SUPREME COURT OF THE UNITED STATES

No. 01–1444

BEN CHAVEZ, PETITIONER *v.* OLIVERIO MARTINEZ

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

[May 27, 2003]

JUSTICE KENNEDY, with whom JUSTICE STEVENS joins, and with whom JUSTICE GINSBURG joins as to Parts II and III, concurring in part and dissenting in part.

A single police interrogation now presents us with two issues: first, whether failure to give a required warning under *Miranda* v. *Arizona,* 384 U. S. 436 (1966), was itself a completed constitutional violation actionable under 42 U. S. C. §1983; and second, whether an actionable violation arose at once under the Self-Incrimination Clause (applicable to the States through the Fourteenth Amendment) when the police, after failing to warn, used severe compulsion or extraordinary pressure in an attempt to elicit a statement or confession.

I agree with JUSTICE THOMAS that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues. As to the second aspect of the case, which does not involve the simple failure to give a *Miranda* warning, it is my respectful submission that JUSTICE SOUTER and JUSTICE THOMAS are incorrect. They conclude that a violation of the Self-Incrimination Clause does not arise until a privileged statement is introduced at some later criminal proceeding.

A constitutional right is traduced the moment torture or its close equivalents are brought to bear. Constitutional protection for a tortured suspect is not held in abeyance

until some later criminal proceeding takes place. These are the premises of this separate opinion.

I

The *Miranda* warning, as is now well settled, is a constitutional requirement adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause. *Dickerson* v. *United States,* 530 U. S. 428, 444 (2000); *Miranda* v. *Arizona, supra,* at 467. *Miranda* mandates a rule of exclusion. It must be so characterized, for it has significant exceptions that can only be assessed and determined in the course of trial. Unwarned custodial interrogation does not in every instance violate *Miranda.* See, *e.g., New York* v. *Quarles,* 467 U. S. 649 (1984) (statement admissible if questioning was immediately necessary for public safety). Furthermore, statements secured in violation of *Miranda* are admissible in some instances. See, *e.g., Harris* v. *New York,* 401 U. S. 222 (1971) (statement admissible for purposes of impeachment). The identification of a *Miranda* violation and its consequences, then, ought to be determined at trial. The exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy.

II

JUSTICE SOUTER and JUSTICE THOMAS are wrong, in my view, to maintain that in all instances a violation of the Self-Incrimination Clause simply does not occur unless and until a statement is introduced at trial, no matter how severe the pain or how direct and commanding the official compulsion used to extract it.

It must be remembered that the Self-Incrimination Clause of the Fifth Amendment is applicable to the States in its full text through the Due Process Clause of the Fourteenth Amendment. *Malloy* v. *Hogan,* 378 U. S. 1, 6 (1964); *Griffin* v. *California,* 380 U. S. 609, 615 (1965). The question is the proper interpretation of the Self-

Incrimination Clause in the context of the present dispute.

Our cases and our legal tradition establish that the Self-Incrimination Clause is a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts. The Clause must provide more than mere assurance that a compelled statement will not be introduced against its declarant in a criminal trial. Otherwise there will be too little protection against the compulsion the Clause prohibits. The Clause protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future. "It 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 criminal prosecution or could lead to other evidence that might be so used." *Kastigar* v. *United States,* 406 U. S. 441, 444–445 (1972) (footnotes omitted). The decision in *Kastigar* described the Self-Incrimination Clause as an exemption from the testimonial duty. *Ibid.* As the duty is immediate, so must be the privilege. Furthermore, the exercise of the privilege depends on what the witness reasonably believes will be the future use of a statement. *Id.*, at 445. Again, this indicates the existence of a present right.

The Clause provides both assurance that a person will not be compelled to testify against himself in a criminal proceeding and a continuing right against government conduct intended to bring about self-incrimination. *Lefkowitz* v. *Turley,* 414 U. S. 70, 77 (1973) ("The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution 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"); accord,

Bram v. *United States,* 168 U. S. 532, 542–543 (1897); *Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892). The principle extends to forbid policies which exert official compulsion that might induce a person into forfeiting his rights under the Clause. *Lefkowitz* v. *Cunningham,* 431 U. S. 801, 806 (1977) ("These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized"); accord, *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York,* 392 U. S. 280 (1968); *Gardner* v. *Broderick,* 392 U. S. 273, 279 (1968). JUSTICE SOUTER and JUSTICE THOMAS acknowledge a future privilege. *Ante,* at 2; *ante*, at 7–8. That does not end the matter. A future privilege does not negate a present right.

Their position finds some support in a single statement in *United States* v. *Verdugo-Urquidez,* 494 U. S. 259, 264 (1990) ("Although conduct by law enforcement officials prior to trial may ultimately impair that right [against compelled self-incrimination], a constitutional violation occurs only at trial"). That case concerned the application of the Fourth Amendment, and the extent of the right secured under the Self-Incrimination Clause was not then before the Court. *Ibid.* Furthermore, *Verdugo-Urquidez* involved a prosecution in the United States arising from a criminal investigation in another country, *id.*, at 274–275, so there was a special reason for the Court to be concerned about the application of the Clause in that context, *id.*, at 269 (noting the Court had "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" (citing *Johnson* v. *Eisentrager,* 339 U. S. 763 (1950))). In any event, the decision cannot be read to support the proposition that the application of the Clause is limited in the way JUSTICE SOUTER and JUSTICE THOMAS describe today.

