Illinois v. Perkins

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Note

**Illinois v. Perkins**

_Incriminating Responses of an Accused to an Undercover Agent's Questions are Admissible. Does This Undermine the Duty to Warn of the Right to Remain Silent?_

**INTRODUCTION**

In *Illinois v. Perkins*\(^1\) the United States Supreme Court held that an undercover police officer need not give *Miranda*\(^2\) warnings before questioning an incarcerated suspect. The Court found that the interests protected by *Miranda* are not implicated when a suspect does not know the identity of his interrogator. This *Note* analyzes the Court's reasoning in light of the concerns that motivated the *Miranda* Court. *Perkins* reflects the Court's recent propensity to undermine the *Miranda* decision. Although *Perkins* is but one in a series of cases in which the Court creates exceptions to the *Miranda* mandate, it differs from the other decisions in important aspects. *Perkins* shifts the focus of inquiry of a suspect's "voluntariness" away from police activity to a suspect's subjective state of mind. For the first time, the Court permitted deliberate police deception in obtaining an unwarned confession from an incarcerated suspect. In doing so, the Supreme Court in *Perkins* created an exception which blurs the bright-line rule provided by *Miranda*. Because the reasoning in the *Perkins* opinion inadequately addresses the concerns that motivated the *Miranda* decision, the Court opens the door to abuse of fifth amendment protections against self-incrimination. The extent of the abuse may now only be limited by the Due Process Clause of the fourteenth amendment.

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On November 8, 1984, Richard Stephenson was shot and killed in Fairview Heights, Illinois. The homicide remained unsolved until March 1986, when Donald Charlton informed police that he had learned about a homicide from a fellow inmate at the Graham Correctional Facility where he was serving a six-year prison sentence for burglary. According to Charlton, Perkins told him details of a murder he had committed in East St. Louis. Because he believed that “people should not kill people,” Charlton cooperated with the police without receiving any compensation. The facts Charlton related revealed details of the Stephenson murder that were not widely known. Because the police believed that only the perpetrator would know the facts of the murder in the detail that Charlton related, they treated the story as a credible one.

By the time Charlton came forward with his story, Lloyd Perkins had been released from Graham and was being held in Montgomery County Jail awaiting trial on an aggravated battery charge, unrelated to the Stephenson murder. The police wanted to investigate Perkins’ possible connection with the Stephenson murder but decided that placement of an eavesdropping device in Perkins’ cell would be impractical.

The police decided to elicit information from Perkins by placing an undercover agent, posing as an escaped convict, in Perkins’ cellblock. The plan was for Charlton and an undercover agent named Parisi to pose as escapees from a work release program who were

4. Id.
5. Id.
6. Id.
8. Id.
10. Id.
11. Id.
12. Id. The Supreme Court has held that a prisoner has no reasonable expectation of privacy in a prison cell. Hudson v. Palmer, 468 U.S. 517 (1984). Accordingly, the fourth amendment is not violated when prison officials randomly search a prison cell. Id. It follows that no fourth amendment violation occurs when officials place an eavesdropping device in a prisoner’s cell.

However, when an informant is placed in an inmate’s prison cell to elicit incriminating testimony, other constitutional issues are raised. In a sixth amendment context, (after an inmate’s sixth amendment right to counsel has attached) admissibility depends on whether the informant “actively” (inadmissible) or “passively” (admissible) questioned the inmate. See Note, Kuhlmann v. Wilson: “Passive” and “Active” Government Informants - A Problematic Test, 72 Iowa L. Rev. 1423 (1987). The author of this note addresses the Court’s most recent decision regarding the admissibility of statements obtained when informants actively question an inmate before a sixth amendment right to counsel attaches or a fifth amendment right to counsel is invoked. See infra note 55 and accompanying text.
arrested in the course of a burglary. Both Parisi and Charlton were instructed to refrain from questioning Perkins directly about the murder but to report anything he said concerning it.\textsuperscript{13} Parisi, assuming the alias of “Vito Bianco” and wearing jail garb, was placed in Perkins’ cellblock together with Charlton.\textsuperscript{14} Charlton spoke with Perkins briefly and introduced Parisi by his alias. Parisi told Perkins that he “wasn’t going to do any more time” and suggested that the three men escape.\textsuperscript{15} The trio met in Perkins’ cell later that evening, after the other inmates were asleep, to refine their escape plan. Parisi initiated Perkins’ narration of the crime by asking him if he had ever “done” anybody. Perkins replied that he had, and he proceeded to describe the events of the Stephenson murder.\textsuperscript{16}

\textsuperscript{13} Perkins, 110 S. Ct. at 2394. Only when an inmate has a constitutionally recognized right to counsel will the Court proscribe informants from directly and actively questioning an inmate. Kuhlmann v. Wilson, 477 U.S. 436 (1986) (to suppress incriminating statements, defendant must show that the police took some action, beyond mere listening, that was designed to deliberately elicit an incriminating response). Here, the instruction not to question Perkins directly was unnecessary because his sixth amendment right to counsel had not yet attached.

In addition, Perkins had not invoked his fifth amendment right to counsel; he was never given Miranda warnings. Had Perkins invoked his fifth amendment right to counsel, the inquiry would focus on whether he subsequently waived that right. See infra note 58 and accompanying text.

The Court is reluctant to find waiver once a suspect has invoked his right to counsel. Edwards v. Arizona, 451 U.S. 477 (1981) (when a suspect invokes his or her right to counsel, interrogation must cease until counsel is made available, unless the suspect initiates further communication). Recently the Court reaffirmed the Edwards rule in Minnick v. Mississippi, 111 S. Ct. 486 (1990). (Any questioning of the accused subsequent to an invocation of right to counsel requires the presence of counsel despite previous meetings between the accused and counsel). For an analysis of waiver and invocation of the right to counsel, see Tomkovicz, Standards for Invocation and Waiver of Counsel in Confession Contexts, 71 Iowa L. Rev. 975 (1986).

\textsuperscript{14} Perkins, 110 S. Ct. at 2396.

