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United States v. Dickerson: The Beginning of the End for *Miranda*

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United States v. Dickerson: The Beginning of the End for *Miranda*?

In *United States v. Dickerson*,[1] the Fourth Circuit held that the admissibility of a confession in federal courts is determined by 18 U.S.C. § 3501,[2] not the rule announced by the Supreme Court in *Miranda v. Arizona*.[3] Accordingly, the Fourth Circuit concluded, pursuant to the statute, that admissibility of a confession depends upon whether or not it is voluntary.[4]

I. FACTUAL BACKGROUND

On January 27, 1997, several FBI agents traveled to defendant Charles Dickerson's apartment to investigate a bank robbery. After a brief conversation, Dickerson agreed to accompany the agents to the FBI office in Washington, D.C. Initially, Dickerson denied any involvement but admitted to being in the vicinity of the bank at the time of the robbery.[5] Based upon this and other information,[6] the agents obtained a warrant to search Dickerson's apartment.[7]

Upon returning to the interview room, one of the interviewing agents informed Dickerson that his apartment would soon be searched. Dickerson subsequently indicated that he wished to make a statement. He admitted to driving the getaway car in several bank robberies,

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1. 166 F.3d 667 (4th Cir. 1999).
2. 18 U.S.C. § 3501 (1994).
3. 166 F.3d at 695. The court also concluded that the executed warrant was sufficiently particular in its description of the items to be seized and that the officers acted in good faith in executing the warrant. *Id.* Thus, the court reversed the district court's order suppressing defendant's statements at the FBI Field Office and the physical evidence retrieved after a search of his apartment before remanding the case for further proceedings. *Id.*
4. *Id.* at 692.
5. *Id.* at 673.
6. *Id.* The agents had information that the culprits had left the scene in a car registered to defendant. Additionally, the agents had discovered that Dickerson had over $550 in cash when they picked him up and had paid his landlord a large sum to cover back rent the same day. *Id.*
7. *Id.* at 673-74.

identifying Jimmy Rochester as the actual robber. Moreover, Dickerson indicated that on the date in question, he stopped the car near the bank whereupon Rochester exited the vehicle.[8] After describing suspicious actions on the part of Rochester,[9] Dickerson was placed under arrest.[10]

Dickerson's confession resulted in the arrest of Rochester. Rochester stated that Dickerson was his driver in seven bank robberies in both Maryland and Virginia.[11] The search of Dickerson's apartment and automobile yielded a large amount of incriminating evidence.[12] This accumulation of evidence resulted in Dickerson's indictment by a federal grand jury on several charges related to the bank robberies.[13]

On May 19, 1997, Dickerson filed a motion to suppress the statements he made during the FBI interview.[14] A hearing was held in the United States District Court for the Eastern District of Virginia on May 30, 1997.[15] The parties disputed whether defendant had been read his *Miranda* rights and whether he waived them prior to his confession. On July 1, 1997, the district court suppressed Dickerson's statement, which implicated himself and Rochester in the bank robbery. The district court concluded that the statement was made while Dickerson was in police custody, in response to police interrogation, and without the necessary *Miranda* warnings.[16]

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8. *Id.* at 674.

9. *Id.* Dickerson indicated that upon returning to the car, Rochester placed something in the trunk. Additionally, Dickerson acknowledged that Rochester had given him a handgun and some dye-stained money. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The search of defendant's apartment yielded a forty-five caliber handgun, dye-stained money, a bait bill, ammunition, masks, and latex gloves. A warrant-authorized search of his vehicle yielded a leather bag and solvent used to clean dye-stained money. *Id.*

13. *Id.* The indictment included one count of conspiracy to commit bank robbery in violation of 18 U.S.C.A. § 371 (1994 & West Supp. 1998), three counts of bank robbery in violation of 18 U.S.C.A. § 2113(a) and (d) (1994 & West Supp. 1998), and three counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C.A. § 924(c)(1) (1994 & West Supp. 1998).

14. 166 F.3d at 674. The motion to suppress also included three other things: (1) the evidence found as a result of his statements; (2) the physical evidence obtained during the search of his apartment; and (3) the physical evidence obtained during the search of his car. *Id.*

15. *Id.* at 674-75.

