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Illinois v. Perkins: Approving the Use of Police Trickery in Prison to Circumvent *Miranda*

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I. INTRODUCTION

Carving the deepest exception to *Miranda v. Arizona*[1] to date, the United States Supreme Court in *Illinois v. Perkins*[2] held that the use of undercover agents to obtain a confession from an incarcerated suspect did not constitute custodial interrogation necessitating the administration of *Miranda* warnings.[3] The *Perkins* Court overruled both the Circuit Court of St. Clair County, Illinois and the Illinois Appellate Court for the Fifth Judicial District. The Illinois courts had held that when an undercover police agent interrogates a suspect in his jail cell about a separate, uncharged crime without administering the *Miranda* warnings, any statements made during the interrogation are inadmissible at trial.[4] The Illinois appellate court reasoned that a conversation between an undercover agent and the suspect constituted custodial interrogation requiring *Miranda* warnings.[5]

In reversing the Illinois appellate court, the Supreme Court held that inculpatory statements are admissible absent *Miranda* warnings when "the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement."[6] In so hold-

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1. 384 U.S. 436 (1966).

2. 110 S. Ct. 2394 (1990).

3. *Id.* at 2396. In *Miranda*, 384 U.S. 436, the court promulgated procedural safeguards to protect a suspect's fifth amendment privilege against compelled self-incrimination. *See infra* notes 15-37 and accompanying text (*Miranda* discussion).

4. People v. Perkins, 176 Ill. App. 3d 443, 450, 531 N.E.2d 141, 146 (5th Dist. 1988), *appeal denied*, 125 Ill. 2d 572, 537 N.E.2d 816 (1989), *cert. granted*, 110 S. Ct. 49 (1989), *rev'd*, 110 S. Ct. 2394 (1990).

5. The appellate court stated that the agent's question inquiring whether Perkins had ever "done someone" was reasonably likely to elicit an incriminating response and thus constituted interrogation. *Perkins*, 176 Ill. App. 3d at 447, 531 N.E.2d at 144. See *infra* notes 77-88 and accompanying text (discussion of the appellate court opinion in *Perkins*).

6. *Perkins*, 110 S. Ct. at 2396.

ing, the Supreme Court determined that an undercover agent's questioning of an incarcerated suspect was not custodial interrogation.[7] According to the Court, custodial interrogation occurs and consequently *Miranda* warnings are required only when the suspect is aware that the person to whom he is speaking is a law enforcement official.[8]

This Article examines the Supreme Court's opinion in *Perkins* and assesses its impact upon both police investigatory techniques and judicial proceedings in Illinois. It begins with a discussion of *Miranda v. Arizona*[9] and *Rhode Island v. Innis*,[10] two landmark decisions that define what constitutes custodial interrogation.[11] The Article then focuses on the decisions in the Illinois courts[12] and the Supreme Court,[13] analyzing the different rationales underlying the disparate conclusions of these courts. The conclusion discusses the potential difficulties unleashed by the *Perkins* decision.[14]

II. CUSTODIAL INTERROGATION

A. Miranda v. Arizona

In *Miranda v. Arizona*,[15] the United States Supreme Court struck the balance between the state's interest in prosecuting criminals and an individual's liberty interest. The Court held that in the absence of specific procedural safeguards or comparable means, a confession obtained during custodial interrogation could not be admitted into evidence against the accused at trial.[16] Moreover, the prosecution bore the burden of demonstrating that the suspect was fully apprised of his fifth amendment privilege[17] and that any waiver was knowingly and intelligently made.[18] The

7. *Id.*
8. *Id.*
9. 384 U.S. 436 (1966).
10. 446 U.S. 291 (1980).
11. *See infra* notes 15-57 and accompanying text.
12. *See infra* notes 74-88 and accompanying text.
13. *See infra* notes 89-143 and accompanying text.
14. *See infra* notes 144-46 and accompanying text.
15. 384 U.S. 436 (1966).
16. *Id.* at 478-79.
17. U.S. CONST. amend. V provides in pertinent part: "[No person] shall be compelled in any criminal case to be a witness against himself . . . ." In *Miranda*, the Court noted that "[t]hose who framed the Constitution and the Bill of Rights were ever aware of subtle encroachments of individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure.' " *Miranda*, 384 U.S. at 459. (citing Boyd v. United States, 116 U.S. 616, 635 (1886)).
18. *Miranda*, 384 U.S. at 479.

Court stated that "the privilege [of the Fifth Amendment] is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' "[19] More importantly, the Court believed that the fifth amendment guarantee always was endangered during custodial interrogation conducted by government officials.[20] The Court explained that "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under [the] compulsion to speak."[21]

Although in pre-*Miranda* decisions, the Court focused primarily upon the use of physical force by the police in order to obtain a confession,[22] the *Miranda* Court noted that the "modern practice of in-custody interrogation [was] psychologically rather than physically oriented."[23] Specifically, the Court identified as psychologically significant the use of incommunicado interrogation and trickery in compelled confessions.[24] This subtle form of coercion casts doubt upon the voluntariness of a subsequently obtained confession.[25] Because the Court believed that an involuntary confes-

19. *Id.* at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

20. *Id.* at 445-458. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person [was] taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. For purposes of *Miranda*, the Court has held that one can be in custody when detained by police officers in his residence. Orozco v. Texas, 394 U.S. 324 (1969).

21. *Miranda*, 384 U.S. at 461.

22. *Id.* at 446 (citing Brown v. Mississippi, 297 U.S. 278 (1936)).

