PRETRIAL AND ERROR: THE USE OF STATEMENTS INADMISSIBLE AT TRIAL IN PRELIMINARY PROCEEDINGS

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INTRODUCTION

"I plead the Fifth." It is a phrase so ubiquitous in American popular culture that even courts credit "shows like 'Law & Order' [and] movies such as 'Guys and Dolls,'" with creating a "culture . . . that knows a person in custody has 'the right to remain silent.'"[1] The Supreme Court itself has acknowledged that "in popular parlance and even in legal literature, the term 'Fifth Amendment' . . . is commonly regarded as being synonymous with the privilege against self-incrimination."[2] Despite Americans' seeming familiarity with the Amendment's protections, the exact parameters of its privilege against self-incrimination remain undefined for America's criminally accused. While it is well-settled that statements violating the Fifth Amendment's Self-Incrimination Clause are inadmissible at trial, this has not stopped prosecutors from using such statements in pretrial proceedings to establish probable cause for trial or to set the terms of a defendant's bail. These pretrial proceedings are critical for two reasons: first, they play a role in the defendant's trial decisions and strategies, and second, they may persuade a defendant to take a plea. Most critically, pretrial proceedings can also result in the accused's loss of liberty.

The Seventh Circuit recently examined a case in which a statement obtained in violation of the Fifth Amendment was used against a

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1. Anderson v. Terhune, 516 F.3d 781, 783 (9th Cir. 2008).
2. Quinn v. United States, 349 U.S. 155, 163 (1955).

woman in pretrial proceedings. On January 13, 2000, three police officers took Teresa Sornberger to the police station for questioning because they suspected that her husband, Scott, had robbed a local bank.[3] Frustrated by Teresa's earlier interview, in which she had provided an alibi for her husband, the officers ensured that this interview would proceed differently.[4] The officers falsely informed Teresa that witnesses placed her at the scene of the robbery and falsely promised her that, if she implicated her husband, she would not be charged with any crime.[5] The officers also repeatedly told Teresa to think about her children and made threats to take away her children by calling the Department of Children and Family Services ("DCFS").[6]

After repeated threats to call DCFS if she continued to maintain her husband's innocence, Teresa verbally confessed that she had assisted her husband in the bank robbery.[7] Following this oral confession, the officers gave Teresa the required *Miranda* warnings and asked her to repeat her oral confession to the police stenographer.[8] When Teresa resisted repeating the statement, the officers again reminded her to think of her children and reiterated their threat to call DCFS.[9] Teresa reluctantly complied, gave her statement to the stenographer, and signed the statement.[10] This statement, which was unwarned and coerced and therefore would be inadmissible at trial, was then used in three separate pretrial proceedings.[11] The prosecution used Teresa's unwarned statements to support a determination of probable cause in a preliminary hearing, which allowed the case to proceed to trial.[12] These statements were also used at arraignment proceedings, when Teresa was called upon to enter a pretrial plea.[13] But perhaps most damaging, Teresa's coerced, false confession was used at her bail hearing, and bail was set at an amount Teresa was unable to

3. Sornberger v. City of Knoxville, 434 F.3d 1006, 1011 (7th Cir. 2006).
4. *Id.* at 1012.
5. *Id.* at 1011.
6. *Id.* at 1012.
7. *Id.* at 1011.
8. *Id.* at 1012.
9. *Id.*
10. *Id.*
11. *See id.* at 1027 (noting that "failure to administer Teresa *Miranda* warnings led to three distinct 'courtroom uses' of her un-warned statements"); *see also id.* at 1023 n.16 (acknowledging that the facts in the record could support a finding that the statement was coerced, as "[t]hreats to a suspect's family or children, even if implicit, certainly may render confessions involuntary for purposes of due process").
12. *Id.* at 1026.
13. *Id.*

make.[14] As a result of these three proceedings, Teresa Sornberger spent four months in jail awaiting trial before the true bank robber confessed.[15] Teresa lost her liberty for four months, primarily based on evidence that would have been inadmissible at trial.

Ultimately, the Seventh Circuit found that Teresa's criminal prosecution was initiated because of her coerced confession, violating the Fifth Amendment's Self-Incrimination Clause.[16] The court determined that the use of Teresa's confession at a probable cause hearing, bail hearing, and arraignment hearing violated the Fifth Amendment's proscription against compelling a criminal defendant "to be a witness against [her]self."[17]

Not all circuits agree with the Seventh Circuit that use of such statements at pretrial hearings are a violation of the Fifth Amendment. It is well-established that the Self-Incrimination Clause means that a person cannot be "compelled in any criminal case to be a witness against himself," and that using a statement that is "testimonial, incriminating, and compelled," is a violation of the clause.[18] But the circuits are fractured over the meaning of "criminal case" within the Fifth Amendment. There are differing interpretations over the precise moment that a "criminal case" begins, and therefore, what proceedings are covered by a person's right against self-incrimination. The Supreme Court offered some guidance on this matter in *Chavez v. Martinez*.[19] Justice Thomas, writing for a plurality, noted 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."[20] Justice Thomas refused to articulate when a criminal case begins, but conceded that a "'criminal case' at the very least requires the initiation of legal proceedings, and police questioning does not constitute such a case."[21]

In the absence of more specific definition from the Supreme Court, circuits have splintered over when a criminal case begins and therefore have also disagreed as to the scope of the Fifth Amendment's protection against self-incrimination. The Third, Fourth and Fifth

14. *Id.* at 1012.
15. *Id.*
16. *Id.*
17. *Id.* at 1027.
18. Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 189 (2004).
19. 538 U.S. 760 (2003).
20. *Id.* at 767.
21. *Id*.

Circuits have held that the Self-Incrimination Clause is only a "trial right," meaning that its protections do not extent to pretrial proceedings.[22] But the Second, Seventh, Ninth and Tenth Circuits have adopted an interpretation of "criminal case" that includes pretrial proceedings, shielding defendants like Teresa Sornberger from acting as witnesses against themselves throughout the criminal process.[23]

This Note argues that a "criminal case," as provided by the Fifth Amendment, begins with the initiation of adversarial judicial criminal proceedings, whether that commencement occurs through a formal charge, a preliminary hearing, indictment, information, or arraignment.[24] A broad understanding of the Fifth Amendment's scope aligns with the Second, Seventh, Ninth and Tenth Circuits' analysis. In particular, this Note endorses the in-depth analysis provided by the Tenth Circuit in its determination that a "criminal case" under the Fifth Amendment includes preliminary proceedings. This Note further offers an analysis of past Supreme Court precedent as well as policy rationales that support a more liberal understanding of "criminal case."

As the Supreme Court has recognized, our justice system is "for the most part a system of pleas, not a system of trials."[25] As part of the system of pleas, "the most critical period of the proceedings against these defendants . . . [is] from the time of their arraignment until the beginning of their trial."[26] Given that close to 98% of federal defendants opt to plead guilty rather than proceed to trial,[27] it is difficult to overstate the importance of the pretrial period. Limiting the application of the Self-Incrimination Clause to trials denies this right to almost all charged with a crime.

Part One of this Note provides a brief overview of the types of proceedings conducted before trial, and the impact these proceedings can have in shaping the way a trial unfolds. Part Two addresses the

22. Burrell v. Virginia, 395 F.3d 508, 514 (4th Cir. 2005); Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005); Renda v. King, 347 F.3d 550, 559 (3d Cir. 2003).

23. Vogt v. City of Hays, 844 F.3d 1235, 1241 (10th Cir. 2017); Stoot v. City of Everett, 582 F.3d 910, 925 (9th Cir. 2009); Higazy v. Templeton, 505 F.3d 161, 173 (2d Cir. 2007); Sornberger v. City of Knoxville, 434 F.3d 1006, 1026–1027 (7th Cir. 2006).

24. This Note is limited to a discussion of the federal pretrial processes.

25. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

26. Powell v. Alabama, 287 U.S. 45, 57 (1932).

27. *See* U.S. SENTENCING COMMISSION, *Fiscal Year 2018 Overview of Federal Criminal Cases*, at 8 (June 2019) [hereinafter *Fiscal Year 2018 Overview*]; *see also* DEP'T OF JUST., Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, Table 5.22.2010, http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last visited Feb. 22, 2020) [hereinafter *Dep't of Justice Sourcebook of Criminal Justice Statistics*].

circuit split over the scope of the Self-Incrimination Clause, beginning with an examination of the Supreme Court's opinion in *Chavez v. Martinez*, and then examining the circuits' interpretation of its holding. Part Three provides an in-depth examination of the Tenth Circuit's analysis that the Self-Incrimination Clause should be applied to pretrial proceedings.