16. *Id.* at 675. The district court's holding rested on its finding that Dickerson's testimony was more believable than the special agent's. The court found that the agent's testimony that he read Dickerson his *Miranda* warnings "shortly after" obtaining the warrant was contradicted by the time the warrant was issued and the time of the execution of the advice-of-rights form. Accordingly, the district court found Dickerson's testimony

However, the district court found that Dickerson's statement was voluntary under the Due Process Clause of the Fifth Amendment.[17] On July 15, 1997, the Government filed a motion for reconsideration of the district court's order suppressing Dickerson's statements made at the FBI interview.[18] The Government contended that because Dickerson's statements were voluntary, they were admissible pursuant to 18 U.S.C. § 3501.[19]

The Government's motion for reconsideration was denied on August 4, 1997.[20] Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure,[21] the district court denied the Government's motion for reconsideration because the Government failed to establish that the evidence was not available when the hearing was ongoing.[22] The Government filed an interlocutory appeal to the Court of Appeals for the Fourth Circuit.[23]

Although the Government contended in its motion for reconsideration that Dickerson's statement was admissible pursuant to Section 3501, it did not raise the applicability of the statute on appeal.[24] In fact the Justice Department would not permit the United States Attorney's Office to brief the issue.[25] Accordingly, the Fourth Circuit decided to use its

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that he was read his *Miranda* rights approximately thirty minutes after being told of the warrant to be credible. *Id.* at 675-76.

17. *Id.* at 676. Because the statement was determined to be voluntary under the Fifth Amendment, evidence found as a result thereof was admissible. *Id.* Thus, Dickerson's motion to suppress that evidence, the statement made by Rochester that Dickerson was the getaway driver, was denied. *Id.* However, because the court found that the warrant was insufficiently particular and there was no basis for the good faith exception to the exclusionary rule, the physical evidence discovered during the search of the apartment was suppressed. *Id.* Finally, because the warrant was deemed to be sufficiently particular, Dickerson's motion to suppress the evidence discovered in the trunk of his car was denied. *Id.*

18. *Id.* The motion for reconsideration also included the district court's order suppressing the physical evidence found from the search of Dickerson's apartment. *Id.*

19. *Id.* The motion also included an affidavit from one of the investigating detectives that "Dickerson was read his Miranda rights before he made th[e] statements." *Id.* Attached to this affidavit was a hand-written statement by Dickerson indicating that he was read his *Miranda* warnings before implicating himself and his accomplice in the robbery. Finally, the motion included an affidavit from another agent contradicting the finding that the agents acted in bad faith. *Id.* at 676-77.

20. United States v. Dickerson, 971 F. Supp 1023, 1024 (E.D. Va. 1997).

21. FED. R. CIV. P. 59(e). The court noted that no provision in the Federal Rules of Criminal Procedure governed motions for reconsideration. 971 F. Supp. at 1024.

22. *Id.*

23. 166 F.3d at 677.

24. *Id.* at 681.

25. *Id.* at 682.

own discretion to determine whether Section 3501 governs the admissibility of confessions in federal courts.[26]

II. LEGAL HISTORY

At common law, confessions that were voluntarily made were admissible against an individual at trial.[27] In 1884 the Supreme Court essentially adopted this rule, concluding that a confession which was made voluntarily was admissible, basing its decision on the reliability of such a confession.[28] The Court subsequently declined to announce a per se rule that any confession made while in custody was involuntary.[29] Moreover, in 1896 the Court concluded that neglecting to warn an individual of his right to remain silent and of his right to an attorney were alone insufficient for a finding of an involuntary confession.[30]

In *Bram v. United States*,[31] the Court announced a constitutional basis for its rule that a confession must be made voluntarily, stating that the issue of voluntariness "is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"[32] The Court indicated that this part of the Fifth Amendment essentially codified the common law rule requiring that confessions be voluntary to be admissible.[33] Years later, the Court would question whether this rule derived from the Fifth Amendment's protection against self-incrimination or from concerns about whether forced confessions are untrustworthy.[34] In *Brown v. Mississippi*,[35] the rule was extended to the states when the Court concluded that to be admissible, a confession had to be voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment.[36]

Prior to 1966 the rule determining the admissibility of confessions in federal courts was consistent for many years, even if its origin was somewhat unclear. Specifically, the traditional rule was that a

26. *Id.* at 683.
27. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 146 (3d ed. 1984).
28. Hopt v. Utah, 110 U.S. 574, 584-85 (1884).
29. *See* Sparf v. United States, 156 U.S. 51, 55 (1895).
30. Wilson v. United States, 162 U.S. 613, 624 (1896).
31. 168 U.S. 532 (1897).
32. *Id.* at 542 (quoting U.S. CONST. amend. V).
33. *Id.* at 543.
34. *See, e.g.*, United States v. Carnigan, 342 U.S. 36, 41 (1951) (footnote omitted).
35. 297 U.S. 278 (1936).
36. *Id.* at 285-87 (citing U.S. CONST. amend. XIV).

voluntary confession was admissible at trial.[37] In 1941 the Court specifically indicated that "voluntariness" was the test for assessing the admissibility of confessions in federal courts.[38] Whatever the rule's traditional basis, the Court would articulate a different approach for determining the admissibility of confessions.

