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# Judicial Legerdemain: 18 U.S.C. § 3501 Pulled From Miranda's Hat

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# NOTES

## JUDICIAL LEGERDEMAIN: 18 U.S.C. § 3501 PULLED FROM *MIRANDA*'S HAT

### I. INTRODUCTION

On September 11, 1973, the United States Court of Appeals for the Second Circuit, in *United States v. Vigo*,[1] reversed a district court decision to suppress a confession given after inadequate *Miranda* warnings had been administered. This result pointed up once again the conflict between the Supreme Court ruling in *Miranda v. Arizona*,[2] and section 701(a) of the Omnibus Crime Control and Safe Streets Act of 1968, codified in 18 U.S.C. § 3501 (1970).[3]

As Judge Timbers noted in his dissent in *Vigo*, the Second Circuit therein "[returned] to the pre-*Miranda* test of voluntariness," thus "[validating], *sub silentio*, Title II of the . . . Act."[4] This result, contrary to the majority's expressed intent to decline consideration of the application and constitutionality of section 3501,[5] goes a long way toward eroding the once-powerful effect of the *Miranda* decision. It is the purpose of this Note to examine this constitutional conflict, evaluating its effect upon the law on admissibility of confessions, both in light of *United States v. Vigo* and in terms of future action by the Supreme Court.

### II. *Miranda v. Arizona*

In this landmark decision the Supreme Court expanded the protection afforded defendants involved in the process of police interrogation which had been required by *Escobedo v. Illinois*.[6] Prior to *Miranda*, admissibility of confessions was determined under the due process clause by a voluntariness test. The courts regarded many different factors including reliability, fairness, and capacity to choose.[7] All circumstances of a confession or statement had to be considered by the court to determine whether or not the defendant was in control of his will at the time he confessed.[8]

In *Escobedo*, the Supreme Court held that, under the sixth amendment as applied to the states by the fourteenth amendment, questioning of a defendant could not take place without counsel once "the process shifts from investigatory

1. No. 73-1133 (2d Cir., Sept. 11, 1973) [hereinafter cited as Vigo Slip Opinion].
2. 384 U.S. 436 (1966).
3. Hereinafter referred to as section 3501.
4. Vigo Slip Opinion 5089 (Timbers, J., concurring and dissenting in part).
5. Id. at 5088 (majority opinion).
6. 378 U.S. 478 (1964).
7. Miranda v. Arizona, 384 U.S. 436, 507-08 (1966) (Harlan, J., dissenting). See Gallegos v. Colorado, 370 U.S. 49 (1962); Watts v. Indiana, 338 U.S. 49 (1949); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Ward v. Texas, 316 U.S. 547 (1942).
8. Reck v. Pate, 367 U.S. 433, 440-41 (1961).

to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate . . . ."[9] The *Miranda* Court sought to formulate "a protective device to dispel the compelling atmosphere of the interrogation."[10] It noted that:

> [W]ithout 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. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.[11]

While there can be no reasonable disagreement with the rationale underlying *Miranda*, problems do arise with the Court's conclusion that in-custody interrogation is necessarily coercive.[12] Hence, it is not surprising that this finding provides a major target for the attacks on the *Miranda* decision.[13] The Supreme Court in *Miranda* determined that most in-custody questioning is conducted in secrecy, making it difficult to recapture what took place during interrogation.[14] The Court, therefore, based its findings on various manuals used by the police in training and practice.[15] Having decided long before *Miranda* that physical abuse

9. 378 U.S. at 492. Criticism of Escobedo, based upon the claim that interrogation is not a proceeding under the sixth amendment which requires right to counsel, was undercut by the Court's reliance in Miranda upon the fifth amendment. See Elsen & Rosett, Protections for the Suspect Under Miranda v. Arizona, 67 Colum. L. Rev. 645, 664 (1967). It is difficult to tell, however, whether or to what extent an independent right to counsel founded on the sixth amendment has survived Miranda. Id. at 665. This problem was discussed in United States v. Wade, 388 U.S. 218, 226-27 (1967).

10. 384 U.S. at 465.

11. Id. at 467. To assure the protection of these rights the Court formulated the following requirements: 1. A defendant in custody must be warned prior to interrogation that he has (a) the right to remain silent, and that anything he says may be used against him in court, (b) the right to consult with a lawyer and to have the lawyer present during interrogation, and (c) the right to appointed counsel if he is indigent; 2. Any indication by such a defendant, prior to or during questioning, that he wishes to remain silent, must result in the cessation of questioning; 3. Any indication that such a defendant wants counsel present during questioning must result in suspension of questioning until his attorney is present; 4. Statements resulting from in-custody interrogation will be admissible if a knowing and willing waiver of the above rights is shown. Id. at 467-79.

