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use of traditional remedies, unless there existed only a slight possibility of such remedies being adequate to effectuate the policies of the Act.

IV. Conclusion

The Fifth Circuit seems to have read the *Gissel* opinion with greater insight than the Board. While the Board correctly notes that employer misconduct should not go unpunished, it appears to place minimal significance in the Court's directive that employee sentiment must also be protected in determining the advisability of issuing a bargaining order, and that employee sentiment is not a secondary goal, but one equal to that of punishment and deterrence of employer misconduct. The Board also seems to lose sight of the fact that *Gissel* called for the use of traditional remedies rather than a bargaining order, if traditional remedies could be effective. The court of appeals did not question the validity of the order in *Gibson*, but merely asked for greater specificity of findings to determine if the issuance of the bargaining order would meet the *Gissel* criteria. Thus, the Board seems to be in conflict with the Supreme Court's guidance for fashioning a remedy when it concludes that it must never look beyond the original unfair labor practices that precipitate a dissolution of what otherwise would have been majority status.

There would seem to be little doubt that when the Board calls upon the Fifth Circuit to enforce its 1970 affirmance of the 1968 order, the court will again refuse to enforce the order because of the Board's pointed repudiation of *American Cable*. This does not preclude the possibility that the District of Columbia Circuit, or one of the other circuits, would enforce a decision such as *Gibson* on the basis of the Board's reasoning. Of course if the Board and the courts of appeals continue to disagree as to the proper application of the *Gissel* criteria in imposing a bargaining order, it is possible that the Supreme Court will entertain another case such as *Gibson* in order to provide greater illumination into the teachings of *Gissel*.

Dennis R. Lewis

United States v. Prudden: An Application of Miranda To Tax Fraud Investigations

Defendant, a fifty-year-old businessman and law school graduate, was selected by the Internal Revenue Service to be the subject of a tax audit. The revenue agent initially conducting the audit found indications of fraud and reported his find to the Intelligence Division of the Internal Revenue Service. A special agent was then assigned to the case. At his first meeting with the defendant, the special agent identified himself as such and showed the defendant his credentials.[1] Up to this point and during sub-

[1] The revenue agent told Prudden from the outset that the investigation was not routine, that the returns had been selected. United States v. Prudden, 424 F.2d 1021 (5th Cir.), *cert. denied*, 400 U.S. 831 (1970).

sequent meetings the defendant was never made aware by the special agent that a criminal investigation was being conducted. Defendant was never given any of the warnings enunciated in *Miranda v. Arizona*.[2] All of the meetings between the defendant and the Internal Revenue agents, extending over some fifteen months, were conducted at the defendant's convenience on generally amicable terms.[3] Defendant was ultimately indicted for tax fraud. The district court entered an order suppressing evidence furnished by the defendant after the entry of the special agent into the case on the grounds that the evidence was obtained by a deliberate scheme to deceive Prudden in order to prevent his understanding that the investigation had been materially altered at the time the special agent entered the case.[4] The Government appealed the order. *Held, reversed*: *Miranda* warnings are not required in tax investigations where the taxpayer is not deprived of his freedom and is not actually compelled or coerced into furnishing statements or documents. *United States v. Prudden*, 424 F.2d 1021 (5th Cir.), *cert. denied*, 400 U.S. 831 (1970).

I. Miranda v. Arizona: Procedural Safeguards Against Self-Incrimination

In *Miranda v. Arizona*[5] the United States Supreme Court recognized that an individual's fifth amendment[6] right against self-incrimination was in such danger of being violated by police compulsion in custodial interrogations that procedural safeguards had to be set up to secure this right. The Court's reasoning was based on the conviction that the very nature and purpose of police interrogation techniques was the eliciting of confessions: "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation."[7] The Court pointed out that such techniques were psychologically rather than physically oriented.[8] The Court concluded that without proper safeguards an individual would thus have his will to resist undermined and hence be compelled to speak.[9] Therefore, for an individual to be able to exercise his constitutional right against self-incrimination in such an atmosphere he must first be made aware of such right, and second have an opportunity to effectively exercise his option to preserve this right.[10]

There has been much discussion and debate as to whether under the *Miranda* doctrine the one interrogated must actually be in custody before

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[2] 384 U.S. 436 (1966).

