

# Recent Case Report

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## Mickey v. Ayers

(9<sup>th</sup> Cir. 2010) 606 F.3d 1223

### Issue

Did a conversation between an officer and an arrestee on an extradition flight from Japan constitute “interrogation” under *Miranda*?

### Facts<sup>1</sup>

After committing a drug-related double murder in Placer County, Douglas Mickey fled to Japan where he was arrested on an extradition warrant. Placer County Sheriff Donald Nunes flew to Japan and attempted to interview Mickey, but he invoked his *Miranda* right to counsel. He was later transported back to Placer County by Nunes and Det. Curtis Landry.

At the start of the flight, Mickey and Sheriff Nunes sat together and engaged in some “small talk.” According to Nunes, Mickey “spoke of his family and hobbies and was generally pleasant and talkative.” When Nunes and Landry switched seats, Mickey talked to Landry about “philosophy, politics, food, football, family, and California.” Landry told Mickey that he had watched him play high school football, that he knew about his brother’s suicide, and he had participated in the investigation into the death of his mother.

About two hours later, Mickey asked if the two murder victims had been buried together. When Landry said they had been cremated and that their ashes had been “scattered in the High Sierra,” Mickey “suffered an emotional lapse.” Landry testified that Mickey “was openly crying” and “found it difficult to speak.” After he calmed down, he said that “nothing would have happened” if the man had not become angry about a dispute they had had over drugs. Landry did not respond to Mickey’s statement; he just listened. As they left the plane for an overnight stopover in Hawaii, Mickey told Landry, “Curt, I would like to continue our conversation at a later time.” Mickey was then transported to the Honolulu County Jail.

Meanwhile, Nunes phoned a deputy DA in Placer County and explained what Mickey had said and the circumstances under which he said it. The DA advised him to “ask Mickey if he wanted to speak and, if Mickey said yes, to *Mirandize* and then to interrogate him.”

The interview was conducted by Landry. After confirming that Mickey still wanted to talk to him, Landry obtained a *Miranda* waiver and began questioning him about the murders. During the interview, which lasted over four hours, Mickey gave a detailed account of how he carried out the killings. His confession was used against him at trial; he was found guilty, and sentenced to death. After the California Supreme Court affirmed the convictions and death sentence, Mickey filed a petition for a writ of habeas corpus with the Ninth Circuit.

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<sup>1</sup> NOTE: Some facts were taken from the California Supreme Court’s decision, *People v. Mickey* (1991) 54 Cal.3d 612.

## Discussion

Mickey contended that his statements should have been suppressed for several reasons. First, he claimed that his in-flight statement was obtained in violation of *Miranda* because he had invoked right to counsel in Japan. The Government responded that the in-flight conversations did not violate *Miranda* because it is settled that officers are free to communicate with suspects who have invoked so long as their communication does not constitute “interrogation.” The question, then, was whether the officers’ discussions with Mikey on the plane constituted interrogation.

The term “interrogation,” as used in *Miranda*, occurs if officers asked questions that were reasonably likely to elicit an incriminating response.<sup>2</sup> Here, however, the court noted that nothing of that sort happened on the plane as the officers asked no questions and “only responded to Mickey’s desire for small talk.” It also pointed out that casual conversation of this sort “is generally not the type of behavior that police should know is reasonably likely to elicit an incriminating response.” Accordingly, it ruled that the in-flight conversations did not constitute prohibited post-invocation interrogation.

Second, Mickey argued that the statements he made in the Honolulu jail should have been suppressed because Landry asked questions that clearly constituted interrogation. But the court ruled that the interview was permitted because Mickey effectively initiated the interview when, as he disembarked in Honolulu, he told Landry that he “would like to continue our conversation at a later time.”

Third, Mickey contended that Landry had engaged in prohibited “softening up” by “participating in a discussion of the connections between their two families, including Landry’s knowledge of Mickey’s brother’s suicide.” In 1977, the California Supreme Court outlawed a *Miranda* tactic called “softening up,” which is loosely defined as a ploy in which officers, who have reason to believe that a suspect will not waive his rights, engage him in a lengthy pre-waiver conversation for the purpose of causing him to believe it would be advantageous to talk; e.g., the officers disparaged the victim to make it appear they were on the suspect’s “side.”<sup>3</sup> Although the courts have not been receptive to claims of “softening up,” defendants frequently raise the issue, usually as a last-ditch effort to obtain a suppression order.

In any event, the Ninth Circuit rejected the claim, pointing out that Det. Landry “did not intend and had no reason to know that his statements about his various family members and how they interacted with Mickey’s family were likely to elicit an incriminating response in the context of a conversation ranging from California, philosophy, and politics to family, food, and football.”

For these reasons, the court ruled that Mickey’s statements were properly admitted into evidence, and it affirmed his conviction and death sentence. POV

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<sup>2</sup> See *Rhode Island v. Innis* (1980) 446 U.S. 291.

<sup>3</sup> 8 See *People v. Honeycutt* (1977) 20 Cal.3d 150.