

Miranda Waivers

[W]e are steeped in the culture that knows a person in custody has the right to remain silent. Miranda is practically a household word.

—*Anderson v. Terhune*¹

Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.

—*Dickerson v. United States*²

Now that the *Miranda* rights have achieved the status of cultural icons—like Dr. Phil and Oprah—it seems appropriate to ask: Why must officers still advise suspects of these rights and obtain waivers of them before any interrogation? The question is especially apt in light of the Supreme Court’s observation that anyone who knows he can refuse to answer an officer’s questions (i.e., virtually everybody) “is in a curious posture to later complain that his answers were compelled.”³

Take the case of Ralph Nitschmann. An officer in Santa Barbara had arrested him for felony assault and was just starting to *Mirandize* him when Nitschmann interrupted and said, “I have the right to remain silent, anything I say can and will be used against me in a court of law” and so on. Nitschmann concluded by saying “I know the whole bit” and, to his subsequent chagrin, the court agreed.⁴

Despite the possibility that *Miranda* has outlived its usefulness, the Supreme Court is not expected to scrap it anytime soon. Over the years, however, the Court has made *Miranda* compliance much less burdensome. As it pointed out in 2000, “If anything,

our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement.”⁵ For example, as we will discuss in this article, the Court has ruled that waivers may be implied, that the language of *Miranda* warnings may vary, that waivers need only be reasonably contemporaneous with the subsequent interview, and that pre-waiver conversations with suspects are permissible within fairly broad limits.

We will begin, however, by explaining the most basic requirement: that waivers must be knowing and intelligent.

“Knowing and Intelligent”

Because a waiver is defined as an “intentional relinquishment or abandonment of a known right,”⁶ the United States Supreme Court has ruled that *Miranda* waivers must be both “knowing” and “intelligent.”⁷ While this is a fundamental rule, for various reasons it continues to be a frequent source of litigation.

“Knowing” waivers

A *Miranda* waiver is deemed “knowing” if the suspect was correctly informed of his rights and the consequences of waiving them.⁸ Although the courts are aware that most suspects know their *Miranda* rights, officers are required to enumerate them because prosecutors have the burden of proving such knowledge by means of direct evidence.⁹ Consequently, officers must inform suspects of the following:

¹ (9th Cir. 2008) 516 F.3d 781, 783.

² (2000) 530 U.S. 428, 443.

³ *United States v. Washington* (1977) 431 U.S. 181, 188.

⁴ *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 681.

⁵ *Dickerson v. United States* (2000) 530 U.S. 428, 443. ALSO SEE *Berghuis v. Thompkins* (2010) ___ U.S. ___ [130 S.Ct. 2250, 2262 [*Miranda* “does not impose a formalistic waiver procedure”].

⁶ *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1048; *People v. \$241,600* (1998) 67 Cal.App.4th 1100, 1109.

⁷ See *Colorado v. Spring* (1987) 479 U.S. 564, 572.

⁸ *Moran v. Burbine* (1986) 475 U.S. 412, 421.

⁹ See *Miranda v. Arizona* (1966) 384 U.S. 436, 471-72 [“No amount of circumstantial evidence that a person may have been aware of his rights will suffice.”]; *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”].

- (1) **RIGHT TO REMAIN SILENT:** The suspect must be informed of his Fifth Amendment right to refuse to answer questions; e.g., *You have the right to remain silent.*
- (2) “ANYTHING YOU SAY . . .” The suspect must be informed of the consequences of waiving his rights; e.g., *Anything you say may be used against you in court.*
- (3) **RIGHT TO COUNSEL:** The *Miranda* right to counsel can be tricky because it has three components: (a) the right to consult with an attorney before questioning begins, (b) the right to have an attorney present while the questioning is underway, and (c) the right to have an attorney appointed if the suspect cannot afford one; e.g., *You have the right to talk to a lawyer and to have him present while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning.*¹⁰

“ . . . AND WILL BE USED AGAINST YOU”: Officers need not—and should not—tell suspects that anything they say “will” be used against them. That is because it is plainly not true. After all, many of the things that suspects say to officers during custodial interrogation will not be used by prosecutors or would be irrelevant at trial; e.g., “This coffee sucks.” Consequently, it is sufficient to inform suspects that anything they say “may,” “might,” “can,” or “could” be used against them.¹¹

LANGUAGE MAY VARY: Officers are not required to recite the *Miranda* warnings exactly as they were enumerated in the *Miranda* decision or as they appear in a departmental *Miranda* card. Thus, the U.S. Supreme Court explained that, while the warnings required by *Miranda* “are invariable,” the Court “has not dictated the words in which the essential information must be conveyed.”¹² Instead, officers are required only to “reasonably convey” the *Miranda* rights.¹³

USING A MIRANDA CARD: Although the language may vary, it is usually best to read the warnings from a standard *Miranda* card to make sure that none of the essential information is inadvertently omitted,¹⁴ and to help prosecutors prove that the officers did not misstate the *Miranda* rights.¹⁵ As the Justice Department observed in its brief in *Florida v. Powell*, “[L]aw enforcement agencies have little reason to assume the litigation risk of experimenting with novel *Miranda* formulations.” Instead, it is “desirable police practice” and “in law enforcement’s own interest” to state warnings with maximum clarity.¹⁶

Similarly, the Court of Appeal noted, “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.”¹⁷ For example, in *Doody v. Ryan* the Ninth Circuit invalidated a waiver because an officer’s improvised *Miranda* warning was con-

¹⁰ See *Miranda v. Arizona* (1966) 384 U.S. 436, 467-72; *Florida v. Powell* (2010) __ U.S. __ [130 S.Ct. 1195, 1203]; *Moran v. Burbine* (1986) 475 U.S. 412, 421.

¹¹ See *Florida v. Powell* (2010) __ U.S. __ [130 S.Ct. 1195, 1203 [“can be used”]; *Dickerson v. United States* (2000) 530 U.S. 428, 435 [“can be used”]; *Colorado v. Spring* (1987) 479 U.S. 564, 577 [“may be used”]; *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 [“could be used”]; *People v. Johnson* (2010) 183 Cal.App.4th 253, 292 [“could be used”]. **NOTE:** Where did the grandiose “will be used” originate? The Court of Appeal explained it as follows: “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. The courts have also upheld other formulations, including use of ‘can’ alone, of ‘might,’ and of ‘could.’” *People v. Valdivia* (1986) 180 Cal.App.3d 657, 664.

¹² *Florida v. Powell* (2010) __ U.S. __ [130 S.Ct. 1195, 1204]. ALSO SEE *People v. Cruz* (2008) 44 Cal.4th 636, 667 [“A valid waiver need not be of predetermined form”]; *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 682 [“A reviewing court need not examine the *Miranda* warnings as if it were construing a will or defining the terms of an easement.”].

¹³ *Duckworth v. Eagan* (1989) 492 U.S. 195, 203; *People v. Wash* (1993) 6 Cal.4th 215, 236-37 [“The essential inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.”].

¹⁴ See *People v. Bradford* (2008) 169 Cal.App.4th 843, 854.

¹⁵ See *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1091 [the waiver process was “somewhat sloppy”].

¹⁶ (2010) __ U.S. __ [130 S.Ct. 1195, 1206].