12. Compare Driver, Confessions and the Social Psychology of Coercion, 82 Harv. L. Rev. 42 (1968) [hereinafter cited as Driver] with Justice White's dissent in Miranda, 384 U.S. at 533-34.

13. See Note, Title II of the Omnibus Crime Control Act: A Study in Constitutional Conflict, 57 Geo. L.J. 438, 443-44 (1968) [hereinafter cited as Title II Note]. The argument is that if the factual determination that in-custody interrogation is necessarily coercive is incorrect, then there is no need for the protection provided by the Miranda warnings to preserve the fifth amendment privilege. Id. at 448-49.

14. 384 U.S. at 445.

15. Id. at 448 & n.8.

automatically proved involuntariness,[16] it was not difficult for the Court to conclude that psychological manipulation was also a great threat to voluntary action by a defendant, and therefore required some control. It is questionable, however, whether the warnings required by *Miranda* are sufficiently effective to guard against this abuse.[17] Under the voluntariness test in effect before *Miranda*, the court made its own examination of the record to determine whether or not there had been physical or mental coercion.[18] Under *Miranda*, a court is still required to do this, but it will suppress a confession "unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[19] The procedural safeguards were the warnings set forth in *Miranda*.[20] The voluntariness test still applies in determining whether a defendant's waiver of the fifth amendment privilege "is made voluntarily, knowingly and intelligently."[21]

The *Miranda* decision was greeted with mixed reactions. Civil libertarians hailed it, while those associated with law enforcement denounced it for effectively handcuffing the police in their work.[22] An increasing crime rate made the latter viewpoint the more popular.[23] One result of the protests provoked by *Miranda* and various other defendants' rights decisions[24] was congressional reaction culminating in the Omnibus Crime Control and Safe Streets Act of 1968.[25]

## III. SECTION 3501

The purpose of section 3501 was, in part, to overrule *Miranda*. Congress found that decision to have demoralized law enforcement officials by mandating the release of criminals whose guilt was almost a certainty.[26] The decisions in

16. Brooks v. Florida, 389 U.S. 413, 414-15 (1967) (per curiam); see Brown v. Mississippi, 297 U.S. 278, 280-82, 286 (1936).

17. Driver 59-61. See also Leiken, Police Interrogation in Colorado: The Implementation of Miranda, 47 Denver L.J. 1, 21-26 (1970).

18. Payne v. Arkansas, 356 U.S. 560, 561-62 (1958). See notes 7-8 supra.

19. 384 U.S. at 444.

20. See note 11 supra.

21. 384 U.S. at 444. "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." Id. at 475.

22. Edwards, The Effects of "Miranda" on the Work of the Federal Bureau of Investigation, 5 Am. Crim. L.Q. 159, 160-61 (1967). See also F. Graham, The Self-Inflicted Wound 6-7 (1970) [hereinafter cited as Graham].

23. See, e.g., Ervin, Miranda v. Arizona: A Decision Based on Excessive and Visionary Solicitude For the Accused, 5 Am. Crim. L.Q. 125 (1967). See also Graham 6-9.

24. E.g., United States v. Wade, 388 U.S. 218 (1967); Escobedo v. Illinois, 378 U.S. 478 (1964); Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

25. Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of 5, 18, 28, 42 & 47 U.S.C. (1970)).

26. S. Rep. No. 1097, 90th Cong., 2d Sess. 41 (1968) [hereinafter cited as Report]. It was also intended to overrule the McNabb-Mallory rule requiring an appearance before a magistrate by an arrested person without unnecessary delay, which rule was used to exclude

*Miranda* and *Escobedo* were characterized by the Senate Committee on the Judiciary as "technical roadblocks thrown up by the Court."[27] The committee report further stated that "[t]he general public is becoming frightened and angered by the many reports of depraved criminals being released to roam the streets in search of other victims."[28]

Section 3501 provides that any confession "voluntarily given" is admissible.[29] It modifies *Miranda* by providing that whether various enumerated factors—which include time elapsing between arrest and arraignment, knowledge of the charge, knowledge of the right to remain silent, knowledge that any statement can be used against the defendant, and advice of the right to counsel and to assistance of counsel when questioned—are present or not "need not be conclusive on the issue of voluntariness of the confession."[30] Thus, the statute states that warnings apparently found by the Supreme Court to be constitutionally required need not necessarily be given before a confession will be admissible.