Part Four provides arguments that have not been previously made about why a "criminal case" under the Fifth Amendment should include pretrial proceedings. This Part posits that a broad understanding of a "criminal case" is consistent with the Court's other applications of the Self-Incrimination Clause and previous Court declarations that preliminary hearings are part of a criminal case. This Note contends that understanding the criminal case as commencing at the initiation of adversary judicial criminal proceedings not only aligns with Justice Thomas's opinion in *Chavez*, but is also consistent with Supreme Court precedent about the scope of the Sixth Amendment's right to counsel.

Finally, Part Five of this Note offers the public policy rationale for extending the right to pretrial proceeding so that the right is afforded to all those who begin criminal proceedings, not just the 2.5% of cases that go to trial.[28] It also explores the policy counter-arguments that have been raised by those who believe that the Self-Incrimination Clause should be limited to only trial proceedings.

I. PRETRIAL PROCEDURES: AN OVERVIEW

In a federal criminal case, the Federal Rules of Criminal Procedure (the "Rules") govern pretrial procedures.[29] These mandatory pretrial proceedings are the defendant's initial foray into the courtroom following an arrest or formal charge in a criminal case.[30] While the exact process may differ based on the needs of an individual case, the types of proceedings and their requirements are the same.[31] This section provides an overview of the different pretrial proceedings and the way that pretrial processes can affect what happens at trial.

28. *See Fiscal Year 2018 Overview*, supra note 27.

29. *See* FED. R. CRIM. P. 1(a) (noting that the rules "govern the procedure in all criminal proceedings" in the federal courts).

30. *Pretrial Hearings*, 47 GEO. L.J. ANN. REV. CRIM. PROC. 286, 286 (2018).

31. *Id.*

A. Types and Purposes of Pretrial Proceedings

Following arrest, a federal criminal defendant has several possible opportunities—both mandatory and optional—to appear before the court before trial commences.[32] Each proceeding safeguards the accused's constitutional rights, beginning with the *Gerstein* hearing.[33] A *Gerstein* hearing, a mandatory proceeding held within 48 hours of a warrantless arrest, reviews the police determination that there was probable cause to make the arrest and determines whether there is probable cause to detain the arrestee pending further proceedings.[34] *Gerstein* hearings may be held in conjunction with "initial appearances," a proceeding mandated by Rule 5 of the Federal Rules of Criminal Procedure.[35] The two proceedings may also occur independently of each other.[36] In an initial appearance, the arresting officer is required to bring the accused before a magistrate judge "without delay."[37] During the initial appearance, the defendant hears the charges against him in open court and is advised of his rights; arrangements are also made for him to have a lawyer (either his own or a public defender).[38] The defendant may also enter a plea at this time.[39] Bail hearings, sometimes referred to as detention hearings, may occur at this initial appearance, or as an entirely separate hearing at a later date.[40] The judge uses this hearing to determine the bail amount or whether the accused is released pending trial.[41] If the accused cannot meet the bail amount, he is remanded to the custody of the U.S. Marshals pending trial.[42]

While *Gerstein* hearings are held to establish probable cause for an arrest, other pretrial proceedings are used to establish the existence of probable cause for trial; namely, preliminary hearings and grand juries. Rule 5.1(a) provides the defendant with a preliminary hearing, also

32. *Id.*
33. *See* Gerstein v. Pugh, 420 U.S. 103 (1975).
34. *Pretrial Hearings*, *supra* note 30, at 286–87, 289.
35. *Id.* at 286.
36. *Id.*
37. *Id.* at 289. Federal Rule of Criminal Procedure 5(d) governs the "initial appearance" proceedings for a felony offense, and Rule 58(b)(2) establishes the procedure for initial appearances in misdemeanor and petty offense cases.
38. FED. R. CRIM. P. 10; *see also* Offices of the United States Attorneys, *Initial Hearing / Arraignment*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/initial-hearing (last accessed Feb. 2, 2020).
39. *See* FED. R. CRIM. P. 5(d)(3); FED. R. CRIM. P. 10.
40. *See* FED. R. CRIM. P. 5(d)(3).
41. *Initial Hearing / Arraignment*, *supra* note 3838.
42. *Id.*

known as a preliminary examination or probable cause hearing.[43] No matter the name, the purpose of this hearing is to demonstrate to the judge's satisfaction that there is sufficient evidence for the case to proceed to trial.[44] The hearing occurs within either 14 days of arrest if the defendant is in custody, or 21 days if the defendant is not in custody.[45] This hearing is not required if the defendant waives his right to the proceeding or if the prosecutor secures an indictment from a grand jury.[46]

Securing an indictment from a grand jury is another proceeding used to establish the existence of probable cause.[47] In a grand jury proceeding, a prosecutor presents the evidence gathered in the case to a group of 16 to 23 jurors;[48] at least 12 members of the grand jury must believe there is a showing of cause for the government to obtain an indictment.[49] An indictment satisfies the general requirement that there is probable cause for trial;[50] if there is no indictment, and no probable cause found at a preliminary hearing, the case will be dismissed and the defendant will not be forced to stand trial.[51] The Rules and pretrial proceedings are meant to ensure due process, and serve to guarantee that a citizen's constitutional rights are not violated.[52]

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43. *Pretrial Hearings*, *supra* note 30, at 291–92. Although initial appearances and preliminary hearings may occur at the same time, this is rare because it does not provide counsel with adequate time to prepare for the preliminary hearing. *Id*. at 286.

44. *Id*. at 291. *See also* FED. R. CRIM. P. 5(a). This is required if a defendant is charged with an offense other than a petty offense, and is conducted by a magistrate judge. If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the complaint must be dismissed, and the defendant must be discharged. FED. R. CRIM. P. 5.1(f).

45. *Pretrial Hearings*, *supra* note 30, at 292.

46. *Id.*

47. *Id.* at 295.

48. FED. R. CRIM. P. 6(a)(1).

49. FED. R. CRIM. P. 6(f).

50. FED. R. CRIM. P. 5.1(a).

51. FED. R. CRIM. P. 5.1(f).

52. *See, e.g.*, Libretti v. United States, 516 U.S. 29, 42 (1995) (quoting Advisory Committee's Notes on FED. R. CRIM. P. 11) (noting that the Rule 11 inquiry is meant to determine the voluntariness of a plea and protect defendants who do not "realiz[e] that [their] conduct does not actually fall within the charge"); *id.* at 52 (Souter, J., concurring) (noting that Federal Rule of Criminal Procedure 10 ensures that arraignment shall be conducted in open court, and helps him to understand the nature of the charges and his rights); Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (requiring that a judicial finding of probable cause must follow a warrantless arrest to impose any significant pretrial restraint on liberty); Upshaw v. United States, 335 U.S. 410, 412 (1948) (finding that the "plain purpose" of Federal Rule of Criminal Procedure 5(a), "that prisoners should promptly be taken before committing magistrates," is to prevent officers from "secret interrogation of persons accused of crime" (internal quotations omitted)).

B. The Effects of Pretrial Proceedings on Trial

Pretrial proceedings are crucial in determining the restrictions on the accused's freedoms (through the terms of the accused's bond or remanding the defendant to jail awaiting trial), as well as if and how the trial proceeds. The most extensive and adversarial of these pretrial procedures is the preliminary hearing. As discussed above, if a judge finds that the government does not have sufficient evidence to support a finding of probable cause, she may dismiss the case altogether.[53] Even if the judge finds that there is enough evidence to proceed to trial, the evidence that the government presents at a preliminary hearing can cause the court to reassess the bail amount or other terms of pretrial release.[54] Preliminary hearings are also used to preserve evidence and lay the foundation for potential witness impeachment or preserve witness testimony for use at trial (if the witness is later unavailable).[55] The preliminary hearing provides several benefits to the defendant. First, the defendant is given the opportunity to persuade the judge that there is not enough evidence to proceed to trial, cross-examine witnesses, and even present his own evidence to the court.[56] Second, the preliminary hearing can be vital to the defense counsel's strategy determinations, because it allows for an assessment of the strength or weakness of the prosecution's case.[57] Although the preliminary hearing's purpose is not to provide discovery to the defendant, that is often a byproduct of the proceeding.[58] Given the volume of information presented at the preliminary hearings, prosecutors use these hearings to their strategic advantage, engaging in different tactics like charge-piling and case-piling, in pursuit of a plea deal.[59] Preliminary hearings

53. FED. R. CRIM. P. 5.1(f).

54. *See* Coleman v. Alabama, 399 U.S. 1, 9 (1970) (observing that at a preliminary hearing, "counsel can also be influential . . . in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail").