¹⁷ *People v. Prysock* (1982) 127 Cal.App.3d 972, 985. ALSO SEE *U.S. v. Warren* (3rd Cir. 2011) 642 F.3d 182, 187 [although the warning was sufficient, it was “disconcerting” that officer did not use a *Miranda* card, especially “considering the resources that have been expended to consider the [suppression] claim”].

verted into a “twelve-page rambling commentary” that was partly “misleading” and partly “unintelligible.”¹⁸

Reading from a *Miranda* card is especially important if the warning-waiver dialogue will not be recorded. This is because officers can usually prove that their warning was accurate by testifying that they recited it from a card, then reading to the court the warning from that card or a duplicate.¹⁹

MINORS: Because minors have the same *Miranda* rights as adults, officers are not required to provide them with any additional information.²⁰ For example, the courts have rejected arguments that minors must be told that they have a right to speak with a parent or probation officer before they are questioned, or that they have a right to have a parent present while they are questioned.²¹

“YOU CAN INVOKE WHENEVER YOU WANT”: Officers will sometimes supplement the basic warning by telling suspects that, if they waive their rights, they can stop answering questions at any time. This is an accurate statement of the law and is not objectionable.²²

NO ADDITIONAL INFORMATION: Officers are not required to furnish suspects with any additional information, even if the suspect might have found it useful in deciding whether to waive or invoke.²³ As the Supreme Court observed in *Colorado v. Spring*, “[A] valid waiver does not require that an individual be informed of all information ‘useful’ in making his decision or all information that might affect his decision to confess.”²⁴ For example, officers need not inform suspects of the topics they planned to discuss during the interview,²⁵ the nature of the crime under investigation,²⁶ the incriminating evidence that they had obtained so far,²⁷ the possible punishment upon conviction,²⁸ and (if not charged with the crime under investigation) that their attorney wants to talk to them.²⁹

INCORRECT MIRANDA WARNINGS: If officers misrepresented the nature of the *Miranda* rights or the consequences of waiving them, a subsequent waiver may be deemed invalid on grounds that it was not knowing and intelligent. For example, in *People v. Russo* an officer’s *Miranda* warning to Russo included the following: “If you didn’t do this, you don’t

¹⁸ (9th Cir. 2011) 649 F.3d 986, 1107.

¹⁹ See, for example, *Oregon v. Elstad* (1985) 470 U.S. 298, 314-15 [“[The officer] testified that he read the *Miranda* warnings aloud from a printed card and recorded Elstad’s responses.”].

²⁰ See *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577 [“special caution” is not required in determining whether a juvenile waived his *Miranda* rights]; *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72 [“A presumption that all minors are incapable of a knowing, intelligent waiver of constitutional rights is a form of stereo-typing that does not comport with the realities of everyday living in our urban society. Many minors are far more sophisticated and knowledgeable in these areas than their parents.”]; *U.S. v. Doe* (9th 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.”].

²¹ See *Fare v. Michael C.* (1979) 442 U.S. 707 [no right to talk with probation officer]; *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.”]; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577 [no right to talk with mother]; *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72 [no right to consult with parents].

²² See *Berghuis v. Thompkins* (2010) __ US __ [130 S.Ct. 2250, 2256] [“[Y]ou have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.”]; *Florida v. Powell* (2010) __ US __ [130 S.Ct. 1195, 1198] [“officers told the suspect that he had “the right to use any of his rights at any time he wanted during the interview”]; *People v. Clark* (1992) 3 Cal.4th 41, 120-21 [“The detectives repeatedly made clear to him that . . . he could stop the interview at any time by merely saying he wanted an attorney.”].

²³ See *Moran v. Burbine* (1986) 475 U.S. 412, 422 [“[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.”]; *Collins v. Gaetz* (7th Cir. 2010) 612 F.3d 574, 590 [“we do not require that a criminal defendant understand every consequence of waiving his rights or make the decision that is in his best interest”].

²⁴ (1987) 479 U.S. 564, 576.

²⁵ See *Colorado v. Spring* (1987) 479 U.S. 564, 577.

²⁶ See *People v. Wash* (1993) 6 Cal.4th 215, 239; *People v. Mitchell* (1982) 132 Cal.App.3d 389, 405; *People v. Boyette* (2002) 29 Cal.4th 381, 411; *People v. Acuna* (1988) 204 Cal.App.3d 602, 611.

²⁷ See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1235.

²⁸ See *People v. Hill* (1992) 3 Cal.4th 959, 982; *People v. Clark* (1993) 5 Cal.4th 950, 987, fn.11; *People v. Jackson* (1996) 13 Cal.4th 1164, 1207, fn.4.

²⁹ See *Moran v. Burbine* (1986) 475 U.S. 412, 422; *People v. Ledesma* (1988) 204 Cal.App.3d 682.

need a lawyer.” This bit of information rendered Russo’s waiver invalid because, said the court, “Russo was left with little choice but to waive the right to counsel in order, in his mind, to maintain the appearance of innocence.”³⁰

UTILIZING DECEPTION: Although officers must correctly explain the *Miranda* rights, a waiver will not be invalidated on grounds that they had lied to him about other matters. As the U.S. Supreme Court observed, “Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*’s concerns.”³¹ For example, waivers have been deemed knowing and intelligent when officers told the suspect that his victim was “hurt” even though she was dead,³² or when FBI agents told the suspect that they wanted to talk to him about “terrorism” when they actually wanted to question him about child molesting.³³

RECORDING WAIVERS: There is no requirement that officers record the waiver process.³⁴ Still, it is usually a good idea because it provides judges with proof of exactly what was said by the officers and the suspect. This was an issue in *People v. Gray* and the recording disposed of it. Said the court, “Thanks to the professionalism of [the officers] in their taping of the statement, there was little room to argue at

trial that the waiver was not complete and unequivocal.”³⁵ In addition, recordings may be helpful in determining whether a suspect waived or invoked because his tone of voice, emphasis on certain words, pauses, and even laughter may “add meaning to the bare words.”³⁶ Note that the waiver process, as well as the subsequent interview, may be recorded covertly.³⁷

“Intelligent” waivers

Suspects must not only know their rights in the abstract, they must have *understood* them. This is what the courts mean when they say that waivers must be “intelligent.”³⁸ As the Court of Appeal put it, “Essentially, ‘intelligent’ connotes knowing and aware.”³⁹ It should be noted that the term “intelligent” is misleading because, as the court pointed out in *People v. Simpson*, “it conjures up the idea that the decision to waive *Miranda* rights must be *wise*. That, of course, is not the idea.”⁴⁰

EXPRESS STATEMENT OF UNDERSTANDING: Technically, officers are not required to obtain an express statement from the suspect that he understood his rights. That is because the courts must consider the totality of circumstances in making this determination.⁴¹ As a practical matter, however, it is dangerous to rely on circumstantial evidence because it

³⁰ (1983) 148 Cal.App.3d 1172, 1177.

³¹ *Illinois v. Perkins* (1990) 496 U.S. 292, 297.

³² *People v. Tate* (2010) 49 Cal.4th 635, 683.

³³ *U.S. v. Farley* (11th Cir. 2010) 607 F.3d 1294.

