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Voluntariness of Admissions (United States v. Vigo)

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CRIMINAL LAW

VOLUNTARINESS OF ADMISSIONS

United States v. Vigo

The Supreme Court in *Miranda v. Arizona*[1] concluded that the prosecution cannot introduce at trial statements elicited from an accused through interrogation unless the individual was first apprised by the authorities of certain of his constitutional rights. The *Miranda* Court articulated the precise form required; prior to the initiation of interrogation, the authorities must warn the accused that : (1) he has the right to remain silent, (2) any statement he makes can be used against him in court, (3) he has the right to the presence of an attorney, and (4) if he desires an attorney but is unable to afford one, one will be appointed before questioning.[2] The procedure of advising the accused of his rights is only applicable to instances of in-custody questioning or where law enforcement personnel have otherwise deprived the accused of his freedom "in any significant way."[3] Voluntary, pre-interrogation statements are clearly admissible.[4]

The enumeration of these safeguards was necessary, in the Court's estimation, to assure the continued integrity of the fifth amendment privilege against self-incrimination. Interrogation of the accused by police in a custodial setting generates "inherently compelling pressures"[5] which erode the ability of the accused effectively to exercise

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1 384 U.S. 436 (1966). *See generally* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 708-16 (1968); Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Symposium, *Interrogation of Criminal Defendants — Some Views on* Miranda v. Arizona, 35 FORD. L. REV. 169 (1966).

2 384 U.S. at 467-73. *Miranda* represents a clarification and expansion of Escobedo v. Illinois, 378 U.S. 478 (1964). Defendant Escobedo was interrogated by police concerning a murder. He was not advised of his right to remain silent, nor given an opportunity to see his attorney. A confession extracted from him was introduced by the prosecution at his trial. *Id.* at 479-83. Reversing Escobedo's murder conviction, the Supreme Court held the statements elicited from him constitutionally inadmissible. The Court announced that where police interrogation shifted from a "general inquiry" to the accusatory stage by focusing upon a particular suspect, the suspect must be advised of his right to remain silent and may not be denied the right to consult with an attorney. *Id.* at 491. The concept of focusing upon a suspect was left somewhat ambiguous in *Escobedo*. Clarification was attempted in *Miranda*, where the Court explained that the phrase referred to instances of questioning by the authorities of individuals in custody or otherwise deprived of freedom in "any significant way." 384 U.S. at 444 n.4.

3 384 U.S. at 444.

4 *See* note 15 *infra*.

5 384 U.S. at 436. The Court, after an extended review of modern police interrogation techniques, expressed the belief that law enforcement officials deliberately create a menacing environment when questioning a person in custody. *Id.* at 448-58. Such an atmosphere has a deleterious effect upon fifth amendment rights in particular:

his privilege against self-incrimination. Waiver of the *Miranda* rights is permissible but, as Chief Justice Warren said in the majority opinion, a "heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[6]

In *United States v. Vigo*[7] the Second Circuit confronted the pivotal question of whether a defendant who had made certain damaging admissions had been the subject of custodial interrogation and was consequently entitled to *Miranda* warnings. In deciding the issue in the negative, the majority engaged in a subtle displacement of the *Miranda* rationale, as well as an indirect application of the "totality of circumstances" test for determining voluntariness of admissions, enunciated in the Omnibus Crime Control Act.[8]

An unidentified informant, working in cooperation with an agent of the Bureau of Narcotics and Dangerous Drugs (BNDD), met with

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> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.

Id. at 467.

