

# Miranda Waivers and Invocations

*“Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.”*<sup>1</sup>

While not as exalted as McDonald’s, Microsoft, or Madonna, *Miranda* also qualifies as an instantly recognizable name that is safely lodged in contemporary American culture. Also like the others, *Miranda* is vilified, scorned, and often ridiculed.

It was in 1966 that the United States Supreme Court announced its decision in *Miranda v. Arizona*. The Court explained that the new *Miranda* procedure was necessary to combat “third degree” interrogation which “brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.”<sup>2</sup>

It was also needed to reduce the more subtle forms of coercion that may exist when officers interrogate a suspect who is in custody. As the Court has pointed out, the interrogation process, “by its very nature, isolates and pressures the individual”<sup>3</sup> and “trades on the weakness of individuals.”<sup>4</sup> For these reasons, there exists “a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion.”<sup>5</sup>

To help reduce these coercive pressures, the Court decided it was necessary to establish safeguards that would reduce the level of coercion by giving suspects “the power to exert some control over the interrogation.”<sup>6</sup> These safeguards took the form of the now-familiar *Miranda* waiver and invocation procedures, which are the subjects of this article.

*Miranda* was, of course, a controversial decision. It still is. In a 1999 article on the subject in *The Washington Post*, the writer observed, “Who invokes their right to remain silent or, especially, their right to counsel? The usual suspects: the hardened criminals, the ones who have been through the system many times before or who come into it well-heeled and well-counseled.”<sup>7</sup>

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<sup>1</sup> *Dickerson v. United States* (2000) 530 U.S. 428, 432.

<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436, 448 [quoting a report from the National Commission on Law Observance and Enforcement].

<sup>3</sup> *Dickerson v. United States* (2000) 530 U.S. 428, 435.

<sup>4</sup> *Miranda v. Arizona* (1966) 384 U.S. 436, 445-6.

<sup>5</sup> *Moran v. Burbine* (1986) 475 U.S. 412, 426.

<sup>6</sup> *Moran v. Burbine* (1986) 475 U.S. 412, 426. ALSO SEE *Michigan v. Mosley* (1975) 423 U.S. 96, 104 [“[*Miranda*] counteracts the coercive pressures of the custodial setting.”]; *New York v. Quarles* (1984) 467 U.S. 649, 656 [“The *Miranda* decision was based in large part on this Court’s view that the warnings . . . would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house.”]. **NOTE:** In an ironic twist to the *Miranda* story, about ten years after Ernesto Miranda was released from jail, he was stabbed to death. Officers arrested a suspect who immediately invoked his *Miranda* right to remain silent. Without a confession or admission, officers were forced to release him. No one was ever charged with Miranda’s murder.

<sup>7</sup> Coughlin, Anne M., “*Miranda* Only Works for the Usual Suspects.” *The Washington Post*, December 12, 1999. ALSO SEE *Dickerson v. United States* (2000) 530 U.S. 428, 444 [“The disadvantage of the *Miranda* rule

Still, *Miranda* did not create the lawless society that its critics feared. According to a story in *The Economist*, “[T]here is little evidence that a significant number of guilty people are going free because of the *Miranda* warning. The chief reason for this is that, contrary to expectations, most people under arrest do not keep their mouths shut and do not ask for a lawyer, even though it is almost always in their interest to do so.”<sup>8</sup>

Furthermore, *Miranda* actually assisted officers and prosecutors in one way. Before it became law, the admissibility of confessions and other incriminating statements depended mainly on whether they were “voluntary,” which was a notoriously vague and elusive concept. This resulted in unpredictability because different judges had different ideas on the subject. *Miranda*, however, provided officers and courts with “concrete constitutional guidelines” for determining the propriety of police interrogation.<sup>9</sup> As a consequence, the courts now rarely suppress statements on grounds they were involuntary if the officers had fully complied with the *Miranda* procedure. Thus, the United States Supreme Court observed in 2004, “[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility.”<sup>10</sup>

As noted, *Miranda* was decided in 1966, which means it is 40-years old this year. So, as we gather around to mark the occasion, it is fitting that we take a moment to acknowledge that, like many who have reached middle age, *Miranda* has matured.

In its youth, *Miranda* was a troublemaker, creating havoc in interrogation rooms and courtrooms as officers, prosecutors, and judges tried to figure out how to implement the new procedure in the variety of circumstances in which police interrogations occur. But over the years—especially in the past 10 or 15—things started jelling.

Not only did the courts work out most of the kinks, they became less concerned with fussy, technical rules and more interested in making sure *Miranda*’s chief objective was achieved; i.e., reducing coercion by giving suspects the “right to cut off questioning” and thereby “control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.”<sup>11</sup> This shift resulted in several welcome changes in the *Miranda* procedure, most notably:

**No ambiguous “invocations”:** The U.S. Supreme Court abolished the rule that a suspect’s equivocal or ambiguous remark can constitute an invocation.

**Limited invocations:** The courts now recognize limited invocations. This means a suspect’s request to limit the scope of the interview or the manner in which it is conducted no longer results in a full-blown invocation.

**Implied waivers:** The courts understand that express waivers are not always required; that a waiver may be implied under certain circumstances.

**Minors and impaired suspects:** There are now realistic standards for obtaining waivers from minors and suspects who are high on drugs, intoxicated, or otherwise impaired.

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is that statements which may be by no means involuntary, made by a defendant who is aware of his ‘rights,’ may nonetheless be excluded and a guilty defendant go free as a result.”].

<sup>8</sup> “A Pillar of the Law Assailed.” *The Economist*, December 11, 1999.

<sup>9</sup> *Miranda v. Arizona* (1966) 384 U.S. 436, 441-2.

<sup>10</sup> *Missouri v. Seibert* (2004) 542 U.S. 600, \_\_\_. ALSO SEE *Berkemer v. McCarty* (1984) 468 U.S. 420, 433, fn.20 [“[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite [Miranda] compliance] are rare.”].

<sup>11</sup> *Michigan v. Mosley* (1975) 423 U.S. 96, 103-4. ALSO SEE *Dickerson v. United States* (2000) 530 U.S. 428, 443 [“If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement”].

**No anticipatory invocations:** It is now settled that suspects can invoke only during actual or impending interrogation; e.g., an “invocation letter” from an attorney will not do.

**”Slightest pressure” standard is abolished:** The rule that the “slightest pressure” renders a waiver involuntary has been abrogated. The courts now consider the totality of the circumstances.

**Post-invocation questioning:** There are now fairly clear rules on when, or under what circumstances, officers may question a suspect who has invoked his right to remain silent or the right to counsel. (This subject will be covered in an upcoming issue of *Point of View*.)

These changes and some others are discussed in this article as we examine what officers must do to comply with the dictates of *Miranda*.

## MIRANDA WAIVERS

It is standard police procedure that officers may not interrogate a suspect who is in custody unless he has waived his *Miranda* rights.<sup>12</sup> As we will discuss in this section, a waiver is valid if it was, (1) knowing, (2) intelligent, (3) voluntary, (4) express or implied, (5) timely, and (6) not the product of impermissible pre-waiver tactics.<sup>13</sup>

### “Knowing” waiver

A waiver is “knowing” if the suspect was *aware* of his *Miranda* rights. Consequently, the first thing officers must do is spell them out, a procedure known as “*Mirandizing*.” Actually, *Mirandizing* serves two purposes. It not only gives suspects notice of the rights they will be asked to waive,<sup>13</sup> it helps reduce any coerciveness or intimidation they might feel by making them aware that they can start and stop the proceedings and thereby “exert some control over the interrogation.”<sup>14</sup>

It is true, of course, that most people know their *Miranda* rights by heart, having heard them recited countless times on TV and in the movies. It is also true that many or most arrestees have been on the receiving end of multiple *Miranda* warnings in the past and are therefore intimately familiar with their rights.

Still, it is essential that officers *Mirandize* every suspect from whom a waiver is required, including “con-wise arrestees.”<sup>15</sup> This is because prosecutors cannot prove a waiver was “knowing” by merely demonstrating that the suspect “probably” knew his rights. As the *Miranda* Court put it, “No amount of circumstantial evidence that a person may have been aware of his rights will suffice.”<sup>16</sup>

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<sup>12</sup> **NOTE:** For an explanation of when officers must comply with *Miranda*, see the article “*Miranda*: When Warnings are Required” in the Summer 2005 *Point of View*.

<sup>13</sup> **NOTE re standard of proof:** The prosecution has the burden of proving a valid waiver by a preponderance of the evidence. See *Colorado v. Connelly* (1986) 479 U.S. 157, 168; *People v. Wash* (1993) 6 Cal.4<sup>th</sup> 215, 236.

<sup>14</sup> *Moran v. Burbine* (1986) 475 U.S. 412, 426. ALSO SEE *New York v. Quarles* (1984) 467 U.S. 649, 656 [“The *Miranda* decision was based in large part on this Court’s view that the warnings . . . would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house.”]; *People v. Hinds* (1984) 154 Cal.App.3d 222, 233-4 [“The reason for *Miranda*’s requirement of express advisement of rights is to dispel the coercion inherent in an environment of incommunicado, police-dominated interrogation.”].

<sup>15</sup> See *People v. Nitschmann* (1995) 35 Cal.App.4<sup>th</sup> 677, 683 [“[T]hose who know the *Miranda* rights, including ‘con-wise’ arrestees, such as appellant, are entitled to the admonition.”].

<sup>16</sup> *Miranda v. Arizona* (1966) 384 U.S. 436, 471-2. ALSO SEE *People v. Bennett* (1976) 58 Cal.App.3d 230, 239 [“The prosecution was required to prove that appellant was *in fact* aware of his rights”].

**THE MIRANDA WARNING:** There are three components to a *Miranda* warning:

- (1) **Right to remain silent:** The suspect must be informed of his Fifth Amendment right to refuse to answer questions.<sup>17</sup> This is typically accomplished by telling him, “*You have the right to remain silent.*”
- (2) **“Anything you say . . .”** The suspect must be told that his decision to speak with officers may have consequences; e.g., “*Anything you say may be used against you in court.*”<sup>18</sup>
- (3) **Right to counsel:** The *Miranda* right to counsel is composed of three elements: (a) the right to consult with an attorney *before* questioning, (b) the right to have an attorney present *during* questioning, and (c) the right to have an attorney appointed if the suspect cannot afford one.<sup>19</sup> The standard *Miranda*-card language that is used to convey this information is, “*You have the right to talk to a lawyer and to have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one.*”

**LANGUAGE MAY VARY:** There is no requirement that officers use certain language or recite the warnings in a particular way.<sup>20</sup> As the United States Supreme Court explained, “We have never insisted that *Miranda* warnings be given in the exact form described in that decision.”<sup>21</sup> Instead, what is required is that officers “reasonably convey” the *Miranda* rights.<sup>22</sup>

**“CAN AND WILL BE USED”:** In the past, officers were instructed to warn suspects that anything they say can “*and will*” be used against them. There is, however, no requirement that officers deliver such an ominous and disconcerting warning. In fact, the Court of

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<sup>17</sup> See *Cooper v. Dubnik* (9<sup>th</sup> Cir. 1992) 963 F.2d 1220, 1239 [“The objective of this advisement is to ensure an accused is both aware of his substantive Constitutional right to silence, as well as his continuous opportunity to exercise that right. It is no accident that the first words out of a police officer’s mouth during a *Miranda* advisement must be: you have a right to remain silent.”].

<sup>18</sup> See *Thompson v. Keohane* (1995) 516 U.S. 99, 107 [suspects must be told “that anything they say may be used against them in court.”]; *Colorado v. Spring* (1987) 479 U.S. 564, 577 [“This Court’s holding in *Miranda* specifically required that the police inform a criminal suspect that he has the right to remain silent and that anything he says may be used against him.” Italics omitted.]; *Arizona v. Roberson* (1988) 486 U.S. 675, 684 [“[T]here is no qualification of the broad an explicit warning that anything a suspect says may be used against him.”].

<sup>19</sup> See *California v. Prysock* (1981) 453 U.S. 355, 361 [“It is clear that the police in this case fully conveyed to respondent his rights as required by *Miranda*. He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one.”]; *People v. Lujan* (2001) 92 Cal.App.4<sup>th</sup> 1389, 1399 [“Defendant is correct that the *Miranda* warnings must advise an accused of the right to have an attorney present before and during questioning.”]; *People v. Nitschmann* (1995) 35 Cal.App.4<sup>th</sup> 677, 682 [“[T]he police must advise the suspect of the right to the presence of an attorney before and during questioning, and that if he cannot afford an attorney one will be appointed.”]. ALSO SEE *Duckworth v. Eagan* (1989) 492 U.S. 195, 203-4 [not error to inform suspect that if he could not afford a lawyer, one would be appointed “if and when you go to court.”].

<sup>20</sup> See *California v. Prysock* (1981) 453 U.S. 355, 359 [“This Court has never indicated that the ‘rigidity’ of *Miranda* extends to the precise formulation of the warnings given to a criminal defendant.”]; *People v. Kelly* (1990) 51 Cal.3d 931, 948 [“[*Miranda* warnings] need not be presented in any precise formulation or talismanic incantation.”]; *People v. Nitschmann* (1995) 35 Cal.App.4<sup>th</sup> 677, 682.

<sup>21</sup> *Duckworth v. Eagan* (1989) 492 U.S. 195, 202.

<sup>22</sup> See *Duckworth v. Eagan* (1989) 492 U.S. 195, 203 [“Reviewing courts need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.”]; *People v. Samayoa* (1997) 15 Cal.4<sup>th</sup> 795, 830 [“[A reviewing court] must determine whether the warnings reasonably would convey to a suspect his or her rights as required by *Miranda*.”]; *People v. Wash* (1993) 6 Cal.4<sup>th</sup> 215, 236-7 [“The essential inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.”].

Appeal has noted it is a patently false statement because, as every judge knows, not all statements or remarks a suspect says can or will be used against him.<sup>23</sup>

So where did the foreboding “and will” come from? It was simply an overreaction. As the court noted in *People v. Valdivia*, “In the latter part of the *Miranda* opinion the Court employed the overstatement ‘can and will be used.’ But at an earlier point the Court described the warning as being that what is said ‘may be used,’ and this alternative has been consistently approved by the lower courts.”<sup>24</sup>

It is, therefore, sufficient to warn suspects that anything they say “may,” “can,” or “could” be used against them in court.<sup>25</sup>

**NO ADDITIONAL INFORMATION:** Officers are not required to furnish suspects with any additional information, even if it might have affected their decision to waive. As the Court noted in *Moran v. Burbine*, “[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.”<sup>26</sup>

For example, the courts have rejected arguments that officers must disclose the subjects that would be discussed during the interview,<sup>27</sup> the criminal charges the suspect might be facing,<sup>28</sup> the possible punishment upon conviction,<sup>29</sup> that the suspect’s attorney is present and wants to talk to him,<sup>30</sup> or that the suspect “has a continuing right to cut off questioning at any time.”<sup>31</sup>

**YOU CAN INVOKE ANYTIME:** Although not a requirement,<sup>32</sup> officers sometimes supplement the *Miranda* warning by informing suspects that they can invoke their rights at any time during the interview; i.e., their decision to waive is not irrevocable. This is an accurate statement of the law and is not objectionable.<sup>33</sup>

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<sup>23</sup> *People v. Valdivia* (1986) 180 Cal.App.3d 657.

<sup>24</sup> See *People v. Valdivia* (1986) 180 Cal.App.3d 657, 664.

<sup>25</sup> See *Thompson v. Keohane* (1995) 516 U.S. 99, 107 [suspects must be told “that anything they say *may* be used against them in court.” Emphasis added.]; *People v. Valdivia* (1986) 180 Cal.App.3d 657, 664 [“The courts have also upheld other formulations, including use of ‘can’ alone, of ‘might,’ and of ‘could.’” Citations omitted.].

<sup>26</sup> (1986) 475 U.S. 412, 422. ALSO SEE *Colorado v. Spring* (1987) 479 U.S. 479, 564, 577 [“Here, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature.”].

<sup>27</sup> See *Colorado v. Spring* (1987) 479 U.S. 479, 564, 577 [“[T]he failure of the law enforcement officials to inform Spring of the subject matter of the interrogation could not affect Spring’s decision to waive his Fifth Amendment privilege in a constitutionally significant manner.”].

<sup>28</sup> See *People v. Mitchell* (1982) 132 Cal.App.3d 389, 405 [court rejects argument that a waiver was invalid because the defendant “was not aware the pending charge of attempted murder would be raised to murder if his victim actually died.”].

<sup>29</sup> See *People v. Hill* (1992) 3 Cal.4<sup>th</sup> 959, 982 [“If a suspect need not be informed of the possible charges against him, there is no basis for concluding that he must be advised of the possible punishment for those charges if proven.”]; *People v. Clark* (1993) 5 Cal.4<sup>th</sup> 950, 987, fn.11 [“Defendant has no right to be advised about the penal consequences of the charges that he faces prior to interrogation.”]; *People v. Wash* (1993) 6 Cal.4<sup>th</sup> 215, 239 [court rejects argument that he should have been informed “that his admissions could be relevant to the state’s decision to seek the death penalty”].

<sup>30</sup> See *Moran v. Burbine* (1986) 475 U.S. 412, 422.

<sup>31</sup> *People v. Castille* (2005) 129 Cal.App.4<sup>th</sup> 863, 885-6.

<sup>32</sup> See *People v. Castille* (2005) 129 Cal.App.4<sup>th</sup> 863, 885-6.

