No. 97-4750

In the
United States Court of Appeals
For the Fourth Circuit

United States of America, *Plaintiff -- Appellant,*

v.

Charles Thomas Dickerson, *Defendant -- Appellee.*

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF REHEARING

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union has been engaged in defense of the Bill of Rights for over 75 years. Many of its efforts have focused on enforcing those portions of the Bill of Rights having to do with administration of the criminal justice system. The ACLU participated as amicus curiae in Miranda v. Arizona, 384 U.S. 436 (1966), because effectuation of a person's right not to be compelled to incriminate himself is essential to the preservation of our accusatorial system of criminal justice. As in 1966, custodial interrogation today remains aimed at inducing a person to confess, and if the Fifth Amendment privilege is to be meaningful, some warning is necessary to assure that persons subjected to custodial interrogation have in mind their constitutional privilege against self-incrimination. The Supreme Court's decision to require such warnings was of constitutional dimension, and the panel therefore erred in relying on a statute purporting to overrule that requirement -- a statute that no Attorney General has relied on since its enactment. At the very least, before doing so, this Court should consider the matter based on full briefing, something the panel did not have before it. Miranda represents one of the most widely recognized statements of basic constitutional right, and that right to be warned during a custodial interrogation should not be cast aside.

STATEMENT OF CONSENT

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In Miranda v. Arizona, the Supreme Court responded to the problem of inherently coercive custodial interrogation by rejecting an after-the-fact assessment of voluntariness as insufficient protection for the Fifth Amendment privilege. Instead, the Court announced that the Fifth Amendment requires police to give suspects basic warnings of their rights prior to custodial questioning. That requirement has become one of the hallmarks of our criminal justice system, widely accepted by the public and law enforcement alike. Variously called "prophylactic" and protective, Miranda's warning requirement has been applied to the States by the Supreme Court both in direct appeals and in federal habeas proceedings, making clear that it is a requirement of constitutional dimension. The Miranda Court invited Congress and the States to alter the warnings and improve on the procedures it set out, but the Court held that such alternative approaches must be "fully as effective as [the Court's] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." 384 U.S. at 490.

Section 3501 is therefore plainly unconstitutional, for it purports to overrule the Court's requirement of warnings and return to the voluntariness analysis that the Court squarely rejected as insufficient. Congress may improve upon the Court's minimum warnings by adopting better methods of informing persons subjected to custodial interrogation of their rights, but it may not reject that constitutional requirement altogether. Amicus therefore urges this Court to grant rehearing, to call for full briefing, and to reject the panel's decision upholding a plainly unconstitutional usurpation of Supreme Court authority.

ARGUMENT

I.The Miranda Court Announced Constitutionally Required Minimum Procedures to Protect Fifth Amendment Rights During Custodial Interrogation.

A.The Miranda Court Established a Minimum Requirement of Warnings During Custodial Interrogations.

In Miranda, the Supreme Court began with the recognition that custodial interrogations are inherently coercive: "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of [the] examiner" and is therefore "at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself." 384 U.S. at 457-58. For that reason, the Court held that the Fifth Amendment privilege is "jeopardized" when police subject persons to custodial interrogations, id. at 478, and that the Fifth Amendment therefore requires

that in such coercive circumstances, a person must receive warnings prior to the interrogation about his rights to remain silent and to consult with a lawyer. Id. at 444, 478-79.

The Court then described specific warnings that would accomplish this purpose. In doing so, the Court was careful to invite alternative approaches several times in the course of its opinion, but every time it did so, it cautioned that any alternative approach must be at least as effective in warning persons of their rights as the warnings the Court had outlined: "Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." Id. at 490 (emphasis added). See also id. at 467 ("[U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed") (emphasis added); id. at 479 (inviting other "fully effective means").

In keeping with its openness to "fully effective equivalents," the Court has sometimes found that warnings other than its own satisfied Miranda's minimum requirements. See Duckworth v. Eagan, 492 U.S. 195, 197 (1989) (holding that informing suspect that an attorney would be appointed "if and when you go to court" provided an effective alternative under the circumstances); California v. Prysock, 453 U.S. 355, 360-61 (1981) (holding that warning sufficed because it did not suggest that attorney would only be appointed after interrogation). But the Court has never upheld warnings that were not "fully as effective as those described [in Miranda] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." 384 U.S. at 490.[1]

B.The Miranda Court's Minimum Warning Requirement Was "Of Constitutional Dimension."

There can be no doubt that the Miranda Court's requirement of minimum warnings in custodial interrogations was based on constitutional ground. First, all nine Justices participating in Miranda understood that the Court's ruling stemmed from the requirements of the Constitution. Second, the Miranda Court applied its own ruling to the States on direct appeal, and the Supreme Court has since applied Miranda's warning requirement on federal habeas review of State convictions, indicating its recognition that the requirement was one vindicating an important constitutional right.