[6] *Id.* at 475. Because a constitutional right was involved, the *Miranda* majority believed a high standard of proof had to be met by the prosecution in establishing a waiver by the defendant. *Id.*

Though the Seventh Circuit, in United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969), extended *Miranda* to certain noncustodial income tax investigations, all other circuits passing on the issue have declined to do so. In *Dickerson*, the defendant revealed to a revenue agent his failure to file income tax returns. Subsequently, an agent from the Intelligence Division of the Internal Revenue Service (IRS) interviewed the defendant but did not inform him that the division engages only in criminal investigations, nor was the defendant given *Miranda* warnings. The court of appeals held that despite the lack of a custodial atmosphere, once a defendant is the subject of an IRS criminal investigation he must be so informed at the first opportunity and apprised of his constitutional rights. *Id.* at 1114-16. *Contra*, United States v. Stamp, 458 F.2d 759, 780-81 (D.C. Cir. 1971), *cert. denied*, 409 U.S. 842 (1972); United States v. Chikata, 427 F.2d 385, 388 (9th Cir. 1970); United States v. White, 417 F.2d 89, 91 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); United States v. Jernigan, 411 F.2d 471, 472 (5th Cir.), *cert. denied*, 396 U.S. 927 (1969); Hensley v. United States, 406 F.2d 481, 484-85 (10th Cir. 1969); Muse v. United States, 405 F.2d 40, 41 (8th Cir. 1968), *cert. denied*, 393 U.S. 117 (1969); United States v. Bagdasian, 398 F.2d 971, 973 (4th Cir. 1968); Taglianetti v. United States, 398 F.2d 558, 566 (1st Cir. 1968). *See generally* Andrews, *The Right to Counsel in Criminal Tax Investigations Under* Escobedo *and* Miranda: *The "Critical Stage,"* 53 IOWA L. REV. 1074, 1111-17 (1968); Note, *Extending* Miranda *to Administrative Investigations*, 56 VA. L. REV. 690, 696-715 (1970).

Miranda has been held inapplicable to parole revocation hearings on the theory that such proceedings are administrative in character. *See* United States v. Johnson, 455 F.2d 932, 933 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972).

[7] 487 F.2d 295 (2d Cir. 1973).

[8] 18 U.S.C. § 3501 (1970). Section 3501 was enacted as title II of the Omnibus Crime Control and Safe Streets Act of 1968 (Act of June 19, 1968, Pub. L. No. 90-351, title II, § 701(a), 82 Stat. 210). *See* note 30 *infra*.

It should be noted at the outset that the constitutionality of section 3501 has been seriously questioned, in that it represents a legislative modification of the strict procedure which *Miranda* deemed constitutionally mandated. *See* note 31 *infra*.

Robert Vigo, ostensibly to arrange the purchase of narcotics. When no transaction was completed at the meeting, Vigo and two companions were followed by a BNDD surveillance team. Subsequently, co-defendant Pagan joined Vigo. The surveillance continued for over an hour. Finally, at approximately 1:00 a.m., Vigo's automobile was stopped and its occupants placed under arrest by six agents. Several packages of heroin were found in the car.[9] Following this search, a BNDD agent allegedly gave Vigo the *Miranda* warnings but could not recall having informed the defendant that anything he said could be used against him in court. Asked if he comprehended his rights, Vigo indicated a desire to talk.[10] Admitting one of the packages contained heroin and belonged to him, Vigo sought to exculpate the co-defendant, as well as the other occupants of the car.[11] Both Vigo and Pagan were indicted for possessing heroin with intent to distribute.[12] A pretrial defense motion to suppress these statements was granted by the district court, and the government appealed.[13]

The majority and dissent in *Vigo* differed significantly in their reconstruction of post-arrest events. Noting that "all the events occurred within a very short span of time after the automobile was stopped,"[14] Judge Lumbard's majority opinion concluded that Vigo's

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9 The court emphasized that all of the events following the arrest occurred in close proximity and that the exact sequence is unclear. 487 F.2d at 298 n.2.

10 487 F.2d at 298. The BNDD agent testified that as Vigo was removed from the car he said, "I know what you got me for." *Id.* at 299 n.3.

11 Vigo stated that co-defendant Pagan realized heroin was present in the car but was not responsible for its presence. He further claimed that the other occupants were unaware heroin was in the automobile. *Id.* at 299.