A recent case illustrates that a violation of the Self-Incrimination Clause may have immediate consequences. Just last Term, nine Justices all proceeded from the premise that a present, completed violation of the Self-Incrimination Clause could occur if an incarcerated prisoner were required to admit to past crimes on pain of forfeiting certain privileges or being assigned harsher conditions of confinement. *McKune* v. *Lile,* 536 U. S. 24 (2002); *id.*, at 48 (O'CONNOR, J., concurring in judgment); *id.*, at 54 (STEVENS, J., dissenting). Although there was disagreement over whether a violation occurred in the circumstances of that case, there was no disagreement that a present violation could have taken place. No Member of the Court suggested that the absence of a pending criminal proceeding made the Self-Incrimination Clause inquiry irrelevant.

This is not to say all questions as to the meaning and extent of the Clause are simple of resolution, or that all of the cited cases are easy to reconcile. Many questions about the application of the Self-Incrimination Clause are close and difficult. There are instances, moreover, when incriminating statements can be required from a reluctant witness, see, *e.g., Gardner*, *supra*, at 276, and others where information may be required even absent a promise of immunity, see, *e.g., Shapiro* v. *United States,* 335 U. S. 1, 19 (1948). JUSTICE SOUTER and JUSTICE THOMAS are correct to note that testimony may be ordered, on pain of contempt, if appropriate immunity is granted. It does not follow that the Clause establishes no present right. The immunity rule simply shows that the right is not absolute.

The conclusion that the Self-Incrimination Clause is not violated until the government seeks to use a statement in some later criminal proceeding strips the Clause of an essential part of its force and meaning. This is no small matter. It should come as an unwelcome surprise to judges, attorneys, and the citizenry as a whole that if a

legislative committee or a judge in a civil case demands incriminating testimony without offering immunity, and even imposes sanctions for failure to comply, that the witness and counsel cannot insist the right against compelled self-incrimination is applicable then and there. JUSTICE SOUTER and JUSTICE THOMAS, I submit, should be more respectful of the understanding that has prevailed for generations now. To tell our whole legal system that when conducting a criminal investigation police officials can use severe compulsion or even torture with no present violation of the right against compelled self-incrimination can only diminish a celebrated provision in the Bill of Rights. A Constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles which preserve their freedom. Today's decision undermines one of those respected precepts.

Dean Griswold explained the place the Self-Incrimination Clause has secured in our legal heritage:

> "The Fifth Amendment has been very nearly a lone sure rock in a time of storm. It has been one thing which has held quite firm, although something like a juggernaut has pushed upon it. It has, thus, through all its vicissitudes, been a symbol of the ultimate moral sense of the community, upholding the best in us, when otherwise there was a good deal of wavering under the pressures of the times." E. Griswold, The Fifth Amendment Today 73 (1955).

It damages the law, and the vocabulary with which we impart our legal tradition from one generation to the next, to downgrade our understanding of what the Fifth Amendment requires.

There is some authority, it must be acknowledged, for the proposition that the act of torturing to obtain a confession is not comprehended within the Self-Incrimination

Clause itself. In *Brown* v. *Mississippi,* 297 U. S. 278 (1936), the Court held that convictions based upon tortured confessions could not stand, but it identified the Due Process Clause, and not the Self-Incrimination Clause, as the source for its ruling. *Id.*, at 285. The Court interpreted the Self-Incrimination Clause as limited to "the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter." *Ibid.* The decision in *Brown* antedated the incorporation of the Clause and the ensuing understanding of its fundamental role in our legal system.

The views expressed by JUSTICE SOUTER and JUSTICE THOMAS also have some academic support. Professor McNaughton, in his revision of Professor Wigmore's treatise on the law of evidence, recites various rationales for the Self-Incrimination Clause, declaring all of them insufficient. 8 J. Wigmore, Evidence §2251 (J. McNaughton rev. ed. 1961). The 11th justification he discusses is the prevention of torture, *id.*, at 315, a practice Professor McNaughton simply assures us will not be revived, *ibid.*

This is not convincing. The Constitution is based upon the theory that when past abuses are forbidden the resulting right has present meaning. A police officer's interrogation is different in a formal sense from interrogation ordered by an official inquest, but the close relation between the two ought not to be so quickly discounted. Even if some think the abuses of the Star Chamber cannot revive, the specter of Sheriff Screws, see *Screws* v. *United States,* 325 U. S. 91 (1945), or of the deputies who beat the confessions out of the defendants in *Brown* v. *Mississippi,* is not so easily banished. See *Oregon* v. *Elstad,* 470 U. S. 298, 312, n. 3 (1985); *id.*, at 371–372, n. 19 (STEVENS, J., dissenting).

