Miranda Waivers

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[1]

Miranda is practically a household word. —Anderson v. Terhune[2]

Now that the *Miranda* has become a cultural icon—like Justin Timberlake and Lady Gaga—it seems appropriate to ask: Why must officers still inform suspects of their *Miranda* rights? 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., just about everybody) "is in a curious posture to later complain that his answers were compelled."[3]

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. "If anything," said the Court, "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement."[4]

Still, there are four legal requirements that must still be met before a waiver can occur. Specifically, a waiver must be "knowing," "intelligent," voluntary, and timely. In this article, we will discuss what officers must do to comply with these requirements. We will also discuss the related subject of communications with suspects before they have waived their rights, and California's new law that restricts interviews with some minors.

"Knowing" Waivers

The requirement that a *Miranda* waiver must be "knowing" simply means that officers must have correctly informed the suspect of his rights and the consequences of waiving them.[5] It is true, of course, that most people know their *Miranda* rights, having heard them recited countless times on television and in the movies. It is also true that many arrestees have received multiple *Miranda* warnings over the years and can recite them faster and more accurately than some officers. Nevertheless, officers must still read them their *Miranda* rights because prosecutors cannot prove that a suspect knew his rights providing the court with a copy of his rap sheet. In the words of the Supreme Court, "No amount of circumstantial evidence that the person may have been aware of this right will suffice."[6]

The Miranda warning

Although officers are not required to recite the *Miranda* warnings exactly as they were enumerated in the *Miranda* decision or as they appear in departmental *Miranda* cards, they must "reasonably convey"[7] the following information:

(1) **Right to remain silent**: The suspect must be informed of his Fifth Amendment right not to answer any questions; e.g., *You have the right to remain silent*.[8]

(2) **Consequences of waiving**: The suspect must be notified of the downside of waiving his rights; i.e., *Anything you say may be used against you in court*.

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[1] (2000) 530 U.S. 428, 443.
[2] (9th Cir. 2008) 516 F.3d 781, 783.
[3] *United States v. Washington* (1977) 431 U.S. 181, 188.
[4] *Dickerson v. United States* (2000) 530 U.S. 428, 443.
[5] See *Moran v. Burbine* (1986) 475 U.S. 412, 421-22.
[6] *Miranda v. Arizona* (1966) 384 U.S. 436, 471-72. 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"].
[7] See *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*."]; *People v. Samayoa* (1997) 15 Cal.4th 795, 830.
[8] See *Miranda v. Arizona* (1966) 384 U.S. 436, 467-68.

(3) **Right to counsel**: The suspect must be told that he has a right (a) to consult with an attorney before questioning, (b) to have an attorney present during questioning, and (c) to have an attorney appointed if he cannot afford one; e.g., *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.*

Although not a requirement,[9] officers may supplement the *Miranda* warning by informing suspects that, if they waive their rights initially, they can invoke them at any time during the interview; i.e., their decision to waive is not irrevocable.[10]

"Can and will be used": In the past, officers were instructed to warn suspects that anything they say "will be used" against them. There is, however, no requirement that officers deliver such an ominous and disconcerting warning. Instead, they only need to notify them that anything they say "may," "might," or "could" be used against them.[11] The Court of Appeal explained the source of this confusion 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.[12]

Furthermore, telling a suspect that anything he said "will" or "can" be used" is patently false because most of the things that suspects say during interviews will not and cannot be used against them; e.g., "This coffee sucks."

NO ADDITIONAL INFORMATION: Officers are not required to furnish suspects with any additional information, even if the information might have affected their decision to waive.[13] As the Supreme Court observed, "[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."[14] For example, the courts have rejected arguments that officers must disclose the topics that would be discussed during the interview,[15] the nature of the crime under investigation,[16] the possible punishment upon conviction, or that the suspect's attorney is present and wants to talk with him.[17]

Note that, because minors have the same *Miranda* rights as adults, officers are not required to provide them with any additional information.[18] As we will discuss later, however, a California statute requires that minors who are 15-years old or younger consult with an attorney before they may waive their rights.