12 21 U.S.C. §§ 812, 841(a)(1), (b)(1)(A) (1970) and 18 U.S.C. § 2 (1970). Under section 812 heroin appears in the schedule of controlled substances. Section 841(a) makes it "unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." Penalties for violation of section 812 are set forth in section 841(b)(1)(A); 18 U.S.C. § 2 (1970) is a general conspiracy statute.

13 In the district court the defendants made three pretrial motions: (1) to suppress statements made by both defendants after their arrest, (2) to suppress evidence, an undetermined quantity of marijuana, discovered in co-defendant Pagan's purse, and (3) to suppress evidence discovered in the search of Vigo's car. Judge Motley granted the first two motions and denied the third. United States v. Vigo, 357 F. Supp. 1360, 1362 (S.D.N.Y. 1972).

The district court found Vigo's statements not voluntary within the meaning of *Miranda*, and because one element of the *Miranda* warnings was not given, held that the prosecution had not established an effective waiver of *Miranda* rights. 357 F. Supp. at 1366-67.

The appeal was restricted to the district court's suppression of evidence seized from co-defendant Pagan and Vigo's incriminating remarks. 487 F.2d at 296-97.

The Second Circuit was unanimous in its reversal of the district court's suppression order concerning the marijuana found in Pagan's purse. The search was deemed permissive and protective following the discovery of a loaded revolver on Vigo's person. *Id.* at 298.

14 *Id.* at 298 n.2.

remarks were spontaneous utterances, coming prior to the commencement of "any systematic inquiry"[15] by BNDD agents. Accordingly, in reversing the district court suppression order the court of appeals majority held the voluntary statements admissible, observing that none of the "inherently compelling factors" the *Miranda* Court associated with police station interrogations was present in this case.[16] Although the court could have interpreted the offering of the defective *Miranda* warnings as an indication that interrogation had begun or was imminent, the majority opinion suggested the warnings served instead to impress upon Vigo the criminality of his conduct. Consequently, the majority felt Vigo fully understood the nature and consequences of his statements.[17]

Judge Timbers' dissent concluded that Vigo's admissions were made as a result of detailed questioning by a federal agent designed to produce inculpatory statements.[18] The case, according to Judge Timbers, turned not upon the voluntariness of Vigo's admissions, but upon the ability of the government to meet its "heavy burden" under *Miranda* of establishing an intelligent waiver of the defendant's privi-

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15 *Id.* at 299. Subsequent to *Miranda* it was unclear what quantum of proof was necessary to establish an incriminating admission as voluntary. The *Miranda* Court had said:

> In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . There is no requirement that police stop a person who enters a police station and states he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

384 U.S. at 478 (footnote omitted).

Professor Wright believes the *Miranda* Court took an ambiguous position on voluntary statements made during custody but before questioning. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 76, at 112-13 (1969).

In Pea v. United States, 397 F.2d 627, 637 (D.C. Cir. 1967) (en banc), the District of Columbia Circuit adopted "beyond a reasonable doubt" as the standard for determining voluntariness. More recently, a closely-divided Supreme Court held that where a confession is challenged as involuntary the prosecution need only establish by a preponderance of evidence the voluntary nature of the admission. Lego v. Twomey, 404 U.S. 477, 488-89 (1972). Mr. Justice Brennan in his dissenting opinion argued that to maintain fifth amendment self-incrimination safeguards, the "beyond a reasonable doubt" test should be employed. *Id.* at 494. *See also* Jackson v. Denno, 378 U.S. 369, 386-89 (1964).

16 487 F.2d at 299. The *Miranda* Court was particularly concerned with what it regarded as the psychologically intimidating atmosphere often associated with police interrogations. Factors the Court identified as contributing to such an atmosphere include isolation of the defendant, relentless interrogation, and trickery. *See* 384 U.S. at 446-55.

17 487 F.2d at 299. In concluding that Vigo knew the nature and consequences of his admissions, the majority curiously introduced in the context of a *Miranda* analysis of voluntariness the concept of waiver, which is only a consideration where custodial interrogation has commenced. The use of a waiver analysis is, however, consistent with the "totality of circumstances" approach of 18 U.S.C. § 3501 (1970). *See* note 8 *supra*.