23. *Id.* at 448. This proposition was first articulated by the Court in Chambers v. Florida, 309 U.S. 227 (1940). As noted by the *Miranda* Court, the *Chambers* Court recognized "that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Miranda*, 384 U.S. at 448 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

24. *Miranda*, 384 U.S. at 448. Custodial interrogations usually are conducted incommunicado, resulting "in a gap in our knowledge as to what in fact goes on in the interrogation rooms." *Id.* The Court opined that while in isolation, the suspect is more susceptible to interrogation techniques that capitalize upon the suspect's confinement in unfamiliar surroundings. The Court examined one interrogation technique that consisted of relentless questioning of the suspect. During the course of this interrogation, questions are phrased by the interrogator to confirm the belief held by the police, i.e., that they know the suspect is guilty, rather than to discover what the suspect actually knew or did. *Id.* at 449-450. The Court further noted that deception and trickery often are employed to induce confessions. For example, "[t]he accused is placed in a line-up . . . [and] is identified by several fictitious witnesses or victims who [associate] him with different offenses [than the one under investigation]. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." *Id.* at 453 (citing O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 106 (1956)).

25. *Id.* at 455-57.

sion is of suspect truthfulness and reliability,[26] a confession would be deemed voluntary only if the accused had been apprised of his fifth amendment privilege prior to the custodial interrogation. The Court reasoned that only with the full and informed knowledge of fifth amendment rights could a subsequently obtained confession be considered the true product of the suspect's free choice.[27]

To ensure that the accused was aware of his privilege against self-incrimination, the *Miranda* Court promulgated procedures to be followed by law enforcement officials prior to custodial interrogation.[28] The procedures, better known as the *Miranda* warnings, required that the suspect:

> be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[29]

If after the *Miranda* warnings are given a confession is obtained, a "heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination."[30]

In defining what constitutes a valid waiver, the Supreme Court stated that waiver could not be presumed from the accused's silence.[31] Thus, unless the accused expressly indicated his willingness to speak in the absence of counsel, an interrogator could not assume that his failure to request counsel constituted a waiver.[32] Also, if the accused answered a few preliminary questions and subsequently invoked his fifth amendment rights, the prior responses

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26. *Id.* at 448, 466.

27. *Id.* at 458.

28. *Id.* at 479.

29. *Id.*

30. *Id.* at 475. The Court placed this burden on the state because the "State [established] the isolated circumstances under which the interrogation [took] place and [had] the only means of making available corroborated evidence of warnings given during incommunicado interrogation . . . ." *Id.* The Court further emphasized, "[t]his Court has always set high standards of proof for the waiver of constitutional rights . . . and we reassert these standards as applied to in custody interrogation." *Id.* (citing Johnson v. Zerbst, 304 U.S. 458 (1938)). In explaining these standards, the Court indicated that even after the appropriate warnings have been given, the suspect must have the opportunity to exercise his rights throughout the questioning. *Id.* at 479.

31. *Id.* at 475. The Court stated, "[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence that show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver." *Id.* (quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962)).

32. *Id.*

would not constitute a waiver.[33] Most importantly, the Court expressly stated that "any evidence that the accused was threatened, tricked or cajoled into a waiver [showed] that the defendant did not voluntarily waive his privilege."[34] The court then concluded that any confession obtained in the absence of *Miranda* warnings or an informed waiver was inadmissible at trial.

Because the *Miranda* opinion applies only to custodial interrogation, much debate has centered upon the circumstances under which an accused is indeed subjected to custodial interrogation.[35] As noted earlier, the *Miranda* Court defined custodial interrogation as questioning by authorities "when an individual is taken into custody or otherwise deprived of his freedom in any significant way."[36] Since *Miranda*, the Supreme Court progressively has qualified and narrowed the definition of custodial interrogation and thereby reduced the number of factual situations in which a person will be found entitled to the protections of *Miranda*.[37]

B. Rhode Island v. Innis

The catalyst of the narrowing of the definition of custodial interrogation was *Rhode Island v. Innis*.[38] In *Innis*, the suspect, Innis, was arrested for the murder of a taxicab driver.[39] At the time of his arrest, the police administered the *Miranda* warnings and Innis immediately requested counsel.[40] Innis subsequently received *Miranda* warnings two more times and declined to answer police questions regarding the murder.[41] While en route to the station, three officers carried on a conversation regarding the whereabouts of the shotgun, believed to be the murder weapon, and the possibility that a child might discover the weapon and injure himself.[42]

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33. *Id.* at 475-76.

34. *Id.* at 476.

35. *See, e.g.*, Kamisar, *Brewer v. Williams, Massiah and Miranda: What Is "Interrogation?," When Does It Matter?* GEO. L.J. 1 (1978); Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699 (1978).

36. *Miranda*, 384 U.S. at 478.

37. *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976).

38. 446 U.S. 291 (1980).

39. *Id.* at 293-94.

40. *Id.* at 294.

