

Miranda and the Law: The Fifth Amendment

A Legal Update

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Miranda v. Arizona (1966) 384 U.S. 436 [86 S.Ct. 1602; 16 L.Ed.2nd 694]

Robert C. Phillips

Deputy District Attorney (Ret.)

(C) (858) 395-0302

RCPhill101@goldenwest.net

Outline: The following is divided into thirteen chapters:

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Chapter 1: The Fifth Amendment and Miranda

The Fifth Amendment:

The Fifth Amendment: “No person . . . shall be compelled in any Criminal Case to be a witness against himself.”

See also: California Constitution, **Art I, Section 15**; “Persons may not . . . be compelled in a criminal cause to be a witness against themselves”

“The right against compulsory self-incrimination is ‘the mainstay of our adversary system of criminal justice, and . . . one of the great landmarks in man’s struggle to make himself civilized.’” (*United States v. Preston* (9th Cir. 2014) 751 F.3rd 1008, 1015; quoting *Michigan v. Tucker* (1974) 417 U.S. 433, 439 [94 S.Ct. 2357; 41 L.Ed.2nd 182].)

Self-Executing:

General Rule: the **Fifth Amendment** self-incrimination privilege is *not* “self-executing.” As a result, at least in most situations (e.g., when not in custody), it is the obligation of the individual seeking the protections of the **Fifth Amendment** to invoke it. The state is not obligated to inform an out-of-custody person of this option. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 429, 439 [79 L.Ed.2nd 409]; *United States v. Saechao* (9th Cir. 2005) 418 F.3rd 1073, 1077.)

“The privilege against self-incrimination ‘is an exception to the general principle that the Government has the right to everyone’s testimony.’ [Citation.] To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who ‘desires the protection of the privilege . . . must claim it’ at the time he relies on it.” (*People v. Tom* (2014) 59 Cal.4th 1210, 1215; quoting (*Salinas v. Texas* (2014) 570 U.S. 178, 183 [133 S.Ct. 2174; 186 L.Ed.2nd 376].) (plur. Opn. of Alito, J.)

Exceptions: However, there are a number of recognized exceptions to this rule (i.e., where it *is* self-executing). An in-custody interrogation situation is one of them; thus, the requirement that the interrogating officer remind such a suspect of his **Fifth Amendment** self-incrimination privilege. (*Minnesota v. Murphy*, *supra*, at p. 439; *United States v. Saechao*, *supra*, at p. 1077, fn. 2.)

Question: Why Do People Waive their Rights and Incriminate Themselves?

Aside from perhaps the need to make oneself look innocent by appearing to cooperate with a law enforcement investigation, and the propensity of

some to feel they he or she is smarter than the police, it is also recognized that: “The compulsion to confess wrong has deep psychological roots, and while confession may bring legal disabilities it also brings great psychological relief.” (*People v. Anderson* (1980) 101 Cal.App.3rd 563, 583-584; *People v. Carrington* (2009) 47 Cal.4th 145, 176.)

The Need for Interrogations:

“Confessions remain a proper element in law enforcement.” (*Miranda v. Arizona* (1966) 384 U.S. 436, 478 [16 L.Ed.2nd 694, 726].)

“(T)he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good” (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 181 [115 L.Ed.2nd 158, 170].)

“Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . . Absent some officially coerced self-accusation, the **Fifth Amendment** privilege is not violated by even the most damning admissions.” (*United States v. Washington* (1977) 431 U.S. 181, 187 [52 L.Ed.2nd 238, 245].)

“(A)dmissions of guilt are more than merely ‘desirable’ [Citation]; they are essential to society’s compelling interest in finding, convicting and punishing those who violate the law.” (*Moran v. Burbine* (1986) 475 U.S. 412, 426 [106 S.Ct. 1135; 89 L.Ed.2nd 410, 424].)

“A confession is like no other evidence. Indeed, ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.’” (*Arizona v. Fulminante* (1991) 499 US 279, 296 [113 L.Ed.2nd 302, 322]; quoting *Bruton v. United States* (1968) 391 U.S. 123, 139-140 [20 L.Ed.2nd 476, 487].)

“So long as the methods used comply with due process standards, it is in the public interest for the police to encourage confessions and admissions during interrogation.” (*People v. Garner* (1961) 57 Cal.2nd 135, 164.)

“Voluntary confessions are not merely ‘a proper element in law enforcement,’ *Miranda v. Arizona* (1966) 384 U.S. 436, 478 [16 L.Ed.2nd 694]) . . . , they are an ‘unmitigated good,’ *McNeil*, 501 U.S. at 181, “essential to society’s compelling interest in finding, convicting, and punishing those who violate the law,”” *Ibid.*” (*Maryland v. Shatzer* (2010) 559 U.S. 98, 108 [175 L.Ed.2nd 1045]; quoting *Moran v. Burbine* (1986) 475 U.S. 412, 426 [106 S.Ct. 1135; 89 L.Ed.2nd 410].)

“Questioning remains an important part of any criminal investigation. Police officers may legitimately endeavor to secure a suspect’s participation in the interrogation process so long as constitutional safeguards are honored.” (*People v. Enraca* (2012) 53 Cal.4th 735, 752.)

“‘A confession is like no other evidence. Indeed, ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.’” [Citations.] While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.’” *People v. Bridgeford* (2015) 241 Cal.App.4th 887, 904-905; quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 296 [113 L.Ed.2nd 302]; see also *People v. Saldana* (2018) 19 Cal.App.5th 432, 436.)

“Except for being captured red-handed, a confession is often the most incriminating and persuasive evidence of guilt—an ‘evidentiary bombshell’ that frequently ‘shatters the defense.’” (*People v. Saldana*, *supra*, citing *People v. Cahill* (1993) 5 Cal.4th 478, 497.)

However, noting that false confessions may easily be obtained by skilled interrogators, the United States Supreme Court has observed, “that a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.” (*In re Elias V.* (2015) 237 Cal.App.4th 568, 599-600; quoting *Escobedo v. Illinois* (1964) 378 U.S. 478, 488–489 [12 L. Ed.2nd 977], fns. omitted.)

In a first degree murder case, the trial court erred in refusing to admit into evidence defendant's testimony about his experience with what happened to people who denied allegations made by police in Thai refugee camps, where he was born and stayed as a boy, because the testimony was relevant under **Evid. Code, § 210** to his state of mind in interacting with detectives who interrogated him and to why he might have given a false confession. However, given the other evidence he introduced concerning his confession, the erroneous preclusion of the testimony did not deprive him of his constitutional right to present a defense and was harmless. (*People v. Xiong* (2020) 54 Cal.App.5th 1046, 1069-1070.)

Evid. Code § 210 provides a definition of “Relevant Evidence:” “‘*Relevant Evidence*’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.”

The Limitations: However, it is also recognized that the end does not always justify the means. The necessity of protecting the constitutional rights of all individuals requires the imposition of certain procedural limitations upon the efforts of law enforcement in collecting evidence in the form of a suspect’s own statements. As described below, this necessarily involves a consideration of the following:

*The **Fifth Amendment** to the United States Constitution:* Right against compulsory *self-incrimination*.

See also **California Constitution, art 1, § 15**; California’s right against self-incrimination privilege.

The Fifth (as applied to the federal government) and ***Fourteenth Amendments*** to the United States Constitution: Deprivation of one’s “right to life, liberty or property without “*due process*” of law.”

Note: “*Due Process*” requires that all persons be treated with “*fundamental fairness*.”

The “Miranda Rule:” In 1966, the United States Supreme Court, in a 5-to-4 decision, established procedural safeguards, including the familiar admonitions (i.e., the right to silence and the right to the assistance of counsel; see below), as a “prophylactic” measure to protect a suspect’s right against self-incrimination, when it decided ***Miranda v. Arizona*** (1966) 384 U.S. 436 [86 S.Ct. 1602; 16 L.Ed.2nd 694].

Pre-Miranda: History and Development of Pre-Miranda Landmark Cases:

Early Common Law:

“At early common law, confessions were admissible at trial without restriction.” (*Development of the Law—Confessions*; 79 **Harv. L.Rev.** 935, 954 (1966))

Note: This, and the following history up until 1951 is summarized primarily from the account provided in ***United States v. Dickerson*** (1999) 166 F.3rd 667, 684-685; reversed on other grounds in ***Dickerson v. United States***

(2000) 530 U.S. 428 [120 S.Ct. 2326; 147 L.Ed.2nd 405].)

In the later part of the eighteenth century, courts began to recognize that certain confessions were not always trustworthy. (E.g.; *The King v. Rudd* (K.B. 1783) 168 Eng. Rep. 160 [1 Leach 115]; “(N)o credit ought to be given (to) a confession forced from the mind by the flattery of hope or by the torture of fear . . .”

“A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected.” (*King v. Warickshall* (K.B. 1783) 168 Eng. Rep. 234, 235 [1 Leach 262, 263-264].)

“The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. (Citations.) (*Michigan v. Tucker* (1974) 417 U.S. 433, 440 [41 L.Ed.2nd 182, 190].)

Pre-Miranda Landmark Cases:

Brown v. Mississippi (1936) 297 U.S. 278 [80 L.Ed. 682]: The Supreme Court adopted a **Fourteenth Amendment** “*due process*” “*totality of the circumstances*” test and a voluntariness standard for evaluating the admissibility of confessions.

Spano v. New York (1959) 360 U.S. 315 [79 S.Ct. 1202; 3 L.Ed.2nd 1265]; Finding the use of a friend (i.e., a “*false friend*”) of the defendant’s to pry a confession out of him, after the defendant had repeatedly declined to talk without the presence of his retained lawyer, with the friend playing on the defendant’s sympathies, to be a **Fourteenth Amendment** “*due process*” violation. “The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Escobedo v. Illinois (1964) 378 U.S. 478 [12 L.Ed.2nd 977]: Ignoring defendant’s request to talk to his attorney was held to be a

violation of his **Sixth Amendment** right to an attorney (later determined to be more appropriately a violation of his **Fifth Amendment** self-incrimination rights; see *Moran v. Burbine* (1986) 475 U.S. 412, 429 [106 S.Ct. 1135; 89 L.Ed.2nd 410, 426].) and his **Fourteenth Amendment** “*due process*” rights.

Historical Note: Daniel Escobedo received a sentence of 40 years in prison for the 1983 ice pick murder of a Korean shopkeeper in Illinois, after his arrest in Mexico and conviction in 2004, in this three and a half-decades-old homicide.

People v. Dorado (1965) 62 Cal.2nd 338: Defendant need not actually request counsel. His statements were held to be inadmissible absent evidence showing he was aware of his right to counsel during an interrogation.

People v. Stewart (1965) 62 Cal.2nd 571: The *Escobedo* rule was held to apply to an investigation when it had “*focused*” on the defendant and he was thereafter subjected to a process of interrogation which lends itself to incriminating statements (at p. 578, fn. 5.), a theory that has since been discredited.

Voluntariness Becoming the Issue:

Slowly, “*voluntariness*” began to be recognized as the hallmark of a valid confession. (E.g.; *Regina v. Garner* (Ct.Crim.App. 1848) 169 Eng. Rep. 267; *Regina v. Baldry* (Ct.Crim.App. 1852) 169 Eng. Rep. 568.)

The United States Supreme Court soon adopted the rule that for a confession to be considered reliable, it must have been obtained voluntarily. (*Hoyt v. Utah* (1884) 110 U.S. 574 [28 L.Ed. 262]; *Pierce v. United States* (1896) 160 U.S. 355 [40 L.Ed. 454].)

However, the fact that the suspect was in “*custody*,” by itself, did not mean that a confession obtained from him or her was involuntary. (*Sparf v. United States* (1895) 156 U.S. 51 [39 L.Ed. 343]; *Wilson v. United States* (1896) 162 U.S. 613 [40 L.Ed. 1090].)

The United States Supreme Court specifically ruled that the failure to warn a suspect of his right to remain silent and of his right to counsel *did not* render a confession involuntary. (*Id.*, at pp. 623-624 [40 L.Ed. at p. 1096].)

Even modernly, it is recognized that purposely ignoring a suspect's purported invocation, continuing to ask questions despite an invocation of one's right to silence, is not, by itself, an issue of voluntariness. (*Pollard v. Galaza* (9th Cir. 2002) 290 F.3rd 1030.)

The fact of a *Miranda* violation, or ignoring a suspect's attempt to invoke his right to counsel (see *Edwards v. Arizona* (1981) 451 U.S. 477, 483 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 386].) does not “*inherently constitute coercion*” without evidence of actual coercion or other circumstances bearing on the suspect's free will. (*People v. Davis* (2009) 46 Cal.4th 539, 599, citing *People v. Bradford* (1997) 14 Cal.4th 1005, 1039-1040; see also *People v. Villasenor* (2015) 242 Cal.App.4th 42, 71-72; and *Bradford v. Davis* (9th Cir. 2019) 923 F.3rd 599, 615-616.)

A court's determination of voluntariness rests on an “independent” consideration of the entire record, including “the characteristics of the accused and the details of the [encounter].” (*People v. Mendez* (2019) 7 Cal.5th 680, 698-699, quoting *People v. Neal* (2003) 31 Cal.4th 63, at p. 80.)

But see “*The Issue of the Intentional Miranda Violation*,” under “*Impeachment*,” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), below.

In *Bram v. United States* (1897) 168 U.S. 532 [42 L.Ed. 568], the Supreme Court asserted for the first time that an involuntary confession was a violation of the **Fifth Amendment's right against self-incrimination**, and that only voluntary confessions were admissible as evidence in trial.

Eventually, however, it began to be recognized that the **Fifth Amendment's “Due Process Clause”** was a more proper basis for requiring that a confession be obtained voluntarily to be admissible in criminal trials. (*Brown v. Mississippi* (1936) 297 U.S. 278 [80 L.Ed. 682]; *Chambers v. Florida* (1940) 309 U.S. 227 [84 L.Ed. 716]; *Ashcraft v. Tennessee* (1944) 322 U.S. 143 [88 L.Ed. 1192]; *United States v. Carignan* (1951) 342 U.S. 36 [96 L.Ed. 48]; *Haynes v. Washington* (1963) 373 U.S. 508 [10 L.Ed.2nd 513].)

Note: Due Process under the **Fifth** (as applied to federal government) and **Fourteenth** (as applied to the individual states) **Amendments** to the United States Constitution refers to the concept that the government (federal or state) cannot deprive a person of his or her “right to life, liberty or property, without due process of law,” requiring, in effect, that all persons be treated with “*fundamental fairness*.”

“*Voluntariness*” was specifically held to be the federal test for determining the admissibility of confessions. (*Lisenba v. California* (1941) 314 U.S. 219, 238 [62 S.Ct. 280; 86 L.Ed. 166].)

Prior to *Miranda*, admissibility of an accused in-custody statements was judged solely by whether they were *voluntary* within the meaning of the **Fifth** and **Fourteenth Amendment** “*due process*” clauses. (*Oregon v. Elstad* (1985) 470 U.S. 298 [84 L.Ed.2nd 222].)

“If a suspect’s statements had been obtained by ‘techniques and methods offensive to due process’ (Citation), or under circumstances in which the suspect clearly had no opportunity to exercise ‘a free and unconstrained will’ (Citation), the statements would not be admitted.” (*Oregon v. Elstad*, *supra*, at p. 304 [84 L.Ed.2nd at p. 229]; citing *Haynes v. Washington* (1963) 373 U.S. 503, 514-515 [10 L.Ed.2nd 513, 521-522].)

See also *People v. Orozco* (2019) 32 Cal.App.5th 802, 819-820; describing law enforcement’s repeated ignoring of defendant’s attempts to invoke while trying to talk him into changing his mind as “*deplorable*” tactics.”

*Applicability of the **Fifth Amendment** to the States:*

Rule: The constitutional protections under the **Fifth Amendment**, against compelling a person to be a witness against himself, were first made applicable to the individual states in *Malloy v. Hogan* (1964) 378 U.S. 1 [84 S.Ct. 1489; 12 L.Ed.2nd 653]. (See also *Vega v. Tekoh* (June. 23, 2022) __ U.S.__, __ [142 S.Ct. 2095; __ L.Ed.2nd __].)

The California Constitution has its own equivalent to the **Fifth Amendment** in **Art 1, § 15**.

California has enacted *statutory* self-incrimination protections as well in **Evidence Code §§ 930 and 940**.

Federal Principles vs. “Independent State Grounds:” **Proposition 8**: Since passage in California of the initiative **Proposition 8** in June, 1982, **Fifth Amendment** issues, including the rules of **Miranda**, have been guided by federal principles rather than the stricter California rules which previously had been based on California’s constitutional principles under the doctrine of “*Independent State Grounds*.”

Substantive Rules: Statements taken in violation of **Miranda** can be used for impeachment purposes, abrogating California’s former rule to the contrary. (*People v. May* (1988) 44 Cal.3rd 309.)

Procedural Rules: California now follows the federal rule that a waiver of the **Miranda** protections needs to be proven by a *preponderance of the evidence*, abrogating the former California rule requiring *proof beyond a reasonable doubt*. (*People v. Markham* (1989) 49 Cal.3rd 63.)

Welf. & Insti. Code § 625.6, requiring minors 17 years of age and younger, be given access to an attorney prior to being advised of his **Miranda** rights and authorizing a trial court to consider a failure to do so as a factor in determining the admissibility of the minor’s statements, due to enactment of California’s **Proposition 8 (Cal. Const. art. I, § 28(d))**, *does not* authorize a court to exercise its discretion to exclude statements if those statements are admissible under federal law. (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 448.)

Applicability to the Military:

The President of the United States, exercising his authority to prescribe procedures for military criminal proceedings (**Art. 36(a), UCMJ, 10 U.S.C. § 836(a)**), has decreed that statements obtained in violation of the self-incrimination clause of the **Fifth Amendment** are generally inadmissible at trials by court-martial. (*Davis v. United States* (1994) 512 U.S. 452, 457 [129 L.Ed.2nd 362, 370]; **Mil. Rules of Evid., § 304(a), (c)(3)**.)

The Court of Military Appeals has held that the Supreme Court's cases construing the **Fifth Amendment** right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial. (*United States v. McLaren* (1993) 38 M.J. 112, 115; *United States v. Applewhite* (1987) 23 M.J. 196, 198.)

The Post-Miranda Rule:

“(T)he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” (*Miranda v. Arizona*, *supra*, at p. 444; see also *People v. Elizalde et al.* (2015) 61 Cal.4th 523, 531.)

The defendant's statements taken in violation of *Miranda* are not admissible in the People's “*case-in-chief*” to establish the defendant's guilt. (*People v. Boyer* (1989) 48 Cal.3rd 247, 271.)

History: In 1966, probably the most significant, most far-reaching, most *unique* decision to come out of the United States Supreme Court in the 20th century was decided by a bare majority of five justices to four. *Miranda v. Arizona*, *supra*, was decided, imposing upon law enforcement an admonishment and waiver requirement, requiring law enforcement officers to warn an in-custody criminal suspect that he or she has a constitutional right to *not* assist his or her interrogators by supplying incriminating information.

The Miranda v. Arizona Case: The facts leading up to the *Miranda* decision are often forgotten; lost in the significant legalities and progressive, historical variations.

Defendant Ernesto Miranda was arrested on March 13, 1963, and charged with kidnapping and rape. Upon being taken to the police station, he was identified by the complaining witness. Without any undue pressure, intimidation, or offers of any benefit, defendant provided a written confession. Defendant neither requested, nor was offered, the assistance of an attorney. He was also never advised that he did not have to answer questions. His confession was introduced in evidence at his later trial. He was convicted and eventually sentenced to prison for 20 to 30 years for each count. The Arizona Supreme Court upheld his conviction. (See *Miranda v. Arizona*, *supra*, at pp. 491-492 [16 L.Ed.2nd at p. 733].) The United States Supreme Court reversed.

Historical Note: Ernesto Miranda was later murdered in a knife fight in a bar on January 31, 1976, in Phoenix, Arizona, at the age

of 34. It is reported that his assailant was read his *Miranda* rights but it is unknown if he invoked those rights.

Cases Joined with the Miranda Decision: The *Miranda* case (No. 759) was joined with three other cases, all with similar issues. All four cases were joined for decision by the United States Supreme Court under the single title of “*Miranda v. Arizona*.” A summary of each case:

Vignera v. New York (No. 760): Defendant Michael Vignera was “picked up” and questioned about a robbery that occurred three days earlier. He gave police an oral confession. He was not warned of his right to the assistance of an attorney nor to remain silent. His confession was admitted against him at his trial. Vignera was convicted and sentenced to 30 to 60 years in prison. The United States Supreme Court reversed his conviction based upon law enforcement’s failure to apprise him of his **Fifth Amendment** self-incrimination privilege or of his right to have counsel present. (*Miranda v. Arizona*, *supra*, at pp. 493-494 [16 L.Ed.2nd at pp. 734-735].)

Westover v. United States (No. 761): Carl Calvin Westover was arrested by local police in Kansas City as a suspect in two robberies. Without any prior advisal of his constitutional rights, he was questioned over the better part of 14 hours. He was then turned over to FBI agents who advised him that he had the right to remain silent and to see an attorney. No waiver of these rights was sought. Defendant confessed to the FBI that he had committed two other robberies in California. His conviction and 30-year sentence in federal court was reversed by the United States Supreme Court, holding that the FBI was the beneficiary of the prior protracted interrogation tactics by local law enforcement. Although advised of his rights by the FBI, he never expressly waived those rights. “In these circumstances an intelligent waiver of constitutional rights cannot be assumed.” (*Miranda v. Arizona*, *supra*, at pp. 494-497 [16 L.Ed.2nd pp. 735-736].)

California v. Stewart (No. 584): Roy Allen Stewart was arrested by Los Angeles Police as a suspect in a series of purse-snatch robberies. One of his victims died from the injuries she suffered during the robbery. Defendant was subjected to nine different interrogations over the next five days, finally resulting in an admission that he robbed the lady who died. Defendant was convicted and sentenced to death. The California Supreme Court reversed his conviction. The United States Supreme Court affirmed California Supreme Court’s decision, holding that defendant was not advised of his rights and that “a knowing and

intelligent waiver of these rights (cannot) be assumed on a silent record.” (*Miranda v. Arizona*, *supra*, at pp. 497-499 [16 L.Ed.2nd at pp. 736-737].)

Shared Salient Features: All four of the above cases involved an “*incommunicado interrogation* of individuals in a *police dominated* atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.” (Emphasis added; *Miranda v. Arizona*, *supra*, at p. 445 [16 L.Ed.2nd at pp. 707].)

Inherent Coerciveness of the Custodial Interrogation: The *Miranda* decision was premised upon the presumption that *any interrogation* in a *custodial* situation (i.e., an “*incommunicado interrogation* of individuals in a *police-dominated* atmosphere.”) is “*inherently coercive*,” with potential “*due process*” implications. (*Miranda v. Arizona*, *supra*, at p. 445 [16 L.Ed.2nd at p. 707].)

As summarized by the California Supreme Court in *People v. Johnson* (2022) 12 Cal.5th 544, at pp. 577-578:

““The **Fifth Amendment** provides that no “person . . . shall be compelled in any criminal case to be a witness against himself.” In *Miranda* [, *supra*,] 384 U.S. 436 . . . , the [United States Supreme] Court concluded that “without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” *Id.*, at 467. Accordingly, the Court formulated the now-familiar “procedural safeguards effective to secure the privilege against self-incrimination.”” *Colorado v. Spring*, 479 U.S. 564, 572 [93 L.Ed.2nd 954; 107 S.Ct. 851] (1987) (quoting *Miranda*, *supra*, 384 U.S. at 444). Among these is the rule that when an accused has “expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” *Edwards* [, *supra*,] 451 U.S. 477, 484–485’ (*Arizona v. Mauro* (1987) 481 U.S. 520, 525–526 [95 L.Ed.2nd 458; 107 S.Ct. 1931], fn. omitted.) ““[I]nterrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.’ (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [64 L.Ed.2d 297, 100 S.Ct. 1682], fns. omitted (*Innis*).) ““[N]ot all conversation between an officer and a suspect

constitutes interrogation. The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response.” (*People v. Hensley* (2014) 59 Cal.4th 788, 810–811 . . . (*Hensley*).) The ban on further interrogation is intended to prevent police ‘from badgering a defendant into waiving his previously asserted *Miranda* rights.’ (*People v. Thomas* (2012) 54 Cal.4th 908, 926. . . .) ‘If further conversations are initiated by the police when there has not been a break in custody, the defendant’s statements are presumed involuntary and inadmissible as substantive evidence at trial.’” (*Ibid.*)

Physical Brutality, or the use of the so-called “*third degree*,” was recognized in *Miranda* as an evil that involves:

Not only a violation of the law; *but also*

The danger of causing a false confession; *and*

Making “police and prosecutors less zealous in the search for objective evidence.” (*Miranda v. Arizona*, *supra*, at p. 447 [16 L.Ed.2nd at p. 708].)

Psychological Effects: The *Miranda* decision, however, is premised more upon the recognition that the modern practice of the in-custody interrogation is *psychologically*, rather than *physically*, oriented. (*Miranda v. Arizona*, *supra*, at pp. 448-455 [16 L.Ed.2nd at pp. 709-712]; discussing interrogative techniques contained in law enforcement training manuals and used to overcome the suspect’s will and take advantage of the weaknesses of the in-custody suspect.)

Overt physical brutality is not a necessary element of a “*due process*” violation. “[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.” (*Blackburn v. Alabama* (1960) 361 U.S. 199, 206 [4 L.Ed.2nd 242, 247].)

“A confession is involuntary whether coerced by physical intimidation or psychological pressure. [Citation.] Law enforcement conduct which renders a confession involuntary does not consist only of express threats so direct as to bludgeon a defendant into failure of the will. Subtle psychological coercion suffices as well, and at time more effectively, to overbear ‘a rational intellect and a free will.’” (*United States v. Tingle* (9th Cir. 1981) 658 F.2nd 1332, 1334-1335.)

“The (*Miranda*) court expressed concern that the use of psychologically coercive interrogation techniques, as well as the inherently coercive effect of an incommunicado interrogation, would, in the absence of adequate safeguards, cause persons undergoing interrogation to incriminate themselves involuntarily. [Citation]” (*People v. Peevy* (1998) 17 Cal.4th 1184, 1191.)

This is the harm that *Miranda* was intended to address. Absent this scenario, or at least a situation approaching this, a *Miranda* admonishment should not be necessary. (See discussion below.)

Inherent Coerciveness: “*Miranda* assumed that ‘incommunicado interrogation’ in a ‘police dominated atmosphere’ is inherently coercive, and that any statement made under such circumstances is not the product of ‘free choice’ unless certain procedural safeguards are followed.” (Emphasis added; *People v. Ray* (1996) 13 Cal.4th 313, 336.)

“An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak.” (*Miranda v. Arizona*, *supra*, at p. 461 [16 L.Ed.2nd at p. 716].)

“The ‘[f]ailure to administer *Miranda* warnings creates a presumption of compulsion. Consequently unwarned statements that are otherwise voluntary within the meaning of the **Fifth Amendment** must nevertheless be excluded from evidence under *Miranda*.’ [Citation].)” (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.)

Miranda as a Constitutional Principle:

***Miranda*: “Constitutional” or “Prophylactic” Rule?:** For many years, it was believed, based upon some very direct and unambiguous authority from both the United States and the California Supreme Courts, as well as many lower appellate courts, that *Miranda* was *not* a constitutionally mandated rule. Rather, it was understood that *Miranda* had a “prophylactic” purpose, and that was to protect against abuses of one’s right against compulsory self-incrimination only and not to provide criminal suspects with an independent constitutional right. (See *New York v. Quarles* (1984) 467 U.S. 649, 654 [104 S.Ct. 2626; 81 L.Ed.2nd 550, 556].)

In deciding the *Miranda* case, the Supreme Court “adopted prophylactic protections that ‘required suppression of many statements that would have been admissible under traditional due process analysis by presuming that

statements made while in custody and without adequate warnings were protected by the **Fifth Amendment**.” (*People v. Mendez* (2019) 7 Cal.5th 680, 698; quoting *Oregon v. Elstad* (1985) 470 U.S. 298, 304 [84 L.Ed.2nd 222; 105 S.Ct. 1285].)

Miranda admonishments, however, are not constitutionally mandated. (*Moran v. Burbine* (1986) 475 U.S. 412, 424-425 [106 S.Ct. 1135; 89 L.Ed.2nd 410, 423].)

“The prophylactic rule of *Miranda* sweeps more broadly than the **Fifth Amendment** itself, however, and requires the suppression of some confessions that, while perhaps not actually involuntary, were obtained in the presumptively coercive environment of police custody. [Citations]” (*Tankleff v. Senkowski* (2nd Cir. 1998) 135 F.3rd 235, 243.)

The standards enunciated in *Miranda* were “designed to assure protection of the Federal Constitution’s **Fifth Amendment** privilege against self-incrimination under ‘inherently coercive’ circumstances.” (*People v. Sims* (1993) 5 Cal.4th 405, 440.)

“The familiar warnings required by *Miranda* are at present construed as judicially declared rules intended to secure the constitutional right against self-incrimination, but the warnings are not themselves rights of constitutional stature. [Citations] ‘[T]he right to silence described in those warnings derives from the **Fifth Amendment** and adds nothing too it.’ [Citation] The warnings are, in short, only a means toward the end of safeguarding the suspect’s **Fifth Amendment** right. [Citations]” (*People v. Montano* (1991) 226 Cal.App.3rd 914, 932.)

The warning and waiver components of *Miranda* are no more than a court-created “series of recommended ‘procedural safeguards’ [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against self-incrimination was protected. [Citation]” (*Davis v. United States* (1994) 512 U.S. 452, 457 [129 L.Ed.2nd 362, 370].)

“It remains clear . . . that this prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the **Fifth Amendment’s** prohibition on coerced confessions, but is instead justified only by reference its prophylactic purpose.” (*Davis v. United States, supra*, at p. 458 [129 L.Ed.2nd at p. 371]; citing *Connecticut v. Barrett* (1987) 479 U.S. 523, 528 [93 L.Ed.2nd 920, 928].)