1.The Miranda Court Expressly Recognized that It Was Establishing a Constitutional Warning Requirement.

The Miranda majority understood that the requirement of warnings in custodial interrogations was based on the Constitution. Thus, while inviting "fully effective" alternatives, the Court cautioned that "the issues presented are of constitutional dimensions and must be determined by the courts. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." 384 U.S. at 490-491 (emphasis added). It was clear to the Miranda majority that the Fifth Amendment dictated the result it announced, because the Court was "satisfied that all the principles embodied in the [Fifth Amendment] privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." 384 U.S. at 461.

The majority was not alone in understanding that the Court was announcing a constitutional principle. Even as he disagreed with some of the majority's conclusions, Justice Clark observed that the Court had "fashion[ed] a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused" of his right to counsel and to silence. Miranda, 384 U.S. at 500 (Clark, J., concurring in part and dissenting in part) (emphasis added). Justice Harlan, too, noted in dissent that the majority had "incorporate[d]" these procedural requirements "into the Constitution." Miranda, 384 U.S. at 505 (Harlan, J., dissenting). And Justice White made it unanimous, recognizing that "[t]o reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if compelled." 384 U.S. at 532 (White, J., dissenting).

2. Application of Miranda's Warning Requirement to the States Demonstrates Its Constitutional Footing.

If the Miranda Court's own words were not enough, the Court's application of its ruling to the States, both on direct appeal and in federal habeas corpus proceedings, demonstrates that the Court

understands its warning requirement to be of constitutional stature. First, the Miranda Court itself applied the "constitutional principles [it] discussed" to the state cases before it. 384 U.S. at 491-94, 497-99. Then as now, application of Supreme Court decisions in state cases required that the ruling be "of constitutional dimension" and not merely a function of the Court's supervisory powers. See Chandler v. Florida, 449 U.S. 560, 569-570 (1981); Staub v. City of Baxley, 355 U.S. 313, 318-319 (1957); 28 U.S.C. § 1257. Cf. Miranda, 384 U.S. at 463 (distinguishing Fifth Amendment basis for warning requirement from supervisory power relied upon in other cases).

Second, the Court again made Miranda's constitutional basis clear by applying it when reviewing state convictions in federal habeas corpus proceedings. As the Court has recognized, jurisdiction to issue writs of habeas corpus extends only to claims that a person is in custody "in violation of the Constitution or laws" of the United States. 18 U.S.C. § 2254(a); see Smith v. Phillips, 455 U.S. 209, 221 (1982). In Withrow v. Williams, 507 U.S. 680 (1993), the Court held that Miranda's warning requirement is cognizable on habeas corpus review as a protection of a fundamental constitutional right: "'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, Miranda safeguards 'a fundamental trial right.'" 507 U.S. at 691 (internal quotation omitted). [2]

Nevertheless, the panel relies heavily on the notion that Miranda's requirement of warnings was "prophylactic," and that "failure to deliver Miranda warnings is not itself a constitutional violation." United States v. Dickerson, No. 97-4750, Slip op. at 38 (E.D. Va Feb. 8, 1999), citing Michigan v. Tucker, 417 U.S. 433 (1974), and Oregon v. Elstad, 470 U.S. 298 (1985) and quoting United States v. Elie, 111 F.3d 1135, 1142 (4th Cir. 1997). To be sure, the Supreme Court held in Tucker and Elstad that failure to give warnings will not support exclusion of "fruits" derived from a confession. But both Elstad and Tucker recognized, one on direct appeal of a State conviction and the other on federal habeas, that failure to give warning requires exclusion of even voluntary statements. Elstad, 470 U.S. at 306-07 ("[U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under Miranda"); Tucker, 417 U.S. at 445 ("This Court said in Miranda that statements taken in violation of the Miranda principles must not be used to prove the prosecution's case at trial"). The tainted fruits holdings of Elstad and Tucker therefore cannot support the panel's sweeping conclusion that Miranda's warning requirement, which the Miranda Court itself imposed on the States, was nevertheless without constitutional foundation. [3]

And there is nothing unusual about a "prophylactic" rule to protect constitutional rights. For instance, the Court has announced numerous preventative enforcement mechanisms regarding treatment of persons after arrest. Massiah v. United States, 377 U.S. 201 (1964), and its progeny established that the Sixth Amendment requires not just assistance of counsel at trial, but also counsel's presence at all post-arraignment "critical confrontations" between the accused and the government. In United States v. Wade, 388 U.S. 218 (1967), the Court concluded that post-arraignment line-ups are so rife with potential prejudice that a bright-line rule allowing defense counsel to be present at any line-up is necessary to protect a defendant's Sixth Amendment right. Id. at 228-32, 236-37. See also Michigan v. Jackson, 475 U.S. 625 (1986) (if a defendant asserts his right to counsel at arraignment, any subsequent police interrogation absent counsel is invalid, even if police obtain a waiver by the defendant of his right to counsel). These prophylactic rules were required to protect the Sixth Amendment right to counsel at trial: "[T]he right to use counsel at the formal trial would be a very hollow thing if, for all practical purposes, the conviction is already assured'" by pretrial abuses. Escobedo v. Illinois, 378 U.S. 478, 487 (1964) (citation omitted).