18 487 F.2d at 300-01 (Timbers, J., dissenting in part).

lege against self-incrimination.[19] In the absence of complete *Miranda* warnings, Judge Timbers deemed this burden unsatisfied.

The irreconcilable differences between the majority and dissent in interpreting the circumstances surrounding Vigo's arrest preclude a conclusive evaluation of the application of *Miranda* to this case.[20] Instead, each opinion must be analyzed in light of the facts it sets forth. The majority characterizes Vigo's statements as voluntary, stating they occurred before "any systematic inquiry" by federal agents. *Miranda* was not designed to bar voluntary admissions. Though the precise distinction between a voluntary and custodial situation was not fully defined by the Supreme Court, an admission arising out of custodial interrogation clearly would not be "voluntary" in the *Miranda* sense.[21] The safeguards outlined in *Miranda* operate only when law enforcement authorities are about to question an individual in their custody or whose freedom has been significantly curtailed. The Ninth and Tenth Circuits have held voluntary admissions made subsequent to arrest but before interrogation admissible, despite the failure of police to inform individuals in this situation of their rights.[22]

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19 Citing the suppression hearing transcript, Judge Timbers revealed that after the incomplete *Miranda* rights were given, Vigo and the federal agent engaged in a discussion concerning a package found in the car, as well as whether the other occupants were aware of the contents of the package. 487 F.2d at 300-01 n.1. He concluded that "Vigo was being questioned in detail." *Id.*

20 The district court suppression order opinion does not directly resolve the factual conflict at the core of *Vigo*. Although Judge Motley found a waiver by Vigo had not been established by the government, the court failed to detail with sufficient particularity the factual basis for its finding. *See* 357 F. Supp. 1363-66; note 26 *infra*.

21 *See* note 15 *supra*.

The California Supreme Court in People v. Arnold, 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967), held that whether circumstances were custodial for the purposes of *Miranda* should be determined by the use of a "reasonable man" test. This standard, or what has been denominated the objective approach, has been followed by several circuit courts of appeals, including the Second Circuit, and the New York Court of Appeals. *See, e.g.*, United States v. Hall, 421 F.2d 540, 544-45 (2d Cir.), *cert. denied*, 397 U.S. 990 (1970); Lowe v. United States, 407 F.2d 1391, 1397 (9th Cir. 1969); People v. Rodney P., 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967); 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 76, at 119 (1969); *cf.* Brown v. Beto, 468 F.2d 1284, 1286-87 (5th Cir. 1972); South Dakota v. Long, 465 F.2d 65, 69-70 (8th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973). *But cf.* United States v. Phelps, 443 F.2d 246, 247 (5th Cir. 1971).

22 In United States v. Tafoya, 459 F.2d 424, 427 (10th Cir. 1972), a *Miranda* warning was found not to be required where shortly following his arrest on narcotics charges the defendant spontaneously uttered incriminating remarks. A Ninth Circuit panel in Klamert v. Cupp, 437 F.2d 1153, 1154-55 (9th Cir. 1970), held admissible an in-custody confession made following an incomplete *Miranda* warning, but prior to questioning by the police. *See* Parson v. United States, 387 F.2d 944, 946 (10th Cir. 1968); United States v. Cruz, 265 F. Supp. 15, 20 (W.D. Tex. 1967); Cameron v. State, 214 So. 2d 370, 371 (Fla. App. 1968).

When an investigation reaches the point at which *Miranda* warnings are necessary, the Second Circuit has held they need not be recited in a "ritualistic" fashion. United States v. Vanterpool, 394 F.2d 697, 698-99 (2d Cir. 1968). Initially the Second Circuit appeared to demand that right to counsel warnings be given in language closely akin to that

The Fifth Circuit has concluded that the mere recital of either full[23] or incomplete[24] *Miranda* warnings by the authorities does not transform a noncustodial situation into "custodial interrogation." By way of analogy, the existence of the in-custody recitation of *Miranda* rights should not yield the conclusive presumption that custodial interrogation occurred in *Vigo*. Given the facts as presented by the majority, Vigo, although in custody, was not within the protection afforded by *Miranda*.[25] Conversely, accepting the additional information supplied by Judge Timbers,[26] the federal agent initiating questioning failed to conform completely to the procedure outlined in *Miranda*, thus barring the admission of Vigo's statements as evidence for the prosecution.