<sup>33</sup> See *Colorado v. Spring* (1987) 479 U.S. 564, 574 [a suspect has the right to “discontinue talking at any time”]; *People v. Lopez* (2005) 129 Cal.App.4<sup>th</sup> 1508, 1526 [“A person who initially waives his or her *Miranda* rights retains the right to cut off further police interrogation.”]; *People v. Kelly* (1990) 51 Cal.3d 931, 949 [OK to tell suspect that he could “stop talking anytime you want to and you don’t have to answer any question”]; *People v. Clark* (1992) 3 Cal.4<sup>th</sup> 41, 120-1 [“The detectives repeatedly made clear to him that . . . he could stop the interview at any time by merely saying he wanted an attorney.”]; *People v. Bestmeyer* (1985) 166

**MINORS:** Minors have the same *Miranda* rights as adults and, therefore, need not be given any additional information. In the past, there was some confusion over whether officers must notify a minor that he has a right to speak with a parent before questioning or that he may have a parent present during questioning. The answer to both is no.<sup>34</sup>

**USING A MIRANDA CARD:** While the language of the warnings may vary, it is usually best to read the warnings from a *Miranda* card, especially if the warning-waiver dialogue is not recorded.<sup>35</sup> If officers do this, they can usually prove the warning was accurate by testifying they recited the warnings from a card, then reading to the court the warning that appears on the same card or a duplicate.<sup>36</sup>

**INCORRECT MIRANDA WARNINGS:** A *Miranda* waiver may be deemed invalid if officers intentionally or inadvertently misrepresented to the suspect the nature of the *Miranda* rights or the consequences of waiving them.<sup>37</sup> For example, in *People v. Russo* an officer's *Miranda* warning to the defendant included this advice: "If you didn't do this, you don't need a lawyer." In ruling that Russo's waiver was invalid, the court said, "The record demonstrates that [the officer] misled Russo to believe that his invocation of the right to counsel would be construed as a tacit admission of guilt. Russo was left with little choice but to waive the right to counsel in order, in his mind, to maintain the appearance of innocence."<sup>38</sup>

**RECORDING WAIVERS:** The *Miranda* procedure and the subsequent interview may be overtly or covertly recorded.<sup>39</sup> While not a requirement,<sup>40</sup> it often helps prosecutors prove

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Cal.App.3d 520, 524 ["[Y]ou can reinvoke your rights once you waive them, if that's what you're worried about."].

<sup>34</sup> See *In re Charles P.* (1982) 134 Cal.App.3d 768, 772 ["Appellant's contention that the failure of the sheriffs to inform him of his right to consult with his parents vitiated his confession is not supported by existing case law."]; *In re John S.* (1988) 199 Cal.App.3d 441, 445 [court notes that in *People v. Burton* (1971) 6 Cal.3d 375 the court "did not hold that the police must advise a minor that he or she has the right to speak to a parent."]; *People v. Maestas* (1987) 194 Cal.App.3d 1499, 1508 [court rejects argument that "the police are under a duty to advise the minor of his right to talk with his parents before interrogation can take place"]; *In re Abdul Y.* (1982) 130 Cal.App.3d 847, 863-7 [court rejects argument that officers were required to inform him that he could speak to his parents or sister]; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 215 ["There is no requirement that a minor be advised of and waive the opportunity to speak to a parent or to have a parent present during police questioning."].

<sup>35</sup> See *People v. Prysock* (1982) 127 Cal.App.3d 972, 985 ["If officers begin to vary from the standard language, their burden of establishing that defendants have been adequately advised before waiving their rights will increase substantially."].

<sup>36</sup> See, for example, *Oregon v. Elstad* (1985) 470 U.S. 298, 314-5 ["[The officer] testified that he read the *Miranda* warnings aloud from a printed card and recorded Elstad's responses."].

<sup>37</sup> See *People v. Gurule* (2002) 28 Cal.4<sup>th</sup> 557, 603 ["If the police had actually promised defendant his statements would not be used against him, contrary to the earlier *Miranda* warning, an error of constitutional dimension would have occurred."]; *Colorado v. Spring* (1987) 479 U.S. 564, 576, fn.8 ["[T]he Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege." Citations omitted.]. **NOTE:** In *People v. Hinds* (1984) 154 Cal.App.4<sup>th</sup> 222, 234 the court ruled an officer deliberately misled the defendant when, just before *Mirandizing* him, he said, "Anything you say doesn't necessarily held [sic] against you, it can be held to help you, depending on what happened." The court's ruling is questionable because the officer actually told Hinds the truth because not everything a suspect says will be used against him. See *People v. Valdivia* (1986) 180 Cal.App.3d 657. Still, such a comment is not recommended.

<sup>38</sup> (1983) 148 Cal.App.3d 1172, 1177.

<sup>39</sup> See *People v. Jackson* (1971) 19 Cal.App.3d 95, 101 ["[A]dmissions and confessions secretly recorded are admissible."]; *People v. Sims* (1993) 5 Cal.4<sup>th</sup> 405, 446, fn.8; *People v. Hines* (1997) 15 Cal.4<sup>th</sup> 997, 1043.

**ALSO SEE** *Lopez v. United States* (1963) 373 U.S. 427, 439.

<sup>40</sup> See *People v. Lucas* (1995) 12 Cal.4<sup>th</sup> 415, 443 ["The police had no obligation to make a tape recording of the *Miranda* advisements or the rest of the interrogation"]; *People v. Gurule* (2002) 28 Cal.4<sup>th</sup> 557, 603

the suspect waived his rights or did not invoke. This is because his tone of voice, emphasis on certain words, pauses, and even laughter may “add meaning to the bare words.”<sup>41</sup>

### “Intelligent” waivers

As noted, waivers must be “intelligent,” as well as “knowing.” Fortunately, this does not mean the decision to waive must have been a smart move. It only means the suspect must have *understood* his rights. As the court noted in *People v. Simpson*:

While we usually indicate waivers must be “intelligent,” that term can be confusing; it conjures up the idea that the decision to waive *Miranda* rights must be wise. That, of course, is not the idea. Essentially, “intelligent” connotes knowing and aware.<sup>42</sup>

To prove that a suspect understood his rights, it is usually best to take the direct approach and ask: “*Did you understand each of the rights I explained to you?*” If he says yes, that is usually enough.<sup>43</sup> If he says no, officers must find out what he did not understand and work with him until he gets it.<sup>44</sup>

The courts will also consider any circumstantial evidence that the suspect understood his rights. For example, in *People v. Tremayne* the defendant made the following comment to the officers who were questioning him: “If I had been smart, I would have taken my dad’s advice and not said anything from the beginning.” “This remark,” said the court, “is proof defendant knew he could remain silent.”<sup>45</sup>

**SUSPECT INTOXICATED, HANDICAPPED:** Even though a suspect said he understood his rights, he may later claim he didn’t because his mental state was impaired by alcohol or drugs, physical injuries, a learning disability, or a mental disorder. Suspects for whom

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[“While we have no wish to discourage law enforcement officials from recording such interrogations, [a rule mandating recording] is not required to protect the due process rights of those being interrogated.”]; *People v. Marshall* (1990) 50 Cal.3d 907, 925. ALSO SEE *People v. Holt* (1997) 15 Cal.4<sup>th</sup> 619, 665 [due process does not require that statements be recorded].

<sup>41</sup> See *People v. Bestmeyer* (1985) 166 Cal.App.3d 520, 526 [the tape recording “allowed the trial judge to hear the words spoken with all the inflections, intonations and pauses that add meaning to the bare words.”]; *People v. Gray* (1982) 135 Cal.App.3d 859, 864 [“Thanks to the professionalism of [the interrogating detectives] in their taping of the statement, there was little room to argue at trial that the waiver was not complete and unequivocal.”]; *People v. McMahon* (2005) 131 Cal.App.4<sup>th</sup> 80, 97 [“Rather, defendant seemed to enjoy the interaction with [the officers].”]; *In re Abdul Y.* (1982) 130 Cal.App.3d 847, 867 [“We have, of course, listened to the tape of appellant’s confession. No coercion may be found”]; *People v. Silva* (1988) 45 Cal.3d 604, 630; *People v. Jennings* (1988) 46 Cal.3d 963, 979; *People v. Musselwhite* (1998) 17 Cal.4<sup>th</sup> 1216, 1239 [no invocation based in part on a videotape of the interview which showed how the suspect “was acting” and “responding”].

<sup>42</sup> (1998) 65 Cal.App.4<sup>th</sup> 854, 859, fn.1. ALSO SEE *Moran v. Burbine* (1986) 475 U.S. 412, 421 [“[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”]; *Brady v. United States* (1970) 397 U.S. 749, 748 [“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”].

<sup>43</sup> See *People v. Memro* (1995) 11 Cal.4<sup>th</sup> 786, 834 [“Defendant said on both occasions that he understood the consequences of speaking, and elected to proceed. We cannot conclude that his waiver was made unknowingly or unintelligently.”]; *People v. Bestmeyer* (1985) 166 Cal.App.3d 520, 526.

<sup>44</sup> See *In re Brian W.* (1981) 125 Cal.App.3d 590, 600 [“Nothing in *Miranda* precludes the police from clarifying with the suspect whether he understands the questions relating to his constitutional rights”]; *People v. Turnage* (1975) 45 Cal.App.3d 201, 211 [“[*Miranda*] leaves unaffected the right of the police to clarify whether the suspect understood his constitutional rights”].

<sup>45</sup> (1971) 20 Cal.App.3d 1006, 1019. ALSO SEE *People v. Winkler* (1986) 178 Cal.App.3d 750, 754; *People v. Nitschmann* (1995) 35 Cal.App.4<sup>th</sup> 677, 682.

English is a second language may also contend they did not understand if the officers spoke in English.<sup>46</sup>

As a practical matter, however, the courts almost always reject “I didn’t understand” arguments if the suspect’s answers to the officers’ questions were responsive and coherent. This is because a suspect’s rational responses demonstrate that he understood the officers’ questions which, in turn, indicates he also understood the *Miranda* warning.

Although less important than the suspect’s fitting responses, the courts sometimes take note of his age, experience, education, background, and intelligence;<sup>47</sup> whether he had been arrested or advised of his *Miranda* rights before,<sup>48</sup> and whether he had previously invoked.<sup>49</sup>

**MINORS: PROVING THEY UNDERSTOOD:** Minors are, of course, capable of understanding the *Miranda* warnings. As the Court of Appeal observed, “A presumption that all minors are incapable of a knowing, intelligent waiver of constitutional rights is a form of stereotyping that does not comport with the realities of every day living in our urban society. Many minors are far more sophisticated and knowledgeable in these areas than their parents.”<sup>50</sup> Accordingly, in determining whether a minor understood his rights, the courts examine the same circumstances they consider when the suspect was an adult, discussed above.<sup>51</sup>

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<sup>46</sup> See *People v. Cortes* (1999) 71 Cal.App.4<sup>th</sup> 62, 70-1; *U.S. v. Labrada-Bustamante* (9<sup>th</sup> Cir. 2005) \_\_ F.3d \_\_ [2005 WL 3005792]

<sup>47</sup> See *Fare v. Michael C.* (1979) 442 U.S. 707, 725-6; *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 [“A recent high school graduate, Elstad was fully capable of understanding this careful administering of *Miranda* warnings.”]; *In re Norman H.*, (1976) 64 Cal.App.3d 997, 1003 [“Here although defendant’s intelligence was very low, there is no showing whatever that he truly did not want to talk, or that his desire was in any way overcome by reason of the police or anyone else taking unfair or unlawful advantage of his ignorance, mental condition, or vulnerability to persuasion.”]; *People v. Lewis* (2001) 26 Cal.4<sup>th</sup> 334, 384 [“Although defendant was less than 14 years old (and subsequent to the interviews was diagnosed a paranoid schizophrenic), he participated in his conversations with detectives, and indeed was keen enough to change his story [to fit the facts].”]; *People v. Riva* (2003) 112 Cal.App.4<sup>th</sup> 981, 989 [“[T]he evidence shows Riva was 18 years of age at the time of his arrest. He had a job, a driver license and attended college.”]; *In re Brian W.* (1981) 125 Cal.App.3d 590, 602 [“He had an I.Q. of 81 and the mental age of 11 or 12 but this is only a factor to be considered in determining whether he lacked the ability to understand his rights.”]; *People v. Neal* (2003) 31 Cal.4<sup>th</sup> 63, 84; *People v. Maestas* (1987) 194 Cal.App.3d 1499, 1508; *In re John S.* (1988) 199 Cal.App.3d 441, 445; *In re Frank C.* (1982) 138 Cal.App.3d 708, 712; *People v. Ventura* (1985) 174 Cal.App.3d 784, 790.

<sup>48</sup> See *People v. Riva* (2003) 112 Cal.App.4<sup>th</sup> 981, 989 [previous juvenile arrest]; *People v. Hector* (2000) 83 Cal.App.4<sup>th</sup> 228, 236 [“substantial prior experience with the criminal justice system”]; *In re Charles P.* (1982) 134 Cal.App.3d 768, 772 [suspect on probation; previously *Mirandized*].

<sup>49</sup> See *In re Bonnie H.* (1997) 56 Cal.App.4<sup>th</sup> 563, 578 [because she had previously invoked, she “knew from this experience that she could end an interrogation by asking again to meet with an attorney.”]; *In re Frank C.* (1982) 138 Cal.App.3d 708, 712 [“The record established that the minor well knew his rights and understood them and initially asserted the very rights he now on appeal claims he failed to understand.”]; *People v. Hill* (1992) 3 Cal.4<sup>th</sup> 959, 981; *U.S. v. Andaverde* (9<sup>th</sup> Cir. 1995) 64 F.3d 1305, 1314 [“[T]he fact that Andaverde later in the interview expressly invoked his right to silence demonstrates that he was conscious of his right to remain silent”].

<sup>50</sup> *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-2. ALSO SEE *In re Eduardo G.* (1980) 108 Cal.App.3d 745, 756 [“[T]here is no presumption that a minor is incapable of a knowing, intelligent waiver of his rights.”]; *In re Norman H.* (1976) 64 Cal.App.3d 997, 1003.

<sup>51</sup> See *Fare v. Michael C.* (1979) 442 U.S. 707, 725 [“We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.”]; *In re Bonnie H.* (1997) 56 Cal.App.4<sup>th</sup> 563, 577 [“special caution” not required in determining whether a juvenile waived his *Miranda* rights]; *In re Charles P.* (1982) 134 Cal.App.3d 768, 771 [court refuses to depart from the totality of circumstances test for minors]; *U.S. v. Doe* (9<sup>th</sup> Cir. 1998) 155 F.3d 1070, 1074 [“The test for reviewing a juvenile’s waiver of rights is identical to that of an adult’s and is based on the ‘totality of the circumstances.’”].



- ❖ **EXAMPLES:** For examples of how a suspect's apt responses may demonstrate he understood his rights, see Appendix A, "Minors and impaired suspects: Proving they understood their rights."

### Voluntary waivers

A suspect's decision to waive his *Miranda* rights must also have been "voluntary," meaning it must not have been motivated by police coercion such as physical violence, threats, or promises.<sup>52</sup> In the words of the United States Supreme Court, "[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."<sup>53</sup>

For example, waivers have been deemed involuntary based, at least in part, on the following:

- Officers told the suspect that, unless he waived his rights they "had to assume the worst, e.g., the death penalty."<sup>54</sup>
- Officers told the suspect that she would lose state financial aid for her child if she did not answer their questions.<sup>55</sup>

In contrast, the court in *People v. Bestelmeyer* noted the following in rejecting an involuntariness claim: "The officers were courteous, polite and low-key. The record is devoid of evidence that there was pressure or coercion brought to bear."<sup>56</sup>

It is important to keep in mind that a *Miranda* waiver may be involuntary only if it was the result of coercion or other police misconduct.<sup>57</sup> For example, a waiver cannot be declared involuntary on grounds the suspect was mentally ill or had a low IQ.<sup>58</sup> (As noted

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<sup>52</sup> See *Colorado v. Spring* (1987) 479 U.S. 564, 574 ["Absent evidence that Spring's will was overborne and his capacity for self-determination critically impaired because of coercive police conduct, his waiver of his Fifth Amendment privilege was voluntary"]; *In re Norman H.* (1976) 64 Cal.App.3d 997, 1003 [there was no indication that his desire to waive "was in any way overcome by reason of the police or anyone else taking unfair or unlawful advantage of his ignorance, mental condition, or vulnerability to persuasion."]; *People v. Whitson* (1998) 17 Cal.4th 229, 248-9 ["On the question of the voluntariness of the waiver, the record is devoid of any suggestion that the police resorted to physical or psychological pressure to elicit statements from defendant."].

<sup>53</sup> *Moran v. Burbine* (1986) 475 U.S. 412, 421.

*Poyner v. Murray* (4<sup>th</sup> Cir. 1992) 964 F.2d 1404, 1413 ["Whether a waiver of the right to counsel was voluntary is measured by the same standard as governs voluntariness determinations in the confession context."].

<sup>54</sup> *People v. Hinds* (1984) 154 Cal.App.3d 222, 234.

<sup>55</sup> *Lynnum v. Illinois* (1963) 372 U.S. 528.

<sup>56</sup> (1985) 166 Cal.App.3d 520, 526. ALSO SEE *Connecticut v. Barrett* (1987) 479 U.S. 523, 527 ["[T]here is no evidence that Barrett was threatened, tricked, or cajoled into his waiver."]; *Moran v. Burbine* (1986) 475 U.S. 412, 421 ["[T]he record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements."]; *In re Brian W.* (1981) 125 Cal.App.3d 590, 603 ["There was no atmosphere of coercion, no prolonged questioning or coercive tactics, no threats or promises of leniency."].