\textsuperscript{15} Id.

\textsuperscript{16} Id. As Justice Marshall discusses in his dissent, Parisi questioned Perkins for thirty-five minutes. Id. at 2401. Parisi’s testimony at Perkins’ murder trial reveals the nature of the inquiry:

[Agent:] “You ever do anyone?”

[Perkins:] “Yeah, once in East St. Louis, in a rich white neighborhood.”

Informant: “I didn’t know they had any rich white neighborhoods in East St. Louis.”

Perkins: “It wasn’t in East St. Louis, it was by a race track in Fairview Heights. . . .”

[Agent]: “You did a guy in Fairview Heights?”

Perkins: “Yeah in a rich white section where most of the houses look the same.”

[Informant]: “If all the houses look the same, how did you know you had the right house?”
Perkins was arrested and charged with the Stephenson murder the following morning. Subsequent to his arrest, Perkins was advised of his constitutional rights, pursuant to *Miranda v. Arizona*, and Perkins requested an attorney. Parisi did not give Perkins *Miranda* warnings because it would have defeated the purpose of the ruse.

Before trial, Perkins moved to suppress the statements made to Parisi in jail. The trial court granted the motion to suppress the statements because Parisi and Charlton, as agents of the State, did not give Perkins *Miranda* warnings before conducting a custodial interrogation. On appeal, the State contended that *Miranda* warnings were not required because Parisi and Charlton did not coerce Perkins to incriminate himself.

The State argued that Perkins made his statements voluntarily and without the compulsion inherent in a “police-dominated” atmosphere because Perkins believed Parisi was a “biker” rather than an undercover agent. The State contended that *Miranda* was applicable only in situations when an authority figure directly interrogates an accused. The Appellate Court of Illinois rejected those contentions and affirmed the trial court’s suppression of Perkins’ statements.

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Perkins: “Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner.”

[Agent]: “How long ago did this happen?”

Perkins: “Approximately about two years ago. I got paid $5,000 for that job.”

[Agent]: “How did it go down?”

Perkins: “I walked up to . . . this guy’s house with a sawed-off under my trench coat.”

[Agent]: “What type gun?”


Id. at 2401-02. Parisi continued his inquiry, asking 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. Id. at 2402.


18. *Id.*

19. 384 U.S. 436 (1966). In *Miranda*, the Supreme Court held that a prosecutor may not use an exculpatory or inculpatory statement arising from custodial interrogation of a defendant unless the prosecutor can demonstrate the use of procedural safeguards effective to secure the defendant’s privilege against self incrimination. *Id.* at 444. Accordingly, *Miranda* requires that police inform suspects that they have a right to remain silent; that any statement they make can and will be used in court as evidence against them; that they have a right to consult with an attorney before and during any interrogation; and that if they cannot afford an attorney, one will be appointed to represent them. *Id.* at 467-73.

20. Perkins, 176 Ill. App.3d at 446, 531 N.E.2d at 143.

21. *Id.*

22. *Id.*

23. *Id.*

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

25. *Id.* at 450, 531 N.E.2d at 145-46. Because no Illinois cases directly addressed the issue of whether an undercover agent’s interrogation of a defendant required that *Miranda* warnings be given, the court looked to other jurisdictions. The court found that
The appellate court found that *Miranda* warnings were essential in overcoming the pressures of interrogation and in ascertaining the truth.\(^26\) The court found warnings to be required to ensure that defendants know that they are free to exercise their fifth amendment\(^27\) right against self-incrimination.

The defendant's fifth amendment constitutional privilege is fulfilled only when an agent of the prosecution warns the defendant prior to custodial interrogation. Because the police may not "do indirectly what they may not do directly,"\(^28\) the court would not "permit the police to subvert the defendant's fifth-amendment right against self-incrimination by questioning the defendant, through informants and while he was in custody, without first warning him of his rights pursuant to *Miranda*."\(^29\) Accordingly, the court found that the failure to warn Perkins pursuant to *Miranda* rendered his statements inadmissible.\(^30\) After the Illinois Supreme Court denied certiorari,\(^31\) the United States Supreme Court granted certiorari\(^32\) to decide whether an undercover law enforcement officer must give *Miranda* warnings prior to questioning an incarcerated suspect.

Other jurisdictions had applied the requirements of *Miranda* in cases involving an informant's custodial interrogation of a defendant. \(^{112}\) See, e.g., Holyfield v. State, 101 Nev. 793, 711 P.2d 834 (1985) (prosecution's failure to give a defendant *Miranda* warnings rendered an informant's surreptitious custodial questioning inadmissible); and State v. Fuller, 203 Neb. 233, 278 N.W.2d 756 (1979) (incriminating statements made to defendant's cellmate were inadmissible because *Miranda* warnings were required when the cellmate acted as an agent of the police in conducting custodial interrogations).

The *Perkins* court discussed a Rhode Island case, State v. Travis, 116 R.I. 678, 360 A.2d 548 (1976), which involved facts similar to those surrounding Perkins' interrogation. In *Travis*, the police placed an undercover officer with long hair and a beard in a cell with the defendant. The defendant allegedly made several incriminating statements about a robbery to the officer. The trial judge denied the defendant's motion to suppress, but on appeal, the Rhode Island Supreme Court reversed the defendant's conviction by holding that "the ruse employed by the police violated the defendant's rights under the fifth amendment of the constitution." *Perkins*, 176 Ill. App. 3d at 450, 531 N.E.2d at 145 (1988) (citing State v. Travis, 116 R.I. 678, 682, 360 A.2d 548, 551 (1976)).


27. The fifth amendment to the United States Constitution mandates that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. The Appellate Court of Illinois found that the defendant's fifth amendment rights are ensured only when the defendant is "guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Perkins*, 176 Ill. App. 3d at 451, 531 N.E.2d at 146 (quoting *Miranda* v. Arizona, 384 U.S. 436, 460 (1966)).