III

In my view the Self-Incrimination Clause is applicable at the time and place police use compulsion to extract a statement from a suspect. The Clause forbids that conduct. A majority of the Court has now concluded otherwise, but that should not end this case. It simply implicates the larger definition of liberty under the Due Process Clause of the Fourteenth Amendment. *Dickerson*, 530 U. S., at 433 ("Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment"). Turning to this essential, but less specific, guarantee, it seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person. *Brown*, *supra*, at 285; *Palko* v. *Connecticut,* 302 U. S. 319 (1937); see also *Rochin* v. *California,* 342 U. S. 165 (1952). The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation. This is true whether the protection is found in the Self-Incrimination Clause, the broader guarantees of the Due Process Clause, or both.

That brings us to the interrogation in this case. Had the officer inflicted the initial injuries sustained by Martinez (the gunshot wounds) for purposes of extracting a statement, there would be a clear and immediate violation of the Constitution, and no further inquiry would be needed. That is not what happened, however. The initial injuries and anguish suffered by the suspect were not inflicted to aid the interrogation. The wounds arose from events preceding it. True, police officers had caused the injuries, but they had not done so to compel a statement or with the purpose of facilitating some later interrogation. The case can be analyzed, then, as if the wounds had been inflicted

by some third person, and the officer came to the hospital to interrogate.

There is no rule against interrogating suspects who are in anguish and pain. The police may have legitimate reasons, borne of exigency, to question a person who is suffering or in distress. Locating the victim of a kidnaping, ascertaining the whereabouts of a dangerous assailant or accomplice, or determining whether there is a rogue police officer at large are some examples. That a suspect is in fear of dying, furthermore, may not show compulsion but just the opposite. The fear may be a motivating factor to volunteer information. The words of a declarant who believes his death is imminent have a special status in the law of evidence. See, *e.g., Mattox* v. *United States,* 146 U. S. 140, 152 (1892) ("The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose"); see also Fed. Rule Evid. 804(b)(2) (providing an exception from the hearsay rule for certain statements uttered under belief of impending death). A declarant in Martinez's circumstances may want to tell his story even if it increases his pain and agony to do so. The Constitution does not forbid the police from offering a person an opportunity to volunteer evidence he wishes to reveal.

There are, however, actions police may not take if the prohibition against the use of coercion to elicit a statement is to be respected. The police may not prolong or increase a suspect's suffering against the suspect's will. That conduct would render government officials accountable for the increased pain. The officers must not give the impression that severe pain will be alleviated only if the declarant cooperates, for that, too, uses pain to extract a statement. In a case like this one, recovery should be available

under §1983 if a complainant can demonstrate that an officer exploited his pain and suffering with the purpose and intent of securing an incriminating statement. That showing has been made here.

The transcript of the interrogation set out by JUSTICE STEVENS, *ante*, at 1–4 (opinion concurring in part and dissenting in part), and other evidence considered by the District Court demonstrate that the suspect thought his treatment would be delayed, and thus his pain and condition worsened, by refusal to answer questions.

It is true that the interrogation was not continuous. Ten minutes of questions and answers were spread over a 45-minute interval. App. to Pet. for Cert. 27a. Treatment was apparently administered during those interruptions. The pauses in the interrogation, however, do not indicate any error in the trial court's findings and conclusions.

The District Court found that Martinez "had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details of the encounter with the police." *Id.*, at 22a. His blinding facial wounds made it impossible for him visually to distinguish the interrogating officer from the attending medical personnel. The officer made no effort to dispel the perception that medical treatment was being withheld until Martinez answered the questions put to him. There was no attempt through *Miranda* warnings or other assurances to advise the suspect that his cooperation should be voluntary. Martinez begged the officer to desist and provide treatment for his wounds, but the questioning persisted despite these pleas and despite Martinez's unequivocal refusal to answer questions. Cf. *Mincey* v. *Arizona,* 437 U. S. 385, 398 (1978) (Court said of similar circumstances: "It is hard to imagine a situation less conducive to the exercise of a rational intellect and a free will" (internal quotation marks omitted)).

The standards governing the interrogation of suspects and witnesses who suffer severe pain must accommodate the exigencies that law enforcement personnel encounter in circumstances like this case. It is clear enough, however, that the police should take the necessary steps to ensure that there is neither the fact nor the perception that the declarant's pain is being used to induce the statement against his will. In this case no reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement. The record supports the ultimate finding that the officer acted with the intent of exploiting Martinez's condition for purposes of extracting a statement.

Accordingly, I would affirm the decision of the Court of Appeals that a cause of action under §1983 has been stated. The other opinions filed today, however, reach different conclusions as to the correct disposition of the case. Were JUSTICE STEVENS, JUSTICE GINSBURG, and I to adhere to our position, there would be no controlling judgment of the Court. In these circumstances, and because a ruling on substantive due process in this case could provide much of the essential protection the Self-Incrimination Clause secures, I join Part II of JUSTICE SOUTER's opinion and would remand the case for further consideration.