Debate as to the constitutionality of section 3501 was reflected in the report of the Senate Committee on the Judiciary.[31] The minority pointed out that the police interrogation and eyewitness testimony provisions of title II "are so squarely in conflict with the recent decisions of the Supreme Court in the *Miranda* and *Wade* cases that they will almost certainly be declared unconstitutional as soon as they are tested in the courts."[32] It further stated that: "The Supreme

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confessions obtained during such delays. See id. at 38-41. See also Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

27. Report 41.

28. Id. For studies of the effect of Miranda on law enforcement see, e.g., O. Stephens, The Supreme Court and Confessions of Guilt 165-200 (1973); Edwards, The Effects of "Miranda" on the Work of the Federal Bureau of Investigation, 5 Am. Crim. L.Q. 159 (1967); Medalie, Zeitz & Alexander, Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347 (1968); Milner, Comparative Analysis of Patterns of Compliance with Supreme Court Decisions, 5 Law & Soc'y Rev. 119 (1970); Seeburger & Wettick, Miranda in Pittsburgh—A Statistical Study, 29 U. Pitt. L. Rev. 1 (1967); Project, Interrogations in New Haven: The Impact of Miranda, 76 Yale L.J. 1519 (1967). None of these studies indicates that the reports frightening the public were founded in fact. See Graham 276-92.

29. 18 U.S.C. § 3501(a) (1970).

30. Id. § 3501(b) (1970). The text of this section is as follows:

(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.

31. Report, supra note 26.

32. Id. at 147.

Court made clear in the *Miranda* opinion that its holding was firmly grounded on a constitutional basis that no legislature could overrule."[33]

The majority apparently relied on the following language in the *Miranda* opinion for support:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless 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 . . . safeguards must be observed.[34]

The claim of constitutionality was based upon the fact-gathering powers Congress used to formulate the standards in section 3501.[35] The argument was that testimony before the Judiciary Committee indicated that the "custodial interrogation-inherent coercion" premise, upon which the Supreme Court based the need for warnings, was incorrect, and that, therefore, the warnings themselves were not required to secure the privilege against self-incrimination.[36] This argument, relying on *Katzenbach v. Morgan*,[37] is a weak one. In *Katzenbach*, the Supreme Court ruled that Congress had the power under the enabling clause of the fourteenth amendment to pass laws which would enforce the prohibitions of the equal protection clause.[38] A judicial determination that enforcement of a state law, precluded by an act of Congress, violated the fourteenth amendment was held to be unnecessary.[39] The Court was careful to note, however, that Congress does not have the power to enact legislation which dilutes equal protection and due process decisions of the Court.[40] It would seem, therefore, that since the Court in *Miranda* clearly intended to increase protections for the defendant beyond the voluntariness test,[41] the effort by Congress to constrict defendants' rights by returning to that test would not survive close scrutiny under *Katzenbach*.[42]

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33. Id. at 149.

34. 384 U.S. at 467 (emphasis added).

35. Report 47.

36. Id. at 60-63. See also Burt, Miranda and Title II: A Morganatic Marriage, 1969 Sup. Ct. Rev. 81; Title II Note 444-46.

37. 384 U.S. 641 (1966).

38. Id. at 648.

39. Id.

40. Id. at 651 n.10. There is no reason to believe that the Court would not also include under this limiting footnote its decisions under the fourteenth amendment protecting the privilege against self-incrimination, i.e., Miranda.

41. 384 U.S. at 467.

42. See Title II Note 446.

It appears that title II was enacted as a result of blind reliance upon the explicit invitation to Congress and the States to develop their own procedures to protect the privilege expressed by the Court in *Miranda*.[43] However, in adopting section 3501, the legislators overlooked the qualification placed upon that invitation by the Court that the substitute safeguards must be "fully as effective as those [of *Miranda*] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."[44]

The uncertain constitutionality of section 3501[45] has led to a reluctance on the part of lower federal courts to confront the question.[46] This hesitancy has created problems as alluded to in *United States v. Vigo*.

## IV. *United States v. Vigo*

Defendant Vigo was arrested at about 1:00 a.m., on April 13, 1972, while driving a car which carried three others. The four were removed from the car, placed under arrest, and told of the offense for which they were being arrested. The arrest was effectuated by six agents of the Federal Bureau of Narcotics and Dangerous Drugs on the basis of both information supplied by an informant and surveillance conduced by the agents. A frisking of Vigo disclosed a loaded revolver tucked in his belt, and a search of the car uncovered a briefcase in the trunk containing heroin as well as narcotics paraphernalia. After this discovery, an agent "advised Vigo that '. . . he had a right to have an attorney, had a right not to say anything at all, that he had a right to have an attorney present during anything we might discuss, if he wanted to discuss anything, and advised him he had the right to have a court-appointed attorney if he so desired and could not afford his own attorney.' "[47] The agent did not remember telling Vigo that anything he said could later be used against him.