[3] The evidence in question was obtained prior to the decision in *Miranda*, but the Supreme Court has ruled that *Miranda* is applicable where the trial begins after June 13, 1966. Johnson v. New Jersey, 384 U.S. 719, 734 (1966).

[4] United States v. Prudden, 305 F. Supp. 110 (M.D. Fla. 1969).

[5] 384 U.S. 436 (1966).

[6] U.S. Const. amend. V.

[7] 384 U.S. at 457.

[8] *Id.* at 448.

[9] *Id.* at 467.

[10] *Id.* at 478-79.

the warnings are required.[11] Under a strict interpretation of *Miranda*, an individual must be taken into custody or deprived of his freedom of action before the warnings must be given.[12] The advocates of such a view look directly to the *Miranda* holding:

> [T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[13]

Those interpreting *Miranda* differently point to what they feel to be the underlying theory of the decision. Their argument is that the Court's primary consideration was the initiation of the adversary process and that custody was merely the point at which such initiation could be identified:[14]

> 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. It is at this point that our adversary system of criminal proceedings commences . . . . [T]he safeguards to be erected about this privilege must come into play at this point.[15]

This view would not limit *Miranda* to custody situations but would require its warnings upon the initiation of the adversary process.[16]

II. Applying Miranda to Tax Fraud Investigations

Tax fraud investigations are criminal in nature and thus theoretically come within the holding in *Miranda*. The difficulty is that the investigative process begins as a civil proceeding and may switch to a criminal one without the suspect's knowing of the change. The IRS begins its investiga-

[11] Andrews, *The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The "Critical Stage,"* 53 Iowa L. Rev. 1074, 1075 n.7 (1968); Wright, *The New Role of Defense Counsel Under Escobedo and Miranda*, 52 A.B.A.J. 1117 (1966).

[12] *See* United States v. Brevik, 422 F.2d 449 (8th Cir. 1970) (the court held that non-custodial tax investigations required no *Miranda* warnings); United States v. Browney, 421 F.2d 48 (4th Cir. 1970) (*Miranda* warnings were not required when the taxpayer was not in custody or deprived of his freedom, and there was no coercion or intimidation on the part of the tax agents); United States v. White, 417 F.2d 89 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970) (a non-custodial interview was held not to be coercive enough to require *Miranda* warnings); United States v. Campione, 416 F.2d 486 (7th Cir. 1969) (no warnings were required since the taxpayer was not deprived of his freedom of action in any significant way); United States v. Charamella, 294 F. Supp. 280 (D. Del. 1968) (*Miranda* was interpreted to require custody before the warnings applied).

[13] 384 U.S. at 444.

[14] *See* United States v. Wainwright, 284 F. Supp. 129 (D. Colo. 1968); United States v. Kingry, 19 Am. Fed. Tax R.2d 762 (N.D. Fla. 1967) (warnings were required at the first visit by the special agent).

[15] 384 U.S. at 477.

[16] For an expansion of "in custody" to situations outside the station house, see Orozco v. Texas, 394 U.S. 324 (1969), where the defendant was questioned in his bedroom by officers who later testified they would not have allowed him to leave. The Court held the warnings were required, pointing to the "or otherwise deprived of his freedom of action in any significant way" language of *Miranda*. *See also* Windsor v. United States, 389 F.2d 530 (5th Cir. 1968) (the warnings were required when the defendant was detained in his hotel room).