A simple failure to administer a *Miranda* warning is not itself a violation of the **Fifth Amendment**. (*Oregon v. Elstad* (1985) 470 U.S. 298, 305, fn. 1 [84 L.Ed.2nd 222; 105 S.Ct. 1285]; *United States v. Gonzalez-*

Sandoval (9th Cir. 1990) 894 F.2nd 1043, 1048; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 955.)

“There is nothing inherently unlawful about noncoercive questioning that merely contravenes the rules set out in *Miranda*.” (*People v. Felix* (1977) 72 Cal.App.3rd 879, 885.)

Similarly, purposely ignoring a suspect’s purported invocation, continuing to ask questions despite an invocation of one’s right to silence, is not, by itself, an issue of voluntariness. (*Pollard v. Galaza* (9th Cir. 2002) 290 F.3rd 1030.)

A court’s determination of voluntariness rests on an “independent” consideration of the entire record, including “the characteristics of the accused and the details of the [encounter].” (*People v. Mendez* (2019) 7 Cal.5th 680, 698-699, quoting *People v. Neal* (2003) 31 Cal.4th 63, at p. 80.)

Dickerson v. United States (2000) 530 U.S. 428 [120 S.Ct. 2326; 147 L.Ed.2nd 405]: The United States Supreme Court determined that the *Miranda* decision announced a “constitutional decision of this Court” and as such, cannot be overruled by a legislative enactment.

Rule Before Dickerson:

Prior to *Dickerson*, case law consistently held that a *Miranda* admonishment was “*not constitutionally mandated*.” (E.g.; see *Moran v. Burbine* (1986) 475 U.S. 412, 424-425 [106 S.Ct. 1135; 89 L.Ed.2nd 410, 423]; see also *Davis v. United States* (1994) 512 U.S. 452, 457 [129 L.Ed.2nd 362, 370]; *Oregon v. Elstad* (1985) 470 U.S. 298, 305, fn. 1 [84 L.Ed.2nd 222; 105 S.Ct. 1285]; *United States v. Gonzalez-Sandoval* (9th Cir. 1990) 894 F.2nd 1043, 1048.)

Facts:

Congress enacted **18 U.S.C. § 3501** two years (i.e., 1968) after *Miranda* was decided for the specific purpose of getting around the rule of *Miranda* by statutorily returning the admissibility of an in-custody defendant’s statements to an issue of *voluntariness*, with a *Miranda*-style admonishment being but one factor to consider (see **18 U.S.C. § 3501(b)(3) & (4)**) in determining whether defendant’s statements were voluntary.

Under the terms of the statute, “*voluntariness*” would be the issue to be decided by the trial court. (**18 U.S.C. § 3501(a)**): “. . . a

confession . . . shall be admissible in evidence if it is voluntarily given.”)

Although not used for almost a third of a century, the Fourth Circuit Court of Appeal applied the statute to make admissible the *un-Mirandized* statements of a bank robber. (See ***United States v. Dickerson*** (4th Cir. 1999) 166 F.3rd 667.) The Supreme Court reversed, finding that despite its earlier language indicating that ***Miranda*** was but a “*prophylactic rule*” of procedure (see above), ***Miranda*** in fact imposed a *constitutional requirement*.

However, a statute cannot overrule a Supreme Court decision which is based upon the Constitution. (E.g., see ***City of Boerne v. Flores*** (1997) 521 U.S. 507, 517-521 [138 L.Ed.2nd 624, 636-638].) In determining the validity of **section 3501**, the Supreme Court was forced to decide whether ***Miranda*** “announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction.” (***Dickerson v. United States***, *supra*, at p. 437 [120 S.Ct. 2326; 147 L.Ed.2nd at p. 415].)

Result: The Supreme Court, in a 7-to-2 decision, concluded in ***Dickerson*** that “***Miranda*** announced a *constitutional rule* that Congress *may not* supersede legislatively,” thus rendering **section 3501** a nullity. (Emphasis added; ***Id.*** at p. 444 [120 S.Ct. 2326; 147 L.Ed.2nd at p. 420].)

Some courts are still confused by this theory. In ***Tekoh v. County of Los Angeles*** (9th Cir. 2021) 985 F.3rd 713, the Ninth Circuit Court of Appeal reversed a trial court decision where the district court judge had instructed a civil jury according to the pre-***Dickerson*** rule; i.e., that the jury was to consider the “*objective totality of all the surrounding circumstances. Whether a confession is improperly coerced or compelled . . .*” (pg. 717.) In reversing, the ***Tekoh*** Court held that when an *un-Mirandized* statement is used against a defendant in a criminal case in the prosecution’s case in chief, the defendant’s constitutional **Fifth Amendment** right against self-incrimination is in fact violated. As such, this violation of the defendant’s constitutional self-incrimination rights may serve as a basis for a federal **42 U.S.C. § 1983** civil suit.

What Does Dickerson Mean: When a police officer violates the rules of ***Miranda***, but before a resulting confession is used in evidence in a trial, has he or she violated the Constitution? The answer is “*No*.”

Chavez v. Martinez (2003) 538 U.S. 760 [155 L.Ed.2nd 984], followed ***Dickerson***, and found that neither a ***Miranda*** violation, nor even a

“coercive” interrogation, violates the **Fifth Amendment** constitutional protection against self-incrimination. It is not until the result of a *Miranda* violation is used in court against the defendant that the defendant’s **Fifth Amendment** self-incrimination privilege has been violated.

In *Chavez*, it was alleged that a police sergeant ignored a seriously wounded suspect’s refusals to answer questions while interfering with the medical personnel’s attempts to treat him, when the suspect (Martinez) had never been advised of his *Miranda* rights. The suspect, who was never charged with a criminal offense arising from this incident, sued Sgt. Chavez and the Oxnard Police Department pursuant to **42 U.S.C. § 1983** in federal court, for violating his federal constitutional rights.

United States v. Patane (2004) 542 U.S. 630 [159 L.Ed.2nd 667] followed *Chavez*, and reiterated the rule that the **Fifth Amendment** (and perhaps even the *Miranda* rule itself) is a “trial right,” and is therefore not violated by a police officer who ignores the *Miranda* admonishment and waiver requirements. A *Miranda* violation does not blossom into a **Fifth Amendment** violation until the product of the improper interrogation is used in court. (See also *United States v. Verdugo-Urguidez* (1990) 494 U.S. 259, 264 [108 L.Ed.2nd 222, 232]; and *People v. Davis* (2005) 36 Cal.4th 510, 552.)

See also *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 727; “(T)he right against self-incrimination is not itself violated until statements obtained by compulsion are used in criminal proceedings against the person from whom the statements were obtained.” (Italics in original, citing *Chavez v. Martinez*, *supra*, at pp. 767-773, 777-778.)

And see *Tobias v. Arteaga* (9th Cir. 2021) 996 F.3rd 571, at p. 580: “The district court correctly denied qualified immunity on Tobias’s claim that the LAPD Detectives violated his **Fifth Amendment** right to counsel by continuing his custodial interrogation after he requested an attorney and then using the resulting confession against him in his criminal case.”

The Ninth Circuit Court of Appeal: Even before *Dickerson*, federal decisions such as *Henry v. Kernan* (9th Cir. 1999) 197 F.3rd 1021.) and *California Attorneys for Criminal Justice v. Butts* (9th Cir. 1999) 195 F.3rd 1039, tended to blur the distinctions between a simple *Miranda* violation and the **Fifth Amendment**.

Henry v. Kernan: Per the Ninth Circuit, any “deliberate course of action to violate *Miranda*” is a constitutional violation as well as a *Miranda* violation. Without attempting to explain the differences between the two, the Court opined that although a simple *Miranda* violation does not implicate the Constitution, when the “police knowingly engage in calculated misconduct in order to secure the disputed evidence,” the Constitution *is* violated. While the defendant in this case was misled into believing that his responses could not be used against him (a police tactic consistently considered to constitute “coercion;” see *California Attorneys v. Butts*, *supra*.), the constitutional violation per the Court was in the interrogating officers’ *deliberate intent* to violate the suspect’s *Miranda* rights.

California Attorneys v. Butts: Although acknowledging that *Miranda* is but a “prophylactic device” used to ensure respect for an in-custody criminal suspect’s **Fifth Amendment** right against self-incrimination and not an independent constitutional right in itself, *this* panel of the Ninth Circuit went on to hold that “*Miranda* cannot be viewed entirely apart from the constitutional rights that it protects.” (Certiorari was denied in *Butts* by the Supreme Court on the same day *Dickerson* was decided.)

The Ninth Circuit Court of Appeal has also interpreted this to mean that a defendant’s **Fifth Amendment** self-incrimination rights have been violated if used even pre-trial, any time they are used to prompt a criminal filing and in certain pre-trial hearings. “A coerced statement has been ‘used’ in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status.” (*Stoot v. City of Everett* (9th Cir. 2009) 582 F.3rd 910, 922-925; finding also that a pre-trial evidentiary hearing, to determine the admissibility of the statements themselves, did *not* constitute a **Fifth Amendment** violation.)

Stoot further held that because it was reasonably foreseeable that a prosecutor would use the results of the interrogation (i.e., defendant’s confession), the fact that it was so used by a prosecutor did not cut off the interrogating officer’s potential civil liability. (*Stoot v. City of Everett*, *supra*, at pp. 926-927.)

The other federal circuits are split on whether the **Fifth Amendment** self-incrimination protections extend to pre-trial hearings:

Yes: *Higazy v. Templeton* (2nd Cir. 2007) 505 F.3rd 161, 171, 173, bail hearings, suppression hearings, arraignments, and probable cause hearings; *Best v. City of Portland* (7th Cir. 2009) 554 F.3rd 698, 702-703, suppression hearings; *Sornberger v. City of Knoxville* (7th Cir. 2006) 434 F.3rd 1006, 1027, bail hearings, arraignments; *City of Hays v. Vogt* (10th Cir. 2017) 844 F.3rd 1235, 1239-1246.)

No: *Renda v. King* Cir. 2003) 347 F.3rd 550, 552, “[A] plaintiff may not base a § 1983 claim on the mere fact that the police questioned her in custody without providing *Miranda* warnings when there is no claim that the plaintiff’s answers were used against her at trial.”; *Burrell v. Virginia* (4th Cir. 2005) 395 F.3rd 508, 514, “[The plaintiff] does not allege any trial action that violated his **Fifth Amendment** rights; thus, ipso facto, his claim fails on the [*Chavez v. Martinez* (2003) 538 U.S. 760 [123 S.Ct. 1994; 155 L.Ed.2nd 984] plurality’s reasoning.”); *Murray v. Earle* (5th Cir. 2005) 405 F.3rd 278, 285, “The **Fifth Amendment** privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right.”

The requirement that the rule of *Miranda* only applies where there is a custodial interrogation “is a function of *Miranda*’s underlying rationale—namely, as a ‘constitutional rule’ implementing the **Fifth Amendment**’s privilege against self-incrimination.” (*People v. Orozco* (2019) 32 Cal.App.5th 802, 811; citing *Dickerson v. United States*, *supra*, at pp. 440-444.)

The Ninth Circuit further held that the same rule applies to *coerced* confessions, in violation of the **Fifth Amendment**. (*Crowe v. County of San Diego* (9th Cir. 2010) 593 F.3rd 841, 862; finding the rule to apply to a “*Dennis H.* hearing” (a hearing within the first 48 hours of custody to determine whether a minor should be declared a ward of the court; *In re Dennis H.* (1971) 19 Cal.App.3rd 350.), grand jury proceedings, and **W&I § 707** hearing to determine whether the boys should be tried as adults.)

There is a split of authority on this issue. The following courts agree with the Ninth Circuit:

- *Sornberger v. City of Knoxville* (7th Cir. 2006) 434 F.3rd 1006.
- *Higazy v. Templeton* (2nd Cir. 2007) 505 F.3rd 161.

But the following courts have held that the **Fifth Amendment** is not violated until used at the actual trial of the matter:

- *Burrell v. Virginia* (4th Cir. 2005) 395 F.3rd 508.
- *Murray v. Earle* (5th Cir. 2005) 405 F.3rd 278.
- *Renda v. King* (3rd Cir. 2003) 347 F.3rd 550.

Note, however, *People v. Superior Court (Corbett)* (2017) 8 Cal.App.5th 670, at p. 679, where the Second District Court of Appeal (Div. 7) erroneously held “. . . the police violated the **Fifth Amendment** by failing to honor Corbett’s unambiguous invocation during custodial interrogation of his right to remain silent.”

The Seventh Circuit Court of Appeal has held that where an un-*Mirandized* statement was used against the defendant *in the commencement* of her criminal prosecution, but where charges were dropped prior to trial, the **Fifth Amendment** is violated. (*Sornberger v. City of Knoxville* (7th Cir. 2006) 434 F.3rd 1006, 1026-1027.)

In discussing what *Dickerson* means, the Ninth Circuit Court of Appeal vacated a district court’s judgment on a jury’s verdict in Plaintiff’s civil suit against a deputy sheriff for having violated his *Miranda* rights, reversing the district court’s judgment as to plaintiff’s requested jury instruction, and remanded for a new trial in an action alleging, in part, that plaintiff’s **Fifth Amendment** right against self-incrimination was violated when his un-*Mirandized* statement was used against him at his criminal trial. The Court held that in light of the Supreme Court’s decision in *Dickerson v. United States*, *supra*, plaintiff had been deprived of his **Fifth Amendment** right against self-incrimination, allowing him to assert a claim against the state official who deprived him of that right under § 1983. The Court held that while the question of liability was ultimately for the jury to decide, plaintiff sufficiently demonstrated a **Fifth Amendment** violation of his *Miranda* rights. Also, there was no question that the deputy sheriff caused the introduction of the statements at plaintiff’s criminal trial even though he himself was not the prosecutor. Where government officials introduce an un-*Mirandized* statement to prove a criminal charge at a criminal trial against a defendant, a § 1983 claim may

lie against the officer who took the statement. By contrast, in cases like *Chavez v. Martinez*, *supra*, where the suspect was never charged, or where police coerce a statement but do not rely on that statement to file formal charges, the **Fifth Amendment** is not implicated. (*Tekoh v. County of Los Angeles* (9th Cir. 2021) 985 F.3rd 713, 719-720.)

The Court in *Tekoh* differentiated its facts from its prior holding in *Fortson v. L.A. City Attorney's Office* (9th Cir. 2017), 852 F.3rd 1190 (a **Second Amendment**, right to the possession of firearms, case), where there was no indication that the plaintiff's un-*Mirandized* statements were used against him in a subsequent criminal case. (At pg. 724, fn. 10.)

The *Tekoh* Court further noted in a footnote that if it had been determined that plaintiff was *not* in custody at the time of the interrogation, then no *Miranda* warnings would have been necessary, and there being no *Miranda* nor **Fifth Amendment** violation, the defendant deputy sheriff could not be civilly liable. (At pg. 725, fn. 11.) The entire *Tekoh* decision, however, is written under the unstated assumption that the plaintiff was in fact in custody at the time of the interrogation in issue.

Tekoh was soon reversed by the U.S. Supreme Court in *Vega v. Tekoh* (June. 23, 2022) __ U.S.__ [142 S.Ct. 2095; __ L.Ed.2nd __]. See below.

Fourteenth Amendment “Due Process:” However, per the majority of the *Chavez* Court, a *coercive* interrogation, conducted in a manner that “shocks the conscience,” may be a **Fourteenth Amendment** “substantive due process” violation. (*Chavez v. Martinez*, *supra*; case remanded for determination of this issue.)

See also *Crowe v. County of San Diego* (9th Cir. 2010) 593 F.3rd 841, 862-863, and *Tobias v. Arteaga* (9th Cir. 2021) 996 F.3rd 571, at pp. 584-585.)

“The substantive due process standard requires showing that an officer engaged in an ‘abuse of power [that] “shocks the conscience” and “violates the decencies of civilized conduct.”’” (*Id.*, at p. 584, quoting *Stoot v. City of Everett* (9th Cir. 2009) 582 F.3rd 910, 928.)

“The **Fourteenth Amendment** of the federal Constitution and **article I, section 7** of the California Constitution make ‘inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion.’” (*People v. Sapp* (2003) 31 Cal.4th 240, 267; see also *People v. Peoples* (2016) 62 Cal.4th 718, 740.)

See “*Lawful Exceptions to the **Miranda** Rule*,” “*Use of non-coerced statements for impeachment purposes*,” (Chapter 5), below.

Dickerson’s Effect upon the Legal Exceptions to Miranda:

Since the United States Supreme Court has held that the rule of *Miranda* is in fact a *constitutional rule*, and not merely the “*prophylactic*” rule we were led to believe for so many years, the question often comes up: “*What about the legal exceptions to **Miranda**; are they still good?*”

The answer is: “*Yes*,” at least so far (see below).

In *Dickerson* (530 U.S. at p. 441 [120 S.Ct. 2326; 147 L.Ed.2nd at p. 418].), the Supreme Court discusses the fact that the court-imposed sanctions for a **Fifth Amendment/Miranda** violation need not necessarily be the same as imposed for a **Fourth Amendment/Search & Seizure** violation, hinting at the continuing validity of prior decisions which have upheld that the non-applicability of “*fruit of the poisonous tree*” doctrine and the lawful use of statements taken in violation of *Miranda* for purposes of impeachment.

The California Supreme Court has held that *Dickerson* has not changed the rules on using uncoerced statements, despite being taken in violation of *Miranda*, for impeachment purposes. (*People v. DePriest* (2007) 42 Cal.4th 1, 29-36; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 29-30.)

See “*Lawful Exceptions to the **Miranda** Rule*” (Chapter 5), below.

The U.S. Supreme Court finally explained the *Dickerson* ruling in more detail in *Vega v. Tekoh* (June. 23, 2022) __ U.S.__ [142 S.Ct. 2095; __ L.Ed.2nd __]. In *Vega*, the Court (in a split, 6-to-3 decision) held that “a violation of *Miranda* is not itself a violation of the **Fifth Amendment**, and . . . (the majority of the Court saw) no justification for expanding *Miranda* to confer a right to sue under (42 U.S.C.) § 1983.” The Court reached this conclusion after evaluating all its earlier decisions where it was noted that *Miranda*, although based upon constitutional

principles and intended to enforce and give weight to the **Fifth Amendment** self-incrimination protections, was never intended to provide a right for a criminal defendant to sue an offending law enforcement officer in a civil suit.

Why Prosecutors and Police Officers Should be Concerned; Applicable Professional and Ethical Standards:

General Principles:

Prosecutors, from an ethical and professional standpoint, as “*officers of the court*,” should *not* be advising police officers to violate *either* the Constitution *or* the dictates of the state and federal Supreme Courts. (See below)

Law Enforcement Officers, having sworn to uphold the Constitution and the laws of this nation and California, should not themselves be purposely devising ways to bypass or ignore the Constitution *or* the dictates of the State and Federal Supreme Courts. (See below)

*Courts’ Condemnation of Intentional **Miranda** Violations:*

The United States Supreme Court has specifically commanded that: “If the accused indicates that he wishes to remain silent, “the interrogation must cease.” If he requests counsel, “the interrogation must cease until an attorney is present.” (***Edwards v. Arizona*** (1981) 451 U.S. 477, 482 [101 S.Ct. 1880; 68 L.Ed.2nd 378].)

“***Edwards*** set forth a “bright-line rule” that *all* questioning must cease after an accused requests counsel. [Citation.] In the absence of such a bright-line prohibition, the authorities through “badger[ing]” or “overreaching”—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel’s assistance.”” (***People v. Henderson*** (2020) 9 Cal.5th 1013, 1022; quoting ***Smith v. Illinois*** (1984) 469 U.S. 91, 98 [83 L.Ed.2nd 488, 105 S. Ct. 490]; see also ***People v. Johnson*** (2022) 12 Cal.5th 544, at pp. 591-502.)

The United States Supreme Court has also condemned the practice of training law enforcement to purposely violate the rules of ***Miranda***. (***Missouri v. Seibert*** (2004) 542 U.S. 600 [159 L.Ed.2nd 643], at fn. 2.)

The California Supreme Court is in agreement:

A defendant's re-initiation of questioning in a murder case was held to be "involuntary" (and thus a **Fourteenth Amendment** "due process" violation) after defendant had invoked his *Miranda* rights to remain silent and to receive assistance of counsel some nine times during the detective's earlier interrogation, where the detective had continued the earlier interrogation in deliberate violation of *Miranda* in the hope of obtaining impeachment evidence, with defendant remaining in custody and incommunicado after the earlier interrogation without being provided access to counsel and without being provided food, drink, or toilet facilities, when the defendant was only 18 years old, inexperienced in legal matters, with minimal education and with low intelligence, and the detective made promises and threats during earlier interrogation after having violated *Miranda*. (*People v Neal* (2003) 31 Cal.4th 63.)

"Our conclusion that the officers' repeated refusal to honor defendant's invocation of his *Miranda* rights did not induce an involuntary statement should not be construed as condoning the officers' tactics. The [U.S.] Supreme Court has made clear that '*Miranda* is a constitutional decision' [Citation.] and articulates 'a constitutional rule' [Citation.], notwithstanding exceptions to the rule like the one at issue here. [Citations.] Thus, the deliberate, intentional and repeated violation of that rule may violate a defendant's constitutional rights. At a minimum, '[a]s we have emphasized on more than one occasion, [such] misconduct . . . is "unethical" and must be "strongly disapproved." [Citation.]' [Citation.] This type of police misconduct is not only nonproductive, as this case demonstrates, but can be counterproductive because in the appropriate case it would compel us to reverse a conviction. [Citation.] Surely, the possibility of reversal must outweigh whatever advantage police interrogators hope to gain by systematically ignoring a defendant's invocation of his or her *Miranda* rights. Moreover, respect for the rule of law is not advanced when the guardians of

the law elect to deliberately violate it.” (*People v. Jablonski* (2006) 37 Cal.4th 774, 817.)

See also *People v. Peevy* (1998) 17 Cal.4th 1184, 1205-1207; declining to decide whether an officer’s intentional violation of *Miranda* was the product of “widespread, systematic police misconduct,” and if so, whether such a practice requires the suppression of a defendant’s statements for all purposes (i.e., to include impeachment).

The California Supreme Court reaffirms “*that principle*,” and warns, again, that if it is found that such the practice of intentional *Miranda* violations have become widespread or pursuant to an official police department practice, an exclusionary rule may be developed. (*People v. Nguyen* (2015) 61 Cal. 4th 1015, 1077-1078.)

And see *People v. Johnson* (2022) 12 Cal.5th 544, at pp. 591-591, where the intentional ignoring of a hospitalized murder suspect’s attempts to invoke both his right to silence (violating *Miranda*) and to the assistance of counsel (violating *Edwards v. Arizona* (1981) 451 U.S. 477, 482 [101 S.Ct. 1880; 68 L.Ed.2nd 378].) was found to be troubling (“. . . *we are troubled by the earlier law enforcement conduct*.”), although the Court ultimately upheld defendant’s later reinitiation of questioning despite finding the issue as “close.”

Later in its decision, the California Supreme Court found it “*concerning* (italics added) the multiple clear violations of *Miranda* that occurred in this case through the repeated efforts of investigating officials to solicit defendant’s waiver of his rights to silence and counsel, after he had expressed his unwillingness to talk,” noting that “it is one thing to reapproach a suspect about his willingness to talk after a ‘significant period of time’ . . . ; it is another thing to reapproach the suspect to confront him or to inquire about his willingness to talk no less than five times in a roughly three-hour span. (*Id.*, at p. —.)

Per the Court in discussing the practice of an intentional *Miranda/Edwards* violation: “We emphasize the substantial costs to the justice system and the lives affected when law enforcement

officials, however well-intentioned, do not conform their own conduct to the law.” (*Id.*, at p. __.)

And then again, at pg. __, fn. 4, the Court reiterated: “No one should take from this opinion the lesson that violations of constitutional rights carry no consequences. Every violation jeopardizes the ability to place before a jury anything a suspect might say, and jeopardizes any conviction that might be obtained if matters that should have been excluded are erroneously admitted.”

The Ninth Circuit’s Opinion:

The federal Ninth Circuit Court of Appeal has also indicated their belief that not only is there civil liability when it is proven that police officers had a pre-existing plan to intentionally ignore an in-custody suspect’s attempts to invoke his **Fifth Amendment** rights (an issue not discussed in **Chavez**), but such a plan might also trigger a federal criminal prosecution per **18 U.S.C. § 241** (10 yrs/\$10,000). (*Cooper v. Dupnik* (9th Cir. 1992) 963 F.2nd 1220, 1243, fn. 10.)

Also, the Ninth Circuit Court of Appeal, noting agreement with the California Supreme Court, termed an intentional **Miranda** violation as, “*unethical and . . . strongly disapproved.*” (*Bradford v. Davis* (9th Cir. 2019) 923 F.3rd 599, 620.)

Other Decisions:

California’s Second District Court of Appeal (Div. 2) has most recently found intentional **Miranda** violations to be a “*deplorable*” interrogation tactic (Italics added; *People v. Orozco* (2019) 32 Cal.App.5th 802, 816.)

Also, out of the Second District’s Division 6: “We share the views of division four of this court: ‘This is a very troubling case, presenting a deliberate police violation of **Miranda**’ [Citation.] The holding of **Miranda** is not arcane and establishes a ‘bright line’ rule. [Citation.] When the police deliberately step over the line and disobey Supreme Court pronouncements, respect for the rule of law necessarily diminishes. Appellant’s confession should not have been admitted into evidence. Were we to reach a

contrary determination, the police could deliberately and successfully ignore the pronouncements of the United States and California Supreme Courts.” (*In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602.)

The Court is making reference to *People v. Bey* (1993) 21 Cal.App.4th 1623, at p. 1628, where Division 4 of the Second District Court of Appeal comments: “This is a very troubling case, presenting a deliberate police violation of *Miranda* coupled with a misrepresentation to appellant about the legal consequences of that violation.”

Legal Effects of Dickerson:

It appears, at least to date, that despite converting *Miranda* from a mere “prophylactic” rule of procedure to a *constitutional principle*, the Supreme Court did not intend to alter the consequences of a *Miranda* violation, or eliminate any of the commonly accepted exceptions to the rule. (See “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), below.

The Supreme Court in *Dickerson* specifically noted that the consequences of a **Fourth Amendment** *search and seizure* violation are not necessarily the same as a **Fifth Amendment** (i.e., *Miranda*) violation. (*Dickerson v. United States, supra*, at p. 441 [147 L.Ed.2nd at p. 418].) The Court specifically referred to the continuing validity of:

The “*Public Safety Exception*.” (per *New York v. Quarles* (1984) 467 U.S. 649 [104 S.Ct. 2626; 81 L.Ed.2nd 550].) (See below)

Use of “*non-coerced*” statements for *impeachment* purposes. (Per *Harris v. New York* (1971) 401 U.S. 222 [28 L.Ed.2nd 1].)

The Ninth Circuit Court of Appeal, in changing its mind from several prior decisions (see *Henry v. Kernan* (9th Cir. 1999) 177 F.3rd 1152 (amended at 197 F.3rd 1021.); and *California Attorneys for Criminal Justice v. Butts* (9th Cir. 1999) 195 F.3rd 1039), more recently ruled that *it matters not whether the violation is intentional*. So long as not coerced, the defendant’s statements are admissible for impeachment purposes. (*Pollard v. Galaza* (9th Cir. 2002) 290 F.3rd 1030.)

The California Supreme Court agrees (*People v. Peevy* (1998) 17 Cal.4th 1184.), at least if not accompanied by aggravating factors sufficient to constitute “*coercion*” and

thus a **Fourteenth Amendment** “*due process*” violation. (*People v. Neal* (2003) 31 Cal.4th 63.)

“Statements taken in violation of *Miranda* are inadmissible in the government’s case-in-chief. The prosecution may still use such statements for impeachment purposes. (E.g., *People v. Pokovich* (2006) 39 Cal.4th 1240, 1247 . . . ; *People v. Peevy* (1998) 17 Cal.4th 1184, 1193) What the government may not use against a defendant for any purpose are any of her involuntary statements. We consider statements involuntary—and thus subject to exclusion under the **Fifth** and **Fourteenth Amendments** of the federal Constitution—if they are the product of ‘coercive police conduct.’ (*People v. Williams* (2010) 49 Cal.4th 405, 437)” (*People v. Caro* (2019) 7 Cal.5th 463, 492.)

But see the concurring opinion in *Caro* (at pp. 527 to 535) arguing that defendant was not only coerced into making incriminating admissions (a “due process” violation), but that she was also in custody while questioned without benefit of a *Miranda* admonishment or waiver.

It was not prosecutorial misconduct for the prosecution to hold back defendant’s tape-recorded confession until the People’s rebuttal case, after defendant testified and claimed that he didn’t remember confessing because he was drunk and “blacked out.” Use of a defendant’s statements for impeachment purposes (to show his lack of intoxication, in the case) is lawful, particularly in this case when the prosecution promised only not to use a particular officer’s testimony as to defendant’s state of inebriation. (*People v. Debouver* (2016) 1 Cal.App.5th 972, 979-981.)

***Miranda* Violations as a Due Process Issue:**

Due Process: The California Supreme Court, in *People v. Neal* (2003) 31 Cal.4th 63, has since held that purposely ignoring an in-custody suspect’s repeated attempts to invoke his *Miranda* rights some nine times, *plus other aggravating circumstances*, constitutes a constitutional “*due process*” violation, sufficient, at least, to preclude the use of a defendant’s resulting statements even for purposes of impeachment. (See also *People v. Orozco* (2019) 32 Cal.App.5th 802, 818-521.)