³⁴ See *People v. Thomas* (2012) __ Cal.4th __ [2012 WL 3043901] [“we reject defendant’s contention that the absence of a recording of the *Miranda* advisements and his waiver of his rights precludes the conclusion that his waiver was knowing and voluntary”]; *People v. Lucas* (1995) 12 Cal.4th 415, 443 [“The police had no obligation to make a tape recording of the *Miranda* advisements”]. BUT ALSO SEE *People v. Gurule* (2002) 28 Cal.4th 557, 603 [although recording is not required, “we have no wish to discourage law enforcement officials from recording such interrogations”].

³⁵ (1982) 135 Cal.App.3d 859, 864.

³⁶ *People v. Bestmeyer* (1985) 166 Cal.App.3d 520, 526.

³⁷ See *Lopez v. United States* (1963) 373 U.S. 427, 439 [“Stripped to its essentials, petitioner’s argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent’s memory, or to challenge the agent’s credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.”]; *U.S. v. White* (1971) 401 U.S. 745, 751 [“If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant’s constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations”]; *People v. Jackson* (1971) 19 Cal.App.3d 95, 101 [“Admissions and confessions secretly recorded are admissible.”].

³⁸ See *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.”]; *People v. Clark* (1993) 5 Cal.4th 950, 985 [“All that is required is that the defendant comprehend all of the information the police are required to convey.”].

³⁹ *People v. Simpson* (1998) 65 Cal.App.4th 854, 859, fn.1.

⁴⁰ (1998) 65 Cal.App.4th 854, 859, fn.1.

⁴¹ See *Moran v. Burbine* (1986) 475 U.S. 412, 421; *Fare v. Michael C.* (1979) 442 U.S. 707, 724-25.

creates uncertainty and generates an additional issue for the trial court to resolve. Furthermore, as we will discuss later, an express statement of understanding may be necessary if the suspect's waiver was implied or if he was mentally impaired. Accordingly, it is best to ask the standard *Miranda*-card question: *Did you understand each of the rights I explained to you?* If he says yes, that should be adequate.⁴²

CIRCUMSTANTIAL EVIDENCE OF UNDERSTANDING: If the suspect said he understood his rights, but claimed in court that he didn't, the court may consider circumstantial evidence of understanding. The circumstances that are most frequently noted are the suspect's age, experience, education, background, and intelligence, prior arrests, and whether he had previously invoked his rights.⁴³

CLARIFYING THE RIGHTS: If the suspect said or indicated that he did not understand his rights, officers must try to clarify them.⁴⁴ For example, when asked if he understood his rights, the defendant in *People v. Cruz* answered "more or less."⁴⁵ So the officer "repeated each *Miranda* admonishment a second time, describing them in less 'formal' terms." The California Supreme Court ruled that such clarification was proper "so as to ensure that defendant

could better understand the rights he was waiving." Note that clarification concerning the right to counsel is frequently necessary because suspects may be confused as to whether a waiver of their right to have counsel present during the interview also constitutes a waiver of their right to be represented by counsel in court.⁴⁶ The answer, of course, is no.

MENTALLY IMPAIRED SUSPECTS: A suspect who tells officers that he understood his rights may later claim that he really didn't because his mental capacity was impaired due to alcohol or drugs, physical injuries, a learning disability, or a mental disorder. In most cases, however, the courts rule that waivers of impaired suspects were sufficiently "intelligent" if their answers to the officers' questions were responsive and coherent. As the California Supreme Court observed in *People v. Clark*, "[T]his court has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication or 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."⁴⁷ For example, in rejecting arguments that impaired suspects were unable to understand their rights, the courts have noted the following:

⁴² See *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 ["Yeh"]; *People v. Memro* (1995) 11 Cal.4th 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."]; *U.S. v. Labrada-Bustamante* (9th Cir. 2005) 428 F.3d 1252, 1259 [court rejects the argument that suspect who told officers he understood his rights did not really understand them because he was unfamiliar with the criminal justice system].

⁴³ See *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."]; *People v. Samayoa* (1997) 15 Cal.4th 795, 831 [he "was an ex-felon who would have been familiar with the *Miranda* admonitions"]; *People v. Nelson* (2012) 53 Cal.4th 367, 375 [two prior arrests]; *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"]; *People v. Riva* (2003) 112 Cal.App.4th 981, 994 [defendant was a college student and had had "previous experience with law enforcement having been arrested as a juvenile"].

⁴⁴ See *People v. Turnage* (1975) 45 Cal.App.3d 201, 211 [the law "permits clarifying questions with regard to the individual's comprehension of his constitutional rights or the waiver of them"]; *People v. Wash* (1993) 6 Cal.4th 215, 239 ["[W]here a defendant expresses ambiguous remarks falling short of an invocation of his *Miranda* rights, the officers may continue talking for the purpose of obtaining clarification of his intentions."]; *Tolliver v. Sheets* (6th Cir. 2010) 594 F.3d 900, 921 ["The difference between permissible follow-up questions and impermissible interrogation clearly turns on whether the police are seeking clarification of something that the suspect has just said, or whether instead the police are seeking to expand the interview."].

⁴⁵ (2008) 44 Cal.4th 636, 668.

⁴⁶ See *Duckworth v. Egan* (1989) 492 U.S. 195, 204 ["We think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel."].

⁴⁷ (1993) 5 Cal.4th 950, 988. **NOTE:** A suspect who was not fluent in English will be deemed to have understood his rights if he expressly said he understood them and his answers to the officers' questions were responsive and coherent. See *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1127-28 ["there was no indication by any of the officers that Mr. Rodriguez had difficulty understanding English nor that the officers had trouble understanding his English"]. ALSO SEE *People v. Gutierrez* (2012) __ Cal.Ap.4th __ [2012 WL 4336239] [waiver by injured suspect].

UNDER THE INFLUENCE OF DRUGS OR ALCOHOL

- Although the suspect had ingested methamphetamine and cocaine, and had not slept “for days,” his answers were “logical and rational.”⁴⁸
- When it was tested two hours after the interview ended, his blood-alcohol content was between .14% and .22%. But he “made meaningful responses to questions asked” and “nothing indicated that [he] was anything but rational.”⁴⁹
- His blood-alcohol content was approximately .21% and the arresting officer testified that his condition was such that he could not safely drive a car but “he otherwise knew what he was doing.”⁵⁰
- He was under the influence of PCP but his answers were “rational and appropriate to those questions.”⁵¹

MENTAL INSTABILITY

- Although the suspect had been diagnosed as a paranoid schizophrenic, 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.”⁵²
- He had been admitted to a hospital because he was suffering from acute psychosis and was under the influence of drugs. In addition, he was “sometimes irrational.” Still, he “was responsive to his questioning.”⁵³

- He claimed to be mentally ill, but “coherently responded to all questioning and acknowledged his understanding of his rights.”⁵⁴
- He had just attempted suicide, but was “alert, and oriented” and “very much aware and awake, and knew what was going on.”⁵⁵

LEARNING DISABILITY

- His IQ was 47, but he 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.”⁵⁶
- He “possessed relatively low intelligence” but was “sufficiently intelligent to pass a driver’s test, and to attempt to deceive officers by [lying to them].”⁵⁷
- His IQ was “below average” and he suffered from “several mental disorders,” but he said he understood his rights and he was “street smart.”⁵⁸
- His IQ was between 79 and 85 but he “completed the eighth grade in school. He is able to read and write and was able to work and function in society.”⁵⁹

It bears repeating that, as some of the courts noted in the above cases, the fact that the suspect attempted to deceive or manipulate officers in the course of an interview is a strong indication that he was sufficiently lucid to appreciate his predicament and formulate a plan (albeit unsuccessful) to outwit them.⁶⁰

⁴⁸ *U.S. v. Burson* (10th Cir. 2008) 531 F.3d 1254, 1260.

