Vanderbilt Law Review

Volume 31
Issue 4 *Issue 4 - May 1978*

Article 11

5-1978

Recent Cases

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RECENT CASES

Constitutional Law—Criminal Proccdure—Courts Split on the Necessity of Separate Authorization for a Covert Entry Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968

I. INTRODUCTION

Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[1] which regulates the use of electronic surveillance,[2] was designed to protect "the privacy of wire and oral communications," and to delineate "on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."[3] In general, communications may be intercepted only by law enforcement officers,[4] who are engaged in the investigation of a certain type of crime,[5] and who have obtained a court order based upon probable cause that authorizes the use of electronic surveillance.[6] Although certain details of the particular interception must be specified in the court order,[7] the statute does

1. 18 U.S.C. §§ 2510-2520 (1976). For an extensive treatment of Title III, see J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE (1977).

2. Electronic surveillance includes both "wiretapping" and "eavesdropping" or "bugging." Wiretapping is the interception of telephonic conversations; eavesdropping or bugging is the interception of conversations not transmitted by wire. 18 U.S.C. § 2510 (1976); 57 B.U. L. REV. 587 & n.1 (1977).

3. S. REP. No. 1097, 90th Cong., 2d Sess. 66, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153. Moreover, "the major purpose of title III is to combat organized crime." *Id.* at 70, [1968] U.S. CODE CONG. & AD. NEWS at 2157.

4. 18 U.S.C. § 2518(1)(a) (1976). A definition of an "investigative or law enforcement officer" is given at 18 U.S.C. § 2510(7):

> "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

Exceptions from the requirement that the interception be made by a law enforcement officer can be found at 18 U.S.C. § 2511(2)-(3) (1976).

5. 18 U.S.C. § 2516 (1976).

6. 18 U.S.C. § 2518 (1976).

7. The necessary elements of the court order are:

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

not expressly require that the judge who authorizes the use of electronic surveillance also authorize covert entries that may be required to place the electronic listening devices.[8] Until recently the federal courts apparently had assumed that an order authorizing the use of electronic surveillance implicitly authorized a surreptitious entry by law enforcement officials to install the necessary device.[9] In *United States v. Ford*,[10] however, the District of Columbia Circuit became the first federal court of appeals to reject this assumption, holding that absent express judicial authorization, a trespassory entry incident to the placement of an electronic listening device is an invasion of privacy that violates the fourth amendment. The Second Circuit subsequently disagreed in *United States v. Scafidi*,[11] holding that authorization of electronic surveillance renders unnecessary explicit authorization of a covert entry incident to the interception. Analysis of these two decisions requires an examination of prior judicial reasoning that recognized the applicability of fourth amendment principles to the interception of oral communications, defined the limits these principles place on the use of electronic surveillance, and led to the passage of Title III.

II. LEGAL BACKGROUND

In *Olmstead v. United States*[12] the Supreme Court for the first time addressed the issue whether an interception of oral communications through electronic surveillance triggers fourth amendment protection.[13] Reading the fourth amendment literally,[14] the Court

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has first heen obtained.

18 U.S.C. § 2518(4) (1976).

8. *E.g.*, United States v. Dalia, 426 F. Supp. 862, 865 (D.N.J. 1977).

9. *See* United States v. Scafidi, 564 F.2d 633, 639 (2d Cir. 1977).

10. 553 F.2d 146 (D.C. Cir. 1977).

11. 564 F.2d 633 (2d Cir. 1977).

12. 277 U.S. 438 (1928).

13. The petitioners had operated a large scale business based on illegal importation, possession, and sale of liquor. They were convicted of conspiracy to violate the National Prohibition Act after federal officers gained incriminating evidence from several wiretaps. Certiorari was granted with "the distinct limitation that the hearings should be confined to the single question whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments." *Id.* at 455. The Court, however, later noted that because the fifth amendment was inapplicable in this case absent a violation of the fourth amendment, the sole consideration of the Court would be whether the government had violated the fourth amendment. *Id.* at 462.

14. The fourth amendment provides:

held that wiretaps made without trespass upon the defendant's property did not violate the Constitution because the government had neither seized tangible materials nor engaged in a physical intrusion.[15] *Olmstead* thus limited the protection of the fourth amendment to physical things and physical areas.[16] In essence, the *Olmstead* doctrine contained two prongs: (1) only material things are protected from seizure within the meaning of the fourth amendment, and (2) a physical trespass is required for an interception of conversations to violate the fourth amendment.[17] In *Goldman v. United States,*[18] the Court extended the applicability of the *Olmstead* doctrine beyond wiretaps to all cases of electronic surveillance.[19]

The first prong of the *Olmstead* doctrine was undermined in *Silverman v. United States.*[20] In *Silverman,* police officers recorded incriminating conversations by pushing an electronic listening device through the party wall of an adjoining house until it touched the heating ducts in the defendants' house. The Court held that the testimony of police officers describing the conversations had been

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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The court refused to enlarge the scope of fourth amendment protection beyond that provided by a strict construction of the constitutional language. *See* 277 U.S. at 464-66.

15. The Court held that wiretapping did not amount to a search or seizure within the meaning of the fourth amendment "unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." *Id.* at 466.

16. Although *Olmstead* did not use the term "constitutionally protected area," *infra* text accompanying note 22, implicit in its stress upon an actual physical invasion is a finding that the fourth amendment protects, in addition to material things, only certain defined areas.

17. The two-pronged *Olmstead* doctrine has been discussed by numerous commentators. *E.g.,* Decker & Handler, *Electronic Surveillance: Standards, Restrictions and Remedies,* 12 CAL. W.L. REV. 60, 62 (1975); Scoular, *Wiretapping and Eavesdropping Constitutional Development from Olmstead to Katz,* 12 ST. LOUIS U.L.J. 513, 516 (1968).

18. 316 U.S. 129 (1942).

19. Petitioners were convicted of conspiracy to violate § 29(b)(5) of the Bankruptcy Act after federal agents intercepted incriminating evidence by means of a detectaphone placed against the wall of a room adjoining the office of one of the petitioners. The agents had committed a prior trespass to install a listening device, but the device malfunctioned. The Court thus concluded that the trespass was irrelevant to the evidence later obtained by the detectaphone. Since there was no trespass related to the intercepted conversations, the Court, expressly refusing to distinguish *Goldman* from *Olmstead* on the basis of a difference between eavesdropping and wiretapping, held that the trial court had correctly admitted the government's evidence. *Id.* at 134-35.

