# Miranda Warning Held Inapplicable to Tax Fraud Investigations in Absence of Custodial Atmosphere.

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CRIMINAL LAW—TAX INVESTIGATIONS—MIRANDA WARNING HELD INAPPLICABLE TO TAX FRAUD INVESTIGATIONS IN ABSENCE OF CUSTODIAL ATMOSPHERE. *United States v. Mackiewicz*, 401 F.2d 219 (2d Cir.), *cert. denied*, 89 S. Ct. 253 (1968).

Mackiewicz was suspected of income tax evasion for failure to report, over a three year period, approximately $84,000 as taxable income. An agent of the Audit Division of the Internal Revenue Service began an audit of defendant's account and from records turned over to him ascertained that Mackiewicz's deposits exceeded his business income. The case was then referred to a special agent of the Intelligence Division of the Internal Revenue Service. An interview was arranged with the defendant at his home. The special agent informed him that the inquiry pertained to certain tax deficiencies and that he did not have to answer any questions or produce any documents which he felt were self-incriminating. The special agent, however, failed to inform defendant of his right to counsel. Defendant indicated by a nod that he understood the warning. Questions were asked from a standard questionnaire designed to enable the agent to fashion a net worth theory. This was done by comparing defendant's annual increment in asset value to his reported income. Defendant pleaded ignorance of the potential import of the agent's questions and a violation of his right to be informed of his constitutionally guaranteed rights required by the ruling in *Miranda v. Arizona*.[1] The trial court held that a *Miranda* warning was inapplicable, absent custodial interrogation, and that he had voluntarily waived his constitutional rights. Held—*Affirmed.* Agents are not required to give *Miranda* warnings to taxpayers suspected of income tax evasion, notwithstanding the fact that the case had been referred to a special agent, and that defendant had voluntarily, unequivocally and intelligently waived his constitutional rights.

Federal courts have generally held that agents of the Internal Revenue Service have no duty to warn taxpayers of their constitutional rights under the fifth and sixth amendments. Also, agents need not advise that the investigation has shifted from the civil to the criminal aspect of the adversary process.[2]

In *Gouled v. United States*,[3] the majority said a special agent of the Internal Revenue Service, misrepresenting the nature of his visit in

1 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

2 United States v. Sclafani, 265 F.2d 408 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959); Turner v. United States, 222 F.2d 926 (4th Cir.), *cert. denied*, 350 U.S. 831 (1955); United States v. Burdick, 214 F.2d 768 (3d Cir.), *cert. denied*, 350 U.S. 831 (1955); Hanson v. United States, 186 F.2d 61 (8th Cir. 1950); Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949).

3 Gouled v. United States, 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921).

order to gain access to the suspect's office to seize incriminating papers, had violated the protections afforded the suspect under the fourth and fifth amendments of the United States Constitution. Although several decisions had passed on the tax investigation area previously,[4] the primary case interpreting *Gouled* is *Turner v. United States.*[5] The court found that in the absence of a showing of coercion, or affirmative misrepresentation on the part of the Internal Revenue agents, there was no violation of the rights secured to the taxpayer by the fourth and fifth amendments. The court also said that it is not essential in tax fraud investigations that the suspect be warned that his statements might be used against him in later criminal proceedings.

The majority of cases apply the same interpretation of the *Turner* rationale.[6] A minority of cases construed the "affirmative misrepresentation" test of *Turner* to be something less than *"affirmative misrepresentation."*[7] *United States v. Sclafani*[8] reaffirmed the *Turner* doctrine, holding that the taxpayer was deemed to be informed of his rights by the warning inherent in the agent's request to see the taxpayer's books. It expressly disapproved the minority line of cases.[9]

In the landmark case of *Escobedo v. Illinois,*[10] the United States Supreme Court enunciated a theory pertaining to the rights of an accused which marked a culmination of past decisions and evidenced a new approach in the area of criminal law.[11] Characterizing this new approach Justice Goldberg speaking for the court stated:

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4 United States v. Burdick, 214 F.2d 768 (3d Cir.), *cert. denied,* 350 U.S. 831 (1955); Hanson v. United States, 186 F.2d 61 (8th Cir. 1950); Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949).