55. *See id.* (noting that at preliminary hearing "skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial . . . [and] preserve testimony favorable to the accused of a witness who does not appear at the trial").

56. *Pretrial Hearings*, *supra* note 30, at 292.

57. *See Coleman*, 399 U.S. at 9 ("[T]rained counsel" at a preliminary hearing can "discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial.").

58. *Pretrial Hearings*, *supra* note 30, at 293.

59. Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1312–13 (2018). Charge-piling and case-piling refer to the prosecutorial strategy of "piling on overlapping, largely duplicative offenses—increasing with each new charge the defendant's potential sentence, his risk of conviction, and the "sticker shock" of intimidation that accompanies a hefty charging instrument" so that a defendant may be willing to negotiate to the prosecutor's

are an "integral part" of the plea bargaining process because prosecutors can use them to stress upon a defendant the weight of the evidence.[60]

Aside from the preliminary hearing's purpose of determining whether to proceed or dismiss the case, other pretrial proceedings can have a greater impact on an individual's freedoms and personal life. Detention hearings are particularly critical pretrial proceedings. At this stage, the court decides whether to detain the defendant or set bail.[61] In considering whether to set bail, the court evaluates evidence of the defendant's ties to the community, his risk of flight, and the potential danger he poses to the public.[62] If the court opts to set bail, it must also determine what amount, which may be too high for the defendant to meet.[63] And, as discussed below, pretrial confinement has significant weight in a defendant's decision to plead guilty or proceed to trial.[64] The Court has noted that "pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships," but that even "pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty."[65]

II. THE SUPREME COURT'S AMBIGUITY BIRTHS A CIRCUIT SPLIT

As explored in Part I, pretrial proceedings are an important step in the process of a criminal case. But the parameters of a defendant's constitutional rights during this pretrial stage are not clearly defined. The Fifth Amendment dictates that a person shall not "be compelled in any criminal case to be a witness against himself."[66] Despite this mandate, there is ambiguity over *when* this right applies: specifically, whether pretrial proceedings qualify as part of a criminal case. The Supreme Court acknowledged the uncertainty about what proceedings were worthy of the Self-Incrimination Clause's protections in *Chavez v. Martinez*, but decided that it did not need to explore the parameters of "when a criminal case begins."[67] The Court therefore did not

"*preferred* sentence." *Id.*

60. Wayne R. LaFave et al., Criminal Procedure §14.1(e), at 899 (6th ed. 2017).
61. *Bail*, 47 GEO. L.J. ANN. REV. CRIM. PROC. 387, 390 (2018).
62. *Id.* at 394.
63. *Initial Hearing / Arraignment*, *supra* note 38.
64. *Infra*, Part V.
65. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).
66. U.S. CONST. amend. V.
67. 538 U.S. 760, 767 (2003).

explicitly decide whether pretrial proceedings were covered by the Fifth Amendment's right against self-incrimination.[68]

After *Chavez*, the circuits differed in their interpretations of "criminal case" in Self-Incrimination Clause analyses. Of the twelve circuits, seven have addressed the issue. The circuits are split nearly down the middle. Three circuits believe that a criminal case begins at trial and that the Self-Incrimination Clause applies only to trial proceedings. Four circuits have come to the opposite conclusion, and provided liberal interpretations of the timeline of a "criminal case," thus extending the Fifth Amendment protection to pretrial proceedings as well. This section explores the Supreme Court decision that gave rise to the circuit split, the determinations of each circuit that has deliberated on this issue, and the Court's most recent foray into clarifying when a "criminal case" begins, which ultimately reached no conclusion on the issue.

A. The Supreme Court's Inconclusive Definition of a "Criminal Case"

In *Chavez*, the Supreme Court examined whether Ben Chavez, a patrol officer in Southern California, had violated Oliverio Martinez's Fifth Amendment rights. Martinez was injured in a shootout with police and rushed to the hospital.[69] While he was treated for his wounds, Martinez verbally expressed a belief he was dying and lamented his pain as Chavez interrogated him about the events of the shootout.[70] Chavez persisted with the interrogation despite Martinez's statement that he would not tell Chavez anything until he was treated.[71] At no point were *Miranda* warnings issued.[72] The interrogation concluded when Martinez admitted that he used heroin, and had taken an officer's gun during the incident.[73]

Martinez was never charged with a crime, and his answers never used against him in a criminal proceeding.[74] But Martinez initiated proceedings of his own. He filed a 42 U.S.C. § 1983 suit on the premise that Chavez's actions violated Martinez's Fifth Amendment right not to be "compelled in any criminal case to be a witness against himself."[75]

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68. *Id.*
69. *Id.* at 767.
70. *Id.* at 769.
71. *Id.* at 764.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 764–65.

The Ninth Circuit agreed and held that Chavez's coercive questioning was a violation of the Fifth Amendment, regardless of the fact that the statements were not used in a single criminal proceeding.[76]

The Supreme Court reversed the Ninth Circuit's decision, although the Court fractured. Justice Thomas delivered the judgment of the Court, and explained that because criminal charges were never brought against Martinez, there was no Fifth Amendment violation.[77] Justices Rehnquist, O'Connor, Scalia, and Souter agreed with this outcome.[78] In his plurality opinion, Justice Thomas specifically noted that, for purposes of the Self-Incrimination Clause, a "criminal case" requires "at the very least requires the initiation of legal proceedings."[79] Because there was no initiation of a criminal case against Martinez, Justice Thomas asserted that there was no need to define "the precise moment when a 'criminal case' commences;" rather, it was enough to limit this case to holding that police questioning "does not constitute a 'case.'"[80]

Justice Thomas further noted that a Self-Incrimination Clause violation does not occur until the compelled statements are used in a criminal case.[81] He maintained that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness."[82] In doing so, Justice Thomas conceded that Supreme Court precedent mandates that the Fifth Amendment allows a person to not answer questions in "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[83] Nevertheless, Justice Thomas still concluded that a violation of the right

76. *Id.* at 765.

77. *Id.* at 766.

78. *Id.* at 763. In addition to Justice Thomas's plurality opinion, Justice Souter delivered a separate opinion, which Justices Stevens, Kennedy, Ginsburg, and Breyer joined as to Part II. *Id.* at 777 (Souter, J., concurring). Part II concluded that the issue of whether Martinez may pursue a claim of liability for a substantive due process violation should be addressed on remand. *See id.* at 779–80 (Souter, J., concurring).

79. *Id.* at 766. This part of the opinion, discussing what constitutes a "criminal case," was joined only by Justices Rehnquist, O'Connor, and Scalia.

80. *Id.* at 767.

81. *Id.* In making this assertion, Justice Thomas also quoted United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990), which observed, "[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."

82. *Id.* at 769.

83. *Id.* at 770 (quoting Kastigar v. United States, 406 U.S. 441, 444 (1972)).

against self-incrimination occurs only if the person is compelled as a witness against himself in a criminal case.[84]

Justices Souter and Breyer, concurring in the judgment, reasoned that the Fifth Amendment's text "focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony."[85] In contrast, Justices Kennedy, Stevens and Ginsburg stated that the Self-Incrimination Clause is violated the moment a confession is compelled, regardless of whether or not it is used in any proceedings, and that the Fifth Amendment applied to pretrial proceedings.[86]

Beyond stating that a criminal case requires at least the initiation of criminal proceedings, Justice Thomas provided no guidelines as to what exactly commences a "criminal case." Therefore, the Court did not provide a singular, definitive moment that triggers the Fifth Amendment protections. This move may have been intentional: some scholars posit that the Court will sometimes issue a "way station" opinion in the hopes of sparking conversation among the circuit courts.[87] The Court will then address the issue later, invoking the circuits' opinions as possible grounds for its decision.[88] Whether or not the plurality opinion in *Chavez* was intended to be ambiguous and spark debate among the federal circuits, that has certainly been the result. Seven circuits have since debated Justice Thomas's plurality opinion, with no unifying consensus as to the definition of a "criminal case" or the parameters of the Self-Incrimination Clause.