20. 365 U.S. 505 (1961). The crimes involved in *Silverman* were gambling offenses under the District of Columbia Code.

erroneously admitted and set aside the convictions. Although it disclaimed the technicality of a trespass as a basis for its holding,[21] the Court stressed that the officers' activity constituted an unauthorized physical penetration into a "constitutionally protected area."[22] Implicit in *Silverman*'s ruling was an assumption that surveillance of oral communications alone might trigger fourth amendment protection.[23] Two years later in *Wong Sun v. United States*,[24] the Court expressly held that conversations might be protected by the fourth amendment, but it limited the scope of that protection to instances of unlawful entry.[25]

By deemphasizing the importance of a trespass to invoke fourth amendment protection for oral statements, *Silverman* also weakened the validity of the second prong of the *Olmstead* doctrine, which demanded a trespass incident to electronic surveillance as a prerequisite to constitutional protection. The Court expressly overruled the trespass prong in *Katz v. United States*,[26] concluding that because "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures," a physical

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21. The Court stated:

> A distinction between tbe detectaphone employed in *Goldman* and the spike mike utilized here seemed to the Court of Appeals too fine a one to draw. The court was "unwilling to believe that the respective rights are to be measured in fractions of inches." But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area.

Id. at 512.

22. *Id.*; *see* note 16 *supra* and accompanying text.

23. Although there was a physical intrusion, the Court's uneasiness with the trespass requirement indicates that the focus of the constitutional protection may have been the conversations.

24. 371 U.S. 471 (1963).

25. Petitioners in *Wong Sun* were convicted of fraudulent and knowing transportation and concealment of illegally imported heroin. One item of evidence was an incriminating oral statement made by one of the petitioners to federal officers who had illegally entered the petitioner's business establishment. The Court held that the exclusionary rule barred this verbal evidence. It stated:

> It follows from our holding in Silverman v. United States that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects." . . . Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.

Id. at 485-86 (citations omitted).

26. 389 U.S. 347 (1967). Petitioner was indicted for transmitting gambling information across state lines. At trial, the government introduced evidence of telephone conversations obtained by FBI agents who had attached an electronic listening and recording device to the outside of a telephone booth from which petitioner placed calls. After his conviction, petitioner challenged the constitutionality of the government's action in intercepting his conversations.

intrusion is not necessary to trigger constitutional protection for oral communications.[27] *Katz* thus rendered obsolete the traditional definition of a fourth amendment search as an intrusion into a "constitutionally protected area,"[28] indicating that the fourth amendment protects against invasions of any privacy interest upon which an individual justifiably has relied.[29]

Because the Court has established that electronic surveillance triggers fourth amendment protection, an oral interception clearly must meet the same constitutional requirements imposed on all searches, including those searches requiring a physical entry to seize tangible evidence. In general, the government may only conduct searches to seize evidence pursuant to judicially issued warrants.[30] This requirement was applied in *Katz,* in which the Court emphasized the crucial importance of obtaining prior judicial authorization of electronic surveillance operations, noting that in its absence the discretion of the police is the sole protection against fourth amendment violations.[31] Under the "plain view" doctrine, formulated in *Coolidge v. New Hampshire,*[32] however, evidence may be seized without a warrant if it is discovered inadvertently in the process of a justifiable intrusion and if it is immediately apparent that the evidence is incriminating.[33] Additionally, a search warrant must particularly describe the place to be searched and the persons or things to be seized;[34] general warrants are constitutionally impermissible.[35] The Court expressly held the particularity requirement

27. *Id.* at 353.

28. The Court stated that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' " *Id.* at 350; *see* notes 16 & 22 *supra* and accompanying text.

29. The Court found that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353.

30. In *Katz,* the Court noted that "[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.* at 357.

31. *Id.* at 358-59.

32. 403 U.S. 443 (1971). Petitioner in *Coolidge* had been convicted of murder. At trial, the government introduced evidence obtained during a search made pursuant to a warrant issued by the state attorney general, who had been in charge of the investigation and was chief prosecutor at trial. The Supreme Court reversed the conviction, holding the search warrant invalid.

33. *Id.* at 465-66.

34. The fourth amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

35. General warrants were so offensive to the American colonists that their use was a factor in the writing of the Declaration of Independence. *See* Berger v. New York, 388 U.S. 41, 58 (1967).

applicable to authorizations of electronic surveillance in *Berger v. New York*,[36] which marked the Court's first attempt to describe the requisite characteristics of constitutionally permissible eavesdropping.[37] Indeed, the Court noted that while particularity is required whenever a fourth amendment intrusion is authorized, it is especially important in warrants authorizing the use of electronic surveillance because of the extreme intrusion on privacy inherent in eavesdropping.[38] Consequently, the Court mandated that such intrusions be minimized to the greatest extent possible.[39] The *Berger* Court also stressed the importance of having a neutral authority authorize the interception.[40]

In response to the requirements established in *Berger* and *Katz*, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[41] Although Title III requires a court order to effect investigative electronic surveillance, its silence on the question of express judicial authorization to make covert entries incident to the surveillance has produced the conflicting results in *Ford* and *Scafidi*.

III. THE INSTANT OPINIONS

In *Ford* the government intercepted incriminating oral communications using electronic listening devices planted by means of a bomb scare ruse in the place of business of one of the defendants.[42]

36. 388 U.S. 41 (1967).

37. Petitioner, acting as a "go-between" for the principal conspirators, was convicted of conspiracy to bribe the chairman of the New York State Liquor Authority in return for the awarding of liquor licenses to the Playboy and Tenement Clubs in New York City. Over the petitioner's objection, the state produced evidence at trial that had been obtained through judicially authorized electronic surveillance. The issue before the Supreme Court was the validity of New York's eavesdrop statute. The Court concluded that the statute was too broad, thus violating the fourth and fourteenth amendments. Among the defects that the Court found in the statute were the following: (1) a lack of required particularity in the warrant as to the crime involved and the conversations to be recorded, (2) the extremely long period of surveillance permitted under a single warrant, (3) the issuance of extensions without new showings of probable cause, (4) the lack of a termination date on the eavesdrop once the desired conversation was intercepted, (5) the permission to make unconsented entries without the requirement of a showing of exigent circumstances, and (6) the absence of a requirement of a return on the warrant. *Id.* at 55-60.

38. *Id.* at 56.

39. *Id.* at 59-60.

40. *Id.* at 54.

41. 18 U.S.C. §§ 2510-2520 (1976).