5 Turner v. United States, 222 F.2d 926 (4th Cir.), *cert. denied,* 350 U.S. 831 (1955).

6 Cases cited *supra* note 4.

7 Matter of Bodkin, 165 F. Supp. 25 (D.C.N.Y. 1958): taxpayer and his accountant were kept unaware of special agent's entry into case because special agent employed a revenue agent to gather all incriminating evidence before announcing his presence to taxpayer; United States v. Wheeler, 149 F. Supp. 445 (D.C. Pa. 1957): special agent's assignment to inspect records of taxpayer had dual purpose of determining if there was any civil liability and if there was any criminal liability involving personnel of Internal Revenue Service; agent misrepresented the purpose of his inquiry to the taxpayer and in so doing gathered incriminating evidence for tax evasion; United States v. Lipshitz, 132 F. Supp. 519 (D.C.N.Y. 1955): special agent's assignment of a revenue agent to gather incriminating evidence without defendant's knowledge or consent . . . could not be distinguished from obtainment thereof by stealth or subterfuge; United States v. Guerrina, 112 F. Supp. 126 (D.C. Pa. 1953): revenue agent failed to inform taxpayer that the true purpose of his inspection of the books was to procure evidence of fraud for contemplated criminal proceedings and not merely a routine audit.

8 United States v. Sclafani, 265 F.2d 408 (2d Cir.), *cert. denied,* 360 U.S. 918 (1959).

9 *Id.* at 414.

10 Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

11 *See generally,* Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), right to counsel at least in capital cases is fundamental to due process of Fourteenth Amendment; Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), Sixth Amendment guarantee of right of counsel must be competently and intelligently waived; Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114, absence of counsel for defendant at time of arraignment violated his rights under due process clause of Fourteenth Amendment; White v. Maryland, 373 U.S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193

> [N]o system of criminal justice can, or should survive, if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[12]

In the area of tax fraud investigation, the effect of the emerging investigatory-accusatory doctrine of *Escobedo* was limited by *Kohatsu v. United States*.[13] The *Escobedo* rule was held not applicable to tax investigations because the revenue agent's function was purely investigatory and not accusatory.[14] The rationale in subsequent cases held that the duty of the special agent was to determine only whether a violation of tax laws had or had not occurred and was therefore purely investigatory and not accusatory.[15] *Kohatsu* was followed generally[16] yet the United States Supreme Court has consistently refused to pass upon the issues involved in this area.[17]

In 1966, the Supreme Court's ruling in the landmark case of *Miranda v. Arizona*[18] announced that: "The protections of the fifth amendment are available outside of criminal court proceedings, and serve to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[19] The *Miranda* rule resulted in a split of authority in tax fraud investigation cases. A minority of post-*Miranda* decisions applied *Miranda* in its liberal sense to tax fraud investigation cases.[20] The

(1963), absence of counsel for petitioner when he enters plea of guilty before magistrate violated his rights under due process clause of Fourteenth Amendment; Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), Sixth Amendment guarantees aid of counsel to defendant under interrogation in completely extrajudicial proceedings (concurring opinion of Justice Stewart).

12 Escobedo v. Illinois, 378 U.S. 478, 490, 84 S. Ct. 1758, 1764, 12 L. Ed. 2d 977, 985 (1964).

13 Kohatsu v. United States, 351 F.2d 898 (9th Cir.), *cert. denied*, 384 U.S. 1011 (1966).

14 *Id.* at 903.

15 *Id.* at 902.

16 *accord*, United States v. Maius, 378 F.2d 716 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967); Selinger v. Bigler, 377 F.2d 542 (9th Cir.), *cert. denied*, 389 U.S. 904, *rehearing denied*, 389 U.S. 998 (1967); Rickey v. United States, 360 F.2d 32 (9th Cir.), per curiam, *cert. denied*, 385 U.S. 835 (1966).