28. Id. at 450, 531 N.E.2d at 145.

29. Id. at 452, 531 N.E.2d at 146.

30. Id.


In *Illinois v. Perkins*,[33] the Court reversed the appellate court's decision. In an eight-to-one decision, the Court held that an undercover officer posing as an inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response.[34] Justice Kennedy, writing for the majority, found that the interests protected by *Miranda* were not implicated when Parisi questioned Perkins in his jail cell.[35] Although "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly,"[36] the warnings need only be given in situations in which the underlying concerns of *Miranda* are implicated.[37]

According to the Court, *Miranda* was concerned with a police-dominated atmosphere that generated "inherently compelling pressures which work to undermine the [defendant's] will to resist and to compel him to speak where he would not otherwise do so freely."[38] *Miranda* forbids police coercion, but it does not prevent "strategic deception."[39] Consequently, the Court held that "[p]loys 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* concerns."[40] Because "[c]oercion is determined from the perspective of the suspect,"[41] the Court found that the essential ingredients of a police-dominated atmosphere and compulsion are lacking when an incarcerated suspect speaks freely to someone he believes is a fellow inmate.[42] The Court held that Perkins' statements were voluntarily made and admissible because he was not coerced.[43]

The Court rejected Perkins' argument that *Miranda* warnings are required whenever a suspect is in custody "in a technical sense and converses with someone who happens to be a government agent."[44]

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34. Id. at 2399.
35. Id.
36. Id. at 2397 (quoting Berkemer v. McCarty, 468 U.S. 420, 437 (1984) (holding that "custody", requiring *Miranda* warnings prior to questioning, occurs whenever a reasonable person in the defendant's position would believe they were not free to leave)). In Berkemer, the Court refused to hold that a motorist was in custody, for *Miranda* purposes, whenever he was stopped and required to vacate his car. Berkemer, 468 U.S. at 440. Although a traffic stop is a "seizure" with fourth amendment implications, the Court held that it does not exert sufficient pressure on a defendant "to require that he be warned of his constitutional rights." Id. at 437.
37. Perkins, 110 S. Ct. at 2397.
38. Id. (quoting *Miranda* v. Arizona, 384 U.S. 436, 467 (1966)).
39. Id.
40. Id.
41. Id. (citing Rhode Island v. Innis, 446 U.S. 291, 301 (1980); Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).
42. Id.
43. Id. at 2399.
44. Id. at 2397.
Unless the suspect has reason to believe that his interrogators have power over him, interrogation and custody do not interact to create a "police dominated" atmosphere. Therefore, *Miranda* warnings are not necessary.\(^{45}\)

The Court compared the police tactics used here to those used in *Hoffa v. United States*.\(^{46}\) In that case the Court approved the admission of a defendant's incriminating statements made to an undercover informant.\(^{47}\) The Court noted that the only difference between the defendant in *Hoffa* and Perkins was that Perkins was incarcerated.\(^{48}\) The Court held that incarceration does not "warrant a presumption that the use of an undercover agent . . . makes any confession thus obtained involuntary."\(^{49}\) The Court suggested that "[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 . . . .\(^{50}\)

The Court also held that their prior sixth amendment decisions\(^{51}\) were inapplicable here.\(^{52}\) The sixth amendment prevents the government from interfering with the accused's right to counsel after the initiation of formal charges. "[T]he government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect is charged with [a] crime."\(^{53}\) The Court found that because Perkins had not yet been charged with the Stephenson mur-

\(^{45}\) *Id.*

\(^{46}\) 385 U.S. 293 (1966). While Hoffa was on trial, he often met with an associate who, unbeknownst to Hoffa, was cooperating with the police. The associate told the police that Hoffa had divulged his attempts to bribe jury members. The Supreme Court held that these statements were admissible at Hoffa's subsequent trial for jury tampering because Hoffa's statements had not been coerced. *Id.* at 304.

\(^{47}\) *Id.*

\(^{48}\) *Perkins*, 110 S. Ct. at 2398.

\(^{49}\) *Id.*

\(^{50}\) *Id.*. The Court leaves the question for another day, but suggests that it may be willing to forego *Miranda* warnings even when an inmate knows the identity of the interrogator. The answer may depend on whether the inmate was actually coerced, rather than on police conduct. The *Miranda* Court attempted to avoid this difficult inquiry. See infra notes 104-107 and accompanying text.

\(^{51}\) The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Court has ruled that the government may not use an undercover agent to circumvent the sixth amendment right to counsel once a suspect has been formally charged with a crime. United States v. Henry, 447 U.S. 264 (1980). Once the suspect's sixth amendment right to counsel attaches, the police may not deliberately elicit incriminating statements from the suspect in the absence of counsel. Massiah v. United States, 377 U.S. 201 (1964).

\(^{52}\) *Perkins*, 110 S. Ct. at 2399.

\(^{53}\) *Id.* at 2398-99 (citing Maine v. Moulton, 474 U.S. 159, 176 (1985)).
der, his sixth amendment right to counsel had not attached. Therefore, the sixth amendment precedent was held to be inapplicable.54

Also unavailing was Perkins' argument that a bright-line rule was desirable and mandated by Miranda. The Court found that the interests protected by Miranda were not implicated. The Court concluded that law enforcement officers would have little difficulty applying the holding that "an undercover law enforcement officer posing as a fellow inmate need not give Miranda warnings to an incarcerated suspect before" questioning the suspect.55

**JUSTICE BRENNAN'S CONCURRING OPINION**56

Although Justice Brennan did not agree with the majority's characterization of Miranda in its entirety, he agreed that the interests protected by the Miranda decision are not implicated when "a suspect does not know that his questioner is a police agent ... ."57 Because the only issue raised at this stage of the litigation was the applicability of Miranda, Justice Brennan concurred in the judgment.58

However, Justice Brennan intimated that the lower court, on remand, might properly find that Perkins' confession violated the Due Process Clause of the fourteenth amendment.59 He indicated that he did not "believe the Constitution condones the method by which the police extracted the confession" from Perkins.60 To the contrary, Justice Brennan thought that "the deception and manipulation practiced on respondent raise a substantial claim that the confession was obtained in violation of the Due Process Clause."61

54. *Id.*

55. *Id.* at 2399.