41. *Id.*

42. *Id.* at 294-95. The following conversation ensued between the officers:

> Officer Gleckman: At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby,] there's a lot of

Innis interrupted the conversation and requested that the officers return to the scene of the arrest where he would reveal the location of the gun.[43] Before Innis was questioned about the gun, he was again given *Miranda* warnings.[44] Innis responded that he "understood those rights, but that he 'wanted to get the gun out of the way because of the kids in the area in the school.' "[45] Subsequently, Innis revealed the gun's location.[46]

After Innis was indicted for the murder, his attorney moved to suppress the shotgun and the statements pertaining to its discovery.[47] The trial court allowed the shotgun and statements into evidence, concluding that because Innis repeatedly was appraised of his *Miranda* rights, he intelligently waived his right to silence.[48] The court did not determine whether the officers had in fact interrogated Innis. Thereafter, Innis was convicted.[49]

On appeal, the Rhode Island Supreme Court held that Innis had invoked his right to counsel and "contrary to *Miranda's* mandate that, in the absence of counsel all custodial interrogation then cease, the police officers in the vehicle had 'interrogated' the respondent without a valid waiver of his right to counsel."[50] The court reasoned that, although the police officers genuinely may have been concerned about child safety and never directly addressed Innis, their conduct subjected Innis to "subtle coercion" that was the equivalent of interrogation within the meaning of the *Miranda* opinion. Moreover, the evidence was insufficient to support a finding of waiver.[51] The United States Supreme Court granted certiorari to address the meaning of "interrogation" under *Miranda*.[52]

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handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.

Officer McKenna: I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it.

Officer Williams: He [Gleckman] said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself.

At this point in the conversation, Innis requested that the officers turn the car around so he could show them the location of the gun. *Id.*

43. *Id.* at 295.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 295-96.
48. *Id.* at 296.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 297.

The *Innis* Court defined interrogation as "not only . . . express questioning, but also . . . words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[53] In determining whether interrogation occurred, the Court focused on the perceptions of the suspect and not on the intent of the police officers.[54] The examining officers' intent was significant only to the extent that it reflected whether the police knew or should have known that their words or actions were reasonably likely to elicit an incriminating response.[55]

Applying its definition of interrogation to the facts of the case before it, the Court held that although the officers' conversation arguably did constitute "subtle compulsion," such compulsion did not rise to the level of interrogation. Consequently, the Court concluded that Innis' statements were not the product of custodial interrogation and therefore were admissible.[56] In its *Innis* decision, the Court grafted an additional requirement onto the applicability of *Miranda* warnings and their attendant safeguards. Specifically, the suspect had to perceive the compulsion in order for police questioning to constitute custodial interrogation.[57] In so holding, the

53. *Id.* at 301. The Court reasoned that psychological ploys are tantamount to direct questioning "because they generate similar pressures, anxieties, and intimidation. They are not only calculated to, but likely to evoke incriminating statements. They 'endanger the privilege against self-incrimination' no less than does more readily identifiable 'interrogation.' " Kamisar, *supra* note 35, at 7. *See also* Graham, *What Is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona*, 14 UCLA L. REV. 59 (1966).

54. *Innis*, 446 U.S. at 302-303. *See* Marks, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the Innis Definition of Interrogation*, 87 MICH. L. REV. 1073, 1082-83 (1989).

55. *Innis*, 446 U.S. at 303. The Court noted:

> the intent of the police . . . may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

Id. at 302 n.7.

56. *Id.* at 303.

57. One oft-quoted legal scholar clearly has articulated the necessary interplay between custodial interrogation and the suspect's perception:

> It is the impact on the suspect's mind of the interplay between police interrogation and police custody—each condition reinforcing the pressures and anxieties produced by the other—that, as the *Miranda* Court correctly discerned, makes 'custodial police interrogation' so devastating. It is the suspect's realization that the same persons who have cut him off from the outside world, and have him in their power and control, want him to confess, and are determined to get him to do so, that makes the 'interrogation' more menacing than it would be

Court departed from the proposition that, under a fifth amendment analysis, a custodial atmosphere inherently was coercive.

III. PEOPLE V. PERKINS

A. Facts

In March of 1986, Donald Charlton, an inmate in the Graham Correctional Facility, Hillsboro, Illinois, informed Agent Kenneth Korunka of the Department of Criminal Investigation that another inmate, Lloyd Perkins, had confessed to murdering someone in East St. Louis, Illinois.[58] When the police were contacted in the East St. Louis area, the details of the murder coincided with an unsolved murder in Fairview Heights, Illinois.[59] A Fairview Heights police investigator held a taped interview with Charlton at the Graham Facility in March 1986.[60] Subsequently, Charlton agreed to cooperate in the investigation and was promised nothing in return.[61]

When Perkins was released from the Graham Facility, investigators obtained a court order releasing Charlton to contact Perkins while wearing an electronic surveillance device.[62] Before contact was made, Perkins was incarcerated on aggravated battery charges in the Montgomery County Jail, Hillsboro, Illinois.[63] Believing that the use of an eavesdrop device in jail would prove impracticable and dangerous, the police devised a sophisticated scheme to procure Perkins' confession.[64] Both Charlton and an undercover police agent, John Parisi, were placed in the same jail cell with Perkins.[65] Charlton and Parisi's presence in the jail would be explained by the ruse that both had escaped from a work-release program at the Graham Facility and were arrested when they ran out of money and attempted a burglary.[66] Both Parisi and Charlton were instructed not to question Perkins about the murder and only

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without the custody and the 'custody' more intimidating than it would be without the interrogation.

Kamisar, *supra* note 35, at 63.

58. People v. Perkins, 176 Ill. App. 3d 443, 444, 531 N.E.2d 141, 142 (5th Dist. 1988). Charlton was serving a six-year prison sentence for burglary. *Id.*

59. *Id.*

60. Brief for Petitioner at 3, *Perkins*, 176 Ill. App. 3d 443, 531 N.E.2d 141 (No. 88-1972).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Perkins*, 176 Ill. App. 3d at 445, 531 N.E.2d at 143.