In *Miranda v. Arizona*,[39] the Court rejected the individualized inquiry of whether a confession was voluntary, holding that any statement resulting from the custodial interrogation of an individual would be presumed involuntary and inadmissible unless the suspect was first provided with four warnings by the police.[40] Despite its decision in *Bram*, in which the Court held that the Fifth Amendment required voluntariness,[41] the Court in *Miranda* conceded that the Constitution did not require any specific remedy to combat the inherent compulsions which plagued the interrogation process.[42] The Court left the door open for the states and Congress to "develop their own safeguards for the privilege, so long as they are fully as effective as [the four warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."[43] However, until such a time, the Court stated that the safeguards must be adhered to.[44]

Two years after the Court's decision in *Miranda*, Congress enacted Section 3501.[45] The statute provides in pertinent part:

> (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

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37. *See, e.g.*, Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) (stating that before *Miranda*, "voluntariness vel non was the touchstone of admissibility of confessions"); Miranda v. Arizona, 384 U.S. 436, 506-07 (1966) (Harlan, J., dissenting) (stating that voluntariness has traditionally been the test for admitting confessions).

38. Lisenba v. California, 314 U.S. 219, 236 (1941).

39. 384 U.S. 436 (1966).

40. *Id.* at 467-74. The four warnings are (1) that the suspect has the right to remain silent; (2) that any statement he makes can and will be used against him; (3) that he has the right to the presence of an attorney during questioning; and (4) that an attorney will be appointed for him if he cannot afford one. *Id.* at 444.

41. *Bram*, 168 U.S. at 544.

42. 384 U.S. at 467.

43. *Id.* at 490.

44. *Id.* at 467.

45. *Dickerson*, 166 F.3d at 685.

> the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
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> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including
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> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment,
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> (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,
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> (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
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> (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 . . . .
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> (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.[46]

The Fourth Circuit emphasized that Congress's intention to return to an individualized inquiry of whether a confession is voluntary was manifested not only in the plain language of the statute but also in its legislative history.[47]

Despite the express intent of Congress in enacting Section 3501, the United States Department of Justice has never vigorously enforced this provision.[48] Nonetheless, Paul Cassell, a law professor and former

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46. 18 U.S.C. § 3501.

47. 166 F.3d at 686. The court referred to S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. The Senate Report accompanying Section 3501 specifically indicated that "[t]he intent of the bill is to reverse the holding of Miranda v. Arizona . . . ." *Id.* at 2141. Additionally, the reports noted that *Miranda* "is the case to which the bill is directly addressed." *Id.* Senate opponents also realized that the legislation was a response to *Miranda*'s irrebuttable presumption by returning to a voluntariness inquiry. *Id.* at 2210-11. Moreover, both supporters and opponents of the legislation in the House of Representatives indicated that the statute was designed to overrule the irrebuttable presumption created by *Miranda*. *See, e.g.*, 114 Cong. Rec. 16.066 (1968) (statement of Rep. Celler); *Id.* at 16.074 (statement of Rep. Corman); *Id.* at 16.278 (statement of Rep. Taylor); *Id.* at 16.296 (statement of Rep. Randall); *Id.* at 16.297-98 (statement of Rep. Pollock).

48. 166 F.3d at 671.

Associate Deputy Attorney General who has submitted amicus briefs in support of Section 3501, contends that the Clinton Administration is the only Executive Department in the thirty year history of the statute that has ever indicated that the statute is unconstitutional or prevented its use.[49] Cassell asserts that even though the constitutionality of Section 3501 was rarely addressed by the courts, the Justice Department, from the Nixon Administration through the Bush Administration, had no policy against its use.[50]

The Supreme Court has referred to Section 3501 as "the statute governing the admissibility of confessions in federal prosecutions."[51] However, the Court has never addressed whether the statute overruled *Miranda*.[52] Several lower courts have concluded that Section 3501, not *Miranda*, determines the admissibility of confessions in federal court.[53] However, since its passage, administrations have generally avoided enforcing the statute.[54] Recently, Attorney General Janet Reno asserted that the Justice Department has had a long-standing policy that dates to previous administrations against enforcing the statute because of doubts as to whether it was constitutional.[55] Nonetheless, members of the current Justice Department—including the Attorney General—have previously indicated that there is no policy against utilizing the statute "in an appropriate case."[56]

Prior to the Department of Justice's questioning the constitutionality of Section 3501, Justice Scalia expressed his displeasure with the Justice Department's consistent failure to enforce the provision.[57] According to Scalia, the department's refusal to invoke the statute has resulted in

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49. Paul G. Cassell, *Statement of Paul G. Cassell Before the Subcomm. on Criminal Justice Oversight of the Senate Judiciary Comm.* (May 13, 1999), *available at* <http:\\www.law.utah.edu\faculty\bios\cassell\Miranda\cassell_testimony.html>.