56. *Id.* at 2399-2401 (Brennan, J., concurring).

57. *Id.*

58. *Id.* In a footnote, Justice Brennan distinguishes this case from those involving a suspect's sixth amendment right to counsel. *Id.* n.1. Justice Brennan states that if Perkins "had been formally charged on the unrelated charge and had invoked his Sixth Amendment right to counsel, he may have a Sixth Amendment challenge to the admissibility of these statements." *Id.* Also, had Perkins "invoked his Fifth Amendment right to counsel or right to silence ... the inquiry would focus on whether he subsequently waived the particular right." *Id.* The waiver of Miranda rights must be "voluntary in the sense that it [must be] the product of free and deliberate choice rather than intimidation, coercion or deception." *Id.* (emphasis in original) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)).

59. Perkins, 110 S. Ct. at 2399-401. The fourteenth amendment to the United States Constitution denies the States the power to "deprive any person of life, liberty, or property, without due process of law ... ." U.S. Const. amend. XIV, § 1. The fifth amendment right to be free from compelled self-incrimination was incorporated through the fourteenth amendment and held to be binding upon the states in Malloy v. Hogan, 378 U.S. 1 (1964).

60. Perkins, 110 S. Ct. at 2399.

61. *Id.* (emphasis added). Justice Brennan's concurrence and the narrow focus of the majority on Miranda itself suggest that a finding by the trial court that the police...
Justice Brennan reminded the majority that due process requires techniques “compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means”. According to Justice Brennan, society has long held the view that the “police must obey the law while enforcing the law” and 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.” Relying on the Court’s opinion in United States v. Henry, Justice Brennan noted that the “mere fact of custody imposes pressures on the accused” making him “particularly susceptible to the ploys of undercover Government agents.” Because of these inherent pressures, the methods used to elicit confessions in a custodial environment must survive close scrutiny.

violated due process in extracting the confession would not be reversed by the Supreme Court on appeal. Justice Brennan states that “[i]t is open to the lower court on remand to determine whether, under the totality of the circumstances, respondent’s confession was elicited in a manner that violated the Due Process Clause.” Other justices joined Justice Brennan’s opinion. However, his views may have been instrumental in forming the majority in favor of remanding the case on Due Process grounds. The impact that Justice Brennan’s recent resignation will have on the Court’s conduct in similar cases remains unclear. In Arizona v. Fulminante, 59 U.S.L.W. 4235, 4235 (U.S. March 6, 1991), five justices held that a harmless-error analysis applies in appellate cases where a coerced confession is admitted as evidence at trial. In light of Justice Brennan’s concern for the integrity of a criminal justice system which presumes the innocence of a criminal defendant, it is unlikely that he would have agreed with the majority in Fulminante that coerced confessions are mere “trial errors” and thus subject to harmless error analysis.

62. Id. at 2400 (quoting Miller v. Fenton, 474 U.S. 104, 116 (1985)).
63. Id. (quoting Spano v. New York, 360 U.S. 315, 320-321 (1959)). In Spano, a majority of the Court found a confession obtained after an overnight, eight-hour questioning session to be inadmissible because it was involuntarily given. Spano at 320, 323. In determining whether a confession is voluntary under the totality of the circumstances, the Court recognized several factors, including but not limited to the subject’s age and experience, physical and mental state, police use of trickery or deception to obtain the confession, and the amount of time a defendant is subjected to interrogation. Id. at 321-23. The inquiry is whether the defendant’s will was overborne by the police. If so, the ensuing confession is inadmissible. Id. at 321.
64. Perkins, 110 S. Ct. at 2400 (quoting United States v. Henry, 447 U.S. 264, 274 (1980)). Because of the pressures inherent to custody, Justice Brennan maintained that the state “is in a unique position to exploit” the suspect’s vulnerability. Id. “[T]he State can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses.” Id. Justice Brennan stated that “testimony in this case suggests the State did just that.” Id.
65. Id. Justice Brennan expressed his reservations about the method used to elicit the confession in this case:

The police devised a ruse to lure respondent into incriminating himself when he was in jail on an unrelated charge. A police agent, posing as a fellow inmate and proposing a sham escape plot, tricked respondent into confessing that he
Justice Marshall considered this to be a fairly straightforward case. "Because Perkins was interrogated by police while he was in custody, Miranda required that the officer inform him of his rights." If a suspect is in custody when interrogated, Miranda requires that the prosecution comply with "procedural safeguards effective to secure the privilege against self-incrimination." Here, Perkins was in custody when he was interrogated by an agent of the police. Accordingly, Perkins' confession should have been suppressed because he "received no Miranda warnings before he was subjected to custodial interrogation ...."

Justice Marshall rejected the majority's Miranda rule exception which applies whenever a suspect does not know the interrogator's identity. He believed the majority's exception was inconsistent with the Miranda rationale. He disagreed with the majority's assertion that conversations between undercover agents and suspects are devoid of the coercion inherent in station-house interrogations. Justice Marshall interpreted Miranda and its progeny as requiring warnings to be given whenever "a law enforcement agent structures a custodial interrogation so that a suspect feels compelled to reveal incriminating information. . . ."

He observed that inmates are more susceptible to police trickery due to psychological pressures inherent to incarceration which

had once committed a murder, as a way of proving that he would be willing to do so again should the need arise during the escape. The testimony of the undercover officer and police informant at the suppression hearing reveal the deliberate manner in which the two elicited incriminating statements from respondent.

Id.