17 Cases cited *supra* note 16.

18 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

19 Miranda v. Arizona, 384 U.S. 436, 467, 86 S. Ct. 1602, 1624, 16 L. Ed. 2d 694, 719 (1966).

20 *See* United States v. Dickerson, 291 F. Supp. 633 (D.C.N.D. Ill. 1968); United States v. Wainwright, 284 F. Supp. 129 (D.C. Colo. 1968); United States v. Gower, 271 F. Supp. 655 (M.D. Pa. 1967); United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967); United States v. Harrison, 265 F. Supp. 660 (S.D.N.Y. 1967); United States v. Kingry, 19 AFTR2d 762 (N.D. Fla. 1967); United States v. Schoenberg, 19 AFTR2d 348 (D.C. Ariz. 1966); recent, United States v. Mathis, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968), holding that Miranda rule applies to tax investigation cases.

majority of decisions chose not to extend the *Escobedo* and *Miranda* rationales into the field of tax investigation.[21]

The "focus-purpose"[22] theory found in *Escobedo* was limited by *Kohatsu,* and gained support in subsequent cases.[23] *Miranda* held that fifth amendment protections were available to a person whose freedom had been curtailed in any significant manner.[24] This holding had little effect on subsequent tax fraud investigations. These post-*Miranda* cases held that the ruling applied only to custodial interrogations,[25] and that a brief warning by the agent at the beginning of the investigation was sufficient to inform the taxpayer of his rights because of his continued freedom of movement during the investigation.[26] Thus, it was inferred that an agent's failure to warn the suspected taxpayer of his constitutional rights before incriminating evidence had been elicited from his records did not violate either the *Escobedo* or *Miranda* rulings.[27] Other cases held that the evidence elicited from the taxpayer during non-custodial Internal Revenue conferences was not subject to a motion to suppress because of the special agent's failure to advise the taxpayer of his constitutional rights. This was held even though the failure to give a warning violated an administrative ruling.[28] Another case held that a taxpayer had to watch out for himself to some extent, and was not entitled to a formal *Miranda* warning because it would be an unprecedented burden on an administrative task.[29]

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21 *See* Frohmann v. United States, 380 F.2d 832 (8th Cir.), *cert. denied,* 389 U.S. 976 (1967); Schlinsky v. United States, 379 F.2d 735 (1st Cir.), *cert. denied,* 389 U.S. 920 (1967); Morgan v. United States, 377 F.2d 507 (1st Cir. 1967); recent, Muse v. United States, 405 F.2d 40 (8th Cir.), *cert. denied,* — U.S. — (1969); United States v. Beal, 404 F.2d 58 (6th Cir.), *cert. denied,* — U.S. — (1969); United States v. Squeri, 398 F.2d 785 (2d Cir. 1968); United States v. Neves, 269 F. Supp. 158 (S.D.N.Y. 1967); United States v. Bachman, 267 F. Supp. 593 (W.D. Pa. 1966); United States v. Spinney, 264 F. Supp. 774 (D. Mass.), *cert. denied,* 390 U.S. 921 (1968); Stern v. Robinson, 262 F. Supp. 13 (W.D. Tenn.), *cert. denied,* 390 U.S. 1027 (1968); United States v. Hill, 260 F. Supp. 139 (S.D. Cal. 1966); United States v. Carlson, 260 F. Supp. 423 (E.D.N.Y. 1966); United States v. Fiore, 258 F. Supp. 435 (W.D. Pa. 1966); United States v. White, 293 F. Supp. 692 (E.D. Pa. 1968).

22 Escobedo v. Illinois, 378 U.S. 478, 490, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), when the investigation is no longer a general inquiry, but has focused on a particular individual with the purpose of eliciting a confession from him, then the accusatory stage has been reached so as to entitle individual to his constitutional rights under the Fifth and Sixth Amendments.