65. *Id.*

66. *Id.*

to engage him in conversation.[67]

Once in the jail cell with Perkins, Parisi suggested that the three men plan an escape from the jail.[68] A conversation ensued regarding the possibility of a shooting occurring during the breakout.[69] At this point, Parisi "initiated the defendant's narration of the crime by asking [Perkins] whether he had ever 'done someone.' "[70] In addition, Parisi and Charlton asked more than sixteen follow-up questions pertaining to the murder and Perkins responded in graphic detail.[71] *Miranda* warnings were not given prior to Parisi's questioning of Perkins.[72] Subsequently, Perkins was arrested for the murder of Stephenson. Only after this arrest did Perkins receive *Miranda* warnings.[73]

Subsequently, at Perkins' murder trial, the court granted Perkins' motion to suppress the statements made to Parisi and Charlton.[74] The court held that Parisi and Charlton were governmental agents who failed to administer *Miranda* warnings prior to a custodial interrogation.[75] The State appealed to the Fifth District Appellate Court on the sole issue of whether *Miranda* was violated.[76]

B. State Appellate Court Decision

On appeal, the State argued that *Miranda* was inapplicable because the jail cell conversation did not constitute interrogation.[77] Additionally, the State reasoned that despite the jail cell setting, the conversation had not occurred in the sort of coercive environment that requires the police to give *Miranda* warnings.[78] In the State's view, tricking Perkins into discussing the details of the crime was distinct from compelling Perkins to speak about the murder because Perkins believed he was confiding in a confederate.[79] Thus, unless Perkins perceived that Charlton and Parisi were governmental agents capable of controlling Perkins' fate, it could not be said that Perkins was subjected to a coercive

67. Brief for Petitioner at 4.
68. *Perkins*, 176 Ill. App. 3d at 445, 531 N.E.2d at 143.
69. Brief for Petitioner at 5.
70. *Perkins*, 176 Ill. App. 3d at 445, 531 N.E.2d at 143.
71. Brief for Petitioner at 5-9.
72. *Perkins*, 176 Ill. App. 3d at 446, 531 N.E.2d at 143.
73. *Id.* at 445-46, 531 N.E.2d at 143.
74. *Id.* at 446, 531 N.E.2d at 143.
75. *Id.*
76. Brief for Petitioner at 10.
77. *Perkins*, 176 Ill. App. 3d at 446, 531 N.E.2d at 143.
78. *Id.*
79. *Id.* at 446, 531 N.E.2d at 144.

environment.[80]

The appellate court rejected the State's arguments and affirmed the trial court's suppression of the confession. The court reasoned that for purposes of *Miranda*, Perkins was in custody even though the crime for which he was incarcerated was distinct from the crime for which he was interrogated.[81] Relying on *Mathis v. United States*,[82] the court noted that "nothing in the *Miranda* opinion [made] the necessity for warnings dependent on the particular reason why the defendant [was] in custody."[83] Next, the court explained that Perkins was in fact interrogated because "the placement of Parisi in the cellblock with the defendant, and Parisi's inquiry whether the defendant had ever 'done someone,' were words and actions reasonably likely to elicit an incriminating response from the defendant."[84] The court expressed its concern that allowing an undercover governmental agent to ask questions of a suspect without *Miranda* warnings essentially would allow the police to do indirectly what they are not permitted to do directly. Specifically, the court worried that the State's argument if accepted would allow police officers to circumvent *Miranda* merely by deceiving the suspect as to the interrogator's identity.[85]

The court concluded that the surreptitious tactics employed by

80. *Id.* Additionally, the State argued that the jail setting was not coercive because Perkins was familiar with incarceration and therefore was immune from the intimidating atmosphere of prison. *Id.*

81. *Id.* at 447, 531 N.E.2d at 144.

82. 391 U.S. 1 (1968).

83. *Perkins*, 176 Ill. App. 3d at 447, 531 N.E.2d at 144 (citing Mathis v. United States, 391 U.S. 1 (1968)). In *Mathis*, the Court held that a suspect interrogated regarding a new, uncharged crime, while incarcerated for a prior crime, was in custody for purposes of *Miranda*. The actual reason for the custodial detention did not have to correspond with the substance of the interrogation. *Mathis*, 391 U.S. 1, 4-5 (1968).

84. *Perkins*, 176 Ill. App. 3d at 447, 531 N.E.2d at 144. The court relied on the definition of interrogation that the Supreme Court articulated in Rhode Island v. Innis, 446 U.S. 289 (1980); *see supra* notes 38-57 and accompanying text. Also, the court relied on decisions rendered in other jurisdictions that similarly interpreted the application of the *Innis* Court's holding. *See* Holyfield v. State, 101 Nev. 793, 711 P.2d 834 (1985) (when police utilized undercover career prison-informant to obtain information from an incarcerated suspect about a separate uncharged crime, the police ploys subverted "constitutional guarantees which [were] designed to assure fairness and integrity in the truth-seeking process"); State v. Fuller, 204 Neb. 196, 281 N.W.2d 749 (1979) (when police gained the cooperation of an inmate to solicit incriminating information from his cellmate, the testimony was held inadmissible. "[S]ince the [cellmate] was acting as a police agent, this was custodial interrogation and the defendant was entitled to warnings."); State v. Travis, 116 R.I. 678, 360 A.2d 548 (1976) (when undercover police officer was placed in defendant's cell dressed as a hippy and engaged the suspect in a conversation, the trickery employed violated the fifth amendment).