<sup>57</sup> See *Colorado v. Spring* (1987) 479 U.S. 564, 574 ["Absent evidence that Spring's will was overborne and his capacity for self-determination critically impaired because of coercive police conduct, his waiver of his Fifth Amendment privilege was voluntary"]; *Colorado v. Connelly* (1986) 479 U.S. 157, 167 ["We hold that coercive police activity is a necessary predicate to the finding that a confession is not voluntary"]; *People v. Clark* (1993) 5 Cal.4th 950, 988 ["An involuntary waiver of *Miranda* rights, however, is a product of government coercion."].

<sup>58</sup> See *U.S. v. Andaverde* (9<sup>th</sup> Cir. 1995) 64 F.3d 1305, 1315 ["The Seventh and Eighth Circuits, and a number of other circuits, have stated that a refusal to sign a waiver form does not show that subsequent statements are involuntary." Citations omitted.]; *U.S. v. Verde-Gomez* (9<sup>th</sup> Cir. 2000) 224 F.3d 1062, 1069-70; *U.S. v. Whithead* (9<sup>th</sup> Cir. 2000) 200 F.3d 634, 638-9; *U.S. v. Rivera* (11<sup>th</sup> Cir. 1991) 944 F.2d 1563, 1568.

earlier, however, these circumstances may be marginally relevant to the issue of whether the waiver was “intelligent.”)

Two other things should be noted. First, it used to be the rule in California that a waiver was involuntary if it resulted from the “slightest pressure.” Now the courts consider the totality of circumstances, which means the existence of some “slight” pressure might be offset by other factors.<sup>59</sup> Second, the United States Supreme Court has said that an otherwise voluntary waiver will not be invalidated merely because officers utilized ploys “to mislead” or to “lull him into a false sense of security.”<sup>60</sup>

### Timely waivers

*Miranda* waivers must be timely or, as the courts in California phrase it, “reasonably contemporaneous” with the start of the interview.<sup>61</sup> The purpose of this requirement is to make sure the suspect had not forgotten the rights that were read to him earlier.<sup>62</sup> In most cases, this is not a problem because waivers are usually obtained just before the start of an interview.

Sometimes, however, there is a delay which could conceivably cause the suspect to forget. This might occur, for example, if officers obtained a waiver when they arrested the suspect but, for some reason, did not interview him until he had been transported to the police station. It could also happen if an interview was resumed after a lengthy recess.

In determining whether a waiver and interview were reasonably contemporaneous, the courts consider the totality of circumstances,<sup>63</sup> especially the following.

**TIME LAPSE:** The time lapse between the waiver and the start or resumption of the interview is probably the most important circumstance. Still, where there is no direct or circumstantial evidence that the suspect forgot his rights, the courts have upheld waivers that were made several hours after the warning.<sup>64</sup>

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<sup>59</sup> See *People v. Clark* (1993) 5 Cal.4th 950, 986, fn.10 [“slightest pressure” standard is contrary to *Arizona v. Fulminante* (1991) 499 U.S. 279, 285].

<sup>60</sup> *Illinois v. Perkins* (1990) 496 U.S. 292, 297.

<sup>61</sup> See *People v. Mickle* (1991) 54 Cal.3d 140, 170 [“[R]eadvisement is unnecessary where the subsequent interrogation is ‘reasonably contemporaneous’ with the prior knowing and intelligent waiver.”]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 640 [“[W]here a subsequent interrogation is ‘reasonably contemporaneous’ with a prior knowing and intelligent waiver, a readvisement of *Miranda* rights is unnecessary.”]; *People v. Braeseke* (1979) 25 Cal.3d 691, 701-2 [“A *Miranda* warning is not required before each custodial interrogation; one warning, if adequately and reasonably contemporaneously given, is sufficient.”]; *People v. Miller* (1996) 46 Cal.App.4th 412; *People v. Bynum* (1971) 4 Cal.3d 589; *People v. Visciotti* (1992) 2 Cal.4th 1, 55 [“When a subsequent interrogation is reasonably contemporaneous it is not necessary to repeat the full *Miranda* warning.”].

<sup>62</sup> See *People v. Cooper* (1970) 10 Cal.App.3d 96, 107 [“After prior warnings, the issue as to ensuing interrogations is whether the defendant was then sufficiently aware of his constitutional rights to be deemed to have knowingly and intelligently waived them.”]; *People v. Quirk* (1982) 129 Cal.App.3d 618, 629 [“[T]he key determination in each case is whether the *Miranda* warning sufficiently warns the defendant of his constitutional rights so that he has an understanding of these rights during any subsequent interrogation.”].

<sup>63</sup> See *People v. Lewis* (2001) 26 Cal.4th 334, 386 [courts must examine the totality of circumstances]; *People v. Booker* (1977) 69 Cal.App.3d 654, 663 [“[One *Miranda* warning] can suffice to establish the voluntariness of several subsequent interrogations; the question of voluntary and knowing waiver remains one for the determination of the trial court under all the facts and circumstances.”]; *People v. Mickle* (1991) 54 Cal.3d 140, 170; *U.S. v. Rodriguez-Preciado* (2005) 399 F.3d 1118, 1128 [“The Supreme Court has eschewed per se rules mandating that a suspect be re-advised of his rights in certain fixed situations in favor of a more flexible approach focusing on the totality of the circumstances.”].

<sup>64</sup> See *U.S. v. Fellers* (8<sup>th</sup> Cir. 2005) 397 F.3d 1090, 1097, 1098 [30 minutes]; *People v. Bynum* (1971) 4 Cal.3d 589, 600 [30-40 minutes]; *People v. Schenk* (1972) 24 Cal.App.3d 233, 236 [40 minutes]; *In re Frank C.* (1982) 138 Cal.App.3d 708, 714 [one hour]; *People v. Riva* (2003) 112 Cal.App.4th 981, 993-4 [one hour];

**SUSPECT’S AGE, EXPERIENCE:** Whether a time lapse actually caused the suspect to forget his rights could depend to some extent on his age, mental state, sophistication, background, and experience with the criminal justice system. Consequently, these circumstances may be considered.<sup>65</sup>

**CHANGED CIRCUMSTANCES:** The courts often note whether the circumstances surrounding the waiver were similar to those at the start or resumption of the interview. The theory here is that the more similarities between the two events, the more likely the suspect would have known the rights explained to him earlier still applied. For example, the courts might look to see if there was a change in the location in which questioning occurred, and whether the officers who were present when the waiver was obtained were the same as the officers who were present when the interview began or resumed.<sup>66</sup>

**REMINDERS:** Did the officers remind the suspect of his *Miranda* rights when the interview began or resumed; e.g., “Do you remember the rights I read to you earlier?” In discussing such a reminder, the California Supreme Court in *People v. Visciotti* observed, “[The defendant] was reminded of the rights he had waived earlier in the day. In asking

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*People v. Braeseke* (1979) 25 Cal.3d 691, 702 [90 minutes]; *U.S. v. Boyd* (8<sup>th</sup> Cir. 1999) 180 F.3d 967, 977 [1½ to 2 hours]; *People v. Lewis* (2001) 26 Cal.4<sup>th</sup> 334, 386 [five hours]; *People v. Miller* (1996) 46 Cal.App.4<sup>th</sup> 412, 418 [six hours]; *People v. Thompson* (1992) 7 Cal.App.4<sup>th</sup> 1966, 1972 [nine hours]; *People v. Inman* (1969) 274 Cal.App.2d 704, 708 [ten hours]; *Guam v. Dela Pena* (9<sup>th</sup> Cir. 1995) 72 F.3d 767, 770 [15 hours]; *U.S. v. Rodriguez-Preciado* (9<sup>th</sup> Cir. 2005) 399 F.3d 1118, 1128-9 [16 hours]; *People v. Long* (1970) 6 Cal.App.3d 741, 748 [one day]; *U.S. v. Andaverde* (9<sup>th</sup> Cir. 1995) 64 F.3d 1305, 1312 [one day]; *People v. Mickle* (1991) 54 Cal.3d 140, 170-1 [36 hours]; *People v. Booker* (1977) 69 Cal.App.3d 654, 665 [three days]; *Martin v. Wainwright* (11<sup>th</sup> Cir. 1985) 770 F.2d 918, 930 [one week]; *Biddy v. Diamond* (5<sup>th</sup> Cir. 1975) 516 F.2d 118 [two weeks]. **COMPARE** *People v. Bennett* (1976) 58 Cal.App.3d 230, 237-8 [six weeks not reasonably contemporaneous].

<sup>65</sup> See *People v. Mickle* (1991) 54 Cal.3d 140, 170 [“[Defendant] was familiar with the criminal justice system and could reasonably be expected to know that any statements made at this time might be used against him in the investigation and any subsequent trial. . . . Nothing in the record indicates that defendant was mentally impaired or otherwise incapable of remembering the prior advisement”]; *People v. Riva* (2003) 112 Cal.App.4<sup>th</sup> 981, 994 [court noted that the defendant was a college student and had had “previous experience with law enforcement having been arrested as a juvenile.”]; *People v. Lewis* (2001) 26 Cal.4<sup>th</sup> 334, 386 [there was evidence that the minor “had prior experience with the police”]; *People v. Bennett* (1976) 58 Cal.App.3d 230, 238 [relevant circumstances include “the background, experience and conduct of the accused.”].

<sup>66</sup> See *Wyrick v. Fields* (1982) 459 U.S. 42, 47 [“Disconnecting the polygraph equipment effectuated no significant change in the character of the interrogation.”]; *People v. San Nicolas* (2004) 34 Cal.4<sup>th</sup> 614, 640 [“*Miranda* does not require a second advisement when a new interviewer steps into the room.”]; *People v. Riva* (2003) 112 Cal.App.4<sup>th</sup> 981, 994 [“Both interrogations were conducted by the same officer.”]; *People v. Mickle* (1991) 54 Cal.3d 140, 170-1 [“Indeed, the hospital interview was conducted by the same two officers who had interrogated defendant and placed him under arrest at the police station.”]; *People v. Cooper* (1970) 10 Cal.App.3d 96, 108 [“Nothing occurred between the time of the warnings and appellant’s statement, including the running of the time involved, which can be construed to have affected his understanding of his rights.”]; *People v. Rich* (1988) 45 Cal.3d 1036, 1077 [new waiver not required merely because the defendant was notified he had failed a polygraph test]; *U.S. v. Rodriguez-Preciado* (9<sup>th</sup> Cir. 2005) 399 F.3d 1118, 1129 [“[T]here were no intervening events which might have given Rodriguez-Preciado the impression that his rights had changed in a material way.”]; *U.S. v. Fellers* (8<sup>th</sup> Cir. 2005) 397 F.3d 1090, 1098; *Guam v. Dela Pena* (9<sup>th</sup> Cir. 1995) 72 F.3d 767, 769 [an arrest does not automatically constitute a sufficient changed circumstance to require a new waiver]. ALSO SEE *People v. Schenk* (1972) 24 Cal.App.3d 233, 236 [“[A] repeated and continued *Miranda* warning need not precede every twist and turn in the investigatory phase of the criminal proceedings.”]. **COMPARE:** *People v. Quirk* (1982) 129 Cal.App.3d 618, 630 [court indicates a new waiver was necessary where there was a three day delay, and the subsequent interview was conducted by a psychiatrist].

defendant if he still wanted to waive his rights, [the officer] clearly implied that those rights were still available to defendant.”<sup>67</sup>

### Express and implied waivers

A *Miranda* waiver may be express or implied by the suspect’s words or conduct. Most waivers are, however, based on a combination of the two.

**EXPRESS WAIVERS:** An express waiver occurs when the suspect says he is willing to waive his rights, or when he signs a waiver form. Express waivers are “usually strong proof” of a valid waiver,<sup>68</sup> and are almost always sufficient proof that the suspect did, in fact, waive his rights.

Most express waivers occur after officers ask the standard *Miranda*-card question. “*Having these rights in mind, do you want to talk to us?*”<sup>69</sup> An affirmative response constitutes an express waiver even if the suspect did not appear to be enthusiastic about it. For example, in *People v. Avalos* the California Supreme Court rejected the argument that the defendant did not demonstrate a sufficient willingness to waive when, after being asked if he wanted to talk, he said, “Yeah, whatever; I don’t know. I guess so. Whatever you want to talk about, you just tell me, I’ll answer.”<sup>70</sup>

**IMPLIED WAIVERS:** Although this issue caused some confusion in the past, it seems to be settled that a waiver of both the right to remain silent and the right to counsel may also be implied.<sup>71</sup> As the California Supreme Court explained in *People v. Whitson*, “[A]n express waiver is not required where a defendant’s actions make clear that a waiver is intended.”<sup>72</sup>

What constitutes an implied waiver? While the courts have not agreed upon a formal checklist, there seem to be four requirements:

- (1) **Correctly advised:** The suspect must have been correctly advised of his *Miranda* rights.
- (2) **Understood:** The suspect must have expressly said he understood his rights.

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<sup>67</sup> (1992) 2 Cal.4<sup>th</sup> 1, 55. ALSO SEE *People v. Roquemore* (2005) 131 Cal.App.4<sup>th</sup> 11, 25 [reminder was sufficient]; *People v. McFadden* (1970) 4 Cal.App.3d 672, 687 [reminder after one day lapse was sufficient]; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-8 [reminder after 3 day lapse was sufficient]; *People v. Brockman* (1969) 2 Cal.App.3d 1002, 1010 [reminder 2 days after waiver]; *People v. Mickle* (1991) 54 Cal.3d 140, 170-1 [“By asking whether he ‘remembered’ [the prior *Miranda* warnings] and the prior conversation, the officers implied that they were simply tying up loose ends from the earlier *Mirandized* session.”]; *People v. Banks* (1970) 2 Cal.3d 127, 135; *U.S. v. Rodriguez-Preciado* (9<sup>th</sup> Cir. 2005) 399 F.3d 1118, 1129 [an officer asked defendant “whether he remembered being advised of his *Miranda* rights the night before, Rodriguez-Preciado replied that he ‘thought he had.’”].

<sup>68</sup> See *North Carolina v. Butler* (1979) 441 U.S. 369, 373.

<sup>69</sup> See *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 [such a question is “clear and comprehensive”].

<sup>70</sup> (1984) 37 Cal.3d 216, 230.

<sup>71</sup> See *North Carolina v. Butler* (1979) 441 U.S. 369, 373 [“in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated”]; *People v. Johnson* (1969) 70 Cal.2d 541, 558 [“Of course, the attendant facts must show clearly and convincingly that he did relinquish his constitutional rights knowingly, intelligently, and voluntarily, but a statement by the defendant to that effect is not an essential link in the chain of proof.”]; *People v. \$241,600* (1998) 67 Cal.App.4<sup>th</sup> 1100, 1109 [“The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. Waiver always rests upon intent.”]; *People v. Cortes* (1999) 71 Cal.App.4<sup>th</sup> 62, 69 [“A valid waiver may be express or implied.”]; *People v. Davis* (1981) 29 Cal.3d 815, 824 [“The absence of an express waiver does not in itself establish that the right has been invoked.”]; *People v. Mitchell* (1982) 132 Cal.App.3d 389, 406 [“[E]xpress waivers are not required under the Fifth Amendment and *Miranda*.”]; *U.S. v. Andaverde* (9<sup>th</sup> Cir. 1995) 64 F.3d 1305, 1313 [“While a waiver of *Miranda* rights must be both intelligent and voluntary, the waiver need not be explicit.”].

<sup>72</sup> (1998) 17 Cal.4<sup>th</sup> 229, 250.

(3) **No coercion:** The officers must not have pressured or otherwise coerced the suspect into waiving his rights.

(4) **Answered freely:** The suspect must have answered the officers' questions freely,<sup>73</sup> as opposed to, for example, "grudging responses to leading questions."<sup>74</sup>

**COMBINATION OF EXPRESS AND IMPLIED:** For whatever reason, in the years after *Miranda* was decided it became routine practice for officers to seek an express waiver of the right to remain silent and an implied waiver of the right to counsel. This is what often happens: After obtaining the suspect's acknowledgment that he understood his rights, officers ask, "*Having these rights in mind, do you wish to talk to us now?*" An affirmative response constitutes an express waiver of the right to remain silent because the suspect has explicitly said he is willing to *talk* with them. The officers will then begin questioning the suspect. If he responds freely, he will be deemed to have impliedly waived the right to counsel.<sup>75</sup>

### Pre-waiver conversations

Before seeking a waiver, officers will almost always have some conversation with the suspect. In many cases the purpose is to help reduce the tension in the room or otherwise try to calm the suspect down. Or the officers may simply want to put their cards on the table. In any event, most pre-waiver conversations are lawful if the officers' questions or remarks were fairly brief and did not constitute "interrogation."