50. *Id.*

51. United States v. Alvarez-Sanchez, 511 U.S. 350, 351 (1994).

52. Davis v. United States, 512 U.S. 452, 457 n.* (1994).

53. *See* United States v. Crocker, 510 F.2d 1129, 1137 (10th Cir. 1975); United States v. Rivas-Lopez, 988 F. Supp. 1424, 1430-36 (D. Utah 1997).

54. *See Davis*, 512 U.S. at 463-64 (Scalia, J., concurring) (stating that every Administration in the twenty-five years since the enactment of Section 3501 has failed to enforce the provision).

55. Cassell, *supra* note 49 (citing *Press Conference of Attorney General Janet Reno* (February 11, 1999)), *available at* <http:\\www.usdoj.gov/ag/speeches/1999/feb1199.htm>.

56. *Id.* (citing *Solicitor General Oversight: Hearing Before The Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 42 (1995); *The Administration of Justice and Enforcement of Laws: Hearings Before The Senate Judiciary Comm.*, 104th Cong., 1st Sess. 91 (June 27, 1995) (written answer of Attorney General Reno to question of Senator Hatch)).

57. *See Davis*, 512 U.S. at 465 (Scalia, J., concurring).

the needless presentation of *Miranda* issues and the release of numerous dangerous criminals.[58]

In *United States v. Sullivan*,[59] the Fourth Circuit was asked by amici to determine the admissibility of a confession under the statute.[60] However, because the court concluded that custody had not yet attached, it declined to address the applicability of Section 3501.[61] The Fourth Circuit would get its chance to visit that issue the following year in *Dickerson*.

III. THE FOURTH CIRCUIT'S RATIONALE

In *Dickerson* the Fourth Circuit noted that whether Section 3501 determines the admissibility of defendant's confession depends upon whether it supersedes the Supreme Court's holding in *Miranda*, and if so, whether Congress has the power to legislatively overrule that decision.[62] The court, after examining the specific language and legislative history of the statute, concluded that Congress clearly intended to return to the pre-*Miranda* inquiry of whether a confession was voluntary.[63]

The court then addressed whether Congress had the power to supersede the judicially created irrebuttable presumption in *Miranda* that any statement made without the warnings is involuntary, and therefore, inadmissible.[64] The court began this inquiry by noting the Supreme Court's recent decision in *City of Boerne v. Flores*.[65] The Court in *Flores* concluded that Congress lacked the authority to supersede a Supreme Court decision interpreting the Constitution.[66] However, the court in *Dickerson* noted that Congress *does* have the power to supplant judicially created rules of evidence and procedure that the Constitution does not mandate.[67] Therefore, regarding nonconstitutional "rules of procedure and evidence for the federal

58. *Id.*
59. 138 F.3d 126 (4th Cir. 1998).
60. *Id.* at 134.
61. *Id.*
62. 166 F.3d at 680.
63. *Id.* at 685-87.
64. *Id.* at 687.
65. *Id.*; Boerne v. Flores, 521 U.S. 507 (1997).
66. 166 F.3d at 687 (citing *Flores*, 521 U.S. at 536).
67. *Id.* (citing Palermo v. United States, 360 U.S. 343, 345-48 (1959); Carlisle v. United States, 517 U.S. 416, 426 (1996); Vance v. Terrazas, 444 U.S. 252, 265 (1980)).

courts," the Court's role is limited to instances in which Congress has not acted.[68]

The Fourth Circuit, using this framework, indicated that some federal courts have determined that Section 3501 superseded the rule announced in *McNabb v. United States*[69] and *Mallory v. United States*.[70] Pursuant to its supervisory power over federal courts, the Court in *McNabb* concluded that any incriminating statements, including voluntary confessions, which were made during an unreasonable delay between defendant's arrest and first appearance, were inadmissible.[71] The Fourth Circuit stated that because these decisions were not constitutionally required, it was easy for the Eighth and Sixth Circuits to determine that Congress had the power to overrule both cases.[72]