B. The Circuit Split Over What Qualifies as a "Criminal Case"

In the nearly two decades since *Chavez*, the circuits have been left to determine the limits of the Fifth Amendment in the pretrial context. In doing so, they are guided only by Justice Thomas's finding that a criminal case begins at the initiation of criminal proceedings. However, because the Court did not explicate if the commencement of criminal proceedings includes pretrial proceedings, the circuits are split over whether the right against self-incrimination is strictly a "trial right" or

84. *Id.*

85. *Id.* at 777 (Souter, J., concurring in the judgment).

86. *Id.* at 795 (Kennedy, J., concurring in part and dissenting in part).

87. *See* Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1197 (2017) ("As justification for overturning precedent, the Court may invoke tensions in the doctrine and countervailing lines of precedent, even though it obviously contributed to those tensions.").

88. *See id.* at 1201–02 (noting that this action is a way that "the Court invokes changes that it played a part in causing without candidly admitting as much.").

if the Fifth Amendment also permits the use of coerced and compelled statements in pretrial criminal proceedings. The Third, Fourth, and Fifth Circuits have held that the Fifth Amendment is only a trial right.[89] The Second, Seventh, Ninth, and Tenth Circuits have concluded that certain pretrial uses of compelled statements are a violation of the Fifth Amendment.[90] For reasons discussed below, this Note asserts that the Second, Seventh, Ninth, and Tenth Circuits are correct that the Fifth Amendment protections *should* apply to pretrial proceedings, and that the Tenth Circuit's analysis of the protection is particularly strong.

On one side of the split, the Third,[91] Fourth,[92] and Fifth[93] circuits adopt a narrow interpretation of "criminal case," holding that the Self-Incrimination Clause does not apply to pretrial proceedings. In doing so, the circuits devoted little time or space to an analysis of *Chavez* or the definition of "criminal case."[94]

The Third Circuit concluded that because *Chavez* left open the question of when a criminal case commenced, "it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution."[95] It reached this conclusion despite acknowledging that a compelled statement used to file criminal charges *was* in fact used in "a criminal case in one sense."[96] Indeed, the coerced statement was used to establish probable cause and obtain a warrant for the suspect's arrest.[97] And, in a case decided two years after *Chavez*,

89. *See* Burrell v. Virginia, 395 F.3d 508, 514 (4th Cir. 2005); Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005); Renda v. King, 347 F.3d 550, 552 (3d Cir. 2003).

90. *See* Vogt v. City of Hays, 844 F.3d 1235, 1246 (10th Cir. 2017) (holding that the Fifth Amendment precluded a coerced statement from admission in probable cause hearings); Best v. City of Portland, 554 F.3d 698, 702–03 (7th Cir. 2009) (holding that the Fifth Amendment protection applied at suppression hearings); Stoot v. City of Everett, 582 F.3d 910, 925 (9th Cir. 2009) (holding that the Self-Incrimination Clause applies at probable cause hearings); Higazy v. Templeton, 505 F.3d 161, 173 (2d Cir. 2007) (holding that that Self-Incrimination Clause applied to initial appearances and bail hearings"); Sornberger v. City of Knoxville, 434 F.3d 1006, 1027 (7th Cir. 2006) (finding that the Fifth Amendment protection was applicable at bail hearings, arraignments, and probable cause hearings).

91. *Renda*, 347 F.3d at 557–59. The Third Circuit provided the most analysis of the three circuits that determined that the Self-Incrimination Clause applies to trial only, devoting 585 words to an analysis of *Chavez* and comparing it to the case at hand.

92. *Burrell*, 395 F.3d at 513–14. The Fourth Circuit devoted 518 words to a discussion of *Chavez* and its application to the case.

93. *Murray*, 405 F.3d at 285. The Fifth Circuit confined its holding that the Fifth Amendment privilege against self-incrimination can "be violated only at trial," to a single 31-word sentence, without exploring the nuances of *Chavez* or defining "criminal case."

94. *See supra* notes 91, 92, 93 (providing the word counts of each circuit's *Chavez* analysis).

95. *Renda*, 347 F.3d at 559.

96. *Id.*

97. *Id.*

the Fifth Circuit merely stated the "privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pretrial conduct by law enforcement officials may ultimately impair that right."[98] It engaged in no discussion of when a "criminal case" begins, and merely cited to the *Chavez* plurality in its assertion that the Fifth Amendment protections only cover use of compelled statements at trial.[99]

While the Third and Fifth Circuits devoted little space and analysis to defining a criminal case, the Fourth Circuit performed a more in-depth parsing of the *Chavez* plurality opinion.[100] It also relied on Justice Souter's concurrence in determining that the Supreme Court meant that the Fifth Amendment is only violated when a statement is used at trial.[101] The circuit interpreted the plurality's opinion in *Chavez* as finding that no constitutional violation had occurred because the compelled testimony was never admitted in court.[102] In its analysis, the Fourth Circuit did not mention that in the Supreme Court's dismissal of Chavez's case, the Court observed that the compelled statements at issue were not used in *any* proceedings, since no charges were ever filed.[103]

The Fourth Circuit also quoted Justices Souter and Breyer's concurrence in *Chavez*, which said that "the text of the Fifth Amendment (applied here under the doctrine of Fourteenth Amendment incorporation) 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 such evidence."[104] Because it reached this conclusion, the Fourth Circuit felt it was bound by prior circuit precedent that dictated that it is only "the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution."[105]

The four circuits that have defined "criminal case" more broadly, however, have not applied the Fifth Amendment to every pretrial proceeding. Rather, the circuits have extended the right on a case-by-

98. *Murray*, 405 F.3d at 285.
99. *Id.* n.12.
100. Burrell v. Virginia, 395 F.3d 508, 513–14 (4th Cir. 2005); *see supra* notes 91, 92, 93 (comparing the word counts of each circuit's Self-Incrimination Clause and *Chavez* analyses).
101. *Id.* at 513.
102. *Id.* at 513.
103. Chavez v. Martinez, 538 U.S. 760, 777 (2003).
104. *Burrell*, 395 F.3d at 513 (quoting Chavez, 538 U.S. at 770).
105. Renda v. King, 347 F.3d 550, 559 (3d Cir. 2003).

case basis to the specific pretrial proceeding at issue in each case. The Second Circuit has held that the right against self-incrimination applies to an initial appearance at which bail is set.[106] The Seventh Circuit first noted that a criminal case includes bail hearings, arraignment hearings, and probable cause hearings under the Fifth Amendment,[107] later adding suppression hearings to the circuit's definition of a criminal case.[108] And the Ninth Circuit held that a criminal case, for the purposes of the Self-Incrimination Clause, includes the filing of formal charges against the declarant, proceedings to determine judicially that the prosecution may continue, and proceedings that determine pretrial custody status.[109] The most recent circuit to adopt a more expansive understanding of the Fifth Amendment, the Tenth Circuit, held that "criminal case" includes probable cause hearings.[110]

Each circuit that has held that the Fifth Amendment applies to pretrial proceedings has provided a significant and thorough analysis of the *Chavez* opinion, and of what constitutes the initiation of a "criminal case."[111] This Note posits that circuits should adopt the Tenth Circuit's extensive Fifth Amendment analysis in *Vogt v. City of Hays*.[112] The Tenth Circuit in *Vogt* examined the Amendment's purpose, Supreme Court precedent on the Fifth and Sixth Amendment, the Framers' intent, and the text of the amendment. In addition to endorsing the Tenth Circuit's analysis determining that "criminal case" covers pretrial proceedings, this Note offers a public policy rationale for extending the right to pretrial proceedings, which aligns with the Court's Fifth and Sixth Amendment precedents.

