHT AGAINST SELF-INCRIMINATION IS A TRIAL RIGHT

The failure of the Supreme Court in *Chavez* to specifically define the term “criminal case” has led to a confused mixture of rules that vary depending upon the circuit in which a trial occurs. Different outcomes for identical facts based merely on the location of the court is the very definition of unfairness. This situation is untenable in a modern age when crimes and investigations frequently cross jurisdictional boundaries. The time has come for the Supreme Court to expressly state that the right against self-incrimination is not violated unless compelled statements are introduced at trial. This is the rule that is most consistent with the Court’s other cases, the language of the Fifth Amendment, and general policy considerations based on practicality.

A. The Supreme Court’s Precedent for Self-Incrimination

In order to understand the Court’s opinion in *Chavez*, it is helpful to examine the way the Court has handled the right against self-incrimination in other cases. Current Supreme Court precedence supports a narrow interpretation of the term “criminal case.” For example, the Supreme Court had previously addressed its understanding of Fifth Amendment rights in *United States v. Verdugo-*

¹⁷⁴ *Id.* at 1242.

¹⁷⁵ *Id.* at 1243 (alteration in original) (quoting NOAH WEBSTER, *Case*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828)).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1246.

¹⁷⁸ *Id.* at 1247 n.8.

Urquidez.¹⁷⁹ In analyzing the application of Fourth Amendment protections to nonresident aliens in foreign countries, the Court emphasized the significant operational differences between the Fourth and Fifth Amendments, stating that “[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a *constitutional violation occurs only at trial*.”¹⁸⁰ In contrast, the Fourth Amendment does not turn on the use of evidence during criminal proceedings but rather is “‘fully accomplished’ at the time of an unreasonable government intrusion.”¹⁸¹ Although the case turned on the Fourth Amendment, the language in *Verdugo-Urquidez* clearly suggests that pretrial conduct of law enforcement officials does not violate the right against self-incrimination.

The Court also made statements in the earlier case of *Withrow v. Williams*¹⁸² that support a narrow interpretation of “criminal case.” When examining the federal habeas claims of a state inmate, the Court specifically described the Fifth Amendment privilege against self-incrimination as a “trial right.”¹⁸³ In addition, the Court stated that the right cannot be “necessarily divorced from the correct ascertainment of guilt.”¹⁸⁴ This “suggests that the right is much more closely tied to the trial than to any other proceeding.”¹⁸⁵ Indeed, if the right is tied to the ascertainment of guilt, pretrial proceedings are not included in the Fifth Amendment’s definition of “criminal case” because they focus on things other than ascertaining guilt beyond a reasonable doubt.

In addition to these pre-*Chavez* opinions, the Supreme Court also commented on the right against self-incrimination shortly after *Chavez* in *United States v. Patane*.¹⁸⁶ In that plurality opinion, the Court held that because the Self-Incrimination Clause is not violated by introduction of nontestimonial evidence obtained as result of voluntary statements, failure to give a suspect *Miranda* warnings does not require

¹⁷⁹ 494 U.S. 259 (1990).

¹⁸⁰ *Id.* at 264 (emphasis added) (citation omitted).

¹⁸¹ *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 906 (1984); *United States v. Calandra*, 414 U.S. 338, 354 (1974)).

¹⁸² 507 U.S. 680 (1993).

¹⁸³ *Id.* at 692.

¹⁸⁴ *Id.*

¹⁸⁵ Michael Votel, *What Is a “Criminal Case” Within the Meaning of the Self-Incrimination Clause? So Far, the Supreme Court Has Pleaded the Fifth*, 46 N. KY. L. REV. 87, 102 (2019).