Using Miranda cards: It is usually best to read the admonition from a standard *Miranda* card, especially if the warning-waiver dialogue was not recorded. As the court observed in *People v. Prysock*, "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."[19] Reading from a card will also enable officers to prove that the warning was accurate by testifying that they recited it from a *Miranda* card, then reading to the court the warning from that card or a duplicate.[20]

UTILIZING DECEPTION: Although officers must correctly explain the *Miranda* rights to the suspect, a waiver will not be invalidated on grounds that they

[9] See *People v. Castille* (2005) 129 Cal.App.4th 863, 886.
[10] See *Florida v. Powell* (2010) 559 U.S. 50, 54; *People v. Kelly* (1990) 51 Cal.3d 931, 949.
[11] See, for example, *Berghuis v. Thompkins* (2010) 560 U.S. 370, 380; *People v. Johnson* (2010) 183 Cal.App.4th 253, 292.
[12] *People v. Valdivia* (1986) 180 Cal.App.3d 657, 664.
[13] *Colorado v. Spring* (1987) 479 U.S. 564, 577; *Collins v. Gaetz* (7th Cir. 2010) 612 F.3d 574, 590.
[14] *Moran v. Burbine* (1986) 475 U.S. 412, 422.
[15] See *Colorado v. Spring* (1987) 479 U.S. 564, 577; *U.S. v. Brenton-Farley* (11th Cir. 2010) 607 F.3d 1294.
[16] See *People v. Tate* (2010) 49 Cal.4th 635, 684; *People v. Boyette* (2002) 29 Cal.4th 381, 411.
[17] See *People v. Roundtree* (2013) 56 Cal.4th 823, 848; *People v. Clark* (1993) 5 Cal.4th 950, 987, fn.11.
[18] See *Fare v. Michael C.* (1979) 442 U.S. 707, 725; *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72.
[19] (1982) 127 Cal.App.3d 972, 985. Also see *Oregon v. Elstad* (1985) 470 U.S. 298, 314-15.
[20] See *Oregon v. Elstad* (1985) 470 U.S. 298, 314-15.

had lied about other matters. In the words of the Supreme Court, "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."[21] For example, waivers have been deemed knowing even though officers told the suspect that his victim was "hurt" when he was actually dead,[22] or when FBI agents told a suspect that they wanted to talk to him about "terrorism" when they really wanted to question him about molesting a child.[23]

RECORDING WAIVERS: There is no requirement that officers record the warning and waiver procedure.[24] Still, it is highly recommended because it provides judges with proof of exactly what the officers and suspect said. For example, in *People v. Gray* the defendant disputed the officer's testimony as to what the officer told him. But the court quickly disposed of the matter, saying, "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."[25] Furthermore, recordings may be helpful because the suspect's tone of voice, emphasis on certain words, pauses, and even laughter may "add meaning to the bare words."[26] Note that the recording may be done covertly, as well as overtly.[27]

Timely Waivers: Reminders

Even though a suspect was correctly informed of his rights, it may be necessary to remind him of his rights if there was a substantial delay between the *Miranda* warning and the start or resumption of the interview. In other words, a *Miranda* warning and the subsequent interview must be "reasonably contemporaneous."[28] This issue commonly arises if the suspect was *Mirandized* in the field during a detention or after he was arrested, but was not questioned until he had been transported to a police station. In such cases, the suspect may argue that his waiver was not "knowing" because he had forgotten his rights or thought that they no longer applied. (This is one reason for not *Mirandizing suspects* until the interview is imminent.)

Note that there is no set time after which a fresh warning or reminder will be required. For example, delays ranging from 30 minutes to 36 hours have been deemed insignificant.[29] Furthermore, in determining whether a reminder was necessary, the courts may consider "any change in the identity of the interrogator or the location of the interview . . . the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights."[30]

"Intelligent" Waivers

Suspects must not only know their rights in the abstract, they must have understood them.[31] This is what the courts mean when they say that waivers must be "intelligent."[32] As the court explained 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."[33]