The court then returned to an analysis of the Supreme Court's opinion in *Miranda*.[73] Although the Court in *Miranda* did not specifically provide a basis for its holding, it hinted that the basis was no different than that set forth in *McNabb* and *Mallory*.[74] Moreover, the Court in *Miranda* conceded that the warnings were not required by the Constitution.[75] Significantly, the Court continuously referred to the warnings as "procedural safeguards,"[76] inviting Congress and the states "to develop their own safeguards for [protecting] the privilege."[77]

The court in *Dickerson* then focused on how the Supreme Court has described and interpreted *Miranda* since the decision was announced.[78] The Supreme Court has often indicated that the warnings are only "prophylactic,"[79] and the safeguards are "not themselves rights protected by the Constitution."[80] Specifically, the Court has held that

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68. *Id.* (citing *Palermo*, 360 U.S. at 353 n.11; Gordon v. United States, 344 U.S. 414, 418 (1953)).

69. 318 U.S. 332 (1943).

70. 166 F.3d at 688 (citing United States v. Pugh, 25 F.3d 669, 675 (8th Cir. 1994); United States v. Christopher, 956 F.2d 536, 538-39 (6th Cir. 1991)); Mallory v. United States, 354 U.S. 449 (1957).

71. 318 U.S. at 343-44. This decision was upheld in *Mallory*. 354 U.S. at 455-56.

72. 166 F.3d at 688 (citing *Pugh*, 25 F.3d at 675; *Christopher*, 956 F.2d at 538-39).

73. *Id.*

74. 384 U.S. at 463.

75. *Id.* at 467.

76. *Id.* at 444.

77. *Id.* at 490.

78. 166 F.3d at 689.

79. *Id.* (quoting New York v. Quarles, 467 U.S. 649, 654 (1984)).

80. *Id.* (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)). *See also* Davis v. United States, 512 U.S. 452, 457-58 (1994); Withrow v. Williams, 507 U.S. 680, 690-91 (1993); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); Connecticut v. Barrett, 479 U.S. 523, 528 (1987); Oregon v. Elstad, 470 U.S. 298, 306 (1985); Edwards v. Arizona, 451 U.S. 477,

statements made in technical violation of *Miranda* were admissible for the purpose of impeachment, provided that the statements were voluntary.[81] Moreover, the Court has refused to extend the "tainted fruits" doctrine to a situation in which the defendant's questioning was not accompanied by the warnings, noting that the police did not violate any constitutional rights "'but departed only from the prophylactic standards later laid down by this court in *Miranda* to safeguard that privilege.'"[82] Additionally, the Fourth Circuit noted that the Supreme Court's sole justification for creating an emergency exception to *Miranda* was that such a violation was not necessarily constitutionally based.[83] Finally, when a confession that was accompanied by the necessary warnings resulted only after a *Miranda* violation, the Court once again refused to extend the "tainted fruits" doctrine because there was no violation of the defendant's constitutional rights.[84]

The court in *Dickerson* noted that the Supreme Court's decisions indicate that it is "well established that the failure to deliver Miranda warnings is not itself a constitutional violation."[85] Thus, the Constitution does not require *Miranda*'s judicially created irrebuttable presumption that a confession not accompanied by the warnings is presumed involuntary.[86] Only Congress, pursuant to its power to prescribe the evidentiary and procedural rules in federal courts, has the authority to supplant the *Miranda* presumption.[87] The Fourth Circuit did not address how *Miranda* could be applied to the states if it is not constitutionally based, dismissing it as "an interesting academic question."[88]

The court emphasized that while Congress was merely responding to the Supreme Court's invitation to enact its own safeguards,[89] the sole

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492 (1981) (Powell, J., concurring).

81. *Id.* (citing Harris v. New York, 401 U.S. 222, 224-25 (1971); *cf.* Mincey v. Arizona, 437 U.S. 385, 401-02 (1978) (holding that involuntary statements could not even be admitted for the limited purpose of impeachment)).

82. *Id.* (quoting *Tucker*, 417 U.S. at 445-46 & n.19).

83. *Id.* at 689-90 (citing *Quarles*, 467 U.S. at 654).

84. *Id.* at 690 (citing Oregon v. Elstad, 470 U.S. 298, 308 (1989)).

85. *Id.* (citing United States v. Elie, 111 F.3d 1135, 1142 (4th Cir. 1997)); *see also* Correll v. Thompson, 63 F.3d 1279, 1290 (4th Cir. 1995) (holding that "a technical violation of Miranda [is not necessarily] a Fifth Amendment violation").

86. 166 F.3d at 690.