42. Members of the District of Columbia Metropolitan Police Department effected the surveillance at the Meljerveen Ltd. Shoe Circus, a suspected site of narcotics activity. Two bomb scare ruses were employed since the listening devices installed in the first attempt malfunctioned. All defendants were indicted for conspiracy to distribute and possess with intent to distribute narcotic drugs in violation of 21 U.S.C. § 846 (1970). Two of the defendants were charged with distributing a controlled substance in violation of 21 U.S.C. § 841(a)

Although the intercept order authorized both the use of electronic surveillance and any manner of entry to effect the interception,[43] the defendants moved to suppress the evidence, claiming that the order was overly broad. The Court of Appeals for the District of Columbia Circuit affirmed the lower court's order to suppress the evidence[44] and held that a nonconsensual, surreptitious entry[45] made in connection with electronic surveillance requires particularized judicial authorization that is distinct from the authorization of the eavesdrop itself.[46]

In reaching its conclusion, the court first noted that the government's action implicated two distinct fourth amendment guarantees—protection from unconsented physical entry into private premises and from unauthorized interceptions of oral statements.[47] The court found that although *Katz* had held that a physical trespass is not a prerequisite to fourth amendment protection for oral communications,[48] it did not render the safeguards of the fourth amendment inapplicable to a physical intrusion.[49] *Katz* thus expanded, rather than diminished the protection of the fourth amendment.[50] Consequently the court rejected the government's conten-

(1970). One defendant was charged with possession of a narcotic drug in violation of 33 D.C. Code § 402 (1973). 553 F.2d at 150 & n.14.

43. The order read in part:

(d) Members of the Metropolitan Police Department are hereby authorized to *enter and re-enter* the Meljerveen Ltd. Shoe Circus located at 4815 Georgia Avenue, Northwest, Washington, D.C., for the purpose of installing, maintaining, and removing the electronic eavesdropping devices. *Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse and strategem.*

553 F.2d at 149-50 (emphasis supplied by court). The intercept order was made pursuant to the D.C. Code provisions that deal with electronic surveillance. Since these provisions "track" the provisions of Title III, however, *id.* at 148 n.4, the decision in *Ford* is directly applicable to the discussion of Title III in this Comment.

44. The District Court for the District of Columbia accepted as true the government contention that the judge who authorized the surveillance knew of and approved in advance the bomb scare ruses. Since there was no formal record of judicial approval, however, the court limited its scrutiny to the face of the warrant, which it found overly broad because it failed to limit the number of entries and failed to specify the time and manner of entry to be used in effecting the surveillance. United States v. Ford, 414 F. Supp. 879, 884 (D.D.C. 1976).

45. The court stated that "[b]y surreptitious entry we mean either entry by ruse or strategem or covert entry." 553 F.2d at 154 n.32.

46. *Id.* at 154-55.

47. *Id.* at 152-53. The dual fourth amendment interests inherent in electronic surveillance effected by a trespassory installation of listening devices was also recognized in United States v. Agrusa, 541 F.2d 690, 696 (8th Cir. 1976). *See* note 65 *infra.*

48. *See* notes 26-29 *supra* and accompanying text.

49. 553 F.2d at 157-58. The court also rejected the contention that *Berger* eliminated fourth amendment protection for covert entries incident to electronic surveillance, concluding that it merely extended particularity requirements to eavesdropping. *Id.* at 157.

50. *Id.*

tion that a covert entry incident to electronic surveillance is not independently within the fourth amendment's protection. The court also rejected the government's argument that even if incidental covert entries are within the protection of the fourth amendment, a valid Title III order makes intrusions on physical privacy per se reasonable and thus vitiates the need for express authorization to make a surreptitious entry.[51] Noting the general rule that a warrant must be obtained before a fourth amendment privacy interest is invaded,[52] the court concluded that no exception to the warrant requirement should be created for covert entries incident to electronic surveillance.[53] In this regard the court rejected the government's contention that courts do not have the necessary expertise to specify the manner of entry required to plant listening devices, finding it untenable in light of the function the judiciary plays in determining the reasonableness of police actions.[54] Moreover, the court characterized the government's argument that any additional invasion of privacy resulting from a covert entry is minor in view of the invasion resulting from the surveillance itself[55] as inconsistent with the fourth amendment.[56] Having concluded that the fourth amendment indeed mandates prior judicial authorization of a covert entry incident to electronic surveillance,[57] the court found the intercept order at issue overly broad,[58] declaring that under the principle established in *Berger* and codified in Title III, the showing of probable cause must fully correspond to the intrusion authorized, and that the police failed to demonstrate a need for the vast discretion afforded them by the warrant.[59]

In *Scafidi* FBI agents, operating pursuant to a Title III inter-

51. The second contention raised by the government is essentially the same proposition enunciated in United States v. Altese, No. 75-341 (E.D.N.Y. Oct. 14, 1976) and United States v. Dalia, 426 F. Supp. 862 (D.N.J. 1977) in finding authorization for a covert entry implicit in the authorization to use electronic surveillance.

52. 553 F.2d at 160 n.47, 160-62; *see* note 30 *supra* and accompanying text.

53. 553 F.2d at 162-63. The court found that "the only rationale for creating a categorical exemption from the warrant requirement . . . would be the convenience of the executing officers." *Id.* at 163.

54. The court stated that such a contention "would lead not only to abrogation of the warrant requirement, but also to the unacceptable conclusion that courts are inherently incapable of reviewing the reasonableness of police action taken with the intent to install or maintain eavesdropping devices." *Id.* at 162.

55. *Id.*

56. Quoting from Chimel v. California, 395 U.S. 752, 764-65 (1969), the court concluded that this argument "is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." 553 F.2d at 162.

57. 553 F.2d at 164-65; *see* text accompanying note 46 *supra.*

58. 553 F.2d at 170.

59. *Id.* at 167-68.

cept order that lacked both specific authorization for covert entries and a statement of the manner of entry to be used,[60] placed listening devices at premises used by the defendants for alleged criminal activities.[61] After their convictions, nine defendants appealed, claiming that the government had acted without authority in making surreptitious entries incident to the surveillance.[62] The Court of Appeals for the Second Circuit upheld the convictions, ruling that an intercept order authorizing the installation of a listening device in particular premises obviates the need for separate authorization of a covert entry to install the device.[63]

In support of its conclusion the court first noted that in enacting Title III, Congress clearly intended the use of surreptitious entries in certain instances.[64] Although recognizing the split in the federal courts as to the necessity of specific judicial authorization of entries incident to authorized surveillance,[65] the court concluded that in order to be effective, an intercept order necessarily grants implicit authority to make whatever reasonable entries are required

60. 564 F.2d at 639.