⁴⁹ *People v. Conrad* (1974) 31 Cal.App.3d 308, 321.

⁵⁰ *People v. Moore* (1971) 20 Cal.App.3d 444, 450.

⁵¹ *People v. Loftis* (1984) 157 Cal.App.3d 229, 232. ALSO SEE *People v. Markham* (1989) 49 Cal.3d 63, 66 [although the suspect appeared to be under the influence of “some drug,” his answers were “logically consistent”]; *People v. Ventura* (1985) 174 Cal.App.3d 784, 791 [although there was testimony that the suspect was “loaded on alcohol and drugs,” he admitted that he understood his *Miranda* rights].

⁵² *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.”].

⁵³ *People v. Panah* (2005) 35 Cal.4th 395, 472.

⁵⁴ *People v. Mitchell* (1982) 132 Cal.App.3d 389, 405-406. ALSO SEE *People v. Palmer* (1978) 80 Cal.App.3d 239, 257 [the suspect “had a history of emotional instability” but “was able to respond to the questions asked of her coherently”].

⁵⁵ *Reinert v. Larkins* (3rd Cir. 2004) 379 F.3d 76, 88.

⁵⁶ *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002.

⁵⁷ *People v. Whitson* (1998) 17 Cal.4th 229, 249.

⁵⁸ *U.S. v. Robinson* (4th Cir. 2005) 404 F.3d 850, 861. ALSO SEE *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.”]; *U.S. v. Rosario-Diaz* (1st Cir. 2000) 202 F.3d 54, 69.

⁵⁹ *Poyner v. Murray* (4th Cir. 1992) 964 F.2d 1404, 1413.

⁶⁰ See *People v. Whitson* (1998) 17 Cal.4th 229, 249.

MINORS: The courts presume that minors are fully capable of understanding their *Miranda* rights.⁶¹ As the Court of Appeal observed in *In re Charles P.*, “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.”⁶² But because the age, maturity, education, and intelligence of a minor may have a greater affect on understanding than they do on adults, these circumstances may be taken into account.⁶³ It is also relevant that the minor had previous experience with officers and the courts.

For example, in ruling that minors were sufficiently capable of understanding their rights, the courts have noted the following:

- “[H]e was no stranger to the justice system. Defendant had been arrested twice before . . . Both sets of charges led to proceedings in juvenile court, and the second resulted in a commitment to juvenile hall.”⁶⁴
- “Nelson was 15 years old. He had two prior arrests, the most recent resulting in a several month stay in juvenile hall.”⁶⁵
- “The minor was an experienced 15-year old at the time of his arrest [and had been] arrested innumerable times in the last couple of years.”⁶⁶

- “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.”⁶⁷
- “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.”⁶⁸

Voluntary Waivers

In addition to being “knowing and intelligent,” *Miranda* waivers must be “voluntary.” This simply means that officers must not have obtained the waiver by means of threats, promises, or any other form of coercion.⁶⁹ Thus, in rejecting arguments that *Miranda* waivers were involuntary, the courts have noted the following:

⁶¹ 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.”]; *People v. Lewis* (2001) 26 Cal.4th 334, 384 [“We also reject defendant’s contention that his young age and low intelligence precluded him from making a voluntary, knowing, and intelligent waiver.”]; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577 [“special caution” not required in determining whether a juvenile waived his *Miranda* rights].

⁶² (1982) 134 Cal.App.3d 768, 771-72. ALSO SEE *In re Eduardo G.* (1980) 108 Cal.App.3d 745, 756 [“there is no presumption that a minor is incapable of a knowing, intelligent waiver of his rights”]; *U.S. v. Doe* (9th 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.”].

⁶³ See *J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S.Ct. 2394]; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169 [“Because defendant is a minor, the required inquiry includes evaluation of the juvenile’s age, experience, education, background and intelligence, and into whether he has the capacity to understand the warnings”]; *People v. Nelson* (2012) 53 Cal.4th 367, 378 [“courts must consider a juvenile’s state of mind”].

⁶⁴ *People v. Lessie* (2010) 47 Cal.4th 1152, 1169. ALSO SEE *In re Steven C.* (1970) 9 Cal.App.3d 255, 268, fn.12; *In re Charles P.* (1982) 134 Cal.App.3d 768, 772 [“He was on probation and had been advised of his *Miranda* rights on a prior occasion”]; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 216 [“prior arrest for arson”]; *People v. Lewis* (2001) 26 Cal.4th 334, 386 [minor “had prior experience with the police”].

⁶⁵ *People v. Nelson* (2012) 53 Cal.4th 367, 375.

⁶⁶ *In re Frank C.* (1982) 138 Cal.App.3d 708, 712.

⁶⁷ *Fare v. Michael C.* (1979) 442 U.S. 707, 726.

⁶⁸ *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 578.

⁶⁹ See *Berghuis v. Thompkins* (2010) __ U.S. __ [130 S.Ct. 2250, 2260] [a waiver “must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception”]; *Colorado v. Connelly* (1986) 479 U.S. 157, 169 [“Of course, a waiver must at a minimum be ‘voluntary’ to be effective against an accused.”]. **NOTE:** While some older cases held that a waiver might be involuntary if it was a result of the “slightest pressure,” this standard was abrogated by the U.S. Supreme Court in *Arizona v. Fulminante* (1991) 499 U.S. 279, 285-86. ALSO SEE *People v. Clark* (1993) 5 Cal.4th 950, 986, fn.10.

- “[T]here is no evidence that Barrett was threatened, tricked, or cajoled into his waiver.”⁷⁰
- “No coercive tactics were employed in order to obtain defendant’s waiver of his rights.”⁷¹
- “[T]he record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements.”⁷²
- “There is no doubt that Spring’s decision to waive his Fifth Amendment privilege was voluntary. He alleges no coercion of a confession by means of physical violence or other deliberate means calculated to break his will.”⁷³

Two other things should be noted. First, the rule that prohibits involuntary *Miranda* waivers is similar to the rule that prohibits involuntary confessions and admissions, as both require the suppression of statements that were obtained by means of police coercion. As the California Supreme Court observed, the voluntariness of a *Miranda* waiver and the voluntariness of a statement are based on “the same inquiry.”⁷⁴ The main difference is that a waiver is involuntary if officers obtained it by pressuring the suspect into waiving his rights; while a statement is involuntary if, after obtaining a waiver, officers coerced the suspect into making it.

Second, because the issue is whether the officers pressured the suspect into waiving, the suspect’s impaired mental state—whether caused by intoxication, low IQ, young age, or such—is relevant only if the officers exploited it to obtain a waiver.⁷⁵

Express and Implied Waivers

Until now, we have been discussing what officers must do to obtain a valid waiver of rights. But there is also something the suspect must do: waive them. As we will now discuss, the courts recognize two types of *Miranda* waivers: (1) express waivers, and (2) waivers implied by conduct.

