The Resource Page: Focus on the Miranda Rule

THE 4TH CIRCUIT STEPS IN...

In February 1999, in *United States v. Dickerson*, the Fourth Circuit rejected three decades of jurisprudence by finding that a 1968 statute had overruled *Miranda v. Arizona*, 384 U.S. 436 (1966). The Fourth Circuit's decision is available on the Internet at http://www.law.emory.edu/4circuit/feb99/974750.p.html. A petition for rehearing *en banc*, filed by the United States, is pending.

Excerpts from *U.S. v. Dickerson*, 1999 U.S. App. LEXIS 1741 (4th Cir. Feb. 8, 1999) (most citations omitted):

OPINION BY WILLIAMS, J.

In response to the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Congress of the United States enacted 18 U.S.C.A. § 3501 (West 1985), with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. Although duly enacted by the United States Congress and signed into law by the President of the United States, the United States Department of Justice has steadfastly refused to enforce the provision. In fact, after initially "taking the Fifth" on the statute's constitutionality, the Department of Justice has now asserted, without explanation, that the provision is unconstitutional. With the issue squarely presented, we hold that Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court. Accordingly, the district court erred in suppressing Dickerson's voluntary confession on the grounds that it was obtained in technical violation of *Miranda*. …

Congress enacted § 3501 as a part of the Omnibus Crime Control Act of 1968, just two years after the Supreme Court decided *Miranda*. Although the Supreme Court has referred to § 3501 as "the statute governing the admissibility of confessions in federal prosecutions," *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994), the Court has never considered whether the statute overruled *Miranda*. Indeed, although several lower courts have found that § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court, no Administration since the provision's enactment has pressed the point.

Recently, Justice Scalia expressed his concern with the Department of Justice's failure to enforce § 3501. *See Davis*, 512 U.S. at 465 (Scalia, J., concurring). In addition to "caus[ing] the federal judiciary to confront a host of `*Miranda*' issues that might be entirely irrelevant under federal law," *id.*, Justice Scalia noted that the Department of Justice's failure to invoke the provision "may have produced — during an era of intense national concern about the problem of run-away crime — the acquittal and the nonprosecution of many dangerous felons," *id.* This is just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted. Despite that fact, the Department of Justice, elevating politics over law, prohibited the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501.

Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it. Here, the district court has suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. Thus, the question of whether § 3501 governs the admissibility of confessions in federal court is squarely before us today.

Determining whether Congress possesses the authority to enact § 3501 is relatively straightforward. Congress has the power to overrule judicially created rules of evidence and procedure that are not required by the Constitution. Thus, whether Congress has the authority to enact § 3501 turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. Clearly it is not. At no point did the Supreme Court in *Miranda* refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, 384 U.S. at 467, disclaimed any intent to create a "constitutional straightjacket," *id.*, referred to the warnings as "procedural safeguards," *id.* at 444, and invited Congress and the States "to develop their own safeguards for [protecting] the privilege," *id.* at 490. Since deciding *Miranda*, the Supreme Court has consistently referred to the *Miranda* warnings as "prophylactic," *New York v. Quarles*, 467 U.S. 649, 654 (1984), and "not themselves rights protected by the Constitution," *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). We have little difficulty concluding, therefore, that § 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts, is constitutional. As a consequence, we hold that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda*. …

Although Congress enacted § 3501 with the express purpose of restoring voluntariness as the test for admitting confessions in federal court, it is important to note that Congress did not completely abandon the central holding of *Miranda*, *i.e.*, the four warnings are important safeguards in protecting the Fifth Amendment privilege against self-incrimination. Indeed, § 3501 specifi-

cally lists the *Miranda* warnings as factors that a district court should consider when determining whether a confession was voluntarily given. Congress simply provided that the failure to administer the warnings to a suspect would no longer create an irrebuttable presumption that a subsequent confession was involuntarily given. ...

DISSENTING OPINION BY MICHAEL , J.

Thirty years have passed since Congress enacted 18 U.S.C. § 3501in reaction to *Miranda*. We are nearing the end of the seventh consecutive Administration that has made the judgment not to use § 3501 in the prosecution of criminal cases. Now, after all this time, the majority supplants the Department of Justice's judgment with its own and says that § 3501 must be invoked. After making that judgment call, the majority holds that the section is constitutional, without the benefit of any briefing in opposition. In pressing § 3501 into the prosecution of a case against the express wishes of the Department of Justice, the majority takes on more than any court should. I therefore respectfully dissent from the parts of the majority opinion that deal with § 3501. ...

The majority begins its reach to inject § 3501 into this case with an overstatement. It says that the § 3501 issue is "squarely presented." In its brief to us the government has said plainly, "we are not making an argument based on § 3501 in this appeal." The defendant, of course, does not mention § 3501. Thus, we are not being urged to inject § 3501 into this case by anyone except the *amici*, the Washington Legal Foundation and the Safe Streets Coalition. That is not enough to put the issue of § 3501's constitutionality and application squarely before us. Perhaps the majority recognizes as much, for it quickly moves to an argument about why the court itself should force § 3501 into this case. ...

It is a mistake for our court to push § 3501 into this case for several reasons. First, courts as a general rule do not interfere with the executive's broad discretion in the initiation and conduct of criminal prosecutions. Forcing the use of § 3501 upon a United States Attorney gets uncomfortably close to encroaching upon the prosecutor's routine discretion. I recognize, of course, that courts have a large measure of control over the course of a case once it is filed. But a decision not to invoke § 3501 in response to a motion to suppress a confession is a matter of prosecutorial strategy. We should leave that to the executive. There is also a related point. In invoking § 3501, the majority overrides 30 years of Department of Justice prosecutorial policy. Any change in this policy should come from Justice.