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<sup>73</sup> See *People v. Johnson* (1969) 70 Cal.2d 541, 558 ["Once the defendant has been informed of his rights, and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them."]; *People v. Sully* (1991) 53 Cal.3d 1195, 1233 ["*Johnson* remains good law on this point"]; *People v. Whitson* (1998) 17 Cal.4th 229, 249 ["[D]efendant's willingness to speak with the officers is readily apparent from his responses."]; *People v. Davis* (1981) 29 Cal.3d 814, 825 ["no hesitation to speak with the interrogating officers about all aspects of the case"]; *People v. Boyette* (1988) 201 Cal.App.3d 1527, 1535 [suspect "asked the arresting officer the reason for his arrest and chose to respond to the officer's mention of eyewitnesses to the burglary."]; *People v. Cortes* (1999) 71 Cal.App.4th 62, 70 ["[The officer] advised defendant of his rights, and defendant understood them. Defendant said he'd tell [the officer] whatever he would tell his attorney, if [the officer] had the time to listen, and then he voluntarily gave a taped interview. Moreover, there is no evidence of coercion or intimidation."]; *People v. Riva* (2003) 112 Cal.App.4th 981, 989 ["[If] the defendant chose to speak with police after he was informed of his rights, understood the information he was given and was not tricked or coerced into surrendering those rights, a valid waiver will be implied."]; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 19 [after acknowledging he understood his rights, the defendant asked if he could talk to the officer]; *People v. Mitchell* (1982) 132 Cal.App.3d 389, 406 ["The record shows Mitchell understood his rights, including that of counsel, and waived each by agreeing to answer the officer's questions."]; *People v. Cooper* (1970) 10 Cal.App.3d 96, 107-8 ["There is nothing in *Miranda*, or any other case of which we are aware, requiring a police officer to ask a defendant if he 'expressly waived' his constitutional rights."]; *People v. Brockman* (1969) 2 Cal.App.3d 1002; *People v. Superior Court (Saari)* (1969) 2 Cal.App.3d 197, 200, fn.4; *U.S. v. Younger* (9th Cir. 2005) 398 F.3d 1179, 1186 ["[A]fter [the officer] advised defendant of his *Miranda* rights but before questioning him, defendant made a spontaneous statement and responded to further questioning without reference to counsel."]; *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1127 ["Waivers of *Miranda* rights need not be explicit; a suspect may impliedly waive the rights by answering an officer's questions after receiving *Miranda* warnings."]; *U.S. v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1448; *Terrovona v. Kincheloe* (9th Cir. 1990) 912 F.2d 1176, 1180.

<sup>74</sup> *North Carolina v. Butler* (1979) 441 U.S. 369, 374-5 [quoting from *Johnson v. Zerbst* (1938) 304 U.S. 458, 464]; *People v. Johnson* (1969) 70 Cal.2d 541, 558 ["[M]ere silence of the accused followed by grudging responses to leading questions will be entitled to very little probative value"].

<sup>75</sup> See *North Carolina v. Butler* (1979) 441 U.S. 369, 372-3 [Court rejects argument that a suspect who expressly waived his right to remain silent must also expressly waive his right to counsel]; *People v. Mitchell* (1982) 132 Cal.App.3d 389, 406 [waiver was effective even though suspect did not expressly waive the right to counsel]; *People v. Whitson* (1998) 17 Cal.4th 229, 250.

**PRE-WAIVER “SMALL TALK”:** Officers do not violate *Miranda* by having a brief and casual pre-waiver conversation with a suspect to settle the atmosphere. For example, in *People v. Gurule*<sup>76</sup> the California Supreme Court ruled that officers did not violate *Miranda* when, before seeking a waiver from a murder suspect, they engaged him in “some small talk, to put him at ease.”

**PUTTING YOUR CARDS ON THE TABLE:** Before seeking a waiver, officers will sometimes explain to the suspect the nature of the crime he is believed to have committed, and even summarize the evidence of his guilt. They may also point out to him that he has only one chance to tell them his side of the story—and *this* is it.<sup>77</sup> These are all permissible practices so long as the officers statements were brief and dispassionate; i.e., not goading.<sup>78</sup>

For example, in *People v. Patterson*<sup>79</sup> an officer sought a waiver after telling the defendant that his accomplice had made a statement and, as the result, the case against the defendant was looking “pretty good.” In ruling the officer did not violate *Miranda* by providing such information, the court said, “[T]he conversation-warning-interrogation sequence is not forbidden under *Miranda*. Indeed, *Miranda* required only that the warning must precede any custodial interrogation designed to elicit incriminating statements, which was done in this case.”

Similarly, in *People v. Dominick*<sup>80</sup> officers sought a waiver from the defendant after telling him (falsely) that “the victim of the stabbing had identified his picture as one of the persons who had raped her and murdered her friend.” The court ruled this brief, pre-waiver comment was lawful.

**TRIVIALIZING THE MIRANDA WARNINGS:** A court might invalidate a waiver if officers obtained it after belittling the *Miranda* rights. As the California Supreme Court noted in *People v. Musselwhite*, “We agree with the proposition that evidence of police efforts to trivialize the rights accorded suspects by the *Miranda* decision—by ‘playing down,’ for example, or minimizing their legal significance—may under some circumstances suggest a species of prohibited trickery and weighs against a finding that the suspect’s waiver was knowing, informed, and intelligent.”<sup>81</sup>

The court then ruled, however, that the officer who questioned Musselwhite did not engage in such a practice by merely saying, “[W]hat we’d like to do is just go ahead and advise you of your rights before we even get started and that way there’s no problem with any of it.”

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<sup>76</sup> (2002) 28 Cal.4<sup>th</sup> 557. ALSO SEE *Clark v. Murphy* (9<sup>th</sup> Cir. 2003) 331 F.3d 1062, 1073 [“There is nothing inherently wrong with efforts to create a favorable climate for confession.” Quoting *Jenner v. Smith* (8<sup>th</sup> Cir. 1993) 982 F. 2d 329, 334].

<sup>77</sup> See *People v. Williams* (1997) 16 Cal.4<sup>th</sup> 635, 658 [“[The *Miranda* right to counsel] was not implicated by Detective Crews’s statement that defendant had ‘one shot’ to talk to the officers.”]; *People v. Kelly* (1990) 51 Cal.3d 931, 949 [“[F]or us to hear your side you have to acknowledge that your rights have been read to you and that you waive your rights.”].

<sup>78</sup> See *Arizona v. Roberson* (1988) 486 U.S. 675, 687 [Court said that if a suspect invokes his *Miranda* rights as to one crime, officers may inform him of the facts of their investigation into a second crime for which he was a suspect “as long as such communication does not constitute interrogation.” Thus, a statement of facts does not necessarily constitute interrogation.].

<sup>79</sup> (1979) 88 Cal.App.3d 742. ALSO SEE *People v. Gray* (1982) 135 Cal.App.3d 859, 863 [before seeking a waiver, it was permissible for officers to tell the suspect about “considerable evidence pointing to his involvement in the death”].

<sup>80</sup> (1986) 182 Cal.App.3d 1174.

<sup>81</sup> (1998) 17 Cal.4<sup>th</sup> 1216, 1237.

“SOFTENING UP”: Defendants sometimes argue that, although they were not actually coerced or otherwise pressured into waiving, their waiver was nevertheless involuntary because officers “softened them up” before seeking it. The term “softening up” comes from the 1977 California Supreme Court opinion in *People v. Honeycutt*.<sup>82</sup>

In *Honeycutt*, the court ruled that “softening-up” is unlawful, and that it occurs if the following circumstances existed: (1) officers had reason to believe the suspect would not waive his rights; (2) before seeking a waiver, they had a lengthy talk with him; (3) the purpose of the talk was to convince him it would be advantageous to waive (in *Honeycutt*, they disparaged the suspect’s victim to make it appear they were on Honeycutt’s “side”), and (4) the suspect waived his rights as the result of the officers’ ploy.<sup>83</sup>

Over the years, however, the courts—including the California Supreme Court—have not been receptive to softening-up claims. In fact, they have usually rejected them, especially when one or more of the four circumstances did not exist.<sup>84</sup>

The courts have good reason for questioning the legitimacy of *Honeycutt*’s softening-up prohibition. First, it was a plurality decision, and its softening-up discussion was pure dicta, which means it is not citable authority.<sup>85</sup> Second, *Honeycutt* was based on the premise that softening-up renders a waiver “involuntary.”<sup>86</sup> But nine years after *Honeycutt* was decided, the U.S. Supreme Court rejected the idea that involuntariness can result from anything other than coercive police conduct.<sup>87</sup> Consequently, because softening-up does not, by any definition of the word, constitute “coercion,” there does not appear to be any legal basis for suppressing a statement based on softening-up.

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<sup>82</sup> (1977) 20 Cal.3d 150.

<sup>83</sup> See *People v. Williams* (1997) 16 Cal.4<sup>th</sup> 635, 661; *People v. Vasila* (1995) 38 Cal.App.4<sup>th</sup> 865, 874; *People v. Mickey* (1991) 54 Cal.3d 612, 647, 650; *People v. Benson* (1990) 52 Cal.3d 754, 778-9; *People v. Musselwhite* (1998) 17 Cal.4<sup>th</sup> 1216, 1240-1.

<sup>84</sup> See *People v. Musselwhite* (1998) 17 Cal.4<sup>th</sup> 1216, 1236 [“The whole of [the officer’s] one-sentence statement is nowhere close to the half-hour of ‘softening up’ of the suspect we disapproved in [*Honeycutt*].”]; *People v. Bestmeyer* (1985) 166 Cal.App.3d 520, 528 [“This record does not indicate that the few brief comments of Detective Cullen fall into [the ‘softening up’] category.”]; *People v. Gray* (1982) 135 Cal.App.3d 859, 864 [five minute pre-waiver explanation of the evidence of the suspect’s guilt was “hardly the ‘softening-up’ condemned in *Honeycutt*.”]; *People v. Michaels* (2002) 28 Cal.4<sup>th</sup> 486, 511; *People v. Gurule* (2002) 28 Cal.4<sup>th</sup> 557, 603 [*Honeycutt* did not apply because the officers did not discuss the victim, nor was there any evidence that the officers’ “small talk” overbore defendant’s free will]; *People v. Patterson* (1979) 88 Cal.App.3d 742, 751 [“[I]t is clear that *Honeycutt* involves a unique factual situation and hence its holding must be read in the particular factual context in which it arose.”]; *People v. Posten* (1980) 108 Cal.App.3d 633, 647 [“*Honeycutt* is distinguishable on its facts”]; *People v. Kelly* (1990) 51 Cal.3d 931, 954; *People v. Maxey* (1985) 172 Cal.App.3d 661, 667; *People v. Mickey* (1991) 54 Cal.3d 612, 641-52 [In *Mickey*, a lengthy pre-waiver conversation did not invalidate a subsequent waiver, although the defense did not specifically raise the “softening up” issue.]; *People v. Kyllingstad* (1978) 85 Cal.App.3d 562, 566; *People v. Maxey* (1985) 172 Cal.App.3d 661, 667.

<sup>85</sup> See *People v. Gray* (1982) 135 Cal.App.3d 859, 863 [“the entire ‘softening up’ issue in *Honeycutt* was dicta joined in by at most four justices.”]. NOTE: Neither plurality decisions nor dicta are binding authority. See *Adoption of Kelsey S.* (1992) 1 Cal.4<sup>th</sup> 816, 829; *People v. Mendoza* (2000) 23 Cal.4<sup>th</sup> 896, 915.

<sup>86</sup> See *People v. Honeycutt* (1977) 20 Cal.3d 150, 160 [“When the waiver results from a clever softening-up of a defendant . . . the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary”].

<sup>87</sup> See *Colorado v. Connelly* (1986) 479 U.S. 157 170 [“The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. . . . The voluntariness of a [*Miranda*] waiver . . . has always depended on the absence of police overreaching, not on ‘free choice’ in any broader sense of the word.”]; *Colorado v. Spring* (1987) 479 U.S. 564, 574 [involuntariness requires “coercive police conduct”]; *People v. Clark* (1993) 5 Cal.4<sup>th</sup> 950, 988 [“An involuntary waiver of *Miranda* rights, however, is a product of government coercion.”].

**UNDERMINING MIRANDA AND THE “TWO STEP”:** In 2004, a majority of the U.S. Supreme Court in *Missouri v. Seibert*<sup>88</sup> ruled that an interrogation strategy known as the “two-step” was unlawful because it was designed to—and did—undermine the *Miranda* procedure and effectively circumvent its protections.<sup>89</sup> The so-called “two step” is a tactic in which officers intentionally question an incarcerated suspect without first obtaining a *Miranda* waiver. If the suspect confesses or makes a damaging admission, they then *Mirandize* him and seek a second statement.

The psychology behind the two-step is that a suspect who has “let the cat out of the bag” by admitting his guilt, will figure he might as well waive his rights because he has nothing left to lose. As the Court explained, the two-step operates to “render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.”

## INVOCATIONS

While a waiver gives officers the go-ahead to begin questioning the suspect, an invocation has just the opposite affect. Specifically, if the suspect invokes while being *Mirandized*, officers may not question him.<sup>90</sup> Furthermore, officers must not insist that he listen to the rest of the warnings and answer the waiver questions before they will recognize the invocation.<sup>91</sup> If the invocation comes during the interview, all questioning must immediately cease.<sup>92</sup> And regardless of when it occurs, officers must not attempt to make him change his mind or even ask why he’s invoking.<sup>93</sup>

These rules, which are precise and unequivocal, have been in effect since *Miranda* was decided in 1966 and they are still strictly enforced.<sup>94</sup>

There were some other rules that were just as strict. The most notorious and troublesome was this one: any statement that could, by any stretch of the imagination, be interpreted as an invocation was, as a matter of law, an invocation.<sup>95</sup> In fact, invocations

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<sup>88</sup> (2004) \_\_ U.S. \_\_ [159 L.Ed.2d 643]. ALSO SEE *People v. Wash* (1993) 6 Cal.4<sup>th</sup> 215, 240-1 a pre-*Seibert* case which appears to be consistent with *Seibert*].

<sup>89</sup> **NOTE:** Although *Seibert* was technically a plurality opinion of four justices, a fifth justice, Justice Kennedy, agreed with the result although he would prohibit such a tactic only if it was used in “a calculated way to undermine the *Miranda* warning.” See *U.S. v. Aguilar* (8<sup>th</sup> Cir. 2004) 384 F.3d 520, 525.

<sup>90</sup> See *Miranda v. Arizona* (1966) 383 U.S. 436, 473-4.

<sup>91</sup> See *Smith v. Illinois* (1984) 469 U.S. 91.

<sup>92</sup> See *Edwards v. Arizona* (1981) 451 U.S. 477, 485; *People v. Smith* (1995) 31 Cal.App.4<sup>th</sup> 1185, 1191 [“Smith’s assertion of his rights should have put an immediate end to the interview.”]; *In re Joe R.* (1980) 27 Cal.3d 496, 515 [“If at any time the minor indicated in any manner that he did not wish to talk further, the police were required to cease questioning him”]; *People v. Hurd* (1998) 62 Cal.App.4<sup>th</sup> 1084, 1090 [“A defendant may invoke his or her Fifth Amendment right to silence by refusing to continue an ongoing interrogation subsequent to waiving that right.”].

<sup>93</sup> See *Michigan v. Harvey* (1990) 494 U.S. 344, 350; *Minnick v. Mississippi* (1990) 498 U.S. 146, 150; *Davis v. United States* (1994) 512 U.S. 452, 458; *People v. Peracchi* (2001) 86 Cal.App.4<sup>th</sup> 353, 358 [a *Miranda* violation occurred when an officer asked the suspect why he wanted to invoke]; *People v. Brockman* (1969) 2 Cal.App.3d 1002, 1007 [“[P]olice are to be prevented from wearing down a prisoner’s resistance by repeated pressuring until he finally makes the statement desired in order to get peace.”]; *Clark v. Murphy* (9<sup>th</sup> Cir. 2003) 331 F.3d 1062, 1069.

<sup>94</sup> See, for example, *Cooper v. Dupnik* (9<sup>th</sup> Cir. 1992) 963 F.2d 1220 [federal civil rights action for deliberately ignoring a *Miranda* invocation].

<sup>95</sup> See *People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, 736 [“[T]o demand that the privilege be invoked with unmistakable clarity (resolving any ambiguity against the defendant) would subvert *Miranda*’s prophylactic intent.”]; *People v. Green* (1987) 189 Cal.App.3d 685, 693 [“Any ambiguity as to whether a person intended to invoke his or her *Miranda* rights is to be resolved in favor of the defendant as an invocation”]; *People v. Porter* (1990) 221 Cal.App.3d 1213, 1219 [“[A]s to whether a person intended to



would automatically occur if the suspect merely indicated he was unwilling to discuss his case “freely and completely.”<sup>96</sup>

Other rules would fabricate an invocation if the suspect asked to talk to his mother, or if he indicated he would want an attorney if his case went to trial. Some courts even permitted “anticipatory invocations,” meaning an invocation that occurred before officers sought to question the suspect, and sometimes even before they arrested him.

Not surprisingly, these latter rules resulted in vast numbers of “invocations,” many of which were not intended. And they explain, at least partly, why so many officers and prosecutors were becoming openly hostile to *Miranda*. Changes were needed.

And they came.

### A new definition of “invocation”

The most dramatic change came in 1994 when the United States Supreme Court announced its decision in the case of *Davis v. United States*.<sup>97</sup> *Davis* was the outgrowth of the Court’s recognition that some lower courts had gone too far—that their obsession with sniffing out “invocations” had transformed *Miranda*’s safeguards into “wholly irrational obstacles to legitimate police investigative activity.”<sup>98</sup> What was needed, said the Court, was an entirely new test for determining what constitutes an invocation.