23 Cases cited *supra* note 17.

24 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

25 United States v. Fiore, 258 F. Supp. 435 (W.D. Pa. 1966).

26 United States v. Carlson, 260 F. Supp. 423 (E.D.N.Y. 1966).

27 United States v. Schlinsky, 261 F. Supp. 265 (D. Mass. 1966).

28 United States v. Jaskiewicz, 278 F. Supp. 525 (D.C.E.D. Pa. 1966); Internal Revenue Service News Release, No. 897, October 3, 1967:

> On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: "As a special agent, I have the function of investigating the possibility of criminal tax fraud." If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

29 Morgan v. United States, 377 F.2d 507 (1st Cir. 1967).

A minority of post-*Miranda* cases applied the *Miranda* warning to Internal Revenue practices of questioning suspected taxpayers. The rationale of these cases involves the boundary between the investigatory-accusatory stage and the entry of the special agent into the tax fraud investigation.[30] The first case on this question, *United States v. Kingry*,[31] held the *Miranda* warning applicable to non-custodial criminal investigations. An appraisal of constitutional rights is required when a tax investigation, without the taxpayer's knowledge, shifts from the civil to the criminal stage of the adversary process.[32] At this stage, the taxpayer is in need of the advice of counsel and should be warned of his rights the moment the investigation becomes criminally oriented.[33] Another case held the *Miranda* warning applicable to trials begun after the date of the decision, hence requiring the Internal Revenue agents to inform the suspected taxpayer of his constitutional rights immediately after the criminal investigation is launched.[34] In *Mathis v. United States*,[35] the *Miranda* warning was held to be required when a revenue agent questioned an already in-custody suspect in relation to the suspect's fraudulently filed tax returns.

The court in the instant case held the *Miranda* warning inapplicable for several reasons. It first reasoned that the defendant had "unequivocally, specifically, and intelligently" waived his constitutional rights.[36] The court reasoned that the defendant's nodding his head in response to the brief warning, coupled with his subsequent cooperation, was sufficient indication that he was aware of his rights and had waived them.[37] The majority of the court stated that the transfer of the case from the Audit Division to the Intelligence Division was not the decisive factor in establishing a custodial interrogation requiring a *Miranda* warning to be given.[38] They reasoned that in some instances administrative investigators might have to infringe upon private citizens' constitutional rights, but the infringement in this case did not warrant a "full-blown" *Miranda* warning.[39] To require a formal warning at this stage of the proceedings would clutter an already difficult administrative task.[40] The court also felt that it would be an administrative impossibility to warn the taxpayer every time an agent's suspicions based on changing evaluations of the evidence shifted.[41] The

30 Cases cited *supra* note 21.
31 United States v. Kingry, 19 AFTR2d 762 (N.D. Fla. 1967).
32 United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967).
33 United States v. Gower, 271 F. Supp. 655 (M.D. Pa. 1967).
34 United States v. Dickerson, 291 F. Supp. 633 (D.C.N.D. Ill. 1968).
35 Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968).
36 United States v. Mackiewicz, 401 F.2d 219 (2d Cir.), *cert. denied*, 89 S. Ct. 253 (1968).
37 *Id.* at 221, 223.
38 *Id.* at 221, 222.
39 *Id.* at 222.
40 *Id.*
41 *Id.*

court held that the investigation was not charged with an atmosphere tantamount to an actual custodial interrogation.[42] They based their reasoning on the interview's total perspective, not on a technical custody requirement.[43] Thus, the court found an absence of a coercive atmosphere because the interview was conducted at the defendant's home where he was free to come and go, or ask the agents to leave.[44] The majority then stated that the agent's failure to explain the potential import of the questions was not intentionally misleading.[45] They reasoned that to require a *Miranda* warning based on the taxpayer's unawareness of the Internal Revenue's procedures would result in a rule "too illusory to form a rational and practical basis for administrative action."[46] The court therefore held that evidence voluntarily given should not be subject to exclusion, absent coercive factors.[47]