At this point Vigo expressed a willingness to talk and, during a discussion with the agent, admitted that one of the packages contained heroin and belonged to him. He explained that two of his companions knew nothing about the heroin and that the third, Miss Pagan, was not responsible for the heroin, although she knew of its existence.[48]

The district court, per Judge Motley, suppressed these statements relying upon both *Miranda* and section 3501.[49] The government appealed under 18 U.S.C.

43. See 384 U.S. at 490; text accompanying note 34 supra.

44. 384 U.S. at 490.

45. For discussions of the constitutionality of section 3501, in addition to those already cited, see B. George, Constitutional Limitations on Evidence in Criminal Cases 318-19 (1973); 3 Wigmore, Evidence § 826a, at 438-41 (Chadbourn rev. 1970); 1 C. Wright, Federal Practice and Procedure (Criminal) § 76, at 120-22 (1969); 82 Harv. L. Rev. 1392 (1969).

46. See, e.g., Ailsworth v. United States, 448 F.2d 439, 441 (9th Cir. 1971); United States v. Robinson, 439 F.2d 553, 562-63 (D.C. Cir. 1970). This reluctance was contrary to the desires of then Attorney General Mitchell. See Stephens, The Burger Court: New Dimensions in Criminal Justice, 60 Geo. L.J. 249, 251 (1971).

47. Vigo Slip Opinion, supra note 1, at 5085.

48. Miss Pagan was a co-defendant in the prosecution and a co-respondent on the appeal.

49. United States v. Vigo, 357 F. Supp. 1360, 1365-66 (S.D.N.Y. 1972). The district court

§ 3731 and the Second Circuit reversed,[50] ruling that *Miranda* was not applicable to a situation where "[t]he statements were made immediately after Vigo's arrest, at the scene of the arrest and before any systematic inquiry was begun by the arresting agents."[51] The court found it unnecessary to rule on the constitutionality or applicability of section 3501.[52]

The testimony at the suppression hearing indicated that Vigo's statements were the result of a "discussion" between Vigo and the agent, following the partial warning of rights.[53] Neither the district court nor the court of appeals noted this aspect of the context in which Vigo made his statements. The district court, in applying the standards of *Miranda*,[54] assumed without question that the statements were the product of "custodial interrogation."[55] Vigo had already been arrested when he made the statements. "Discussion" would seem to involve more than a statement made by the defendant; there would have to be active participation by the agent.[56] Assuming that Vigo's statements were the result of "custodial interrogation," Judge Motley had no difficulty finding the statements inadmissible since the government did not meet the heavy burden imposed upon it under *Miranda*.[57]

Judge Motley also found the statements to be inadmissible under 18 U.S.C. § 3501,[58] since

> given the absence of counsel, the failure of the agent to warn defendant that his statement would be used against him and the absence of any evidence that defendant otherwise knew the consequences of a waiver of his privilege against self-incrimination, the confession was not "voluntary" within the meaning of § 3501.[59]

It was this part of Judge Motley's decision suppressing Vigo's statements

also suppressed a statement made by Miss Pagan since there was no evidence of a waiver, id. at 1367, and evidence found during a search of Miss Pagan's purse was suppressed on a finding that the arrest of Pagan was unlawful and there was no reason to believe that she was armed or presently dangerous. Id. at 1365.

50. Vigo Slip Opinion. Judge Timbers dissented on the question of the admissibility of Vigo's statements. Id. at 5088.

51. Id. at 5087. The government did not challenge the suppression of Pagan's statement on appeal, but it did challenge the suppression of evidence seized from her pocketbook. The court of appeals reversed in this regard, holding that "the search of Miss Pagan's purse was reasonable and proper as a normal protective measure on the part of law enforcement authorities." Id. at 5086.

52. Id. at 5088. But see id. at 5088-89 (Timbers, J., concurring and dissenting in part).

53. Transcript at 14, United States v. Vigo, 357 F. Supp. 1360 (S.D.N.Y. 1972).

54. See note 11 supra.

55. 384 U.S. at 444; see 357 F. Supp. at 1366.