61. The defendants were operating a numbers lottery in Brooklyn during three different time periods at three separate locations. Evidence was obtained at two of these sites by electronic surveillance. Twenty defendants were tried together on four counts, but only nine were convicted, all for operating illegal gambling businesses, in violation of 18 U.S.C. § 1955 (1976).

62. Defendants made other claims on appeal, including insufficiency of affidavits underlying the intercept order. 564 F.2d at 638-42.

63. *Id.* at 640.

64. *Id.* at 639.

65. *Id.* In addition to the cases cited, consider United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), United States v. Volpe, 430 F. Supp. 931 (D. Conn. 1977), and *In re* United States, 563 F.2d 637 (4th Cir. 1977). In *Agrusa,* the Title III warrant expressly authorized surreptitious entries, although the breadth of the authorization was similar to that found fatally defective in *Ford.* 541 F.2d at 693. The court affirmed the defendant's conviction, declining to decide what resolution it would reach if express approval of covert entries had not been given. It stated, however, that a lack of express authorization would have made its decision more difficult. *Id.* at 696. A recent comment on *Agrusa* finds prior judicial authorization of surreptitious entries incident to electronic surveillance necessary. 57 B.U. L. REV. 587 (1977). It states:

> Contrary to the conclusion in *Agrusa,* the addition of the element of a forcible entry to effect an electronic surveillance is not merely "one of degree." A forcible entry to install a bug substantively changes the nature of the search because it constitutes a more significant privacy intrusion than does a nontrespassory method of interception, such as a wiretap. This difference rises to a constitutional level and requires that a magistrate determine whether a nontrespassory method of surveillance is available before authorizing surreptitious entry to install a bug.

Id. at 599. The comment notes that a forcible entry adds to the intrusiveness of eavesdropping by creating a potential for police abuse through both rummaging and pretextual searches associated with the plain view doctrine, by offending society's sense of security, and by allowing the government to engage in eavesdropping. *Id.* at 600-05. *In re United States,* the only other circuit court decision besides *Ford* and *Scafidi* to squarely confront the issue of separate authorization, takes a position similar to that in *Ford.*

to effect the interception.[66] The court also found significant the failure of Congress to provide in Title III, in general a highly detailed statute, a requirement of separate authorization for a covert entry.[67] Additionally, the court pointed out that because courts lack the requisite familiarity with both the installation of listening devices and the premises under surveillance,[68] a judge who explicitly authorizes the manner and place of installation might be forced to visit the premises. The court also noted that if the directions contained in the intercept order were extremely detailed, unforeseen deviations due to emergencies might render the actions of the executing officers illegal.[69] The court thus determined that judges should leave the manner of execution of an intercept order to the discretion of law enforcement agencies, whose competence in the area of electronic surveillance exceeds that of the judiciary.[70]

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66. The court stated that:

> [T]he most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

564 F.2d at 639-40; *see* note 51 *supra* and accompanying text.

67. 564 F.2d at 640.

68. The expertise argument also was made in *Ford*. *See* note 54 *supra* and accompanying text.

69. 564 F.2d at 640.

70. *Id.* Judge Gurfein concurred with the opinion of the court written by Judge Moore. He observed that Title III requires not that a warrant specify the manner of effecting the placement of a listening device, but rather that it include "a particular description of the place where the communication is to be intercepted." *Id.* at 643. Moreover, he found significant a 1970 amendment to Title III, Pub. L. No. 91-358, § 211(b), 84 Stat. 654 (amending 18 U.S.C. § 2518(4)), which allows the order authorizing electronic surveillance to direct "a communication carrier, landlord, custodian or other person . . . to furnish . . . all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively." He observed that "[w]ith its [Congress'] attention having been called to the need for doing the job 'unobtrusively' to the point of enlisting the aid of persons whose aid would amount to trespass, ... the requirement that he [the judge] separately sanction each surreptitious entry . . . . can hardly be due to congressional oversight." 564 F.2d at 643-44. Judge Gurfein also concluded that the fourth amendment requirements are satisfied by a Title III order that does not expressly authorize covert entries, stating that:

> The orders here [in question] do conform precisely to the requirements of the Fourth Amendment as well as to those of § 2518. They particularly describe the *premises* to be "searched." They state that there is probable cause to believe that particular oral conversations of *named* persons and others concerning the *specified* offenses will be obtained through the interception at the *named* premises which, there is probable cause to believe, are being used for commission of the *named* offenses. "Prompt" execution of the authorization is ordered, and the interception is limited not only in time but to occasions when at least one of the named subjects is present.

Id. at 644 (emphasis supplied by court). In addition, he noted that although *Berger* involved a surreptitious entry, the Supreme Court did not mention it as a separate constitutional problem. He conceded that the dissent was correct in concluding that covert entries incident to electronic surveillance might be dangerous, but argued that law enforcement agents are

IV. COMMENT

The instant decisions represent the first federal appellate court attempts to determine whether covert entries to install electronic listening devices are implicitly authorized in Title III orders providing only for the interception of communications.[71] The analysis adopted by the Second Circuit in *Scafidi* has little to commend it. The court subjectively concluded that the "most reasonable interpretation" of a Title III intercept order is that it implicitly authorizes law enforcement officials to enter private premises to install listening devices.[72] The court sought to buttress this conclusion by emphasizing both the practical problems it found inherent in separate authorization[73] and Title III's failure to expressly require that covert entries be separately authorized.[74] This "common sense"[75] approach in effect treats resolution of the issue of implicit authorization as a mere exercise in statutory interpretation. Although Title III's provisions governing the issuance of intercept orders arguably may be construed to permit covert entries to install listening devices without express judicial authorization, the *Scafidi* approach ignores a vital threshold issue that must be resolved prior to any interpretation of congressional intent—whether the fourth amendment itself permits implicit authorization of covert entries. The drafters of Title III sought to embody in a comprehensive statute the fourth amendment's protection against unreasonable intrusions into the privacy of oral communications articulated by the Supreme Court in *Berger* and *Katz*.[76] As the *Ford* court properly recognized, however, the fourth amendment provides no less protection against un-

better able to evaluate the risks inherent in effecting interceptions than are judges. Although Judge Gurfein rejected the necessity of separate authorization for a covert entry, he suggested that judges make such an express authorization until the Supreme Court speaks on the issue.

Judge Smith dissented from the majority opinion. *Id.* at 645. He stressed that the different methods of planting listening devices entail varying degrees of danger and that in some instances a trespassory entry might not be required. He thus concluded that a judge should be required to pass on the method used to effect electronic surveillance.