**THE “UNAMBIGUOUS AND UNEQUIVOCAL” TEST:** The Court ruled that invocations would no longer result if the suspect said something that indicated he *might* be invoking. Instead, invocations would occur only if the suspect’s words *clearly demonstrated* a present intent to invoke.<sup>99</sup> This made sense. After all, if a suspect has been advised of his

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invoke his or her *Miranda* rights is to be resolved in favor of the defendant as an invocation.”]; *Diaz v. Senkowski* (2<sup>nd</sup> Cir. 1996) 76 F.3d 61, 63 [“Prior to [*Davis*], the circuits were split over whether ambiguous requests for counsel require cessation of questioning.”]; *Lord v. Duckworth* (7<sup>th</sup> Cir. 1994) 29 F.3d 1216, 1221 [the “majority rule” before *Davis* was that an ambiguous invocation constituted an invocation]; *People v. Crittenden* (1994) 9 Cal.4<sup>th</sup> 83, 129 [“Earlier decisions of this court and the Courts of Appeal have indicated that a request for counsel need not be unequivocal in order to preclude questioning by the police.”]; *People v. Thompson* (1990) 50 Cal.3d 134, 165 [“It is true a request for counsel need not be unequivocal to invoke the defendant’s right to call a halt to questioning.” Citations omitted.].

<sup>96</sup> See *People v. Burton* (1971) 6 Cal.3d 375, 382; *People v. Crittenden* (1994) 9 Cal.4<sup>th</sup> 83, 129; *People v. Duran* (1983) 140 Cal.App.3d 485, 492; *People v. Green* (1987) 189 Cal.App.3d 685, 693; *People v. Barrow* (1976) 60 Cal.App.3d 984, 993; *People v. Hinds* (1984) 154 Cal.App.3d 222, 235; *People v. Porter* (1990) 221 Cal.App.3d 1213, 1218.

<sup>97</sup> (1994) 512 U.S. 452.

<sup>98</sup> *Davis v. United States* (1994) 512 U.S. 452, 460.

<sup>99</sup> See *Davis v. United States* (1994) 512 U.S. 452, 460; *People v. Stitely* (2005) 35 Cal.4<sup>th</sup> 514, 535 [“In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect must *unambiguously* assert his right to silence or counsel. It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights.”]; *People v. McMahon* (2005) 131 Cal.App.4<sup>th</sup> 80, 95 [“[T]he Supreme Court [in *Davis*] limited the protection afforded in *Edwards* to cases where the suspect makes a clear, unequivocal request for counsel”]; *People v. Gonzalez* (2005) 34 Cal.4<sup>th</sup> 1111, 1125 [the test is “whether, in light of the circumstances, a reasonable officer would have understood a defendant’s reference to an attorney to be an unequivocal and unambiguous request for counsel”]; *People v. Cunningham* (2001) 25 Cal.4<sup>th</sup> 926, 993 [“The suspect must unambiguously request counsel.”]; *Clark v. Murphy* (2003) 331 F.3d 1062, 1070 [“In sum, unless the accused makes an unambiguous request for counsel, the authorities are free to continue questioning.”]; *Lord v. Duckworth* (7<sup>th</sup> Cir. 1994) 29 F.3d 1216, 1221 [“Lord was subject to questioning ‘unless and until’ he *clearly* requested an attorney.”]; *Soffar v. Cockrell* (5<sup>th</sup> Cir. 2002) 300 F.3d 588, 595 [“First, courts have rejected as ambiguous statements asking for advice on whether or not to obtain an attorney. Second, a suspect’s question about how to obtain an attorney does not constitute an unambiguous assertion of his right. Third, a suspect’s inquiry into how long it would take to get an attorney is not a clear invocation.”]. **NOTE: Is this rule fair?** “Of course, such an approach may disadvantage suspects who, for emotional or intellectual reasons, have difficulty

rights and says he understands them, it is not asking too much to require that he clearly and unambiguously inform officers if and when he wants to invoke them. Thus, in discussing invocations of the right to counsel, the Court explained:

Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.<sup>100</sup>

**CONSIDER IN CONTEXT:** In determining whether a suspect's words constituted an unambiguous invocation, the courts must consider them in context.<sup>101</sup> This is important because a remark that appears to be an invocation in the abstract might take on an entirely different meaning when considered in light of what the suspect and the officers said beforehand, including the tenor or sense of their words.

A good example is found in *People v. Jennings*<sup>102</sup> where the defendant said, "I'm not going to talk. I'm not saying shit to you no more man." On the surface, this would seem to be a clear invocation. But the court pointed out that, in light of the preceding interplay between the suspect and the officers, it was apparent that his remark was directed at only one of the three officers who were interviewing him. Thus, the suspect was essentially saying he would not talk to *that* officer but would continue speaking with the others.

Similarly, in *In re Joe R.*<sup>103</sup> the defendant claimed he invoked when, after an officer accused him of lying, he said, "That's all I got to say." Taken in context, said the court, the defendant was essentially saying, "That's my story, and I'll stick with it."

With these principles in mind, we will now look at some examples of what does, and does not, constitute an invocation.

### Invocation of the right to remain silent

A suspect invokes his right to remain silent if he says something that clearly demonstrates either, (1) a present unwillingness to submit to an interview or, (2) an

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expressing themselves. However, a rule requiring a clear invocation of rights from someone who has already received and waived them avoids difficulties of proof and promotes effective law enforcement." *People v. Stitely* (2005) 35 Cal.4<sup>th</sup> 514, 535. ALSO SEE *McNeil v. Wisconsin* (1991) 501 U.S. 171, 180 ["If a suspect does not wish to communicate to the police except through an attorney, he can simply tell them that when they give him the *Miranda* warnings."].

<sup>100</sup> *Davis v. United States* (1994) 512 U.S. 452, 459. **NOTE: Davis applies to all invocations:** Although the issue in *Davis* was *Miranda*'s right to counsel, it is apparent that the ruling applies equally to invocations of the right to remain silent. See *People v. Stitely* (2005) 35 Cal.4<sup>th</sup> 514, 535 [suspect must "unambiguously assert his right to *silence* or counsel." Emphasis added.]; *Soffar v. Cockrell* (5<sup>th</sup> Cir. 2002) 300 F.3d 588, 594, fn.5 [court notes that "the Sixth, Seventh, Eighth, and Eleventh [Circuits] have held that the *Davis* rule applies equally to the right to remain silent." Citations omitted.]; *Arnold v. Runnels* (2005) 421 F.3d 859, 870 (dis. opn. of Callahan, J.) [the First, Sixth, Seventh, Eighth, and Eleventh Circuits have held that *Davis* applies to the right to remain silent. Citations omitted.].

<sup>101</sup> *Connecticut v. Barrett* (1987) 479 U.S. 523, 528 ["Nothing in our decisions or in the rationale of *Miranda*, requires authorities to ignore the tenor or sense of a defendant's response to these warnings."]. ALSO SEE *People v. Peracchi* (2001) 86 Cal.App.4<sup>th</sup> 353, 359-60 [invocation is "to be determined in light of all of the circumstances, and the words used must be considered in context."]; *People v. Scaffidi* (1992) 11 Cal.App.4<sup>th</sup> 145, 153-4; *In re Joe R.* (1980) 27 Cal.3d 496, 515 ["[T]he words here must be construed in context."].

<sup>102</sup> (1988) 46 Cal.3d 963.

<sup>103</sup> (1980) 27 Cal.3d 496.

unequivocal desire to terminate an interview in progress.<sup>104</sup> Although officers can usually tell right away if a suspect is invoking this right, there are some situations that have caused uncertainty.

**SUSPECT REQUESTS TO TALK WITH SOMEONE:** In the past, it was the rule in California that a minor's request to speak with his mother or father was an invocation of the right to remain silent even if it was apparent he was not invoking.<sup>105</sup> Citing this rule, defense attorneys would argue that an adult suspect invoked by requesting to speak with, for example, his probation officer, employer, friend, parent, or psychologist. But as the result of *Davis* and another important Supreme Court case, *Fare v. Michael C.*,<sup>106</sup> these arguments are now summarily rejected.<sup>107</sup>

**MERE RELUCTANCE TO TALK:** A suspect's reluctance to talk with officers or discuss a certain subject does not constitute an invocation if it appeared he was just uncomfortable discussing the matter or providing details.

For example, in *People v. Hayes*<sup>108</sup> a murder suspect admitted shooting the victims but, when officers pressed him for details, he said, "Do I gotta still tell you after I admit it?" In ruling this comment did not constitute even a limited invocation, the court said:

[T]aken in context defendant's remark meant that although he was willing to confess to the crimes he was uncomfortable about going into their details. Such reluctance is an understandable reaction to a confession of multiple robbery-murder, and does not rise to the level of an implied assertion of the defendant's constitutional right to cut off questioning.

Similarly, in *People v. Castille*<sup>109</sup> an officer asked a murder suspect, "What did you see when you saw the cashier (the person he had killed)?" The suspect responded, "Do I have to talk about this right now?" This was not an invocation, said the court, because the suspect "merely demonstrated his discomfort with the particular question about seeing the body of the clerk, who had been shot in the head with a large caliber slug."

❖ **EXAMPLES:** For more examples of statements that were and were not deemed invocations of the right to remain silent, see Appendix B, "Is *this* an invocation? ("Right to remain silent").

### Invocation of the right to counsel

In *Miranda*'s "Dark Ages," it seemed as if invocations of the right to counsel would occur whenever a suspect uttered the word "attorney," regardless of the context. After *Davis*, however, an invocation results only if the suspect makes "some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney in

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<sup>104</sup> See *Connecticut v. Barrett* (1987) 479 U.S. 523, 528; *People v. Boyer* (1989) 48 Cal.3d 247, 271; *People v. Hayes* (1985) 38 Cal.3d 780, 784; *People v. Hurd* (1998) 62 Cal.App.4<sup>th</sup> 1084, 1090 ["A defendant may invoke his or her Fifth Amendment right to silence by refusing to continue an ongoing interrogation subsequent to waiving that right."]; *People v. Johnson* (1993) 6 Cal.4<sup>th</sup> 1, 25.

<sup>105</sup> See *People v. Burton* (1971) 6 Cal.3d 375.

<sup>106</sup> (1979) 442 U.S. 707 [Court rejects argument that a minor invokes his right to remain silent by requesting to speak with his probation officer].

<sup>107</sup> See *People v. Barrow* (1976) 60 Cal.App.3d 984, 994 [talk to employer]; *People v. Dreas* (1984) 153 Cal.App.3d 623, 631 [talk to friend, employer]; *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 538 [talk to parent]; *People v. Hector* (2000) 83 Cal.App.3d 228, 235-6 [talk to parent]; *People v. Robertson* (1982) 33 Cal.3d 21, 40 [talk to psychologist].

<sup>108</sup> (1985) 38 Cal.3d 780.

<sup>109</sup> (2005) 129 Cal.App.4<sup>th</sup> 863, 885.

dealing with custodial interrogation by the police.”<sup>110</sup> As the Ninth Circuit observed in *U.S. v. Cheely*, “Of course, Cheely does not necessarily invoke his rights simply by saying the magic word ‘attorney’; that word has no talismanic qualities, and a defendant does not invoke his right to counsel any time the word falls from his lips.”<sup>111</sup> On the other hand, an invocation would ordinarily result if the suspect said something like, “I wanna lawyer,”<sup>112</sup> or “I think now that you told me what you think, I better talk to a lawyer.”<sup>113</sup>

Most of the confusion in this area occurs when a suspect indicates he wants to be represented by an attorney when he gets to court. This is sometimes interpreted by officers as an invocation of the *Miranda* right to counsel but, as we will now explain, it’s not.

**TWO RIGHTS TO COUNSEL:** Most suspects naturally want to be represented by an attorney if and when they get to court. And they have a Constitutional right to one pursuant to the Sixth Amendment. Specifically, a suspect who has been charged with a crime has a right to have an attorney when he appears before a judge in court and is therefore “facing a state apparatus that has been geared up to prosecute him.”<sup>114</sup> Thus, when a charged suspect invokes his Sixth Amendment right to counsel by, for example, retaining an attorney or asking a judge to appoint one, he is essentially saying that he does not have the knowledge or experience necessary to deal with the legal issues that might arise in the courtroom.

In contrast, the *Miranda* right to counsel is concerned with what happens in the police interview room or any other location in which custodial interrogation takes place. Consequently, when a suspect tells officers he wants to have an attorney present when he is questioned or that he wants to speak with one before questioning begins, he is essentially saying that “he considers himself unable to deal with the pressures of custodial interrogation without legal assistance.”<sup>115</sup>

Most suspects do not, however, appreciate the distinction between these two rights. As the result, they seldom say *why* they want an attorney. It is, therefore, important that officers understand the difference between these two rights to counsel so they will know how to respond.

**SUSPECT WANTS AN ATTORNEY IN COURT:** With these differences in mind it becomes clear—especially in light of *Davis*—that officers are not required to terminate an interview when a suspect says or indicates he wants an attorney in court.<sup>116</sup> As the

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<sup>110</sup> See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178. ALSO SEE *Davis v. United States* (1994) 512 U.S. 452, 459; *People v. Lisper* (1992) 4 Cal.App.4<sup>th</sup> 1317, 1324.

<sup>111</sup> (9th Cir. 1994) 36 F.3d 1439, 1447-8. ALSO SEE *Poyner v. Murray* (4th Cir. 1992) 964 F.2d 1404, 1411 [“[T]he mere mention by a suspect of the word ‘attorney’ is not sufficient to invoke the right to counsel.”].

<sup>112</sup> *People v. Boyer* (1989) 48 Cal.3d 247.

<sup>113</sup> *People v. Dingle* (1985) 174 Cal.App.3d 21.

<sup>114</sup> See *Arizona v. Roberson* (1988) 486 U.S. 675, 685. ALSO SEE *Moran v. Burbine* (1986) 475 U.S. 412, 430 [“[The purpose of the Sixth Amendment right to counsel] is to assure that in any criminal prosecution, the accused shall not be left to his own devices in facing the prosecutorial forces or organized society.”].

<sup>115</sup> *Arizona v. Roberson* (1988) 486 U.S. 675, 684.

<sup>116</sup> See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178 [“To invoke the Sixth Amendment interest is, as a matter of fact, not to invoke the *Miranda-Edwards* interest.”]; *Patterson v. Illinois* (1988) 487 U.S. 285, 290; *People v. Morris* (1991) 53 Cal.3d 152, 202 [“[The defendant’s] request for counsel at the arraignment on the marijuana charge is not a clear expression of a desire that police interrogation on the murder charge cease until he had consulted with counsel.”]; *People v. Avila* (1999) 75 Cal.App.4<sup>th</sup> 416, 421 [“[I]nvocation of the Sixth Amendment’s right to counsel does not trigger the Fifth Amendment’s corollary right to counsel under *Miranda*.”]; *People v. Lisper* (1992) 4 Cal.App.4<sup>th</sup> 1317, 1325 [“Just because a criminal defendant invokes his Sixth Amendment right to counsel, it does not mean he is simultaneously invoking his Fifth Amendment right

California Supreme Court observed, “A desire to have an attorney in the future, coupled with an unambiguous willingness to talk in the meantime, is not an invocation of the [Miranda] right to counsel requiring cessation of the interview.”<sup>117</sup> For example, the following were deemed not invocations:

- **Suspect:** . . . attorneys and stuff like that I can’t afford one right at the moment.  
**Officer:** Well, this says that an attorney can be appointed for you.  
**Suspect:** Well, I feel I need one.  
**Officer:** O.K. you’d rather not talk about the case.  
**Suspect:** No, I don’t mind talking about the case, but I just feel I want it noted that I want an attorney.  
**Officer:** [So] you do want an attorney but not necessarily at this particular second. Is that right?  
**Suspect:** Yes.<sup>118</sup>
- **Suspect:** I’d like to know how long it will take to get an attorney. I would like to talk to you in the interim period but I would like to try to get one—you know, get the process started.  
**Officer:** Do you want an attorney right now?  
**Suspect:** No, I’m willing to start but I’m sure during the process I’m going to want one.<sup>119</sup>

**SUSPECT RETAINS AN ATTORNEY ON ANOTHER CASE:** Just as a suspect’s request for counsel in court has no bearing on whether he thinks he needs an attorney in dealing with officers, neither is his act of requesting or accepting legal representation in another case. For example, in *People v. Sully*<sup>120</sup> an attorney was appointed to represent Sully for a murder in Burlingame with which he had been charged. (This appointment constituted an invocation of Sully’s Sixth Amendment right to counsel as to the Burlingame murder and would, therefore, have prohibited any further questioning as to *that* crime.) Sully was also a suspect in the uncharged murders of three people whose bodies were found in Golden Gate Park. So, when San Francisco police investigators learned that he was in the San Mateo County Jail on the Burlingame murder they went there, obtained a *Miranda* waiver, and questioned him about their murders.

On appeal, Sully argued that his Sixth Amendment invocation as to the Burlingame murder also constituted an invocation of his *Miranda* right to counsel. And because it is settled that an invocation of the *Miranda* right to counsel forecloses police-initiated questioning as to *any* crime, he argued that his answers to the officer’s questions should have been suppressed. Sully’s argument went nowhere with the California Supreme Court which ruled, “[D]efendant’s appearance and acceptance of appointed counsel on one

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on a separate case.”]; *U.S. v. Charley* (9<sup>th</sup> Cir. 2005) 396 F.3d 1074, 1082 [“Invocation of the Sixth Amendment right to counsel alone does not constitute an invocation of the *Miranda-Edwards* Fifth Amendment right to counsel.”]; *U.S. v. Cheely* (9<sup>th</sup> Cir. 1994) 36 F.3d 1439, 1447-8 [“Of course, Cheely does not necessarily invoke his rights simply by saying the magic word ‘attorney’; that word has no talismanic qualities, and a defendant does not invoke his right to counsel any time the word falls from his lips.”]; *Poyner v. Murray* (4<sup>th</sup> Cir. 1992) 964 F.2d 1404, 1411 [“[T]he mere mention by a suspect of the word ‘attorney’ is not sufficient to invoke the right to counsel.”].