The Court noted in *Neal* that in addition to the detective purposely ignoring the defendant’s attempts to invoke both his right to

remain silent and, repeatedly (i.e., nine times), his right to an attorney, the defendant was also young, inexperienced, and had minimal education and intelligence, and he had been deprived of food, water, bathroom facilities, and any contact with non-custodial personnel overnight while remaining in custody. Also, undermining his will to resist, defendant was subjected to the detective's promise to help him if he cooperated, but a threat that the "system" would "stick it to him" if he didn't. This, all added together, constituted a **Fourteenth Amendment** "*due process*" violation. As the product of a constitutional "*due process*" violation that went well beyond simply ignoring an attempt to invoke one's *Miranda* rights, the defendant's decision to reinitiate questioning and his resulting confessions were "*involuntary*" and inadmissible for *any* purpose (including impeachment).

A court's determination of voluntariness rests on an "independent" consideration of the entire record, including "the characteristics of the accused and the details of the [encounter]." (*People v. Mendez* (2019) 7 Cal.5th 680, 698-700, quoting *People v. Neal*, *supra*, at p. 80, while differentiating the facts from those in *Neal*.)

See also *People v. Johnson* (2022) 12 Cal.5th 544, at p. 584, where the Supreme Court differentiated the facts in this case from those of *Neal*.

How does Neal square with Chavez?

Despite the fact that the California Supreme Court in *Neal* never intimated that the detective's actions "*shocked the conscience*," which was the necessary threshold for finding a "*due process*" violation in the federal *Chavez* case, it was noted in *Neal* (in fn.1) that *Chavez* did not apply to a criminal case in that the issue in *Chavez* was a person's right to file a civil lawsuit, per **42 U.S.C. § 1983**, while the issue in *Neal* was the potential suppression of elicited statements in a criminal case. The Court did not cite any authority for its conclusion that what constitutes a "*due process*" violation depends upon the nature of the resulting court proceeding; i.e., *civil vs. criminal*.

Totality of the Circumstances:

To find a "*due process*" violation, there must have been some form of coercion. Repeatedly ignoring a suspect's invocation to this right to counsel, even though combined with purposely putting him into an interview room with his girlfriend hoping that she might elicit some incriminating statements (which in fact happened), although a form of deception, was not what elicited defendant's

eventual confession. In considering the “totality of the circumstances, and “(b)ecause the ‘proximate caus[e]’ of his ensuing confession was the conversation—and not the deceptive act of orchestrating its occurrence—the requisite proximate causal link between the police stratagem and defendant’s confession is missing.” (*People v. Orozco* (2019) 32 Cal.App.5th 802, 818-821.)

Purposes of Miranda:

As indicated by the multitude of cases described in this outline (see below), the courts have made it clear that the purposes of *Miranda* are threefold:

- To insure respect for these constitutional principles by law enforcement; and
- To guarantee an awareness of these constitutional principles by those being questioned by law enforcement in a custodial, incommunicado, context.
- To protect an in-custody criminal suspect from the inherent coerciveness of an *incommunicado, police-dominated* (i.e., “stationhouse”) interrogation.

See *Vega v. Tekoh* (June. 23, 2022) __ U.S.__, __ [142 S.Ct. 2095; __ L.Ed.2nd __].

Understanding these *purposes* behind the *Miranda* decision often helps to understand the reasoning behind the case law of *Miranda*, and to recognize under what circumstances it is, or is not, necessary to apply its rules.

“The ‘constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.’ *Schmerber v. California*, 384 U.S. 757, 762 (1966). To maintain a ‘fair state-individual balance,’ the privilege ensures that the government ‘shoulder[s] the entire load’ in building a criminal case. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). ‘[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from [the defendant’s] own mouth.’ *Id.*” (*Minnesota v. Diamond* (2018) 905 N.W.2nd 870.)

The rules of ***Miranda*** only apply when there is a law enforcement-citizen contact involving an “*incommunicado interrogation* of individuals in a *police dominated atmosphere*, resulting in self-incriminating statements without full warnings of constitutional rights.” (Emphasis added; ***Miranda v. Arizona***, *supra*, at p. 445 [16 L.Ed.2nd at p. 707].)

The purpose behind ***Miranda*** is “preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment.” (***Arizona v. Mauro*** (1987) 487 U.S. 520, 529-530 [95 L.Ed.2nd 458, 468].)

“The (***Miranda***) court expressed concern that the use of psychologically coercive interrogation techniques, as well as the inherently coercive effect of *incommunicado* interrogation, would, in the absence of adequate safeguards, cause persons undergoing interrogation to incriminate themselves involuntarily. [Citation]” (***People v. Peevy*** (1998) 17 Cal.4th 1184, 1191.)

See also ***Missouri v. Seibert*** (2004) 542 U.S. 600, 610, & fn. 2 [159 L.Ed.2nd 643], criticizing an interrogation tactic (interrogation-warning-interrogation) intended to “exert . . . pressure upon an individual as to disable him from making a free and rational choice.”

The ***Miranda*** decision was premised upon the presumption that *any interrogation* in a custodial situation (i.e.; “*incommunicado interrogation of an individual in a police-dominated atmosphere*”) is “*inherently coercive*.” (***Miranda v. Arizona*** (1966) 384 U.S. 436, 445 [16 L.Ed.2nd 694, 708].) see also ***Doody v. Ryan*** (9th Cir. 2011) 649 F.3rd 986, 1018-1019; ***In re Joseph H.*** (2015) 237 Cal.App.4th 517, 530.)

See also ***People v. Orozco*** (2019) 32 Cal.App.5th 802, 812, noting that “those pressures nonetheless necessitate a ‘protective device’—namely, ***Miranda***’s rule—to ensure that suspects do not make the type of compelled statements at the core of the **Fifth Amendment**’s privilege.”

Miranda was intended to address those circumstances where an in-custody defendant's “‘will was overborne’ or if his confession was not ‘the product of a rational intellect and a free will’” (Citations omitted; ***People v. Haydel*** (1974) 12 Cal.3rd 190, 198; see also ***Doody v. Ryan*** (9th Cir. 2011) 649 F.3rd 986, 1002; ***People v. McWhorter*** (2009) 47 Cal.4th 318, 346-347; ***People v. Caro*** (2019) 7 Cal.5th 463, 492.)

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The “focus is on ‘whether [the] defendant’s will was overborne by the circumstances surrounding the giving of [the] confession,’ an inquiry that ‘takes into consideration the totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation.’” (*United States v. Preston* (9th Cir. 2014) 751 F.3rd 1008, 1016; quoting *Dickerson v. United States* (2000) 530 U.S. 428, 434 [120 S.Ct. 2326; 147 L.Ed.2nd 405].)

Talking about the **Fifth Amendment** right against self-incrimination, the United States Supreme Court has noted that: “Its essence is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.” (*Culombe v. Connecticut* (1961) 367 U.S. 568, 581-582 [6 L.Ed.2nd 1037].)

“‘Any police interview of an individual suspected of a crime has coercive aspects to it.’ [Citation] When police conduct results in an individual being placed ‘in custody,’ the substantial coercion inherent in his situation ‘blurs the line between voluntary and involuntary statements, and thus heightens the risk that [the person being interrogated] will not be ‘accorded his privilege under the **Fifth Amendment** . . . not to be compelled to incriminate himself.’” [Citation] Custodial police interrogation, by its very nature, isolates and pressures the individual, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed.’ [Citation]” (*United States v. IMM* (9th Cir. 2014) 747 F.3rd 754, 764.)

“The [United States Supreme Court] has stated in summary that to counteract the coercive pressure inherent in custodial surroundings, ‘*Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. [Citation.] After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. [Citation.] Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. [Citation.] Critically, however, a suspect can waive these rights. [Citation.] To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the “high standar[d] of proof for the waiver of

constitutional rights [set forth in] *Johnson v. Zerbst* [(1938)] 304 U.S. 458 [82 L.Ed. 1461, 58 S.Ct. 1019].” ’ [Citation.]” (*People v. Williams* (2010) 49 Cal.4th 405, 425; *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1413-1414.)

We’re talking about “*psychological*” pressure, even if unintended, exerted upon a person subjected to an in-custody interrogation, and not just “*physical abuse*.” (*Miranda v. Arizona*, *supra*, at pp. 448-455 [16 L.Ed.2nd at pp. 709-712]; *In re Elias V.* (2015) 237 Cal.App.4th 568, 577; *People v. Saldana* (2018) 19 Cal.App.5th 432, 437-438.)

“The [*Miranda*] court expressed concern that the use of *psychologically coercive techniques*, as well as the inherently coercive effect of *incommunicado interrogation*, would, in the absence of *adequate safeguards*, cause persons undergoing interrogation to incriminate themselves involuntarily. [Citation.]” (Italics added; *People v. Peevy* (1998) 17 Cal.4th 1184, 1191.)

“The foundational theses of *Miranda* are that ‘the modern practice of in-custody interrogation is psychologically rather than physically oriented’ (*Miranda*, *supra*, 384 U.S. at p. 448), and the psychological techniques now employed by interrogators ‘trade[] on the weakness of individuals,’ and ‘may even give rise to a false confession.’ (*Miranda v. Arizona*, *supra*, at p. 455 & fn. 24, citing *Borchard, Convicting the Innocent* (1932).)” (*In re Elias V.*, *supra*.)

“The (*Miranda*) court expressed concern that the use of psychologically coercive interrogation techniques, as well as the inherently coercive effect of incommunicado interrogation, would, in the absence of adequate safeguards, cause persons undergoing interrogation to incriminate themselves involuntarily. [Citation.]” (*People v. Peevy* (1998) 17 Cal.4th 1184, 1191.)

See also *Missouri v. Seibert* (2004) 542 U.S. 600, 608 [159 L.Ed.2nd 643], criticizing an interrogation tactic (interrogation-warning-interrogation) intended to “exert . . . pressure upon an individual as to disable him from making a free and rational choice.”

Scope of the Miranda Rule:

Limited to Governmental Compulsion: “The **Fifth Amendment’s** self-incrimination clause states that ‘[n]o person . . . shall be compelled in any criminal case to be a witness against himself.’ (**U.S. Const., 5th Amend.**) The clause does not, however, ‘establish an unqualified “right to remain silent.”’ (*Salinas v. Texas* (2014) 570 U.S. 178, 189 [133 S.Ct. 2174; 186

L.Ed.2nd 376].) (plur. Opn. of Alito, J.) By definition, “a necessary element of compulsory self-incrimination is some kind of compulsion.” (*Lakeside v. Oregon* (1978) 435 U.S. 333, 339. [55 L.Ed.2nd 319].) The ‘sole’ form of compulsion targeted by the **Fifth Amendment** privilege is ‘governmental coercion’-not “‘moral and psychological pressures . . . emanating from sources other than official coercion’” or the absence of “‘free choice’ in any broader sense of the word.’” (*Colorado v. Connelly* (1986) 479 U.S. 157, 170 [107 S.Ct. 515; 93 L.Ed.2nd 473].)” (*People v. Tom* (2014) 59 Cal.4th 1210, 1223; *People v. Sultana* (1988) 204 Cal.App.3rd 511, 522.)

“Absent police conduct causally related to the confession, there is simply no basis for concluding any state actor has deprived a criminal defendant of due process of law. (*United States v. Wolf* (9th Cir. 1987) 813 F.2nd 970, 974-975.)”

E.g.: Whether or not defendant suffered from “schizophrenic reaction, schizo affective type with paranoid trends” was irrelevant to the issue of voluntariness absent some allegation of coercive police conduct. (*Henderson v. Norris* (8th Cir. 1977) 118 F.3rd 1283, 1288.)

“(T)o the extent he suggests his statements were involuntary because at the time of the interviews with police he was under the influence of medication, we reject that claim as well. The due process inquiry focuses on the alleged wrongful and coercive actions of the state, . . . and not the mental state of defendant.” (*People v. Weaver* (2001) 26 Cal.App.4th 876, 921.)

California now follows the same rule. (*People v. Cox* (1990) 221 Cal.App.3rd 980, 987; methamphetamine influence; see also (*People v. Haskett* (1990) 52 Cal.3rd 210, 244; *People v. Benson* (1990) 52 Cal.3rd 754, 778-779.)

“A finding of coercive police activity is a prerequisite to finding that a confession was involuntary under the federal and state Constitutions. [Citations.]” (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

Whether or not the defendant might have been affected by what experiences he had (e.g., beating, torture) in his home country of Guatemala, is irrelevant on the issue of voluntariness absent some police misconduct in this case. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1097.)

However, despite a finding of “*coercive police activity*,” this does not mean, by itself, that a resulting confession is involuntary. It must also be shown that the statement and inducement are causally linked. (*People v. Maury*, *supra*, at pp. 404-405; citing *People v. Bradford* (1997) 14 Cal.4th 1005, 1041; and *People v. Benson*, *supra*, at pp. 778-779. See also *People v. Jimenez* (2021) 72 Cal.App.5th 712, 726.)

See also *United States v. IMM* (9th Cir. 2014) 747 F.3rd 754, 764; “Custodial police interrogation, by its very nature, isolates and pressures the individual, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed.” [Citation]”

Even statements obtained by compulsion by a foreign government (e.g., obtained under threat of imprisonment) are inadmissible in a later prosecution in the United States, in that as “compelled” statements, their use in a U.S. prosecution violates the **Fifth Amendment**. (*United States v. Conti* (2nd Cir. 2017) 864 F.3rd 63.)

Asserting the Privilege In Prior Proceedings:

The case law is quite clear that a suspect, in or out of custody, can assert his **Fifth Amendment** rights “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . .”, if it might subject the person to potential criminal liability. (*Kastigar v. United States* (1972) 406 U.S. 441, 444 [32 L.Ed.2nd 212].)

“It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant but also ‘privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.’ (*Lefkowitz v Turley*, 414 U.S. 70, 77, . . . 38 L.Ed.2nd 274 [1973]).” (*Minnesota v. Murphy* (1984) 465 U.S. 420, 426; 79 L.Ed.2nd 409].)

“(A)though the text of the *Self-Incrimination Clause* at least suggests that ‘its coverage [is limited to] compelled testimony that is used against the defendant in the trial itself,’ [Citation], potential suspects may, at times, assert the privilege in (prior) proceedings in which answers might be used to incriminate them in a subsequent criminal case. [Citations.]” (Italics added; *United States v. Patane* (2004) 542 U.S. 630, 638 [159 L.Ed.2nd 667].)

Documents: The self-incrimination privilege generally extends to documents:

Rule: The **Fifth Amendment** protects individuals from having to disclose documents when the very act of production would constitute self-incrimination. (*United States v. Bright* (9th Cir. 2010) 596 F.3rd 683, 688.)

“The **Fifth Amendment** grants persons the privilege not to ‘provide the State with [self-incriminatory] evidence of a testimonial or communicative nature.’” (*Id.*, at p. 692; quoting *United States v. Rodriguez-Rodriguez* (9th Cir. 2006) 441 F.3rd 767, 772.)

Exceptions: There are exceptions, however:

Bank Records: See *Doe v. United States* (1988) 487 U.S. 201 [101 L.Ed.2nd 184], where the Court upheld an order directing defendant to sign a consent directive authorizing banks in the Cayman Islands and Bermuda to disclose records of his accounts. The Court found that compelling defendant to sign the consent directive was not protected by the privilege against self-incrimination because neither the form itself nor the act of signing it were testimonial communications. Compelling defendant to sign the form was “more like ‘be[ing] forced to surrender a key to a strongbox containing incriminating documents’ than it is like ‘be[ing] compelled to reveal the combination to [petitioner’s] wall safe.’” (*Id.*, at p. 219, fn. 9.)

See also the dissenting opinion by Justice Stevens at pp. 219-221, arguing that defendant cannot “be compelled to use his mind to assist the prosecution in convicting him of a crime He may in some cases be forced to surrender a key to a strongbox containing incriminating documents, but I do not believe he can be compelled to reveal the combination to his wall safe—by word or deed,” and that being forced to sign a consent directive authorizing banks to disclose records of his accounts was tantamount to being forced to reveal the combination to a wall safe.

Corporations: A corporation is not a “person” for purposes of the privilege against self-incrimination. (*Hale v.*

Henkel (1906) 201 U.S. 43, 75 [50 L.Ed. 652]; overruled in part on other grounds in *Murphy v. Waterfront Comm’n*. (1964) 378 U.S. 52 [12 L.Ed.2nd 678], and *United States v. While* (1944) 322 U.S. 694, 699 [88 L.Ed. 1542].)

The “*collective entity rule*” provides that “representatives of a collective entity act as agents, and the official records of the organization that are held by them in a representative rather than a personal capacity cannot be the subject of their personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally . . . Any claim of **Fifth Amendment** privilege asserted by the agent would be tantamount to a claim of privilege by the corporation, which possesses no such privilege.” (*Braswell, supra*, 487 U.S. at pp. 99–100.) Thus, while business records of a sole proprietor or practitioner may be protected from release by the **Fifth Amendment**, an individual ‘cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally.’” (*Id.*, at pp. 851–852; citing *Bellis v. United States* (1974) 417 U.S. 85, 88, 93–101 [40 L.Ed.2nd 678].)

A custodian of corporate records may *not* resist a grand jury subpoena for such records on the ground that the act of production would incriminate him under the **Fifth Amendment**. (*Braswell v. United States* (1988) 487 U.S. 99 [101 L.Ed.2nd 98].)

In *In re Twelve Grand Jury Subpoenas* (9th Cir. 2018) 908 F.3rd 525, the federal district court held appellant in contempt for his failure to comply with the court’s order to respond to twelve grand jury subpoenas in his capacity as a records custodian for various corporate entities. He appealed that order, arguing that, because the corporations and limited liability companies (“LLCs”) are small, closely held entities for which he is either the sole shareholder or sole employee, or is solely responsible for accounting and record keeping, he may invoke the **Fifth Amendment** privilege against self-incrimination to resist producing those collective

entities' documents. The Ninth Circuit disagreed, reaffirming the rule in *Braswell v. United States* (1988) 487 U.S. 99 [101 L.Ed.2nd 98], and holding that the **Fifth Amendment** provides no protection to a collective entity's records custodians, and that the size of the collective entity and the extent to which a jury would assume that the individual seeking to assert the privilege produced the documents are not relevant.

Tax Returns: Where defendant invoked the **Fifth Amendment** as a means of avoiding the necessity of filing a tax return, the Supreme Court held that he could not do so. Convicted of willfully refusing to make a return of his net income as required by the **Revenue Act of 1921**, defendant argued that because his income was derived from the illicit traffic in liquor in violation of the **National Prohibition Act**, the **Fifth Amendment** self-incrimination privilege protected him from having to file a return. The Supreme Court disagreed, ruling that it would be an extreme application of the **Fifth Amendment** to say that it authorized defendant to refuse to report his income because it had been made from crime. If the return called for answers that defendant was privileged from making, he could have raised his objections in the return. But he could not refuse to file any return at all. (*United States v. Sullivan* (1927) 274 U.S. 259 [71 L.Ed. 1037].)

Marijuana Entities: A trial court properly denied an application by defendants—a medical marijuana collective and its president—for a preliminary injunction against a city's attempts to stop them from operating the collective because there was no likelihood they would ultimately prevail in the city's action to collect unpaid marijuana business taxes or on their cross-complaint. Although defendants contended that payment of the marijuana business tax would force the president to incriminate himself in violation of his **Fifth Amendment** privilege by admitting liability for violating federal drug laws, the self-incrimination privilege did not apply because the tax was not the obligation of the president, but rather belonged to the collective. Under the "collective entity rule," the president could not assert the **Fifth Amendment** to resist the tax. (*City of San Jose v. Medimarts, Inc.* (2016) 1 Cal.App.5th 842, 848-854.)

Passwords to Electronic Devices:

In *Fisher v. United States* (1976) 425 U.S. 391 [96 S.Ct. 1569; 48 L.Ed.2nd 39], the U.S. Supreme Court stated that “[t]he act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of the papers produced.” 425 U.S. at 410. The act of production may, therefore, be testimonial and protected by the **Fifth Amendment**.”

The rule of *Fisher* has been extended to passwords used to prevent third-party access to cellphones and other electronic devices:

Requiring defendant to provide “. . . all passwords used or associated with the . . . computer . . . and any files” held to be a **Fifth Amendment** self-incrimination violation in that testimony providing a password is a “*testimonial communication*” because it reveals the “*contents of the mind*.” “In this case, the government is not seeking documents or objects—it is seeking testimony from the defendant, requiring him to divulge through his mental processes his password—that will be used to incriminate him.” The court reasoned that compelling defendant to testify to the password is more like compelling him to provide the combination to the wall safe than the key to the strongbox containing incriminating documents. Any files or data discovered by accessing the computer would be a “*derivative use*” of the illegally compelled testimonial evidence concerning the password. (*United States v. Kirschner* (Mich. 2010) 823 F. Supp.2nd 665.)

Defendant’s forced decryption of his hard drives and production of the files would have been tantamount to his testimony of knowing the existence and location of potentially incriminating files, his possession, control, and access to the encrypted items, and his ability to decrypt. It therefore triggered his **Fifth Amendment** privilege against self-incrimination. (*United States v. Doe (In re Grand Jury Subpoena Duces Tecum)* (11th Cir. 2012) 670 F.3rd 1335.)

The **Fifth Amendment** self-incrimination privilege protects a person from being compelled to provide a password (i.e., numeric or alpha-numeric passcodes) to his or her cellphone or other electronic device, in that such information qualifies as a “*testimonial communication*.”

(In re Search of a Residence in Oakland (N.D. Cal. 2019)
354 F.Supp.3rd 1010, 1014-1016.)

But there is case law tending to indicate to the contrary:

The Third Circuit Court of Appeal held that “the Magistrate Judge had subject matter jurisdiction under **Federal Rule of Criminal Procedure 41** to issue a search warrant for the search of defendant’s encrypted computers and attached hard drives, and therefore had jurisdiction to issue an order under the **All Writs Act** that sought ‘to effectuate and prevent the frustration’ of that warrant.” “When law enforcement could not decrypt the contents of those devices, and Doe refused to comply, the Magistrate Judge issued the Decryption Order pursuant to the **All Writs Act**. The Decryption Order required Doe to ‘assist the Government in the execution of the . . . search warrant’ by producing his devices in ‘a fully unencrypted state.’ . . . the Decryption Order here was a necessary and appropriate means of effectuating the original search warrant.” The Court further upheld the Magistrate Judge’s ruling that requiring defendant to provide the necessary passwords did *not* violate the **Fifth Amendment** in that the requested information was not “testimonial.” (*United States v. Apple Mac Pro Computer, John Doe, et al.* (3rd Cir. 2017) 851 F.3rd 238.)

Use of Biometric Features In Lieu of Passcodes:

In noting the issue to be one of first impression, the Minnesota Supreme Court has held that a suspect’s act of providing a fingerprint to the police to unlock a cellphone was in fact not a testimonial communication. This is because the compelled act of providing a fingerprint elicited only physical evidence from defendant’s body and did not reveal the contents of his mind. Thus, by not constituting a “testimonial communication,” the compelled use of a biometric feature to open the defendant’s cellphone did not violate the **Fifth Amendment** privilege against self-incrimination. (*Minnesota v. Diamond* (2018) 905 N.W.2nd 870.)

Where police seized the defendant’s cellphone from his home pursuant to a search warrant but were unable to examine its contents because it was locked and encrypted, the government filed a motion seeking to compel the defendant to either produce his passcode or to provide his fingerprint, either of which could unlock

the phone. The trial court denied the motion as to the passcode, holding that compelled disclosure would be testimonial and thus barred by the Fifth Amendment. However, the court granted the motion as to the fingerprint. In upholding this ruling, the Virginia Appellate Court noted that the **Fifth Amendment** does not prohibit compelling a defendant to exhibit, and to permit the government to document, physical characteristics such as by submitting to fingerprinting, standing for a photograph, making a voice recording, or providing a blood sample. The Court found this to be no different than requiring a defendant to use his biometric features to unlock a cellphone. After pointing out that the production of a fingerprint, unlike a passcode, did not require defendant to communicate any knowledge at all and thus is not testimonial, the court concluded that the defendant could be compelled to unlock the phone via his fingerprint consistent with the **Fifth Amendment**. (*Commonwealth of Virginia v. Baust* (Va. Cir. Ct. 2014) 89 Va. Cir. 267.

However, a federal district court magistrate judge ruled that compelling a subject through a magistrate's order in a search warrant to use his biometric features (e.g., fingerprint, iris, or facial recognition technology) to unlock an electronic device is testimonial (i.e., a "testimonial communication") in nature and a violation of the **Fifth Amendment** absent a waiver. (*In re Search of a Residence in Oakland* (N.D. Cal. 2019) 354 F.Supp.3rd 1010, 1014-1016.)

"While securing digital devices is not a novel concept, the means of doing so have changed. Indeed, consumers have had the ability to utilize numeric or alpha-numeric passcodes to lock their devices for decades. Courts that have addressed the passcode issue have found that a passcode cannot be compelled under the **Fifth Amendment**, because the act of communicating the passcode is testimonial, as '[t]he expression of the contents of an individual's mind falls squarely within the protection of the **Fifth Amendment**.'" See *Doe v. United States*, 487 U.S. 201, 219, 108 S.Ct. 2341, 101 L.Ed.2nd 184 (1988) (Stevens, J., dissenting) (citing *Boyd v. United States*, 116 U.S. 616, 633-635, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *Fisher v. United States*, 425 U.S. 391, 420, 96 S.Ct. 1569, 48 L.Ed.2nd 39 (1976)); see also *United States v. Kirschner*, 823 F. Supp. 2nd 665, 669 (E.D. Mich. 2010) (citing *Doe*, 487 U.S. at 208 n. 6); *Commonwealth v. Baust*, 89 Va. Cir. 267 (2014). Today, technology has provided citizens with shortcuts to entering passcodes by

utilizing biometric features. The question, then, is whether a suspect can be compelled to use his finger, thumb, iris, or other biometric feature to unlock a digital device.” (*In re Search of a Residence in Oakland, supra*, at p. 1015.)

The Court answered this question in the negative, citing the **Fifth Amendment** self-incrimination privilege, and differentiating “*testimonial*” or “*communicative*” acts from being forced to provide “*real or physical evidence*.” (*Id.*, at pp. 1015-1016.)

See also *In re Application for a Search Warrant* (N.D. Ill. 2017) 236 F. Supp.3rd 1066, at p. 1073: “With a touch of a finger, a suspect is (in effect) testifying that he or she has accessed the phone before, at a minimum, to set up the fingerprint password capabilities, and that he or she currently has some level of control over or relatively significant connection to the phone and its contents.”

See “<https://www.lawfareblog.com/fifth-amendment-decryption-and-biometric-passcodes>,” for a Harvard Law School student’s analysis of the issue.

The “Foregone Conclusion” Doctrine: An exception applies when the existence and location of the documents are a “*foregone conclusion*.”

In *Fisher v. United States* (1976) 425 U.S. 391, 411 [96 S.Ct. 1569; 48 L.Ed.2nd 39] (see above), the Supreme Court also discussed the “*foregone conclusion*” rule, which acts as an exception to the otherwise applicable act-of-production doctrine. Under this rule, the **Fifth Amendment** does *not* protect an act of production when any potentially testimonial component of the act of production—such as the existence, custody, and authenticity of evidence—is a “foregone conclusion” that “adds little or nothing to the sum total of the Government’s information.” 425 U.S. at 411. For the rule to apply, the Government must be able to “describe with reasonable particularity” the documents or evidence it seeks to compel. (See also *United States v. Hubbell* (2000) 530 U.S. 27, 30 [120 S.Ct. 2037; 147 L.Ed.2nd 24].)

See also *United States v. Bright* (9th Cir. 2010) 596 F.3rd 683:

“(W)here ‘[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the papers[,] . . . enforcement

of the summons’ does not touch upon constitutional rights.” (*Id.*, at p. 692.)

“(T)he testimonial aspect of production is minimized if not eliminated when the existence, ownership, control, or authenticity of the document (or thing) is a ‘forgone [gone]’ conclusion.” (*United States v. Pearson* (N.D.N.Y. 2006) 2006 U.S. Dist. LEXIS 32982; upholding subpoenas for “(a)ny and all passwords, keys, and/or log-ins used to encrypt any and all (computer) files, . . .”)

See also *In re: Grand Jury Subpoena to Boucher* (D. Vt. 2009) 2009 U.S. Dist. LEXIS 13006; and *United States v. Fricosu* (D. Colo. 2012) 841 F. Supp.2nd 1232, for further applications of the “*Foregone Conclusion*” doctrine.

But see *In re: Grand Jury Subpoena Duces Tecum Dated March 25, 2011: U.S. v. John Doe* (11th Cir. 2012) 670 F.3d 1335: The “*foregone conclusion*” doctrine was held to be *inapplicable* where a search warrant was issued to seize all digital media, as well as any encryption devices or codes necessary to access such media, and where certain portions of the data on the hard drives of defendant’s seized laptops and external hard drives were encrypted and inaccessible. The Court held that the “*foregone conclusion*” doctrine was not applicable because the explicit and implicit factual communications associated with decryption and production were not foregone conclusions. The government failed to show with “*reasonable certainty*” that it knew any files existed at all (the specific file name is not necessary), knew any files were located on the encrypted hard drives, could independently authenticate any such files, or that defendant could access and decrypt any such files.

Employing the “*foregone conclusion*” theory, the Third Circuit Court of Appeal held that “the Magistrate Judge had subject matter jurisdiction under **Federal Rule of Criminal Procedure 41** to issue a search warrant for the search of defendant’s encrypted computers and attached hard drives, and therefore had jurisdiction to issue an order under the **All Writs Act** that sought ‘to effectuate and prevent the frustration’ of that warrant.” “When law enforcement could not decrypt the contents of those devices, and Doe refused to comply, the Magistrate Judge issued the Decryption Order pursuant to the **All Writs Act**. The Decryption Order required Doe to ‘assist the Government in the execution of the . . . search warrant’ by producing his devices in ‘a fully unencrypted state.’ . . . the Decryption Order here was a necessary and

appropriate means of effectuating the original search warrant.” The Court further upheld the Magistrate Judge’s ruling that requiring defendant to provide the necessary passwords did not violate the **Fifth Amendment** in that the requested information was not “testimonial.” (*United States v. Apple Mac Pro Computer, John Doe, et al.* (3rd Cir. 2017) 851 F.3rd 238.)