¹⁸⁶ 542 U.S. 630 (2004).

suppression of the physical fruits of the suspect's unwarned but voluntary statements.¹⁸⁷ Justice Thomas, joined by Justices Rehnquist and Scalia, stated that in regard to the Self-Incrimination Clause, "We need not decide here the precise boundaries of the Clause's protection. For present purposes, it suffices to note that the core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself *at trial*."¹⁸⁸ Justice Kennedy, joined by Justice O'Connor, concurred in the judgment and stated that it was "unnecessary to decide whether the detective's failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is '[any]thing to deter' so long as the unwarned statements are not later introduced *at trial*."¹⁸⁹

How does *Mitchell v. United States*¹⁹⁰ fit in? Does the Court's conclusion that a sentencing hearing is part of a "criminal case"¹⁹¹ mean that a "criminal case" also includes pretrial proceedings? It does not. The issue in *Mitchell* was not whether the government could introduce a prior compelled statement of the defendant in her sentencing hearing, it was whether the court could compel a defendant to provide testimony in a sentencing hearing and make an adverse inference against her if she didn't testify.¹⁹² Thus, the Court was addressing when the privilege could be invoked, and its decision was perfectly consistent with its prior rulings that the privilege can be invoked essentially anytime that immunity is not granted.¹⁹³ In addition, a sentencing hearing is obviously not a pretrial proceeding. Sentencing can occur only after there has been a conviction in trial or by guilty plea. As noted by the Court in *Mitchell*, "a court must impose sentence before a judgment of conviction can issue."¹⁹⁴ For all intents and purposes under this rule, a sentencing hearing is just another part of a trial proceeding.

¹⁸⁷ *Id.* at 637–38.

¹⁸⁸ *Id.* at 637 (emphasis added) (citing *Chavez v. Martinez*, 538 U.S. 760, 764–68, 777–79 (2003)).

¹⁸⁹ *Id.* at 645 (alteration in original) (emphasis added).

¹⁹⁰ 526 U.S. 314 (1999).

¹⁹¹ *Id.* at 327.

¹⁹² *See id.* at 318–19.

¹⁹³ *See supra* notes 14–23 and accompanying text.

¹⁹⁴ *Mitchell*, 526 U.S. at 327 (citing FED. R. CRIM. P. 32(d)(1)).

B. Text of the Fifth Amendment

Any interpretation of “criminal case” must also include an examination of the text of the Fifth Amendment itself. The Self-Incrimination Clause of the Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”¹⁹⁵ While this simple language should be easy to interpret, it is not. In fact, it has been called “an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights” that “[f]rom the beginning . . . lacked an easily identifiable rationale.”¹⁹⁶

The natural tendency might be to focus only on the phrase “criminal case,” but it must be examined in context with the term “witness.” As stated by Professor Akhil Reed Amar, “witness” in its natural sense means “someone whose testimony, or utterances, are introduced at trial. Witnesses are those who take the stand and testify, or whose out-of-court depositions or affidavits are introduced at trial in front of the jury.”¹⁹⁷ Indeed, *Chavez* recognized this when stating that “[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial” and that “Martinez was never made to be a ‘witness’ against himself in violation of the Fifth Amendment’s Self-Incrimination Clause because his statements were never admitted as testimony against him.”¹⁹⁸

When determining what the term “witness” means, referring to the Confrontation Clause of the Sixth Amendment is also helpful. This clause states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹⁹⁹ The Supreme Court has repeatedly and consistently stated that the right of confrontation is a right that applies at trial.²⁰⁰ Indeed, there is extensive

¹⁹⁵ U.S. CONST. amend. V.

¹⁹⁶ Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857 (1995).

¹⁹⁷ *Id.* at 900.

¹⁹⁸ *Chavez v. Martinez*, 538 U.S. 760, 767 (2003).

¹⁹⁹ U.S. CONST. amend. VI.