The Supreme Court has established mechanisms to protect other fundamental rights as well. [4] For instance, in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court created a bright-line rule to safeguard First Amendment rights, reordering the law of some states by requiring public figures to prove "actual malice" in order to recover on claims of defamatory falsehood. Id. at 279-80. Sullivan does not place constitutional value on falsehoods, [5] but it nevertheless demanded a special standard of proof beyond mere falsehood in order to protect free expression. Id. at 264-65, 278-79.

Thus, whether they are the result of an interpretation of the Fifth Amendment privilege or a "prophylactic" rule designed to safeguard that constitutional right, Miranda's warning requirements apply to the States and the federal government with the force of constitutional law. As the Supreme Court has consistently held, whatever alternative formulations Congress or the States might adopt must

therefore comply with the constitutional requirement of minimally effective warnings to suspects subjected to custodial interrogations.

II.Section 3501 is Unconstitutional Because It Purports to Overrule Miranda's Warning Requirement Entirely and Return to the Voluntariness Standard that Miranda Rejected as Insufficient.

> **A.Miranda Required Warnings and Held that Post Hoc Voluntariness Analysis Is Insufficient to Protect the Fifth Amendment Privilege.**

Before Miranda, the problem of custodial interrogations was addressed only after the interrogation was long over, when a court attempted retrospectively to assess whether the circumstances of the interrogation were so coercive as to render the resulting statement involuntary. E.g., Haynes v. Washington, 373 U.S. 503 (1963). See Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J., concurring); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (listing factors considered in assessing voluntariness of confessions, including age, education level, intelligence, lack of advice about rights, and length of detention).

Miranda squarely rejected that approach as insufficient alone to protect the Fifth Amendment privilege in the context of custodial interrogations, and in doing so it left no doubt that after-the-fact assessment of voluntariness is no substitute for the warnings required during interrogation:

> **Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.**

384 U.S. at 468-69 (footnote omitted).

B.Section 3501 Is Unconstitutional Because It Would Jettison the Requirement of Warnings and Return to the Voluntariness Standard That Miranda Rejected as Insufficient.

Although the Miranda Court invited Congress and the States to adopt methods for informing persons of their rights at least equally effective as the warnings it required, Congress's effort in 1968 falls far below that constitutional minimum. Rather than adopting alternative methods of informing suspects of their rights, Congress enacted 18 U.S.C. § 3501 in a bald attempt to overrule the warning requirement altogether and return to the post hoc voluntariness standard rejected as insufficient in Miranda.

That is the way the panel read it: "It is clear that Congress enacted § 3501 with the express purpose of returning to the pre-Miranda case-by-case determination of whether a confession was voluntary." Dickerson, No. 97-4750 at 32. And it is what 3501 says, for it provides that "a confession . . . shall be admissible in evidence if it is voluntarily given," 18 U.S.C. § 3501(a), and then proceeds to require that the trial judge make this after-the-fact assessment based on "all the circumstances surrounding the giving of the confession . . . ." Id. § 3501(b). See also Davis, 512 U.S. at 464 (Scalia, J., concurring) (noting that section 3501 "seems to provide" for the pre-Miranda voluntariness test in federal criminal prosecutions).

If Miranda's requirement of warnings has constitutional force -- and it must, for the Miranda Court so held and its holding has been applied repeatedly to the States -- then Section 3501 is unconstitutional because Congress cannot diminish rights that the Supreme Court has found to be protected by the Constitution. See Katzenbach v. Morgan, 384 U.S. 641, 649-50, 656-58 (1966) (Congress may legislate to enforce constitutional rights, but not diminish them); cf. City of Boerne v. Flores, 117 S.Ct. 2157 (1997).