85. *Perkins*, 176 Ill. App. 3d at 449, 531 N.E.2d at 145-146 (citing *Miranda*, 384 U.S. at 469). The court reiterated, "[t]he defendant's fifth amendment constitutional privilege

the police intentionally subverted Perkins' constitutional rights. Consequently, his statements were not given through a knowing and intelligent waiver of those rights.[86] The Illinois Supreme Court denied the State's petition for leave to appeal.[87] Thereafter, the United States Supreme Court granted certiorari.[88]

C. *The Supreme Court Majority Opinion*

In an eight-to-one decision, with Justice Brennan concurring in the result, the United States Supreme Court reversed the Illinois appellate court and held that the use of an undercover agent to solicit incriminating statements from an incarcerated suspect about a crime distinct from the crime for which he was incarcerated, did not constitute "custodial interrogation."[89] The Court stated that *Miranda* was not implicated in this situation and the defendant was not entitled to warnings before being questioned by an undercover agent.[90] It noted that the concerns that underlie the *Miranda* decision are not present when an undercover agent is utilized.[91] The Court explained that *Miranda* exists to preserve the fifth amendment privilege under circumstances that involved the inherently compelling pressures generated by incommunicado interrogation in a police-dominated atmosphere.[92] Under the facts of *Perkins*, the Court did not find the existence of pressure sufficient to undermine the defendant's will and to compel him to speak when he would not otherwise do so.[93] The Court stated that "[t]he essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate."[94] Defining co-

is thus fulfilled only when the agent of the prosecution warns the defendant of his rights pursuant to *Miranda* prior to custodial interrogation." *Id.*

86. *Id.* at 449-450, 531 N.E.2d at 146. The court further explained, "[t]he judiciary must apply constitutional rights, even under new and perhaps difficult circumstances, or the 'constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.' " *Id.* at 450, 531 N.E.2d at 146 (citing Weems v. United States, 217 U.S. 349, 373 (1910)).

87. People v. Perkins, 125 Ill. 2d 572, 537 N.E.2d 816 (1989), *cert. granted*, 110 S. Ct. 49 (1989).

88. Illinois v. Perkins, 110 S. Ct. 49 (1989).

89. Illinois v. Perkins, 110 S. Ct. 2394, 2396 (1990).

90. *Id.* at 2399.

91. *Id.* at 2397.

92. *Id.* (citing *Miranda*, 384 U.S. at 445).

93. *Id.* at 2397.

94. *Id.*

ercion from the perspective of the suspect,[95] the Court reasoned that a coercive atmosphere is not present if the suspect believes himself to be speaking with cellmates.[96] Pressures sufficient to weaken the suspect's will occur only if a suspect knows he is speaking to a government official who appears to control his fate.[97] Here, although there was technically both "custody" and "interrogation," the Court held that the defendant's ignorance of his interrogators' identities prevented a finding of sufficient coercion and therefore negated a finding of custodial interrogation.[98]

The Court also expressly approved the use of subterfuge in a prison setting.[99] The majority stated that "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."[100] The Court decidedly rejected Perkins' argument that the reliability of such confessions was questionable because inmates frequently boast about alleged criminal activities to other prisoners.[101] The Court concluded that *Miranda* was not meant to shelter an inmate who speaks at his own peril "motivated solely by the desire to impress his fellow inmates."[102]

The Court found further support for its conclusion that undercover interrogation was not violative of the Fifth Amendment in its decision in *Hoffa v. United States*.[103] In *Hoffa*, the Court held that undercover agents could be used to investigate a suspect not in custody.[104] In addition, the *Hoffa* Court determined that even though an undercover agent tricked the suspect into believing he was a trusted friend, this did not affect the "voluntariness of the state-

95. *Id.* (citing Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).

96. *Id.*

97. *Id.* The Court explained that compelling pressures are generated when the suspect perceives that the police will reward or penalize him, depending upon how he responds to their inquiries. *Id.* at 2397-98.

98. *Id.*

99. *Id.* at 2397.

100. *Id.* (ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concern) (citing Oregon v. Mathiason, 429 U.S. 492, 495-496 (1977); Moran v. Burbine, 475 U.S. 412 (1986) (when police fail to inform suspect of attorney's efforts to reach him, neither *Miranda* nor fifth amendment require suppression of prearraignment confession after voluntary waiver)). With jails overrun by gangs and violence, it is conceivable that a prisoner would believe that a fellow inmate could influence his fate within the prison. Clearly, this is one reason why the use of undercover agents in prison can be so effective.

101. *Perkins*, 110 S. Ct. at 2398.

102. *Id.* This conclusion fails to recognize that many prisoners actively lie to project a "tough guy image" to ensure their physical safety.

103. 385 U.S. 293 (1966).

104. *Perkins*, 110 S. Ct. at 2398.

ments."[105] Although the Court noted that unlike Perkins, Hoffa was not in custody, the Court determined that the fact of custody did not warrant a presumption that a confession was involuntary without a showing of compulsion.[106] The Court further discounted the importance of custody alone, by distinguishing *Mathis v. United States*.[107] The Court stated that in *Mathis* the suspect *knew* he was dealing with a government official while in custody and for this reason alone, *Miranda* applied.[108]

The Court also rejected Perkins' argument that those decisions holding that the sixth amendment prohibits the use of undercover agents once the prosecution has commenced applied equally to a fifth amendment analysis.[109] The Court explained that this line of cases was not applicable because the sixth amendment protected the accused's right to counsel and prohibited government interference with that right only when the suspect was charged with the crime.[110] At the time of Perkins' encounter with the agent, "no charges had been filed on the subject of the interrogation"; therefore, the sixth amendment was not implicated.[111]

Finally, the Court rejected Perkins' argument that a bright-line test was necessary to effectuate the purposes of *Miranda*.[112] The Court rejected this contention concluding once again that the interests protected by *Miranda* were not implicated when an undercover agent interrogated a suspect.[113]

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105. *Id.*

106. *See supra* note 57 and accompanying text (discussing *Innis*' departure from the proposition that a custodial atmosphere inherently was coercive).