66. Id. at 2401-04 (Marshall, J., dissenting).
67. Id. at 2402.
68. Id. at 2401 (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)).
69. Id.
70. Id.
71. Id. at 2402.
72. Id. at 2403. Justice Marshall cited Miranda to support his contention that it was concerned with the pressures inherent in custodial interrogation. The Miranda court noted:

We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

. . . . More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.

make the suspect likely to talk with fellow inmates. *Miranda* prohibits the police from deceptively taking advantage of an inmate's psychological vulnerability by exploiting those pressures. As the Court observed in a sixth amendment context, the mere fact of custody may bring subtle influences to bear that make an inmate susceptible to the ploys of undercover agents.\(^7\) In addition, when a suspect is in custody, the constant threat of physical danger peculiar to the prison environment may make the suspect demonstrate "his toughness to other inmates by recounting or inventing past violent acts."\(^7\) The unique pressures inherent to incarceration are not eliminated by the suspect's ignorance of the interrogator's true identity.\(^7\) Therefore, the Court "need not inquire past the bare facts of custody and interrogation to determine whether *Miranda* warnings are required."\(^7\) According to Justice Marshall, *Miranda* was not "concerned solely with police coercion."\(^7\) Rather, *Miranda* was concerned with any police tactics that may operate to compel a suspect in custody to make incriminating statements. The compulsion "proscribed by *Miranda* includes deception by the police."\(^7\) Among other things, the *Miranda* Court was concerned with confessions obtained through police trickery. The *Miranda* Court noted that "interrogators sometimes are instructed to induce a confession out of trickery."\(^7\) Justice Marshall cited other decisions which indicate that *Miranda* warnings were meant to ensure that the police do not coerce or trick captive suspects into confessing.\(^8\) Although police deception has been allowed to obtain incriminating statements, as in *Hoffa v. United States*,\(^8\) the defendant in that case was not in custody, and *Mi-

\(^7\) Perkins, 110 S.Ct. at 2403 (citing United States v. Henry, 447 U.S. 264, 274 (1980)).
\(^7\) Id.
\(^7\) Id.
\(^7\) Id.
\(^7\) Id. at 2402 (emphasis in original).
\(^7\) Id. (emphasis added).
\(^8\) Perkins, 110 S.Ct. at 2402 (citing Berkemer v. McCarty, 468 U.S. 420, 433 (1984)). See supra note 34. Justice Marshall also cited other decisions for the proposition that *Miranda* was meant to prevent police from using trickery to obtain a confession: Moran v. Burbine, 475 U.S. 412 (1986) (waiver of *Miranda* rights must be voluntary in the sense that it is free of intimidation, coercion or deception); and Massiah v. United States, 377 U.S. 201 (1964) (a defendant's Constitutional privilege against self-incrimination is seriously imposed upon if the defendant does not know that he or she is under interrogation by a government agent).
\(^8\) 385 U.S. 293 (1966). See supra notes 44-47 and accompanying text.
randa's concerns were not implicated.82

Finally, Justice Marshall rejected the Court's adoption of an exception to *Miranda* because it violates the "bright-line" approach the Court had desired in *Miranda*.83 The outer boundaries of the exception created by the majority might be unclear in cases with fact patterns different than the facts in this case.

Justice Marshall concluded his dissent by offering some disturbing hypothetical questions. He wondered if *Miranda* would be violated if an undercover agent beat a confession out of a suspect, or if an undercover agent obtained incriminating statements from the suspect while posing as the suspect's defense attorney or priest.84 Although such tricks may deceive a suspect into confiding in one believed to be a trusted adviser, they may be permitted by the majority's exception. Justice Marshall rejected the "adoption of a substantial loophole in our jurisprudence protecting suspects' Fifth Amendment rights."85

THE *MIRANDA* CONCERNS

The majority claims that *Miranda* is not implicated when an inmate talks with an undercover agent in a cell because there is no coercion in such a case.86 Justice Brennan agreed that the interests protected by *Miranda* were not implicated in this case, but he suggested the police may have violated Perkins' fourteenth amendment due process rights.87 Justice Marshall wrote that because of the pressures inherent in incarceration, *Miranda* warnings are required whenever a suspect is interrogated while in custody.88

As Justice Marshall points out in his dissent, the Court has long recognized that there are psychological pressures inherent in incarceration.89 These pressures helped motivate the *Miranda* Court:

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, . . .

82. *Perkins*, 110 S. Ct. at 2402. Here, of course, Perkins was interrogated while in custody.

83. *Id.* at 2403-04. One reason *Miranda* was decided was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda* v. Arizona, 384 U.S. 436, 441-42 (1966). Justice Marshall cited subsequent Supreme Court decisions reiterating this goal. *See*, e.g., *Fare v. Michael C.*, 442 U.S. 707 (1979) (*Miranda* has the virtue of informing the police with specificity as to what they may do in conducting custodial interrogation).

84. *Perkins*, 110 S. Ct. at 2404. This conduct would most likely be prohibited by the Due Process Clause of the fourteenth amendment. *See supra* notes 56-58 and accompanying text. Impersonating the defendant's attorney would also be prohibited as an interference with the defendant's sixth amendment right to counsel, had the right attached. *See supra* notes 12, 13, 51, & 58 and accompanying text.

85. *Id.*

86. *Id.* at 2396-99. *See supra* notes 33-43 and accompanying text.

87. *Id.* at 2399-401. *See supra* notes 59-65 and accompanying text.

88. *Id.* at 2401-03. *See supra* notes 66-76 and accompanying text.

89. *Id.* at 2403. *See supra* notes 72-76 and accompanying text.
this Court has 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.

... [T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.

... As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.\(^9\)

The *Miranda* Court was concerned with the pressures inherent in custodial interrogation. To offset these pressures, *Miranda* required that a suspect be warned of his constitutional rights prior to being asked questions likely to elicit an incriminating response.\(^91\) Whether a suspect is coerced directly by police under a bright light or indirectly by police trickery in a "police-dominated" atmosphere, *Miranda* prohibits the police from questioning without first warning the suspect.