56. Webster's Second International Dictionary 746 (1957) defines "discussion" as "argument for the sake of arriving at truth or clearing up difficulties." The difference between "volunteered" statements and statements made in response to "interrogation" is considered in Institute of Continuing Legal Education, Criminal Law and the Constitution—Sources and Commentaries 351-60 (1968).

57. 357 F. Supp. at 1366. See also note 21 supra.

58. 357 F. Supp. at 1366-67; see notes 29-30 supra and accompanying text.

59. 357 F. Supp. at 1366-67 (footnote omitted).

which the government attacked on appeal, relying exclusively upon section 3501 in seeking a reversal of that suppression.[60] Nevertheless, the court of appeals completely avoided "the question of the application and constitutionality of § 3501."[61] Relying upon the following language from *Miranda*, the appeals court held that the circumstances of Vigo's statements were not meant to be subject to the strict standards set forth in that decision:[62]

"In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. . . . Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."[63]

According to the Second Circuit panel, Vigo's statements were given voluntarily under this section of *Miranda*.[64]

Is it possible to consider Vigo's statements to have been made "without any compelling influences?" There would seem to be something inherently compelling about an arrest,[65] especially when a search of one's car has just turned up a quantity of heroin. There is nothing in the record to indicate that Vigo began making his statements without prompting by an agent.[66] His was not the case of an individual walking up to a police officer and making a confession.[67] It is true that statements made at the time of arrest without warnings can be voluntary,[68] but not when they are in response to questioning by an arresting agent.[69] Courts also

60. Brief for Appellant at 6-15, United States v. Vigo, No. 73-1133 (2nd Cir., Sept. 11, 1973). Where the failure of an agent to warn a defendant that any statement made by the defendant could be used against him in court would be conclusive against admissibility of any statement made during in-custody interrogation without a clear waiver under Miranda, 384 U.S. at 476, the same is not true under section 3501(b). See text accompanying note 30 supra.

61. Vigo Slip Opinion 5088.

62. See note 11 supra.

63. Vigo Slip Opinion 5086-87, quoting Miranda v. Arizona, 384 U.S. 436, 478 (1966). The court failed to note that Vigo's statements were made during a discussion with the agent.

64. Vigo Slip Opinion 5087.

65. See Miranda v. Arizona, 384 U.S. 436, 515 (1966) (Harlan, J., dissenting). See also Driver 56-57.

66. The burden of proof on this issue is with the government. See Lego v. Twomey, 404 U.S. 477, 489 (1972).

67. Miranda v. Arizona, 384 U.S. 436, 478 (1966).

68. See, e.g., United States v. Tafoya, 459 F.2d 424 (10th Cir. 1972); Stone v. United States, 385 F.2d 713 (10th Cir. 1967), cert. denied, 391 U.S. 966 (1968); Pitman v. United States, 380 F.2d 368 (9th Cir. 1967). In these cases the statements in issue were not made in response to questioning or "discussion" and were therefore admissible.

69. Orozco v. Texas, 394 U.S. 324 (1969); Gonzales v. Beto, 425 F.2d 963, 971 (5th Cir.) (dictum), cert. denied, 400 U.S. 928 & 1001 (1970). In Miranda, the Supreme Court said, "The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 477.

have held that statements made in response to on-the-scene investigatory questioning by police officers need not be preceded by *Miranda* warnings.[70] However, once the suspect is in custody or deprived of freedom of action, questioning must follow the warnings required by *Miranda* in order that statements made in response be admissible.[71]

The court of appeals relied upon the following factors in ruling Vigo's statements voluntary:

> None of the inherently compelling factors of station-house interrogation were present. The arresting agents did not coerce or deceive him. He was aware of the illegality of his acts, and had in addition been given three of the four warnings required by *Miranda*. He spoke in an effort to protect his companions, particularly Miss Pagan, and with evident knowledge of the meaning and consequences of what he said. Under these circumstances, the admissibility of his statements was not precluded either by the Fifth Amendment or by *Miranda*.[72]

This language is more a return to the totality-of-the-circumstances test which the Supreme Court modified in *Miranda*[73] than a finding that *Miranda* did not require warnings in the Vigo situation.[74] It was Judge Timbers who noted:

> To hold Vigo's inculpatory statements to have been "voluntary" so that *Miranda* warnings need not have been given, in effect is to return to the pre-*Miranda* test of voluntariness and to validate, *sub silentio*, Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501 (1970).[75]

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70. E.g., United States v. Barnes, 464 F.2d 828 (D.C. Cir. 1972), cert. denied, 410 U.S. 986 (1973); United States v. Fallon, 457 F.2d 15 (10th Cir. 1972); Lucas v. United States, 408 F.2d 835 (9th Cir. 1969); United States v. Gibson, 392 F.2d 373 (4th Cir. 1968).