²⁰⁰ See *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 54 n.10 (1987) (“[T]he right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination,” and does not “require the government to produce witnesses whose statements are not used at trial.”); *California v. Green*, 399 U.S. 149, 157 (1970) (“[I]t is this literal right to ‘confront’ the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause.”); *Barber v. Page*, 390 U.S. 719, 725 (1968) (“The right to confrontation is basically a trial right.”), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004); see also *Bullcoming v. New Mexico*, 564 U.S. 647, 657 (2011) (“As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused *at trial* unless

case law in the lower courts declining to apply the confrontation right to various pretrial proceedings.²⁰¹ Because the term “witness” in the Confrontation Clause means a witness at trial, it follows that the term “witness” means the same thing in the Self-Incrimination Clause.²⁰²

Because interpreting the text of the Self-Incrimination Clause is difficult, examining the original understanding and purpose of the clause is helpful.²⁰³ Indeed, “[m]any of the great legal minds of the early-to-mid twentieth century favored the purpose-oriented approach” to constitutional and statutory interpretation.²⁰⁴ The followers of this approach, such as Justice Holmes, Justice Cardozo, and Judge Hand, “believed that a court’s job was to give effect to the ‘will’ of the legislature, irrespective of whether that will was found in the ‘terms’ of the statute itself.”²⁰⁵

In the American colonies, “the privilege was a trial right [that] did not affect pretrial questioning, which was not conducted under oath.”²⁰⁶ This was because the privilege was, in part, designed to protect people from being forced to either tell the truth and incriminate

the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.”) (emphasis added).

²⁰¹ See, e.g., *United States v. Andrus*, 775 F.2d 825, 836 (7th Cir. 1985) (“[T]he sixth amendment does not provide a confrontation right at a preliminary hearing.”); *United States v. Harris*, 458 F.2d 670, 677 (5th Cir. 1972) (“There is no Sixth Amendment requirement that [defendants] be allowed to confront [witnesses] at a preliminary hearing prior to trial.”); *Peterson v. California*, 604 F.3d 1166, 1170 (9th Cir. 2010) (concluding that the Supreme Court’s holding in *Crawford* does not disturb the holdings of *Andrus* and *Harris* because *Crawford* deals only with the admission of testimonial hearsay evidence at trial); see also *United States v. Hernandez*, 778 F. Supp. 2d 1211, 1227 (D.N.M. 2011) (right to confrontation does not apply at detention hearings); *United States v. Bibbs*, 488 F. Supp. 2d 925, 926 (N.D. Cal. 2007) (right to confrontation does not apply at detention hearings); *United States ex rel. Smith v. Pate*, 305 F. Supp. 225, 227 (N.D. Ill. 1969) (right to confrontation does not apply at suppression hearings (citing *McCray v. Illinois*, 386 U.S. 300, 312–13 (1967))).

²⁰² See Amar & Lettow, *supra* note 196, at 919 (“Only the defendant’s compelled testimony should be protected by the [Fifth] Amendment. The ‘witnessing’ that the defendant has a right to exclude from the criminal trial includes both communicating on the stand at trial and introducing at trial any earlier compelled depositions. This definition of witness closely tracks what seems to be the best definition of witness under the Confrontation and Compulsory Process Clauses of the Sixth Amendment.”).

²⁰³ Votel, *supra* note 185, at 99 (“Because the plain language of the Self-Incrimination Clause is, on its own, inconclusive on the precise moment that a ‘criminal case’ commences, it is helpful to look to the original understanding and fundamental purpose of the Clause.”).

²⁰⁴ Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner’s Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 456 (2002).

²⁰⁵ *Id.* at 456–57 (citations omitted).

²⁰⁶ William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 416 (1995).

themselves or lie under oath.²⁰⁷ Indeed, “the privilege was very much considered a trial right and quite often did not stop English and colonial governments from using a person’s self-incriminating statements at trial” and “[t]here is a strong argument that this weak colonial privilege against self-incrimination is one of the reasons why the drafters chose to include the Self-Incrimination Clause in the Bill of Rights.”²⁰⁸

Even after it was enacted, “the Fifth Amendment rarely played a significant role in criminal procedure and the privilege against self-incrimination was still strictly limited to trials.”²⁰⁹ This was largely because defense lawyers were not yet common, so a criminal defendant would be forced to speak to defend himself, which meant that exercise of the privilege was not entirely plausible.²¹⁰