*Miranda* was also concerned with "the esteem in which the administration of justice is held by the public."\(^92\) Justice Brennan alluded to this concern in his concurrence when he wrote that "the police must obey the law while enforcing the law . . . ."\(^93\) In addressing these concerns, the *Miranda* Court quoted Justice Brandeis:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution.\(^94\)

Justice Kennedy and the majority of the *Perkins* Court gave little notice to these concerns by holding that police misconduct is permissible as long as it "does not rise to the level of compulsion or coercion. . . ."\(^95\)

There were other concerns underlying the *Miranda* decision. The Court was concerned with "the dangers of false confessions" and the tendency that coerced confessions made "the police and prosecutors..."
less zealous in the search for objective evidence.”96 All of the policies discussed by the *Miranda* Court were thought to point to one overriding concern: the concern that the constitutional foundation underlying the privilege against self incrimination is the respect a government “must accord to the dignity and integrity of its citizens.”97 The warnings were created to help maintain a “fair state-individual balance.”98 The warnings were also created to ensure that the government would bear their entire burden of proof. In order to “respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.”99

The *Perkins* majority addressed only one concern underlying the *Miranda* decision: direct police coercion.100 However, in addition to this concern, *Miranda* addressed several other concerns: psychological pressures inherent in incarceration, indirect police coercion, fairness, the dangers of false confessions and police misconduct, burden of proof, maintenance of the proper state-individual balance, and adherence to an accusatory rather than inquisitional criminal justice system. By focusing solely on direct police coercion, the *Perkins* majority created an exception that fails to address many of the concerns that motivated the *Miranda* decision.

The Court in *Miranda* also attempted “to give concrete constitutional guidelines for law enforcement agencies and courts to follow.”101 One of the virtues of the *Miranda* decision was to provide the police with a “bright-line”102 approach in conducting custodial interrogations. As was pointed out by Justice Marshall, in creating an exception to the *Miranda* rule, the majority has muddied the constitutional waters.103 The *Miranda* Court did not require, as the *Perkins* majority does, a court to inquire into the mental state of a suspect to determine whether he was coerced into confessing. It simply held that the “prosecution may not use statements . . . stemming

97. Id. at 460.
98. Id.
99. Id. (citing Chambers v. Florida, 309 U.S. 227, 236-38 (1940)).
100. See supra note 40 and accompanying text.
101. *Miranda*, 384 U.S. at 441-42. Also, see supra note 83 and accompanying text.
from custodial interrogation” unless suspects are first informed of their Constitutional rights. The *Miranda* Court did not qualify this requirement to permit the exception created by the *Perkins* majority. Although Perkins may not have been directly coerced in a “police-dominated” atmosphere, he was in custody when interrogated by the police. In such a situation, *Miranda* requires that suspects be informed of their Constitutional rights prior to police questioning. The exception created by the *Perkins* majority is at odds with this strict mandate and diffuses the bright-line rule intended by the *Miranda* Court.

**Dismantling Miranda**

Although the exception created by the Court in *Perkins* does not overrule *Miranda*, it reflects the Court’s recent propensity to undermine the *Miranda* decision. *Miranda* was a five-to-four decision. It only took a slight shift in the Court’s majority to produce decisions which have chipped away at various aspects of *Miranda*. To

105. In *Miranda*, Chief Justice Warren wrote that “[b]y 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.” *Id.* The Court has defined custody as “‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting in part *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the court introduced a “reasonable suspect” test holding that custody occurs whenever a reasonable person in the suspect’s position would believe they were not free to leave. *Id.* at 442. See supra note 36.
106. The Court has held that interrogation includes “express questioning” or its “functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). Interrogation has been defined as “any words or actions on the part of the 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.” *Id.* at 301. Although it is not dispositive, police intent is a factor which the courts consider in deciding whether the defendant was interrogated. The courts will consider whether the police knew, or should have known, that the suspect was likely to incriminate himself or herself as a result of their conduct. *Id.* at 301-02.
108. See Benner, *Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59 (1989). Professor Benner writes that “although the Court would not overrule the decision because of the sensitivity to the political overtones of a direct attack” the Rehnquist Court has nevertheless gradually dismantled *Miranda* “of its carefully crafted methodology . . . .” *Id.* at 121. Under the new doctrine developed by the Rehnquist Court, a confession is “voluntary” if and only if the police did not coerce the defendant. *Id.* at 126. Professor Benner concludes that the premise that the absence of coercive police conduct is synonymous with due process “ignores history, is contrary to precedent, and cannot be justified by the deterrence rationale upon which it is founded.” *Id.*
appreciate its importance, Perkins should be considered in light of these recent Supreme Court decisions.

In New York v. Quarles,\(^{109}\) the Court created a “public-safety” or “emergency” exception to the Miranda rule. In an opinion written by Justice Rehnquist, the Court concluded that “the need for answers to questions in a situation posing a threat to the public safety outweighs the need for”\(^{110}\) Miranda warnings. Therefore, a police officer may forgo giving Miranda warnings in circumstances where the dangers to the police or to the public outweigh the suspect’s fifth amendment right to remain silent.\(^{111}\)

In Oregon v. Elstad,\(^{112}\) the Court held that a confession made subsequent to an unwarned statement was admissible. The Court said that the “fruit of the poisonous tree” doctrine, which is broadly applied to fourth amendment violations, must be more narrowly applied to Miranda violations. Because Miranda “sweeps more broadly than the Fifth Amendment itself,”\(^{113}\) the Court held that absent deliberate coercion or improper tactics in obtaining an unwarned statement, the “technical” violation of Miranda did not render the confession involuntary. Although the suspect may have thought the “cat was out of the bag” after making the first unwarned (and inadmissible) statement, rendering subsequent warnings meaningless, the Court held that the subsequent Miranda warnings cured the defect.

In Moran v. Burbine,\(^{114}\) the Court declined to read Miranda as

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\(^{109}\) 467 U.S. 649 (1984). Quarles was approached by a police officer in a grocery store. Upon seeing the officer, Quarles turned and ran toward the rear of the store, where he was caught. A frisk revealed that Quarles was wearing an empty shoulder holster. After handcuffing him, the officer asked Quarles where the gun was. Quarles had not been given Miranda warnings. He answered “the gun is over there,” nodding in the direction of some empty cartons. Id. at 652. The Court held that the gun and the statement revealing its location need not be suppressed. Id. at 659. It reached the same conclusion as to subsequent statements declared to be fruits of the Miranda violation. Id. at 660.