71. See Orozco v. Texas, 394 U.S. 324 (1969); United States v. Jaskiewicz, 433 F.2d 415, 419 (3d Cir. 1970), cert. denied, 400 U.S. 1021 (1971); Gollaher v. United States, 419 F.2d 520, 523-24 (9th Cir.), cert. denied, 396 U.S. 960 (1969); Posey v. United States, 416 F.2d 545, 549-50 (5th Cir. 1969), cert. denied, 397 U.S. 946 (1970); Morgan v. United States, 377 F.2d 507 (1st Cir. 1967). See also Evans v. United States, 377 F.2d 535 (5th Cir. 1967); United States v. Tchack, 296 F. Supp. 500 (S.D.N.Y. 1969). See generally 3 Wigmore, Evidence § 826a (Chadbourn rev. 1970).

72. Vigo Slip Opinion 5087 (footnote omitted). Following these statements the court cited various cases where statements given in the absence of Miranda warnings were held to have been voluntary. These cases are clearly distinguishable from Vigo since in none of these cases had any warnings been given or, if the suspect was in custody, had any questions been asked which in any way solicited the statements made. United States v. Tafoya, 450 F.2d 424 (10th Cir. 1972); Sablowski v. United States, 403 F.2d 347 (10th Cir. 1968); Parson v. United States, 387 F.2d 944 (10th Cir. 1968); Stone v. United States, 385 F.2d 713 (10th Cir. 1967), cert. denied, 391 U.S. 966 (1968); Pitman v. United States, 380 F.2d 368 (9th Cir. 1967); United States v. Cruz, 265 F. Supp. 15 (W.D. Tex. 1967); People v. Gant, 264 Cal. App. 2d 420, 70 Cal. Rptr. 801 (1968); Cameron v. State, 214 So. 2d 370 (Fla. Dist. Ct. App. 1968).

73. 384 U.S. at 476. This voluntariness test, calling for a consideration of all the circumstances of the confession or statement, was similar to section 3501. See notes 7-8, 29-30 supra and accompanying text.

74. Cf. 384 U.S. at 478.

75. Vigo Slip Opinion 5088-89 (Timbers, J. concurring and dissenting in part).

Since Judge Timbers felt that Vigo's statements were the result of custodial interrogation,[76] and inasmuch as one of the required *Miranda* warnings was not given,[77] the only way that the statements could be found admissible would be under section 3501.[78] This seems to have been the government's view in preparing its brief on appeal.[79]

## V. Admissibility Today

*Vigo* is not the first case in which the Second Circuit has avoided a decision as to the constitutionality and application of section 3501.[80] Indeed, the Second Circuit is not alone in its reluctance to confront those issues.[81] While there are limited circumstances in which it is proper for the court to sidestep constitutional issues,[82] it is questionable whether the court in *Vigo* properly could avoid the issue of the constitutionality of section 3501.[83] If the courts continue to use section 3501 in substance but not in name it will be only those courts' interpretations of *Miranda* which will be subject to review and not the substance of section 3501.[84] The requirements of *Miranda* may fade away in time as the Supreme

76. Id. at 5090. Judge Timbers noted that the statements were made during a discussion with the agent. Id. See text at note 53.

77. Vigo Slip Opinion 5087.

78. While Miranda held that the warning not given Vigo is required before Vigo's statements are admissible, 384 U.S. at 476, section 3501 says that "[t]he presence or absence of any of the above-mentioned factors to be taken into consideration by the judge [including the warning not given Vigo] need not be conclusive on the issue of voluntariness of the confession." 18 U.S.C. § 3501(b) (1970). See also note 60 and text accompanying note 30 supra.

79. See Brief for Appellant, United States v. Vigo, No. 73-1133 (2d Cir., Sept. 11, 1973); note 60 supra and accompanying text.

80. See United States v. Johnson, 467 F.2d 630 (2d Cir. 1972), cert. denied, 93 S. Ct. 3069 (1973), where the court said, "The difficult question of whether section 3501 was intended to overrule Miranda v. Arizona, 384 U.S. 436 (1966), or whether it would be constitutional if it was, is not presently before us and we express no opinion as to the possible answers." Id. at 636 n.6 (parallel citations omitted).