The Founders would have known that the right against self-incrimination was limited to trials. The fact that the Founders did not clearly state in the Fifth Amendment that the right applied to pretrial proceedings indicates that this was not their purpose. Rather, it would appear that their purpose was to enact “a protection against torture, which might often lead to unreliable confessions.”²¹¹ Thus, “[w]hile the early history and understanding of the Self-Incrimination Clause cannot simply be applied one-for-one today, it at least suggests that the privilege against self-incrimination was originally designed to be quite narrow.”²¹²

C. Policy and Practicality

Extending the definition of “criminal case” to include pretrial proceedings would fundamentally change the nature of those proceedings. It would do so in a way that is simply not practical.

Pretrial proceedings are simply not set up to deal with the fact-intensive inquiry that is required to determine whether a statement was “compelled.” As stated by the Supreme Court in *Schneckloth v. Bustamonte*, a determination of whether a statement was voluntary requires an assessment of “the totality of all the surrounding circumstances—both the characteristics of the accused and the details

²⁰⁷ *Id.* at 412–13.

²⁰⁸ *Votel*, *supra* note 185, at 100.

²⁰⁹ *Id.*

²¹⁰ *Stuntz*, *supra* note 206, at 419–20.

²¹¹ *Amar & Lettow*, *supra* note 196, at 865.

²¹² *Votel*, *supra* note 185, at 100.

of the interrogation.”²¹³ Some of the factors that must be assessed under the totality of the circumstances include

the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.²¹⁴

Essentially, a court must assess “the factual circumstances surrounding the confession, assess[] the psychological impact on the accused, and evaluate[] the legal significance of how the accused reacted.”²¹⁵

Pretrial proceedings, such as bail hearings and probable cause determinations, are not set up for this fact-intensive “totality of the circumstances” analysis. In addition, these assessments frequently require significant legal research to complete the analysis. A “totality of the circumstances” analysis often requires a lengthy suppression hearing and extensive legal briefing for a court to determine whether a statement was voluntary and will be admissible at trial.²¹⁶ Requiring this to be done in pretrial proceedings would significantly expand the time that these sorts of hearings take and would slow down the justice system, greatly harming judicial economy.²¹⁷

In addition, a rule that the Self-Incrimination Clause does not apply in pretrial proceedings “fits with the way we apply rules of evidence, such as hearsay.”²¹⁸ This is because the “[r]ules of evidence, of course, apply at trial—but they do not apply in pretrial proceedings, such as depositions and grand jury hearings.”²¹⁹ As stated by Professor Amar,

Like the privilege against compelled self-incrimination, rules of evidence such as hearsay are meant to improve reliability. Reliability of individual bits of information is critical at trial, where final decisions are made, but not so critical where the goal is simply to gather as much relevant information as possible before sifting, as in pretrial proceedings. The different burdens of proof at the pretrial and trial stages—probable cause for an indictment as opposed to proof

²¹³ 412 U.S. 218, 226 (1973).

²¹⁴ *Id.* (citations omitted).

²¹⁵ *Id.*

²¹⁶ *See id.*

²¹⁷ *See, e.g.,* Samantha Ruben, Note, *Clarifying the Scope of the Self-Incrimination Clause: City of Hays v. Vogt*, 94 CHI.-KENT L. REV. 137, 148–49 (2019) (“Before resolving preliminary issues in a case, courts would have to adjudicate fact-intensive suppression questions. . . . It might also slow down the pretrial process, including probable cause assessments and bail determinations.”).

²¹⁸ Amar & Lettow, *supra* note 196, at 910 n.229.

²¹⁹ *Id.*

beyond a reasonable doubt for a criminal conviction—lead to differences in the need for rules emphasizing reliability.²²⁰

Essentially, the very different nature of pretrial proceedings as to the rules of evidence and the burden of proof shows that the benefits of including these hearings in the definition of “criminal case” are not worth the cost.

