TESTIMONY

of

Gilbert G. Gallegos
National President
Grand Lodge, Fraternal Order of Police

in support of
the decision *United States v. Dickerson*

before the

Senate Committee on the Judiciary, Subcommittee on Criminal Oversight

13 May 1999

Good morning, Mr. Chairman and distinguished members of the Senate Subcommittee on Criminal Justice Oversight. My name is Gilbert G. Gallegos, National President of the Grand Lodge, Fraternal Order of Police. The FOP is the nation's largest organization of law enforcement professionals, representing more than 277,000 rank-and-file law enforcement officers in every region of the country.

I am pleased to have the opportunity this morning to speak in support of a recent court decision, *United States v. Dickerson*, which upholds a Congressional attempt to address legislatively the issues of pretrial interrogations and self-incrimination which are currently governed by the Supreme Court's decision in *Miranda v. Arizona* (1968).

Law enforcement officers have a demanding and difficult job, and much is expected of us—whether it's rescuing a cat, directing traffic, delivering a baby, or busting a drug dealer. As a police officer, I am very proud to say that the brave men and women who I am privileged to represent here today work very hard to meet, and hopefully exceed, those expectations every day.

A career in law enforcement, like any other, is not without its frustrations. But for a police officer, these frustrations have less to do with the workplace and more to do with our criminal justice system which all too often allows criminals to avoid justice because of "technicalities."

What precisely are these technicalities? Perhaps the American public does not know how many criminals are walking the streets today or how many will be released from prisons today because of these "technicalities." I would wager, however, that most law enforcement officers would be able to tell you how many crooks they arrested have walked on a "technical."

Let me give you just one example of how this can happen. On 24 July 1985, the bodies of Paul Conrad and Sandra Wiker were discovered in Lancaster, Pennsylvania. It was a brutal murder—the victims had been stabbed, strangled, bound and gagged.

Two days later, several detectives of the Lancaster Police Department, along with the District Attorney, interviewed two people who provided information linking a man named Zook to the killings and naming a hotel where they thought Zook could be found. The police decided to stake out the motel. A few hours later, Zook left his hotel room, and pursuant to their instructions, the police officers placed him under arrest. At that time, Zook had in his possession a knife and a revolver along with two rings later identified as belonging to Paul Conrad.

Zook was brought to police headquarters and, shortly thereafter, read his *Miranda* rights. He was questioned about the murders and the weapons in his possession. It is worth noting that Zook was not at all unfamiliar with police procedure or the criminal justice system, having been previously convicted of attempted murder, robbery, burglary and criminal conspiracy. According to Lancaster Police Lieutenant Michael Landis, one of the interrogating officers, Zook offered an explanation of his whereabouts on various key dates, but could not provide the names of witnesses to corroborate his story. He could offer no cogent explanation as to why he checked into the motel under an alias. He claimed he got the gun and the ring in exchanges for drugs but would not, or could not, name the other party to the transaction. When asked whether he knew

Sandra Wiker, he denied knowing her. When confronted with the fact that her name was listed in his own address book, he could not explain the discrepancy and became angry.

At the pre-trial hearing to determine whether or not Zook's statements should have been suppressed, Lieutenant Landis stated that about two-thirds of the way into the interview, after being asked if he knew Conrad or Wiker, Zook asked if he could use the phone to call his mother to see if she could get him an attorney. At this point, the officer asked if this meant Zook wanted him to stop the questioning until Zook had an attorney present. Zook told Lieutenant Landis no and allowed the interview to continue.

By a 4 to 3 vote, the Pennsylvania Supreme Court threw out Zook's conviction for the murders. The Court ruled that under *Miranda* Lt. Landis should have stopped questioning when he asked to use the phone even though Zook agreed to continue and there was no evidence of coercion. Since, the Court said it could not be established exactly when Zook asked to make the phone call, all of his statements had to be thrown out.

I should point out that there is no question Zook made his statements voluntarily, not as a result of any improper police coercion. I should also point out that of the eight judges who examined the question as to whether the Lancaster Police Department had to stop questioning when Zook made his request, four found that they should have and four found that they had no reason to do so. Yet the jury's conviction of Zook for these two brutal murders was thrown out.

This is a technicality.

The issue before the Fourth Circuit in *Dickerson* was precisely the question of whether to let a confessed, dangerous criminal go free on a "technicality." Fortunately, the Fourth Circuit refused to allow this to happen, and instead applied a law Congress had passed in 1968— Section 3501 of Title 18, U.S. Code. "No longer will criminals who have voluntarily confessed their crimes be released on mere technicalities," the court wrote in upholding this law. To this holding, law enforcement officers all across the country say, "It's about time."