In United States v. Marrero, 450 F.2d 373 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972), then Chief Judge Friendly found it necessary in a concurring opinion to write:

"I assume that when the majority opinion says 'The admissibility of confessions in federal criminal prosecutions is governed by § 3501 which must be read as a whole,' it does not decide by implication on the serious issues whether that section, added by the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 210, intended to overrule Miranda v. Arizona, 384 U.S. 436 (1966), or would be constitutional if it did." Id. at 379 (parallel citations omitted).

81. See note 46 supra and accompanying text.

82. See Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

83. See text accompanying note 75 supra.

84. Were section 3501 to be held unconstitutional, a direct appeal to the Supreme Court would be proper under 28 U.S.C. § 1252 (1970). Were the decision of the lower court to uphold the validity of section 3501, review by the Supreme Court could be by certification under 28 U.S.C. § 1254(3) (1970). When the courts do not rely on section 3501 in considering a motion to suppress a statement made by an accused in custody in response to interro-

Court continues to deny certiorari in cases where statements are held admissible under *Miranda* by lower courts.[85]

In fact, a survey of several recent Second Circuit cases indicates that this process is well under way.[86] In *United States v. Vanterpool*,[87] the court provided the foundation for many of the cases distinguishing *Miranda* when it stated that "the words of *Miranda* do not constitute a ritualistic formula which must be repeated without variation in order to be effective. Words which convey the substance of the warning along with the required information are sufficient."[88] This opened the way for broader interpretation of warnings by the lower courts. In *United States v. Lamia*[89] the court followed its initiative in *Vanterpool* by holding that a warning that defendant "need not make any statement at this time" complied with the "right to remain silent" warning required by Miranda.[90] The Second Circuit, in turn, relied on its *Lamia* ruling, in *United States v. Carneglia*,[91] to find that the omission of a specific warning of the right to counsel during questioning did not invalidate the total warnings when defendant was told both of his right to remain silent and of his right to appointed counsel—who would be appointed if and when he went to court. There the court considered evidence of subsequent conduct: the defendant, shortly after making his statement, informed the agent that he wished to consult with counsel before answering any more questions.[92]

A strong indication that the initial strength of *Miranda* will be eroded considerably with the acquiescence of the present Supreme Court is the opinion of that Court by Chief Justice Burger in *Harris v. New York*.[93] There, the Court held that a statement by the defendant, which was inadmissible against him during the prosecution's direct case because of a lack of procedural safeguards required under *Miranda*, could be used for impeachment purposes in attacking

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gation, review is possible only if the Supreme Court grants certiorari. 28 U.S.C. § 1254(1) (1970).

85. See, e.g., cases cited in note 86 infra.

86. See United States v. Carneglia, 468 F.2d 1084 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973); Massimo v. United States, 463 F.2d 1171 (2d Cir. 1972), cert. denied, 409 U.S. 1117 (1973); United States v. Lamia, 429 F.2d 373 (2d Cir.), cert. denied, 400 U.S. 907 (1970).

87. 394 F.2d 697 (2d Cir. 1968).

88. Id. at 698-99.

89. 429 F.2d 373 (2d Cir.), cert. denied, 400 U.S. 907 (1970).

90. Id. at 375-76. Taking this warning with the warning that he had a "right to an attorney" and that one would be appointed for him if he could not afford one, the court found an adequate warning that he need not make a statement until he had the advice of an attorney. Id. at 376-77. The problem arises when the defendant thinks a statement is a formal explanation or written statement. The Miranda Court explicitly required the "right to remain silent" warning to protect against this misinterpretation. 384 U.S. at 467-68.

91. 468 F.2d 1084 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973).

92. In Miranda, the Supreme Court stated that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." 384 U.S. at 470.

93. 401 U.S. 222 (1971).

the credibility of the defendant's testimony at trial. Acknowledging that "[s]ome comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose . . ." the Court nevertheless determined that "discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling."[94] Justice Burger wrote: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[95]

Recently, in *Schneckloth v. Bustamonte*,[96] the Supreme Court dealt at length with the question of voluntariness in the context of search and seizure. In reversing the Ninth Circuit, the Court held that while the state must demonstrate that consent to search was voluntarily given and not coerced, this "[v]oluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."[97]

The Court made it clear that this holding was limited to situations where the subject of the search was not in custody.[98] It specifically stated that "[t]he considerations that informed the Court's holding in *Miranda* are simply inapplicable

94. Id. at 224. In Miranda, the Court said that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. The Court also said that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him [an individual in custody]." Id. at 479 (footnote omitted). At a third place the Court said that, "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense." Id. at 476.