87. *Id.* at 691 (citing Carlisle v. United States, 517 U.S. 416, 426 (1996); Vance v. Terrazas, 444 U.S. 252, 265 (1980); Palermo v. United States, 360 U.S. 343, 345-48 (1959); *cf.* Alfredo Garcia, *Is* Miranda *Dead, was it Overruled, or is it Irrelevant?*, 10 ST. THOMAS L. REV. 461, 461-65, 479 (1998) (concluding that Section 3501 "overruled Miranda" but arguing that *Miranda* was already dead)).

88. *Id.* at 691 n.21.

89. *Id.* at 691 (citing *Miranda*, 384 U.S. at 460).

source of the Court's power was the lack of a federal statute governing the issue.[90] Thus, when Congress passed Section 3501, the Court's authority to proscribe the procedural safeguards ceased.[91]

The court concluded by asserting that Section 3501 would not necessarily lessen the protections derived from the Fifth Amendment but would instead prevent the release of criminals on mere technicalities.[92] Because the warnings are still factors evaluated by the district court when assessing whether a confession is voluntary, the court emphasized that its decision would not provide police officers with an incentive to refrain from reading the warnings.[93] Instead, the court stated that reading the warnings would remain the best way to assure a finding of voluntariness.[94]

Accordingly, the court held that the admissibility of confessions in federal courts is determined by 18 U.S.C. § 3501, not *Miranda*.[95] Therefore, the court reversed the district court's order suppressing the statements made by Dickerson during the FBI interview, remanding the case for further proceedings.[96]

One circuit judge dissented in part, contending first that the majority should not have substituted its judgment for that of the Department of Justice.[97] Additionally, the dissent asserted that because the issue of Section 3501 was not briefed by the Government, it was not properly before the court.[98] The dissent further argued that courts should defer to an executive's discretion regarding criminal prosecutions.[99] Moreover, the dissent stated that it was not prudent to decide issues not raised by the parties.[100] Additionally, the dissent asked, "[i]f *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts?"[101] Finally, the

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90. *Id.*
91. *Id.*
92. *Id.* at 691-92.
93. *Id.* at 692 (citing 18 U.S.C.A. § 3501(b)).
94. *Id.*
95. *Id.* at 695. The court also concluded that the warrant was sufficiently particular and that the officers, in executing the warrant, acted in good faith. *Id.*
96. *Id.* The court also reversed the district court's order suppressing the physical evidence which was discovered pursuant to the search of his apartment. *Id.*
97. *Id.* (Michael, J., dissenting in part and concurring in part). Justice Michael concurred with the majority that the warrant should be upheld pursuant to the good faith exception but dissented from the holding that the warrant was sufficiently specific. *Id.*
98. *Id.* Only the amici, the Washington Legal Foundation and the Safe Streets Coalition, contended that Section 3501 governed this issue.
99. *Id.* at 696 (citations omitted).
100. *Id.* at 697.
101. *Id.*

dissenting judge maintained that Congress, not the judiciary, should inquire as to why administrations have refused to enforce Section 3501 for three decades.[102]

IV. IMPLICATIONS

Currently, the impact of the Fourth Circuit's decision is limited to determining the admissibility of confessions in federal courts in Virginia, West Virginia, Maryland, North Carolina, and South Carolina.[103] However, the Supreme Court recently decided to hear the *Dickerson* case.[104] Whatever the Court ultimately decides, the Fourth Circuit's decision will definitely have major implications. It will enable the Court to decide the fate of the *Miranda* warnings, something the Court has been unwilling to do in the past.[105]

If the Supreme Court proceeds to reverse *Miranda*, the magnitude of the Fourth Circuit's decision will impact all federal courts. If the Court affirms the Fourth Circuit's decision that failure to give the warnings does not automatically preclude the use of evidence in federal cases, states would presumably be permitted to enact statutes similar to Section 3501.[106] Of course, if the Court determines that the statute is constitutional, the rules governing confessions in federal prosecutions would immediately be significantly altered. According to Bureau of Justice statistics, federal prosecutions make up only about five percent of total criminal prosecutions.[107] However, if states follow suit by passing laws consistent with Section 3501, then the magnitude of the Fourth Circuit's decision will indeed be realized.[108]

The Supreme Court's decision will likely be a close one which could be decided by the slimmest of margins.[109] Prior writings indicate that Chief Justice Rehnquist along with Justices Scalia and Thomas are the most likely to vote to overrule *Miranda*.[110] Justices Stevens, Souter, Ginsburg, and Breyer would appear to be less willing to depart from the

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102. *Id.* at 697-98.

103. Alexandra Varney McDonald, *Mixing it Up with* Miranda, A.B.A. J., Apr. 1999, at 30, 30.

104. Dickerson v. United States, 120 S. Ct. 578 (1999).

105. *See Davis*, 512 U.S. at 462-65 (Scalia, J., concurring).