With all the legal gymnastics available to defense lawyers, the caprice of judges and overburdened prosecutors, it is certain that many persons who ought to be locked up are walking the streets today. Many blame law enforcement officers, expecting us to be legal experts on exclusionary rule law and be able to quote verbatim all case law on the Fourth, Fifth, and Fourteenth amendments. Police officers make life and death decisions every day; they are trained to prevent crime and catch criminals. They know the law and apply it every day as they walk their beats and patrols. They are also called upon to exercise their judgment and common sense in uncommon situations. Unfortunately, we too often find that common sense is not always admissible in court.

A big step toward common sense was taken when Congress passed section 3501. That statute encouraged police agencies to give the now standard "*Miranda"* warnings. But at the same time, it said that a confession could be used in court so long as it was "voluntary." This approach properly recognizes the vital importance of confessions to law enforcement. No one suggests that police officers should be able to coerce or threaten a suspect to obtain a confession. But that is

not what the *Miranda* decision is about. Even before *Miranda*, any confession obtained by threats—an "involuntary" confession—was excluded. *Miranda* did not add anything to those situations, and Section 3501 preserves in full force the rule that involuntary confessions cannot be admitted. Instead, *Miranda* created a whole host of new procedural requirements that applied, not to situations of threats, but to ordinary, everyday police questioning all over the country.

Here it is important to understand what rules the decision actually imposed on police. The general public may think that it knows all about *Miranda* from watching television programs and seeing the four warnings read from a card. But for police officers on the streets, much more is involved.

To begin with, police officers have to decide when it is time to apply the *Miranda* procedures. The courts have told officers that warnings are required only when a suspect is in "custody." Making this determination is very complicated, as shown by the fact that respected judges with ample time to consider the issues frequently cannot agree among themselves over whether or not a suspect was in custody. If a suspect is in "custody," *Miranda* warnings must be given whenever "interrogation" of a suspect begins. Here again, respected judges have often disagreed on what constitutes interrogation, but police officers are expected to know on the spot, often in tense and dangerous situations.

If a suspect in "custody" is "interrogated," police officers must not only read *Miranda* warnings but then obtain a "waiver" from the suspect of his rights. Pages of judicial ink have been spilled on what constitutes a valid waiver of rights, but police officers must decide almost instantaneously whether they have a valid waiver from a suspect. Then, once officers get a waiver, they must be constantly ready to know if a suspect has changed his mind and decided to assert his right to see a lawyer or to remain silent. If this change of mind has taken place, a police officer must still know if and when he can reapproach a suspect to see if the suspect has changed his mind yet again.

Finally, on top of all this, police are expected to know that *Miranda* warnings are not always required, as the Supreme Court has specifically created exceptions for situations involving "public safety" or "routine booking," and other courts have recognized exceptions for routine border questioning, general on-the-scene questioning, and official questioning at a meeting requested by a suspect. And police, too, must know about whether a suspect has been questioned by officers from another agency and about another crime and another time, and, if so, whether a suspect invoked his rights during that other questioning.

Police officers all around the country spend a great deal of time attempting to learn all these rules and follow them faithfully. But since judges disagree with exactly how to apply all these rules, it is not surprising to find that police officers too will occasionally make mistakes and deviate from some of the *Miranda* requirements.

There will also be situations when police officers and criminal suspects disagree about whether all the rules were followed. *Dickerson* provides a very good illustration of this. Charles Dickerson, the confessed bank robber, said that he received his warnings only *after* he had given his confession.

The officer involved testified to the contrary that they followed their normal procedures and read the warnings before questioning. Dickerson apparently had prior experience as a suspect in the criminal justice system and had probably even heard the *Miranda* rights before. In situations like this, it makes no sense to throw out a purely voluntary confession on technical arguments about exactly when the *Miranda* warnings were read, for all the reasons that the Fourth Circuit gave in its opinion.

Of course, our Constitution, and the Bill of Rights in particular, were enacted and ratified with the aim of protecting the individual from an abuse of power by government. In an arrest and interrogation situation, the law enforcement officers represent the government and no one ought to be deprived of their constitutional rights during that questioning. But the Fifth Amendment's prohibition of anyone being "compelled" to be a witness was designed to protect against coercion by government agents, not technical mistakes that might occur in administering complicated court rules. This was exactly what the Fourth Circuit recognized in its *Dickerson* opinion in refusing to allow, as the court put it, "mere technicalities" to prevent a completely voluntary confession from being introduced before the jury.