EXPRESS WAIVERS: An express waiver occurs if the suspect signs a waiver form or if he responds in the affirmative when, after being advised of his rights, he says he is willing to speak with the officers; e.g., “*Having these rights in mind, do you want to talk to us?*” “Yes.” Note that while an affirmative response is technically only a waiver of the right to remain silent (since the suspect said only that he was willing to “talk” with officers), the courts have consistently ruled it also constitutes a waiver of the right to counsel if, thereafter, the suspect freely responded to the officers’ questions.⁷⁶

Three other things should be noted about express waivers. First, they constitute “strong proof” of a valid waiver.⁷⁷ Second, an affirmative response will suffice even if the suspect did not appear to be delighted about waiving his rights. 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.”⁷⁸

⁷⁰ *Connecticut v. Barrett* (1987) 479 U.S. 523, 527.

⁷¹ *People v. Saucedo-Contreras* (2012) __ Cal.4th __ [2012 WL 3263996].

⁷² *Moran v. Burbine* (1986) 475 U.S. 412, 421. ALSO SEE *People v. Whitson* (1998) 17 Cal.4th 229, 248-49; *In re Brian W.* (1981) 125 Cal.App.3d 590, 603.

⁷³ *Colorado v. Spring* (1987) 479 U.S. 564, 573-74.

⁷⁴ *People v. Guerra* (2006) 37 Cal.4th 1067, 1093. ALSO SEE *Colorado v. Connelly* (1986) 479 U.S. 157, 169-70 [“There is obviously no reason to require more in the way of a ‘voluntariness’ inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context.”].

⁷⁵ See *Colorado v. Connelly* (1986) 479 U.S. 157, 169-70 [“The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on ‘free choice’ in any broader sense of the word.”]; *Fare v. Michael C.* (1979) 442 U.S. 707, 725; *Collins v. Gaetz* (7th Cir. 2010) 612 F.3d 574, 584 [“The Supreme Court has said that when the police are aware of a suspect’s mental defect but persist in questioning him, such dogged persistence can contribute to a finding that the waiver was involuntary.” Citations omitted.]. COMPARE *Illinois v. Perkins* (1990) 496 U.S. 292, 297 [an otherwise voluntary waiver will not be invalidated merely because officers utilized “[p]loys to mislead” or “lull him into a false sense of security.”].

⁷⁶ See *North Carolina v. Butler* (1979) 441 U.S. 369, 372-73 [Court rejects argument that a suspect who agreed to speak with officers must also expressly waive his right to counsel]; *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.”].

⁷⁷ *North Carolina v. Butler* (1979) 441 U.S. 369, 373 [“An express written or oral statement of waiver ... is usually strong proof of the validity of that waiver but is not inevitably either necessary nor sufficient to establish waiver.”].

⁷⁸ (1984) 37 Cal.3d 216, 230.

Third, if the suspect expressly waived his rights, it is immaterial that he refused to sign a waiver form,⁷⁹ or that he refused to give a written statement.⁸⁰

IMPLIED WAIVERS: In 1969 the California Supreme Court ruled that *Miranda* waivers may be implied under certain circumstances.⁸¹ Ten years later, the U.S. Supreme Court reached the same conclusion.⁸² And yet, because the language in both decisions was somewhat tentative,⁸³ there was some uncertainty as to what was required to obtain an implied waiver. Consequently, officers would often seek express waivers out of an abundance of caution.

In 2010, however, the U.S. Supreme Court ruled unequivocally in *Berghuis v. Thompkins* that a waiver will be implied if the suspect, having “a full understanding of his or her rights,” thereafter answered the officers’ questions. Thus, in ruling that Thompkins had impliedly waived his rights, the Court said, “If Thompkins wanted to remain silent, he could have said nothing in response to [the officer’s] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation.”⁸⁴ But because did neither of these things, the Court ruled he had impliedly waived his rights.

Consequently, a waiver of both the right to remain silent and the right to counsel will be found if the following circumstances existed:

- (1) **CORRECTLY ADVISED:** Officers correctly informed the suspect of his rights.
- (2) **UNDERSTOOD:** The suspect said he understood his rights.
- (3) **NO COERCION:** Officers exerted no pressure on the suspect to waive his rights.⁸⁵

Thus, in ruling that the defendant in the post-*Thompkins* case of *People v. Nelson* had impliedly waived his rights, the California Supreme Court observed, “Although [the defendant] did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights.”⁸⁶

It should be noted that in *People v. Johnson* the California Supreme Court indicated that a waiver might be implied only if the suspect freely and unreservedly answered the officers’ questions.⁸⁷ But the Court in *Thompkins* seemed to reject this idea, as it ruled that Thompkins had impliedly waived his rights even though he was “largely silent during the interrogation which lasted about three hours.”⁸⁸

⁷⁹ See *Berghuis v. Thompkins* (2010) __ U.S. __ [130 S.Ct. 2250, 2256] [“Thompkins declined to sign the form.”]; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-78; *U.S. v. Andaverde* (9th 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. Brown* (7th Cir. 2011) 664 F.3d 1115, 1118 [“It is immaterial that defendant did not sign a waiver form”]; *U.S. v. Plugh* (2nd Cir. 2011) 648 F.3d 118, 123; *U.S. v. Binion* (8th Cir. 2009) 570 F.3d 1034, 1041 [“Refusing to sign a written waiver of the privilege against self incrimination does not itself invoke that privilege”].

⁸⁰ 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”].

⁸¹ See *People v. Johnson* (1969) 70 Cal.2d 541, 558.

⁸² See *North Carolina v. Butler* (1979) 441 U.S. 369, 374-75.

⁸³ See *North Carolina v. Butler* (1979) 441 U.S. 369, 374-75 [“the question of waiver must be determined on “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”]; *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.” Emphasis added.].

⁸⁴ (2010) __ U.S. __ [130 S.Ct. 2250, 2263].

⁸⁵ **NOTE:** The following pre-*Berghuis* opinions were consistent with *Berghuis*: *People v. Lessie* (2010) 47 Cal.4th 1152, 1169 [“While defendant did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights.”]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 86; *People v. Johnson* (2010) 183 Cal.App.4th 253, 294; *People v. Whitson* (1998) 17 Cal.4th 229, 245 [“the investigating police officers advised defendant of his *Miranda* rights at each of the three interviews. On each one of these occasions, defendant affirmatively told the interviewing officers that he understood those rights [and] his answers were responsive to the questions asked of him.”]; *People v. Riva* (2003) 112 Cal.App.4th 981, 988-89; *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1127-28.

⁸⁶ (2012) 53 Cal.4th 367, 380. Citations omitted. ALSO SEE *People v. Gutierrez* (2012) __ Cal.App.4th __ [2012 WL 4336239] [“A defendant, by his words and conduct, may make an implied waiver of his *Miranda* rights by acknowledging that he understands the rights read and answering questions.”].

⁸⁷ (1969) 70 Cal.2d 541, 558 [“mere silence of the accused followed by grudging responses to leading questions will be entitled to very little probative value”].

⁸⁸ (2010) __ U.S. __ [130 S.Ct. 2250, 2259].