107. 391 U.S. 1 (1968). Significantly, the Court overtly indicated its desire to limit *Miranda* by stating, "[t]he bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official, but we do not have occasion to explore that issue here." *Perkins*, 110 S. Ct. at 2398.

108. *Perkins*, 110 S. Ct. at 2398 (emphasis added).

109. *Id.* at 2398-99. *See* Kuhlmann v. Wilson, 477 U.S. 436 (1986); Maine v. Moulton, 474 U.S. 159 (1985); United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964) (when charges were filed on the subject of the interrogation, the use of undercover agents to deliberately elicit an incriminating response was a violation of the sixth amendment right to counsel). However, the Court was willing to limit this long standing principle. In *Kuhlmann*, the Court held statements admissible under the sixth amendment, when an undercover informant was placed in a jail cell with the defendant to listen for inculpatory statements. The Court held that the informant must take some action to induce a statement before the trickery employed constitutes deliberate elicitation. *Kuhlmann*, 477 U.S. at 456-57.

110. *Perkins*, 110 S. Ct. at 2398-99.

111. *Id.*

112. *Id.*

113. *Id.*

D. The Concurring Opinion

In a concurring opinion, Justice Brennan agreed that the suspect must know that his interrogator is a police agent before such questioning amounts to interrogation in an "inherently coercive" environment requiring application of *Miranda*.[114] To Justice Brennan, the only issue before the Court was whether "*Miranda* [applied] to the questioning of an incarcerated suspect by an undercover agent."[115] The concurring Justice emphasized that "[n]othing in the Court's opinion [suggests] that, had respondent previously invoked his Fifth Amendment right to counsel or right to silence, his statements would be admissible. If respondent had invoked either right, the inquiry would focus on whether he subsequently waived the particular right."[116]

Although Justice Brennan agreed that the requirements of *Miranda* were not implicated, he was highly critical of the police tactics employed in *Perkins* and concluded that the police conduct "[raised] a substantial claim that the confession was obtained in violation of the Due Process Clause."[117] Because fundamental fairness is at issue under a due process analysis, the techniques of custodial interrogation are as significant as the voluntariness of the statements.[118] For Justice Brennan, the unfairness readily was ap-

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114. *Id.* (Brennan, J., concurring).

115. *Id.* at 2399 (Brennan, J., concurring).

116. *Id.* Justice Brennan further suggested that "[s]ince respondent was in custody on an unrelated charge when he was questioned, he may be able to challenge the admission of these statements if he previously had invoked his *Miranda* rights with respect to that charge." *Id.* (Brennan, J., concurring) (citing Arizona v. Roberson, 486 U.S. 675 (1988)).

117. *Id.* at 2399 (Brennan, J., concurring). Justice Brennan further explained:

> This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment . . . . Although these decisions framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether a confession was 'involuntary,' Blackburn v. Alabama, 361 U.S. 199, 207 (1960), the Court's analysis has consistently been animated by the view that 'ours is an accusatorial and not an inquisitorial system,' Rogers v. Richmond, 365 U.S. 534, 541 (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness.

Id. at 2399-2400 (Brennan, J., concurring) (quoting Miller v. Fenton, 474 U.S. 104, 109-110 (1985)).

118. *Id.* at 2400 (Brennan, J., concurring). Justice Brennan expounded upon the need for fundamental fairness in investigative techniques:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feel-

parent in *Perkins*.[119] The police fabricated an elaborate escape scheme to gain Perkins' confidence when he was imprisoned on an unrelated charge.[120] Moreover, Perkins' confinement enabled the government to control Perkins' environment and barrage him with questions in a manner calculated to induce a confession.[121]

In light of the due process implications, Justice Brennan suggested that on remand the Illinois Court apply the well-established "totality of the circumstances" test to determine if the police conduct violated due process.[122] In conclusion, Justice Brennan concluded that there was strong evidence supporting the exclusion of Perkins' confession as a violation of the Due Process Clause.[123]

Justice Brennan disagreed with the majority's conclusion that the Court's holding would not be difficult to apply in practice because the use of undercover agents was a recognized law enforcement technique.[124] The concurring Justice contended that "[a]s the methods used to extract confessions [become] more sophisticated, a [court's] duty to enforce federal constitutional protections [does] not cease. It only [becomes] more difficult because of the more delicate judgments to be made."[125]

> ing that the police must obey the law while enforcing the law, that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Id. (Brennan, J., concurring) (quoting Spano v. New York, 360 U.S. 315, 320-321 (1959)).

119. *Id.* (Brennan, J., concurring).

120. *Id.* (Brennan, J., concurring).

121. *Id.* (Brennan, J., concurring). Justice Brennan believed that the testimony before the Court indicated that Perkins was barraged with questions until he confessed. *Id.* (Brennan, J., concurring).

122. *Id.* at 2400-01 (Brennan, J., concurring). Under the "totality of the circumstances test," the admissibility of a defendant's statements depends solely upon whether they were voluntary within the meaning of the due process clause. The due process clause proscribes the use of statements obtained by unduly offensive means or "under circumstances in which the suspect clearly had no opportunity to exercise a 'free and unconstrained will.'" Oregon v. Elstad, 470 U.S. 298, 304 (1985) (quoting Haynes v. Washington, 337 U.S. 503, 514 (1963)).