71. *See* note 65 *supra* and accompanying text.

72. *See* note 66 *supra* and accompanying text.

73. *See* notes 68-69 *supra* and accompanying text.

74. *See* text accompanying note 67 *supra.*

75. That the court is addressing the issue of the necessity of separate authorization from what it sees as a "common sense" point of view is obvious from the language used in the opinion. Not only does the court speak of "the most reasonable interpretation" of a Title III intercept order, *see* text accompanying note 72 *supra,* but it also includes such conclusory statements as "[a]nd such placing will have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a 'bug' to intercept his conversations," and "[i]t would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation." 564 F.2d at 640.

76. *See* text accompanying note 41 *supra.*

reasonable intrusion into private premises.[77] Thus, even if *Scafidi* is correct in asserting that a Title III intercept order implicitly authorizes incidental covert entries, such an implicit authorization nonetheless must withstand constitutional scrutiny.

Ford, in contrast to *Scafidi,* focuses on the issue whether implicit authorization of covert entries is constitutionally permissible[78] and correctly concludes that the fourth amendment requires separate authorization in order to protect private premises from unreasonable physical intrusions. A covert entry pursuant to a Title III intercept order that merely authorizes the interception of communications is analogous to a general search warrant[79] because it places unfettered discretion in law enforcement officials to decide on the manner of entry and the scope of the search undertaken in locating a suitable place to install an authorized listening device. Law enforcement officials thus conceivably might rummage the entire premises under the guise of installing or relocating such devices,[80] and in the course of their search might seize personal papers and effects discovered in "plain view," which presumably would be admissible at trial.[81] Moreover, an intercept order lacking express authorization of limited covert entries might be employed as a pretext to search for tangible evidence in cases when the government is able to meet the probable cause requirements for issuance of an intercept order, but cannot make a showing of probable cause sufficient to obtain a warrant to search for tangible evidence.[82] Like

77. As noted by the court in *Ford,* the *Katz* decision expanded, not diminished, the scope of fourth amendment protection. *See* notes 49-50 *supra* and accompanying text.

78. *See* notes 47-59 *supra* and accompanying text.

79. *See* notes 34-35 *supra* and accompanying text. *But see* 564 F.2d at 644 (Gurfein, J., concurring) ("the order is detailed enough to defeat any realistic claim that it is a 'general warrant' ").

80. This type of "rummaging" was noted by the court in *Ford.* 553 F.2d at 158. The potential for police abuse of the plain view doctrine in this context was also recognized in 57 B.U. L. REV. 587, 601-02 (1977). *See* note 65 *supra.*

81. *See* notes 32-33 *supra* and accompanying text.

82. This abuse of "pretextual searches" was recognized in 57 B.U. L. REV. 587, 601-02 (1977). While the probable cause requirements for obtaining an intercept order and for obtaining a search warrant for tangible evidence may be essentially equivalent where both are requested to facilitate investigation of the same criminal activity, the requirements may vary when different crimes are involved. For example, law enforcement officials may possess sufficient evidence to demonstrate probable cause that drugs are being transported across state lines and thus may be able to obtain a Title III warrant to intercept communications related to the drug operation. In addition the law enforcement officials may suspect that the same parties are harboring stolen goods in a given location but have insufficient evidence to obtain a search warrant for the purpose of seizing that tangible evidence. If in such a case the officers may obtain an intercept order that in effect constitutes implicit authorization to make covert entries incident to the surveillance, they may fashion the manner of entry to maximize their chances of encountering the suspected goods. Of course, if the officers have sufficient evidence to obtain an intercept order, they may also be able to obtain separate

searches made under the guise of locating a proper place to install a listening device, pretextual searches conflict with Supreme Court decisions requiring that warrants be particularized as to the place to be searched and the evidence to be seized.

Implicit authorization of covert entries is also inconsistent with the constitutional requirement that oral evidence be gathered in such a manner as to minimize intrusions into private premises. This "least intrusive means" requirement, articulated in *Berger*[83] and implicit in *Katz*, attempts to minimize the distinct invasion of privacy that results from an entry incident to an oral interception,[84] and may frequently require that conversations be intercepted by means of wiretaps, which can be effected without physical trespass, rather than by the installation of listening devices on private premises.[85] If, however, the authorizing judge determines that a listening device must be employed to intercept communications, he still must ensure that the physical intrusion necessary to install the device be minimized to the greatest extent possible.[86] An implicit authorization, which necessarily places no limitation on the number of devices to be installed or upon their location within the premises, does

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authorization to make entries, assuming the surveillance cannot be accomplished by less intrusive nontrespassory means. In issuing separate authorization, however, a judge presumably will place reasonable restrictions on the manner and scope of entry. Thus excessive discretionary power in law enforcement officials will be avoided and the possibility of abuse will be reduced to a minimum.

83. *See* text accompanying note 39 *supra*.

84. The *Ford* court also found the least intrusive means doctrine implicit in United States v. United States District Court (Keith), 407 U.S. 297 (1972):

> Contrary to the Government's contention, the Fourth Amendment's protections against physical trespass do not disappear simply because a probable cause showing has been made, and statutory authorization received, for gathering oral evidence. Quite the contrary, the least intrusive means rationale implicit in *Katz* and *Keith* requires that, where possible, such evidence should be gathered without entering private premises and that where entry is required the judicial authorization therefor should circumscribe that entry to the need shown.

553 F.2d at 158; *see* note 49 *supra* and accompanying text.

85. The author of 57 B.U. L. REV. 587, 605-06 (1977) concludes that a nontrespassory wiretap is required under the least intrusive means doctrine unless it would be inadequate:

> Accordingly, the "least intrusive means" test compels that courts consider as prima facie unreasonable a government request to break and enter private premises in order to install a bug—a presumption that should be rebuttable only by a government proffer of evidence demonstrating that a conventional wiretap would be ineffective . . . . [I]n the context of electronic surveillance, it is not unfair or burdensome to require a preliminary showing that no less intrusive means is available. First, the problem of timing is not as critical as it may be in searches for tangible evidence because the evidence—words—is incapable of being removed or destroyed. Second, a "least intrusive means" requirement does not pose any threat to the searching officers because a wiretap can be implemented with little or no danger—a striking contrast to the dangers attending a forcible entry into a suspect's home or office.

86. *See* notes 79 & 84 *supra* and accompanying text.

nothing to limit physical intrusions. Separate authorization, in contrast, provides some assurance that the interception will be effected by the least intrusive means possible because it requires the authorizing judge to limit the scope and manner of entry as the circumstances dictate.