The Third Circuit concluded that the Government had provided evidence amply supported by the record sufficient to establish the “*foregone conclusion*” doctrine.

- a. The Government had lawful custody of the devices which were seized pursuant to a valid search warrant.
- b. Prior to the seizure, Doe possessed, accessed, and owned all of the devices.
 - 1) Doe did not dispute their existence or his ownership of the devices.
 - 2) Doe’s sister stated that he had in her presence opened the devices, accessed the data by entering passwords from memory, and shown her images.
 - 3) Doe had provided the Government with access to the data on some of the devices by entering multiple passwords from memory.
- c. There are images on the devices that constitute child pornography.
 - 1) The investigation led to the identification of Doe as a user of an internet file sharing network that was used to access child pornography.
 - 2) Forensic analysis showed that the Mac Pro had been used to visit sites common in child exploitation.
 - 3) Doe’s sister stated that he had shown her hundreds of pictures and videos child pornography images from the devices.
 - 4) Forensic analysis showed that Doe had downloaded thousands of files known by their “hash” values to be child pornography.

The “*foregone conclusion*” doctrine is inapplicable to searches of cellphones and other electronic devices, such devices not being comparable to other storage equipment, be it physical or digital, and are thus entitled to greater privacy protection. (*In re Search of a Residence in Oakland* (N.D. Cal. 2019) 354 F.Supp.3rd 1010, 1014-1016-1018.)

Where defendant was indicted on healthcare fraud and money laundering charges, a pre-trial repatriation order requiring defendant to repatriate any proceeds that he may have transferred to any African bank during a three-year period, up to \$7,287,000, violated defendant’s **Fifth Amendment** privilege against self-incrimination because the order compelled defendant to incriminate himself by personally identifying, and demonstrating his control over, untold amounts of money located in places the government may not have been aware of. The federal district court failed to apply the proper “*foregone conclusion*” exception test, relieving the government of its obligation to prove its prior knowledge of the incriminating information that could be implicitly communicated by repatriation. The government’s narrow promise of limited use immunity was insufficient to counterbalance these harms. (*United States v. Oriho* (9th Cir. Aug. 10, 2020) __ F.3rd __ [2020 U.S. App. 25232].)

A court order requiring defendant to disclose the passcodes to his passcode-protected cellphones did not violate the **Fifth Amendment** because even though it was a testimonial act, it was held to be permissible by the New Jersey Supreme Court under the “*foregone conclusion*” test where the issue here was one of surrender rather than testimony. Further, the order did not violate New Jersey law. (*State v. Andrews* (2020) 243 N.J. 447.)

Real and Physical Evidence:

The **Fifth Amendment** right “does not protect a suspect from being compelled by the State to produce ‘real or physical evidence.’” (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 589 [110 L.Ed.2nd 528; 110 S.Ct. 2638]; see also *Schmerber v. California* (1966) 384 U.S. 757, 766 [16 L.Ed.2nd 908, 917]; *People v. Elizalde et al.* (2015) 61 Cal.4th 523, 532; *People v. Sudduth* (1966) 65 Cal.2nd 543, 546; blood or breath in a DUI case.)

Examples of “*real or physical evidence*” include fingerprints, photographs, handwriting exemplars, blood samples, standing in a

lineup, or speaking for voice identification. (*People v. Elizalde et al.*, *supra*; citing *Pennsylvania v. Muniz*, *supra*, at pp. 591–592.)

Burden of Proof:

It is the prosecution’s burden to prove, by a preponderance of the evidence, that the accused’s rights under *Miranda* were not violated. (*Lego v. Twomey* (1972) 404 U.S. 477, 489 [30 L.Ed.2nd 618, 627]; *People v. Sapp* (2003) 31 Cal.4th 240, 267; *People v. Bradford* (1997) 14 Cal.4th 1005, 1033; *People v. Villasenor* (2015) 242 Cal.App.4th 42, 59; *People v. Peoples* (2016) 62 Cal.4th 718, 740.)

Limitations on the Need for Miranda: Given the declared justifications for having a “*Miranda Rule*,” courts should guard against a *blind application* of the rule without considering *the need* for its use in any particular factual setting; I.e.: To insure that an in-custody criminal suspect, in an *incommunicado, police-dominated atmosphere*, is aware of his or her constitutional rights as they relate to self-incrimination and the right to an attorney’s assistance during the interrogation process, so that he or she may knowingly and intelligently choose whether, and to what extent, he or she wishes to waive those rights and cooperate in an interrogation conducted by law enforcement.

“Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.” (*Berkemer v. McCarty* (1984) 468 U.S. 420, 437 [82 L.Ed.2nd 317, 333].)

A *Miranda* admonishment and waiver is necessary *only* when a criminal suspect is subjected to the coerciveness which is inherent in any “*incommunicado, police-dominated*” interrogation.

“An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described (elsewhere in the decision) cannot be otherwise than under compulsion to speak.” (*Miranda v. Arizona*, *supra*, at p. 461 [16 L.Ed.2nd at p. 716]; see also *Missouri v. Seibert* (2004) 542 U.S. 600 [159 L.Ed.2nd 643].)

In deciding whether a conversation between a police officer and a criminal suspect is an “*interrogation*,” a court must keep in mind the purpose behind the *Miranda* and the *Edwards* (i.e., *Edwards v. Arizona* (1981) 451 U.S. 477, 482 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 385]; prior invocation of right to counsel preventing any further interrogation.) decisions, and that is to prevent officials from using the coercive nature of confinement to extract confessions that

would otherwise not have been given in an unrestrained environment. (*People v. Dement* (2011) 53 Cal.4th 1, 26.)

“One of the Court’s primary concerns in *Miranda* was the temptation for law enforcement officers, operating with little or no supervision over their investigative actions, to overbear the will of a defendant in an isolated custodial interrogation setting.” (*Sessoms v. Grounds* (9th Cir. 2015) 776 F.3rd 615, 621; citing *Miranda v. Arizona*, *supra*, 384 U.S. at 461, 466.)

“The purpose of the rule in *Edwards* (i.e., *Edwards v. Arizona* (1981) 451 U.S. 477, 482 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 385]; prior invocation of right to counsel preventing any further interrogation.) is to preserve ‘the integrity of an accused’s choice to communicate with police only through counsel,’ [citation], by ‘prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights,’ [citation].” (Citation) It ‘is not a constitutional mandate, but judicially prescribed prophylaxis.’ (*Id.* at p. 105.)” (*People v. Bridgeford* (2015) 241 Cal.App.4th 887, 900; citing *Maryland v. Shatzer* (2010) 559 U.S. 98, 106 [175 L.Ed.2nd 1045].)

Take away this “*tension factor*,” and the suspect may then be questioned concerning his or her potential criminal liability without violating any constitutional protections. This can be done either:

- Through a *Miranda* admonishment and waiver; *or*
- Through some other circumstance which eliminates, or at least minimizes “*custody*,” i.e., the fear and inherent coerciveness of the interrogation situation and going to jail (See “*The ‘Beheler Admonishment,’ or Taking the ‘Custody’ Out of An Interrogation*,” under “*Custody*” (Chapter 2, below); *or*
- If already a jail inmate, setting up an interview while eliminating, or at least minimizing, the fear of being charged with a new criminal offense. (See “*Miranda and the Jail Inmate*,” below.)

Guarding Against a False Confession: It is increasingly being recognized that skilled interrogators have the ability to push in-custody suspects to the point where the obtaining of a false confession is entirely possible, where the suspect eventually will tell his or her interrogators whatever it is that they want if, for no other reason, to end the questioning.

“‘[C]ustodial police interrogation, by its very nature, isolates and pressures the individual,’ *Dickerson (v. United States)* (2000) 530 U.S.

428, at 435, 120 S.Ct. 2326, 147 L.Ed.2nd 405, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, see, e.g., Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N. C. L. Rev. 891, 906-907 (2004).” (*Corley v. United States* (2009) 556 U.S. 303, 320-321 [173 L.Ed.2nd 443].)

“The pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed,” particularly when the suspect is a juvenile. (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 531.)

“The power of these interrogation techniques to extract a confession is keenly described in *Miranda*. (*Miranda*, *supra*, 384 U.S. at pp. 445-455.) Since *Miranda* <https://advance.lexis.com/search/?pdmfid=1000516&crid=f00c81c6-81aa-441c-ab72-3dc2a42d8361&pdsearchterms=2018+Cal.App.+LEXIS+29&pdstartin=hlct%3A1%3A2&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqtype=and&pdpsf=&ecomp=s81d9kk&earg=pdpsf&prid=5b7c5f0a-2563-47e3-9d3e-1d52a1311b15>, the United States Supreme Court has expressed concern that such interrogation ‘can induce a frighteningly high percentage of people to confess to crimes they never committed.’ (*Corley v. United States* (2009) 556 U.S. 303, 321.) ‘Estimates of false confessions as the . . . cause of error in wrongful conviction cases range from 14 to 25 percent.’ (*In re Elias V.* (2015)) 237 Cal.App.4th (568) at p. 578.)” *People v. Saldana* (2018) 19 Cal.App.5th 432, 437-438.)

In a first degree murder case, the trial court erred in refusing to admit into evidence defendant's testimony about his experience with what happened to people who denied allegations made by police in Thai refugee camps, where he was born and stayed as a boy, because the testimony was relevant under **Evid. Code, § 210** to his state of mind in interacting with detectives who interrogated him and to why he might have given a false confession. However, given the other evidence he introduced concerning his confession, the erroneous preclusion of the testimony did not deprive him of his constitutional right to present a defense and was harmless. (*People v. Xiong* (2020) 54 Cal.App.5th 1046, 1049, 1071-1074.)

Evid. Code § 210 provides a definition of “Relevant Evidence:”
“‘*Relevant Evidence*’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.”

Experts are available (e.g., Psychologist Ricardo Winkel) who will testify on the issue of “*suggestibility within the context of false confessions*.” In one case involving a defendant who confessed to molesting two young

children, Dr. Winkel was to testify (although the trial court erroneously excluded his testimony) that research has shown that people “confess to things they didn’t do, including terrible crimes.” Per Dr. Winkel, factors or variables that may make a person more susceptible to giving a false confession include low education level, having cognitive deficits, being interrogated in a non-native language, having a passive, compliant, or dependent personality, and lacking experience with law enforcement. Dr. Winkel is also of the opinion that, “(e)ach of these variables separately could contribute to making a person susceptible. The more variables you have, the higher the likelihood the person would [falsely confess]. Sometimes it increases geometrically or exponentially.” Emotional state, such as being anxious or depressed, is another factor. A skillful investigator may obtain a false confession “without any undue coercion [or] anything untoward” and that “there are cases where people [falsely] confess not because . . . of the actions of the investigator, but because of something in them.” (*People v. Caparaz* (June 30, 2022) __ Cal.App.5th __, __ [2022 Cal.App. LEXIS 579].)

See “*Juveniles and False Confessions*,” under “*Miranda* Protections as They Relate to Juveniles,” under “*Juveniles & Miranda*” (Chapter 10), below.

***Miranda* Becoming Routine Practice:**

Despite an immediate and overwhelming reluctance by law enforcement to willingly comply with what was considered by many legal scholars as an *unwarranted* extension of the **Fifth Amendment** self-incrimination privilege, “*Miranda* has (since) become embedded in routine police practice to the point where the warnings have become part of our national culture. [Citation]” (*Dickerson v. United States* (2000) 530 U.S. 428, 443 [120 S.Ct. 2326; 147 L.Ed.2nd 405, 419].)

Note: But the rules surrounding the application of the *Miranda* requirements are anything but simple, with time and a multitude of court decisions on the issue doing nothing to increase law enforcement’s understanding and consistent compliance with its requirements.

“The basic rule of (*Miranda*), and its progeny, is familiar: Under the **Fifth Amendment** to the federal Constitution, as applied to the states through the **Fourteenth Amendment**, ‘[n]o person . . . shall be compelled in any criminal case to be a witness against himself (or herself)’ (Citation.) ‘In order to combat (the) pressures (of custodial interrogation) and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his (or her) rights’ to remain silent and to have the assistance of counsel.

(Citation.) ‘(I)f the accused indicates in any manner that he (or she) wishes to remain silent or to consult an attorney, interrogation must cease, and any statement obtained from him (or her) during interrogation thereafter may not be admitted against him (or her) at his (or her) trial’ (citation), at least during the prosecution's case-in-chief (citations).” (*People v. Lessie* (2010) 47 Cal.4th 1152, 1162.)

Good Faith: However, note that an officer’s “*good faith*,” as applied to some **Fourth Amendment** situations, does not apply to a *Miranda* violation. (*People v. Smith* (1995) 31 Cal.App.4th 1185, 1191-1194; “(The) fundamental difference in the theoretical underpinnings of the **Fourth** and **Fifth Amendment** exclusionary rules persuades against application of the ‘good faith’ exception in **Fifth Amendments** (sic) cases.” (pg. 1193))

Incompetence of Counsel:

Failure of a defendant’s attorney to challenge the admissibility of statements obtained as the product of an admitted violation of *Miranda*, even if defendant might have repeated his confession to other acquaintances, and even if not challenging the confession might have affected his plea bargaining position only (given the value of a recorded confession to police verses the same story being testified to by acquaintances whose memory and credibility were unknown), constitutes incompetence of defense counsel and grounds for granting a writ of habeas corpus. (*Moore v Czerniak* (9th Cir. 2009) 574 F.3rd 1092.)

A defendant who represents herself cannot later complain on appeal that an issue was not properly raised at the trial court level, and thus has waived that issue, even if she had counsel at one point who had the opportunity to raise the issue and should have, so long as she also had the opportunity to raise it herself while representing herself. (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1195-1196; i.e., an inadequate advisal of her *Miranda* rights which, because not raised at the trial level, allowed for the admission of incriminating statements that should have been suppressed.)

See also *Cook v. Ryan* (9th Cir. 2012) 688 F.3rd 598.

After initially waving his rights, defendant told detectives, “*I refuse to talk to you guys*” clearly and unequivocally invoking his right to silence. Counsel’s inaction in failing to object to admission of defendant’s recorded confession to murder resulted in a prejudicial denial of effective assistance of counsel as to defendant’s first degree murder conviction, as

the prosecutor relied upon the confession heavily in her arguments to the jury. (*People v. Bichara* (2017) 7 Cal.App.5th 1261, 1277-1284.)

Prerequisites to a Miranda Admonishment:

The Three Legal Prerequisites: It is generally recognized that a Miranda admonishment and waiver is unnecessary unless all three of the following legal prerequisites are present at the same time:

1. The suspect is *in custody* (See “*Custody*” (Chapter 2), below);
2. An *interrogation* is imminent (See “*The Custodial Interrogation*” (Chapter 3), below; and
3. The questioning is conducted by *law enforcement* (or an *agent* of law enforcement) (See “*Law Enforcement*” (Chapter 4), below).

Analyzing the Prerequisites: These legal prerequisites, however, when analyzed, are not as simple as might first appear.

Care must be taken to carefully analyze “*all the surrounding circumstances*” of any custody, advisal, waiver, and interrogation to determine whether any resulting statements from a criminal suspect were in fact lawfully obtained. (E.g., see *United States v. Kim* (9th Cir. 2002) 292 F.3rd 969, 974.)

These factors include: “(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual.” (*Ibid.*; see also *United States v. Mora-Alcaraz* (9th Cir. 2021) 986 F.3rd 1151, 1156.)

This issue (i.e.: Is the suspect subjected to a “*custodial interrogation requiring a **Miranda** admonishment?*”) is one of “*mixed law and fact*,” and will be subject to litigation and second-guessing by attorneys, the trial court, and the appellate courts. (*Thompson v. Keohane* (1995) 516 U.S. 99, 101-116 [133 L.Ed.2nd 383].)

Therefore, *in close cases*, it is always best to err on the side of caution and admonish the suspect and attempt to obtain a free and voluntary waiver whenever a criminal suspect is to be questioned. The Courts in *Miranda* and many other cases (e.g., *People v. Peevy* (1998) 17 Cal.4th 1184; *People v. Neal* (2003) 31 Cal.4th 63; and *People v. Jablonski* (2006) 37

Cal.4th 774, 817; *People v. Nguyen* (2015) 61 Cal. 4th 1015, 1077-1078.) have demanded that we respect this general rule.

Tactical Advice: Rather than relying upon, or hoping for, a correct legal analysis and an informed decision by the trial court, it is always best for law enforcement to consider the following:

- *If* a subject who is to be interrogated appears to be cooperative and ready to waive, administer a ***Miranda*** admonishment and obtain a waiver, thus eliminating the issue altogether.
- *If*, however, the subject appears to be *uncooperative* and *not* likely to waive, consider taking the coerciveness (i.e., the “*custody*”) out of the interrogation by simply informing him that he *is not* under arrest (e.g.; see ***California v. Beheler*** (1983) 463 U.S. 1121, 1125 [103 S.Ct. 3517; 77 L.Ed.2nd 1275].), when practical to do so under the circumstances, ensuring at the same to minimize or eliminate all the other attributes of an arrest situation (e.g., handcuffs, exposed weapons, locked doors, too many officers present, accusatory questioning (see “*The Non-Custodial Interrogation*,” under “*Custody*” [Chapter 2, below], etc.), and interview the subject without a ***Miranda*** admonishment and waiver.

If the person has already been formally arrested, and is uncooperative and unlikely to waive his constitutional rights, the only tactic left is to postpone questioning until he has settled down, being careful *not* to do anything affirmatively to put him in a better frame of mind. (See ***People v. Honeycutt*** (1977) 20 Cal.3rd 150, finding the intentional softening up of a suspect to be improper, and a tactic which *cannot* lead to a knowing and intelligent waiver of rights.)

Rule: A ***Miranda*** admonishment and waiver should be the *general rule*, using other interrogation techniques (e.g., a “***Beheler*** admonishment;” see below) *only* when dictated by the circumstances.

Chapter 2: Custody

The Non-Custodial Interrogation:

Rule: If a suspect is not “*in custody*,” he need not be “*Mirandized*” prior to questioning. (*United States v. Salvo* (6th Cir. 1998) 133 F.3rd 943, 948; *People v. Pilster* (2006) 138 Cal.App.4th 1395; *Dyer v. Hornbeck* (9th Cir. 2013) 706 F.3rd 1134, 1137-1145; *People v. Zaragoza* (2016) 1 Cal.5th 21, 56-57.)

Note: The verb, to “*Mirandize*” is, of course, no more than a term of art referring to the process of administering an admonishment of the applicable constitutional rights as described in the *Miranda* decision.

“The obligation to administer *Miranda* warnings attaches only when the person questioned is in ‘custody.’” (*People v. Saldana* (2018) 19 Cal.App.5th 432, 454, citing, *Stansbury v. California* (1994) 511 U.S. 318, 322 [128 L.Ed.2nd 293, 298].)

Where there is no custody, there are none of the inherent pressures of the “incommunicado interrogation” that *Miranda* was intended to address. “In *Miranda* jurisprudence, custody is ‘a term of art that specifies circumstances that are thought generally to present a serious danger of coercion.’” (*People v. Saldana*, *supra*, quoting *Howes v. Fields* (2012) 565 U.S. 499, 508-509 [132 S.Ct. 1181; 182 L.Ed.2nd 17].)

“When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning, designed to bring out the person’s explanation or lack of explanation of the circumstance which aroused the suspicion of the police, and enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.” (*People v. Manis* (1969) 268 Cal.App.2nd 653, 665; see also *People v. Davidson* (2013) 221 Cal. App.4th 966, 968.)

See also *United States v. Patterson* (7th Cir. 2016) 826 F.3rd 450; a temporary and relatively non-threatening detention involved in a *Terry* stop (i.e., a temporary detention for investigation) does not constitute *Miranda* custody. In addition, in the Seventh Circuit, it has been repeatedly held that a “*Terry* frisk” (defendant having been patted down for firearms prior to a consensual transportation) does not establish custody for *Miranda* purposes. (Referring to *Terry v. Ohio* (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].)

The Custodial Interrogation:

Definition of “Custody:”

Rule: For purposes of ***Miranda***, a person is in custody when he or she has been “deprived of his (or her) freedom in any significant way.” (***Miranda v. Arizona***, *supra*, at p. 444 [16 L.Ed.2nd at p. 706]; ***People v. Arnold*** (1967) 66 Cal.2nd 438, 448; ***People v. Kopatz*** (2015) 61 Cal.4th 62, 80; ***People v. Elizalde et al.*** (2015) 61 Cal.4th 523, 531.)

“An interrogation is custodial, for purposes of requiring advisements under ***Miranda***, when “a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way.” [Citation.] Custody consists of a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. [Citations.] When there has been no formal arrest, the question is how a reasonable person in the defendant’s position would have understood his [or her] situation. [Citation.] All the circumstances of the interrogation are relevant to this inquiry, including the location, length and form of the interrogation, the degree to which the investigation was focused on the defendant, and whether any indicia of arrest were present. [Citation.]” (***People v. Potter*** (2021) 66 Cal.App.5th 528, 539; quoting ***People v. Moore*** (2011) 51 Cal.4th 386, 394–395.)

Test: Whether or not a person is in custody for purposes of ***Miranda*** depends upon “[H]ow a reasonable man (or woman) in the suspect’s shoes would have understood his (or her) situation.” (Emphasis added; ***Berkemer v. McCarty*** (1984) 468 U.S. 420, 442 [82 L.Ed.2nd 317, 336]; ***People v. Boyer*** (1989) 48 Cal.3rd 247, 272; ***In re Kenneth S.*** (2005) 133 Cal.App.4th 54; ***People v. Bejasa*** (2012) 205 Cal.App.4th 26, 35; ***People v. Kopatz*** (2015) 61 Cal.4th 62, 80; ***In re I.F.*** (2018) 20 Cal.App.5th 735, 759; ***In re Matthew W.*** (2021) 66 Cal.App.5th 392, 405.)

Which Means . . . : This in turn has been held to mean that a person is *not* in custody unless:

“He has been formally arrested, or there exists a restraint on freedom of movement of the degree associated with a formal arrest.” (***California v. Beheler*** (1983) 463 U.S. 1121, 1125 [103 S.Ct. 3517; 77 L.Ed.2nd 1275, 1279]; ***People v. Pilster*** (2006) 138 Cal.App.4th 1395; ***People v. Linton*** (2013) 56 Cal.4th 1146, 1167; ***In re Anthony L.*** (2019) 43 Cal.App.5th 438, 445.); *or*

“(W)hen, under the totality of the circumstances, the ‘suspect’s freedom of action is curtailed to a “degree associated with formal arrest.”’ (Citation)” (*United States v. Howard* (4th Cir. 1997) 115 F.3rd 1151, 1154; *People v. Moore* (2011) 51 Cal.4th 386, 395; *People v. Linton*, *supra.*); or

“(A) reasonable person in that position would ‘have felt he or she was not at liberty to terminate the interrogation and leave.’ [Citations]” (*Tankleff v. Senkowski* (2nd Cir. 1998) 135 F.3rd 235, 243; see also *People v. Zamudio* (2008) 43 Cal.4th 327, 340-346; *Thompson v. Keohane* (1995) 516 U.S. 99, 112 [133 L.Ed.2nd 383]; *People v. Saldana* (2018) 19 Cal.App.5th 432, 455; *People v. Delgado* (2018) 27 Cal.App.5th 1092, 1104.)

A “reasonable person” under these circumstances means a reasonable “innocent” person. (*United States v. Galindo-Gallegos* (9th Cir. 2001) 244 F.3rd 728, 731, fn. 15; *United States v. Wauneka* (9th Cir. 1985) 770 F.2nd 1434, 1438; *Ford v. Superior Court [People]* (2001) 91 Cal.App.4th 112; *Dyer v. Hornbeck* (9th Cir. 2013) 706 F.3rd 1134, 1137-1145.)

Factors: Include, but are not limited to:

- Whether contact with law enforcement was initiated by the police or the person interrogated;
- If initiated by the police, whether the person voluntarily agreed to an interview;
- Whether the express purpose of the interview was to question the person as a witness or a suspect;
- Where the interview took place;
- Whether police informed the person that he or she was under arrest or in custody;
- Whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person’s conduct indicated an awareness of such freedom;

- Whether there were restrictions on the person’s freedom of movement during the interview;
- How long the interrogation lasted;
- How many police officers participated;
- Whether the police dominated and controlled the course of the interrogation;
- Whether they manifested a belief that the person was culpable and they had evidence to prove it;
- Whether the police were aggressive, confrontational, and/or accusatory;
- Whether the police used interrogation techniques to pressure the suspect; *and*
- Whether the person was arrested at the end of the interrogation.

(*In re Matthew W.* (2021) 66 Cal.App.5th 392, 405; noting that “(n)o one factor is dispositive,” citing *In re I.F.* (2018) 20 Cal.App.5th 735, 759; and *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162; *People v. Potter* (2021) 66 Cal.App.5th 528, 539-540.)

The Court in *In re Matthew W.* notes the addition factor in juvenile cases, noting that “a child’s age may be considered in the *Miranda* analysis, ‘so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer.’” (*Id.*, at pp. 405-406, citing *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 277 [180 L. Ed. 2nd 310; 131 S. Ct. 2394].)

Case Law:

Custody “implies a situation in which the suspect knows he is speaking with a government agent and does not feel free to end the conversation; the essential element of a custodial interrogation is coercion.” (*United States v. Martin* (7th Cir. 1995) 63 F.3rd 1422, 1429; see also *United States v. James* (7th Cir. 1997) 113 F.3rd 721, 726.)

“For *Miranda* purposes, we think the crucial consideration is the degree of coercive restraint to which a reasonable (person) believes

he is subject *at the time of questioning*” (Emphasis added; *People v. Taylor* (1986) 178 Cal.App.3rd 217, 230.)

A *Miranda* admonishment is not necessary (and does not violate C.F.R. § 287.3, which requires an admonishment after an illegal alien has been arrested and placed in formal proceedings) before formal removal proceedings have commenced (i.e., when the INS files a notice to appear in the immigration court). (*Samayoa-Martinez v. Holder* (9th Cir. 2009) 558 F.3rd 897, 901-902.)

“*Miranda* requires that a person questioned by police after being ‘taken into custody or otherwise deprived of his freedom of action in any significant way . . . [must first] be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.’ (*Miranda*, *supra*, 384 U.S. at p. 444, fn. omitted.) ‘By its very nature, custodial police interrogation entails ‘inherently compelling pressures.’” [Citation.] Even for an adult, the physical and psychological isolation of custodial interrogation can ‘undermine the individual’s will to resist and . . . compel him to speak where he would not otherwise do so freely.’” [Citation.] Indeed, the pressure of custodial interrogation is so immense that it “‘can induce a frighteningly high percentage of people to confess to crimes they never committed.’” (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, 269 [180 L.Ed.2nd 310; 131 S.Ct. 2394].)” (*People v. Torres* (2018) 25 Cal.App.5th 162, 172.)

Denial of defendant's motion to suppress incriminating statements made during questioning after a polygraph examination, pursuant to the **Fifth Amendment**, was affirmed because defendant was not in custody and not entitled to the *Miranda* protections where he was aware of his freedom to leave and availed himself of this right at least twice. (*United States v. Ferguson* (8th Cir. 2020) 970 F.3rd 895.)

After being arrested (taken into custody and handcuffed) in his home during an investigation of a shooting, during which officers used the ram of an Emergency Response Unit’s rescue vehicle to open the door, defendant was taken to an unmarked police car and unhandcuffed. Told 45 minutes later that illegal firearms were found in his home, he was also told that he was not under arrest despite his stated belief that he was. Defendant made incriminating statements at this point. After being advised of his rights, defendant indicated “Not really” when asked if he wished to waive his rights, but continued on with the interview anyway,

further incriminating himself. Three hours later, defendant was finally arrested. Despite these circumstances, defendant's motion to suppress his statements was denied; the denial being upheld by the Eighth Circuit Court of Appeal. The Appellate Court concluded that the officers' assurances to defendant that he was not under arrest and his decision not to terminate the interview suggested that defendant knew that he had the ability to exercise his free will and that he was not restrained to the degree associated with a formal arrest. Defendant also argued that his statements were involuntary because the officers: (1) pressured him to cooperate by offering to help him avoid eviction if he cooperated; (2) made it clear the only way to avoid arrest and potential prosecution as a shooter was to cooperate; (3) confronted him with the possibility of federal charges and losing his children and his job; (4) and halted the arrest process during the interrogation because defendant "had more he wants to say." Acknowledging that a person's statements to police officers will be deemed involuntary when they are obtained by "threats, violence, or express or implied promises sufficient to overbear the defendant's will and critically impair his capacity for self-determination," the Court held here that none of the tactics utilized by the officers amounted to improper threats or promises that overbore defendant's will. As the officers testified, they believed that defendant merely drove the vehicle the night of the shooting but did not shoot the victim himself. As a result, in the interview, they tried to persuade him to become a witness against the shooters and put psychological pressure on him to do so. The court concluded that defendant understood his rights and carefully weighed the risks and benefits of incriminating cooperation throughout the protracted interview, showing that his will was not overcome at any point. As such, his statements were not involuntary. (*United States v. Roberts* (8th Cir. 2020) 975 F.3rd 709.)

Defendant's statements to the police were properly suppressed as the product of a custodial interrogation conducted without the required *Miranda* warnings where, expecting to meet a single police officer at a shopping mall, defendant was confronted with four armed officers and two police cars, the police taking custody of his seven-year-old son and leading him out of defendant's sight, the police being well aware that defendant would not leave his son with strangers. (*United States v. Mora-Alcaraz* (9th Cir. 2021) 986 F.3rd 1151, 1156-1157.)

A truck driver who was stopped by the Border Patrol and detained while awaiting the arrival of a drug-sniffing canine, based upon a reasonable suspicion that the defendant was transporting controlled

substances, was not in custody while questioned pending the arrival of the dog. In so deciding, the Court considered the following factors: The defendant was only questioned for two minutes, on the side of the highway, visible to those driving past. The Border Patrol agent's questioning was never hostile nor accusatory: his tone was cooperative and he never accused defendant of lying or committing a crime; defendant was not handcuffed nor otherwise physically restrained, answering the agent's questions while leaning against the hood of the BPA's vehicle. (*United States v. Nelson* (5th Cir. 2021) 990 F.3rd 947; noting also that a person is not in custody for purposes of *Miranda* merely because he is detained and not free to go.)