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[21] *Illinois v. Perkins* (1990) 496 U.S. 292, 297.
[22] *People v. Tate* (2010) 49 Cal.4th 635, 683.
[23] *U.S. v. Farley* (11th Cir. 2010) 607 F.3d 1294.
[24] *See People v. Pearson* (2012) 53 Cal.4th 306, 318; *People v. Thomas* (2012) 54 Cal.4th 908, 929.
[25] (1982) 135 Cal.App.3d 859, 864.
[26] *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 526.
[27] See *People v. Jackson* (1971) 19 Cal.App.3d 95, 101; *Lopez v. United States* (1963) 373 U.S. 427, 439.
[28] See *Wyrick v. Fields* (1982) 459 U.S. 42; *People v. San Nicolas* (2004) 34 Cal.4th 614, 640.
[29] See, for example, *Berghuis* v. *Thompkins* (2010) 560 U.S. 370, 386 [3 hours]; *People v. Spencer* (2018) 5 Cal.5th 642, 668]["Only five hours"]; *People* v. *Pearson* (2012) 53 Cal.4th 306, 317 [27 hours].
[30] *People v. Mickle* (1991) 54 Cal.3d 140, 170.
[31] *Moran v. Burbine* (1986) 475 U.S. 412, 421; *Brady v. United States* (1970) 397 U.S. 749, 748.
[32] See *Brady v. United States* (1970) 397 U.S. 742, 748.
[33] (1998) 65 Cal.App.4th 854, 859, fn.1.

CIRCUMSTANTIAL EVIDENCE OF UNDERSTANDING? As a practical matter, the only way to prove that a suspect understood his rights is to ask. This is why *Miranda* cards typically include the question, *Do you understand each of the rights I have explained to you?* If necessary, however, a court may also consider circumstantial evidence of understanding such as whether the suspect previously had invoked or waived his rights; and his age, experience, background, and intelligence.[34]

CLARIFYING THE MIRANDA RIGHTS: If the suspect says or indicates that he did not understand his rights, officers must attempt to clarify them.[35] Furthermore, they must not begin the interview until the suspect confirms that he now understands the admonition.

IMPAIRED SUSPECTS: A suspect who told officers that he understood his rights may later claim that he didn't because his mental state was impaired due to alcohol, drugs, physical injuries, a learning disability, or mental disorder. In most cases, however, the courts reject these arguments if the suspect's 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 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."[36] For example, in rejecting arguments that impaired suspects were unable to understand their rights, the courts have noted the following:

- The suspect "answered the officers' questions coherently and intelligibly."[37]
- The suspect was under the influence of PCP but his answers were "rational and appropriate to those questions."[38]
- The suspect was 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."[39]
- The suspect's IQ was 47 but he testified that 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."[40]
- Although the suspect "possessed relatively low intelligence," he was "sufficiently intelligent to pass a driver's test, and to attempt to deceive officers by [lying to them]."[41]
- The suspect had an IQ of between 79 and 85 but he had "completed the eighth grade," could read and write, and "was able to work and function in society."[42]

In contrast, in *Rodriguez v. McDonald* the court invalidated a waiver because the suspect "was not only young (14-years old); he also had Attention Deficit Hyperactivity Disorder and a 'borderline' I.Q. of seventy-seven."[43]

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[34] See, for example, *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4; *People v. Memro* (1995) 11 Cal.4th 786, 834; *People v. Riva* (2003) 112 Cal.App.4th 981, 989.

[35] See *People v. Cruz* (2008) 44 Cal.4th 636, 668; *People v. Farnam* (2002) 28 Cal.4th 107, 181; *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"].

[36] (1993) 5 Cal.4th 950, 988. Also see *People v. Frye* (1998) 18 Cal.4th 894, 988 ["To have prevailed, defendant would have had to establish his consumption of alcohol so impaired his reasoning that he was incapable of freely and rationally choosing to waive his rights and speak with the officers."].

[37] *U.S. v. Daniels* (8th Cir. 2014) 775 F.3d 1001, 1005.

[38] *People v. Loftis* (1984) 157 Cal.App.3d 229, 232.

[39] *People v. Lewis* (2001) 26 Cal.4th 334, 384.

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

[41] *People v. Whitson* (1998) 17 Cal.4th 229, 249.