Miranda's warnings have become among our most widely respected and recognized manifestations of individual rights. And Miranda's warning requirement has proven remarkably successful in the 30 years since it was announced. Miranda has created guidance for the police while at the same time ensuring that suspects are informed of their constitutional rights prior to questioning and that the police honor those rights during the interrogation process. As the Miranda Court itself predicted, constitutional rules established by the decision have "not constitute[d] an undue interference with a proper system of law

enforcement." Miranda, 384 U.S. at 481. In a 1988 study addressing the effectiveness of Miranda, an American Bar Association Panel concluded that there is little basis for the notion that law enforcement would be improved in the absence of the warning requirement:

> **Although the Miranda decision has sparked heated controversy on a political level, the restrictions it imposes are not considered troublesome by either police or prosecutors. . . . The Committee finds that Miranda does not have a significant impact on law enforcement's ability to solve crime or to prosecute criminals successfully.**
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> *** * ***
>
> **There should also be wider recognition of Miranda's virtues. Although it does little to impede police in their investigation, Miranda has a very important symbolic value, reminding police officers of the limits of their authority over suspects. It has also helped to professionalize police departments and very likely to reduce the incidence of physically coerced confessions.**

American Bar Association, Criminal Justice In Crisis 27, 33-34 (1988). [6]

Because Miranda's requirement of sufficient warnings at the time of a custodial interrogation has the force of constitutional law, this Court should not ignore the judgment of every Attorney General serving in the last thirty years, and it cannot uphold a Congressional enactment that purports to overrule a constitutional decision of the Supreme Court.

CONCLUSION

For these reasons, amicus urges this Court to grant rehearing, to call for briefing, and to adhere to the constitutional warning requirement set out in Miranda v. Arizona.

Respectfully submitted,

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ADDENDUM

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 3501

§ 3501.Admissibility of confessions

(a)In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of

voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b)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.

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.

(c)In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.*

(d)Nothing contained in this section shall bar the admission in evidence of any concession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e)As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

(Added Pub. L. 90-351, Title II, § 701(a), June 19, 1968, 82 Stat. 210, and amended Pub. L. 90-578, Title III, § 301(a)(3), Oct. 17, 1968, 82 Stat. 1115.)

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David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190 (1988)

**Stephen J. Schulhofer, Reconsidering Miranda,
54 U. Chi. L. Rev. 435 (1987)**

NOTES:

1This Circuit has recently recognized that although Miranda is not rigid in its demand that particular warnings be given to suspects, it does require that some method be employed to apprise suspects of their constitutional rights. United States v. Frankson, 83 F.3d 79, 81 (4th Cir. 1996) ("[S]atisfaction of Miranda

does not turn on the precise formulation of the warnings, but rather, on whether the Ôwarnings reasonably convey to [a suspect] his rights.'") (citing Duckworth v. Eagan, 492 U.S. 195, 203 (1989)). 2All nine Justices participating in Withrow recognized the existence of habeas jurisdiction to entertain Miranda claims under section 2254(a). 507 U.S. at 686 & n.3; id. at 699 (O'Connor, J., concurring in part and dissenting in part) (focusing on "prudential" not jurisdictional issues); id. at 715 (Scalia, J., concurring in part and dissenting in part) (noting habeas jurisdiction but counseling equitable discretion). Thus, all agreed Miranda's requirements were constitutionally grounded; the only debate in Withrow was whether to apply the prudential limitation of Stone v. Powell, 428 U.S. 465 (1976) to bar Miranda claims on habeas -- something the Court declined to do. 3The panel also notes the public safety exception announced in New York v. Quarles, 467 U.S. 649 (1984), Dickerson, No. 97-4750 at 36-37, but even in announcing that exception, the Supreme Court indicated the constitutional underpinning of Miranda's warning requirement. In Quarles, the Court accepted that some questioning may proceed without the required warnings where necessary to secure the immediate safety of police officers or the public. Police were therefore entitled, before giving warnings, to ask about the whereabouts of a gun that might otherwise have been used against them at the scene of an arrest. 467 U.S. at 657. In so holding, the Court reaffirmed Orozco v. Texas, 394 U.S. 324, 326 (1969), in which it applied Miranda to questioning about a gun conducted four hours after the crime -- questioning that was "clearly investigatory." 467 U.S. 659 n.8. And Orozco could not have been clearer: Use of an accused's statements in the absence of required warnings was "a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in Miranda." 394 U.S. at 326. See also Quarles, 467 U.S. at 660 (O'Connor, J., concurring in part and dissenting in part) (stating that Miranda "held unconstitutional, because inherently compelled, the admission of statements derived from in-custody questioning not preceded by an explanation of the privilege against self-incrimination and the consequences of forgoing it") (emphasis added). 4 See David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190 (1988) (analyzing prophylactic rules developed by the Court in the First and Fourteenth Amendment contexts).

5See Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact").

6Commentators agree:

> **Miranda reaffirms our constitutional commitment to limited government; it provides a measure of reassurance to arrested suspects who may fear abuse; and by reducing the permissible level of interrogation pressure, it gives suspects questioned in the stationhouse at least some of the safeguards that we extend to suspects questioned in formal, public proceedings.**

Stephen J. Schulhofer, Reconsidering Miranda, 54 U. Chi. L. Rev. 435, 460-461 (1987).