Significantly, the majority found that Vigo's statements were "voluntary and admissible" under *Miranda*, thereby sparing the court the

in *Miranda*. *See* United States v. Fox, 403 F.2d 97, 100 (2d Cir. 1968). More recently, the appellate court seems to be less strict in evaluating right to counsel warnings. *See* United States v. Carneglia, 468 F.2d 1084, 1091 (2d Cir. 1972), *cert. denied*, 401 U.S. 945 (1973); United States v. Cusumano, 429 F.2d 378, 379-80 (2d Cir. 1970), *cert. denied*, 400 U.S. 830 (1972). *See also* Keegan v. United States, 385 F.2d 260 (9th Cir. 1967), *cert. denied*, 391 U.S. 967 (1968).

Appellate courts have uniformly held that voluntary, self-incriminating statements produced during general, on-the-scene investigations by law enforcement officials are outside the compass of *Miranda*. *See, e.g.*, United States v. Thompson, 463 F.2d 1258, 1259 (D.C. Cir. 1972); Utsler v. Erickson, 440 F.2d 140 (8th Cir.), *cert. denied*, 404 U.S. 956 (1971); United States v. LeQuire, 424 F.2d 341, 343-44 (5th Cir. 1970); Sablowski v. United States, 403 F.2d 347, 349-50 (10th Cir. 1968); United States v. Gibson, 392 F.2d 373, 376 (4th Cir. 1968); United States v. Messina, 388 F.2d 393, 395 (2d Cir. 1968); People v. Gant, 264 Cal. App. 2d 420, 70 Cal. Rptr. 801 (2d Dist. 1968).

[23] United States v. Owens, 431 F.2d 349 (5th Cir. 1970). On this point the *Owens* court remarked, "By gratuitously advising [defendant] of his rights, the agent in no way conferred additional rights on him." *Id.* at 352.

[24] United States v. Akin, 435 F.2d 1011 (5th Cir. 1970), *cert. denied*, 401 U.S. 1011 (1971).

[25] Two post-*Miranda* Supreme Court decisions illustrate the various circumstances which may be considered custodial interrogation. Convicted of knowingly filing false income tax returns, based in part upon statements elicited from him during a prison interview with an IRS agent, the petitioner in Mathis v. United States, 391 U.S. 1 (1968), urged reversal on the ground that adequate *Miranda* warnings were not given. The government argued that the warnings were unnecessary because the investigation had been routine, emphasizing that incarceration in this instance was for reasons unrelated to the investigation. *Id.* at 4. The Court held that the *Miranda* warnings should have been given, maintaining that the need for such warnings did not turn upon the specific reason an individual was in custody, but on whether custodial interrogation had begun. *Id.* at 4-5. *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 76, at 117 (1969). *But cf.* United States v. Reid, 437 F.2d 1166 (7th Cir. 1971).

Shortly after *Mathis*, the Court in Orozco v. United States, 394 U.S. 324 (1969), held that an individual questioned in his bedroom, who from the outset of the interrogation was considered under arrest, was entitled to *Miranda* warnings. *Id.* at 326-27.