Contacting defendant during a medical emergency, after he called 911 to report that his girlfriend was not breathing (she later dying of a drug overdose), and telling him to quit pacing about the apartment and to stay in one place, and later to remain outside while the paramedics treated the victim, and then later asking him if he would agree to accompany the officers to the police station for questioning after having told him several times that he was not under arrest, was not custody for purposes of *Miranda*. In fact, the Court ruled that he was only consensually encountered under these circumstances. (*United States v. Parker* (8th Cir. 2021) 993 F.3rd 595.)

Evidence of defendant's previous domestic violence act were admitted into evidence against him. Specifically, his response to a police officer (who asked him, "*Why did you run?*" after he was apprehended). The prosecution introduced defendant's response—that he ran to avoid being accused of hitting his girlfriend—in connection with establishing a prior incident of domestic violence. The victim in that earlier incident was not identified at trial. The prosecution introduced the evidence under **Evidence Code section 1109**, which makes prior acts of domestic violence admissible to show propensity to engage in such conduct. On appeal, the People characterized the situation as an initial investigatory effort by police to confirm that the right person had been apprehended, which does not require a *Miranda* advisement. The Court rejected that characterization because the record lacked any indication that the police were unsure of defendant's identity or were otherwise equivocal about arresting him. Rather, at the time the question was posed, defendant had already been detained at gunpoint and handcuffed, and his arrest was a foregone conclusion. The Court therefore concluded that defendant was clearly in custody at the time he made the statement. He had been apprehended in a bowling alley by an "arrest team" of several officers who detained

him at gunpoint. He was then handcuffed and transferred to a different officer who, without giving a ***Miranda*** advisement, asked, “*Why did you run?*” while escorting defendant to a police vehicle. A reasonable person in those circumstances would not have felt free to terminate the encounter; indeed, defendant was unable to do so as he was being physically restrained. The Court further held that asking defendant why he decided to run from police was reasonably likely to produce an incriminating response. Defendant’s statement was therefore obtained in violation of ***Miranda*** and should not have been admitted. (***People v. Roberts*** (2021) 65 Cal.App.5th 469, 479-480.)

Defendant was held *not* to be in custody during an interrogation at the police station, and therefore ***Miranda*** warnings were not required, because defendant voluntarily went to the police station two weeks after he had been told that he was suspected of having molested his daughter and, once inside the interview room, defendant was expressly told he could leave at any time. A detective’s statements to defendant indicating his belief in the daughter’s allegations and urging defendant to tell the truth did not transform the voluntary interview into a custodial interrogation because defendant was repeatedly told that he was free to leave, there were no physical restraints placed on him, and the tone and tenor of the questioning would not have caused a reasonable person in defendant’s position to believe he was not free to terminate the interviews and leave the police station. The total of three interrogations, one after the other, was no longer than 2 hours in duration. He was also allowed to leave after the questioning. (***People v. Potter*** (2021) 66 Cal.App.5th 528; differentiating this case from ***People v. Saldana*** (2018) 19 Cal.App.5th 432, 454-463, ***People v. Aguilera*** (1996) 51 Cal.App.4th 1151, and ***People v. Torres*** (2018) 25 Cal.App.5th 162, where the respective defendants were held to be in custody for purposes of ***Miranda***. (pp. 543-544.)

Officers, investigating the receipt of child pornography and told by neighbors that defendant—admittedly on probation for trafficking in child pornography—had asked to use their Internet service to register as sex offender, contacted defendant at his home. Being invited into his house and while awaiting the receipt of a search warrant, and without the benefit of a ***Miranda*** admonishment and waiver, defendant made various incriminating statements. In appealing his conviction, the Eighth Circuit Court of Appeals held that defendant was not in custody for ***Miranda*** purposes, making it unnecessary for the officers to advise him of his ***Miranda*** rights before they questioned him. *First*, it was undisputed that the

officers informed defendant many times as they were awaiting the receipt of a warrant that he was not under arrest and was not obligated to speak to them. The court noted that repetitive reminders that a defendant is free to terminate an interview “is powerful evidence that a reasonable person would have understood that he was free to terminate the interview.” *Second*, defendant retained his freedom of movement during questioning, as the officers never handcuffed him nor physically or verbally restrained him from moving about his house although they did tell him that officers would have to accompany him as he did so. The Court found that “police escorts throughout a house do not restrain a defendant’s movement to the degree associated with a formal arrest.” In addition, while defendant was told his vehicle needed to be searched if he chose to leave in it, the court concluded that this did not restrict defendant’s movement during their questioning or require him to answer questions. *Third*, defendant voluntarily acquiesced to official requests to respond to questions. Although the officers initiated the encounter, they frequently reminded him he was not obligated to speak with them as he continued to answer questions. *Finally*, the officers did not use any strong arm or deceptive tactics, nor did they arrest him at the conclusion of the questioning. Defendant further argued that his statements to the officers were involuntary. A statement is involuntary when it is obtained by threats, violence, or express or implied promises that “*overbear the defendant’s will*.” Here, the Court held that defendant’s will was not overborne when he made the statements to the officers. The court found there was no evidence that defendant lacked the requisite maturity, education, or mental or physical stamina to understand his rights. Throughout the interview, the officers continued to remind defendant he was not under arrest and was not obligated to talk to them. In addition, although the officers discussed the potential of a lengthy prison sentence for defendant, it was defendant who first raised the topic. Finally, defendant admitted he had experience with the criminal justice system, suggesting he was familiar with his constitutional rights. Based on these facts, the Court concluded that defendant voluntarily made statements to the officers. (*United States v. Sandell* (8th Cir. 2022) 27 F.4th 625.)

When defendant (while a search warrant is being executed at his home) is taken, unhandcuffed, to a police van parked in front of his residence for questioning, and is told that he was not under arrest, that he was not charged with any crime, and that they were talking voluntarily, and he is released immediately thereafter, his resulting confession was held to be admissible despite the lack of a *Miranda*

warning and waiver. No custody. (*United States v. Woodson* (11th Cir. 2022) 30 F.4th 1295.)

In so ruling, and in discussing the issue of “custody,” the Court noted that in the *Miranda* context, a person is in custody when he finds himself in “circumstances that are thought generally to present a serious danger of coercion.” To evaluate the issue of coercion, the court is to ask, “whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.” To answer that question, the court will examine “all of the circumstances surrounding the interrogation,” including the location and duration of the questioning, statements made during the interview, the presence or absence of physical restraints, and whether the person was released after the interview.)

Objective vs. Subjective Test:

The test being an “*objective*” one, the fact that the suspect is a juvenile or otherwise inexperienced in the criminal justice system is irrelevant to the “*custody*” inquiry. (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 663 [158 L.Ed.2nd 938].)

But see “*The Age of a Minor*,” below.

Defendant’s prior criminal history, being a “subjective factor,” is not relevant to the issue of custody. (*People v. Torres* (2018) 25 Cal.App.5th 162, 174, fn. 2.)

“[T]he initial determination of custody depends on the objective circumstances of the interrogation, and *not* on the subjective views harbored by *either* the *interrogating officers* or *the person being questioned*.” (Emphasis added; *Stansbury v. California* (1994) 511 U.S. 318, 323 [128 L.Ed.2nd 293, 298]; *People v. Zamudio* (2008) 43 Cal.4th 327, 346; *People v. Kopatz* (2015) 61 Cal.4th 62, 80; *People v. Moore* (2015) 236 Cal.App.4th Supp. 10, 14.)

The fact that the defendant had military training and “was trained to obey orders from those in authority” is irrelevant, in that the test is an “*objective*” one; i.e., as viewed by a “*reasonable person*.” The defendant’s military training is a “*subjective*” factor that is irrelevant in determining the issue of “custody.” (*United States v. Salyers* (7th Cir. 1998) 160 F.3rd 1152, 1159.)

“Whether a defendant knows he is guilty and believes incriminating evidence will soon be discovered is irrelevant.” (*United States v. Moya* (11th Cir. 1996) 74 F.3rd 1117, 1119.)

The existence of probable cause to arrest, if not communicated to the suspect, does not by itself trigger a need for a *Miranda* admonishment. (*People v. Robertson* (1982) 33 Cal.3rd 21, 38.)

“[E]vidence of the [police] officer’s subjective suspicions or beliefs is relevant only . . .

. . . ‘if the officer’s views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave,’ or . . .

. . . if such evidence is ‘relevant in testing the credibility of [the officer’s] account of what happened during an interrogation . . .’” (*People v. Standsbury* (1995) 9 Cal.4th 824, 830 (reversed on other grounds); *Standsbury v. California* (1994) 511 U.S. 318, 325 [128 L.Ed.2nd 293, 300]; see also *United States v. James* (7th Cir. 1997) 113 F.3rd 721, 728.)

The fact that a minor/suspect’s father, who was asked for permission to talk with his son, subjectively believed, based on prior contacts with law enforcement, that “[a]nytime you’re told to do something by the cops, it’s an order,” was held to be irrelevant. (*In re I.F.* (2018) 20 Cal.App.5th 735, 768.)

Note: The fact that a person might be reluctant to merely walk away from a police officer who is attempting to ask him questions is irrelevant. “We do not consider the ‘subjective views harbored by either the interrogating officers or the person being questioned.’” *Id.*, at p. 767, quoting *Yarborough v. Alvarado* (2004) 541 U.S. 652, at p. 663 [158 L.Ed.2nd 938].)

The Age of a Minor:

Although the age of a suspect is generally considered a subjective factor that is not to be considered in determining whether a person is in custody (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 663 [158 L.Ed.2nd 938].), the Supreme Court has determined that in the case of a minor, where a minor’s age is either known, or apparent, to an interrogator, this factor becomes an objectively perceived one, and must be taken into consideration when determining whether the minor is in custody for purposes of *Miranda*. (*J.D.B. v. North Carolina* (2011) 564 U.S. 261

[180 L.Ed.2nd 310; 131 S.Ct. 2394]; see also *United States v. IMM* (9th Cir. 2014) 747 F.3rd 754, 765; *In re I.F.* (2018) 20 Cal.App.5th 735, 760; *People v. Delgado* (2018) 27 Cal.App.5th 1092, 1104; *In re Matthew W.* (2021) 66 Cal.App.5th 392, 405-406.)

Defendant in *IMM*, a 12-year-old minor, was held to be in custody when questioned in a closed interrogation room despite his mother signing a “Parental Consent to Interview Form,” where the minor was never advised of his *Miranda* rights and was subjected to a 55-minute, accusatory interrogation. Someone of the defendant’s age would not have understood that he was free to leave.

Where a 16-year-old homicide suspect had been taken to a police station in handcuffs and shackled to the floor of an interrogation room and forced to give up his possessions (including his cellphone), and then left alone in that room for nearly an hour and a half, he was in custody for purposes of *Miranda*. Although one detective thereafter effectively freed him from custody by unshackling him and telling he was not under arrest and was free to leave, there were still a “lingering indicia” of custody that should have been factored in to the reasonable-person calculus. When a second detective later came into the room, demanded the passcode to his cellphone, and told him that he would not be leaving until they “dumped” the contents of his phone, defendant was effectively put back into custody. No reasonable person under those circumstances would have felt like he was free to leave. Accordingly, defendant should not have been asked any questions at that point before *Mirandizing* him. All of defendant’s unwarned statements after that point should have been suppressed. The trial court’s denial of the motion was held to be error. (*People v. Delgado* (2018) 27 Cal.App.5th 1092, 1104-1105.)

The “Focus of Suspicion” Fiction: The sometimes invoked “*focus of suspicion*” test is no longer (if it ever really was) valid (*People v. Standsbury* (1995) 9 Cal.4th 824 (reversed on other grounds); *Standsbury v. California* (1994) 511 U.S. 318, 325 [128 L.Ed.2nd 293, 300]; *In re Joseph R.* (1998) 65 Cal.App.4th 954, 959; see also *Minnesota v. Murphy* (1984) 465 U.S. 420, 431 [79 L.Ed.2nd 409,422].), except as it might affect how a reasonable person upon whom law enforcement is then directing their attention would perceive his position under the circumstances. (See also *In re Kenneth S.* (2005) 133 Cal.App.4th 54.)

The rule of law that a suspect must be advised of his rights under *Miranda* at that point in time where he has become the “*focus of suspicion*” and is to be questioned, irrespective of his custody status, has long since been repudiated. (*People v. Cunningham* (2015) 61 Cal.4th 609, 648; citing

Stansbury v. California (1994) 511 U.S. 318, 326 [128 L.Ed.2nd 293, 298].)

“To the extent language in our earlier opinions may be read to suggest that an officer’s subjective focus of suspicion is an independently relevant factor in establishing custody for the purpose of *Miranda*, such language is disapproved.” (*People v. Stansbury*, *supra*, pg. 830, fn. 1.)

See also *Berkemer v. McCarty* (1984) 468 U.S. 420, 442 [82 L.Ed.2nd 317]: “A policeman’s unarticulated plan has no bearing on the question whether a suspect was ‘in custody’ at a particular time.”

Miranda warnings are not necessarily required just because the “*focus*” of an investigation is directed at the defendant. (*Beckwith v. United States* (1976) 425 U.S. 341 [48 L.Ed.2nd 1].)

However, when the fact that a particular person has become the focus of an official investigation is communicated by the police to that person, it becomes one of the factors to consider when determining whether a reasonable person would believe he or she is in custody under the circumstances. (*People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1163.)

The California Supreme Court did note, however: “While the nature of the police questioning is relevant to the custody question, police expressions of suspicion, with no other evidence of a restraint on the person’s freedom of movement, are not necessarily sufficient to convert voluntary presence at an interview into custody.” (*People v. Moore* (2011) 51 Cal.4th 386, 402.)

The California Supreme Court has noted: “While the nature of the police questioning is relevant to the custody question, police expressions of suspicion, with no other evidence of a restraint on the person’s freedom of movement, are not necessarily sufficient to convert voluntary presence at an interview into custody.” (*People v. Moore* (2011) 51 Cal.4th 386, 402.)

It is irrelevant that the motivation behind an officer’s questions during a traffic stop (following too close) was to discover evidence of criminal activity (suspecting that defendant and his passenger were transporting drugs) in that a police officer’s “unarticulated plan” has no bearing on whether a suspect is in custody for *Miranda* purposes. (*United States v. Johnson* (8th Cir. 2020) 954 F.3rd 1106.)

Factors in Determining Custody:

Evaluating the Circumstances: “Two inquiries are essential to this determination: first, what are the circumstances surrounding the

interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 530-531; citing *Thompson v. Keohane* (1995) 516 U.S. 99, 112 [133 L.Ed.2nd 383].)

“*Custody*” implies a situation in which the suspect would reasonably know that he or she is speaking with a government agent and does not feel, under the circumstances, that he or she is free to end the conversation. (*United States v. James* (7th Cir. 1997) 113 F.3rd 721, 726.)

“[C]ustody exists for *Miranda* purposes if a reasonable person in that position would ‘have felt he or she was not at liberty to terminate the interrogation and leave.’” (*Tankleff v. Senkowski* (2nd Cir. 1998) 135 F.3rd 235, 243; see also *Thompson v. Keohane* (1995) 516 U.S. 99, 112 [133 L.Ed.2nd 383, 394]; *United States v. Martin* (7th Cir. 1995) 63 F.3rd 1422, 1429.)

Totality of the Circumstances: Whether or not a person is in custody depends upon an evaluation of the “*totality of the circumstances*,” taking into consideration the following factors:

- Whether the suspect has been formally arrested;
- Absent a formal arrest, the length of the detention;
- Whether contact with law enforcement was initiated by the police or the person interrogated;
- Whether the suspect is searched, frisked, or patted down;
- The location of the interview;
- The ratio of officers to suspects;
- How many police officers participated;
- The demeanor of the officer, including the nature of the questioning;
- Whether the suspect agreed to the interview and was informed he or she could terminate the questioning;
- Whether the person’s conduct indicated an awareness of such freedom;
- Whether the police informed the person he or she was considered a witness or a suspect (But, see “*Note*,” below);
- Whether they manifested a belief that the person was culpable and they had evidence to prove it;
- Whether there were restrictions on the suspect’s freedom of movement during the interview;
- Whether the police officers dominated and controlled the interrogation or were aggressive, confrontational, and/or accusatory;
- Whether the police used interrogation techniques;

- Whether they pressured the suspect; *and*
- Whether the suspect was arrested at the conclusion of the interview.

(*People v. Pilster* (2006) 138 Cal.App.4th 1395; 1403-1404, i.e., no one factor is controlling; see also *People v. Zamudio* (2008) 43 Cal.4th 327, 340-346; *United States v. Brobst* (9th Cir. 2009) 558 F.3rd 982, 995-997; *Stanley v. Schriro* (9th Cir. 2010) 598 F.3rd 612, 618-619; *United States v. Basher* (9th Cir. 2011) 629 F.3rd 1161, 1166-1167; *People v. Bejasa* (2012) 205 Cal.App.4th 26, 35-36; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162; *People v. Stansbury* (1995) 9 Cal.4th 824, 831-835; *United States v. Galindo-Gallegos* (9th Cir. 2001) 244 F.3rd 728; *People v. Herdan* (1974) 42 Cal.App.3rd 300, 306-307; *People v. Salinas* (1982) 131 Cal.App.3rd 925, 935; *People v. Morris* (1991) 53 Cal.3rd 152, 197-198; *United States v. Fike* (5th Cir. 1996) 82 F.3rd 1315, 1324-1326; *People v. Lopez* (1985) 163 Cal.App.3rd 602, 608; *People v. Spears* (1991) 228 Cal.App.3rd 1, 25-26; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753-1754; *Tanklff v. Senkowski* (2nd Cir. 1998) 135 F.3rd 235, 244; *In re B.M.* (2017) 10 Cal.App.5th 1292, 1297; *People v. Saldana* (2018) 19 Cal.App.5th 432, 454-463; *In re I.F.* (2018) 20 Cal.App.5th 735, 759; *People v. Torres* (2018) 25 Cal.App.5th 162, 172-173; *In re M.S.* (2019) 32 Cal.App.5th 1177, 1188; *In re Anthony L.* (2019) 43 Cal.App.5th 438, 445; *People v. Potter* (2021) 66 Cal.App.5th 538, 539-540.)

The “*whether the suspect was arrested at the conclusion of the interview*” factor is not satisfied by merely allowing the suspect to walk out of the police station after the interrogation, only to arrest him minutes later, down the block. This “pretense” has been recognized as “more of a ruse than an actual statement of honest intent” that does not lend any weight to the argument that he was not arrested at the time of the interrogation. (*People v. Saldana*, *supra*, at p. 461.)

“Where the person being questioned is a minor, the court may also consider the child’s age in the *Miranda* analysis, as long as the child’s age was known to the officer or objectively apparent to a reasonable officer, because ‘a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.’” (*In re Anthony L.* *supra*, at p. 446; quoting *In re I.F.*, *supra*, at p. 760.)

But see *United States v. Fernandez-Ventura* (1st Cir. 1998) 132 F.3rd 844, 847; and *United States v. Pratt* (1st Cir. 1981) 645 F.2nd 89, 91; “pat down” search in a U.S. Customs inspection is *insufficient*, by itself, to constitute custody.

A number of the above factors may be distilled down into one category; i.e., “*the nature of the interrogation*,” e.g., whether police (1) dominated and controlled the interrogation; (2) manifested a belief (defendant) was culpable and they had evidence to prove it; (3) were aggressive, confrontational, and accusatory; (4) used interrogation techniques to pressure (defendant); and (5) arrested him at the end of the interrogation. (See *People v. Saldana* (2018) 19 Cal.App.5th 432, 454-463.)

Also note *United States v. Leal* (7th Cir. 2021) 1 F.3rd 545, where the Court held that the fact that defendant was arrested after a non-custodial questioning was irrelevant to the custody issue.

Conflict of Interest of a Parent as a Factor:

It has been argued that in a case where a parent of the suspect, who had also lost a child in the case (i.e., one child murdering his or her sibling), had a conflict of interest which itself was a circumstance that should be factored in. Such a conflict, per this argument, could cause the parent to unwittingly interfere with the thoughtful exercise of the child/suspect’s constitutional rights, or even contribute to a false confession. “(I)n situations where the parent or other interested adult has a relationship with the victim, ‘the adult may operate, consciously or subconsciously, as more of a fact-finder or inquisitor in order to determine how her loved one was harmed.’” (*In re I.F.* (2018) 20 Cal.App.5th 735, 760-766; quoting Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?* (2004) 41 Am. Crim. L.Rev. 1277, 1294.)

Other potential conflicts include when the parent may be the victim of the crime, or may himself be a suspect, or when a parent urges cooperation with law enforcement as a matter of moral responsibility. Also, some parents, believing their children to be innocent, may encourage cooperation out of a desire to promote good citizenship or to aid in the investigation of a crime. Others, believing their children to be guilty, may urge cooperation out of a desire to teach their children life lessons about

personal responsibility or respect for authority.
(Citations omitted; *In re I.F.*, *supra*, at p. 761.)

Although a parent's conflict of interest may be a factor among others to consider in evaluating the issue of a custody for *Miranda* purposes, there is no authority for an exclusionary rule based upon that factor alone. (*Id.*, at p. 766.)

The Ninth Circuit Court of Appeals Opinion: The Ninth Circuit has reduced the number of factors down to the following, while often referring to this list as “non-exhaustive:”

- The language used to summon the individual;
- The extent to which the defendant is confronted with evidence against him;
- The physical surroundings of the interrogation;
- The duration of the detention; *and*
- The degree of pressure applied to detain the individual.
- Enforced isolation, isolating the defendant from the outside world or merely keeping him from having contact with other people.

(*United States v. Barnes* (9th Cir. 2013) 713 F.3rd 1200, 1203-1207; *United States v. Beraun-Panez* (9th Cir. 1987) 830 F.2nd 127; *United States v. Bassignani* (9th Cir. 2009) 575 F.3rd 879, 883; citing *United States v. Kim* (9th Cir. 2002) 292 F.3rd 969, 974-977; noting that “Other factors may also be pertinent to, and even dispositive of, the ultimate determination whether a reasonable person would have believed he could freely walk away from the interrogators.” See also *United States v. IMM* (9th Cir. 2014) 747 F.3rd 754, 765.)

Witness or Suspect: Whether the person is questioned as a *witness* or a *suspect* is a factor to consider. (*People v. Aguilera*, *supra*.)

E.g.: Reading a person his *Miranda* rights in itself is a factor indicating custody. (*People v. Boyer* (1989) 48 Cal.3rd 247, 268, 272; overruled on other grounds.)

The California Supreme Court has noted also that the fact a person is advised of his *Miranda* rights is itself a factor to consider in that it conveys to a suspect that the police believe that he must be guilty of something. (*Ibid.*; see also *People v. Moore* (2011) 51 Cal.4th 386, 403.)

Note, however: **DO NOT** tell a suspect that he has the choice of being treated as a “*witness or a suspect*.” Such an admonishment can, and probably will, be interpreted as an “*offer of leniency*,” i.e., inferring that he may be immune from prosecution should he cooperate, which will likely be fatal to the admissibility of any resulting statements. (See “*Offers of Leniency*,” under “*Specific Issues Affecting Voluntariness*,” under “*Voluntariness After Waiver*” (Chapter 9), below.)

Whether the suspect was informed that he was free to leave and/or terminate the interview at any time is an important factor (see ***California v. Beheler*** (1983) 463 U.S. 1121 [103 S.Ct. 3517; 77 L.Ed.2nd 1275]; ***People v. Aguilera***, *supra*; ***Tankleff v. Senkowski*** (2nd Cir. 1998) 135 F.3rd 235, 244; ***People v. Torres*** (2018) 25 Cal.App.5th 162.), and is discussed in more detail below.

I.e.; a “***Beheler*** Admonishment,” per ***California v. Beheler***, *supra*.)

See: “*The ‘Beheler Admonishment’ or Taking the ‘Custody’ Out of An Interrogation*,” below.

The Gladys R. Questionnaire: Also, the fact that a police officer begins an interview of a minor with a ***Gladys R.*** questionnaire, done in order to determine by “clear evidence” whether a minor under the age of 14 years understood the wrongfulness of his act (see ***In re Gladys R.*** (1970) 1 Cal.3rd 855, and **P.C. § 26**) is, in itself, a factor to consider when determining whether a suspect-minor was in custody at the time. (***In re Joseph H.*** (2015) 237 Cal.App.4th 517, 531.)

Location as a Factor: While not dispositive in and of itself (***United States v. Howard*** (4th Cir. 1997) 115 F.3rd 1151, 1155.), the location of the interview is an important factor the court will consider in determining custody. For instance:

The Suspect’s Home or Place of Business: Questioning in one’s own home is *less* intrusive and less likely to require a ***Miranda*** admonishment. (***Michigan v. Summers*** (1981) 452 U.S. 692, 702, and fn. 15 [69 F.2nd 340, 349]; see also ***United States v. Jones*** (9th Cir. 1991) 933 F.2nd 807; ***United States v. Sutera*** (8th Cir. 1991) 933 F.2nd 641; and ***United States v. Fike*** (5th Cir. 1996) 82 F.3rd 1315, 1325; ***United States v. Craighead*** (9th Cir. 2008) 539 F.3rd 1073, 1083.)

Absent the use of handcuffs, guns, or excessive force, the detention of a person in his own home while a search

warrant is being executed, or a search based upon consent, is *not* custodial. (*Michigan v. Summers* (1981) 452 U.S. 692, 702, fn. 15 [69 L.Ed.2nd 340, 349]; *United States v. Fike* (5th Cir. 1996) 82 F.3rd 1315, 1325; *United States v. Saadeh* (7th Cir. 1995) 61 F.3rd 510, 520; *United States v. Rith* (10th Cir. 1999) 164 F.3rd 1323, 1332; *United States v. Axsom* (8th Cir. 2002) 289 F.3rd 496.)

Questioning in one's home, however, does not always mean there is no custody requiring a *Miranda* admonishment. (See *Orozco v Texas* (1969) 394 U.S. 324 [22 L.Ed.2nd 311]; *United States v. Craighead*, *supra*, where defendant was moved to storeroom in his home and the door closed.)

E.g.: An officer entering defendant's hotel room with a pass key, with his gun drawn, and ordering defendant to raise his hands and get out of bed, resulted in a situation where a reasonable person would have reasonably believed he was deprived of his freedom in a significant way, even though the officer reholstered his gun before questioning defendant about an alleged rape. Defendant, per the court, was in custody. (*People v. Benally* (1989) 208 Cal.App.3rd 900.)

Questioning a suspect in her place of business, while tending to minimize the intrusiveness, is largely offset when that suspect is isolated from other family members and subjected to a full-fledged interrogation. (*United States v. Kim* (9th Cir. 2002) 292 F.3rd 969, 977-978.)

Asking a 15-year-old minor (homicide suspect) to reenact what was later determined to be a second degree murder of her baby within minutes of his birth was held to lawful despite not having advised the minor of her *Miranda* rights, there being no "custody" at that time. The reenactment took place in the minor's apartment and lasted only about 30 minutes. The police were not confrontational or aggressive, and were aware of the minor's obvious age. The minor consented to participating in the reenactment. Her parents were present and also consented to the reenactment after being informed that she was not required to participate. The Juvenile Court magistrate made the finding that the officers "took great care to make sure this was not a coercive environment [and were] sensitive to [M.S.'s] physical condition (the victim's birth and murder

occurring only three days earlier).” The Appellate Court held that the Juvenile Court had made the proper ruling in denying defendant’s motion to suppress and was supported by substantial evidence. (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1188.)

Where defendant was questioned about a suspected tax fraud scheme in her own living room, whereupon she admitted to her role in the crime, it was held that she was not in custody at the time of the questioning. When an interview takes place in a suspect’s home, that fact usually weighs against finding the kind of custodial situation that requires a *Miranda* warning. Also, before the interview began, the agents told defendant that she was the subject of an investigation and described “the voluntary nature of the interview.” Asking defendant if she would agree to answer their questions, she agreed. Also significant was the fact that no weapons were brandished, no handcuffs were used, and the agents employed a “professional and cordial tone.” Finally, defendant never asked to end the questioning and when the interview was over the agents left without arresting her. The court held that these facts did not constitute an environment that presented a meaningful danger of coercion. As a result, the court concluded that defendant was not in custody for *Miranda* purposes, so no *Miranda* warning was required. (*United States v. Cooper* (D.C. Cir. 2020) 949 F.3rd 744.)

Questioning defendant in his own home after being told that he was not under arrest, that he was not in custody, and that the agents would leave at any time he told them to go, the Court held that the defendant was not in custody for purposes of *Miranda*. Also, at one point, defendant’s wife interceded, talking to defendant out of the agents’ presence, after which defendant invited the agents back into his home to continue the questioning. (*United States v. Deason* (11th Cir. 965 F.3rd 1252.)

Questioning a 17-year-old minor in his own home was nonetheless determined to be a custodial interrogation due to other factors indicating that a reasonable person in defendant’s position would *not* have felt free to leave or terminate the questioning. (*In re Matthew W.* (2021) 66 Cal.App.5th 392, 406-410.)

In Public: Questioning in a public place, or at a neutral location is less intrusive, and, absent indications that the subject is in fact being arrested, is less likely to require a ***Miranda*** admonishment. For example:

Questioning in a busy airport, while being told that she was free to leave, did not constitute an interrogation requiring a ***Miranda*** admonishment. (*United States v. Yusuff* (7th Cir. 1996) 96 F.3rd 982.)

See also *United States v. Torres-Guevara* (10th Cir. 1998) 147 F.3rd 1261; questioning outside the airport after being told that she was free to leave did not require a ***Miranda*** admonishment in that the defendant was not in custody, and not even being detained.