123. *Perkins*, 110 S. Ct. at 2400-01. Justice Brennan noted that "[t]he deliberate use of deception and manipulation by the police appears to be incompatible 'with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means,' and raises serious concerns that respondent's will was overborne." *Id.* at 2400 (Brennan, J., concurring) (citation omitted).

124. *Id.* at 2401. *See supra* notes 103-13 and accompanying text (use of undercover agents discussed).

125. *Perkins*, 110 S. Ct. at 2401 (Brennan, J., concurring) (citing *Spano*, 360 U.S. at 321).

E. The Dissenting Opinion

In a dissenting opinion, Justice Marshall argued that the Court was indeed carving an exception into the *Miranda* opinion.[126] The dissenting Justice contended that *Miranda* clearly applied here because the suspect was interrogated by an agent of the police while in custody.[127] Justice Marshall asserted that, in the absence of *Miranda* warnings, Perkins' confession was inadmissible.[128] Justice Marshall disagreed with the majority's distinguishing this case from *Miranda* based on the suspect's lack of knowledge as to the true identity of his interrogators. Justice Marshall stated that such a distinction enabled police to circumvent *Miranda*'s requirement of informing a suspect of his constitutional rights merely by using undercover agents to extract a confession.[129]

Justice Marshall criticized the majority's assertion that Perkins was not in custody "because he was familiar with the custodial environment as a result of being in jail for two days and previously spending time in prison."[130] Noted that familiarity with confinement "[did] not transform . . . incarceration into some sort of non-custodial arrangement,"[131] Justice Marshall also criticized the Court's characterization of Parisi's thirty-five minute interrogation as a "conversation."[132] Parisi asked "a series of questions designed to elicit specific information about the victim, the crime scene, the weapon, Perkins' motive, and his actions during and after the shooting."[133] In short, Parisi's conduct subjected Perkins to direct questioning and created a substantial likelihood that Perkins would incriminate himself.[134]

Justice Marshall also disagreed with the majority's focus on the perceptions of the suspect in determining whether custodial interrogation occurred. Arguing that such a focus misapplied *Miranda*,[135] Justice Marshall emphasized that "*Miranda* was not . . . concerned solely with police *coercion* . . . [but] with *any* police tactics that may operate to compel a suspect in custody to make in-

126. *Id.* (Marshall, J., dissenting).
127. *Id.* (Marshall, J., dissenting).
128. *Id.* (Marshall, J., dissenting).
129. *Id.* (Marshall, J., dissenting).
130. *Id.* (Marshall, J., dissenting).
131. *Id.* (Marshall, J., dissenting) (citing *Orozco*, 394 U.S. 324). The State pressed this point in the Illinois appellate court. *See supra* note 80 and accompanying text.
132. 110 S. Ct. at 2401 (Marshall, J., dissenting).
133. *Id.* at 2402 (Marshall, J., dissenting).
134. *Id.* (Marshall, J., dissenting) (citing Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980)).
135. *Id.* at 2402 (Marshall, J., dissenting).

criminating statements without full awareness of his constitutional rights."[136] For Justice Marshall, police deception and trickery are synonymous with compulsion because they enable the police to forego appraising the suspect of constitutional rights.[137]

Additionally, Justice Marshall argued that prison inherently was coercive and enabled the police to exploit the suspect's insecurities.[138] The control that the prison authorities exercise over the jail cell environment places the suspect in a position of defenselessness.[139] The police exploited Perkins' psychological vulnerability by inducing him to discuss his prior killing to demonstrate his ability to kill if necessary in the proposed escape plan.[140] For Justice Marshall, the exploitation of a psychological vulnerability operated to the same effect as physical coercion; the suspect's ignorance of his interrogator's identity did not eliminate this coercion.[141]

Finally, Justice Marshall emphasized the Court's prior conviction that a bright-line test was necessary to provide clear constitutional guidelines for law enforcement officials.[142] The dissenting Justice opined that the majority's holding exacerbated the lack of clarity already present in the application of *Miranda*. Justice Marshall noted that *Miranda* had been formulated in an attempt to provide a definitive test for the preservation of an individual's fifth amendment privilege. According to the dissent, by refusing to apply *Miranda* in a case that so clearly fell within its scope, the majority only confused and complicated the intended simplicity of *Miranda*.[143]

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136. *Id.* (Marshall, J., dissenting) (citing Miranda v. Arizona, 384 U.S. 436, 468 (1966) and Estelle v. Smith, 451 U.S. 454, 467 (1981)) (emphasis in original).

137. *Id.* (Marshall, J., dissenting).

138. *Id.* at 2403 (Marshall, J., dissenting). Justice Marshall explained, "[t]he psychological pressures inherent in confinement increase the suspect's anxiety, making him likely to seek relief by talking with others." *Id.* (Marshall, J., dissenting).

139. *Id.* at 2403 (Marshall, J., dissenting). Justice Marshall stated that:

> [b]ecause the suspect's ability to select people with whom he can confide is completely within [government] control, the police have a unique opportunity to exploit the suspect's vulnerability. In short, the police can insure that if the pressures of confinement lead the suspect to confide in anyone, it will be a police agent.

Id. (Marshall, J., dissenting) (quoting White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 605 (1979)). *See also* Dix, *Undercover Investigation and Police Rulemaking*, 53 TEX. L. REV. 203 (1975).

140. *Perkins*, 110 S. Ct. at 2403 (Marshall, J., dissenting).

141. *Id.* (Marshall, J., dissenting).

142. *Id.* (Marshall, J., dissenting).