After the Tenth Circuit held in *Vogt v. City of Hays* that the Fifth Amendment applies to pretrial proceedings, the Supreme Court granted certiorari in that case to clarify what a "criminal case" is for the Self-Incrimination Clause. Three months after oral argument, the Court

106. Higazy v. Templeton, 505 F.3d 161, 173 (2d Cir. 2007).

107. Sornberger v. City of Knoxville, 434 F.3d 1006, 1026–1027 (7th Cir. 2006).

108. Best v. City of Portland, 554 F.3d 698, 703 (7th Cir. 2009).

109. Stoot v. City of Everett, 582 F.3d 910, 925 (9th Cir. 2009)

110. Vogt v. City of Hays, 844 F.3d 1235, 1246 (10th Cir. 2017), *cert. granted*, City of Hays v. Vogt, 138 S. Ct. 55 (2017).

111. The Second Circuit's opinion included 990 words discussing *Chavez* and what constitutes a criminal case. *Higazy*, 505 F.3d at 171–73. The Seventh Circuit explored the issue in 1,543 words in its first case on the issue. *Sornberger*, 434 F.3d at 1023–27. The Ninth Circuit analyzed the issue in 1,552 words. *Stoot*, 582 F.3d at 922–25. The Tenth Circuit spent the most time on the issue, evaluating the *Chavez* decision and the meaning of a criminal case in 3,835 words. *Vogt*, 844 F.3d at 1239–46.

112. 844 F.3d 1235 (2017).

dismissed the case as improvidently granted.[113] There is speculation that the Court dismissed the case as improvidently granted because it was fraught with procedural issues.[114] Supreme Court commentators noted that the three-month lag between oral arguments and the case's dismissal suggest that the Court's interest was piqued.[115] Moreover, it has been suggested that the Court will be looking for a "clean" cert petition on this issue to readdress the case.[116]

III. THE TENTH CIRCUIT'S ANALYSIS

By dismissing *Vogt* as improvidently granted, the Supreme Court left the Tenth Circuit's holding untouched, offering no opinion on the circuit's analysis or holding that the Self-Incrimination Clause applies to pretrial proceedings. This Note, however, proposes that the Tenth Circuit's in-depth analysis of the Self-Incrimination Clause should be adopted by the Court and other circuits. This section provides an overview of the Tenth Circuit's analysis of the Court's precedent regarding the application of the Self-Incrimination Clause within the pretrial context. It will also describe the opinion's textual analysis of the Fifth Amendment. This section concludes with a discussion of the Tenth Circuit's evaluation of the Fifth Amendment's history, which suggests that the Self-Incrimination Clause is more than a "trial right."

A. The Tenth Circuit's Examination of Supreme Court Precedent Concerning the Self-Incrimination Clause

The Tenth Circuit's analysis examined both Supreme Court precedent on the parameters of the Self-Incrimination Clause and the Fifth Amendment more broadly. As the Tenth Circuit noted, the Court has long allowed the Fifth Amendment to be invoked by witnesses during grand jury proceedings.[117] In the seminal case extolling a

113. Rory Little, *Opinion analysis: A DIG in* Vogt, SCOTUSBLOG (May 29th, 2018 4:17 pm), https://www.scotusblog.com/2018/05/opinion-analysis-a-dig-in-vogt/.

114. *Id.* At oral argument, the Justices expressed concerns about non-record information, which allegedly suggested that some of the plaintiff's factual allegations were questionable. The Justices openly sparred about whether the non-record information should be considered. Further, the City of Kansas noted that the statements at issue "were viewed as 'compelled' only by application of a 1967 employment-law decision . . . that has long been controversial," and asked the Court to reconsider the doctrine (even though that was not mentioned in the cert petition).

115. *Id.*

116. *Id.*

117. Counselman v. Hitchcock, 142 U.S. 547, 563 (1892), *overruled in part by* Kastigar v. United States, 406 U.S. 441, 453 (1972). This holding was later limited by *Kastigar,* which found that the government can compel testimony from an unwilling witness who invokes the Fifth

witness's right to the Fifth Amendment privilege, *Counselman v. Hitchcock*, the Supreme Court held that "[t]he case before the grand jury was . . . a criminal case," and because of this, the witness could invoke the privilege to remain silent.[118] The Court's analysis was informed by the text of the Fifth Amendment, particularly in light of the text of the Sixth Amendment. The Sixth Amendment specifically employs the term "criminal prosecution" in describing its limits, and the Court stated that a "criminal prosecution" is much narrower than the term "criminal case," which is employed by the Fifth Amendment.[119] The Court used this analysis to bolster its conclusion that grand jury proceedings are part of a criminal case for the purposes of the Self-Incrimination Clause.[120]

In contrast to *Counselman*, the Supreme Court in *United States v. Verdugo-Urquidez* later suggested that the right against self-incrimination is limited to trial.[121] But this suggestion was made in dicta; the issue in *Verdugo-Urquidez* was the scope of the Fourth Amendment, and the Court only analyzed the Fifth Amendment in an effort to define the Fourth Amendment's scope.[122] Thus, the Court's reasoning regarding the Self-Incrimination Clause does not carry precedential weight because the Fifth Amendment was not an issue in the case.

The Court has since refused to limit the Fifth Amendment by finding that the right expires when the trial concludes following the judge or jury's determination of guilt or innocence.[123] Rather, the Court has held that the protection against self-incrimination applies to the sentencing phase of a criminal trial.[124] In reaching its conclusion, the Court rejected the argument that sentencing proceedings are not part of a "criminal case," because such a view is contrary to law and common sense.[125] In *Chavez*, the Court had another opportunity to define the Fifth Amendment as only a trial right, but notably refused to do so.[126]

Amendment privilege against compulsory self-incrimination if the government promises immunity to the witness.

118. *Counselman*, 142 U.S. at 562.
119. *Id*. at 563.
120. *Id*.
121. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990).
122. *Id*.
123. Vogt v. City of Hays, 844 F.3d 1235, 1241 (10th Cir. 2017).
124. Mitchell v. United States, 526 U.S. 314, 327 (1999).
125. *Id.*
126. Chavez v. Martinez, 538 U.S. 760, 766 (2003).

B. The Tenth Circuit's Textual Analysis of the Fifth Amendment

The Tenth Circuit endorsed the Supreme Court's analysis of the Fifth Amendment in the seminal Self-Incrimination Clause case, *Counselman*. In particular, the Tenth Circuit echoed the Court's determination that the language "criminal case" is much broader than the Sixth Amendment's use of "criminal prosecution."[127] In addition to noting that the phrase "criminal case" appears to encompass the proceedings of a "criminal prosecution," the Tenth Circuit examined the term's plain meaning at the time of the Sixth Amendment's ratification.[128] The Tenth Circuit cited to four dictionaries from the Founding era, including the dictionary that the Supreme Court often cites as evidence of the original meaning of the Constitution.[129] These definitions ultimately led the Tenth Circuit to conclude that the Founders understood that "case" was not limited to a trial. [130] This understanding seems particularly strong given that the Framers could have restricted the right to "trial."[131] The Framers specifically used "trial" in the Sixth and Seventh Amendments,[132] and also used the phrase "criminal prosecution" in the Sixth Amendment.[133] The Tenth Circuit reasoned that the use of different phrases in these adjacent amendments was a deliberate choice of the Framers, supporting the view that the Fifth Amendment is not simply at trial right. [134]

The Tenth Circuit cited the Supreme Court's decision in *Blyew v. United States* to further support its textual analysis.[135] In *Blyew*, the Court defined "case" in Article III broadly, declaring that "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action."[136] The Tenth Circuit found that this centuries-old Supreme Court definition of "case," particularly as a "proceeding in court," meant that the Fifth Amendment's use of "criminal case" is not limited to trial.[137]

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127. *Vogt*, 844 F.3d at 1242.
128. *Id*.
129. *Id*. at 1242–43.
130. *Id*. at 1243.
131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*.
135. 80 U.S. 581, 584 (1871). Justice Thomas also cited to this opinion in his analysis of "criminal case" during his plurality opinion in Chavez v. Martinez, 538 U.S. 760, 766 (2003).
136. *Id*. at 595.
137. *Vogt*, 844 F.3d at 1243.