<sup>117</sup> *People v. Clark* (1992) 3 Cal.4<sup>th</sup> 41, 121.

<sup>118</sup> *People v. Turnage* (1975) 45 Cal.App.3d 201, 211, fn.5.

<sup>119</sup> *People v. Clark* (1992) 3 Cal.4<sup>th</sup> 41, 120-1. ALSO SEE *People v. Watkins* (1970) 6 Cal.App.3d 119, 124; *Lord v. Duckworth* (7<sup>th</sup> Cir. 1994) 29 F.3d 1216, 1221 [Suspect: “I can’t afford a lawyer but is there any way I can get one?” Court: “Lord most likely was asking for clarification of his right to counsel at trial.”].

<sup>120</sup> (1991) 53 Cal.3d 1195, 1234.

charge does not amount to an invocation of [*Miranda*] rights with respect to another, uncharged offense.”

Similarly, in *McNeil v. Wisconsin*<sup>121</sup> an attorney was appointed to represent McNeil on an armed robbery charge. A homicide detective later visited him in jail, obtained a *Miranda* waiver and interviewed him about an unrelated murder for which McNeil was an uncharged suspect. McNeil was later charged with the murder, and his statements to the detective were used against him at trial. On appeal, the United States Supreme Court ruled that, although McNeil invoked his Sixth Amendment right to counsel as to the robbery when he accepted court-appointed counsel, he did not thereby invoke his *Miranda* right to counsel as to the murder.

**SUSPECT HAS AN ATTORNEY IN THE CASE UNDER INVESTIGATION:** As a practical matter, officers are seldom able to question suspects about crimes for which they have retained or requested counsel. This is because most attorneys will tell them to invoke or otherwise keep their mouths shut.<sup>122</sup> If, however, the suspect is willing to speak with officers without the attorney, and if he has not been charged with the crime under investigation, police-initiated questioning is, as noted earlier, permitted under both the Sixth Amendment.

It is also permitted under *Miranda* for two reasons. First, retaining an attorney does not constitute an unambiguous request to have an attorney present during questioning. As the California Court of Appeal observed, a represented suspect may be quite willing to speak with officers without his attorney about the crime for which he is represented because of his desire “to vindicate himself in the eyes of the officers.”<sup>123</sup> Second, as we will discuss later, only the suspect can invoke his *Miranda* rights, and the invocation must occur during actual or impending interrogation, not, for example, when the suspect is talking privately with his lawyer.

**SUSPECT REQUESTS AN ATTORNEY IF HE WILL BE CHARGED:** An invocation does not result if an uncharged suspect says he wants an attorney *if* he will be charged sometime in the future. Such a statement, said the California Supreme Court, is “at best, ambiguous and equivocal” because officers do not know for sure if the suspect will, in fact, be charged. “Confronted with this statement,” said the court, “a reasonable officer would have understood only that the suspect might be invoking the right to counsel which is insufficient under *Davis* to require cessation of questioning.”<sup>124</sup>

**SUSPECT WANTS AN ATTORNEY AT LINEUP:** Neither a suspect’s request for an attorney at a lineup, nor his refusal to participate in a lineup without an attorney, constitutes a *Miranda* invocation. As the Court of Appeal observed, “The Sixth Amendment guarantees the right to counsel at a physical lineup, but the mere presence, or absence, of an attorney at a lineup does not affect the suspect’s right to counsel during custodial interrogation.”<sup>125</sup>

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<sup>121</sup> (1991) 501 U.S. 171.

<sup>122</sup> See *Dickerson v. United States* (2000) 530 U.S. 428, 449 (dis. opn. of Scalia, J.) [“The only good reason for having counsel there is that he can be counted on to advise the suspect that he should not speak.”]; *Watts v. Indiana* (1949) 338 U.S. 49, 59 (conc. opn. of Jackson, J.) [“[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.”].

<sup>123</sup> *People v. Ledesma* (1988) 204 Cal.App.3d 682, 695.

<sup>124</sup> *People v. Gonzalez* (2005) 34 Cal.4<sup>th</sup> 1111, 1126 .

<sup>125</sup> *People v. Lispier* (1992) 4 Cal.App.4<sup>th</sup> 1317, 1325.

- ❖ **EXAMPLES:** For more examples of statements that were deemed invocations and not invocations of the *Miranda* right to counsel, see Appendix B, “Is *this* an invocation?” (“Right to counsel”).

### **Suspect invokes *Miranda* for some other crime**

Here we encounter one of those misguided rules that should have, but has not yet, been replaced by something rational. It is as follows: If the suspect invokes his right to remain silent or his *Miranda* right to counsel as to one crime, he effectively invokes that right as to *all* crimes—even if it was apparent he wanted to discuss the other crimes.<sup>126</sup> This rule is based on the dubious notion that every suspect who invokes “considers himself unable to deal with the pressures of custodial interrogation” with regard to all the crimes he might have committed,<sup>127</sup> at least so long as he remains in custody.<sup>128</sup>

For example, if a suspect decides he wants an attorney before talking with robbery investigators about a holdup for which he was arrested, homicide investigators may not later seek to question him about an unrelated murder unless he is released from custody. Furthermore, by seeking to interview the suspect, the homicide investigators would have violated *Miranda* even if they didn’t know about the invocation.<sup>129</sup>

### **Limited invocations**

Speaking of misguided rules, there was one that said an invocation occurred whenever a suspect said something that merely indicated he was unwilling to discuss his case “freely and completely.”<sup>130</sup> As the result of this indiscriminate “all or nothing” approach, an invocation of the right to remain silent could occur, for example, if the suspect was merely reticent or “uncomfortable” discussing one aspect of his case. It might also happen if he didn’t want the interview recorded. Likewise, an invocation of the *Miranda* right to counsel would sometimes result if the suspect refused to discuss a certain subject unless his attorney was present.

Now the courts take a more thoughtful approach, having realized that a suspect’s refusal or reluctance to discuss a particular subject or answer a certain question, with or without an attorney, does not necessarily demonstrate a desire to terminate an interview.<sup>131</sup> On the contrary, the suspect’s act of placing limits or conditions on an

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<sup>126</sup> See *Arizona v. Roberson* (1988) 486 U.S. 675, 684 [“[T]here is no reason to assume that a suspect’s state of mind is in any way investigation-specific”]; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 177 [“his prior invocation of the offense specific Sixth Amendment right with regard to the West Allis burglary was also an invocation of the non-offense-specific *Miranda-Edwards* right.”]; *People v. DeLeon* (1994) 22 Cal.App.4<sup>th</sup> 1265, 1270 [“[Q]uestioning on another crime is prohibited unless counsel is present.”]; *People v. Avila* (1999) 75 Cal.App.4<sup>th</sup> 416, 421 [*Miranda* invocations “prohibit custodial interrogation concerning all investigations, making an invocation of a suspect’s *Miranda* rights non-offense specific.”].

<sup>127</sup> See *Arizona v. Roberson* (1988) 486 U.S. 675, 683. **NOTE:** In his dissenting opinion in *Roberson*, Justice Kennedy rejected this idea, observing that a suspect “will want the opportunity, when he learns of the separate investigations, to decide whether he wishes to speak to the authorities in a particular investigation with or without representation.” At p. 692.

<sup>128</sup> See *People v. Storm* (2002) 28 Cal.4<sup>th</sup> 1007.

<sup>129</sup> See *Arizona v. Roberson* (1988) 486 U.S. 675, 687 [“[C]ustodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel.”].

<sup>130</sup> See, for example, *People v. Burton* (1971) 6 Cal.3d 375, 382; *People v. Duran* (1983) 140 Cal.App.3d 485, 492; *People v. Barrow* (1976) 60 Cal.App.3d 984, 993; *People v. Marshall* (1974) 41 Cal.App.3d 129, 133.

<sup>131</sup> See *People v. Johnson* (1993) 6 Cal.4<sup>th</sup> 1, 25-6 [the “freely and completely” language simply reflects “the familiar rule that police interrogation must cease once the defendant, by words or conduct, demonstrates a desire to invoke his right to remain silent or to consult with an attorney.”]; *People v. Silva* (1988) 45 Cal.3d

interview demonstrates a willingness to speak with officers *if* they accept his conditions.<sup>132</sup>

Accordingly, if officers are willing to honor the restrictions imposed by the suspect, they may continue the interview. This is because they will have shown him that he does, in fact, have the ability to control the manner in which the interview is conducted which, as discussed, satisfies *Miranda* because it reduces the coerciveness of the interview.

The following are some common limited invocations.

**REQUEST TO SPEAK “OFF THE RECORD”:** If a suspect states that something he is about to say is “off the record,” his statement is treated as a limited invocation of the right to remain silent covering only the part of the subsequent interview that is reasonably understood to be off-the-record. For example, in *People v. Johnson*<sup>133</sup> a murder suspect who was being interviewed abruptly said, “This is off the record.” The officer responded, “You’re doing all the talking, don’t let me stop you.” Johnson then asked, “Can you get me 10 years?” After the officer explained the various sentencing possibilities, he resumed the interrogation, during which Johnson made some incriminating statements.

On appeal, the California Supreme Court ruled the discussion concerning sentencing was properly suppressed because the officer had impliedly agreed that it would be off the record. The subsequent statements were, however, admissible because there was no reason for Johnson to believe they were included in his “off the record” request.

Johnson also claimed his statements should have been suppressed because the officer, before resuming the discussion about the murder, didn’t tell him the interview was now “on the record.” The court refused to impose such a requirement when, as here, it was apparent that Johnson’s *Miranda* waiver “remained valid as to discussions not involving sentencing.”

In contrast, in *People v. Bradford*<sup>134</sup> a murder suspect, after invoking his *Miranda* right to counsel, agreed to speak with the officer “off the record.” He then confessed. The court ruled, however, the confession was obtained in violation of *Miranda* because, among other things, there was no indication that the “off the record” conversation was limited to a certain subject.

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606, 629-30 [“A defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate an interrogation already in progress.”]; *People v. Ashmus* (1991) 54 Cal.3d 932, 968-70 [“[Defendant] evidently sought to alter the course of the questioning. But he did not attempt to stop it altogether.”]; *Connecticut v. Barrett* (1987) 479 U.S. 523, 525 [“The Connecticut Supreme Court nevertheless held as a matter of law that respondent’s limited invocation of his right to counsel prohibited all interrogation . . . Nothing in our decisions, however, or in the rationale of *Miranda*, requires authorities to ignore the tenor or sense of a defendant’s response to these warnings.”].

<sup>132</sup> See *Michigan v. Mosley* (1975) 423 U.S. 96, 103-4 [“Through the exercise of his option to terminate questioning [the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person’s exercise of that option counteracts the coercive pressures of the custodial setting.”].

<sup>133</sup> (1993) 6 Cal.4th 1. **NOTE:** In the past, officers were deemed to have misrepresented the *Miranda* rights if they granted a suspect’s request to speak “off the record.” The courts reasoned that it is deceptive to inform a suspect he is speaking “off the record” when, in fact, anything he says may be used against him. See *People v. Braeseke* (1979) 25 Cal.3d 691, 702 [“A request to speak ‘off the record’ cannot constitute a knowing and intelligent waiver of rights which include the advisement that ‘anything a suspect says can be used against him in a court of law.’”]. In reality, this is not a misrepresentation because a suspect can, in fact, have an “off the record” conversation with an officer if the officer grants the suspect’s request to speak privately. In other words, although it is generally true that anything a suspect says may be used against him, there is an exception to this rule when both the suspect and the officer agree that all or part of the suspect’s statement will be “off the record.” See *People v. Johnson* (1993) 6 Cal.4th 1, 32.

<sup>134</sup> (1997) 14 Cal.4th 1005, 1037.



**REQUEST TO TURN OFF RECORDER:** Suspects sometimes request or insist that officers not record all or part of their interview. This might occur at the start of the interview or while it is underway, usually just before they say something incriminating. In any event, the question arises: Does such a request constitute a limited invocation so that officers must either comply or terminate the interview?

The answer is no. Although a “no recording” request is somewhat similar to an “off the record” request, it is not treated as a limited invocation, because the suspect, having waived his rights, knows that anything he says may be used against him. Consequently, officers are not required to honor the request unless the suspect made it clear that his “no recording” request was tantamount to an “off the record” request. As the California Supreme Court observed:

It is well-established that a suspect does not invoke his or her right to remain silent merely by refusing to allow the tape recording of an interview, unless that refusal is accompanied by other circumstances disclosing a clear intent to speak privately and in confidence to others.<sup>135</sup>

For example, in *People v. Samayoa*, the court ruled the defendant’s “no recording” remark did not constitute a limited invocation because, immediately afterwards he demonstrated his willingness to participate in a recorded interview by waiving his *Miranda* rights.<sup>136</sup>

In contrast, in *Arnold v. Runnels*<sup>137</sup> the Ninth Circuit ruled the defendant’s “no recording” request constituted a limited invocation because, right after the officers refused the request, he began responding “no comment” to most of the their questions. Said the court, “Arnold clearly and unequivocally invoked his *Miranda* rights selectively, with respect to a tape-recorded interrogation.”

It should be noted that this issue can probably be avoided if officers *secretly* record the interview.<sup>138</sup> For one thing, it is less likely that the suspect will make a “no recording” request if he does not see a microphone or recorder. But even if he makes the request, and if officers falsely tell him the interview is not being recorded, it would not be deemed a limited invocation unless, as noted earlier, he said something else that demonstrated a belief that he was speaking “privately and in confidence” with the officers.

**REFUSAL TO DISCUSS A CERTAIN SUBJECT:** A suspect’s refusal to discuss a certain subject or answer a certain question constitutes an invocation of the right to remain silent only as to *that* subject or question. Thus, the United States Supreme Court pointed out in *Fare v. Michael C.* that, although the defendant said sometimes told officers that he “would not answer the question,” these remarks “were not assertions of his right to remain silent.”<sup>139</sup>

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<sup>135</sup> *People v. Samayoa* (1997) 15 Cal.4th 795, 829-30. ALSO SEE *People v. Johnson* (1993) 6 Cal.4th 1, 26-7; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-8. **NOTE:** Such a request clearly does not constitute a full-blown invocation. See *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-8 [refusal to be recorded was not an invocation]. **NOTE:** Although the courts in *People v. Hinds* (1984) 154 Cal.App.3d 222, 235-6 and *People v. Nicholas* (1980) 112 Cal.App.3d 249, 268 arguably ruled otherwise, such an interpretation would be contrary to the California Supreme Court’s rulings in *Samayoa* and *Johnson*.

(1993) 6 Cal.4th 1, 26

<sup>136</sup> (1997) 15 Cal.4th 795, 829-30.

<sup>137</sup> (9th Cir. 2005) \_\_ F.3d \_\_.

<sup>138</sup> See *People v. Jackson* (1971) 19 Cal.App.3d 95, 101 “[A]dmissions and confessions secretly recorded are admissible.”]; *People v. Sims* (1993) 5 Cal.4th 405, 446, fn.8; *People v. Hines* (1997) 15 Cal.4th 997, 1043.

**ALSO SEE** *Lopez v. United States* (1963) 373 U.S. 427, 439.

<sup>139</sup> (1979) 442 U.S. 707, 727. ALSO SEE *People v. Ashmus* (1991) 54 Cal.3d 932, 969 [based on the totality of circumstances, the defendant, by telling the officer “I ain’t saying no more,” “sought to alter the course of the questioning. But he did not attempt to stop it altogether.”]; *People v. Michaels* (2002) 28 Cal.4th 486, 510

For example, in *People v. Silva*<sup>140</sup> an officer who was questioning Silva about a murder asked if he had driven a certain truck. Silva responded, “I really don’t want to talk about that.” In ruling that Silva had merely invoked his right to remain silent as to questions involving his driving of the truck, the California Supreme Court noted, “A defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate an interrogation already in progress.”

Similarly, a refusal to discuss a certain subject without counsel is an invocation of the *Miranda* right to counsel only as to discussions about *that* subject.<sup>141</sup>

**OTHER LIMITED INVOCATIONS:** The following are, at most, limited invocations.

**REFUSAL TO DEMONSTRATE:** A suspect’s mere refusal to demonstrate something does not constitute an invocation because he is essentially saying, “I’ll tell you, but I won’t show you.”<sup>142</sup>

**REFUSAL TO DISCUSS A PARTICULAR SUBJECT WITHOUT AN ATTORNEY:** A refusal to discuss a certain subject without counsel constitutes an invocation of the *Miranda* right to counsel only as to discussions pertaining to that subject.<sup>143</sup>

**REFUSAL TO SPEAK WITH A CERTAIN OFFICER:** Such a request—frequently the result of the “good cop-bad cop” routine—does not constitute an invocation if it appears the suspect was willing to speak with the other officer.<sup>144</sup>

**REFUSAL TO SPEAK NOW:** A suspect’s statement that he would like to speak with officers later—but not now—is an invocation of the right to remain silent at the present time. Thus, officers may seek to question him after waiting a while.<sup>145</sup>

**REFUSAL TO SIGN WAIVER FORM:** Not an invocation.<sup>146</sup>

**REFUSAL TO GIVE WRITTEN STATEMENT:** Not an invocation.<sup>147</sup>

**REFUSAL TO TAKE POLYGRAPH TEST:** Not an invocation.<sup>148</sup>

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[“Defendant’s statement, ‘Okay, that one’ implies a refusal to answer a particular question”]; *People v. Montano* (1991) 226 Cal.App.3d 914, 932, fn.4 [“The Attorney General likewise does not argue that defendant’s invocation was only a qualified one, foreclosing only a limited area of further interrogation.”]; *People v. Watkins* (1970) 6 Cal.App.3d 119, 124 [“[T]he court determined that, although defendant at one time halted questioning on one subject, he did not refuse to carry on any further conversation.”].