tions with a civil audit of the taxpayer's records,[17] conducted by a revenue agent[18] whose function is merely to conduct the audit. The revenue agent thus begins the gathering of information from the taxpayer. If he finds indications of fraud he notifies the Intelligence Division of the IRS.[19] The Intelligence Division reviews the report, known as a fraud referral, and decides whether to begin a criminal investigation.[20] If one is begun, a special agent is assigned to the case. The special agent differs from the revenue agent in that he is a well-trained criminal investigator and not simply an auditor.[21] He has the power to arrest the taxpayer.[22] The special agent begins by contacting the taxpayer and interviewing him in a fashion similar to the revenue agent. These interviews are usually at the taxpayer's convenience, until the special agent decides to take the taxpayer into custody.[23] The significance of the assignment of a special agent is, therefore, that at this point the full investigative powers of the IRS have begun to seek evidence for a possible criminal prosecution.[24]

The courts have not uniformly applied *Miranda* to criminal tax litigation. The early cases applied the strict interpretation[25] and held that in the absence of custodial interrogation the *Miranda* warnings were not required.[26] In *Mathis v. United States*[27] the Supreme Court for the first time required *Miranda* warnings in a tax fraud case. However, the taxpayer in *Mathis* was actually in prison for another offense at the time of his questioning by a revenue agent. The Court held that when a taxpayer is actually in custody, *Miranda* warnings must be given at the inception of a routine civil audit.[28] After *Mathis* most courts continued to follow the strict interpretation of *Miranda*.[29] However, in *United States v. Turzynski*[30] a federal district court indicated that compulsion to incriminate one's self could occur by a combination of the ignorance of one's rights and the implication by the IRS that the purpose of the interrogation was simply accurately to determine tax liability. This compulsion was considered just as real as in custodial interrogation situations. The court held in *Turzynski* that the *Miranda* warnings were required at the first contact by the IRS with the taxpayer after the investigation had converted from civil to criminal. More recently and more importantly, the Seventh Circuit held

[17] 6 CCH 1970 STAND. FED. TAX REP. ¶ 5999A.

[18] For a description of this procedure, see United States v. Turzynski, 268 F. Supp. 847, 849 (N.D. Ill. 1967).

[19] *Id.*

[20] *Id.*

[21] R. SCHMIDT, LEGAL AND ACCOUNTING HANDBOOK OF FEDERAL TAX FRAUD 183-84 (1963).

[22] INT. REV. CODE of 1954, § 7608(b)(2)(B).

[23] Andrews, *supra* note 11, at 1085.

[24] *Id.*

[25] *See* note 11 *supra*, and accompanying text.

[26] For a list of cases, see Andrews, *supra* note 11, at 1088 n.71.

[27] 391 U.S. 1 (1968).

[28] *Id.* at 5.

[29] *See* Marcus v. United States, 422 F.2d 752 (5th Cir. 1970); United States v. Brevik, 422 F.2d 449 (8th Cir. 1970); Simon v. United States, 421 F.2d 667 (9th Cir.), *cert. denied*, 398 U.S. 904 (1970); United States v. Caiello, 420 F.2d 471 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); United States v. White, 417 F.2d 89 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); United States v. Campione, 416 F.2d 486 (7th Cir. 1969); United States v. Jernigan, 411 F.2d 471 (5th Cir.), *cert. denied*, 396 U.S. 927 (1969).

[30] 268 F. Supp. 847 (N.D. Ill. 1967).

in *United States v. Dickerson*[31] that *Miranda* warnings must be given to a taxpayer under criminal investigation by either the revenue agent or the special agent upon first contact with the taxpayer after the case has been transferred to the Intelligence Division. The court noted that because the taxpayer was not informed of the criminal investigation, he found himself in a dilemma. Not knowing the possible consequences of his disclosures he might have felt obligated to supply information simply to expedite the determination of any tax deficiency. A rare taxpayer would know he could refuse to disclose his records to IRS agents, but even he would probably not know the difference in the functions of a revenue agent and a special agent.[32] The court concluded: "Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings . . . ."[33] Thus *Turzynski* and *Dickerson* announced a new judicial viewpoint as to the applicability of *Miranda* to tax fraud investigations. Few courts followed this reasoning, but support was found among several legal commentators.[34]