Timely Waivers

The final requirement for obtaining a *Miranda* waiver is that the waiver must be timely or, in legal jargon, “reasonably contemporaneous” with the start or resumption of the interview.⁸⁹ This means that officers may be required to obtain a new waiver or at least remind the suspect of his rights if, under the circumstances, there was a reasonable likelihood that he had forgotten his rights or believed they had somehow expired. On the other hand, the California Supreme Court observed that “where a subsequent interrogation is reasonably contemporaneous with a prior knowing and intelligent waiver, a readvisement of *Miranda* rights is unnecessary.”⁹⁰

As a practical matter, there are only two situations in which a new warning or reminder is apt to be required. The first occurs if officers obtained a waiver long before they began to question the suspect. This would happen, for example, if an officer obtained a waiver at the scene of the arrest, but the suspect was not questioned until after he had been driven to the police station. If such cases, the suspect may later claim in court that he had forgotten his rights in the interim. (This is one reason why officers should not *Mirandize* suspects or seek waivers unless they want to begin an interview immediately.) In any event, the most important factor in these cases is simply the number of minutes or hours between the time the suspect waived his rights and the time the interview began.⁹¹

The second situation is more common as it occurs when officers recessed or otherwise interrupted a lengthy interview at some point. This typically happens when officers needed to compare notes, consult with other officers or superiors, interview other suspects or witnesses, conduct a lineup, or provide the suspect with a break. Although the Court of Appeal has said that a new *Miranda* warning “need not precede every twist and turn in the investigatory phase of the criminal proceedings,”⁹² and although these arguments are frequently contrived, officers need to know what circumstances are relevant so they can determine whether a new waiver may be necessary.

CHANGES IN LOCATION, OFFICERS, TOPIC: In addition to the time lapse between the waiver and the resumption of the interview, the courts will consider whether there was a change in circumstances that would have caused the suspect to reasonably believe that his *Miranda* rights did not apply to the new situation. What changed circumstances are important? The following, singly or in combination, are frequently cited:

- **CHANGE IN LOCATION:** The site of the interview had changed during the break.
- **CHANGE IN OFFICERS:** The pre- and post-break interviews were conducted by different officers.
- **CHANGE IN TOPIC:** When the interview resumed after the break, the officers questioned the suspect about a different topic.⁹³

⁸⁹ See *Wyrick v. Fields* (1982) 459 U.S. 42; *People v. Smith* (2007) 40 Cal.4th 483, 504 [“This court repeatedly has held that a *Miranda* readvisement is not necessary before a custodial interrogation is resumed, so long as a proper warning has been given, and the subsequent interrogation is reasonably contemporaneous with the prior knowing and intelligent waiver.”]; *People v. Lewis* (2001) 26 Cal.4th 334, 386. ALSO SEE *Berghuis v. Thompkins* (2010) __ U.S. __ [130 S.Ct. 2250, 2263] [officers are “not required to rewarn suspects from time to time”].

⁹⁰ *People v. San Nicolas* (2004) 34 Cal.4th 614, 640.

⁹¹ **NOTE:** There is no set time limit after which a reminder or new waiver will be required. See *U.S. v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1312 [“The courts have generally rejected a per se rule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners.”].

⁹² *People v. Schenk* (1972) 24 Cal.App.3d 233, 236

⁹³ See *Wyrick v. Fields* (1982) 459 U.S. 42, 47-48. Also see *People v. Martinez* (2010) 47 Cal.4th 911, 944-50 [overnight, same location, different officers, different topics, reminder given]; *People v. Riva* (2003) 112 Cal.App.4th 981, 994 [“Both interrogations were conducted by the same officer.”]; *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]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 640 [“*Miranda* does not require a second advisement when a new interviewer steps into the room.”]; *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.”]; *U.S. v. Rodriguez-Preciado* (9th 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.”]; *Guam v. Dela Pena* (9th Cir. 1995) 72 F.3d 767, 769 [an arrest does not automatically constitute a sufficient changed circumstance to require a new waiver].

SUSPECT’S STATE OF MIND: The suspect’s impaired mental state or young age are relevant as they might affect his ability to remember his rights as the interview progressed and as circumstances changed. Conversely, his mental alertness would tend to demonstrate an ability to retain this information. Thus, in ruling that a waiver was reasonably contemporaneous with an interview that resumed over 30 hours later, the court in *People v. Mickle* observed that “[n]othing in the record indicates that defendant was mentally impaired or otherwise incapable of remembering the prior advisement.”⁹⁴

MIRANDA REMINDERS: Even if there was some mental impairment or a change in circumstances, the courts usually reject timeliness arguments if the officers reminded the suspect of his *Miranda* rights when the interview began or resumed; e.g., *Do you remember the rights I read to you earlier?* If he says yes, that will usually suffice. For example, in *People v. Viscotti* the court noted that the defendant “was reminded of the rights he had waived earlier in the day . . . [the officer] clearly implied that those rights were still available to defendant.”⁹⁵

Before leaving this subject, here are examples of situations in which the courts rejected arguments that the time lapse between the waiver and the beginning or resumption of an interview rendered the waiver untimely:

<u>Hours</u>	<u>Location</u>	<u>Officers</u>	<u>Topics</u>	<u>Remind</u>
2	Same	Same	Same	Yes ⁹⁶
5	Same	Different	Same	No ⁹⁷
6	Same	Same	Same	No ⁹⁸
9	Different	Same	Same	No ⁹⁹
12	Same	Same	Same	Yes ¹⁰⁰
15	Same	Same	Same	Yes ¹⁰¹
16	Same	Same	Same	Yes ¹⁰²
27	Same	Same	Same	Yes ¹⁰³
36	Same	Same	Same	Yes ¹⁰⁴

Pre-Waiver Communications

Before seeking a waiver, officers will almost always have some conversation with the suspect. Frequently, it will consist of small talk to help relieve the tension that is inherent in any custodial interrogation. This is, of course, permissible so long as it was relatively brief. As the Ninth Circuit observed in *Clark v. Murphy*, “There is nothing inherently wrong with efforts to create a favorable climate for confession.”¹⁰⁵

There are, however, two types of pre-waiver communications that may invalidate a subsequent waiver on grounds that they undermined the suspect’s ability to freely decide whether to waive his *Miranda* rights. They are (1) communications that were part of a so-called “two-step” interrogation process, and (2) communications in which officers trivialized the

⁹⁴ (1991) 54 Cal.3d 140, 170. ALSO SEE *People v. Riva* (2003) 112 Cal.App.4th 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. Smith* (2007) 40 Cal.4th 483, 504 [we consider “the suspect’s sophistication or past experience with law enforcement”].

⁹⁵ (1992) 2 Cal.4th 1, 55. ALSO SEE *People v. Pearson* (2012) 53 Cal.4th 306, 317 [“defendant was asked if he remembered his *Miranda* rights, and he said he did”]; *People v. Martinez* (2010) 47 Cal.4th 911, 950 [“they did remind him of the admonition given the night before and then specifically asked him if he remembered those rights and whether he still wanted to talk”]; *People v. Smith* (2007) 40 Cal.4th 483, 504 [relevant circumstances include “an official reminder of the prior advisement”]; *People v. McFadden* (1970) 4 Cal.App.3d 672, 687 [reminder after one day lapse OK]; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-78 [reminder after three day lapse OK].

⁹⁶ *Wyrick v. Fields* (1982) 459 U.S. 42, 47-48. ALSO SEE *People v. Martinez* (2010) 47 Cal.4th 911, 944-50.

⁹⁷ *People v. Lewis* (2001) 26 Cal.4th 334, 386-87.

⁹⁸ *People v. Miller* (1996) 46 Cal.App.4th 412, 418.

⁹⁹ *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1972.