Questioning defendant in a non-obtrusive manner, outdoors, in public, did not require a ***Miranda*** admonishment. (*United States v. Guerrero-Hernandez* (10th Cir. 1996) 95F.3rd 983.)

Contacting defendant on a public street and asking him if he was “selling dope,” resulting in an incriminating response, was not an interrogation requiring a ***Miranda*** admonishment. (*People v. Vasquez* (1993) 14 Cal.App.4th 1158.)

Questioning defendant at his parole officer’s office, telling him he was free to leave; no custody. (*People v. Carpenter* (1997) 15 Cal.4th 312, 383-384.)

Questioning a witness in testimony in a court proceeding is not a custodial interrogation. (*United States v. Kilgroe* (9th Cir. 1992) 959 F.2nd 802; *United States v. Valdez* (2nd Cir. 1994) 16 F.3rd 1324, 1328.)

Questioning in a public setting, albeit a rural, isolated location, where there were some 15 to 20 non-law enforcement witnesses present, diminished the coerciveness involved, eliminating the need for a ***Miranda*** admonishment and waiver. The situation was no more coercive than a detention situation. (*United States v. Galindo-Gallegos* (9th Cir. 2001) 244 F.3rd 728.)

But see *United States v. Beraun-Panez* (9th Cir. 1987) 812 F.2nd 578, where, in a remote area, defendant was separated from his companions and questioned. A *Miranda* admonishment should have been given.

The initial questioning in an international border situation (at the primary inspection point) prior to developing probable cause to arrest does not require a *Miranda* admonishment. (*United States v. Leasure* (9th Cir. 1997) 122 F.3rd 837.)

Immigration officials escorting a smuggling suspect from the primary to the secondary inspection areas at the U.S./Mexican international border *did not* constitute “custody” for purposes of *Miranda*. However, putting the subject into a holding cell while removing his shoes and belt *was* custody. Any questioning after that point should have been preceded by a *Miranda* admonishment and waiver. (*United States v. Butler* (9th Cir. 2001) 249 F.3rd 1094, 1099-1101.)

Questioning in the secondary inspection area, although lasting longer than normal (the delay being caused by the defendant’s inability to provide satisfactory evidence of identification), is to be expected at a Custom’s inspection station and did not constitute custody. (*Untied States v. Osuna* (6th Cir. 1999) 170 F.3rd 654.)

However, despite questioning defendant in a public shopping mall, in a low-key tone, and in a limited detention (i.e., 36 minutes) situation, the Ninth Circuit found defendant to have been in custody for purposes of *Miranda* under circumstances where he was confronted by four armed police officers, with two police cars with lights flashing, and after having separated him from his seven-year-old son. (*United States v. Mora-Alcaraz* (9th Cir. 2021) 986 F.3rd 1151, 1155-1157.)

The Court found of particular significance on the issue of custody the fact that the officers had asked to speak with him outside the presence of his son. “No physical restraint of Mora-Alcaraz was necessary so long as the police kept him separated from his son. He could not leave.” (*Id.*, at p. 1157.)

In a Hospital Room or Ambulance:

While defendant is in an ambulance receiving medical treatment, he is not in custody for purposes of ***Miranda***. (*People v. Mosley* (1999) 73 Cal.App.4th 1081, 1090-1091; see also *United States v. Martin* (9th Cir. 1985) 781 F.2nd 671, 673; defendant a hospital patient.)

The California Supreme Court noted that questioning a defendant without benefit of a ***Miranda*** admonishment and waiver, when the defendant is a hospital patient and hooked up to medical devices, is “tread(ing) on perilous ground.” However, the Court, under the circumstances, found this issue to be one that did not need deciding in that even if in violation of ***Miranda***, the admission of the defendant’s resulting statements was harmless beyond a reasonable doubt. (*People v. Caro* (2019) 7 Cal.5th 463, 492-495.)

But see the concurring opinion in *Caro* (at pp. 527 to 535) arguing that defendant was not only coerced into making incriminating admissions (a “due process” violation), but that she was also in custody while questioned without benefit of a ***Miranda*** admonishment or waiver.

Defendant was briefly questioned while in an emergency room of a hospital about how he had become a gunshot victim. The Eighth Circuit Court of Appeal upheld the trial court’s ruling that a ***Miranda*** admonishment was not required in that defendant was not in custody at the time, and that his statements were not coerced. First, the interview lasted only a few minutes. ***Miranda*** warnings were not required because defendant was not in custody. Second, being on pain medication does not automatically establish that a person’s will has been overborne if there is evidence that the patient answered “reasonably” and understood what was occurring. Here, the officer testified that defendant answered questions in an appropriate context and manner; he spoke in a normal cadence and pace; he did not slur his words; and that the officer was able to totally understand his answers. In addition, the Court added that defendant refused to answer some of the officer’s questions, which suggested that the pain medication did not impair his ability to resist “police pressure.” Finally, the Court found there was no evidence to suggest that the officer employed strong-arm tactics, deception, or made

threats or promises while talking to defendant. (*United States v. Mattox* (8th Cir. 2022) 27 F.4th 668.)

In a Police Car: Questioning the suspect in the back seat of a police car may or may not indicate custody, depending upon the circumstances. The cases are mixed. For example:

Two F.B.I. agents questioning a murder suspect for over an hour in a closed car held to be custody. (*United States v. Lee* (9th Cir. 1982) 699 F.2nd 466.)

Questioning in the back seat of a sheriff's car, where defendant helped determine the place of the interview, plus other non-coercive circumstances, held *not* to require a *Miranda* admonishment. (*United States v. McKinney* (8th Cir. 1996) 88 F.3rd 551.)

But, while the back seat of a police car might be considered a coercive setting for a protracted interrogation, spontaneous statements made by the in-custody suspect are admissible. (*United States v. Murphy* (6th Cir. 1997) 107 F.3rd 1199.)

Brief questioning of a suspect in the back seat of a patrol car after a traffic stop and a gun and drugs were recovered; no custody. (*United States v. Murray* (7th Cir. 1996) 89 F.3rd 459, 461-462.)

Secretly tape recording conversations in the back seat of a police car is lawful: No questioning; no expectation of privacy. (*People v. Chandler* (1968) 262 Cal.App.2nd 350; *People v. Seaton* (1983) 146 Cal.App.3rd 67, 82; *People v. Crowson* (1983) 33 Cal.3rd 623, 630; *United States v. Gilley* (11th Cir. 1995) 43 F.3rd 1440; *People v. Loyd* (2002) 27 Cal.4th 997, 1009, fn. 14; *People v. Cleland* (2003) 109 Cal.App.4th 121.)

See also *United States v. Bailey* (8th Cir. Minn. 2016) 831 F.3rd 1035: Even though the officer might have expected that defendant, left alone in the back seat of a patrol car with a recording device running, might say something if left alone, the court found the officer's act of leaving him alone in the back of the patrol car did not constitute interrogation. *Miranda* warnings were not required.

Same rule holds true for taped conversations of prisoners in the back of a transportation van. (*United States v. Paxton* (7th Cir. Ill. 2017) 848 F.3rd 803; also upholding the admissibility of identification questions the agents asked the defendants as they entered the van, which were later used to identify the speakers in the recorded conversations, finding that such questioning did not violate the **Fifth Amendment**. Although the defendants had not yet been given their *Miranda* warnings, the questions asked by the agents were similar to routine booking questions, which are not the type of questions that typically produce incriminating information.

Placing a co-suspect in the back seat of a police car with a hidden tape recorder, even after the defendant had requested counsel, is *not* a violation of the defendant's rights. (*People v. Lucero* (1987) 190 Cal.App.3rd 1065, 1067-1069.)

But see United States v. Ricardo D. (9th Cir. 1990) 912 F.2nd 337, 340: "Detention in a patrol car exceeds permissible *Terry* (i.e., *detention*) limits absent some reasonable justification," thus converting the contact into an arrest and necessitating a *Miranda* admonishment and waiver before questioning.

Referring to the landmark case decision on detentions and pat downs; *Terry v. Ohio* (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].

Questioning defendant while seated in the back seat of the officer's patrol vehicle during a traffic stop, held not to be "custody" for purposes of *Miranda*, the Court holding that the circumstances surrounding the questioning did not resemble a formal arrest in that defendant was asked a modest number of questions and never indicated that his detention would be anything other than temporary. (*United States v. Johnson* (8th Cir. 2020) 954 F.3rd 1106; noting that it did not matter if the motivation behind the officer's questions was to discover evidence of criminal activity in that a police officer's "unarticulated plan" has no bearing on whether a suspect is in custody for *Miranda* purposes.)

In a Police Station: Questioning at the police station is a strong factor indicating the need for a ***Miranda*** admonishment, but there are exceptions. (***People v. Esqueda*** (1993) 17 Cal.App.4th 1450, 1481-1482.)

Requiring a person to remain in the coercive environment of a police facility is a “*de facto*” arrest; i.e., “*custody*.” (***People v. Aguilera*** (1996) 51 Cal.App.4th 1151, 1166-1167.)

However, while questioning in a police station tends to be more intrusive, it does not always necessarily mean the subject is in custody. (***Oregon v. Mathiason*** (1977) 429 U.S. 492, 495 [50 L.Ed.2nd 714, 719]; see also ***Green v. Superior Court*** (1985) 40 Cal.3rd 126, 136; and ***People v. Rippberger*** (1991) 231 Cal.App.3rd 1667, 1690-1691; ***California v. Beheler*** (1983) 463 U.S. 1121, 1124-1125 [103 S.Ct. 3517; 77 L.Ed.2nd 1275, 1278-1279]; ***People v. Stansbury*** (1995) 9 Cal.4th 824, 833; ***People v. Potter*** (2021) 66 Cal.App.5th 528, 540.)

In ***Oregon v. Mathiason***, *supra*: Defendant was invited to the police station, told that although the police officer believed he was involved in a burglary, he was not under arrest, and after a 30-minute interview he was allowed to leave: *No custody*.

Defendant was interviewed in an FBI interview room, when he voluntarily went with the agent and after being told several times that he was not in custody and was free to leave, and then transported home afterwards; *no custody*. (***United States v. Crawford*** (9th Cir. 2004) 372 F.3rd 1048, 1059-1060.)

Voluntarily accompanying detectives to the police station, while being told he was not under arrest and then, as previously promised, being given a ride home afterwards, was *not* a custodial interrogation. (***People v. Holloway*** (2004) 33 Cal.4th 96, 118-121.)

Defendant hired another to kill his sister’s ex-husband. The ensuing investigation eventually led to Baines. He was either asked, or volunteered, to go to the police station to answer questions. He was *not* told he was under arrest. He was *not* handcuffed. No firearms were used. He was taken

to an unlocked interrogation room and, without a **Miranda** admonishment, questioned for six hours during which he made certain incriminating statements. After failing a polygraph test, defendant asked if he could speak with a lawyer and whether he could leave. He was told no. The trial court later ruled that Baines was *not* in custody until he asked if he could leave, and that his statements up to that point were admissible in court against him. The Ninth Circuit Court of Appeal, in a split decision, affirmed. Per the Court; “There is no evidence here to suggest that, under clearly established federal law, a reasonable person in Bain’s situation would have felt that he was not free to terminate the police interrogation.” (**Baines v. Cambra** (9th Cir. 2000) 204 F.3rd 964.)

Being held in a *locked interrogation room* for over seven hours (although he was told that he need only knock if he needed anything) prior to initiating questioning, did not convert a detention into an arrest where there was no other indicia of custody (handcuffs, guns, etc.). The Appellate Court described defendant as one who “*deliberately chose a stance of eager cooperation in the hopes of persuading the police of his innocence,*” and found that he had never been “*seized*” (i.e., *arrested*) for purposes of the **Fourth Amendment**, and that his transportation and lengthy wait at the station had been voluntary, and he was therefore never illegally arrested. (**Ford v. Superior Court [People]** (2001) 91 Cal.App.4th 112.)

Defendant registering as a sex registrant (per **P.C. § 290(a)**) at a police station is not entitled to the assistance of his attorney in that the process is not the equivalent to a custodial interrogation. (**People v. Sanchez** (2003) 105 Cal.App.4th 1240, 1245-1246.)

The same reasoning may apply to similar government-dominated locations, such as the office of the defendant’s probation officer. (**United States v. Howard** (4th Cir. 1997) 115 F.3rd 1151; see also **People v. Carpenter** (1997) 15 Cal.4th 312, 383-384; parole officer’s office.)

Also, an arrested individual held in a police station has no more of a privacy expectation than does a jail inmate or a prisoner in a police car. Secretly tape-recording his conversation with another, therefore, is not illegal. (**People v. Califano** (1970) 5 Cal.App.3rd 476, 481.)

Voluntarily coming to the police station, being told that he is not under arrest and is free to leave, with the interrogation room door being left partially open and his foster mother only about 10 feet away, was *not* custody for purposes of *Miranda* despite occurring in a secure area of a police station. (*In re Kenneth S.* (2005) 133 Cal.App.4th 54.)

However, coming to the police station on one's own volition is only the beginning of the inquiry. Subsequent factors may very well change what initially was a voluntary submission to answering some questions into a custodial interrogation, requiring a *Miranda* admonishment and waiver. (*People v. Saldana* (2018) 19 Cal.App.5th 432, 456; noting that the "location" of an interrogation is a key factor in evaluating whether an interrogation involved "custody.")

Fourth Amendment Custody vs. Fifth Amendment Custody: Note *People v. Pilster* (2006) 138 Cal.App.4th 1395, at page 1406, where it was noted that "custody" for purposes of *Miranda*, under the **Fifth Amendment**, involves a different analysis than "custody" for purposes of a detention or arrest under the **Fourth Amendment**. "In contrast (to **Fourth Amendment**, search and seizure issues), **Fifth Amendment Miranda** custody claims do not examine the reasonableness of the officer's conduct, but instead examine whether a reasonable person (in the defendant's position) would conclude the restraints used by police were tantamount to a formal arrest."

The fact that "custody" for purposes of the **Fifth Amendment** involves a different analysis than does custody for purposes of the **Fourth Amendment** has been recognized in other decisions. (See *United States v. Sullivan* (4th Cir. 1998) 138 F.3rd 126, 131; *United States v. Smith* (7th Cir. 1993) 3 F.3rd 1088, 1097.)

"Whether an individual has been unreasonably seized for **Fourth Amendment** purposes and whether that individual is in custody for *Miranda* purposes are two different issues. [Citation.]" (*People v. Bejasa* (2012) 205 Cal.App.4th 26, 38, quoting *People v. Pilster*, *supra*, at p. 1405.)

But see *People v. Kopatz* (2015) 61 Cal.4th 62, 80, where the California Supreme Court determined that, at least as was relevant in this case, "the test for determining whether a person was seized under the **Fourth Amendment** or was in "*Miranda* custody" is essentially the same: whether a reasonable person would have felt he or she was at liberty to

leave or to decline the officers' requests to go to the detective bureau and be interviewed there."

Burden of Proof: It is the defendant's burden to prove he was in custody during an interrogation that produced evidence he seeks to exclude under *Miranda*. (*United States v. Davis* (5th Cir. 1986) 792 F.2nd 1299, 1309; *United States v. Charles* (5th Cir. 1984) 738 F.2nd 686, 692; *United States v. Goldberger* (D.C. Dist. Ct. 1993) 837 F.Supp. 477, 454, fn. 4.)

Detentions: Not all questioning of a criminal suspect constitutes a "custodial interrogation."

On-The-Scene Investigations; Investigatory vs. Accusatory Questioning: *Miranda* does not apply to "investigative" (as opposed to "accusatory") questioning; i.e., a "temporary detention for investigation."

"Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding (in *Miranda*) In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. (fn. omitted)" (*Miranda v. Arizona*, *supra*, at pp. 477-478 [16 L.Ed.2nd at pp. 725-726].)

People who have been temporarily detained for investigation are not "in custody" for purposes of *Miranda* and do not have to be warned prior to questioning (*People v. Manis* (1969) 268 Cal.App.2nd 653, 669; *People v. Breault* (1990) 223 Cal.App.3rd 125, 135; *People v. Clair* (1992) 2 Cal.4th 629, 675.) so long as nothing occurs which would cause a reasonable person to believe to believe he is being arrested. (See *Stansbury v. California* (1994) 511 U.S. 318 [128 L.Ed.2nd 293].)

However, while a "*Terry stop*" situation (referring to *Terry v. Ohio* (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889], authorizing a temporary detention for investigation) does not itself require a *Miranda* admonishment, a detention, where the suspect, at least temporarily, is not free to leave, may be one factor for the court to consider when determining whether "custody," for purposes of *Miranda*, exists. (*United States v. Salvo* (6th Cir. 1998) 133 F.3rd 943, 949-950.)

Questioning intended to enable an officer "to determine whether a crime has been committed or is in progress" is not the type of questioning intended by the Supreme Court to require a *Miranda* admonishment. (*Lowe v. United States* (9th Cir. 1969) 407 F.2d 1391, 1393-1394.)

Initial on-the-scene questioning of a criminal suspect, so long as “brief and causal,” does not likely require a *Miranda* admonishment and waiver. The fact that the suspect has been handcuffed is but one factor to consider when determining whether *Miranda* is implicated. (*People v. Davidson* (2013) 221 Cal.App.4th 966.)

“Questioning under these (i.e., detention) circumstances is designed to bring out the person’s explanation or lack of explanation of the circumstances which aroused the suspicion of the police, and thus enable the police to quickly ascertain whether such person should be permitted to go about his business or held to answer to charges.” (*People v. Milham* (1984) 159 Cal.App.3rd 487, 500.)

See also *People v. Patterson* (1979) 88 Cal.App.3rd 742, 747-748; discussing “investigatory” verses “accusatory” questioning during a traffic stop of persons subsequently determined to be robbery suspects:

“It is an act of responsible citizenship for individuals to give whatever information they may have to aid law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.” (*Ibid*, citing *Miranda v. Arizona*, supra, at pp. 477-478 [16 L.Ed.2nd at pp. 725-726].)

The fact that an officer deliberately delays making an arrest until after a “non-custodial” interrogation can be completed is irrelevant. The suspect has no right to an earlier arrest so as to trigger his **Sixth Amendment** right to counsel (and, arguably, his **Fifth Amendment**, *Miranda* rights). “There is no constitutional right to be arrested.” (*Hoffa v. United States* (1966) 385 U.S. 293, 319-310 [17 L.Ed.2nd 374, 386]; see also *People v. Webb* (1993) 6 Cal.4th 494, 527.)

However, using an otherwise lawful detention as a tool with which to coerce the employees of a business to submit to interviews, conditioning their release on answering questions, is unlawful and a violation of the **Fourth Amendment**, and will subject the offending law enforcement officers to potential civil liability. (*Ganwich v. Knapp* (9th Cir. 2003) 319 F.3rd 1115.)

Also, an interview that degenerates into an accusatory, intimidating interrogation, will correspondingly change the situation from a non-custodial interrogation into a custodial interrogation. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151.)

It is arguable that a law enforcement officer, required by his supervisors to remain at the station pending being subjected to questioning by Internal

Affairs, is not in custody for purposes of *Miranda*. (See *Aguilera v. Baca* (9th Cir. 2007) 510 F.3rd 1161, 1167-1171.)

The issue in *Aguilera v. Baca* was whether sheriff's deputies were "in custody" for **Fourth Amendment** purposes, the Court holding that they were not. This conclusion was based upon an evaluation of some 13 separate factors. A similar argument could be made that they were also not in custody for **Fifth Amendment, *Miranda*** purposes.

Examples Where "Custody" is Lacking:

Traffic stops, at least until (and if) the subject is arrested: (*Berkemer v. McCarty* (1984) 468 U.S. 420, 438-439 [82 L.Ed.2nd 317, 334]; *People v. Tully* (2012) 54 Cal.4th 952, 982-983.)

While technically an *arrest and release*, traffic stops do not involve the custody normally associated with a formal arrest for a bookable offense. "(T)he atmosphere surrounding an ordinary traffic stop is substantially less '*police dominated*' than that surrounding the kinds of interrogation at issue in *Miranda* itself . . ." (Emphasis added; *Berkemer v. McCarty*, *supra*, at pp. 438-439 [82 L.Ed.2nd at p. 334].)

Questioning defendant while seated in the back seat of the officer's patrol vehicle during a traffic stop for "following too close," held not to be "custody" for purposes of *Miranda*, the Court holding that the circumstances surrounding the questioning did not resemble a formal arrest in that defendant was asked a modest number of questions and never indicated that his detention would be anything other than temporary. (*United States v. Johnson* (8th Cir. 2020) 954 F.3rd 1106; noting that it did not matter if the motivation behind the officer's questions was to discover evidence of criminal activity (suspecting that defendant and his passenger were transporting drugs) in that a police officer's "unarticulated plan" has no bearing on whether a suspect is in custody for *Miranda* purposes.)

Traffic Stops to Investigate Criminal Activity: Stopping vehicles upon a reasonable suspicion the occupants are engaged in criminal activity. (*United States v Hill* (8th Cir. 1996) 91 F.3rd 1064.)

See also *People v. Lopez* (1985) 163 Cal.App.3rd 602, 606-609; traffic stop resulting in a "*receiving stolen property*" investigation.

And *United States v. Sullivan* (4th Cir. 1998) 138 F.3rd 126, 130-132: Officer asked defendant whether he had anything illegal in his car after completing a traffic stop, and pressed the issue when defendant became nervous, resulting in defendant's admission to a gun under his seat. No custody.

Pre-Arrest Phase of a D.U.I. (Driving while Under the Influence) Stop. (*Berkemer v. McCarty* (1984) 468 U.S. 420 [82 L.Ed.2nd 317]; *Pennsylvania v. Bruder* (1988) 488 U.S. 9 [102 L.Ed.2nd 172]; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1752-1754.)

This rule holds true even when a traffic accident is involved. (*People v. Milham* (1984) 159 Cal.App.3rd 487.)

This is true even though the officer has decided as soon as defendant steps out of his car that he will be taken into custody, so long as this intent is not communicated to the defendant. (*Berkemer v. McCarty*, *supra*, at p. 442 [82 L.Ed.2nd at p. 336].)

But see People v. Bejasa (2012) 205 Cal.App.4th 26, where it was noted that whether or not a DUI suspect is in custody for purposes of *Miranda*, even before a field sobriety test and the general initiation of on-the-scene questioning, is dependent upon the totality of the circumstances.

Questions asked by an arresting officer during the administration of a "Field Sobriety Test" does not, as a general rule, constitute an interrogation for purposes of *Miranda*. (*People v. Cooper* (2019) 37 Cal.App.5th 642.)

Investigating a traffic collision:

See *People v. Bellomo* (1992) 10 Cal.App.4th 195; e.g: "Were you the driver?"

Investigations of Criminal Activity:

Stop and detention of a burglary suspect on the street. (*People v. Farnam* (2002) 28 Cal.4th 107, 180-181.)

Initial stages of a child abuse investigation. (*People v. Salinas* (1982) 131 Cal.App.3rd 925, 936.)

Police responding to a citizen's reports of juvenile activity (i.e., throwing rocks at cars) without any specific information as to a

suspect description. (*In re Victor B.* (1994) 24 Cal.App.4th 521, 524-525.)

Police responding to juveniles throwing rocks at a bus contacted the minor and his companion. The officer told them they did not have to answer any questions and never indicated that they would be taken into custody; held to be a detention only. (*In re Joseph R.* (1998) 65 Cal.App.4th 954.)

During a *temporary detention for investigation*, where the subject is merely asked to identify himself, at least under most circumstances. (*Hiibel v. Sixth Judicial District Court of Nevada* (2004) 542 U.S. 177 [159 L.Ed.2nd 292]; refusing to identify oneself under such circumstances may subject the person to arrest for delaying the officer in the performance of his duties.)

Questioning a subject in public, in front of witnesses, does not normally involve the “*incommunicado, police dominated*” situation *Miranda* was intended to offset. Physical seizure of a suspected undocumented alien, while in a group of about 15 to 20 similarly situated individuals, was not custody for purposes of *Miranda*, and did not require a waiver prior to asked about the subject’s citizenship. (*United States v. Galindo-Gallegos* (9th Cir. 2001) 244 F.3rd 728.)

An interview of a suspect in his kitchen during which he was repeatedly told, “*you’re not coming clean*,” and that he was facing five years for not “coming clean;” a truthful statement about the potential consequences of making a false statement to a federal law enforcement officer during an investigatory interview, but was not so accusatory as to require a *Miranda* admonishment. (*United States v. Howard* (4th Cir. 1997) 112 F.3rd 777, 782-783.)

A six-hour interrogation of a murder suspect at the police station, where nothing was said or done to indicate that he was not free to leave (i.e., unlocked interview room, no handcuffs nor gun-use), was found to be a non-custodial interrogation. (*Bains v. Cambra* (9th Cir. 2000) 204 F.3rd 964.)

A consensual interview of defendant at the police station where he was questioned as a witness only, was told he was not under arrest, and nothing occurred that would have caused a reasonable person to believe that he was in custody. (*People v. Zamudio* (2008) 43 Cal.4th 327, 340-346; see also *People v. Zaragoza* (2016) 1 Cal.5th 21, 56-57; described as a consensual encounter, although done at a sheriff’s station.)

Even though questioning is brief, and takes place in the home (two factors that tend to indicate a lack of custody), a person may still be in custody for purposes of *Miranda* when the police presence tends to dominate the area. *United States v. Brobst* (9th Cir. 2009) 558 F.3rd 982, 995-997.)

During an investigation of the defendant's missing wife and child, where the interview began as a missing person's interview and the detective never confronted defendant, at least until the end of the hour-long interview, with his suspicions that defendant was responsible. (*Stanley v. Schriro* (9th Cir. 2010) 598 F.3rd 612, 618-619.)

Even when the questioning became "accusatory," when balanced with all the other factors (including being told he was not under arrest), the defendant is still not necessarily in custody. (*Id.*, at p. 619.)

Briefly sounding a police siren at a campsite, verbally announcing their presence, and asking the subjects to come out of their tent did not amount to an arrest. Neither did the act of asking defendant and his son to keep their hands in view. And with there being evidence that defendant's vehicle was not completely blocked in, there was no custody for purposes of *Miranda*. (*United States v. Basher* (9th Cir. 2011) 629 F.3rd 1161, 1166-1167.)

Where defendant is detained by police upon observing him pushing a new motorcycle, with wires hanging out of it, and he attempts to hide behind a large car as the officer approached. It was held that detaining him, despite handcuffing him upon observation that he was acting "hanky," appeared to be ready to flee, and was armed with a screwdriver, did not require a *Miranda* admonishment to ask him if the motorcycle belonged to him. (*People v. Davidson* (2013) 221 Cal. App.4th 966, 968-973.)

A detective and a deputy district attorney talking to defendant, who at that point was merely a suspect in a homicide, in his own bedroom for only 30 minutes, after telling him he was not under arrest and not obligated to speak with them, was not in custody for purposes of *Miranda*. Other factors the Court considered were that the detective and DDA were not dressed in a manner that asserted official authority, there was no evidence that either was armed, or if armed, that any weapon were visible, no evidence that they blocked defendant's exit from the bedroom, defendant was not restrained, and the nature of their questioning did not appear to

have been aggressive or particularly confrontational. (*People v. Linton* (2013) 56 Cal.4th 1146, 1167.)

No custody was found in a welfare fraud investigation in *United States v. Faux* (2nd Cir. 2016) 828 F.3rd 130, during a 2-hour interview, where:

1. The agents told defendant that she was not under arrest,
2. The tone of the conversation was conversational,
3. There was no indication the agents raised their voices while questioning defendant,
4. Although defendant's movements were monitored by an agent when she used the bathroom and retrieved a sweater from a closet, the agent did not restrict defendant's movements to the degree of a person under formal arrest,
5. The agents questioned defendant in the familiar surroundings of her home,
6. Although the agents never told defendant that she was not free to leave, she did not attempt to end the encounter, leave the house, or join her husband, who was being questioned in another room,
7. The agents did not display their weapons, or otherwise threaten or use any physical force against defendant, and
8. The agents did not handcuff defendant during the interview and she was not arrested at its conclusion.

Based on the "totality of the circumstances," the Court concluded that the 17-year old defendant was not subjected to a custodial interrogation where the officer did not place her under arrest or handcuff her. He was the only officer present. The detention was not prolonged and occurred in a non-coercive atmosphere outside defendant's residence. The officer's questioning was not aggressive, confrontational, or accusatory. He simply told her that he "had gotten a call of a fight inside the house and [he] asked her what . . . happened." The officer also did not use interrogation techniques to pressure defendant. He testified that: "She was just telling me what happened." A reasonable person in defendant's situation would have believed she was free to leave at any time and to terminate the interview. (*In re B.M.* (2017) 10 Cal.App.5th 1292, 1297-1298.)

Custody was lacking where the agents, despite having to use handcuffs to quiet a panicking defendant down, never drew their

weapons, defendant was told several times that he was not under arrest and was free to leave, he was in the familiar surroundings of his own home, the interrogation lasted, at most, only several minutes, and the handcuffs were removed as soon as defendant had calmed himself down. (*United States v. Familetti* (2nd Cir. N.Y. 2017) 878 F.3rd 53.)

Contacting defendant during a medical emergency, after he called 911 to report that his girlfriend was not breathing (she later dying of a drug overdose), and telling him to quit pacing about the apartment and to stay in one place, and later to remain outside while the paramedics treated the victim, and then later asking him if he would agree to accompany the officers to the police station for questioning after having told him several times that he was not under arrest, was not custody for purposes of *Miranda*. In fact, the Court ruled that he was only consensually encountered under these circumstances. (*United States v. Parker* (8th Cir. 2021) 993 F.3rd 595.)

Drug Investigations. (*People v. Hubbard* (1970) 9 Cal.App.3rd 827; *People v. Montoya* (1981) 125 Cal.app.3rd 807; *People v. Vasquez* (1993) 14 Cal.App.4th 1158.)