95. 401 U.S. at 226. See also United States v. Baratta, 397 F.2d 215 (2d Cir.), cert. denied, 393 U.S. 939 (1968), where the court allowed a statement which was inadmissible because of a lack of Miranda warnings to be used to refresh the recollection of the defendant on the witness stand when the statement was not identified, read, or otherwise presented to the jury and where the defendant testified that his recollection was not refreshed. But see United States v. Jeffery, 473 F.2d 268 (9th Cir. 1973), where statements inadmissible under Miranda were not received into evidnce at trial to contradict the defendant's trial testimony.

For discussions of the Harris decision see Dershowitz & Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L.J. 1198 (1971); Kent, Harris v. New York: The Death Knell of Miranda and Walder?, 38 Brooklyn L. Rev. 357 (1971); Note, Impeachment By Unconstitutionally Obtained Evidence: The Rule of Harris v. New York, 1971 Wash. U.L.Q. 441 (1971); 40 Fordham L. Rev. 394 (1971).

96. 412 U.S. 218 (1973).

97. Id. at 248-49 (footnote omitted).

98. Id. at 248.

in the present case."[99] The inherently coercive situation involved when the techniques of police questioning are combined with the nature of custodial surroundings are not present when there is a consent search involving someone not in custody.[100]

The great lengths to which the Court went in distinguishing its *Miranda* holding from *Schneckloth* appear to give greater weight to the former. In fact, the Court was careful not to rule out the possibility that warnings may be required to prove voluntariness when the consent to search is given by one in custody.[101]

Of the five justices in the *Miranda* majority only Justices Douglas and Brennan are still on the Court. Justices Stewart and White remain from the minority. In *Harris*, Justices Black, Brennan, Douglas, and Marshall dissented. Justice Harlan was in the majority. Since *Harris*, Justices Black and Harlan have been replaced on the Court by Justices Rehnquist and Powell. Of course, it is difficult to say with any degree of certainty what the Court would do if presented with a challenge to section 3501.[102] It appears unlikely, though, that such an appeal would be heard by the Court in the near future.[103] Presently, this is not the crucial issue. Without a Supreme Court ruling, section 3501 has become influential.

Where a suspect is questioned contemporaneously with his arrest, the Second Circuit's decision in *Vigo* has modified *Miranda* at least as extensively as section 3501. Both section 3501 and *Vigo* are the law. While section 3501 has never been relied upon in deciding the admissibility of a statement given by a suspect during in-custody interrogation, *Vigo* provides a facile decisional alternative. If the Second Circuit trend continues,[104] *Vigo* will be a major influence upon the courts when they consider statements given in similar circumstances. Unhappily, as Judge Timbers wrote in his *Vigo* dissent:

> Dissatisfaction with a controlling Supreme Court decision, however, does not warrant judicial legislation. I am sure that my colleagues do not suggest it does. But their application of *Miranda* to the facts of the instant case strikes me as coming perilously close to frustrating the rationale of this controlling Supreme Court decision.[105]

Indeed, whether out of respect for the opinion of Congress expressed in the pas-

99. Id. at 246.

100. Id. at 247.

101. See id. at 240-41 n.29.

102. This is true, basically, because of the doctrine of stare decisis. It was out of respect for stare decisis that Justice Harlan concurred in the Court's opinion in Orozco v. Texas, 394 U.S. 324 (1969), where it was held that Miranda warnings were required before questioning a suspect who was in custody even when the interrogation was being conducted in the suspect's bedroom. Id. at 327-28 (Harlan, J., concurring).

103. See text accompanying notes 80-84 supra. Many cases never reach the appeal stage. The defendant, once the trial court has found a statement admissible, often chooses to plead guilty to a part of the indictment in order to limit his exposure at sentencing. Such a plea of guilty precludes any appeal of the ruling of admissibility. See United States v. Selby, 476 F.2d 965 (2d Cir. 1973).

104. See text accompanying notes 85-92 supra.

105. Vigo Slip Opinion 5092 (Timbers, J., concurring and dissenting in part).

sage of title II of the Omnibus Crime Control and Safe Streets Act of 1968 and in the legislative history of that act,[106] or for some other reason, the lower federal courts, while avoiding a direct ruling on the constitutionality of section 3501,[107] have put its provisions to work in direct defiance of the Supreme Court's decision in *Miranda v. Arizona*. In so doing they have virtually eliminated the need for prosecutors to rely upon section 3501 and, as a result, the need to rule on that statute's constitutionality.

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106. See Report, supra note 26.
107. See notes 80-81 supra.