¹⁰⁰ *People v. Smith* (2007) 40 Cal.4th 483, 504-5.

¹⁰¹ *Guam v. Dela Pena* (9th Cir. 1995) 72 F.3d 767, 770.

¹⁰² *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1088.

¹⁰³ *People v. Pearson* (2012) 53 Cal.4th 306, 316-17.

¹⁰⁴ *People v. Mickle* (1991) 54 Cal.3d 140, 171.

¹⁰⁵ (9th Cir. 2003) 331 F.3d 1062, 1073. ALSO SEE *People v. Gurule* (2002) 28 Cal.4th 557, 559 [“the officers engaged him in some small talk to put him at ease”]; *Mickey v. Ayers* (9th Cir. 2010) 606 F.3d 1223, 1235 [“Casual conversation is generally not the type of behavior that police should know is reasonably likely to elicit an incriminating response.”]; *U.S. v. Tail* (8th Cir. 2006) 459 F.3d 854, 858 [“Polite conversation is not the functional equivalent of interrogation.”].

Miranda protections. Less problematic, but worth discussing, is the subject of “softening up.” Finally, we will cover the common—and usually legal—practice of seeking a waiver after informing the suspect of some or all the evidence that tends to prove he is guilty.

The “Two Step”

In 2004, the U.S. Supreme Court ruled in *Missouri v. Seibert* that the pre-waiver tactic known as the “two step” was illegal.¹⁰⁶ What’s a two step? It was a crafty device in which officers would (step one) blatantly interrogate the suspect before obtaining a *Miranda* waiver. The officers knew, of course, that any statement he made would be suppressed, but they didn’t care because, if he confessed or made a damaging admission, they would go to step two. Here, the officers would seek a waiver and, if the suspect waived, they would try to get him to repeat his previous statement.¹⁰⁷

In most cases, they succeeded because the suspect would think (erroneously) that his first statement could be used against him and, therefore, he had nothing to lose by repeating it. As the Court in *Seibert*

explained, the two step renders *Miranda* warnings ineffective “by waiting for a particularly opportune time to give them, after the suspect has already confessed.”

Although the Court banned two-step interviews, the justices could not agree on a test for determining whether officers had, in fact, engaged in such conduct. So the lower courts were forced to utilize a seldom-used procedure for resolving these issues.¹⁰⁸ And in implementing this procedure, both the California Supreme Court and the Ninth Circuit concluded that the appropriate test focuses on the officers’ intent. Specifically, a two-step violation results if the officers deliberately utilized a two-phase interrogation for the purpose of undermining *Miranda*.¹⁰⁹

How can the courts determine the officers’ intent? It is seldom difficult because they will usually have begun by conducting a systematic, exhaustive, and illegal pre-waiver interrogation of the suspect pertaining to the crime under investigation; and the interrogation will have produced a confession or highly incriminating statement which the suspect essentially repeated after he waived his rights.¹¹⁰

¹⁰⁶ (2004) 542 U.S. 600.

¹⁰⁷ See *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 973 [“A two-step interrogation involves eliciting an unwarned confession, administering the *Miranda* warnings and obtaining a waiver of *Miranda* rights, and then eliciting a repeated confession.”].

¹⁰⁸ **NOTE:** Because none of the views in *Seibert* garnered the votes of five Justices, the holding of the Court “may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. U.S.* (1977) 430 U.S. 188, 193. Because Justice Kennedy concurred in the judgment of the plurality on the narrowest grounds (he rejected the plurality’s position that a “fruits” analysis should be applied to unintentional violations), his opinion represents the holding of the Court. And because Justice Kennedy would apply the “fruits” analysis only if the two-step procedure was employed deliberately, a statement will not be suppressed if it was employed inadvertently. See *People v. Camino* (2011) 188 Cal.App.4th 1359, 1370 [“Because Justice Kennedy concurred in the judgment on the narrowest grounds, his concurring opinion [in which the invalidity of a waiver depends on whether the officers intended to circumvent *Miranda*] represents the *Seibert* holding.”]. BUT ALSO SEE *U.S. v. Heron* (7th Cir. 2009) 564 F.3d 879, 885 [court questions whether *Seibert* established an intent-based test].

¹⁰⁹ See *People v. Scott* (2011) 52 Cal.4th 452, 478 [two-step violation occurs if “the officers were following a policy of disregarding the teaching of *Miranda*”]; *U.S. v. Reyes-Bosque* (9th Cir. 2010) 596 F.3d 1017, 1031 [“If the use of the two-step method is not deliberate, the post-warning statements are admissible if they were voluntarily made.”].

¹¹⁰ See *Missouri v. Seibert* (2004) 542 U.S. 600, 616 [the questioning was “systematic, exhaustive, and managed with psychological skill,” adding that when the police were finished “there was little, if anything, of incriminating potential left unsaid.”]; *Bobby v. Dixon* (2011) __ U.S. __ [132 S.Ct. 26, 31 [in discussing *Seibert*, the court noted that a “detective exhaustively questioned Seibert”]; *People v. Camino* (2010) 118 Cal.App.4th 1359, 1376 [court notes “the comprehensiveness of the first interview which left little, if anything, of incriminating potential left unsaid”]; *U.S. v. Aguilar* (8th Cir. 2004) 384 F.3d 520, 525 [“[T]he method and timing of the two interrogations establish intentional, calculated conduct by the police”; the unwarned interrogation “lasted approximately ninety minutes”]. COMPARE *People v. San Nicolas* (2005) 34 Cal.4th 614, 639 [“[D]efendant answered a few questions posed by the Nevada police officer concerning the location of his car and his duffel bag. Defendant did not speak about the crime itself.”]; *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 974 [court noted the brevity of the initial questioning]; *U.S. v. Walker* (8th Cir. 2008) 518 F.3d 983, 985 [the pre-waiver interview consisted of a single question]; *U.S. v. Fellers* (8th Cir. 2005) 397 F.3d 1090, 1098 [the pre-waiver conversation “was relatively brief”]. COMPARE: *Bobby v. Dixon* (2011) __ U.S. __ [132 S.Ct. 26, 31] [“But in this case Dixon steadfastly maintained during his first, unwarned interrogation that he had ‘nothing whatsoever’ to do with Hammer’s disappearance.”].

Other circumstances that are indicative of a two-step interview include the officers' act of blatantly or subtly reminding the suspect during the post-waiver interrogation that he had already "let the cat out of the bag," the officers' use of interrogation tactics (e.g., good-cop/bad-cop) during the pre-waiver interrogation, and a short time lapse between the pre- and post-waiver statements.¹¹¹

Trivializing Miranda

Although there is not much law on this subject, a court might invalidate a waiver if officers obtained it after trivializing the *Miranda* rights or minimizing the importance of his decision to talk with them. Thus, in *People v. Musselwhite* the California Supreme Court said:

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.¹¹²

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." In contrast, in *Doody v. Ryan* the

Ninth Circuit ruled that a juvenile's waiver was invalid because, among other things, the officers had implied that the *Miranda* warnings "were just formalities."¹¹³

"Softening up"

Defendants sometimes argue that, although they were not actually coerced or otherwise pressured into waiving their rights, their waiver was nevertheless involuntary because officers engaged in a pre-waiver process known as "softening up." The term comes from the 1977 case of *People v. Honeycutt*,¹¹⁴ a controversial decision of the California Supreme Court in which a minority of the court opined that a waiver resulting from "softening up" would be invalid. Although the justices neglected to define the term, the conduct they labeled as "softening up" consisted of a lengthy pre-waiver conversation in which the officers suggested to the suspect that it would be advantageous to talk to them because they were on his "side."