Expanding the definition of “criminal case” to include pretrial proceedings would also have an unwarranted deterrent effect on police investigations. The Supreme Court has stated that “[j]ust as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that police[men] investigating serious crimes make no errors whatsoever.”²²¹ Subjecting the police to liability for improper interviews that are never used in trial would penalize them for the sort of mistakes the Supreme Court said are allowable in our system of justice, and it would deter police from conducting as many interviews as they otherwise would. Indeed,

Reading pretrial, pre-indictment violations into existing Self-Incrimination Clause doctrine needlessly blurs the line between constitutional and procedural rights under the Fifth Amendment. . . . Adopting a rule to allow for self-incrimination liability in most pretrial proceedings absent a full balancing of competing interests may also adversely affect future prosecutions. Restraining prosecutorial conduct could have an overdeterrent effect²²²

This sort of deterrence is unnecessary “because substantive and procedural safeguards already exist to protect the purpose of the privilege.”²²³ First, a compelled statement of a defendant will be suppressed and will not be admitted in the trial.²²⁴ Second, as noted by the Court in *Chavez*, plaintiffs can already sue the police for torture or other abuse that leads to a compelled confession. Instead, this reading of the Self-Incrimination Clause’s scope “simply means that the Fourteenth Amendment’s Due Process Clause, rather than the Fifth Amendment’s Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.”²²⁵ “Ultimately, because there are other substantive and procedural

²²⁰ *Id.*

²²¹ *Michigan v. Tucker*, 417 U.S. 433, 446 (1974).

²²² Geoffrey B. Fehling, Note, Verdugo, *Where’d You Go? Stoot v. City of Everett and Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations*, 18 GEO. MASON L. REV. 481, 519–20 (2011).

²²³ Votel, *supra* note 185, at 103.

²²⁴ *See Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

²²⁵ *Chavez v. Martinez*, 538 U.S. 760, 773 (2003).

safeguards already in place to prevent and discourage the compelling of statements, thereby helping to prevent violations of the Self-Incrimination Clause from ever occurring, the broader view of the Clause is both wrong and unnecessary.”²²⁶

CONCLUSION

The failure of the Supreme Court in *Chavez* to specifically define the term “criminal case” has led to a confused mixture of rules that vary depending upon the circuit in which the trial occurs. Different outcomes for identical facts based merely on the location of the court is the very definition of unfairness. This situation is untenable in a modern age when the investigation of crime frequently crosses jurisdictional boundaries. Regardless of what has been done in the past, the time has come for the Supreme Court to expressly state that the right against self-incrimination is not violated unless compelled statements are introduced at trial. As noted by Professor Amar,

[T]he question is *not* whether the word *case must* mean “at trial but not before” but whether it most sensibly *should* mean this to achieve maximum textual coherence, structural harmony, common sense, and so on. Our reading of the word *case* [(to mean at trial)] enables the words of the Self-Incrimination Clause to fit together and make good policy sense; it coheres with the idea of “*witness*” “in” a “*case*”; it fits with the cognate words and principle of the Sixth Amendment, which is about “*witnesses*” *at trial* (there is no right to confront grand jury witnesses or those who give investigators pretrial statements that are never introduced at trial) . . . and it draws support from American history.²²⁷

Abraham Lincoln famously stated that in regard to the participants in great contests, “[b]oth *may* be, and one *must* be, wrong.”²²⁸ The same principle applies to the circuit courts when it comes to the definition of “criminal case” for the Self-Incrimination Clause. They cannot all be right, and this system of rules based on the location of the court is not fair to litigants or the public. It is time for this unfairness to end.

²²⁶ Votel, *supra* note 185, at 104.

²²⁷ Amar & Lettow, *supra* note 196, at 910 n.229.

²²⁸ Abraham Lincoln, Meditation on the Divine Will (Sept. 1862), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 403, 403–04 (Roy P. Basler ed., 1953).