C. The Tenth Circuit's Examination of the Fifth Amendment's Legislative History

The Tenth Circuit also engaged in a thread of analysis that no other circuit (on either side of the split) has explored: an extensive evaluation of the history surrounding the drafting and ratification of the Fifth Amendment.[138] The Tenth Circuit first noted that when James Madison drafted the Amendment, he did not confine the Self-Incrimination Clause to "criminal case[s]," but broadly wrote the Clause as "nor shall be compelled to be a witness against himself," which could be interpreted as extending to civil cases as well.[139] In subsequent floor debates, a Representative suggested that the Fifth Amendment should be limited to criminal cases, in an attempt to distinguish civil and criminal liability.[140] Historical sources from this time show that the right against self-incrimination was understood to arise not at criminal trial, but in pretrial proceedings.[141]

The Tenth Circuit also explained that limiting the Fifth Amendment to a defendant's trial would have been superfluous, because at this time, criminal defendants were unable to testify at their own trial.[142] Therefore, the rational understanding of the right is that it was meant for non-trial proceedings.[143] In addition, the Tenth Circuit noted that the Sixth Amendment also provides rights to the defendant alone (unlike the Fifth Amendment, which can be invoked by any witness).[144] The deliberate placement of the Self-Incrimination Clause in the Fifth Amendment illustrates that it was not intended to be restricted to trial; indeed, it was not even intended to be restricted even to defendants.[145]

IV. SUPREME COURT PRECEDENT FAVORS APPLYING THE FIFTH AMENDMENT TO PRETRIAL PROCEEDINGS

The Tenth Circuit's analysis, while thorough and appropriate, is not exhaustive. In addition to endorsing the Tenth Circuit's analysis and holding that the Self-Incrimination Clause extends to pretrial proceedings, this Note provides an analysis of the Supreme Court's precedent that also promotes the application of this protection to

138. *Id.* at 1244–46.
139. *Id.* at 1244.
140. *Id.* at 1244–45.
141. *Id.* at 1245.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 1244.

pretrial proceedings. This section explores the Court's application of the Self-Incrimination Clause generally and how pretrial proceedings align with this precedent. It also examines Court precedent defining pretrial proceedings as part of a "criminal case" within the context of the Sixth Amendment's right to counsel and other contexts. Identifying these proceedings as part of a "criminal case" is consistent with both the text of the Fifth Amendment, and Justice Thomas's plurality opinion in *Chavez*.

A. The Supreme Court's Broad Application of the Self-Incrimination Clause

The Supreme Court has consistently articulated that the "basic function" of the Fifth Amendment is to "protect innocent men . . . who otherwise might be ensnared by ambiguous circumstances."[146] The Court has also observed that the Fifth Amendment's "sole concern is to afford protection against being forced to give testimony leading to the infliction of [criminal] penalties."[147] Additionally, the Court has asserted that the Self-Incrimination Clause in particular "reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty."[148] In keeping this critical concern in mind, the Court has sworn to "zealous[ly] . . . safeguard the values which underlie the [Fifth Amendment] privilege."[149]

The Court has upheld this pledge by holding that the right against self-incrimination is not limited to criminal defendants. Witnesses who reasonably believe that danger or penalty may result from their answers are able to invoke the Fifth Amendment.[150] Even an innocent witness who provides truthful answers may invoke this privilege.[151] The right against self-incrimination is not limited to information that would lead to a criminal conviction. This right also extends to evidence that could provide a link to an evidence chain needed to support the case for prosecuting a criminal.[152] What qualifies as acting as a "witness"

146. Grunewald v. United States, 353 U.S. 391, 421 (1957).
147. Kastigar v. United States, 406 U.S. 441, 453 (1972).
148. *Id.* at 444–45.
149. *Id.* at 445.
150. Hoffman v. United States, 341 U.S. 479, 486 (1951)
151. *Grunewald,* 353 U.S. at 421–22.
152. Ohio v. Reiner, 532 U.S. 17, 20 (2001).

against oneself covers not only compelled oral testimony, but also compelled production of papers and belongings.[153]

The Supreme Court's view of *Miranda* also supports a broad interpretation of the Fifth Amendment. The Court stated that *Miranda's* exclusionary rule "sweeps more broadly than the Fifth Amendment itself" in order to support the protections provided by the Self-Incrimination Clause.[154] Finally, the Court has noted that the Fifth Amendment "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[155]

B. Supreme Court Precedent Declaring Preliminary Hearings as Part of a Criminal Case

Although Justice Thomas deferred from providing a definitive starting point of a criminal case, he clearly articulated the principle that a case begins, at the very least, at the "initiation of legal proceedings."[156] In the context of the Sixth Amendment, the Supreme Court has provided definitions of what qualifies as a legal proceeding and which pretrial hearings are part of a "criminal prosecution"; these pretrial hearings trigger the Amendment's right to counsel.[157] The Tenth Circuit determined that the term "criminal case" is broader than the Sixth Amendment's use of "criminal prosecution."[158] Because "criminal case" encompasses the multiple stages of a criminal prosecution, the Fifth Amendment should be applied to each proceeding that is covered by the Sixth Amendment's right to counsel. Furthermore, the Sixth Amendment's right to counsel and the Fifth Amendment's Self-Impeachment Clause share a similar purpose. The Sixth Amendment's right to counsel attaches to adversarial pretrial proceedings in which the accused may be prejudiced or face loss of liberty.[159] This purpose is

153. Bellis v. United States, 417 U.S. 85, 87 (1974).

154. Oregon v. Elstad, 470 U.S. 298, 306 (1985).

155. Kastigar v. United States, 406 U.S. 441, 444–45 (1972) (emphasis added).

156. Chavez v. Martinez, 538 U.S. 760, 766 (2003).

157. *See* Rothgery v. Gillespie Cty., 554 U.S. 191, 213 (2008) (right to counsel attaches at a defendant's "initial appearance"); Brewer v. Williams, 430 U.S. 387, 401 (1977) (right to counsel attaches at post-arraignment interrogation because adversarial proceedings had begun); United States v. Wade, 388 U.S. 218, 236–37 (1967) (right to counsel attaches at pretrial lineup).

158. Vogt v. City of Hays, 844 F.3d 1235, 1242 (10th Cir. 2017).

159. *See* Rothgery v. Gillespie Cty., 554 U.S. 191, 213, 217 (2008) (holding that the right to counsel attaches at "criminal defendant's initial appearance before a judicial officer, where . . . his

equally applicable to the Self-Impeachment Clause: the privilege can be invoked in any proceeding, civil or criminal, where a defendant's disclosures could be used against him in a criminal prosecution (and thus lead to a loss of his liberty).[160] The pretrial proceedings that trigger the Sixth Amendment right to counsel should be covered by the Fifth Amendment because both protect the individual in a case that may result in a loss of liberty.[161]

In its analysis of whether a proceeding requires the Sixth Amendment's right to counsel, the Court first evaluates whether the proceeding is a "critical stage" of prosecution that requires the aid of an attorney.[162] In making determinations about what qualifies as a "critical stage," the Court has used language similar to that in Justice Thomas's plurality opinion in *Chavez*. Specifically, the Court has determined that a criminal trial commences at "'the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"[163] The rationale is simple: at this point, the government has committed itself to prosecution, and the accused is in the midst of complex procedural and substantive criminal law.[164] A commitment to prosecution is self-evidently adversarial.

In guaranteeing a defendant's right to counsel at an initial appearance (whether on a formal complaint or an arraignment on indictment), the Court reaffirmed precedent that "*by the time* a defendant is brought before a judicial officer," an adversarial relationship has begun.[165] The fact that a defendant may then have restrictions imposed on his freedoms only furthers the inference that

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liberty is subject to restriction" and further holding that the right attaches at a preliminary hearing because "substantial prejudice. . . inheres").

160. *Kastigar*, 406 U.S. at 444–45.

161. *See* Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972) (finding that the right to counsel attaches to criminal cases which may result in the accused's loss of liberty); *Kastigar*, 406 U.S. at 444–45 (noting that the Fifth Amendment's privilege against self-incrimination "reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty"). The right to counsel has also been considered critical to ensuring the right to a fair trial. Arsenault v. Massachusetts, 393 U.S. 5, 6 (1968).