[26] Judge Timbers provided additional information bearing on the circumstances surrounding the *Vigo* admissions, including the fact that the federal agent and Vigo "discussed" the package containing heroin, as well as the knowledge of the other occupants of the presence of narcotics in the car. 487 F.2d at 300-01 n.1 (Timbers, J., dissenting in part). Concluding that Vigo had been "questioned in detail," Judge Timbers believed the discussion generated by this questioning was fairly extensive. *Id.*

task of examining the constitutionality of section 3501 of the Omnibus Crime Control Act.[27] Section 3501 was apparently enacted by Congress to "offset" the *Miranda* decision.[28] The statute provides that a confession "shall be admissible in evidence if it is voluntarily given."[29] In evaluating the voluntariness of a confession, section 3501(b) establishes a "totality of circumstances" approach.[30] Knowledge by the accused of his constitutional rights, the *sine qua non* of admissibility under *Miranda*, is not a determinant of admissibility under section 3501.[31] The question unresolved in *Vigo* is whether these statutory standards satisfy the constitutional imperative expressed by *Miranda*.

The *Vigo* majority, in evaluating the applicability of *Miranda*, employed in part the calculus of section 3501, as the dissent discerned.[32] In passing on the voluntariness of Vigo's admissions, the

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27 487 F.2d at 299.

28 The Senate Judiciary Committee report on the Omnibus Crime Control and Safe Streets Act made it plain title II was a response to the *Escobedo* and *Miranda* holdings:

> After considering the testimony of many witnesses, and statements and letters of many other interested parties, the committee found that there is a need for legislation to offset the harmful effects of the Court decisions mentioned above [*Escobedo* and *Miranda*]. These decisions have resulted in the release of criminals whose guilt is virtually beyond question.

S. REP. No. 1097, 90th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 2127 (1968).

Though the Court in *Miranda* had encouraged a legislative response to the problems of maintaining fifth amendment rights in custodial situations, it made it clear that any alternate procedure developed would have to be "at least as effective in apprising accused persons of their right of silence and . . . continuous opportunity to exercise it . . . ." 384 U.S. at 467.

29 18 U.S.C. § 3501(a) (1970).

30 Voluntariness under section 3501(b) is to be measured by five criteria:

> The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
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> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501(b) (1970).

It should be noted that the statutory language of this section indicates that waiver need not be demonstrated to admit a confession arising out of custodial interrogation.

31 To the extent it contravenes *Miranda*, the constitutionality of section 3501 is open to serious speculation. Professor Wright has said:

> The statute, insofar as it attempts to change the Miranda result, is unconstitutional. Reasonable men can and do disagree on the wisdom of Miranda, and whether the Constitution required that decision. The Court held that it did. Rights derived from the Constitution cannot be taken away by act of Congress.

1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 76, at 121 (1969).

32 487 F.2d at 301 (Timbers, J., dissenting in part).

majority noted: "None of the inherently compelling factors of station-house interrogation were present."[33] It added that the defendant had spoken "with evident knowledge of the meaning and consequences of what he said."[34] This language suggests admissibility was determined, in part at least, on the basis of circumstances surrounding the incriminating statements. *Miranda*, however, does not prescribe this method of evaluation. Having found the admissions to have been made before interrogation, the majority's analysis, in the absence of a claim by the defendant of coercion, should have been completed. By examining the issues of the defendant's knowledge of criminality and waiver of his rights, the majority went beyond the issue of interrogation, thereby circumventing the *Miranda* rule. Thus, concern for procedural safeguards was partially displaced by the court's reliance on the surrounding circumstances test in judging the admissibility of the confession. The result was a more relaxed standard for making this determination. Under *Vigo*, a confession would be deemed voluntary based on a standard implicitly rejected in *Miranda*. According to the *Miranda* rationale[35] only where procedural safeguards were observed could the relinquishment of the privilege against self-incrimination be considered the product of free choice.

The majority opinion in *United States v. Vigo* indicates that future Second Circuit decisions involving *Miranda* should be scrutinized with care. *Vigo* applies a test of admissibility which appears to incorporate section 3501 in the course of what is ostensibly a *Miranda*-grounded analysis of the admissibility of certain damaging statements

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33 487 F.2d at 299.

34 *Id.*

35 Harris v. New York, 401 U.S. 222 (1971), represents a paring of the reach of the *Miranda* doctrine. *Harris* held that statements inadmissible for the prosecutor's case in chief could nonetheless be utilized to impeach the credibility of a defendant appearing as a witness in his own behalf. *Id.* at 224. In Chief Justice Burger's view, the holding was necessary to prevent a defendant from using *Miranda* to commit perjury with impunity. *Id.* at 225-26.