Anticipation of this new viewpoint was evidenced by the publication of IRS News Releases which indicated internal changes of the procedures to be followed by IRS agents in tax fraud investigations.[35] The most recent release since the *Mathis* decision announced that at the initial meeting a special agent is required to identify himself, describe his functions, and advise the taxpayer that anything he says may be used against him, that he cannot be compelled to incriminate himself by answering questions or producing documents, and that he has the right to seek the assistance of an attorney before responding.[36] At first glance this would seem to rid the courts of the problem of *Miranda* application to non-custodial tax fraud investigations. If the IRS is going to require the essence of the warnings as a matter of policy then there would seem to be no need for a judicial determination of the requirement of the warnings.[37] However, situations have arisen in which special agents have not followed these instructions.[38] Thus, the question of whether the IRS is bound by its own policy statements and procedures has come before the courts. In *United States v. Heff-*

[31] 413 F.2d 1111 (7th Cir. 1969).

[32] *Id.* at 1116.

[33] *Id.*

[34] *See* Lay, *The Effect of Mathis on Right To Counsel in Tax Investigations*, 14 VILL. L. REV. 689 (1969); Comment, *Fifth Amendment Privilege in Criminal Tax Investigations: Miranda and the Omnibus Crime Act*, 42 TEMP. L.Q. 255 (1969). *See also* United States v. Wainright, 284 F. Supp. 129 (D. Colo. 1968); United States v. Kingry, 19 Am. Fed. Tax R.2d 762 (N.D. Fla. 1967).

[35] IRS News Release No. 897 (Oct. 3, 1967): "[I]f the criminal aspects of the matter are not resolved by preliminary inquiry and further investigation becomes necessary the special agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel."

[36] IRS News Release No. 949 (Nov. 26, 1968).

[37] The court in *Prudden* indicated that its holding may be of limited effect since the IRS has required special agents to give the taxpayer all "essential" *Miranda* warnings at the initial conference. 424 F.2d at 1030 n.14.

[38] *See* United States v. Jernigan, 411 F.2d 471 (5th Cir.), *cert. denied*, 396 U.S. 927 (1969).

ner[39] the Fourth Circuit held that governmental agencies must scrupulously observe rules of procedure which they have established for themselves. When they fail to do so, their actions cannot stand, and the courts will strike them down.[40] However, in *United States v. Luna*[41] the western district of Texas declined to follow *Heffner*, saying: "The Constitution and laws may of necessity dictate preconditions for the admissibility of evidence in a federal trial; administrative agencies may not."[42] Therefore, the question of whether *Miranda* warnings are required in non-custodial tax fraud investigations is still not clearly answered.[43]

III. UNITED STATES V. PRUDDEN

In *United States v. Prudden*[44] the Fifth Circuit held that *Miranda* warnings were not required as long as the taxpayer was not deprived of his freedom and not actually compelled or coerced into furnishing statements or documents. In so holding, the Fifth Circuit adopted custody as the sole determinant of compulsion.[45] The court dwelled at length on the fifth amendment concept of compulsion. In analyzing *Miranda* the court was of the opinion that actual or inherent compulsion must be shown before the fifth amendment right against self-incrimination requires *Miranda* warnings.

According to the court, only when the taxpayer is in custody or deprived of his freedom in any significant way can he be said to be under actual or inherent compulsion. This seems to be overly restrictive, since a person does not have to be physically restrained in order to feel compelling psychological pressure. Such compulsion may arise by the confrontation of a taxpayer with a representative of the Government who presents himself in such a manner and conducts himself in such a way as to make the overall situation just as compelling as many custodial interrogations.

At a different level are the psychological pressures an individual may feel, not as a result of custody or even of the demeanor of the questioning official, but as a result of his general feeling of uneasiness in confronting any government agent. No warnings should be required in this type of situation. The compulsion originated with the individual and not from

[39] 420 F.2d 809 (4th Cir. 1969).