The Fourth Circuit also properly explained why legally this makes good sense. In *Miranda v. Arizona*, the Supreme Court established various procedures to safeguard the Fifth Amendment rights of persons in custodial interrogations. The Court thought that, without certain safeguards, no statement obtained by law enforcement authorities could be considered "voluntary" and thus admissible in court. Ever since, the words "You have the right to remain silent..." have been part of every law enforcement officer's lexicon.

However, the Supreme Court has made it clear over the past 25 years that procedural safeguards imposed by the *Miranda* decision were not rights protected by the Constitution, but rather measures designed to help ensure that the right against self-incrimination was protected. As the Court explained a few years later in *Michigan v. Tucker* (1974), the safeguards were not intended to be a "constitutional straightjacket" but rather to provide "practical reinforcement" for the exercise of Fifth Amendment rights.

In *Tucker*, a rape suspect gave exculpatory responses without being fully Mirandized. (He was questioned before the Court had decided *Miranda*.)

The suspect's statements led them to a witness who provided damaging testimony, testimony which the defense sought to have excluded because the witness was located through an interrogation in which the suspect had not been fully advised of his rights. The Court, however, allowed the evidence to be used, explaining that "Certainly no one could contend that the interrogation faced by [the suspect] bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed."

Similar to the decision in *Tucker*, the Supreme Court ruled in *New York v. Quarles* (1985) that there is a "'public safety' exception to the requirement that Miranda warnings be given." Police officers approached by a victim raped at gunpoint were advised that her attacker had just entered a supermarket. After arresting the suspect and discovering an empty holster on his person, the officer asked, "Where is the gun?" The suspect revealed where he had hidden the weapon, an

important piece of evidence, which the suspect's lawyers successfully excluded in State court because the suspect was not Mirandized between his arrest and the "interrogation."

The Supreme Court, however, overruled the lower court's decision, stating that police officers ought not to be "in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that and neutralize the volatile situation confronting them." The Court recognized the "kaleidoscopic situation...confronting the officers," not that "spontaneity rather than adherence to a police manual is necessarily the order of the day," and worried that "had *Miranda* warnings deterred [the suspect] from responding to [the officer's] questions, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area." Accordingly, the Court allowed the statement made by Quarles to be used against him.

The logic of the Supreme Court's "public safety" decision in *Quarles* is exactly the logic of Section 3501. This statute was drafted in 1968, after the Senate Judiciary Committee held extensive hearings on the effects of the Supreme Court's rulings in *Miranda* and some other cases. The Committee was deeply concerned about *Miranda's* effects on public safety, concluding that "[t]he rigid, mechanical exclusion of an otherwise voluntary and competent confession is a very high price to pay for a 'constable's blunder.'"

To reduce that high price, Congress enacted 18 U.S.C. 3501, which instructs Federal judges to admit confessions "voluntarily made." The statute also spelled out the factors a court must "take into consideration" in order to determine the "voluntariness" of a confession. The Senate report which accompanied the "Omnibus Crime Control and Safe Street Act of 1968," explained the rationale for Section 3501 quite bluntly: "[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities...The Committee is convinced that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic and extremely harmful to law enforcement."

Unfortunately, for various legal reasons that will doubtlessly be discussed by others in this hearing, the benefits of this statute were not generally obtained until the Fourth Circuit's recent decision in *Dickerson*. The FOP agrees with the Fourth Circuit— as well as with the United States Congress—that this statute is constitutional and that it is a prudent and necessary approach to considering defendants motions to suppress voluntary confessions.

It has taken too long for the statute to be applied by the courts, but we now hope that the decision will be quickly upheld in the Supreme Court, so that the benefits of the statute will be available in all cases presented in Federal court. FOP members often work cases prosecuted in Federal court and, indeed, the *Dickerson* case itself involved a coordinated effort by both Federal and local police officers to apprehend Dickerson and bring him to justice.

We also hope that the benefits of the statute will end up being extended to State courts as well. Arizona has a statute almost identical to Section 3501, and we expect that a favorable ruling on the Federal statute would help that state and other states draft similar legislation. Moreover, even without any State statutes, a favorable court ruling on Section 3501 might well set the stage for avoiding the suppression of voluntary confessions because of technical *Miranda* issues in state courts.