The *Harris* decision was made despite the presence in *Miranda* of dicta condemning the use of self-incriminating admissions for impeachment purposes absent "full warnings" and an effective waiver. 384 U.S. at 477. *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 76, at 111 (1969).

The Supreme Court recently indicated it will review the case of a suspect arrested for rape who was given *Miranda* warnings by the authorities but was not informed that he had the right to court-appointed counsel. During subsequent interrogation the accused provided the name of a third-party he said would corroborate his alibi, but who at trial offered testimony incriminating the accused. Michigan v. Tucker, 42 U.S.L.W. 3325 (U.S. Dec. 4, 1973). The Michigan Supreme Court sustained the conviction. *Id.* A federal district court granted the accused a writ of habeas corpus, holding on the authority of *Miranda* that the testimony of the witness should have been excluded, as it represented the "fruit" of a violation of the accused's fifth amendment rights. Tucker v. Johnson, 352 F. Supp. 266 (E.D. Mich. 1972), *aff'd*, 480 F.2d 927 (6th Cir. 1973).

made by the defendant. Whether or not *Miranda* will be gradually emasculated by section 3501 is an open question. However, the factual discrepancies in the *Vigo* opinions highlight the ease with which the *Miranda* doctrine can be thwarted should a court decide to selectively view the facts.

SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT

United States v. Candella

One of the fundamental principles of the fourth amendment is that warrantless searches and seizures are per se unreasonable exclusive of a few exceptions which are "jealously and carefully drawn".[1] A prosecutor seeking to rely on evidence gathered in a warrantless search or seizure has the burden of proving that it was justified by one of the few authorized exceptions[2] to the warrant requirement.[3] In *United*

1 Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

2 One of the exceptions is a search or seizure performed with the consent of the individual who is the subject of the search. *See* Zap v. United States, 328 U.S. 624, 628 (1946). The consent must be "freely and voluntarily given," more than mere "acquiescence to a claim of lawful authority." Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968). "A consent is not a voluntary one if it is the product of duress or coercion, actual or implicit." United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963). The consent must be "unequivocal, specific, and intelligently given." *Id.*

The "plain view" doctrine is another exception to the requirement that seizure of evidence be supported by warrant. *See* Harris v. United States, 390 U.S. 234 (1968), which states that:

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.

Id. at 236.

Evidence obtained under the "plain view" doctrine is not the product of a search. Bretti v. Wainwright, 439 F.2d 1042, 1046 (5th Cir.), *cert. denied*, 404 U.S. 943 (1971); United States v. Molkenbur, 430 F.2d 563, 566 (8th Cir.), *cert. denied*, 400 U.S. 952 (1970). To be valid a "plain view" seizure must have been "inadvertent." Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971).

Evidence seized by an officer in hot pursuit of a fleeing felon is also excepted from the warrant requirement. Warden v. Hayden, 387 U.S. 294, 298-300 (1967). Police may also lawfully seize evidence without a warrant when it is obtained incident to a lawful arrest. Chimel v. California, 395 U.S. 752 (1969). The arresting officer is restricted, however, to a search of the arrestee's person and the area "within his immediate control," by which is meant "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763.

An automobile, because of its mobility, may be searched without warrant when there is probable cause. Chambers v. Maroney, 399 U.S. 42, 48-52 (1970). However, in Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court emphasized that probable cause alone is not sufficient; there must also exist "exigent circumstances." *Id.* at 458-64, *quoting* Chambers v. Maroney, 399 U.S. 42, 51 (1970).

If there is an emergency a warrant is not required. *See* United States v. Jeffers, 342 U.S. 48, 52 (1951). A seizure without a warrant can also be made when evidence is about to be destroyed. McDonald v. United States, 335 U.S. 451, 455 (1948).

3 Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971); Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); United States v. Jeffers, 342 U.S. 48, 51 (1951); United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973).