\(^{110}\) Id. at 657.

\(^{111}\) Id. This begs the question regarding the scope of the exception. Under what circumstances do the dangers involved outweigh the suspect’s constitutional rights? May the police keep a suspect indefinitely without giving Miranda warnings if they claim to be seeking information to protect the public? The Court has not indicated the scope of the emergency exception, and has further “lesse[n]ed the desirable clarity of [the Miranda] rule.” Id. at 658.

\(^{112}\) 470 U.S. 298 (1985). The police suspected Elstad, an eighteen-year-old, for burglary. They obtained an arrest warrant and served it at his home. Prior to warning Elstad pursuant to Miranda, the arresting officer began talking to Elstad about the burglary. When the officer indicated that he thought Elstad was involved in the burglary, Elstad replied “Yes, I was there.” Id. at 301. Later at the police station, after giving him Miranda warnings, the police obtained a full written confession from Elstad. Id.

Elstad’s lawyers argued that the subsequent confession introduced at trial was the product of the unwarned statement and was thus inadmissible as “the fruit of the poisonous tree.” Id. at 302. The Court rejected this argument and held that Elstad’s written confession was admissible. Id. at 318.

\(^{113}\) Id. at 306.

\(^{114}\) 475 U.S. 412 (1986). Brian Burbine was in custody as a murder suspect
forbidding police deception of a suspect’s attorney.\textsuperscript{116} The Court reasoned that the “[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a Constitutional right.”\textsuperscript{116} \textit{Miranda} did not require that the police inform a suspect of an attorney’s efforts to contact him. The Court held that, despite the police deception, the suspect had made a knowing and voluntary waiver of his Constitutional right to remain silent. As it did in \textit{Elstad}, the Court stressed that \textit{Miranda} warnings are not themselves rights protected by the Constitution. Rather, they are “procedural safeguards” created to protect the fifth amendment right against compulsory self-incrimination. Failure to give \textit{Miranda} warnings is a “technical violation” which differs in significant respects from a violation of the fifth amendment.\textsuperscript{117}

In \textit{Colorado v. Connelly},\textsuperscript{118} written by Chief Justice Rehnquist, the Court renovated the due process “voluntariness” test for determining the validity of confessions.\textsuperscript{119} The Court held that a psychotic defendant could voluntarily waive his \textit{Miranda} rights despite suffering from “command hallucinations” which interfered with his ability to make free and rational choices.\textsuperscript{120} The defendant was compelled by “voices in his head” to confess to the murder of a young girl. The Court focused on police conduct and found that, absent police coercion, the defendant had voluntarily waived his rights. The Court held that “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.”\textsuperscript{121}

\textbf{PERKINS: A NEW APPROACH}

\textit{Perkins} represents the Supreme Court’s most recent approach in applying the \textit{Miranda} doctrine. Although it creates yet another ex-

\begin{itemize}
  \item \textsuperscript{115} Id. at 424.
  \item \textsuperscript{116} Id. at 422.
  \item \textsuperscript{117} \textit{See} Broome, \textit{You (Might) Have a Right to Remain Silent}, \textit{7 Cal. Law.} 37, 39 (1987) (discussing the \textit{Burbine} and \textit{Elstad} decisions).
  \item \textsuperscript{118} 479 U.S. 157 (1986).
  \item \textsuperscript{119} \textit{See supra} note 108.
  \item \textsuperscript{120} 479 U.S. at 170-71.
  \item \textsuperscript{121} Id. at 167.
\end{itemize}
ception to the *Miranda* mandate, it differs from the other decisions undermining *Miranda*. For example, in *Connelly*, the Court focused on police activity.\textsuperscript{122} Absent police coercion, the Court found the statements were voluntarily made, despite clear evidence that the statements were a product of internal forces beyond the suspect's control. Conversely, the *Perkins* majority focused on the suspect's beliefs.\textsuperscript{123} The majority wrote that "where a suspect does not know that he is conversing with a government agent"\textsuperscript{124} coercion will not be presumed despite the absence of *Miranda* warnings. The Court has conveniently shifted its focus from police conduct to the suspect's state of mind.

*Perkins* is distinguishable from the *Burbine* and *Elstad* decisions. In *Burbine*, the Court emphasized that although they found the police deception of Burbine's attorney distasteful,\textsuperscript{125} Burbine was not prevented from voluntarily waiving his rights. The deception in *Burbine* was practiced indirectly on the defendant by deceiving his attorney. However, in *Perkins*, the police deception was practiced directly on the defendant. *Elstad* did not involve police deception.\textsuperscript{126} Although he had not been given his *Miranda* warnings, Elstad knew he was talking to a police officer who was investigating a burglary.\textsuperscript{127} In contrast, Perkins did not know he was speaking with a police officer who was investigating a murder. In addition, Perkins was in jail when he made his "confession." When Elstad made his original inculpatory statements, he was in his house.