106. ASSOCIATED PRESS, *Justices to Weigh Law's Limit on Landmark 'Miranda' Rule*, 222 N.Y. L.J. 1 (1999).

107. David E. Rovella, *'Miranda' Upheaval Unlikely*, NAT'L L.J., Mar. 1, 1999, at A1, A9.

108. *Id.*

109. Joan Biskupic, *High Court to Reconsider* Miranda *Warning*, WASH. POST, Dec. 7, 1999, at A.

110. *Id.*

longstanding precedent.[111] The key votes will likely be those of Justices O'Connor and Kennedy.[112] Although generally tough on criminal law matters, both have previously authored opinions endorsing *Miranda* and may be reluctant to significantly alter the way that our criminal justice system operates.[113]

If the Supreme Court upholds Section 3501, some maintain that police practices will not significantly change in that officers will likely continue to read suspects their rights. Some have noted that the Fourth Circuit's opinion specifically indicated that it should not be interpreted as a disincentive to give the warnings.[114] Glenn Lammi, an attorney for the Washington Legal Foundation, believes that police behavior will not change because the statute specifically refers to most of the warnings as factors that a court must consider in making its inquiry regarding voluntariness.[115] However, the statute makes no mention of the right to have an appointed counsel if the accused cannot afford an attorney.[116] Nonetheless, opponents of *Miranda* contend that the statutory safeguards are adequate.[117] Moreover, one commentator contends that because *Miranda* has become such a part of American life, the Court could not completely undo the 1966 decision even if it tried.[118] Thus, the question then becomes whether reliable evidence such as a voluntary confession should be suppressed merely because of a technicality.[119]

Some had thought that there were additional obstacles which could prevent proponents of Section 3501 from realizing their goal. It was amici, the Washington Legal Foundation and the Safe Streets Coalition, not the Government, who injected Section 3501 into the case.[120] As a result, the dissenting judge in *Dickerson* contended that the validity of the statute was not properly before the court.[121] Similarly, some experts once thought that the Supreme Court would refuse to address the constitutionality of the statute because of the unusual procedural

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111. *Id.*
112. *Id.*
113. *Id.*
114. Paul G. Cassell, *Take Technicality Out of* Miranda, L.A. TIMES, Dec. 6, 1999, at B7.
115. McDonald, *supra* note 103.
116. *See, e.g.*, 18 U.S.C. § 3501.
117. McDonald, *supra* note 103.
118. Akhil Reed Amar, *All Together Now: 'You Have the Right to . . .'*, L.A. TIMES, Dec. 12, 1999, at M1.
119. *Id.*
120. *Dickerson*, 166 F.3d at 695.
121. *Id.*

history.[122] However, the Court has asked University of Utah law professor Paul G. Cassell, who has previously submitted briefs on behalf of the Washington Legal Foundation, to argue that Section 3501 should govern the admissibility of confessions in federal courts.[123] Thus, the Court will apparently decide the validity of the statute despite the Government's failure to rely on it at the district or appellate court level.

Until recently, it was unclear as to what position the Department of Justice would take on the statute if it came before the Supreme Court. The Justice Department finally concluded that the petition for certiorari should be granted regarding the admissibility of defendant's statements.[124] However, the Government contends that the fact that *Miranda* has consistently been applied to the states indicates that it has a constitutional foundation and cannot be superseded merely by legislation such as Section 3501.[125] Finally, the Justice Department urged the Court not to overrule *Miranda* because of the principle of stare decisis and the unique role that the case plays in our criminal justice system.[126]

Certainly, the basis for the *Miranda* decision will have to be addressed. The dissenting judge questioned the majority's finding that the Court's decision was not constitutionally based.[127] The dissent responded by rhetorically asking why the Court repeatedly applied the judicial rule to state prosecutions.[128] Some amici who have argued in favor of the statute have indicated that *Miranda*'s application to the states does not mean that it is constitutionally required.[129] Rather, the amici contend that it may be a constitutional common law decision.[130] Alternatively, because of the number of issues addressed in *Miranda*, the Court may not have specifically considered the issue of whether federal courts have supervisory power over the states.[131]

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122. McDonald, *supra* note 103.

123. *Dickerson*, 120 S. Ct. at 578; ASSOCIATED PRESS, *supra* note 106.

124. Brief for United States on Petition for Writ of Certiorari at 15, Dickerson v. United States, 120 S. Ct. 578 (1999) (No. 99-5525).

125. *Id.* at 7.

126. *Id.* at 13-14.