The potential for police abuse during covert entries coupled with the policy expressed in *Berger* and *Katz* of minimizing physical intrusions mandates that requests for authorizations of covert entries to install listening devices be considered carefully by the authorizing judge. *Ford* correctly grants broad discretion to the authorizing judge to establish necessary restrictions.[87] Discretion is desirable because of the impossibility of establishing immutable warrant requirements to cover the variety of circumstances in which the interception of communications may be conducted. For example, a bomb scare ruse like that in *Ford* may be appropriate when a nocturnal breaking and entering is impossible because the premises in which the listening device is to be installed is a commercial operation that either remains open continuously or employs armed guards during hours in which the establishment is closed. If the conversations are to be intercepted in a nursing home, however, a bomb scare ruse may endanger the safety of elderly occupants, while a nocturnal entry would pose no such hazards. Because of the varying circumstances from case to case, separate authorization may render the task of the authorizing judge uncertain and time consuming. The fourth amendment nevertheless requires that an intercept order expressly authorizing law enforcement officials to enter premises to install electronic surveillance devices be predicated on thoughtful, independent consideration of an individual's justifiable expectation that his home or his business will be free from unreasonable governmental intrusion.

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87. The court in affirming the judgment of the district court held that a judge must limit the time, manner, and number of entries if the warrant is not to he deemed overly broad. *See* notes 44 & 58 *supra* and accompanying text. Under *Ford,* therefore, the Title III warrant upheld in *Agrusa* would be invalid. *See* note 65 *supra.* The court also stated that a judge should specify in the warrant the extent to which the executing officers may be armed. 553 F.2d at 165 n.58.

Constitutional Law—Criminal Procedure—Custodial Suspect's Admissions After Assertion and Subsequent Waiver of Right to Counsel Are Not Per Se Excluded in Absence of Coercion

I. Facts and Holding

Appellant, convicted in federal district court[1] of an offense arising from transportation of marijuana, claimed that the admission at trial of incriminating statements he made after requesting the assistance of an attorney[2] violated his sixth amendment right to counsel.[3] The government argued that appellant had waived his right to counsel in response to a question asked by an officer who sought to determine whether appellant actually had asserted that right.[4] The trial court admitted the incriminating statements into evidence. On appeal, the Ninth Circuit Court of Appeals sitting *en banc, held,* affirmed. Uncoerced incriminating statements are not per se excluded at trial when a custodial suspect asserts but subsequently waives his sixth amendment right to counsel in response to a question seeking clarification of his assertion of that right. *United States v. Rodriguez-Gastelum,* 569 F.2d 482 (9th Cir. 1978).

II. Legal Background

The fifth amendment privilege against self-incrimination[5] and the sixth amendment right to the assistance of counsel[6] provide vital protections for suspected criminals. The Supreme Court consistently has interpreted the privilege against self-incrimination to

1. Appellant was convicted in the United States District Court for the District of Arizona, William C. Frey, J.

2. Authorities informed appellant of his *Miranda* rights after arresting him and taking him into custody. When asked to discuss his possession of the marijuana appellant responded: "Okay, okay, but with an attorney." United States v. Rodriquez-Gastelum, 569 F.2d 482 (9th Cir. 1978).

3. The sixth amendment guarantees any person accused of a crime the right "to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. In particular, appellant contended that his *Miranda* rights had been violated. *See* Miranda v. Arizona, 384 U.S. 436 (1966); notes 11-16 *infra* and accompanying text.

4. The government contended that because the officer was not certain that appellant had invoked his sixth amendment right, the officer asked the subsequent question, "Do you want to talk to me now without any attorney?" The appellant answered, "That's fine," and then made incriminating statements. 569 F.2d at 483-84.

5. The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.

6. *See* note 3 *supra.*

require the exclusion at trial of a defendant's involuntary confessions[7] and has extended the right to counsel beyond the formal trial of the accused.[8] Moreover, the fifth and sixth amendments interact to protect criminal suspects:[9] unless he fully understands the legal implications of his statements, a suspect may fail to utilize his privilege against self-incrimination. The assistance of counsel is essential to prevent unknowing self-incrimination.[10]

To preserve these rights, the Supreme Court established specific standards for police conduct in the landmark case of *Miranda v. Arizona*.[11] *Miranda* strengthened the fifth amendment privilege by requiring that law enforcement officials inform custodial suspects that they may remain silent, and that anything they say may be used against them in court.[12] To effectuate the sixth amendment right to counsel, *Miranda* also held that officials must inform suspects that they may have an attorney present during questioning.[13] The Court explicitly prescribed required police procedure: "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must

7. The privilege against coerced self-incrimination was established in Brown v. Mississippi, 297 U.S. 278 (1936), in which the Supreme Court held that confessions obtained by violence violated due process. In Chambers v. Florida, 309 U.S. 227 (1940), the Court stated that our accusatory system of criminal justice demands that the government produce evidence against an individual by its own independent labors, rather than compelling it from the mouth of the accused. The privilege guarantees the accused the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will . . . ." Malloy v. Hogan, 378 U.S. 1, 8 (1964). *See* Jackson v. Denno, 378 U.S. 368 (1964); Massiah v. United States, 377 U.S. 201 (1964); Spano v. New York, 360 U.S. 315 (1959).

8. The sixth amendment specifically guarantees a criminal defendant the right to have the assistance of counsel during a federal criminal trial. U.S. CONST. amend. VI. The Supreme Court has extended this right beyond the trial itself in a series of cases: Powell v. Alabama, 287 U.S. 45 (1932) (counsel must be allowed at every "critical stage" in the proceedings); Hamilton v. Alabama, 368 U.S. 52 (1961) (pretrial arraignment); Gideon v. Wainwright, 372 U.S. 335 (1963) (applies to the states through the fourteenth amendment); Douglas v. California, 372 U.S. 353 (1963) (counsel must be provided for indigents during appeals of right); Massiah v. United States, 377 U.S. 201 (1964) (interrogation of indicted defendants); United States v. Wade, 388 U.S. 218 (1967) (pretrial identification procedures); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearings); Argersinger v. Hamlin, 407 U.S. 25 (1972) (counsel must be provided for indigents on trial for any offense potentially resulting in incarceration).

9. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Spano v. New York, 360 U.S. 315 (1959).

10. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964), in which the accused did not know that admission of complicity was legally as damaging as admission of the entire act itself.

11. 384 U.S. 436 (1966). The Court held that the defendant's involuntary confession should have been excluded at trial. *Id.* at 479.