<sup>140</sup> (1988) 45 Cal.3d 604.

<sup>141</sup> See *People v. Clark* (1992) 3 Cal.4th 41, 122 [“Defendant did not refuse to talk at all without an attorney. Rather, he indicated he would not talk about one limited subject—unrelated to the offenses here charged—without an attorney present.”].

<sup>142</sup> See *People v. Hurd* (1998) 62 Cal.App.4th 1084.

<sup>143</sup> See *People v. Clark* (1992) 3 Cal.4th 41, 122 [“Defendant did not refuse to talk at all without an attorney. Rather, he indicated he would not talk about one limited subject—unrelated to the offenses here charged—without an attorney present.”].

<sup>144</sup> See *People v. Jennings* (1988) 46 Cal.3d 963, 978 [“[T]he statements reflect only momentary frustration and animosity toward [one officer].”].

<sup>145</sup> See *People v. Bolden* (1996) 44 Cal.App.4th 707, 713 [“There was no evidence appellant Bolden was undecided *whether* to talk to investigator Kean, only *when* to do so.”]; *People v. Conrad* (1973) 31 Cal.App.3d 308, 321-2 [“I have something very serious to talk to you about and would like to talk to you again at a later time,” did not demonstrate “that he wished to remain silent forever but simply that he wanted to talk about talking further.”]; *People v. Brockman* (1969) 2 Cal.App.3d 1002, 1010 [suspect invoked the right to remain silent but then said he would make a statement in a “couple of days”; officers were justified in inquiring two days later whether the suspect now wanted to make a statement]; *People v. Riva* (2003) 112 Cal.App.4th 981, 994 [“[R]iva’s statement he did not want to talk anymore ‘right now’ clearly indicated he might be willing to talk in the future.”]; *People v. Rich* (1988) 45 Cal.3d 1036, 1066, 1077 [“I’ve got something to tell you, but not now.”]. ALSO SEE *People v. Mickey* (1991) 54 Cal.3d 612, 652 [“[Detective Landry], I would like to continue our conversation at a later time.”].

<sup>146</sup> See *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-8.

<sup>147</sup> See *Connecticut v. Barrett* (1987) 479 U.S. 523, 530, fn.4 [“[T]here may be several strategic reasons why a defendant willing to speak to the police would still refuse to write out his answers to questions”].

## Other invocation issues

**CLARIFYING AMBIGUOUS INVOCATIONS:** Although an ambiguous invocation does not constitute an invocation, it is sometimes wise to attempt to clarify whether the suspect did, in fact, intend to invoke. This is because a statement that appears ambiguous to officers may be viewed as an unambiguous invocation to a judge. As the U.S. Supreme Court pointed out in discussing invocations of the right to counsel, “Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. [This] will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect’s statement regarding counsel.”<sup>149</sup>

**NO INVOCATIONS BY PROXY:** Invocations cannot be made by proxy. In other words, the person who invoked must have been the suspect, not, for example, his father or attorney.<sup>150</sup>

**NO ANTICIPATORY INVOCATIONS:** A *Miranda* invocation is effective only if it occurred during actual or impending custodial interrogation. Thus, an invocation cannot be made at some point before officers sought to question the suspect. As the United States Supreme Court observed in *McNeil v. Wisconsin*, “We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation.”<sup>151</sup> Or, as the court explained in *People v. Avila*, “Simply stated, the *Miranda* rights cannot be invoked except during the custodial interrogation against which they are being asserted.”<sup>152</sup>

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<sup>148</sup> *People v. Davis* (1981) 29 Cal.3d 814, 825 [by refusing to take polygraph test, the defendant “did not thereby assert that he was generally unwilling to discuss the case, but only that he was unwilling to submit to the scrutiny of the lie detector”].

<sup>149</sup> *Davis v. United States* (1994) 512 U.S. 452, 461.

<sup>150</sup> See *Moran v. Burbine* (1986) 475 U.S. 412, 433, fn.4 [it is an “elemental and established proposition” that “the privilege against compulsory self-incrimination is, by hypothesis, a personal one that can only be invoked by the individual whose testimony is being compelled.”]; *People v. Beltran* (1999) 75 Cal.App.4<sup>th</sup> 425, 430 [“The [Fifth Amendment] right is a personal one which must be invoked by the individual whose testimony is being compelled, and there is no agency theory under which Beltran’s attorney could invoke that personal right on his behalf.”]. ALSO SEE *People v. Avila* (1999) 75 Cal.App.4<sup>th</sup> 416, 422-4 [invocation by suspect’s attorney invalid].

<sup>151</sup> *McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn.3. ALSO SEE *People v. Calderon* (1997) 54 Cal.App.4<sup>th</sup> 766, 770 [“Although the passage in *McNeil* is dicta, we consider it with deference. Moreover, the antipathy expressed in *McNeil* towards the anticipatory invocation of the *Miranda* rights is consistent with *Miranda*’s underlying principles.”]; *U.S. v. LaGrone* (7<sup>th</sup> Cir. 1994) 43 F.3d 332, 338 [“[W]e believe [the *McNeil* dicta] represents more closely the state of the law today.”]; *People v. Beltran* (1999) 75 Cal.App.4<sup>th</sup> 425, 432 [a *Miranda* invocation is effective only in the context of custodial interrogation]; *People v. Calderon* (1997) 54 Cal.App.4<sup>th</sup> 766, 770-1 [invocation made to public defender investigator was ineffective]; *People v. Morris* (1991) 53 Cal.3d 152, 202 [request for counsel at arraignment did not constitute a *Miranda* invocation]; *U.S. v. Wright* (9<sup>th</sup> Cir. 1991) 962 F.2d 953, 956 [“[T]he request by Wright’s counsel at a plea hearing to be present at interviews with her client did not trigger the *Miranda-Edwards* rule”]; *U.S. v. Grimes* (11<sup>th</sup> Cir. 1998) 142 F.3d 1342, 1348 [“[T]he *Miranda* rights may be invoked only during custodial interrogation or when interrogation is imminent.”]. ALSO SEE *People v. Turnage* (1975) 45 Cal.App.3d 201, 213 [invocation “must relate to the present rather than a remote, indefinite future”]. **NOTE:** Because *Miranda* rights can be invoked only during actual or impending custodial interrogation, a suspect may lose the ability to invoke. As the Seventh Circuit noted, the ability to invoke is not like the Energizer Bunny—it does not keep going and going. Instead, there are “certain windows of opportunity.” *U.S. v. LaGrone* (7<sup>th</sup> Cir. 1994) 43 F.3d 332, 338.

<sup>152</sup> (1999) 75 Cal.App.4<sup>th</sup> 415, 422. ALSO SEE *Alston v. Redman* (3<sup>rd</sup> Cir. 1994) 34 F.3d 1237, 1246 [“[T]o be effective, a request for *Miranda* counsel must be made within the context of custodial interrogation and no sooner.”].

For example, in *People v. Nguyen*,<sup>153</sup> officers had just arrested the defendant and were attempting to handcuff her when she grabbed her cell phone and said she “intended to call a lawyer.” The officers said she would have to wait until they arrived at the police station. At the station, Nguyen did not renew her request. On the contrary, she waived her rights and freely made several damaging admissions.

On appeal, she contended she had effectively invoked her right to counsel when she told the officers that she wanted to call a lawyer. The court disagreed, saying, “To conclude defendant asserted her *Miranda* right to counsel before the officer had completed the arrest or sought to question her would permit invocation of *Miranda* rights ‘anticipatorily,’ and contravene the views expressed in *McNeil*.”

Ignoring the plain language of *McNeil*, court-appointed attorneys in Orange County began having their clients sign “INVOCATION NOTICES,” then filing these “invocations” with the court; e.g., “The above-named defendant hereby invokes his *Miranda* rights.” In fact, court clerks even went out and bought rubber stamps that said, Defendant invokes the right to counsel and the right to remain silent.<sup>154</sup> This silly practice resulted in two published cases, *People v. Beltran*<sup>155</sup> and *People v. Avila*,<sup>156</sup> in which the courts abruptly ended it. As the court in *Avila* observed:

Allowing an anticipatory invocation of the *Miranda* right to counsel would extend an accused’s privilege against self-incrimination far beyond the intent of *Miranda* and its progeny. . . . The form, if valid, would unduly hinder effective law enforcement by placing an unjustifiable burden on police.

POV

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## Appendix A

### Minors and impaired suspects: Proving they understood their rights

Although a suspect’s mental condition and maturity may affect his ability to understand his rights, the courts will usually rule the suspect understood his rights if his answers were responsive and coherent. The following are examples. [Note: Some quotes were edited.]

#### Heroin withdrawal

- Although the defendant “began to display physical signs of withdrawal,” experiencing “chills, shaking, and trembling,” his waiver was intelligent because he

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<sup>153</sup> (2005) \_\_ Cal.App.4th \_\_ [33 Cal.Rptr.3d 390]. ALSO SEE *People v. Farnam* (2002) 28 Cal.4th 107, 179-81.

<sup>154</sup> See *People v. Avila* (1999) 75 Cal.App.4th 415, 423, fn.9.

<sup>155</sup> (1999) 75 Cal.App.4th 425.

<sup>156</sup> (1999) 75 Cal.App.4th 415. **NOTE:** A similar attempt was made by a public defender’s office in Florida. Same result: The Florida Supreme Court ruled a *Miranda* invocation did not result when a suspect signed pre-interrogation form. *Sapp v. Florida* (1997) 690 So.2d 581, 585.

“remained coherent and responsive, was aware of what was going on, and told the agents that he was able to continue with questioning.”<sup>157</sup>

- The suspect was going through heroin withdrawal but an officer testified that he “was coherent, sitting up facing me. He spoke and interacted. He seemed normal.” In ruling the waiver was valid, the court noted, “our case law supports the finding that individuals going through heroin withdrawal can voluntarily and intelligently waive their *Miranda* rights.”<sup>158</sup>
- The suspect was shaking as the result of narcotic withdrawal but he “spoke coherently and the officer had no trouble understanding him.”<sup>159</sup>

#### **Suspect seriously injured**

- “Although the defendant was seriously injured in the collision, there was no direct evidence that *during* any of his interviews with the police, his judgment was clouded or otherwise impaired by pain, medications, or surgical procedures. The police officers testified, without contradiction, that defendant’s answers were clear and responsive.”<sup>160</sup>

#### **Pain medication**

- A hospitalized defendant’s waiver was intelligent although he was in pain and was “groggy” from Demerol. The court noted he was “relatively coherent” and “spoke freely” with the officers.<sup>161</sup>

#### **Under the influence of alcohol and/or drugs**

- The suspect, whose blood-alcohol content was between .14% and .22% two hours after the interview was terminated, “made meaningful responses to questions asked” and “nothing indicated that [he] was anything but rational.”<sup>162</sup>
- The suspect “had been drinking and had a history of emotional instability” but “was able to respond to the questions asked of her coherently.”<sup>163</sup>
- Although the suspect appeared to be under the influence of “some drug,” his answers were “logically consistent.”<sup>164</sup>
- The suspect was under the influence of PCP but his answers were “rational and appropriate to those questions.”<sup>165</sup>

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<sup>157</sup> *U.S. v. Kelly* (9<sup>th</sup> Cir. 1992) 953 F.2d 562, 565. ALSO SEE *U.S. v. Colman* (9<sup>th</sup> Cir. 2000) 208 F.3d 786, 791 [“Although Defendant’s heroin withdrawal caused lethargy and physical discomfort, such symptoms alone are insufficient to establish involuntariness,”].

<sup>158</sup> *U.S. v. Rodriguez-Rodriguez* (9<sup>th</sup> Cir. 2004) 364 F.3d 1142.

<sup>159</sup> *People v. Williams* (1970) 8 Cal.App.3d 44, 50-1.

<sup>160</sup> *People v. Whitson* (1998) 17 Cal.4<sup>th</sup> 229, 249.

<sup>161</sup> *U.S. v. Martin* (9<sup>th</sup> Cir. 1985) 781 F.2d 671, 674. ALSO SEE *People v. McFadden* (1970) 4 Cal.App.3d 672, 686 [hospitalized suspect had been given Demerol but he “answered those [questions] that he could and would explain his answers quite often. He was responsive to the questions asked of him.”].

<sup>162</sup> *People v. Conrad* (1974) 31 Cal.App.3d 308, 321. ALSO SEE *People v. Clark* (1993) 5 Cal.4<sup>th</sup> 950, 988 [“[T]his court has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication of ingestion of drugs, where, as in this case, there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him.”]; *People v. Houle* (1970) 13 Cal.App.3d 892, 896 [“While the record discloses that [appellant] was under the influence of [amphetamine], it also contains evidence that appellant understood the *Miranda* warning.”]; *People v. Frye* (1998) 18 Cal.4<sup>th</sup> 894, 988; *People v. Bauer* (1969) 1 Cal.3d 368, 374 [“[A] defendant may not be permitted to obtain exclusion of a statement that he is under the influence of narcotics on the sole ground that he in fact was under the influence of narcotics.”].

<sup>163</sup> *People v. Palmer* (1978) 80 Cal.App.3d 239, 257.

<sup>164</sup> *People v. Markham* (1989) 49 Cal.3d 63, 66.

<sup>165</sup> *People v. Loftis* (1984) 157 Cal.App.3d 229, 232.

- The suspect had ingested a small quantity of alcohol and drugs but “acted sober and appeared to understand the proceedings.”<sup>166</sup>
- The suspect’s blood-alcohol content was approximately .21%, and the arresting officer testified his condition was such that he could not safely drive a car, but “he otherwise knew what he was doing.”<sup>167</sup>
- Although the suspect had a blood-alcohol content of .229%, this fact “neither proves nor disproves defendant’s capacity to understand and rationalize, since there is no established statutory or decisional standard correlating blood alcohol content with cerebral impairment of which this court can take judicial notice.”<sup>168</sup>
- Although there was testimony that the suspect was “loaded on alcohol and drugs,” he admitted that he understood his *Miranda* rights.<sup>169</sup>
- When questioned, the suspect had been admitted to a hospital, suffering from acute psychosis and was under the influence of drugs. “While [the officer] acknowledged defendant was sometimes irrational during the interrogation, he also testified that defendant was responsive to his questioning. . . .”<sup>170</sup>
- Not an “intelligent” waiver: The 13-year old suspect had consumed nine cans of beer on the night of his arrest, and during the interrogation “it became clear that [he] was highly intoxicated, at times loud and boisterous and alternating between responsiveness and silence. He was so ill that at times he had ‘dry heaves’ and appeared to be vomiting. Appellant’s condition was such that in sitting down he nearly fell out of his chair.”<sup>171</sup>

#### **Mental illness**

- Suspect was diagnosed as a paranoid schizophrenic, but he “participated in his conversations with detectives, and indeed was keen enough to change his story when [a detective] revealed that the fire originated from inside the car.”<sup>172</sup>
- A suspect who claimed to be mentally ill “coherently responded to all questioning and acknowledged his understanding of his rights.”<sup>173</sup>

#### **Learning disability**

- A suspect whose IQ was 47 testified he “knew what an attorney was, that he could get one, that he did not have to speak to police unless he wanted to, and that they could not force him to talk.”<sup>174</sup>
- A suspect who “possessed relatively low intelligence” was “sufficiently intelligent to pass a driver’s test, and to attempt to deceive officers by [lying to them].”<sup>175</sup>
- A suspect with a “below average” I.Q. and “several mental disorders” indicated he understood his rights; plus he was “street smart.”<sup>176</sup>

<sup>166</sup> *People v. Avalos* (1984) 37 Cal.3d 216, 231.

<sup>167</sup> *People v. Moore* (1971) 20 Cal.App.3d 444, 450.

<sup>168</sup> *People v. Stroud* (1969) 273 Cal.App.2d 670, 679.

<sup>169</sup> *People v. Ventura* (1985) 174 Cal.App.3d 784, 791.

<sup>170</sup> *People v. Panah* (2005) 35 Cal.4th 395, 472.

<sup>171</sup> *In re Peter G.* (1980) 110 Cal.App.3d 576, 584.

<sup>172</sup> *People v. Lewis* (2001) 26 Cal.4th 334, 384. ALSO SEE *People v. Watson* (1977) 75 Cal.App.3d 384, 397 [“A schizophrenic condition does not render a defendant incapable of effectively waiving his rights. Nor does the presence of evidence of subnormality require the automatic exclusion of a confession.”].

<sup>173</sup> *People v. Mitchell* (1982) 132 Cal.App.3d 389, 405-6.

<sup>174</sup> *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002.

<sup>175</sup> *People v. Whitson* (1998) 17 Cal.4th 229, 249.