Questioning a person outside an airport, after telling her that she was free to leave, held to be a consensual encounter only and not requiring a *Miranda* admonishment and waiver. *United States v. Torres-Guevara* (10th Cir. 1998) 147 F.3rd 1261; the Court further holding that even if the contact were deemed to be a detention, *Miranda* was not applicable. (*Id.*, at p. 1264, fn. 4.)

Voluntary Responses by a citizen to a police officer's inquiries concerning the contents of his pockets. (*People v. Epperson* (1986) 187 Cal.App.3rd 115, 119.)

Curbstone Lineup Detentions: Detention of a criminal suspect pending the bringing of the victims to his location for a curbstome lineup does not require that the suspect be admonished to ask him questions. (*People v. Farnum* (2002) 28 Cal.4th 107, 180-181.)

Customs Inspections are not in themselves a custody situation (*United States v. Ventura* (1st Cir. 1996) 85 F.3rd 708; *United States v. Fernandez-Ventura* (1st Cir. 1998) 132 F.3rd 844), at least until the subject is put into a holding cell. (*United States v. Butler* (9th Cir. 2001) 249 F.3rd 1094, 1099-1101.)

Border searches, upon initial entry into the United States, being told to go to the secondary inspection area and told to step out of the vehicle. (*United States v. Leasure* (9th Cir. 1997) 122 F.3rd 837, 839-840; but see *United States v. Butler*, *supra*.)

Deportation Interviews. (*United States v. Montoya-Robles* (Utah 1996) 935 F.Supp. 1196, and cases cited therein; *Miranda* admonishment unnecessary.)

Probation Violations: Investigation concerning a possible (non-criminal) probation violation. (*United States v. Nieblas* (9th Cir. 1997) 115 F.3rd 703.)

Defendant Registering as a Sex Registrant (per **P.C. § 290(a)**) at a police station is not entitled to the assistance of his attorney in that the process is not the equivalent to a custodial interrogation. (*People v. Sanchez* (2003) 105 Cal.App.4th 1240, 1245-1246.)

While Transporting to a Police Station:

While a non-consensual transportation of a suspect to another location is generally considered a “de facto arrest” (*Kaupp v. Texas* (2003) 538 U.S. 626, 630 [155 L.Ed.2nd 814, 820].), this is not always true. Holding that “(T)he police may move a suspect without exceeding the bounds of an investigative detention when it is a reasonable means of achieving the legitimate goals of the detention ‘given the specific circumstances’ of the case,” the Ninth Circuit Court of Appeal found that a defendant was *not* under arrest when she encouraged officers to check on the welfare of her children while intimating that she had hurt them, was told that she was not under arrest, and was transported without handcuffs. (*United States v. Charley* (9th Cir. 2005) 396 F.3rd 1074, 1077-1082.)

See also *People v. Kopatz* (2015) 61 Cal.4th 62, 80-81: Transporting defendant to the police station for questioning from the hospital, when he was not handcuffed nor patted down for weapons prior to entering the patrol car, and where defendant did not object, held *not* to be “custody” for purposes of *Miranda*.

Being voluntarily transported to the police station where he was held in a locked interrogation room for over seven hours prior to initiating questioning did not convert a detention into an arrest where there was no other indicia of custody (handcuffs, guns, etc.), and where the defendant “*deliberately chose a stance of eager cooperation in the hopes of persuading the police of his*

innocence.” (*Ford v. Superior Court [People]* (2001) 91 Cal.App.4th 112.)

Voluntarily coming to the police station, being told that he is not under arrest and is free to leave, with the interrogation room door being left partially open and his foster mother only about 10 feet away, was *not* custody for purposes of *Miranda* despite occurring in a secure area of a police station. (*In re Kenneth S.* (2005) 133 Cal.App.4th 54.)

Where defendant voluntarily let officers escort her to the police station and agreed to submit to an interview, she was told that she was not under arrest and was free to leave. She was never handcuffed. No custody. (*Dyer v. Hornbeck* (9th Cir. 2013) 706 F.3rd 1134, 1137-1145.)

The Court noted that although there was not enough to overturn the trial court’s decision that defendant’s interrogation was non-custodial in a Writ of Habeas Corpus review, it was still “troubled” by the fact that the interrogation lasted for almost four hours, the time of night, distance from defendant’s home to the police station, and confronting defendant with evidence of her guilt; facts that could have been enough to off-set the fact that defendant was told she was not in custody. (*Id.*, at pp. 1138-1139: See also the concurring opinion at pp. 1141-1144.)

Following conviction and judgment of death, defendant challenged the admission of pretrial statements under *Miranda*. An officer testified he was directed by detectives to transport the defendant from the hospital to the detective bureau, and the officer advised the defendant that’s where they were going. Defendant did not object. He was not handcuffed, he was not under arrest, he was not frisked, and he walked to the police car of his own accord. After an interview with detectives in an unlocked interview room, the same officer drove defendant to his brother’s home. The interview lasted less than an hour during which defendant was provided water and permitted to use the restroom. The Supreme Court reiterated that *Miranda* warnings are only required prior to custodial interrogation, and that defendant here was not in custody. The Court expressly found the defendant’s encounter with the officers was consensual, officers are not required to inform individuals of their right to refuse police requests, defendant knew he could leave at the end of the interview, and under the reasonable person test, a person in defendant’s position

would feel free to leave. (*People v. Kopatz* (2015) 61 Cal.4th 62, 80.)

Over the Telephone: Defendant calling the detective on the telephone from the jail is not “custody” for purposes of *Miranda*. (*Saleh v. Fleming* (9th Cir. 2008) 512 F.3rd 548.)

When Already Lawfully Imprisoned:

Lawful imprisonment by itself, imposed upon conviction of a crime, does not involve the coercive pressures identified in the *Miranda* decision and thus does not constitute “*Miranda* custody” requiring a waiver of rights before being subject to interrogation. (*Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2nd 1045]; differentiating incarceration pursuant to conviction from “*Miranda* [or ‘interrogative’] custody.”)

Prison inmates questioned by ICE agents, five at a time, as to their status within the United States, held not to constitute “custody” for purposes of *Miranda*. (*United States v. Arellano-Banuelos* (5th Cir. TX 2019) 827 F.3rd 355.)

See “*Miranda* and the Jail Inmate,” below.

Examples Where “Custody” was Found:

Custody was found where defendant’s parole officer scheduled a meeting with him at the request of federal agents. Defendant was required to attend such a meeting and was not told that the federal agents would be present. Upon arrival for the meeting, defendant was searched and escorted through a locked door to his parole officer’s office where, without the benefit of a *Miranda* admonishment, the two federal agents questioned defendant about an earlier undercover drug-buy. Defendant admitted his involvement only after listening to a recorded phone call between him and an FBI informant, when he admitted to being involved. Then, after a *Miranda* admonishment and waiver, defendant confessed. The Court also found that the agents engaged in a prohibited two-step interrogation under *Missouri v. Seibert* (2004) 542 U.S. 600 [159 L.Ed.2nd 643]. (*United States v. Barnes* (9th Cir. 2013) 713 F.3rd 1200, 1203-1207.)

The trial court’s finding of “custody” was “assume(d)” by the appellate court to be correct where even though the 15-year-old defendant was told that he was “not under arrest right now,” the detective’s tone was “calm and non-confrontational,” the interview took place in the defendant’s home (i.e., his bedroom), and lasted only 20 minutes. In contrast, the

following circumstances were indicative of a custodial interrogation: I.e.; no one asked defendant if he wanted to speak with the police (defendant's mother having let the officers into his room), defendant was not told that he was free to leave and nothing in his conduct suggested that he thought he could do so, defendant was told that an "incident" (i.e., an assault on a 61-year-old victim) had been recorded on a video, the room in which the interview took place was small with the officers standing between defendant and the door, and after some initial small-talk, defendant was questioned about the incident in question, repeatedly being told to verbalize his answers when he nodded or shrugged. Finally, the questioning ended with defendant's arrest. The Court upheld (although termed it a "close issue") the trial court's conclusion that the 15-year-old defendant would not have felt free to leave under these circumstances. (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 446-447.)

Detentions vs. Arrests: Intended detentions can be (sometimes inadvertently) converted into *Miranda*-style custody (i.e., a "*de facto arrest*") under certain circumstances, thus requiring a *Miranda* admonishment and waiver prior to questioning. Examples:

Indicators of an Arrest:

At Gunpoint: (*People v. Taylor* (1986) 178 Cal.App.3rd 217, 229; *United States v. Ramos-Zaragosa* (9th Cir. 1975) 516 F.2nd 141, 144.)

In Handcuffs: (*New York v. Quarles* (1984) 467 U.S. 649 [104 S.Ct. 2626; 81 L.Ed.2nd 550]; *United States v. Purry* (D.C. Cir. 1976) 545 F.2nd 217, 220.)

Putting the Suspect Into a Patrol Car: (*People v. Natale* (1978) 77 Cal.App.3rd 568, 572; *United States v. Parr* (9th Cir. 1988) 843 F.2nd 1228; *United States v. Henley* (9th Cir. 1993) 984 F.2nd 1040, 1042.)

"Detention in a patrol car exceeds permissible *Terry* limits absent some reasonable justification." (*United States v. Ricardo D.* (9th Cir. 1990) 912 F.2nd 337, 340; referring to the landmark case decision on detentions and pat downs; *Terry v. Ohio* (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].)

During an Overwhelming, Excessive Show of Force: (*Orozco v. Texas* (1969) 394 U.S. 324 [22 L.Ed.2nd 311].)

Defendant was asked to step away from the boarding area at an airport, his travel document are taken, and he was surrounded by seven officers with visible handguns, plus two officers who testified that they would not have allowed him to leave. (*United States v. Ali* (2nd Cir. 1996) 86 F.3rd 275, adopting the facts as described at 68 F.3rd 1468, 1470-1471.)

See also *People v. Taylor* (1986) 178 Cal.App.3rd 217, 229; felony stop with four officers, several police cars, and a police helicopter.

And see *United States v. Rousseau* (9th Cir. 2001) 257 F.3rd 925, where a lone police officer detained defendant at gun point and handcuffed him. Held *not* to be an arrest where defendant matched the description of an armed intruder from a burglary and attempted kidnapping occurring minutes earlier.

The fact that a suspect is informed of his *Miranda* rights, even though done prematurely, might in itself count as an indication that the subject is being arrested. (*People v. Boyer* (1989) 48 Cal.3rd 247, 268, 272.)

A Non-Consensual Transportation of a suspect will likely convert a detention into an arrest. (*Dunaway v. New York* (1979) 442 U.S. 200 [60 L.Ed.2nd 824]; *People v. Harris* (1975) 15 Cal.3rd 384, 390-392.)

But see *Gallegos v. City of Los Angeles* (9th Cir. 2002) 308 F.3rd 987; where a 2-to-1 majority found that stopping a subject at gunpoint, handcuffing him, and then transporting him back to the scene of a crime to see if the victim could identify him, a procedure which took 45 minutes to an hour, *was not* an arrest, but was no more than an “investigative stop (*that*) worked as it should.”

Reversing the Effects: When present, these custody factors *may* possibly be negated by (1) reholstering the guns, (2) removing the handcuffs, (3) taking the suspect out of the police car, (4) and minimizing or terminating the show of force, after which non-Mirandized questioning may begin. (*People v. Taylor*, *supra*; *People v. Clair* (1992) 2 Cal.4th 629, 679; *In re Joseph R.* (1998) 65 Cal.App.4th 954, 961; *United States v. Gregory* (9th Cir. 1989) 891 F.2nd 732, 733; *United States v. Harley* (2nd Cir. 1982) 682 F.2nd 398, 400.)

Even though not formally arrested, questioning during a detention may require a **Miranda** admonishment where, “the questioning has ceased to be brief and casual and becomes sustained and coercive.” (*People v. Salinas* (1982) 131 Cal.App.3rd 925, 936.)

Removing handcuffs and telling the defendant that he was not under arrest, along with circumstances devoid of any indications of an arrest: Defendant was not in custody for purposes of **Miranda**. (*People v. Holloway* (2004) 33 Cal.4th 96, 118-121.)

However, removing the indicia of arrest may not always break the causal connection sufficiently to guarantee the admissibility of a suspect’s subsequent incriminating statements. For instance, in *United States v. Ramirez* (9th Cir. 2020) 976 F.3rd 946, at p. 961, it was noted that; “No requirement exists that a defendant remain seized following an illegal seizure for the defendant’s subsequent statements to be deemed tainted by the illegal seizure.” (Citing *United States v. Bocharnikov* (9th Cir. 2020) 966 F.3rd 1000, 1004, where defendant’s statements made eight months later, while no longer detained, in a “follow-up” interview, were held to be inadmissible as a product of his earlier illegal arrest.)

See “*Removing the Indicia of an Arrest*,” below.

Misdemeanor Citations: What about a misdemeanor citation (per **P.C. § 853.6**), particularly when written at the scene of the arrest; i.e., without transporting the subject to a police station or jail?

Unknown: While arguably this involves no more coerciveness than a traffic ticket, particularly when the suspect is informed that he or she will merely be cited and released, we are without any direct authority to date upholding the admission of the subject’s statements without a **Miranda** admonishment and waiver. Until decided by an appellate court, because citing someone on a misdemeanor citation is in fact an arrest with the expectation that he or she will be charged with a criminal offense, it is suggested that such persons be **Mirandized** before questioning.

Consensual Encounters: If a person who is detained need not be **Mirandized**, then certainly a person who is the subject of a *consensual encounter* certainly need not be **Mirandized**. There is nothing inherently coercive in the consensual encounter situation that would require a **Miranda** admonishment. (See *United States v. Yusuff* (7th Cir. 1996) 96 F.3rd 982, 987-988.)

Questioning defendant in a three-hour interview by using “a measure of subterfuge” by leading him to believe that they were there to help him locate a snowmobile lost in the mountain snow, in an investigation of whether defendant had illegally operated a motor vehicle within a National Forest Wilderness Area (**16 U.S.C. § 551, 36 C.F.R. § 261.16(a)**), was held *not* to be a custodial interrogation. Defendant was “a man of intelligence and experience.” The interview was low key. Defendant was not prevented from leaving the room to use his cellphone. Although defendant was aware that there might be a criminal investigation coming from the incident leading to the charges, no ***Miranda*** admonishment was necessary. (***United States v. Unser*** (10th Cir. 1999) 165 F.3rd 755, 766-767.)

Questioning a person outside an airport, after telling her that she was free to leave, held to be a consensual encounter only and not requiring a ***Miranda*** admonishment and waiver. ***United States v. Torres-Guevara*** (10th Cir. 1998) 147 F.3rd 1261.)

Grand Jury Proceedings:

A complete ***Miranda*** admonishment is generally not required in a grand jury setting, at least where defendant is given the minimum advisal to the effect that he does not have to answer incriminating questions and that he can have access to an attorney. *Reason:* No custody as contemplated by ***Miranda***. (***United States v. Mandujano*** (1976) 425 U.S. 564 [48 L.Ed.2nd 212]; see also ***United States v. Washington*** (1977) 431 U.S. 181 [52 L.Ed.2nd 238]; ***United States v. Myers*** (6th Cir. 1997) 123 F.3rd 350, 359-362; ***United States v. Williston*** (10th Cir. Okla. 2017).) 862 F.3rd 1023.)

See also ***Braswell v. United States*** (1988) 487 U.S. 99 [101 L.Ed.2nd 98]: A custodian of corporate records may not resist a grand jury subpoena for such records on the ground that the act of production would incriminate him under the **Fifth Amendment**.

Note: Where a grand jury witness is given immunity, thus forcing his testimony, attempting to use his grand jury testimony against him at a later trial is violative of his **Fifth Amendment** compulsory self-incrimination rights. (***New Jersey v. Portash*** (1979) 440 US. 450 [59 L.Ed.2nd 501].)

Just because the defendant’s limited command of the English language may have made it difficult for her to understand her right

not to answer incriminating questions posed by a grand jury does not insulate her from being prosecuted for perjurious statements. (*United States v. Wong* (1977) 431 U.S. 174 [54 L.Ed.2nd 231].)

The “Beheler Admonishment;” or Taking the “Custody” Out of An Interrogation:

The Beheler Interrogation Tactic: California Peace officers are taught the available alternate tactic of using a so-called “**Beheler admonishment**,” or simply telling the suspect at the beginning of the interview that he or she is not under arrest, or is otherwise free to terminate the interview and leave whenever he or she so chooses. (See *United States v. Norris* (9th Cir. 2005) 428 F.3rd 907, 912-913; *Smith v. Clark* (9th Cir. 2015) 804 F.3rd 983, 986; *People v. Torres* (2018) 25 Cal.App.5th 162, 174.)

The **Beheler** case involved the following circumstances: Defendant’s companion killed a person in an attempt to steal hashish. Defendant called the police, advised them of the person who committed the murder, and gave permission for them to search his yard for the gun. Defendant voluntarily went to the station house and spoke to police about the murder, although the police did not advise him of his **Miranda** rights. He returned home, was later arrested, was advised of and waived his **Miranda** rights, and gave a second, taped confession. On appeal from the appellate court’s reversal of his conviction, the Court held that at the first interview, **Miranda** warnings were not required because defendant was neither taken into custody nor significantly deprived of his freedom of action in any way. **Miranda** warnings were not required simply because the questioning took place in the station house or because the questioned person was one whom the police suspected. That the police knew much about defendant before his interview was irrelevant, especially because it was defendant who had initiated the earlier communication with police. The length of time that elapsed between the commission of the crime and the police interview had no relevance to the inquiry. (See *California v. Beheler* (1983) 463 U.S. 1121 [103 S.Ct. 3517; 77 L.Ed.2nd 1275].)

Note: See also “*The ‘Beheler Admonishment’ in the Jail Setting*,” below.

Effects on the Custody Issue: A **Beheler** admonishment helps to take the coerciveness, and thus the “custody,” out of the situation, depending upon an evaluation of the totality of the circumstances. The theory is that no reasonable person would believe he or she is about to be arrested (i.e., “in custody,” or “seized,” for purposes of **Miranda**) when told that he or she is free to terminate the questioning and walk away. (See *California v. Beheler*, *supra*.)

The test, again, is how a reasonable person under the circumstances would have understood his position as far as whether he or she was “in custody,” the idea being that by telling the subject he is free to leave, no reasonable

person would have believed he was in custody. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442 [82 L.Ed.2nd 317, 336]; *People v. Boyer* (1989) 48 Cal.3rd 247, 272.)

Note: Telling a person that he is not under arrest *may not* be enough by itself to negate what is otherwise an arrest in all cases. (See “*Exceptions*,” below, and *United States v. Lee* (9th Cir. 1982) 699 F.2nd 466, 467.). But even if it is not, it is at least a factor to consider when evaluating the “*totality of the circumstances*.” (*United States v. Bravo* (9th Cir. 2002) 295 F.3rd 1002.) 1011.)

Note also: *Lee* was decided prior to *Beheler*, and may not be good law anymore. The defendant in *Lee* was in fact advised that he was not under arrest and that he could leave the car and terminate the interview at any time. He was then released after confessing to having killed his wife. These circumstances, however, were not considered in the legal analysis by the Court.

Factors:

The Ninth Circuit Court of Appeal has listed specific factors to consider in determining whether a person is in custody when a *Beheler* admonishment is used:

- The number of law enforcement personnel and whether they were armed;
- Whether the suspect was at any point restrained, either by physical force or by threats;
- Whether the suspect was isolated from others; *and*
- Whether the suspect was informed that questioning was voluntary and that he was free to leave or terminate the interview.

(*United States v. Craighead* (9th Cir. 2008) 539 F.3rd 1073, 1082-1089.)

State authority has cited an even more comprehensive list:

- Whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview;
- Whether the express purpose of the interview was to question the person as a witness or a suspect;
- Where the interview took place;
- Whether police informed the person that he or she was under arrest or in custody;

- Whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom;
- Whether there were restrictions on the person's freedom of movement during the interview;
- How long the interrogation lasted;
- How many police officers participated;
- Whether they dominated and controlled the course of the interrogation;
- Whether they manifested a belief that the person was culpable and they had evidence to prove it;
- Whether the police were aggressive, confrontational, and/or accusatory;
- Whether the police used interrogation techniques to pressure the suspect; *and*
- Whether the person was arrested at the end of the interrogation.

(*People v. Potter* (2021) 66 Cal.App.5th 538, 539-540; quoting *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162; see also *In re Matthew W.* (2021) 66 Cal.App.5th 392, 405.)

See also “*Factors in Determining Custody*,” above.

Appellate Authority: The appellate courts consistently, but with some exceptions (see below), uphold this tactic as lawful. For example:

Green v. Superior Court (1985) 40 Cal.3rd 126, 131-135: Telling a suspect he was free to leave, in a two-hour interview that was detained, but not accusatory.

People v. Chutan (1999) 72 Cal.App.4th 1276: Inviting a child molest suspect to the police station to discuss the children, telling him he was not under arrest, and bringing him back afterwards; no *Miranda* admonishment required.

United States v. Salvo (6th Cir. 1998) 133 F.3rd 943: Defendant was questioned by the FBI about pornographic material he possessed in several public settings, being told each time that although they had enough evidence with which to charge him, he was not going to be arrested at that time.

Baines v. Cambra (9th Cir. 2000) 204 F.3rd 964: Defendant hired another to kill his sister's ex-husband. The ensuing investigation eventually led to Baines. He was either asked, or volunteered, to go to the police station to answer questions. He was *not* told he was under arrest. He was *not* handcuffed. No firearms were used. He was taken to an unlocked

interrogation room and, without a *Miranda* admonishment, questioned for six hours during which he made certain incriminating statements. After failing a polygraph test, defendant asked if he could speak with a lawyer and whether he could leave. He was told no. The trial court later ruled that Baines was *not* in custody until he asked if he could leave, and that his statements up to that point were admissible in court against him. The Ninth Circuit Court of Appeal, in a split decision, affirmed. Per the Court; “There is no evidence here to suggest that, under clearly established federal law, a reasonable person in Bain’s situation would have felt that he was not free to terminate the police interrogation.”

See *People v. Storm* (2002) 28 Cal.4th 1007, 1036-1038, discussed below, for the California Supreme Court’s approval of the use of a *Beheler* admonishment theory.

United States v. Crawford (9th Cir. 2004) 372 F.3rd 1048: Defendant was only detained although the FBI had probable cause to arrest him. After voluntarily going with the FBI to their office, he was told several times that he was not in custody and that he was free to leave. After admitting in a one-hour interview that he did in fact commit an armed bank robbery, defendant was transported home, released, and indicted at a later time. No custody.

People v. Holloway (2004) 33 Cal.4th 96, 118-121: Despite being handcuffed initially, removing the handcuffs and telling the subject that he was not under arrest was sufficient to negate any need to *Mirandize* the suspect. The fact that the suspect was a parolee was irrelevant.

Defendant was specifically told he was not under arrest and, in fact, that he was free to terminate the interview at any time. Nothing was ever done or said that indicated to the contrary. And then, as promised, he was driven home after the interview. No custody. (*United States v. Norris* (9th Cir. 2005) 428 F.3rd 907, 912-913.)

Defendant, a minor, was brought in by his foster mother, but told that he was not under arrest and that he was free to leave. No custody despite being taken to a secure area of a police station. (*In re Kenneth S.* (2005) 133 Cal.App.4th 54.)

Beheler has specifically been upheld even in the jail context where a county jail inmate was questioned by a jail investigator some four days after defendant beat his cellmate, where the questioning took place in a “professional interview room” with the door left unlocked and slightly ajar, with handcuffs having been removed, the questioning was other than “accusatorial,” and the defendant was told that he was not required to talk

to the investigator and that he would be taken back to his cell whenever he wished. (*People v. Macklem* (2007) 149 Cal.App.4th 674.)

Being told that he was not under arrest and that he was free to end the questioning and leave whenever he wished took the custody out of the questioning of a suspect in a multiple murder investigation. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1399-1401.)

A suspect being “instructed” to follow officers to a conference room where they could have some privacy is a factor tending to indicate custody. Also, the fact that the interview took two and a half hours indicates custody, but was not a strong factor because even as such, it was not a “marathon” interview. But these factors were outweighed by the low-key, non-confrontational tone of the interview, being interviewed in a conference room at the defendant’s own workplace, and not being confronted with the evidence against him while also being told, twice, that he was not under arrest. (*United States v. Bassignani* (9th Cir. 2009) 575 F.3rd 879, 883-887; noting, however, that it would have been better had he been told that he was free to terminate the interview and leave at any time. (*Id.*, at p. 886.)

The dissent similarly criticized telling the defendant that he’d be free to leave “*when we’re done*,” agreeing with the trial court that this shows that at least during the interview, defendant was in custody. (*Id.*, p. 890.)

Defendant being told he was not under arrest while being interviewed about his missing wife and child, took the custody out of the interview even after it became accusatory and after defendant began making admissions. (*Stanley v. Schriro* (9th Cir. 2010) 598 F.3rd 612, 618-619.)

Telling defendant “*And you understand that you’re not in any trouble, you’re not under arrest, and that you’re free to leave at any time?*”, along with allowing her two unaccompanied trips to the bathroom, held to be a non-custodial interrogation. (*Dyer v. Hornbeck* (9th Cir. 2013) 706 F.3rd 1134, 1137-1145.)

The Court noted, however (citing *United States v. Craighead* (9th Cir. 2008) 539 F.3rd 1073, and *United States v. Brown* (11th Cir. 2006) 441 F.3rd 1130, 1347.) that although there was *not* enough to overturn the trial court’s decision that defendant’s interrogation was non-custodial in a Writ of Habeas Corpus review, it was still “*troubled*” by the fact that the interrogation lasted for almost four hours, the time of night, distance from defendant’s home to the police station, and confronting defendant with evidence of her guilt, could have been enough to off-set the fact that defendant was

told she was not in custody. See specifically the concurring opinion at pp. 1141-1144.)

See also *United States v. Gowadia* (9th Cir. 2014) 760 F.3rd 989, 992-996, where defendant voluntarily submitted to a series of non-custodial interrogations, during each of which he acknowledged that he was not in custody and free to terminate the questioning. The Court ruled that neither **18 U.S.C. § 3501(c)**, the *McNabb-Mallory* rule, nor **Fed. R. Crim. Pro. 5(a)** required a “without unnecessary delay” arraignment in that defendant has not yet been arrested nor detained.

Referring to *McNabb v. United States* (1943) 318 U.S. 332, 343-344 [87 L.Ed. 819], and *Mallory v. United States* (1957) 354 U.S. 449 [1 L.Ed.2nd 1479]. (See “The *McNabb-Mallory* Rule,” under “*Statements Taken During a Delay in Arraignment*,” under “*Suppression Issues and Procedures*” (Chapter 13), below.

See *United States v. Hinkley* (1st Cir. 2015) 803 F.3rd 85, for an excellent example where defendant’s interrogator did it all “by the book.” Defendant was held not to be in custody for the first 39 minutes of his interview where he transported himself to the police station, asked if he minded that the door to the interrogation be closed, advised of the route to the station’s exit in case of an emergency, questioned by only one officer, and told that he was not in custody at the beginning of the interview. He was also reminded that he was free to leave when they were 29 minutes into the interview. At the 39-minute point, defendant was then told that he was no longer free to leave and was advised of his *Miranda* rights, which he waived. The next day he was interviewed again and asked if he remembered his rights and wanted them read to him again. He responded that he remembered them and didn’t need to hear them again. Defendant’s motion to suppress his statements made before and after his waiver, was denied.

After driving herself to the police station (even though accompanied by a police officer), having agreed to talk with police at the station, and after being told that she was not under arrest and was free to leave at any time, taking her into an interrogation room, with the door shut, and holding onto her cellphone during the questioning, did not convert the interview into a custodial interrogation. Aside from being told that the phone would be returned to her when they were done, and despite sending an incoming call to voicemail for her (an act to which she consented), defendant was allowed to use it to call her husband when she asked. A *Miranda* admonishment was held to be unnecessary under the circumstances. (*United States v Swan* (1st Cir. 2016) 842 F.3rd 28.)

Custody was lacking where the agents, despite having to use handcuffs to quiet a panicking defendant down, never drew their weapons, defendant was told several times that he was not under arrest and was free to leave, he was in the familiar surroundings of his own home, the interrogation lasted, at most, only several minutes, and the handcuffs were removed as soon as defendant had calmed himself down. (*United States v. Familetti* (2nd Cir. N.Y. 2017) 878 F.3rd 53.)

Suppression of defendant's pre-arrest statements to a detective was not required under the **Fifth Amendment** because defendant was not in custody at the time. Among other factors, defendant was at his house and the detective repeatedly told him that he was not under arrest, could end the interview whenever he wanted, and was free to leave. The fact that he was arrested immediately upon attempting to leave was not enough, in itself, to find custody during the prior interrogation. (*United States v. Giboney* (8th Cir. 2017) 863 F.3rd 1022.)

A 12-year-old murder suspect being immediately informed that, "both of these doors are open, you are not under arrest, you're not being detained, you're here on your [own] free will," and then being told that he could "get up" and "walk out anytime," which it appeared that the minor heard and understood, "would have alerted a reasonable 12 year old that he was free to terminate the interview and leave." (*In re I.F.* (2018) 20 Cal.App.5th 735, 769; the Court finding no custody.)

But see below, where the same minor was held to be in custody during subsequent interviews.

In a sting operation where defendant came to a location thinking he was going to be meeting with a 15-year-old minor for purposes of performing certain sex acts, the Seventh Circuit Court of Appeal held that the district court erred in granting defendant's motion to suppress his incriminating statements made to federal agents in that considering all of the circumstances of the interview—from the initial encounter to the formal arrest at the end of the questioning—the Court held that he was not in custody within the meaning of *Miranda*. Relevant factors to determine whether a person is in custody for *Miranda* purposes include: 1) the location and duration of the questioning; 2) statements made by the officers; 3) the presence or absence of physical restraints during the questioning; and 4) the release of the person at the end of the questioning. The Court noted that defendant voluntarily consented to the interview and that the bedroom door where he was interviewed, although closed, remained unlocked throughout the questioning. Defendant did not face the restraint of freedom proscribed in *Miranda* and its progeny. Therefore his **Fifth Amendment** rights were not violated. (*United States v. Leal* (7th

Cir. 2021) 1 F.4th 545; noting that defendant's subjective beliefs are irrelevant for *Miranda* purposes.)