12. *Id.* at 469.

13. *Id.* at 471.

have an opportunity to confer with an attorney."[14] The Court's opinion was based upon two express assumptions: first, that all custodial interrogations are inherently coercive, and second, that removal of this coercive nature requires adequate warnings to the suspect.[15] If police fail to comply with these rules, all evidence subsequently obtained must be excluded at trial.[16] *Miranda* thus created a per se exclusionary rule that mandates the suppression of illegally obtained evidence.

Although *Miranda* explicitly outlined the procedural requirements for protecting a suspect's rights, the decision left uncertain the proper standard for determining when those rights are effectively waived. The Court stated that waiver would not be presumed from either silence or the successful elicitation of a suspect's statement and also placed a "heavy burden" on the government to show that the accused "knowingly and intelligently waived" his rights.[17] The standard for determining a waiver of the right to counsel, stated initially in *Johnson v. Zerbst*[18] and reaffirmed after *Miranda* by *Brewer v. Williams*,[19] requires an "intentional relinquishment of a known right" by the accused. This determination depends on the specific facts of each case.[20]

Recent decisions have significantly limited the scope of the *Miranda* doctrine.[21] In *Michigan v. Tucker*,[22] police warned the suspect of his right to counsel before questioning began, but did not inform him that counsel would be appointed for him if he could not afford to retain one. The Court refused to exclude a subsequent incriminating statement, finding that this minor violation did not render the statement involuntary: a bad faith violation or flagrant misconduct was necessary to invoke the per se exclusionary rule.[23] The *Tucker* Court viewed the exclusionary rule of *Miranda* not as a constitutional principle, but only as a sanction designed to deter willful police misconduct.[24]

14. *Id.* at 474.
15. *Id.* at 444.
16. *Id.* at 474.
17. *Id.* at 475.
18. 304 U.S. 458 (1937).
19. 430 U.S. 387 (1977). *See* text accompanying notes 28-31 *infra.*
20. 304 U.S. at 464.
21. In Harris v. New York, 401 U.S. 222 (1971), the Court allowed the use of oral and written statements obtained in violation of *Miranda* for the impeachment of a criminal defendant who took the witness stand in his own behalf. This case was the first indication of the trend toward limiting *Miranda.*
22. 417 U.S. 433 (1974).
23. *See id.* at 446.
24. *See id.* at 440.

In *Michigan v. Mosley*,[25] the Court required that, after a suspect has asserted his fifth amendment privilege against self-incrimination, the police must fully respect and "scrupulously honor" the suspect's "right to cut off the questioning."[26] The *Mosley* Court followed the rationale in *Tucker*, however, in holding that the suspect's constitutional rights were not violated when a different officer, after repeating the *Miranda* warnings, interrogated the suspect about a different crime two hours after the privilege had been invoked.[27] Justice White, in concurrence, explicitly distinguished *Mosley* from the situation arising when a suspect asserts the sixth amendment right to counsel.[28] In *Brewer v. Williams*,[29] which presented such a sixth amendment case, the Court distinguished the less egregious violations in *Tucker* and *Mosley* and reversed a conviction based on a "clear violation" of the *Miranda* rules.[30] In addition to implementing the *Johnson v. Zerbst*[31] "intentional relinquishment" test for waiver of the right to counsel, the Court affirmed the distinction between the privilege against self-incrimination and the right to counsel.[32] The *Brewer* Court also expressly refused to review the *Miranda* doctrine.[33]

The Ninth Circuit Court of Appeals recently considered two cases raising important questions concerning the right to counsel. In *United States v. Pheaster*[34] the suspect requested an attorney and refused to answer questions after officials gave the *Miranda* warn-

25. 423 U.S. 96 (1975).

26. *Id.* at 103.

27. *Id.* The opinion emphasized that the subsequent interrogation did not constitute repeated efforts to wear down the suspect's resistance, and stated that *Miranda* did not require a per se proscription upon further questioning of indefinite duration once the suspect asserts his rights to silence.

28. "[T]he reasons to keep the lines of communications between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto." *Id.* at 110 n.2 (White, J., concurring in result).

29. 430 U.S. 387 (1977).

30. The suspect's attorneys and police had agreed that the suspect would not be interrogated during a car trip with police. During the trip, the police appealed to the suspect's religious convictions, and the suspect led them to the body of the victim.

31. 304 U.S. 458 (1937). *See* text accompanying note 18 *supra.*

32. 430 U.S. at 397-98.

33. Twenty-two states urged the Court to re-examine and overrule the procedural ruling in *Miranda*. 430 U.S. at 424. Despite the Court's unwillingness to re-examine the ruling in *Miranda*, it has continued to define restrictively the scope of *Miranda's* holding. *See* United States v. Wong, 97 S. Ct. 1823 (1977) (warnings are not required in subsequent prosecution for perjury); United States v. Mandujano, 425 U.S. 564 (1976) (*Miranda* does not apply to grand jury proceedings); Beckwith v. United States, 425 U.S. 341 (1976) (IRS investigators do not have to comply with *Miranda* when the suspect is not in custody).

34. 544 F.2d 353 (9th Cir. 1976), *cert. denied sub nom.*, Inciso v. United States, 429 U.S. 1099 (1977).

ings. After a recitation of the evidence against him and repeated requests for the location of the victim by officials, however, the suspect admitted complicity.[35] The court affirmed the conviction, based on a distinction between interrogation of a suspect and the presentation of evidence to that suspect.[36] In *United States v. Flores-Calvillo*,[37] facts very similar to those in *Pheaster* resulted in exclusion of the evidence on initial hearing before the circuit court.[38] The court, however, delayed issuance of the mandate and action on a petition for rehearing until disposition of the instant case, which gave the Ninth Circuit an opportunity to reconcile the inconsistent decisions in *Pheaster* and *Flores-Calvillo*.

III. THE INSTANT DECISION

The circuit court, rejecting the application of a per se exclusionary rule in sixth amendment cases, characterized the interrogating officer's question as noncoercive and intended only to clarify appellant's prior statement.[39] Although the court could not agree whether appellant's words effectively invoked his fifth and sixth amendment rights,[40] it found resolution of that issue unnecessary because the appellant's subsequent agreement to talk effectively waived those rights.[41] The court based the finding of a waiver on the "relinquishment of a known right" standard expressed in *Johnson* and *Brewer*.[42] The court applied this standard, however, with flexibility according to the circumstances of each case,[43] reasoning that strict application of the test would effect a return to the per se exclusionary rule it had initially rejected.[44] Advancing several reasons for rejecting the per se exclusionary test, the court first argued that a per se rule would deprive suspects the opportunity to make

35. Upon hearing that a fingerprint on one of the kidnap notes had been positively identified as his, the defendant admitted his complicity in the crime. 544 F.2d at 368.