162. Coleman v. Alabama, 399 U.S. 1, 7 (1970). The Court noted that the determination whether the hearing is a "critical stage" that requires counsel depends on an analysis "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." *Id.* (quoting United States v. Wade, 388 U.S. 218, 227 (1967)).

163. *Rothgery*, 554 U.S. at 198 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)).

164. *Id.*

165. *Id.* at 202 (emphasis added).

these proceedings are adversarial in nature.[166] The right to counsel applies at a pre-indictment preliminary hearing, where the court determines if there is sufficient evidence to warrant presenting a case to the grand jury; if there is, the court will also set bail if required.[167] This is particularly true because these hearings present an opportunity for a lawyer to examine and cross-examine witnesses, which may expose fatal flaws in the State's case and cause the magistrate to refuse to set bail.[168] The Court repeatedly recognized that these arraignment proceedings are so critical that "[w]hat happens there may affect the whole trial."[169] The Court has further treated the bail hearings as a "*critical stage of the State's criminal process* at which the accused is as much entitled to such aid (of counsel) . . . as at the trial itself."[170]

C. Additional Doctrine Identifying Pretrial Proceedings as Part of a Criminal Case

Outside the context of the Sixth Amendment's right to counsel, the Court has noted several additional proceedings that qualify as the initiation of a criminal prosecution. This includes probable cause hearings (for the purpose of § 1983 claims).[171] The Court held in *Burns v. Reed* that "appearing at a probable-cause hearing is 'intimately associated with the judicial phase of the criminal process . . .' and with the initiation and conduct of a prosecution."[172] Arrest warrants[173] and grand jury proceedings[174] are two additional ways that the government can initiate the legal process of a criminal trial. Furthermore, Congress has identified pretrial processes as part of "legal proceedings," to use Justice Thomas's words, in the Federal Rules of Criminal Procedure.[175] While some of the Rules cover purely technical aspects of federal

166. *Id.*

167. *Coleman*, 399 U.S. at 8.

168. *Id.* at 9.

169. Hamilton v. Alabama, 368 U.S. 52, 54 (1961); *see also* White v. Maryland, 373 U.S. 59, 60, (1963) (finding that the preliminary hearing as a critical stage of trial, because the petitioner entered a plea before the magistrate judge, without assistance of counsel).

170. *Coleman*, 399 U.S. at 9–10 (emphasis added).

171. Burns v. Reed, 500 U.S. 478, 490–91 (1991).

172. *Id.* at 492 (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976)).

173. Manuel v. City of Joliet, 137 S. Ct. 911, 919 n.6 (2017).

174. Costello v. United States, 350 U.S. 359, 362 (1956) ("There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for *instituting criminal proceedings* against persons believed to have committed crimes." (emphasis added)).

175. Jordan Gross, *An Ounce of Pretrial Prevention Is Worth More Than a Pound of Post-Conviction Cure: Untethering Federal Pretrial Criminal Procedure From Due Process Standards of Review*, 18 BERKELEY J. CRIM. L. 317, 324 (2013).

criminal procedure, such as recording requirements for preliminary hearings, many Rules address procedures with substantive and constitutional dimensions.[176] The scope of the Rules govern "all criminal proceedings,"[177] which includes Title II, the section covering "Preliminary Proceedings."[178] The Rules also encompass grand jury proceedings,[179] indictments,[180] arraignments,[181] pleas,[182] and pleadings and pretrial hearings.[183] An understanding of these pretrial proceedings as worthy of the Fifth Amendment's protections aligns with Justice Thomas's statement that a case begins at the initiation of legal proceedings. It also supports Supreme Court precedent and interest in ensuring that the rights of the accused are protected at all stages of a criminal case.

V. POLICY RATIONALE FOR APPLYING THE SELF-INCRIMINATION CLAUSE TO PRETRIAL PROCEEDINGS

There are significant policy reasons that bolster the view that all who have been formally accused of a crime should be able to invoke this right. This section of the Note advocates extending the Fifth Amendment's protections to preliminary proceedings to address underlying public policy concerns, and also explores opponents' beliefs that such an extension would be difficult for the justice system to handle.

A. Policy Arguments for a Broad Understanding of the Self-Incrimination Clause

Justice Souter's concurring opinion in *Chavez* noted that extending the bare guarantees of the Fifth Amendment's Self-Incrimination Clause may be warranted if it is needed to protect the core of the right against contemporary society's pressures.[184] The invasive pressures of contemporary society is evidenced by the steadily increasing percentage of guilty pleas. Our criminal justice system has largely

176. *Id.* at 320–21.

177. FED. R. CRIM. P. 1.

178. FED. R. CRIM. P. 3–5.1. These sections as encompassed in Title II cover criminal complaints, arrest warrants, the initial appearance and preliminary hearings.

179. FED. R. CRIM. P. 6.

180. FED. R. CRIM. P. 7.

181. FED. R. CRIM. P. 10.

182. FED. R. CRIM. P. 11.

183. FED. R. CRIM. P. 12.

184. Chavez v. Martinez, 538 U.S. 760, 777 (2003) (Souter, J., concurring in the judgment) (quoting Miranda v. Arizona, 384 U.S. 436, 510 (1966) (Harlan, J., dissenting)).

foregone trials in favor of plea deals. In 2018, 97.4% of federal offenders pled guilty, which is a half percent increase from the 96.9% guilty plea rate in 2013.[185] In contrast, only 83% of federal cases resolved in 1979 were the result of guilty pleas.[186] This is not solely a federal issue; 94% of state criminal convictions resulted in guilty pleas.[187]

This trend may be a consequence of how pretrial proceedings unfold. The Supreme Court has recognized that "the most critical period of the proceedings against these defendants . . . [is] from the time of their arraignment until the beginning of their trial."[188] The use of coerced statements during this critical stage can shape the outcome of the case and whether a defendant chooses to plead or proceed to trial.

The role that pretrial proceedings—particularly bail hearings—can play in a defendant's decision to plead cannot be overstated. The process costs of pretrial detention and bail bonds are two critical factors in most misdemeanor defendants' decision to plead guilty rather than face trial.[189] It can be particularly compelling to plead guilty when a defendant considers that the length of the pretrial detention can equal or even exceed the punishment that may be imposed after trial.[190] An offer to plead guilty in exchange for a sentence of time already served is one that many defendants feel is too good to refuse.[191] Furthermore, pretrial detention can hamper a defendant's ability to prepare for his trial: for instance, it is more difficult for detained defendants to meet with their attorneys.[192] This further incentivizes quick plea bargains in misdemeanors, even if the defendant would probably win acquittal at an eventual trial.[193]

185. *See Fiscal Year 2018 Overview*, supra note 27; *see also Dep't of Justice Sourcebook of Criminal Justice Statistics*, supra note 27.

186. Hindelang Criminal Justice Research Ctr., Univ. of Albany, Sourcebook of Criminal Justice Statistics Online tbl.5.22.2010 (Kathleen Maguire ed.), http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last visited Mar. 3, 2020).

187. Missouri v. Frye, 566 U.S. 134, 143 (2012); *see also* Padilla v. Kentucky, 559 U.S. 356, 372 (2010) ("Pleas account for nearly 95% of all criminal convictions.").

188. Powell v. Alabama, 287 U.S. 45, 57 (1932).

189. Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 951–55 (1983).

190. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2492 (2004).

191. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2146 (1998).

192. Bibas, *supra* note 190190, at 2492.

193. *See id.* In these instances, "the shadow of pretrial detention looms much larger over these small cases than does the shadow of trial."

Even an acquittal at trial cannot recover the toll of days spent in jail during pretrial detention.[194] The desire of defendants for immediate release from jail gives prosecutors more leverage to obtain a plea from detained defendants than from those free on bail.[195] In this vein, prosecutors sometimes engage in a practice known as overcharging, or alternatively as "charge-piling," in which prosecutors will charge the defendant with a more serious crime, or multiple crimes, thereby exposing the accused to a higher sentence.[196] The "charge bargain" is then an agreement to replace a higher charge with a lower one in exchange for a guilty plea; it often results in prosecutors obtaining the sentence that they actually prefer in the most efficient means possible.[197] In some instances, a defendant who is guilty of only one of the charges may have difficulty defending successfully against both and decide to plead.[198] Pretrial processes are crucial to determining when a prosecutor may be overreaching (either factually or legally) in the charges.[199]

As Justice Ginsburg noted during her questioning at oral argument in *Vogt v. City of Hays*, it seems contrary to common sense that evidence which would be inadmissible at trial could be introduced at a probable cause hearing to determine if there is enough evidence to go to trial.[200]

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194. *Id.* at 2493.

195. Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 444 (1971).

196. Crespo, *supra* note 59, at 1313–14. The author exemplifies "charge-piling" using a defendant who omits armed robbery, "[a]nd yet, in practice, a prosecutor could and routinely would commence a prosecution against such a defendant by piling on a host of additional charges, including (to list just some examples) aggravated assault, theft, threats, possession of a weapon, and using a firearm during a crime of violence." *Id.* at 1314.

197. *Id*. at 1311–12. This Note is not suggesting that prosecutors try to convict innocent persons of crimes they did not commit. Rather, scholars have concluded that "various pressures on prosecutors . . . can cause them to act in ways that subvert justice . . . [often] unintentionally." Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 295 (observing that prosecutors can suffer from "tunnel vision" that prevents them from seeing the flaws in their case); *Cf.* United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) ("[T]o coerce cooperation . . . prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that no one—not even the prosecutors themselves—thinks are appropriate.").

198. Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1143 (2005).

199. Crespo, *supra* note 59, at 1332; *see also* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 865 (1995) (observing that prosecutors sometimes exploit the gap "between the quantity and quality of evidence necessary to support a legitimate charge and the quantity and quality of evidence needed to prove that the defendant committed the charged offense").

200. Transcript of Oral Argument at 31–32, City of Hays v. Vogt, 138 S. Ct. 55 (mem.) (2017) (No. 16–1495).

The same is true of arraignments, bail hearings, or indictments. The case of Teresa Sornberger is a perfect illustration of the use of such statements and their impact. Teresa Sornberger's coerced confession, which would have been inadmissible at the trial stage, was used to find probable cause for a trial and to set her bail at an amount that she could not meet.[201]

Teresa Sornberger's circumstances are hardly unique; five out of six defendants remain in jail awaiting trial because they cannot afford bail amounts.[202] In 2017, only 40 percent of all federal defendants were released on bail.[203] Empirical studies show that many more defendants are imprisoned before trial than are convicted and imprisoned following trial.[204] Additional empirical data shows that if all defendants had the economic capability to make bail, fewer than 6.8% of defendants would plead guilty to misdemeanors.[205] Eliminating the use of statements that would be considered inadmissible at trial could alleviate the burden on defendants and chip away at the system of mass incarceration.

B. Counter-Arguments: In Favor of Limiting the Fifth Amendment to Trial

Advocates for limiting the Self-Incrimination Clause to a trial right have expressed several concerns about understanding the parameters of a "criminal case" to include pretrial proceedings. They believe that the text and the spirit of the Self-Incrimination Clause show that it applies only to trial proceedings. Advocates of this view, including the Department of Justice, have also raised concerns that extending the right would fundamentally alter the nature of pretrial proceedings and lead to inefficiency among the courts.

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201. Sornberger v. City of Knoxville, 434 F.3d 1006, 1013 (7th Cir. 2006).

202. Thomas H. Cohen & Brian A. Reaves, Pretrial Release of Felony Defendants in State Courts, Bureau Just. Stat. 1 (Nov. 2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf. *See also* Eric Holder, Att'y Gen., U.S. DEP'T OF JUST., *Address at the National Symposium on Pretrial Justice* (June 1, 2011), http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110601.html (noting that many pretrial detainees have been "charged with crimes ranging from petty theft to public drug use," and that they are detained "because they simply cannot afford to post the bail required—very often, just a few hundred dollars—to return home until their day in court arrives").

203. Administrative Office of the U.S. Courts on behalf of the Federal Judiciary, Pretrial Services - Judicial Business 2017, https://www.uscourts.gov/statistics-reports/pretrial-services-judicial-business-2017 (last visited on Mar. 3, 2020). This percentage decreases to 28% when immigration cases are included in the analysis.

204. Alschuler, *supra* note 189, at 953.

205. Lynch, *supra* note 191, at 2146.

The Solicitor General has suggested that a Self-Incrimination Clause violation requires that the statement be incriminating and would establish a defendant's criminal responsibility.[206] The government also has argued that preliminary proceedings do not determine criminal guilt or innocence.[207] The government's argument overlooks the plain meaning of the Fifth Amendment: that the privilege can be invoked in any criminal case, and that Justice Thomas has explained that the criminal case begins with the initiation of adverse legal proceedings. A preliminary or bail hearing, is, by its nature, adversarial. If these hearings were not adversarial, the Sixth Amendment's right to counsel would not apply. Nor does the government's argument address the claim that the Founders could have limited the Fifth Amendment by specifically using "trial," rather than "case."

An understanding that the Self-Incrimination Clause precludes compelled statements against interest in pretrial proceedings necessarily means that the court would have to resolve admissibility issues either before or during pretrial proceedings. Admissibility is not always a simple determination to make because it involves "careful scrutiny of all the surrounding circumstances."[208] Requiring that suppression issues be resolved in preliminary proceedings may delay the proceedings. [209] This may lead to logistical issues because many pretrial proceedings are supposed to be completed soon after charges are filed.[210] There is a concern that these deadlines would be difficult to meet, and resolution of the ultimate issues delayed, if courts also need to determine the admissibility of challenged evidence.[211]

There is no doubt that some of these concerns are valid. But as Justice Sotomayor noted during the *Vogt v. City of Hays* oral arguments, of the four circuits which have held that the Fifth Amendment applies

206. Brief for the United States as Amicus Curiae Supporting Petitioner at 10, City of Hays v. Vogt, 138 S. Ct. 55 (2017) (No. 16–1495).

207. *Id*. at 11.

208. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

209. Brief for the United States as Amicus Curiae Supporting Petitioner at 11, City of Hays v. Vogt, 138 S. Ct. 55 (2017) (No. 16–1495).

210. *See* FED. R. CRIM. P. 5.1(c) (requiring that the preliminary hearing take place within 21 days of the initial appearance if the defendant is not in custody, and within 14 days after the initial appearance if the defendant is in custody); FED. R. CRIM. P. 5(a) (requiring that initial appearances occur "without unnecessary delay"); *Pretrial Hearings*, *supra* note 30, at 286 (noting that *Gerstein* hearings must be held within 48 hours of arrest).

211. Brief for the United States as Amicus Curiae Supporting Petitioner at 30, City of Hays v. Vogt, 138 S. Ct. 55 (2017) (No. 16–1495).

to pretrial proceedings, none have been "gummed up" by this shift.[212] This may be because not every defendant will have a statement that they wish to contest as a violation of the Self-Incrimination Clause. It may also be that the analysis is often less difficult or cumbersome than proponents of limiting this privilege to trial suggest.

CONCLUSION

Any observer of the criminal justice system knows that the case does not begin when the judge enters the courtroom on the first day of trial. The nature of our system means that the judge has already made several important decisions that affect trial proceedings and strategy, and counsel on both sides have advocated different aspects of their case in front of the judge. While the *Chavez* decision may have failed to specify a specific moment when a "criminal case" begins, Justice Thomas's explanation alone that it "requires the initiation of legal proceedings," is enough to demand that the Self-Incrimination Clause should cover all pretrial proceedings. This understanding is only bolstered in consideration of the Tenth Circuit's extensive analysis, as well as the Court's understanding of pretrial processes as legal proceedings, and the policy rationales for extending the right to the period before opening statements.

The balance of values between efficiency and the protection of the rights of the accused has always been a difficult one. But the capacity for pretrial proceedings to impair or severely impact a person's liberties shows that in this critical stage before trial, it makes little sense to weaponize statements that would be inadmissible at trial. Using a person's statements against his interest and compelling him to be a witness against himself in a way that results in the loss of liberty or hampers the ensuing trial is exactly what the Self-Incrimination Clause is meant to prevent.

212. Transcript of Oral Argument at 34, City of Hays v. Vogt, 138 S. Ct. 55 (mem.) (2017) (No. 16–1495).