In considering the statute, it is important to understand that police officers will continue to give *Miranda* warnings if the principles of Section 3501 are applied around the country. The statute itself provided that the giving of *Miranda* warnings is a factor to be considered in determining whether a confession is voluntary. The Fourth Circuit specifically pointed to this fact in upholding the statute. It said, "Lest there be any confusion on the matter, nothing in today's opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings.... [T]hose warnings are among the factors a district court should consider when determining whether a confession was voluntarily given." Police agencies will continue to do their best to follow *Miranda* when the statute is applied just as we do now. The only change will be that dangerous confessed criminals, like Mr. Dickerson, will not escape justice and be set free to commit their crimes again. The FOP strongly endorses this return to common sense in our nation's courtrooms, and hopes that the Congress and the Department of Justice will do whatever they can to insure that this is the ruling of the United States Supreme Court.

On behalf of its members, the FOP is also keenly interested in having the Supreme Court affirm the *Dickerson* opinion because its implication for civil damage suits that are filed against police agencies. As the Committee is well aware, police agencies and law enforcement officers today are frequently sued in a variety of circumstances. Responding to such suits requires significant time and energy that could otherwise be devoted to apprehending criminals. That time and energy should be devoted to litigation only when crucial issues are at stake.

The courts around the country have routinely held that a mere allegation that a police officer failed to properly deliver all of the *Miranda* warnings is not the sort of allegation that warrants a Federal civil rights lawsuit under Section 1983. Because *Miranda* rights are not constitutionally required, the courts have repeatedly explained, alleged *Miranda* violations are not actionable under Section 1983. Many courts have reached this conclusion, which demonstrates not only that this position is a strong one, but also that police officers frequently face lawsuits from disgruntled criminal suspects that they have interviewed who are motivated solely by a desire to disrupt law enforcement activities.

So long as the *Dickerson* opinion is upheld by the Supreme Court, this line of cases will remain in place. *Dickerson* explained that "it is certainly well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation." Yet those who challenge *Dickerson* jeopardize not only that court's specific decision but the rationale that has shielded police officers from having to respond to a civil rights suit whenever they have arguably deviated from *Miranda.* The FOP therefore strongly supports *Dickerson* not simply because it helps insure the conviction of dangerous criminals, but also because it helps to permit police officers to concentrate on their difficult task of catching and convicting criminal defendants rather than spending time themselves as defendants in unwarranted civil lawsuits.

In closing, let me say that I agree with those who have expressed concerns about *Miranda's* harmful effects on law enforcement. Sometimes we hear the claim that police have "learned to live with *Miranda"* as an argument against any change in the rules used in our courts. If what is meant by this is that police will do their very best to follow whatever rules the Supreme Court establishes, it is true police have "learned to live with *Miranda*." Indeed, since 1966, police professionalism in this country has expanded tremendously in many ways.

But if what is meant by this is that police "live with" and do not care about the harmful effects of these Court rules, nothing could be further from the truth. I can tell you from my experience as a law enforcement officer that too often these rules interfere with the ability of police officers to solve violent crimes and take dangerous criminals off the streets. The main culprit is not the *Miranda* warnings, which suspects have often heard time and again. The barrier to effective police questioning comes from all of the other technical requirements, which in far too many cases make it impossible for police officers to ask questions of suspects, and to rigid exclusionary rules that prevents the use of any information obtained if there is the slightest hint of noncompliance.

Many crimes can only be solved and prosecuted if law enforcement officers have a chance to interview criminals and have their confessions introduced in court. Unfortunately, the *Miranda* procedures and its accompanying exclusionary rule in many cases prevent the police from ever having this opportunity.

It is no coincidence that immediately after the imposition of all these technical requirements by the Supreme Court's decision in *Miranda*, the criminal case "clearance rate" of the nation's police fell sharply to lower levels. At the time, police officers around the country pointed to the *Miranda* decision as one of the major factors in this drop, and time has proven them right.

Time has also proven the wisdom of the action that Congress took back then. Responding to the urgent requests of law enforcement, Congress decided to restore common sense to our criminal justice system by passing Section 3501. This is a law that needs to be enforced so that entire "voluntary" confessions obtained by hardworking police officers are not suppressed from the jury.

As a country, we should never "learn to live with" the devastating effects of crime. To the contrary, we should never stop striving to improve our efforts to apprehend and convict dangerous criminals through fair and appropriate means. The FOP and its members are constantly working to find better ways to help provide safe streets and safe communities to all our nation's citizens. The FOP strongly supports Section 3501 as a vital step in this direction.

Mr. Chairman, I would like to thank you and all the distinguished members of this Subcommittee for your efforts to advance Section 3501. I would be pleased to answer any questions you may have.