143. *Id.* at 2404 (Marshall, J., dissenting). Justice Marshall aptly noted,

> if *Miranda* now requires a police officer to issue warnings only in those situations in which the suspect might feel compelled to speak by the fear of reprisal

IV. IMPACT

Although the *Perkins* decision clarified the applicability of *Miranda* to the questioning of prisoners held on unrelated charges by undercover police officers, the decision creates a wealth of new problems and ambiguities. Most significantly, the decision rejects the *Miranda* presumption that an interrogation while in police custody is presumptively coercive. After *Perkins*, trial courts must determine the "voluntariness" of a confession on a case-by-case basis. Mere custodial interrogation will no longer suffice to preclude use of an accused's self-incriminating statements. Affirmative evidence of coercion must now be introduced to warrant exclusion of such statements. As a result of this case-by-case approach, law enforcement authorities undoubtedly will go for the "outer limits" of propriety until informed by courts as to what investigatory "techniques" will be tolerated.

A second problem posed by the *Perkins* decision lies in the difficulty of evaluating the reliability of the prisoner/jail cell informant. Because the informant may either be accused or convicted of a crime, the reliability of evidence obtained from an inmate clearly is in doubt.[144] Inmates do not usually qualify as good samaritans, testifying or informing on their fellow inmates in an effort to see justice done. More realistically, inmates look for concrete rewards: "good time" credit against their sentence, a change of cell, a better job assignment, or transfer to a more desirable prison facility in exchange for testimony. Thus, the extensive use of jail cell informants could promote a flood of perjured, or at best, "inaccurate" recollections of alleged statements.[145]

Use of non-police, jail cell informants places the jury in the inev-

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for remaining silent or in the hope of more lenient treatment should he confess, presumably it allows custodial interrogation by an undercover officer posing as a member of the clergy or an attorney hired by others to represent the prisoner. Although such abhorrent tricks would play on a suspect's need to confide in a trusted adviser, neither would cause the suspect to think that the listeners have official power over him.

Id. (Marshall, J., dissenting) (citations omitted).

144. Reliability of such evidence clearly is in doubt in some situations as recently has been pointed out in a series of California cases in which the convict/stoolie later admitted perjuring himself in numerous cases. The convict virtually had been a professional witness for California in all manner of cases, relaying fabricated jailhouse confessions to authorities.

145. The problem is compounded by the fact that lay witnesses, lacking the professional training of police officers, have considerable difficulty in recounting detailed conversations such as that reported by the police officer in *Perkins*. Although wiring a jail cell informant with a microphone and tape recorder would limit the errors in transmission of a jail cell confession, in many instances "body wires" are too risky. A suspect

itable position of trying to determine which of two prisoners is more reliable, the accused or the informant. Once the trial court has determined that the alleged inculpatory statements are admissible into evidence, the jury must decide how to treat these statements. To assist jurors in this determination, an instruction could be given to the jury during the course of the trial at the time they are called upon to consider the informant's testimony. Illinois Pattern Instruction 3.17, Testimony of an Accomplice, could be used as a template for this proposed instruction.[146] Using this instruction, the court could inform the jury that "when a prisoner claims that another prisoner has confessed to a crime, or has made an incriminatory statement concerning a crime, such testimony is subject to suspicion and should be considered with caution. It must be carefully examined and weighed with all the other evidence in the case."

It is unlikely that similar instructions would be necessary when an undercover police officer has been used to obtain a jail cell admission or incriminatory statement. Such testimony obviously is not subject to the same inherent unreliability factors as fellow inmate reported confessions, although it may be subject to other unreliability factors. Police officers are not motivated by the same concerns as inmates, and thus when a trained police officer recounts the details of the alleged confession, the testimony is more readily accepted. Although undercover police officer testimony still is subject to challenge as to veracity, bias, and other credibility factors, a specific instruction beyond that generally given to jurors as to non-undercover police officer testimony would not appear necessary.

A final problem posed by *Perkins* concerns its impact on the practices of law enforcement investigation. The *Perkins* decision arguably allows the police to question surreptitiously already incarcerated individuals regarding any unrelated crimes. Additionally, because the Court now requires positive proof of coercion before *Miranda* becomes applicable, law enforcement officials are apt to use multiple forms of trickery and deceit to obtain inculpatory remarks from the accused. Because trickery undoubtedly is more cost effective than nondeceptive methods of investigation, the

may discover the wire and further efforts of interrogation would be entirely futile if not dangerously foolhardy.

146. I.P.I. sec. 3.17 (Crim.) (2d ed. 1981). This section provides, "[w]hen a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." *Id.*

police quickly will develop a multitude of techniques designed specifically to deceive the accused. Moreover, the decision could result in less than thorough investigations. It is not uncommon for law enforcement officials to curtail, if not abandon, their investigation once a confession has been obtained.

V. CONCLUSION

The *Perkins* Court's finding that surreptitious questioning of an incarcerated suspect by an undercover police officer does constitute custodial interrogation carved the deepest exception to the *Miranda* rule to date. The coercive deception tacitly approved in *Perkins* intrinsically is at odds with the original goals of *Miranda* and the protections of the fifth amendment. Whereas *Miranda* held that custodial interrogation was presumptively coercive, the *Perkins* court required an actual showing of coercion even if a person is interrogated while in custody. This new standard in evaluating the voluntariness of a confession imposes a substantial burden on the trial courts that now must determine when a particular deceptive practice amounts to coercion. The courts undoubtedly will struggle with developing some guidelines for determining when a trick or a deceptive practice causes a statement to become involuntary. Because the Supreme Court has presented no guidelines for making such a determination, confusion and debate are likely to abound over the question in the future.