For various reasons, however, California courts have not been receptive to "softening up" claims. One reason is, as the Court of Appeal noted, "*Honeycutt* involves a unique factual situation and hence its holding must be read in the particular factual context in which it arose."¹¹⁵ In addition, the *Honeycutt* court's discussion of "softening up" was pure dicta (i.e., it was irrelevant to the resolution of the case¹¹⁶) and it was contained in a plurality

¹¹¹ See *People v. Camino* (2010) 118 Cal.App.4th 1359, 1376 [court notes "the continuity between the two interviews"]; *U.S. v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1159 [relevant circumstances include "the timing, setting, and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements."]; *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 974 [court notes the "lack of any reference to the prewarning statements during the more comprehensive postwarning interrogation" and the four-hour delay between the two admissions]; *U.S. v. Heron* (7th Cir. 2009) 564 F.3d 879, 887 ["Here, the lengthy temporal separation between Heron's first and second encounters persuades us that the district court did not err when it found that the later warnings served their intended purpose."]; *U.S. v. Aguilar* (8th Cir. 2004) 384 F.3d 520, 525 [the pre-waiver interrogation "included some good cop/bad cop questioning tactics"].

¹¹² (1998) 17 Cal.4th 1216, 1237.

¹¹³ (9th Cir. 2011) 649 F.3d 986, 1002. BUT ALSO SEE *People v. Johnson* (2010) 183 Cal.App.4th 253, 294 ["Referring to the process as clearing a 'technicality' and encouraging Holmes to talk and ask questions did not minimize the significance of her rights or the risks of her speaking with detectives."].

¹¹⁴ (1977) 20 Cal.3d 150.

¹¹⁵ *People v. Patterson* (1979) 88 Cal.App.3d 742, 751. ALSO SEE *People v. Gurule* (2002) 28 Cal.4th 557, 602 ["But unlike in *Honeycutt*, neither [of the officers] discussed the victim. Nor is there any other evidence suggesting that the manner in which [the officers] engaged in small talk overbore defendant's free will." *Honeycutt* is thus distinguishable.]; *People v. Scott* (2011) 52 Cal.4th 452, 478 [no softening up as the officers "had no prior relationship with defendant [and] did not seek to ingratiate themselves with him by discussing unrelated past events and former acquaintances. Nor did they disparage his victims.]; *People v. Michaels* (2002) 28 Cal.4th 486, 511 ["the facts here are not at all like *Honeycutt*"]; *People v. Posten* (1980) 108 Cal.App.3d 633, 647 ["*Honeycutt* is distinguishable on its facts"].

¹¹⁶ See *People v. Mendoza* (2000) 23 Cal.4th 896, 915 ["A decision is not authority for everything said in the opinion but only for the points actually involved and actually decided."].

decision (i.e., a majority of the justices did not endorse it¹¹⁷). In addition, *Honeycutt* was based on the premise that softening-up renders a waiver “involuntary.” But nine years later the United States Supreme Court rejected the idea that involuntariness can result from anything other than *coercive* police conduct.¹¹⁸ And because it is hardly “coercive” for officers to pretend to be sympathetic to the suspect’s plight, there is reason to believe that *Honeycutt* is a dead letter.

Putting your cards on the table

Before seeking a waiver, officers may make a tactical decision to disclose to the suspect some or all of the evidence of his guilt they had obtained to date. In many cases, the officers think that the suspect will be more likely to waive his rights if he realized there was abundant evidence of his guilt, or if he thought he could explain it away.

It is, of course, possible that the suspect will respond to such a disclosure by making an incriminating statement. But the courts have consistently ruled that it does not constitute pre-waiver “interrogation,” nor is it otherwise impermissible if the officers did so in a brief, factual, and dispassionate manner.

For example, in *People v. Gray*¹¹⁹ the officers sought a waiver from a murder suspect after telling him about “considerable evidence pointing to his involvement in the death.” In rejecting an argument that such a tactic had somehow invalidated his subsequent waiver, the court noted that the officer’s recitation of the facts was “accurate, dispassionate and not remotely threatening.”

In addition, having such information may be helpful to the suspect in determining whether or not to waive his rights. Thus, the Ninth Circuit ruled that “*Miranda* does not preclude officers, after a defendant has invoked his *Miranda* rights, from informing the defendant of evidence against him or of other circumstances which might contribute to an intelligent exercise of his judgment.”¹²⁰

For these reasons the courts have ruled that officers did not violate *Miranda* when, before seeking a waiver, they provided the suspect with the following information:

YOU WERE ID’D: Officers told the suspect that a victim or witness had identified him as the perpetrator.¹²¹

WE FOUND THE GUN: An FBI agent told a convicted felon, “We found a gun in your house.”¹²²

WE FOUND THE DOPE: A Border Patrol agent told the suspect that “agents had seized approximately 600 pounds of cocaine and that [he] was in serious trouble.”¹²³

PLAYING WIRETAPPED CONVERSATIONS: Officers played a recording of a wiretapped conversation that incriminated the suspect.¹²⁴

CHECK OUT THIS PHOTO: An FBI agent showed the suspect a surveillance photo of the suspect as he was robbing a bank.¹²⁵

YOUR ACCOMPLICE CONFESSED: An officer told the suspect that his accomplice had made a statement and, as the result, the case against the suspect was looking “pretty good.”¹²⁶

POV

In the next edition: Miranda invocations and post-invocation communications.

¹¹⁷ 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.”]; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 829 [plurality decisions do not constitute binding authority].

¹¹⁸ *Colorado v. Connelly* (1986) 479 U.S. 157, 170. ALSO SEE *People v. Clark* (1993) 5 Cal.4th 950, 988.

¹¹⁹ (1982) 135 Cal.App.3d 8593. ALSO SEE *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 411; *U.S. v. Washington* (9th Cir. 2006) 462 F.3d 1124, 1134 [“even when a defendant has invoked his *Miranda* rights, this does not preclude officers from informing the defendant about evidence against him or about other information that may help him make decisions about how to proceed with his case”].

¹²⁰ *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169.

¹²¹ *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192.

¹²² *U.S. v. Payne* (4th Cir. 1992) 954 F.2d 199, 203. ALSO SEE *U.S. v. McGlothen* (8th Cir. 2009) 556 F.3d 698, 702 [an officer showed an arrested drug dealer a gun he had found during a search of his home].

¹²³ *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169. ALSO SEE *U.S. v. Lopez* (1st Cir. 2004) 380 F.3d 538, 545-46 [an officer told an arrested drug dealer that he has found “the stuff” in his van]; *U.S. v. Wipf* (8th Cir. 2005) 397 F.3d 677.

¹²⁴ *U.S. v. Vallar* (7th Cir. 2011) 635 F.3d 271, 285.

¹²⁵ *U.S. v. Davis* (9th Cir. 1976) 527 F.2d 1110.

¹²⁶ *People v. Patterson* (1979) 88 Cal.App.3d 742, 752 [“It is well established that the practice of confronting a suspect with the confession of an accomplice is entirely lawful and does not vitiate the voluntariness of a *Miranda* waiver.”].