[40] The *Heffner* decision was based on United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), wherein the failure of the Board of Immigration and Department of Justice to follow their own procedures was held to be a violation of due process.

[41] 313 F. Supp. 1294 (W.D. Tex. 1970).

[42] *Id.* at 1295.

[43] Should *Dickerson* be adopted by the Supreme Court the problem might arise of the revenue agent's withholding his fraud referral until he has obtained the incriminating evidence, which previously had been the pursuit of the special agent. Establishing a point in time at which the warnings attach would then be difficult. *See* United States v. Davis, 424 F.2d 1241 (5th Cir. 1970).

[44] 424 F.2d 1021 (5th Cir.), *cert. denied*, 400 U.S. 831 (1970).

[45] The court cited with approval Marcus v. United States, 422 F.2d 752 (5th Cir. 1970), United States v. Jernigan, 411 F.2d 471 (5th Cir.), *cert. denied*, 396 U.S. 927 (1969), and Agoranos v. United States, 409 F.2d 833 (5th Cir.), *cert. denied*, 396 U.S. 824 (1969), all of which held that the *Miranda* doctrine applies only to cases of in-custody interrogation. The court said that even if Prudden could show that his investigation was one with "dominant criminal overtones," he could not invoke *Miranda* because he could not show compulsion. 424 F.2d at 1031. Based on the court's approval of *Marcus*, *Jernigan*, and *Agoranos* one can only conclude that custody is the court's sole determinant of compulsion.

any outside agency. To require warnings in such a situation, which would apparently be required under the *Turzynski* and *Dickerson* holdings, would also prescribe that the warnings be given at the inception of the original civil audit, where the revenue agent's main purpose is to determine the true tax liability of the subject of the investigation. This reasoning would also require all governmental administrative officials to give full *Miranda* warnings every time there is a confrontation with a citizen where there is the possibility of a criminal prosecution.[46] Such a requirement would stifle administrative efficiency by requiring additional investigation for civil information should the citizen decide not to speak, and should he request an attorney, the expense of providing one in so many instances would be unbearable. Moreover, the warnings themselves would be reduced to such a commonplace level that citizens would begin to pay them no heed.[47]

IV. Conclusion

The court in *United States v. Prudden* has ruled that *Miranda* warnings are required only under compulsive situations, and that compulsion does not exist outside of actual custody. Therefore, according to *Prudden*, a taxpayer being investigated for tax fraud is not under compulsion unless he is taken into custody, and until that point is reached the investigator is under no duty to warn him of his constitutional rights. A more reasonable approach, and one borne out by the Internal Revenue Service's ruling on the matter,[48] would appear to be to recognize that the pressures of a tax investigation and the attitude of the investigator may make the taxpayer feel compelled, if he is not apprised of his rights, to reveal evidence which could incriminate him in a subsequent trial for tax fraud. In order to take account of this possibility, the court should allow itself, in its announced policy of case-by-case determination of the applicability of *Miranda* warnings in tax fraud cases,[49] to go beyond the narrow confines of custody in its search for the fundamental element of compulsion.

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[46] The *Dickerson* reasoning relies on the possibility of criminal prosecution that accompanies an administrative inquiry. *See* note 31 *supra*, and accompanyng text. But such a possibility exists in varying degrees in most administrative inquiries. Therefore, if the *Dickerson* reasoning is sound, it will not admit of degrees and all such inquiries will be covered.

[47] Should the government agent be guilty of fraud, deceit, or trickery in obtaining information from the taxpayer, such information would be inadmissible in a criminal proceeding against the taxpayer. This was discussed by the court when it said: "While we recognize that fraud, deceit or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable, Prudden, as the moving party in the motion to suppress, did not sustain the burden that was his of demonstrating that fraud, deceit or trickery were present." 424 F.2d at 1032.

[48] IRS News Release No. 949 (Nov. 26, 1968).

[49] "In applying *Miranda*'s rule, this Circuit has taken a case-by-case approach . . . ." 424 F.2d at 1030.