Second, it is "a sound prudential practice" for us to avoid issues not raised by the parties. This is because "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." We perform our role as neutral arbiter best when we let the parties raise the issues, and both sides brief and argue them fully. That did not happen here. By invoking § 3501, the majority injects into this case the overriding constitutional question of whether § 3501 can supersede *Miranda*. It then decides the question against the defendant, when the only briefing we have on the issue is about two pages from *amici* that the majority agrees with. The majority holds that § 3501 governs the admissibility of confessions in federal court because *Miranda* is not a constitutional rule. I don't know whether it is or not, but before I had to decide, I would want thoughtful lawyers on *both* sides to answer one question for me. If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts? This question illustrates that the § 3501 issue is so sweeping that we should not be delving into it on our own. ...

INTERNET RESOURCES ON MIRANDA

University of Utah law professor Paul Cassell made the successful argument in *Dickerson* and has written extensively criticizing *Miranda*; one of his articles is available on the web at http://www.law.utah.edu/faculty/bios/cassell/STANFIN.html.

On the opposing side, professors Yale Kamisar and Charles Weisselberg have written their reactions to the methods used by Baltimore police to trample the spirit of *Miranda* while purporting to follow its literal rule. They base their view of police procedures on David Simon's book, *Homicide: A Year on the Killing Streets*. The Kamisar/Weisselberg pieces are available at http://jurist.law.pitt.edu/lawbooks/infeb99.htm.

RECENT ARTICLES OF NOTE

Paul G. Cassell & Richard Fowles, *Handcuffing the Cops: A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).

Paul G. Cassell & Richard Fowles, *Falling Clearance Rates after Miranda: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998).

John J. Donohue, III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998).

Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998).

The Resource Page

NEW BOOKS

LEGAL LANGUAGE. By Peter M. Tiersma. The University of Chicago Press, 1999 ($26). 314 pp.

Peter Tiersma tackles the question of why legal language differs from ordinary English from multiple perspectives. First, he provides an historical overview of how legal English developed from the time of the Norman Conquest. Second, he shows how and why lawyers tend to use obfuscatory language. Third, he demonstrates that lawyers are capable of communicating in clear terms when they want to do so (*e.g.*, "If it doesn't fit, you must acquit."). Fourth, he shows how a failure to communicate clearly can have dangerous consequences in many areas, including jury instructions in capital cases that often leave juries genuinely uncertain about the most basic of issues – what is an "aggravating circumstance" and how does it differ from the ordinary usage of "aggravation" to mean an annoyance? Last, he points to some solutions to the problems he has surveyed, suggesting careful discarding of those language uses that serve no purpose, while retaining those that actually contribute to the functioning of the legal system.

SUGGESTIONS FOR THE RESOURCE PAGE

Each issue of *Court Review* features The Resource Page, which seeks to help judges find solutions to problems they may be facing, alert them to new publications, and generally try to provide some practical information judges can use. Please let us know of resources you have found useful in your work as a judge so that we can tell others. Write to the editor, Judge Steve Leben, 100 N. Kansas Ave., Olathe, Kansas 66061, e-mail: sleben@ix.netcom.com.

HOW TO AVOID THE DIVORCE FROM HELL AND DANCE TOGETHER AT YOUR DAUGHTER'S WEDDING. By M. Sue Talia. Nexus Publishing Co., 1997 ($12.95). 264 pp.

Family law judges may want to recommend this book to attorneys and pro se litigants alike. Sue Talia has practiced family law in California for twenty years. She offers time-tested, common sense suggestions for handling all sorts of issues in a divorce case, focusing primarily on how to reduce damage to the children. Chapter 11 on "Courts and Judges" has one central theme that most judges would like to communicate to parties in family law cases: courts are the choice of last resort in resolving family issues. That chapter alone could make a great hand-out, a good message from the bench at the first conference with parties, or the basis for a good civic club speech.

INTERNET SITES OF INTEREST

JURIST: The Law Professors' Network
http://jurist.law.pitt.edu/

The JURIST site, run by Pittsburgh law professor Bernard Hibbitts, makes a great home page for a judge wanting a daily update of activity in the legal world, as well as links to other material of genuine interest. Links are provided up front to legal news from major U.S. newspapers and from various Internet sites. A monthly review of legal books is provided. A "reference desk" is also provided, giving references to court- and judge-related resources, as well as professional organizations, legal dictionaries, legal research Web sites and an online "reference librarian" to whom you can submit questions about how to find something you're looking for. As for the site name, while most of our readers would think "jurist" means judge and would wonder about its use for a site targeted to law professors, Black's Law Dictionary (Pocket Edition) actually defines jurist as "one who has thorough knowledge of the law; esp., a judge or an eminent legal scholar." So it is quite appropriate for judges to share the JURIST site with law professors, and it receives frequent use from both groups.

Information Technology Association of America
(http://www.itaa.org/)

A trade group with a clear point of view, the ITAA nonethless provides a great deal of information technology information, including a home page specifically devoted to Y2K issues (at http://www.itaa.org/year2000/). From the Y2K home page, you can get plain language summaries on the issue, updates on pending legislation, and some materials on the use of ADR to handle Y2K disputes.

CPR Institute for Dispute Resolution
(http://www.cpradr.org)

This ADR-focused organization, listed in the Fall 1998 Resource Page review of ADR resources, also has links to materials on using ADR for Y2K cases (http://www.cpradr.org/Y2Kinformation page.htm).

Pending Y2K Litigation Summary
(http://www.consult2000.com/)

A Y2K consulting service, Next Millennium Consulting, has posted a list of pending Y2K litigation. There are summary statements about the claims in each case, providing a good overview of the potential for Y2K litigation.

FOCUS ON MIRANDA

The Resource Page focuses on the *Miranda* Rule at page 42-43.