*Perkins* is also distinguishable from *New York v. Quarles*.\textsuperscript{128} The Court in *Quarles* was concerned with emergency situations. Justice Rehnquist wrote that the "overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings . . . ."\textsuperscript{129} Perkins' interrogation was not necessitated by an emergency. Rather, it was the product of careful planning. Also, Quarles' "interrogation" was conducted in a public place and consisted of one question.\textsuperscript{130} While Perkins was incarcerated, he was questioned about a serious crime for thirty-five minutes.\textsuperscript{131}

*Perkins* represents a further departure from the *Miranda* rationale. It purports to create a narrowly defined exception applicable

\textsuperscript{122} Id. at 167, 170-71.
\textsuperscript{123} See supra notes 42, 45 and accompanying text.
\textsuperscript{124} Perkins, 110 S. Ct. at 2397.
\textsuperscript{126} See supra note 112.
\textsuperscript{127} Id.
\textsuperscript{129} Id. at 651.
\textsuperscript{130} See supra note 109.
\textsuperscript{131} Perkins, 110 S. Ct. at 2401 (Marshall, J., dissenting). See supra note 16.
only to cases with similar facts.\textsuperscript{132} However, in creating this exception, it shifts the focus of the "voluntariness" inquiry away from police activity to the suspect's state of mind.\textsuperscript{133} Although police deception has been tolerated in the past,\textsuperscript{134} the Court has never permitted deliberate police deception of an inmate in obtaining an unwarned confession. The Court has opened the door for the use of incommunicado interrogation as a legitimate investigative tactic. For the first time, the Court encourages the use of police deception in the custodial interrogation context.\textsuperscript{135}

In a parenthetical, the Court indicates its willingness to further undermine the \textit{Miranda} doctrine. The Court said that even when a suspect "is aware that he is speaking to an official,"\textsuperscript{136} custody may not in every instance require \textit{Miranda} warnings.\textsuperscript{137} Perhaps the Court has lost sight of its role as the protector of Constitutional rights as Justice Brennan accused it of doing in his dissent from the granting of certiorari in \textit{Colorado v. Connelly}:

\begin{quote}
\[\text{the Court goes beyond the mere philosophic inclination to facilitate crimi-}\]
\end{quote}

\textsuperscript{132} \textit{Id.} at 2399. The Court said that "[l]aw enforcement officers will have little difficulty putting into practice our holding that undercover agents need not give \textit{Miranda} warnings to incarcerated suspects." \textit{Id.}

\textsuperscript{133} \textit{See supra} notes 122-24 and accompanying text.

\textsuperscript{134} \textit{See, e.g.}, Moran v. Burbine, 475 U.S. 412 (1986) (permitting police deception of the suspect's attorney); \textit{see supra} notes 114-16, 125 and accompanying text; \textit{see also} Hoffa v. United States, 385 U.S. 293 (1966) (permitting police deception of a suspect while the suspect was released on bail); \textit{see supra} notes 44-48 and accompanying text.

\textsuperscript{135} \textit{See supra} notes 39-40 and accompanying text. The Court wrote that "\textit{Miranda} was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates." \textit{Perkins}, 110 S. Ct. at 2398. Because Perkins did not know the true identity of his cellmates "[h]e spoke at his own peril." \textit{Id.}

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} The Court recently had the opportunity to address this issue but decided not to do so when it denied certiorari in Lockhart v. Hill, 110 S. Ct. 3258 (1990) (mem). Justice Marshall, in dissent, stated his belief "that \textit{Miranda} and its progeny [had] already answered" the question of whether custody mandated that an inmate be given warnings prior to interrogation. \textit{Id.} at 3259 (Brennan & Marshall, JJ., dissenting). Although the defendant, an inmate, was not given \textit{Miranda} warnings before questioning by prison officials, the trial court denied his motion to suppress the incriminating responses. \textit{Id.} Both the appellate court and the state supreme court affirmed the subsequent conviction. \textit{Id.} Justice Marshall dissented because the case provided "the Court a chance to clarify what constitutes 'custody' for \textit{Miranda} purposes in the prison setting." \textit{Id.} at 326.

Perhaps the majority denied certiorari because it thought that \textit{Perkins} had already clarified the issue. According to the \textit{Perkins}' majority, \textit{Miranda} is only implicated in situations where confessions are coerced and involuntary. If "the danger of coercion result[ing] from the interaction of custody and official interrogation" is absent, \textit{Miranda} warnings need not be given prior to custodial interrogation. \textit{Perkins}, 110 S. Ct. at 2397. \textit{See also supra} notes 38-50 and accompanying text.
nal prosecution: the Court gives the appearance of being not merely the
champion, but actually an arm of the prosecution.

... In making the specific guarantees of the Bill of Rights a part of our
fundamental law, the Framers recognized that limitless state power afflicts
the innocent as well as the guilty, even a crime—free world is not worth the
fear and oppression that inevitably follow unrestricted police power, and
that a truly free society is one in which every citizen—guilty or inno-
cent—is treated fairly and accorded dignity and respect by the State. ... Our
is the duty to prevent encroachment on these principles. ... This
Court has, sadly, lost sight of this role, to the detriment of the rights of
each of us.\textsuperscript{138}

The \textit{Perkins} decision supports Justice Brennan's accusations.

\section*{CONCLUSION}

The extent to which the Court feels comfortable in creating excep-
tions to the \textit{Miranda} doctrine reflects its belief that \textit{Miranda} extends
protection beyond the scope of the Constitution. \textit{Miranda} attempted
to address concerns beyond deliberate physical police coercion. These
concerns addressed the psychological pressures inherent in incarcera-
tion, indirect police coercion, and adherence to an accusatory rather
than inquisitional criminal justice system. By focusing solely on di-
rect police coercion, the \textit{Perkins} majority creates an exception that
ignores many of the concerns that motivated the \textit{Miranda} decision.

Although the exception created by the Court does not overrule
\textit{Miranda}, it represents a new approach to the recent Supreme Court
decisions which have all but eroded the \textit{Miranda} doctrine. The
Court now shifts the focus of the "voluntariness" inquiry away from
police conduct. For the first time, the Court permits deliberate police
deception of an inmate in obtaining an unwarned confession. By fo-
cusing on the suspect's state of mind, the Court creates an exception
that blurs the bright-line rule which \textit{Miranda} attempted to provide.
By labeling \textit{Miranda} violations as mere "technicalities," the Court
diminishes the protection \textit{Miranda} provides to secure Constitutional
rights. The Court has opened the door to abuse by encouraging the
use of police deception in custodial interrogations. The extent of the
abuse may now only be limited by the Due Process Clause of the
fourteenth amendment.

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\textsuperscript{138} 474 U.S. 1050, 1052-53 (1986) (Brennan, J., dissenting). \textit{See supra} notes
118-21 and accompanying text.

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