127. 166 F.3d at 697.

128. *Id.* (citing Stansbury v. California, 511 U.S. 318 (1994) (per curiam)); Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) (noting that regarding state court cases, the Court's "authority is limited to enforcing the commands of the United States Constitution").

129. Brief of Amici Curiae Washington Legal Foundation and Safe Streets Coalition in Response to Supplemental Briefs of the Parties and Amicus National Ass'n of Criminal Defense Lawyers at 7, United States v. Leong, 1997 WL 351214 (4th Cir. June 26, 1997).

130. *Id.* (citing Mapp v. Ohio, 367 U.S. 643 (1961); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)).

131. *Id.*

Finally, proponents of Section 3501 have noted that *Miranda* has been consistently referred to as "prophylactic."[132]

One commentator has explained that fashioning presumptions and prophylactic rules is a necessary part of the judiciary.[133] Specifically, Yale Kamisar notes that because prudential concerns prevent the Court from hearing all but a limited number of cases, it must establish such rules in order to give meaning to constitutional rights.[134] Accordingly, since *Miranda* the Court has created what it has referred to as prophylactic rules and subsequently cited the establishment of such rules approvingly.[135]

According to Justice Scalia, however, by continuously refusing to address the constitutionality of the statute, courts are neglecting their responsibility to decide what the law is.[136] Nonetheless, as Kamisar notes, the Court has indicated that the *Miranda* opinion struck "the proper balance" between police interests and the constitutional rights of the defendant.[137]

Undoubtedly, one of the advantages of the *Miranda* decision is the bright line test that the Court announced. If the statute is upheld, courts will be forced to conduct "voluntariness" inquiries that will likely result in prudential problems.[138] This will no doubt have a major impact on federal prosecutions and in any prosecutions in states that enact similar statutes.

How the Court will rule is difficult to predict. What is certain is that the Fourth Circuit's decision will have major ramifications, perhaps

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132. *Id.*

133. *See* Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 472 (1999).

134. *Id.*

135. *Id.* (citing North Carolina v. Pearce, 395 U.S. 711 (1969)). In *Pearce* the Court established what would become known as a "presumption of vindictiveness." *Id.* (citing CHARLES H. WHITEBRAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 762 (3d ed. 1993). To prevent judges from "punishing" defendants for having successfully challenged their first convictions, a judge who imposes a harsher sentence must identify the reasons, using objective criteria. *Id.* (citing *Pearce*, 395 U.S. at 725-26). The Court noted that a judge's motivation would be difficult to ascertain in an individual case. *Id.* (citing *Pearce*, 395 U.S. at 725 n.20). A solid majority on the Court would later identify *Pearce* as a "prophylactic rule." *Id.* (citing Colten v. Kentucky, 407 U.S. 104, 116 (1972)). The following year, the Court compared "the *Pearce* prophylactic rules" to those of *Miranda*, indicating that the purpose of each is to guard the integrity of a part of the criminal process. *Id.* at 473 (citing Michigan v. Payne, 412 U.S. 47, 53 (1973)).

136. *See* United States v. Davis, 512 U.S. 452, 465 (1994) (Scalia, J., concurring).

137. Kamisar, *supra* note 133, at 466 (citing Moran v. Burbine, 475 U.S. 412, 424, 433 n.4 (1986)).

138. Rovella, *supra* note 107.

providing the impetus that alters a significant part of our criminal justice system. Because of the make-up of the Court, it may be unlikely that *Miranda* will be completely discarded. Perhaps the Court will fashion some sort of compromise and avoid directly the question of *Miranda*'s continued vitality. For example, the Court may transform *Miranda*'s irrebuttable presumption that any custodial statement not accompanied by the warnings is involuntary into a rebuttable presumption. Alternatively, the Court may place a premium on videotaping interrogations to eliminate coercion by holding that the failure to videotape should be a strong factor in suggesting that a confession is involuntary.[139] Additionally, the Court might alter the warnings in a manner which provides the suspect with more incentive to cooperate.[140] For example, the warnings could provide that silence at the time of interrogation could be used against a party upon later offering an alibi.[141] Such a compromise would give a little to both conservatives and liberals.[142]

Obviously, the Court's decision will immediately impact federal prosecutions. It will also likely have a major effect on how state prosecutions are conducted if the Court finds that the *Miranda* warnings are not constitutionally required. This may result in states enacting legislation similar to Section 3501 if legislatures are given more responsibility for establishing requirements for police interrogations. Thus, the Fourth Circuit's decision will indeed have major implications.

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139. Amar, *supra* note 118.
140. *Id.*
141. *Id.*
142. *Id.*