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

[43] (9th Cir. 2017) 872 F.3d 908, 923

WAIVERS BY MINORS: While it is undisputed that minors are generally more likely than adults to feel intimidated when they are questioned by officers, it is also undisputed (at least by most) that many minors today are as hardened and unintimidated by authority as the average resident of San Quentin. As the Court of Appeal observed in 1982, "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."[44]

Consequently, in determining whether a minor understood his rights, the courts apply the same standards and principles that apply when the defendant was an adult.[45] But because the age, maturity, education, and intelligence of minors may have a greater effect on understanding than they do on adults, these circumstances will usually have greater importance, especially if the minor was younger than 16.[46] For example, in ruling that minors understood their rights, the courts have noted the following:

- "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."[47]
- "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 [he] 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."[48]
- "The evidence reveals a very unintelligent 15-year-old boy. His intelligence quotient was that of about a 7- or 8-year old (I.Q. 47). 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 police unless he wanted to, and that they could not force him to talk."[49]
- "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." She also lied to the police about her name, age, and family background."[50]

Despite this, California's legislature passed a law that essentially says that all minors who are 15-years old or younger are incapable of understanding their rights and, therefore, officers may not even seek waivers from them until they have consulted with an attorney. And because attorneys will almost always advise minors not to cooperate with the police, the legislature has apparently sought to prevent officers from interviewing them, regardless of the minor's intelligence and experience, and regardless of the seriousness of the crime under investigation.

But because the legislature failed to obtain a two-thirds vote on the bill, a statement by a minor may not be suppressed on grounds that it was obtained in violation of the statute. Moreover, the bill itself specifies that the only remedy for a violation is that the consequence for a violation is that the trial

[44] *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72.
[45] 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.4th 563, 577 ["special caution" not required in determining whether a juvenile waived his *Miranda* rights]; *U.S. v. Doe* (9th Cir. 1998) 155 F3 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."].
[46] See *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272; *People v. Nelson* (2012) 53 Cal.4th 367, 378; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169; *People v. Jones* (2017) 7 Cal.App.5th 787, 809.
[47] *Fare v. Michael C.* (1979) 442 U.S. 707, 726. Edited.
[48] *In re Charles P.* (1982) 134 Cal.App.3d 768, 772.
[49] *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002.
[50] *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 578.

courts must consider this fact, along with other relevant circumstances, in determining the admissibility of the minor's statement. But this is something the courts would have done anyway because, under federal and California law, a minor's age is a relevant circumstance in determining whether he understood his rights.[51] Thus, the Court of Appeal has observed that the statute "does not authorize a court to exercise its discretion to exclude statements if those statements if those statements are admissible under federal law."[52] Instead, said the court, "the proper inquiry remains not whether officers complied with the state statute, but whether federal law compels exclusion of the minor's statements."

Voluntary Waivers

In addition to being "knowing" and "intelligent," *Miranda* waivers must be "voluntary," meaning that officers must not have obtained it by means of threats or other form of coercion. As the Supreme Court explained, "[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."[53] For example, in rejecting arguments that *Miranda* waivers were involuntary, the courts have noted the following:

- "[T]he record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements."[54]
- "The officers made no threats or promises of any kind, and there is no indication that the questioning was oppressive in any way."[55]
- "The officers were courteous, polite and low-key. The record is devoid of evidence that there was pressure or coercion brought to bear."[56]

In contrast, the courts have invalidated *Miranda* waivers because the officers told the suspect that, unless he waived his rights, they "had to assume the worst, e.g., the death penalty,"[57] or when officers told the suspect that she would stop receiving state financial aid for her child if she did not waive.[58]

Three other things should be noted about voluntariness. First, the rule prohibiting involuntary *Miranda* waivers is similar to the rule that prohibits involuntary confessions and admissions.[59] The difference is that a waiver is involuntary if officers coerced a suspect into waiving his rights; while a statement is involuntary if officers, after obtaining a voluntary waiver, coerced him into making an incriminating statement. Second, in the past, some courts indicated that a waiver was involuntary if it resulted from the "slightest pressure." This incoherent standard was abrogated by the Supreme Court.[60] Third, because the issue is whether officers pressured the suspect into waiving, the suspect's mental state—whether caused by intoxication, low IQ, young age, or such—is relevant to the issue of voluntariness only if the officers exploited it to obtain the waiver.[61]