The concurring opinion agreed with the majority's application of *Miranda*. There was, however, a statement by the concurring judge that the analysis of *Miranda* may have been misapplied.[48] It was also his opinion that a requirement of a warning at the moment the case was referred to a special agent would not cause serious administrative difficulties.[49]

The non-extension policy enunciated in *United States v. Mackiewicz* bolsters the majority of federal court decisions holding *Miranda* inapplicable in absence of a custodial atmosphere.[50] This custodial test is supported by a prior United States Supreme Court decision in *Mathis v. United States*.[51] The facts are distinguishable because the petitioner was in custody when the agent made his interrogation. It seems this case will be limited to its peculiar fact situation and will not control the usual tax fraud investigation. Placing such a limitation on the theory behind *Miranda* has the effect of limiting the application of the *Escobedo* rule. It also overlooks the nature of the tax investigation itself,[52] and denies to the suspected taxpayer his constitutional rights at a point when they are critically needed.[53]

The view in *Mackiewicz* is supported by a majority of federal court decisions, however the United States Supreme Court has not yet decided the precise issue of a pre-custodial *Miranda* warning in tax investigation

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42 *Id.*
43 *Id.*
44 *Id.* at 222, 223.
45 *Id.* at 223.
46 *Id.*
47 *Id.*
48 *Id.* at 226.
49 *Id.*
50 Cases cited *supra* note 21.
51 Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968).
52 Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation*, 44 Taxes 660, 690.
53 *Id.*

cases.[54] The Supreme Court's decision in *Mathis v. United States* is not determinative of this issue. The facts of that case were such as to denote an obvious situation in which *Miranda* clearly applied. *Mathis* would therefore be confined to the principle that the *Miranda* requirements are not limited to the questioning of one who is in custody in connection with the very case under investigation.[55]

The court appeared to rely heavily on the theory that a *Miranda* warning would further burden an administrative task and hinder the collection of taxes. A recent Internal Revenue news release would indicate that the Service holds a contrary opinion.[56] A previous case held, however, that there was no violation of *Miranda* where the agent failed to give a taxpayer a *Miranda* warning, although such failure violated an administrative ruling.[57] Such a contention is dubious, as evidenced by the language of the concurring opinion in *Mackiewicz*.[58] A more realistic approach would be that revenue agents could no longer depend on the suspected taxpayer to be his own executioner.[59] More diligent investigatory procedures would then be required of revenue agents in obtaining incriminating evidence from the suspected taxpayer.[60] The result would therefore more fully conform with the *Miranda* rationale of giving "meaningful protection to fifth amendment rights."[61]

The argument of an over-burdened administrative task is without merit. A warning would better serve the ends of justice by informing the suspect taxpayer of his perilous situation and of the constitutional rights available to him. To hold otherwise would promote a class distinction in the field of criminal law[62] by recognizing government expediency to be paramount to an individual's constitutionally guaranteed rights. The potential consequences of an adverse tax investigation are such as to warrant a *Miranda* warning the moment the investigation assumes the status of a criminal investigation. It is at this point that the defendant becomes an accused, and no distinction should be made between a criminal tax investigation and any other criminal investiga-

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54 Muse v. United States, 405 F.2d 40 (8th Cir.), *cert. denied*, — U.S. — (1969); United States v. Beal, 404 F.2d 58 (6th Cir.), *cert. denied*, — U.S. — (1969); *see also*, cases cited *supra* note 17.

55 Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968).

56 Internal Revenue Service news release, No. 949, November 26, 1968.

57 United States v. Jaskiewicz, 278 F. Supp. 525 (D.C.E.D. Pa. 1966).

58 United States v. Mackiewicz, 401 F.2d 219, 226 (2d Cir.), *cert. denied*, 89 S. Ct. 253 (1968).

59 See note 52 *supra*, at 689.

60 *Id.*

61 Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 1505, 20 L. Ed. 2d 381 (1968).

62 See Andrews, *The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: "The Critical Stage,"* 76 Iowa L. Rev. 1074.