<sup>176</sup> *U.S. v. Robinson* (4th Cir. 2005) 404 F.3d 850, 861. ALSO SEE *U.S. v. Rosario-Diaz* (1st Cir. 2000) 202 F.3d 54, 69 [although defendant’s ID was in the middle 70s and she had no prior involvement with the criminal

Although the suspect had an IQ of between 79 and 85 (“dull normal” category), “he nevertheless completed the eighth grade in school. He is able to read and write and was able to work and function in society . . . ”<sup>177</sup>

“He had an I.Q. of 81 and the mental age of 11 or 12 but this is only a factor to be considered in determining whether he lacked the ability to understand his rights.”<sup>178</sup>

**Minors:** In rejecting arguments that minors did not understand their rights, the courts have noted the following:

- “Appellant was a worldly 12-year-old. He was on probation and had been advised of his *Miranda* rights on a prior occasion. Considering the fact that the appellant had a prior experience with the juvenile court, it would be reasonable to assume that he knew what the role of an attorney was in the juvenile law process. At no time did the appellant’s actions or words suggest a lack of understanding of his rights.”<sup>179</sup>
- “The minor was an experienced 15-year old at the time of his arrest . . . In addition to being home on probation, the minor has been arrested innumerable times in the last couple of years . . . ”<sup>180</sup>
- “He was a 16 year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years. . . . There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be.”<sup>181</sup>
- “Steven is a 16-year-old minor with a good deal of prior police contact. In five prior incidents he was given the *Miranda* warning. Further, there is of record no evidence that Steven was fatigued at the time of questioning.”<sup>182</sup>
- “Although she was a 16-year-old juvenile, she was streetwise, having run away from home at the ages of 13 and 15, and having traveled and lived on her own in San Francisco and the Southwest. [When questioned about the murder] she lied to the police about her name, age, and family background. She [invoked the right to counsel] when [the investigators] read her her *Miranda* rights which stopped the interrogation process. Bonnie knew from this experience that she could end an interrogation by asking again to meet with an attorney.”<sup>183</sup>
- “The evidence suggests a very unintelligent 15-year-old boy. His intelligence quotient was that of about a 7 or 8 year old (I.Q. 47) . . . . He is ignorant of the meaning of many words and phrases, even some of the most simple and rudimentary. . . . On the other hand, there is other evidence which is sufficient to support the trial court’s conclusion that appellant understood the [*Miranda* warning]. By his own testimony in open court, minor disclosed that he knew what an attorney was, that he could get one, that he did not have to speak to the police unless he wanted to, and that they could not force him to talk.”<sup>184</sup>

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justice system, the arresting officer and the government’s expert witness testified that she “understood what was happening” when she waived her rights].

<sup>177</sup> *Poyner v. Murray* (4<sup>th</sup> Cir. 1992) 964 F.2d 1404, 1413.

<sup>178</sup> *In re Brian W.* (1981) 125 Cal.App.3d 590, 602.

<sup>179</sup> *In re Charles P.* (1982) 134 Cal.App.3d 768, 772.

<sup>180</sup> *In re Frank C.* (1982) 138 Cal.App.3d 708, 712.

<sup>181</sup> *Fare v. Michael C.* (1979) 442 U.S. 707, 726.

<sup>182</sup> *In re Steven C.* (1970) 9 Cal.App.3d 255, 268.

<sup>183</sup> *In re Bonnie H.* (1997) 56 Cal.App.4<sup>th</sup> 563, 578.

<sup>184</sup> *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002.

- “Appellant, age 16, who had been arrested on previous occasions and had been placed in juvenile hall, was familiar with police procedures. The record abundantly supports the trial court’s finding that appellant’s confession was freely and voluntarily made after a knowing and intelligent waiver of rights.”<sup>185</sup>
- Although the minor was in the ninth grade, he had “achieved between the fifth and seventh grade levels on basic school skills. However, his I.Q. test was 89 and he was described as ‘of average intellectual potential’ and ‘average intelligence.’”<sup>186</sup>

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## Appendix B

### Is *this* an invocation?

**Notes:** Some pre-*Davis* cases were included when the rulings were consistent with *Davis*. Some quotes were edited.

#### Right to remain silent

- **Suspect:** I don’t know if I wanna talk anymore since it’s someone killed, you know.  
**Court:** Just an expression of uncertainty.<sup>187</sup>
- **Officer:** How did that [robbery-murder] go down?  
**Suspect:** Well, I did it all. It was self-defense.  
**Officer:** Well, I know it, but what happened?  
**Suspect:** Do I gotta still tell you after I admit it?  
**Court:** Suspect was merely “uncomfortable about going into the details.”<sup>188</sup>
- **Officer:** Can you tell us what happened?  
**Suspect:** I can’t.  
**Court:** “That response does not amount to an invocation.”<sup>189</sup>
- **Officer:** Okay, we’re talking deadly serious stuff here partner. We’re through bantering around. You’ve got to think what’s best for me. Now what do these guys know and what don’t they know. If they got enough to do me, what’s my best thing to do. What’s best for me.  
**Suspect:** I don’t know what you, I don’t want to talk about this. You all are getting me confused. I don’t even know what you’re talking about. You’re making me nervous here telling me I done something I ain’t done. Kill somebody, come on, give me a break.<sup>190</sup>  
**Court:** This was “something less” than an invocation.
- **Officer:** Would you like to quit [the interview] now?  
**Suspect:** (Nods affirmatively)  
**Court:** A “highly equivocal” statement.<sup>191</sup>

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<sup>185</sup> *People v. Maestas* (1987) 194 Cal.App.3d 1499, 1510.

<sup>186</sup> *In re Jessie L.* (1982) 131 Cal.App.3d 202, 216.

<sup>187</sup> *People v. Wash* (1993) 6 Cal.4<sup>th</sup> 215, 238-9.

<sup>188</sup> *People v. Hayes* (1985) 38 Cal.3d 780, 786.

<sup>189</sup> *People v. Montano* (1991) 226 Cal.App.3d 914, 931.

<sup>190</sup> *People v. Musselwhite* (1998) 17 Cal.4<sup>th</sup> 1216, 1238-40.

<sup>191</sup> *People v. Carr* (1972) 8 Cal.3d 287, 297.



- **Refusal to reenact crime or take polygraph test:** In the absence of circumstances indicating an intent to terminate the interview, a suspect's refusal to reenact the crime or take a polygraph test is not an invocation.<sup>192</sup>
- **Officer:** Having these rights in mind, do you want to talk to me now?\
 

**Suspect:** I ain't got nothin' to say.

**Officer:** Is that, you don't know what to say or you'll answer some questions of mine?

**Suspect:** I ain't got nothin' to say at all.

**Court:** [H]ow many times must a defendant exclaim, 'I ain't got nothin' to say' to invoke his privilege to remain silent."<sup>193</sup>
- **Suspect:** "I'll take the Fifth. I don't want to talk."
- Court:** An invocation.<sup>194</sup>
- **Suspect:** "I think it's about time for me to stop talking."
- Court:** Under the circumstances, the remark "expressed apparent frustration but did not end the interview."<sup>195</sup>

### Right to counsel

- Suspect accepted the appointment of counsel in another case.
 

**Court:** "[Defendant's] acceptance of appointed counsel on one charge does not amount to an invocation of [the *Miranda* right to counsel] with respect to another, uncharged offense."<sup>196</sup>
- **Suspect:** "My mother will put out money for a high price lawyer out of New York."
- Court:** "Yet we have found no case suggesting that a suspect's statement concerning the possible retention of a lawyer for *future* proceedings would require termination of a police interrogation."<sup>197</sup>
- **Suspect:** I want to have an attorney present. I will talk to you now until I think I need one. I don't need one present at this time."
- Court:** Suspect's second sentence undid the invocation resulting from the first sentence.<sup>198</sup>
- **Suspect:** "Maybe I should talk to a lawyer."
- Court:** "The courts below found that petitioner's remark to the NIS agents . . . was not a request for counsel, and we see no reason to disturb that conclusion."<sup>199</sup>
- **Suspect:** "I can't afford a lawyer but is there anyway I can get one?"
- Court:** [This] statement lacked the clear implication of a present desire to consult with counsel."<sup>200</sup>
- **Suspect:** "Didn't you tell me I had the right to an attorney?"
- Court:** The defendant was merely "seeking clarification of his right to an attorney."<sup>201</sup>
- **Suspect:** "[My public defender told me] not to say nothin' about the case or anything, unless I had a lawyer present."

<sup>192</sup> *People v. Hurd* (1998) 62 Cal.App.4<sup>th</sup> 1084, 1091.

<sup>193</sup> *People v. Carey* (1986) 183 Cal.App.3d 99, 105. ALSO SEE *In re Albert R.* (1980) 112 Cal.App.3d 783, 790.

<sup>194</sup> *In re Johnny V.* (1978) 85 Cal.App.3d 120, 133.

<sup>195</sup> *People v. Stitely* (2005) 35 Cal.4<sup>th</sup> 514, 535.

<sup>196</sup> *People v. Sully* (1991) 53 Cal.3d 1195, 1234. ALSO SEE *People v. Morris* (1991) 53 Cal.3d 152, 201-2; *U.S. v. Charley* (9<sup>th</sup> Cir. 2005) 396 F.3d 1074, 1082 ["Invocation of the Sixth Amendment right to counsel alone does not constitute an invocation of the *Miranda-Edwards* Fifth Amendment right to counsel."].

<sup>197</sup> *People v. Johnson* (1993) 6 Cal.4<sup>th</sup> 1, 28.

<sup>198</sup> *People v. Cunningham* (2001) 25 Cal.4<sup>th</sup> 926, 994.

<sup>199</sup> *Davis v. United States* (1994) 512 U.S. 452, 462.

<sup>200</sup> *Lord v. Duckworth* (7<sup>th</sup> Cir. 1994) 29 F.3d 1216, 1221.

<sup>201</sup> *Poyner v. Murray* (4<sup>th</sup> Cir. 1992) 964 F.2d 1404, 1411.

**Court:** In context, the defendant's statement was "only an explanation of why he was willing to proceed without counsel."<sup>202</sup>

- **Suspect:** "Can I get an attorney right now?"

**Court:** An "ambiguous" statement.<sup>203</sup>

- **Suspect:** "[M]aybe I should have an attorney."

**Court:** This statement "was equivocal and therefore inadequate to invoke the rule that all questioning must cease."<sup>204</sup>

- **Suspect:** "Do I need a lawyer?" or "Do you think I need a lawyer?"

**Court:** Not an invocation. "[Defendant] asked [the officer] for his opinion on the need for an attorney."<sup>205</sup>

- **Suspect:** "What time will I see a lawyer?"

**Court:** "[The defendant's] question was an inquiry regarding the time at which appointed counsel would be made available."<sup>206</sup>

- **Suspect:** "Did you say I could have a lawyer?"

**Court:** "Viewed in context, defendant's statement simply indicated defendant wished to ascertain whether he had heard the officer correctly."<sup>207</sup>

- **Suspect:** "I think I would like to talk to a lawyer."

**Court:** Not an "unambiguous and unequivocal request for counsel."<sup>208</sup>

- **Suspect:** "Should I be telling you or should I talk to a lawyer?"

**Court:** Ambiguous. Not an invocation.<sup>209</sup>

- **Suspect:** "There wouldn't be [an attorney] running around here now, would there?"

**Court:** Defendant's language was phrased in a question. It displayed a lack of decisiveness that the defendant wanted to assert his right to counsel."<sup>210</sup>

- **Suspect:** "Can I call a lawyer or my mom to talk to you?"

**Court:** "[This statement] did not constitute an unequivocal request for counsel to be present."<sup>211</sup>

- **Suspect:** "I just thinkin', maybe I shouldn't say anything without a lawyer and then I thinkin' ahh."

**Court:** "[Defendant] did not clearly and unambiguously request an attorney. His reference to a lawyer was patently ambiguous."<sup>212</sup>

- **Suspect:** "Could I call my lawyer?"

**Court:** "Wilkinson's question was not such a clear and unambiguous request for counsel that [the officer] was required to stop his interrogation."<sup>213</sup>

- **Suspect:** "If I sign this would I be able to make a phone call to get my lawyer?"

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<sup>202</sup> *People v. Thompson* (1990) 50 Cal.3d 134, 166. ALSO SEE *Dormire v. Wilkinson* (8<sup>th</sup> Cir. 2001) 249 F.3d 801, 805 [after asking if he could phone his girlfriend, the defendant asked if he could call his lawyer, to which the officer said, "yes." Court: "[I]t is not clear that Wilkinson was actually requesting the presence of an attorney when he asked 'Could I call my lawyer?'"].

<sup>203</sup> *U.S. v. Younger* (9<sup>th</sup> Cir. 2005) 398 F.3d 1179, 1187.

<sup>204</sup> *People v. Sapp* (2003) 31 Cal.4<sup>th</sup> 240, 268.

<sup>205</sup> *U.S. v. Ogbuehi* (9<sup>th</sup> Cir. 1994) 18 F.3d 807, 813-4.

<sup>206</sup> *U.S. v. Doe* (9<sup>th</sup> Cir. 1999) 170 F.3d 1162, 1166.

<sup>207</sup> *People v. Crittenden* (1994) 9 Cal.4<sup>th</sup> 83, 130.

<sup>208</sup> *Clark v. Murphy* (9<sup>th</sup> Cir. 2003) 331 F.3d 1062, 1071. COMPARE *People v. Neal* (2003) 31 Cal.4<sup>th</sup> 63, 73 ["I am ready to talk to my lawyer" was an invocation].

<sup>209</sup> *Clark v. Murphy* (9<sup>th</sup> Cir. 2003) 331 F.3d 1062, 1072.

<sup>210</sup> *People v. Scaffidi* (1992) 11 Cal.App.4<sup>th</sup> 145, 154-5.

<sup>211</sup> *People v. Roquemore* (2005) 131 Cal.App.4<sup>th</sup> 11, 25.

<sup>212</sup> *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 527.

<sup>213</sup> *Dormire v. Wilkinson* (8<sup>th</sup> Cir. 2001) 249 F.3d 801, 805.

**Court:** “[This was] an ambiguous and equivocal reference to his constitutional right.”<sup>214</sup>

- **Suspect:** “But will [having an attorney] make a difference?”

**Court:** “Defendant merely wanted to know whether it would make a difference if he gave up his right to have an attorney present.”<sup>215</sup>

- **Suspect:** “Actually, you know what, I’m gonna call my lawyer.”

**Court:** “[D]efendant failed to unambiguously declare the present intent to exercise this right to counsel.”<sup>216</sup>

- **Suspect:** “Fuck you. I want to talk to my lawyer.”

**Court:** “We see nothing ambiguous or equivocal about this statement.”<sup>217</sup>

- **Suspect:** “I don’t know if I should talk to you without a lawyer.”

**Court:** “[A]t best an equivocal request for representation.”<sup>218</sup>

- **Officer:** “Do you understand each of these rights I have read to you?”

**Suspect:** Yes, I understand and I was told to talk to an attorney but I’m going to tell you the same thing I’m going to tell him.

**Court:** “Defendant’s passing references to an attorney do not reflect a request or desire to consult with an attorney or even an interest in doing so.”<sup>219</sup>

- **Suspect:** “What time will I see a lawyer?”

**Court:** “[Doe’s question was an inquiry regarding the time at which appointed counsel would be made available. [The officer] was not required to forgo interrogation.”<sup>220</sup>

- **Suspect:** “Could I call my lawyer?”

**Court:** “[The officer] could have reasonably believed in these circumstances that Wilkinson was merely inquiring whether he had the right to call a lawyer.”<sup>221</sup>

- **Suspect:** “[E]xcuse me, if I am right, I can have a lawyer present through all this, right?”

**Court:** “[D]efendant’s words did not unambiguously invoke the right to counsel.”<sup>222</sup>

- **Suspect:** “I think now that you told me what you think, I better talk to a lawyer.”

**Court:** An invocation.<sup>223</sup>

- **Suspect:** “Well, if I’m under arrest [he was] I wanna lawyer.”

**Court:** An invocation.<sup>224</sup>

- After the interrogating officer asked the suspect if he understood that he had a right to counsel, the suspect said, “Uh, yea. I’d like to do that.”

**Court:** An invocation.<sup>225</sup>

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<sup>214</sup> *People v. McMahon* (2005) 131 Cal.App.4<sup>th</sup> 80, 97.

<sup>215</sup> *People v. Maynarich* (1978) 83 Cal.App.3d 476, 481.

<sup>216</sup> *People v. McMahon* (2005) 131 Cal.App.4<sup>th</sup> 80, 97.

<sup>217</sup> *People v. Lopez* (2005) 129 Cal.App.4<sup>th</sup> 1508, 1527.

<sup>218</sup> *People v. Michaels* (2002) 28 Cal.4<sup>th</sup> 486, 510.

<sup>219</sup> *People v. Cortes* (1999) 71 Cal.App.4<sup>th</sup> 62, 68, 71.

<sup>220</sup> *U.S. v. Doe* (9<sup>th</sup> Cir. 1999) 170 F.3d 1162, 1166.

<sup>221</sup> *Dormire v. Wilkinson* (8<sup>th</sup> Cir. 2001) 249 F.3d 801, 803-4.

<sup>222</sup> *U.S. v. Younger* (9<sup>th</sup> Cir. 2005) 398 F.3d 1179.

<sup>223</sup> *People v. Dingle* (1985) 174 Cal.App.3d 21.

<sup>224</sup> *People v. Boyer* (1989) 48 Cal.3d 247.

<sup>225</sup> *Smith v. Illinois* (1984) 469 U.S. 91.