36. Although the court never expressly found an implied waiver, the opinion stated that a waiver resulted from the defendant's response to the presentation of the evidence. The defendant, however, never *expressly* waived the right to counsel, and the decision implies that a similar response to an interrogation, rather than to a presentation of evidence, would not have resulted in a waiver. *Id.* at 366-68.

37. 19 CRIM. L. REP. (BNA) 2405 (9th Cir. 1976) (petition for rehearing pending). After asserting her right to counsel, the defendant in *Flores-Calvillo* subsequently agreed to talk to officials.

38. The court expressly adopted the distinction between the right to silence and the right to counsel contained in *Mosley* and *Brewer*.

39. United States v. Rodriquez-Gastelum, 569 F.2d 482, 484 (9th Cir. 1978).

40. *Id.*

41. *Id.*

42. *Id.* at 488. *See* notes 18 and 28 *supra* and accompanying text.

43. 569 F.2d at 488.

44. *Id.*

their own assessments and to exercise independent judgment.[45] Similarly, the court asserted that a per se rule could "imprison" a person in his privileges by creating a situation where a suspect could never relinquish his rights even if he so desired.[46] Finally, a per se rule, in the majority's opinion, unnecessarily threatened effective enforcement of the law.[47]

Judge Hufstedler maintained in dissent[48] that the explicit language in *Miranda* requiring the cessation of questioning upon a suspect's request for an attorney and the reaffirmance of that language in *Brewer* mandated suppression of the evidence in question.[49] The dissent additionally found *Mosley* inapplicable because it had expressly distinguished waiver of the right to counsel from waiver of the privilege against self-incrimination.[50] Arguing that the appellant, having initially requested counsel, could not waive that right until he had consulted with an attorney, the dissent viewed the instant case as a routine *Miranda* violation requiring exclusion of the incriminating statements.[51]

IV. COMMENT

The instant decision follows the recent series of Supreme Court cases that have construed *Miranda* as establishing only a set of judicially created rules of evidence, and not a constitutional doctrine.[52] The Supreme Court implicitly has rejected the basic *Miranda* assumption that all custodial interrogations are inherently coercive by distinguishing between flagrant violations requiring exclusion of the evidence at trial and minor violations which do not deprive suspects of their constitutional rights.[53] When viewed in this developing framework, the result in the instant case is predictable.[54] The court found only a minor violation of the *Miranda* rules and therefore did not require exclusion of the incriminating evidence.

Although relying heavily on the Supreme Court decision in *Mosley*, the instant court completely discounts the crucial distinc-

45. *Id.*
46. *Id.*
47. *Id.*
48. Judge Ely joined Judge Hufstedler in his dissent; Judge Goodwin, joined by Judges Browning and Anderson, concurred with the court's rejection of the per se rule, but found no waiver by the appellant. *Id.* at 488-91.
49. *Id.* at 489.
50. *Id.*
51. *Id.* at 490.
52. *See* notes 21-23 *supra* and accompanying text.
53. *See* text accompanying notes 22-28 *supra*.
54. *See* Michigan v. Tucker, 417 U.S. 433 (1974); Michigan v. Mosley, 423 U.S. 96 (1975).

tion between the privilege against self-incrimination and the right to counsel,[55] which was expressly acknowledged in both *Mosley* and *Brewer*.[56] When a suspect asserts the right to silence, the implication arises that he is satisfied to rely on his own judgment and chooses to make his own decisions. When a suspect requests the assistance of counsel, however, he concedes that he is incompetent to deal with the authorities alone: to exercise intelligent judgment, he needs an attorney's help. Once a suspect requests an attorney, questioning must be discontinued.[57] Any subsequent waiver by the suspect before conferring with an attorney should be viewed as the result of the same incompetence that initially led him to seek legal counsel. The right to counsel, once asserted, thus requires more rigid protection than the right to silence.

The instant opinion ultimately rests on the finding that appellant effectively waived his right to counsel. Although purporting to use the *Johnson v. Zerbst* standard for testing the validity of a waiver,[58] the opinion never expressly applies that test to the facts. The court summarily states that the "intentional relinquishment" standard is satisfied.[59] Yet the confusion apparent in appellant's conduct and statements forcefully rebuts any assertion that he knowingly and intelligently waived his rights. *Miranda* requires an officer to insure that the suspect fully understands his rights and privileges before interrogation.[60] Once reasonably alerted to a suspect's confusion or misapprehension, an officer should be required to presume against waiver and discontinue questioning.[61] The instant court utilized the somewhat circular argument that a "flexible" application of the waiver test is necessary to prevent a return to the per se exclusionary rule. When the per se rule is rejected, however, a strict application of the waiver test remains as the only effective protection of a suspect's rights. "Flexible" application unjustifiably relieves the "heavy burden" that *Miranda* places on the government and negates the strict requirement of an intelligent and knowing waiver.

The holding in this case carries the trend toward reinterpreta-

55. *See* note 28 *supra*. Justice White's footnote was cited in the Court's opinion in *Brewer* also. 430 U.S. at 436 n.10.

56. *See* text accompanying notes 28 and 33 *supra*.

57. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

58. *See* text accompanying note 18 *supra*.

59. 569 F.2d 482, 488 (9th Cir. 1978).

60. *See* text accompanying notes 11-16 *supra*.

61. *See generally*, United States v. Tafoya, 459 F.2d 424 (10th Cir. 1972); United States v. Speaks, 453 F.2d 966 (1st Cir. 1972); United States v. Jenkins, 440 F.2d 574 (7th Cir. 1971); United States v. Nielsen, 392 F.2d 849 (7th Cir. 1968).

tion of *Miranda* to an undesirable extreme. Although the rejection of the per se rule will diminish the number of reversals of factually correct convictions, relegating the protection of the right to counsel to the same analysis employed in right to silence cases operates an injustice on criminal suspects. The request for an attorney should trigger greater protection because every effort should be made to insure that the suspect exercises his judgment intelligently. Despite the Supreme Court's retrenchment from the *Miranda* assumption that all custodial interrogations are inherently coercive, coercion remains a problem, especially where a suspect is confused or unable to exercise his rights intelligently. Thus implementation of a strict waiver test is necessary to secure a suspect's rights in the absence of the per se rule.

R. MICHAEL MOORE