Express and Implied Waivers

Miranda waivers may be express or implied. An express waiver results if the suspect, after being advised of the *Miranda* rights, responded in the affirmative when officers asked if he was wiling to speak with them; e.g., "Having these rights in mind, do you want to talk to us?" Note that an affirmative response constitutes an express waiver even if the suspect did not appear enthusiastic about it. For example, in *People v. Avalos* the California Supreme

[51] See *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169.
[52] *In re Anthony L.* (2019) __ Cal.App.5th __ [2019 WL 6837968]
[53] *Moran v. Burbine* (1986) 475 U.S. 412, 421. Also see *Colorado v. Spring* (1987) 479 U.S. 564, 572.
[54] *Moran v. Burbine* (1986) 475 U.S. 412, 421. Also see *People v. Parker* (2017) 2 Cal.5th 1184, 1216.
[55] *U.S. v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1075.
[56] *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 526.
[57] *People v. Hinds* (1984) 154 Cal.App.3d 222, 234.
[58] *Lynumn v. Illinois* (1963) 372 U.S. 528
[59] *People v. Guerra* (2006) 37 Cal.4th 1067, 1093.
[60] See *Arizona v. Fulminante* (1991) 499 U.S. 279, 285-86; *People v. Clark* (1993) 5 Cal.4th 950, 986, fn.10.
[61] See *Colorado v. Connelly* (1986) 479 U.S. 157, 169-70; *Collins v. Gaetz* (7th Cir. 2010 612 F.3d 574, 584.

Court rejected the argument that the defendant did not demonstrate a sufficient willingness to waive when he responded "Yeah, whatever; I don't know. I guess so."[62] It is also immaterial that the suspect refused to sign a waiver form or provide a written statement.[63]

In contrast, an implied waiver will result if the suspect, after being advised of his rights and acknowledging that he understood them, freely answered the officers' questions. As the Supreme Court explained, "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."[64] Or, in the words of the California Supreme Court, "It is well settled that law enforcement officers are not required to obtain an express waiver of a suspect's *Miranda* rights prior to a custodial interview and that a valid waiver of such rights may be implied from the defendant's words and actions."[65]

Pre-Waiver Communications

Before seeking a waiver, officers will almost always have some conversation with the suspect. In many cases, the purpose is simply to reduce tension. As the Ninth Circuit observed, "There is nothing inherently wrong with efforts to create a favorable climate for confession."[66] For example, in *People v. Gurule*[67] the California Supreme Court rejected the argument that officers violated *Miranda* when, before seeking a waiver from a murder suspect, they engaged him in "some small talk, to put him at ease." There are, however, some communications that may invalidate a subsequent waiver.

"INTERROGATION": A *Miranda* violation will result if officers asked a question or made a statement that was "reasonably likely to elicit an incriminating response," even if it did not blatantly call for one.[68] Although such a violation will not necessarily invalidate a subsequent waiver, it complicates things. This subject was covered in the article "*Miranda* 'Interrogation,'" in the Winter 2020 edition.

PUTTING YOUR CARDS ON THE TABLE: Before seeking a waiver, officers will sometimes provide suspects with information about the status of their investigation. This will not invalidate a subsequent waiver so long as it was done in a brief, factual, and dispassionate manner, as opposed to goading, provocative, or accusatory.[69] For example, the courts have ruled that officers did not violate *Miranda* when they told the suspect that a witness had identified him as the perpetrator,[70] or that his accomplice had confessed,[71] or that "agents had seized approximately 600 pounds of cocaine and that [he] was in serious trouble,"[72] or that officers played a tape recording of a wiretapped conversation that incriminated the suspect,[73] or that an agent showed him a surveillance photo showing him robbing the bank.[74]

In contrast, a waiver may be invalidated if officers presented the evidence in a manner that was goading or accusatorial. Some examples:

[62] (1984) 37 Cal.3d 216, 230.
[63] See *Berghuis v. Thompkins* (2010) 560 US 370, 375; *Connecticut v. Barrett* (1987) 479 US 523, 530, fn.4.
[64] *Berghuis v. Thompkins* (2010) 560 U.S. 370, 385. Also see *People v. Nelson* (2012) 53 Cal.4th 367, 375.
[65] *People v. Parker* (2017) 2 Cal.5th 1184, 1216.
[66] *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1073. Also see *People v. Gurule* (2002) 28 Cal.4th 557, 559.
[67] (2002) 28 Cal.4th 557, 602.
[68] *Rhode Island v. Innis* (1980) 446 U.S. 291, 301
[69] See *Arizona v. Roberson* (1988) 486 U.S. 675, 687; *People v. Gray* (1982) 135 Cal.App.3d 859, 865.
[70] *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192; *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573.
[71] See *People v. Patterson* (1979) 88 Cal.App.3d 742, 752; *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928, 934.
[72] *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169.
[73] *U.S. v. Vallar* (7th Cir. 2011) 635 F.3d 271, 285 ["Merely apprising Vallar of the evidence against him by playing tapes implicating him in the conspiracy did not constitute interrogation."].
[74] *U.S. v. Davis* (9th Cir. 1976) 527 F.2d 1110. Also see *People v. Thomas* (1990) 219 Cal.App.3d 134, 143.

- The officer "launched into a monologue on the status of the investigation including that a newly contacted witness *disputed defendant's claim* as to the last time defendant had visited the victims' residence."[75]
- An officer questioning a murder suspect described the crime scene, "including the condition of the victim, bound, gagged, and submerged in the bathtub, and said to defendant that the victim 'did not have to die in this manner and could have been left there tied and gagged in the manner in which he was found."[76]
- An officer implied that the suspect's fingerprint had been found on the murder weapons; i.e., "Think about that little fingerprint" that officers had found on the murder weapon."[77]

TRIVIALIZING MIRANDA: A court might invalidate a waiver if officers belittled the importance of the *Miranda* rights or the significance of waiving them. As the California Supreme Court noted in *People v. Musselwhite*, "[E]vidence 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."[78]

"TWO-STEP" INTERVIEWS: A "two step" interview is one in which officers begin by interrogating the suspect without obtaining a *Miranda* waiver. Then, if he confesses or makes a damaging admission, they will seek a waiver and, if he waives, try to get him to repeat the statement.[79] As the Ninth Circuit explained, "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."[80]

The two-step works on the theory that the suspect will usually waive his rights and repeat his incriminating statement because he will think (erroneously) that his first statement could be used against him and, thus, he had nothing to lose by repeating it. Currently, the courts seem to have taken the position that a statement obtained during a two-step interview will be suppressed only when a court find that officers employed the two-step as a tactic to undermine *Miranda*."[81]

"SOFTENING-UP": Defendants sometimes argue that, although they were not actually coerced into making a statement, their waiver was nevertheless involuntary because officers had "softened them up." The term "softening up" comes from the 1977 case of *People v. Honeycutt* in which the California Supreme Court ruled that an interview with a suspect was involuntary because of three circumstances: (1) the officers had reason to believe that the suspect would not waive his rights, (2) they had a lengthy talk with him before seeking a waiver, (3) the apparent objective of the talk was to convince him that it would be advantageous to waive their rights. In *Honeycutt*, for example, the officers disparaged the suspect's victim to make it appear that they were on Honeycutt's "side."

Over the years, however, the courts have not been receptive to softening-up claims. For example, in *People v. Musselwhite* the court disposed of the issue by pointing out that "[t]he 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]."[82] And in *People v. Patterson* the court said "it 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."[83] POV

[75] *People v. Boyer* (1989) 48 Cal.3d 247, 274].
[76] *People v. Sims* (1993) 5 Cal.4th 405, 444.
[77] *People v. Davis* (2005) 36 Cal.4th 510, 555.
[78] (1998) 17 Cal.4th 1216, 1237. Also see *Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986, 1002-1003.
[79] See *Missouri v. Seibert* (2004) 542 U.S. 600.
[80] *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 973.
[81] See *People v. Krebs* (2019) 8 Cal.5th 265, __ ; *U.S. v. Williams* (2nd Cir. 2012) 681 F.3d 35, 41.
[82] (1998) 17 Cal.4th 1216, 1236. Also see *People v. Gurule* (2002) 28 Cal.4th 557, 603.
[83] (1979) 88 Cal.App.3d 742, 751.