Other factors considered by the Court were that (1) defendant voluntarily consented at every stage of the encounter, stepping out of the car, complying with the pat down, surrendering his cellphone, wallet, and car keys, and accompanying the agents to the house to be interviewed and agreeing to speak with the two agents inside the interview room; (2) the agents told defendant initially that he was not under arrest, and defendant never asked the agents to end the encounter or otherwise indicated that he wanted to leave; (3) the short duration of the interview, which was less than twenty-minutes; (4) the agents did not use physical restraint or brandish their weapons; and (5) the agents did not confront defendant with evidence of his guilt until after he had voluntarily confessed. The Court also held that the fact that the agents arrested defendant at the end of the interview was not relevant in that it had no bearing as to whether a reasonable person would have believed that he was free to end the questioning and leave while the questioning took place.

Defendant was held *not* to be in custody during an interrogation at the police station, and therefore *Miranda* warnings were not required, because defendant voluntarily went to the police station two weeks after he had been told that he was suspected of having molested his daughter and, once inside the interview room, defendant was expressly told he could end the questioning and leave at any time and that the closed door was not locked. A detective's statements to defendant indicating his belief in the daughter's allegations and urging defendant to tell the truth did not transform the voluntary interview into a custodial interrogation because defendant was repeatedly told that he was free to leave, there were no physical restraints placed on him, and the tone and tenor of the questioning would not have caused a reasonable person in defendant's position to believe he was not free to terminate the interviews and leave the police station. The total of three interrogations, one after the other, was no longer than 2 hours in duration. He was also allowed to leave after the questioning. (*People v. Potter* (2021) 66 Cal.App.5th 528.)

Exceptions: However, *Beheler* admonishments are not always successful in overcoming other factors which tend to indicate custody. Custody will be found where despite a *Beheler*-style admonishment, the suspect is treated like he is in custody.

Defendant was subject to custodial interrogation even when told he was free to leave and terminate a police interview when the totality of the circumstances, including the fact the defendant was questioned in a closed

FBI car with two officers for well over an hour while police were inside his house, would have suggested to a reasonable person that he was not free to leave. (*United States v. Lee* (9th Cir. 1982) 699 F.2nd 466, 467-468.)

Where eight armed law enforcement officers were in the suspect's home and the suspect was directed to a back storeroom where the door was shut and an armed detective stood at the door during the questioning. (*United States v. Craighead* (9th Cir. 2008) 539 F.3rd 1073, 1088: "The mere recitation of the statement that the suspect is free to leave or terminate the interview . . . does not render an interrogation non-custodial per se.")

Despite telling a suspect that he was not in custody, custody was found where he had already been subjected to a custodial interrogation the previous day but was released only on the condition that he return the following afternoon when he would be formally booked, that if he didn't return on time the police "would come and get him . . . and his family would not like the way they did it," and where he had been told that a co-suspect had already been formally charged and that he would also be formally arrested and charged later that day. (*Moore v Czerniak* (9th Cir. 2009) 574 F.3rd 1092, 1103, fn. 11.)

People v. Aguilera (1996) 51 Cal.App.4th 1151: An accusatory two-hour interrogation involving high pressure accusations, threats and promises that only the truth could keep him out of jail. Despite being told he was not under arrest, defendant was also told that the interview was not going to end until they arrived at the truth, and they would not let him leave until they had a chance to check his alibi.

People v. Moore (2011) 51 Cal.4th 386, 402-404: The interrogation of a suspect, despite being told that he was not under arrest and would be taken home after obtaining his statement, likely became a custodial interrogation at that point when defendant's request that the officers honor their promise to take him home was ignored and the interrogation continued.

The California Supreme Court did note, however: "While the nature of the police questioning is relevant to the custody question, police expressions of suspicion, with no other evidence of a restraint on the person's freedom of movement, are not necessarily sufficient to convert voluntary presence at an interview into custody." (*Id.*, at p. 402.)

The legal effect of telling the suspect that he was not under arrest and that he was free to leave at any time was somewhat dissipated by following that comment up with; "(W)e're not going to arrest you right now." This suggested that the defendant might well be arrested later (which, in fact,

he was, immediately after being released and as he was walking away from the police station). (*People v. Saldana* (2018) 19 Cal.App.5th 432, 456-458.)

In *Saldana*, the defendant was eventually held to have been in custody for purposes of *Miranda* despite a *Beheler* admonishment, given the nature of the interrogation such as using sophisticated accusatorial interrogation techniques. “(W)hen a suspect has been told by the police that he is not under arrest and can leave at any time, but the contemporaneous conduct of the police nullifies that advice, the advice ‘will not carry the day.’” (*Id.*, at p. 458, citing 2 LaFave et al., *Criminal Procedure* (4th ed. 2015) § 6.6(d), p. 820, fn. 64.)

The *Saldana* Court differentiated its facts from those occurring in *Moore*, *supra*, noting that in *Moore*, the police consistently referred to the defendant as a “witness” only, and the interview itself was “not . . . particularly intense or confrontational.” (*Moore*, at p. 402.) “For a substantial period, while [the] defendant filled in his previous statements with details, the questioning did not convey any suspicion of defendant or skepticism about his statements.” (*People v. Saldana*, *supra*, at pp. 461-462.)

Telling a 12-year-old minor that, “*If you don’t want to answer a question, just tell me. ‘Sam I don’t want to answer it.’ That’s fine. Okay? If you don’t know an answer say, ‘Hey I don’t . . . I don’t know’ and that . . . and that’s fine also,*” was held to communicate to the minor, under the circumstances, only that he could decline to answer specific questions; “it would not have assured a reasonable 12 year old that he was free to terminate the interview and leave.” And then, after approximately 30 minutes of small talk, being told: “*You know there’s a door there and you know that door’s open so . . . if you want bam, you just . . . leave you alone,*” was also held to be insufficient to take the custody out of the interrogation where the investigators failed to seek confirmation that the minor understood the significance of the open door, or the ambiguous invitation to “*bam, you just . . . leave you alone.*” And then telling the minor at the very end of that portion of the interrogation that, “(y)ou can go whenever you want, okay?”, was held to be too little, too late. (*In re I.F.* (2018) 20 Cal.App.5th 735, 773-775.)

In a follow-up to the above initial interview, a second interview was held at a different location with the participation of the minor’s father. As a prelude to this second interview, the investigator told the family, including the minor, that they would be leaving the district attorney’s office together “at the end of the interview.” The interrogator assured them that: “[Y]ou’re free to

go at any point. You don't want to talk about anything, you just stop and get up and go." Moments later, they were also told, "*So you guys understand at any point you guys can get up and just walk out of here. Okay? No matter what happens, you guys are all still gonna leave here. Okay? Do you understand that?*", directing the comment to the minor's father. Based upon this, the Court questioned whether these assurances were reasonably calculated to inform the minor (as opposed to the father) that he was free to terminate the interview and leave, "conflat(ing)" the idea that the minor would be leaving when the interview was over with the idea that he was free to leave at any time, creating an ambiguity as to the terms on which the minor might leave. (*Id.*, at pp. 776-777.)

In noting that a ***Beheler*** admonishment standing alone is not sufficient to take the custody out of an interrogation, but disagreeing with the Ninth Circuit Court of Appeal in its conclusion that, "(i)t has never been the law that a police officer can insulate an otherwise clearly custodial interrogation from ***Miranda***'s reach simply by telling a suspect that he or she is 'not under arrest,'" (See ***Smith v. Clark*** (9th Cir. 2015) 804 F.3d 983, 988.), California's Fourth District Court of Appeal held that a ***Beheler*** admonishment is but one factor, taking into consideration the totality of the circumstances, in determining whether a suspect is in custody for purposes of ***Miranda***. (***People v. Torres*** (2018) 25 Cal.App.5th 162, 174-180; finding that an interrogation became custodial despite an earlier ***Beheler*** admonishment when it became too "confrontational and accusatory.")

Telling a 17-year-old minor, a the suspect in a stabbing, that he was not under arrest and was free to leave (while failing to also tell him that he could terminate the questioning at any time) held to be insufficient, in light other circumstances, to negate the requirement that he be advised of his ***Miranda*** rights before questioning, (***In re Matthew W.*** (2021) 66 Cal.App.5th 392, 406-410.)

Practice Notes:

There is no case decision indicating that there is anything illegal, unprofessional, unethical, or otherwise improper in this interrogation technique.

The legality of the use of such a tactic hinges on the successful communication to the suspect the impression, as would be understood by a reasonable person, that he or she is not in custody.

This always raises an “*issue of fact*” for the court to determine, considering all the surrounding circumstances, whether the subject is, or is not, “*in custody*.” (See below)

Caution: A ***Beheler*** admonishment must be worded in such a way that it does not infer to the suspect that he or she is being offered *leniency*; e.g., that he is being offered a lesser punishment or given immunity, or any other consideration that might motivate the person to provide a false or unreliable confession. (See “*Offers of Leniency*,” under “*Voluntariness After Waiver*” (Chapter 9), below.)

Removing the Indicia of an Arrest:

Custody, requiring a ***Miranda*** admonishment and waiver, can be undone, in effect, by removing the indicia of an arrest, such as by putting drawn firearms away, removing the suspect from a locked patrol car, and/or unhandcuffing him, before questioning him. For instance:

Questioning a murder suspect after removing him from a locked patrol car, where he had not been searched nor handcuffed, resulted in a non-custodial interrogation. (***People v. Thomas*** (2011) 51 Cal.4th 449, 475-478.)

Unhandcuffing a suspect at his parole officer’s office and asking him to accompany officers to their office for questioning, and then transporting him home after questioning, resulted in a non-custodial interrogation. (***People v. Holloway*** (2004) 33 Cal.4th 96, 120.)

After removing a minor from a locked patrol car and taking the handcuffs off before questioning, a ***Miranda*** admonishment and waiver was not necessary. (***In re Joseph R.*** (1998) 65 Cal.App.4th 954, 958, fns. 4 & 5.)

“We caution we do not suggest that ***Miranda*** warnings must be given in each instance where police officers initially use weapons or other force to effect an investigative stop. For ***Miranda*** purposes, we think the crucial consideration is the degree of coercive restraint to which a reasonable citizen believes he is subject at the time of questioning. Police officers may sufficiently attenuate an initial display of force, used to effect an investigative stop, so that no ***Miranda*** warnings are required when questions are asked.” (***People v. Taylor*** (1986) 178 Cal.App.3rd 217, 230.)

However, removing the indicia of arrest may not always break the causal connection sufficiently to guarantee the admissibility of a suspect’s subsequent incriminating statements. For instance, in ***United States v.***

Ramirez (9th Cir. 2020) 976 F.3rd 946, at p. 961, it was noted that; “No requirement exists that a defendant remain seized following an illegal seizure for the defendant’s subsequent statements to be deemed tainted by the illegal seizure.” (Citing United **States v. Bocharnikov** (9th Cir. 2020) 966 F.3rd 1000, 1004, where defendant’s statements made eight months later, while no longer detained, in a “follow-up” interview, were held to be inadmissible as a product of his earlier illegal arrest.)

Note: It is extremely helpful if, upon removing the indicia of an arrest, the officer follow this up with a **Beheler**-style admonishment, assuring the suspect that he is not under arrest.

See “*Reversing the Effects*,” above.

Miranda Invocations by the Out-of-Custody Suspect:

Issue: Although a suspect who is deemed *not* “in custody” for purposes of **Miranda** need not be reminded of his self-incrimination rights, per **Miranda**, this does not resolve the issue of whether the out-of-custody (i.e., “detained” or “consensually encountered”) suspect may effectively cut off questioning with a **Miranda** invocation.

Rule: The case law is quite clear that a suspect, in or out of custody, can assert his **Fifth Amendment** rights “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . .”, if it might subject the person to potential criminal liability. (**Kastigar v. United States** (1972) 406 U.S. 441, 444 [32 L.Ed.2nd 212].)

There is also case law, however, indicating that attempts to invoke prior to being taken into custody are legally ineffective, so far as triggering the need to discontinue an on-going interrogation. “We have in fact never held that a person can invoke his **Miranda** rights anticipatorily, in a context other than ‘custodial interrogation’ . . .” (**McNeil v. Wisconsin** (1991) 501 U.S. 171, 182, fn. 3 [115 L.Ed.2nd 158, 171].)

Attempting to invoke before an interrogation begins, or is at least imminent, is similarly ineffective. (**United States v. LaGrone** (7th Cir. 1994) 43 F.3rd 332, 339.)

See **Stanley v. Schriro** (9th Cir. 2010) 598 F.3rd 612, 618-619, where the detective’s reinitiation of the interview after defendant invoked his right to silence and to an attorney, held to be lawful in that defendant was found *not* to be in custody at the time he originally invoked.

A suspect invoking his right to counsel in a non-custodial interview does not prevent officers from attempting to re-interview him at a later date. An attempt to invoke under such a circumstance has been referred to by the U.S. Supreme Court as an “*anticipatory invocation*,” and legally ineffective. (*Bobby v. Dixon* (2011) 565 U.S. 23 [132 S.Ct. 26; 181 L.Ed.2nd 328].)

However, just because *Miranda* does not apply to the above situations does not mean that the out-of-custody suspect may not invoke his **Fifth Amendment** self-incrimination rights, requiring an interrogator to “*scrupulously*” honor that invocation and terminate questioning, at least for the time-being. (See *People v. Waldie* (2009) 173 Cal.App.4th 358, 364-367; finding that the results of such an interrogation are inadmissible in court; see also *People v. Ramos* (2013) 216 Cal.App.4th 195, 206-297.)

“(T)he use of a defendant’s prearrest silence as substantive evidence of guilt violates the **Fifth Amendment’s** privilege against self-incrimination. . . . (A)pplication of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime.” (*People v. Waldie*, *supra*, at p. 366.)

Defendant’s refusal to submit to an interview by a detective, missing a scheduled appointment and otherwise being uncooperative, at least when combined with defendant’s express statement that she did not want to talk with the detective, held to be an invocation of her right to silence. (*People v. Ramos*, *supra*; rejecting the People’s argument that defendant’s lack of cooperation was admissible consciousness-of-guilt evidence.)

Miranda and the Jail Inmate:

General Rule: The fact that defendant is already a prison or jail inmate is a “*significant factor*” tending to indicate “*custody*” and dictating the necessity of a *Miranda* admonishment before questioning, at least in close cases. (See *Mathis v. United States* (1968) 391 U.S. 1 [20 L.Ed.2nd 381].)

Recent Trend: However, more recent authority is quite clear that *this is not always the case*, and in fact *may be* the exception to the rule. In fact, it is arguable that the rules of *Miranda* need to be reevaluated when the situation involves the questioning of an inmate in a prison or local jail:

“For purposes of *Miranda*, custodial interrogation involves ‘*a measure of compulsion above and beyond that inherent in custody itself*.’ (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300 [64 L.Ed.2nd 297, 307, . . .].)” *People v. Ray* (1996) 13 Cal.4th 313, 336.)

“No interrogation occurs where the purpose behind *Miranda* is not implicated—preventing governmental officials from exploiting the ‘coercive nature of confinement to extract confessions that would not [otherwise] be given.’ (*Arizona v. Mauro* (1987) 481 U.S. 520, 530 [95 L.Ed.2nd 458, 468, . . .].)” (*People v. Ray*, *supra*, at pp. 336-337.)

The purpose behind *Miranda* is “preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment.” (*Arizona v. Mauro*, *supra*, at pp. 529-530.)

Releasing a prison inmate back into the general population at the prison constitutes a break in “*Miranda* custody,” sufficient to allow law enforcement to reinitiate questioning after a prior invocation by defendant to the assistance of counsel. The Court set an arbitrary time period after an earlier in-custody invocation to when questioning is again allowed, sufficient to relieve the stresses of a police-dominated interrogation, at 14 days, although the break in this case was 2½ years. (*Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2nd 1045].)

Lawful imprisonment by itself, imposed upon conviction of a crime, does not involve the coercive pressures identified in the *Miranda* decision, and thus does not constitute the “*Miranda* custody” which requires a waiver of rights before being subjected to an interrogation. (*Ibid*; Differentiating incarceration pursuant to conviction from “*Miranda* [or ‘interrogative’] custody.”)

See *People v. Bridgeford* (2015) 241 Cal.App.4th 887, 900-903, applying the 14-day rule of *Shatzer* to the pre-trial situation, where the defendant was released from physical custody (i.e., back onto the street), rearrested, and then questioned again without having waited the necessary 14 days between invocation of the right to counsel and re-interrogation.

Note also *Trotter v. United States* (Wash. D.C. 2015) 121 A.3rd 40, a case out of the federal appellate court for Washington D.C., ruling that the rule of *Shatzer* does *not* apply to the pre-trial detainee pending trial in that he is not serving a sentence of imprisonment, as was the case in *Shatzer*, and is still under the pressures of a pending prosecution.

“(I)t is difficult to apply the basic *Miranda* principles in the context of questioning directed to a prisoner who is already under detention in a custodial facility.” (*People v. Macklem* (2007) 149 Cal.App.4th 674, 692.)

The need for a **Miranda** admonition “will only be triggered by ‘some restriction on this freedom of action in connection with the interrogation itself.’” (*Saleh v. Fleming* (9th Cir. 2008) 512 F.3rd 548; defendant, after having previously invoked, telephoned the detective from the jail and made an admission.)

“(S)ome additional restraint, over and above mere incarceration, is required before an interrogation is custodial for **Miranda** purposes.” (*People v. Roldan* (2005) 35 Cal.4th 646, 736, fn. 41.)

On the issue of what constitutes a “restriction” sufficient to amount to “custody” for purposes of **Miranda**: “In the prison (or jail) situation, this necessarily implies a change in the surroundings of the prisoner which results in an added imposition on this freedom of movement. Thus, restriction is a relative concept, one not determined exclusively by a lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.” (*Cervantes v. Walker* (9th Cir. 1978) 589 F.2nd 424, 428.)

The interrogation of a prison or jail inmate is not necessarily custodial just because the prisoner is removed from the general prison population and questioned about events that occurred outside the prison. (*Howes v. Fields* (2012) 565 U.S. 499 [132 S.Ct. 1181; 182 L.Ed.2nd 17].)

A “defendant’s incarceration for an unrelated offense does not necessarily constitute custody for **Miranda** purposes.” (*People v. Molano* (2019) 7 Cal.5th 620, 648, fn. 8.)

Factors to consider in determining whether a jail/prison inmate is in custody for purposes of **Miranda** include, but are not necessarily limited to (See *Cervantes v. Walker*, *supra*, at pp. 427-428; *People v. Anthony* (1986) 185 Cal.App.3rd 1114, 1122; *United States v. Conley* (4th Cir. 1985) 779 F.2nd 970, 971-974; *Howes v. Fields* (2012) 565 U.S. 499, 509 [132 S.Ct. 1181; 182 L.Ed.2nd 17].):

- The language used to summon the inmate to the interview;
- The nature of the physical surroundings of the interview;
- The extent to which the suspect is confronted with the evidence against him and the pressure exerted on him.
- Whether there was an opportunity given to the inmate to leave the site of the questioning.

Another Possible Factor: It may be an additional factor that:

- The inmate’s interrogator was an investigator for the agency responsible for the jail, inquiring about an incident that occurred in

the jail, as opposed to someone from an outside agency inquiring about an offense other than something that occurred in the jail. (*People v. Macklem* (2007)149 Cal.App.4th 674.)

The *Macklem* Court cites *Mathis v. United States* (1968) 391 U.S. 1 [20 L.Ed.2nd 381], for the idea that this is a factor to consider. *Mathis* never really says this. The investigator in *Mathis* just happened to be other than a jail investigator with no discussion as to the significance, if any, of this fact. It is questionable, therefore, whether this fact is really a factor that must be considered.

More recently, in fact, the United States Supreme Court never mentions the need for the interrogation to be by a jail investigator as a factor, and specifically found whether or not the interview concerned a crime that occurred in or outside the jail to be irrelevant. (See *Howes v. Fields* (2012) 565 U.S. 499, 509 [132 S.Ct. 1181; 182 L.Ed.2nd 17].)

Examples:

In *Cervantes v. Walker* (9th Cir. 1978) 589 F.2nd 424, defendant was questioned in the prison library where he suffered no increased restriction above that already incident to his incarceration. *Held*: No custody for purposes of *Miranda*.

In response to Cervantes' argument that his status as a prison inmate meant that he was "*in custody as a matter of law*," the Court noted that such a result "would not only be inconsistent with *Miranda* but would torture it to the illogical position of providing greater protection to a prisoner than to his non-imprisoned counterpart. We cannot believe the Supreme Court intended such a result. Thus, while *Mathis v. United States* (1968) 391 U.S. 1 [20 L.Ed.2nd 381].) may have narrowed the range of possible situations in which on-the-scene questioning may take place in a prison, we find in *Mathis* no express intent to eliminate such questioning entirely merely by virtue of the interviewee's prisoner status." (*Cervantes v. Walker, supra*, at p. 427.)

In *People v. Macklem* (2007)149 Cal.App.4th 674, the Court, differentiating itself from *Mathis*, noted that in *Mathis*, the defendant "was being questioned about matters that did not arise within the prison itself, by a government agent who was not a member of the prison staff; the prisoner was therefore subjected to 'an additional imposition on his limited freedom of movement, thus requiring *Miranda* warnings.'" (Citing *Cervantes v. Walker, supra*, at p. 428)

Macklem involved the questioning of the defendant about an assault he perpetrated while he was a county jail inmate awaiting trial on another case. The circumstances of **Cervantes** were similar to those of **Macklem**.

Defendant, a prison inmate, found standing near a dead body with 16 stab wounds, was asked by a correctional officer; “*Why did you do it?*” Defendant’s responses were admissible in that the officer “*had not, at that time, embarked upon a process of interrogation that lent itself to eliciting incriminating statements.*” Also, although in custody “*in the general sense,*” he was not in custody for this offense. (**People v. Sanchez** (1967) 65 Cal.2nd 814, 824.)

Statements obtained from a prison inmate during an interview by federal agents concerning an offense other than for what the defendant was incarcerated were held to be admissible in **United States v. Menzer** (7th Cir. 1994) 29 F.3rd 1223, at pages 1232-1233, the Court noting: “While it is undisputed that the defendant was incarcerated for an unrelated crime, we conclude that Menzer was not ‘*in custody*’ for the purposes of **Miranda** because there was no ‘added imposition on his freedom of movement’ nor ‘any measure of compulsion above and beyond [imprisonment].’ . . . The defendant voluntarily appeared at the interviews, he was not restrained in any manner, the room was well lit, there were two windows exposing the interview room to the prison administrative office area, the door to the interview room was unlocked and the defendant was told by Agent Eggum that he was free to leave at any time. [footnote omitted] . . . Based on the foregoing, we are in agreement with the trial court’s denial of the motion to suppress because despite the defendant’s incarceration, there was no ‘added imposition on his freedom of movement,’ [Citation] ‘nor any measure of compulsion above and beyond [the] confinement.’”

Defendant was held *not* to be in custody for purposes of **Miranda** when he telephoned the investigator from the jail and made incriminating remarks. (**United States v. Turner** (9th Cir. 1994) 28 F.3rd 981, 983-984.)

Defendant, a county jail prisoner, was asked by a jailer why he killed the victim (another inmate), minutes after the incident. Defendant’s response was admissible in that he was in custody “*only in the general sense,*” and the jailer’s questions were devoid of “*inquisitorial techniques.*” (**People v. Morse** (1970) 70 Cal.2nd 711, 720.)

See also **United States v. Willoughby** (2nd Cir. 1988) 860 F.2nd 15, 23-24 where defendant inmate requested the police to visit him in jail to talk about other crimes. “Though defendant was indeed a prisoner, there was no measure of compulsion above and beyond that confinement.”

And see *People v. Ray* (1996) 13 Cal.4th 313, at pages 336 to 338, where defendant/inmate initiated the contact, volunteered a confession for reasons that were personal to him (i.e., his religious beliefs), and was warned that his statements would be forwarded to the appropriate law enforcement agency and could lead to his prosecution.

Asking a prison inmate, “*What was going on; what the problem was?*”, immediately after defendant was observed attacking and stabbing another inmate and had been ordered back to his own cell, did not require a *Miranda* admonishment. (*United States v. Scalf* (10th Cir. 1984) 725 F.2nd 1272, 1276: “Because Scalf was not deprived of his freedom nor was he questioned in a coercive environment, the *Miranda* warnings were not required before his brief conversation with Officer Sanchez.”)

In *United States v. Cooper* (4th Cir. 1986) 800 F.2nd 412, at page 414, the Court noted that; “‘(C)ustody’ or ‘restriction’ in the prison context ‘necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement.’ [Citation]”

A jail inmate who calls the police and subjects himself over the telephone to interrogation cannot later complain that he was “*in custody*” for purposes of *Miranda*. (*People v. Anthony* (1986) 185 Cal.App.3rd 1114, 1117: “Appellant’s conversations with the police were hardly the sort of “incommunicado interrogation . . . in a police-dominated atmosphere” that operates to “overcome free choice” at which the *Miranda* rule was aimed.”

Similarly, a jail inmate who telephones a police investigator from jail and makes admissions is not in custody for purposes of *Miranda* (*Saleh v. Fleming* (9th Cir. 2008) 512 F.3rd 548, 550-551.)

Asking a jail inmate why he set a fire in his cell did not require a *Miranda* admonishment. “In the context of questioning conducted in a prison setting, restricted freedom ‘implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement.’ [Citation]” *Garcia v. Singletary* (11th Cir. 1994) 13 F.3rd 1487, 1492.)

It was held in *People v. Fradiue* (2000) 80 Cal.App.4th 15, that a prison inmate caught with heroin in his cell and placed into “administrative segregation,” applying the four-prong analysis of *Cervantes*, was *not* in custody for purposes of *Miranda* when questioned. Defendant was not “summoned” to the interview; he was interrogated in his own cell where he was most comfortable; he was not “confronted” with any evidence against him, but simply asked whether the heroin was his; and, even

though in administrative segregation, there were no restraints or pressures used upon him.

In *Howes v. Fields* (2012) 565 U.S. 499 [132 S.Ct. 1181; 182 L.Ed.2nd 17], defendant was serving a term of imprisonment in a county jail when questioned by deputies about allegations that he'd molested a twelve-year-old boy prior to being incarcerated. He was removed from the general jail population and questioned in an interview room. After being told that he could return to his cell whenever he wanted, he was questioned without the benefit of a *Miranda* admonishment. Noting that such a circumstance is a lot less coercive for a jail inmate than it might be for someone arrested off the street, the Court found no error in failing to *Mirandize* him.

The rule of *Mathis* (above), was not intended to impose a per se rule that all inmates are automatically in custody for purposes of *Miranda*. (*United States v. Conley* (4th Cir. 1985) 779 F.2nd 970.) Recognizing that a different test for “custody” in a jail setting is necessary, the *Conley* Court noted at page 973 that:

“Prisoner interrogation simply does not lend itself easily to analysis under the traditional formulations of the *Miranda* rule. A rational inmate will always accurately perceive that his ultimate freedom of movement is absolutely restrained and that he is never at liberty to leave an interview conducted by prison or other government officials. Evaluation of prisoner interrogations in traditional freedom-to-depart terms would be tantamount to a *per se* finding of ‘custody,’ a result we refuse to read into the *Mathis* decision.”

Despite being handcuffed, and at the time chained, during transit to the infirmary for medical treatment, during which time an incriminating conversation was had with a correctional officer, defendant was held *not* to be in custody for purposes of *Miranda*. (*Ibid.*)

But note *Jackson v. Giurbino* (9th Cir. 2004) 364 F.3rd 1002, finding that a defendant's inmate status necessarily meant that he was in custody, and that a *Miranda* advisal and waiver was necessary before he could be questioned. This is a questionable decision in light of the abundance of case authority to the contrary, made without any analysis of the issue.

The Ninth Circuit Court of Appeal further held that the use of this defendant's un-*Mirandized* inculpatory statement against him at trial potentially made the offending deputy sheriff (along with the Ventura Sheriff's Department [but *not* the District Attorney's Office]) civilly liable for a **Fifth Amendment** self-incrimination

violation, despite the fact that he was again convicted in a re-trial without using the inculpatory statement; again a questionable decision under *Chavez v. Martinez* (2003) 538 U.S. 760 [155 L.Ed.2nd 984] and subsequent cases (See *Miranda's Relationship to the United States Constitution*,” under “*The Fifth Amendment and Miranda*” (Chapter 1), above). The Court further noted, however, that damages were likely “minimal” under the circumstances. (See results on remand: *Jackson v. Barnes* (9th Cir. 2014) 749 F.3rd 755; reversing the trial court’s granting of summary judgment.)

Prison inmates questioned by ICE agents, five at a time, as to their status within the United States, held not to constitute “custody” for purposes of *Miranda*. (*United States v. Arellano-Banuelos* (5th Cir. TX 2019) 827 F.3rd 355.)

Caveat: However, it should not be forgotten that being an inmate is one factor to consider, and cannot be ignored when determining whether a person, prior to interrogation, should be *Mirandized*. (*Mathis v. United States* (1968) 391 U.S. 1 [20 L.Ed.2nd 381].)

Prison/jail Witnesses: When a subject is in custody, but he or she is interviewed as a *witness* as opposed to a criminal suspect, a *Miranda* admonishment is not required. (*People v. Wader* (1993) 5 Cal.4th 610, 637.)

Note: Never suggest to a criminal suspect that cooperation could lead to his being “*treated as a witness instead of a suspect*.” Such an admonition is likely to be considered an “*offer of leniency*,” invalidating any resulting statements. (See “*Offers of Leniency*,” under “*Voluntariness After Waiver*” (Chapter 9), below)

But see People v. Anthony (2019) 32 Cal.App.5th 1102, 1114-1127: where it was held to be *Miranda* error to question an in-custody defendant about the prior murder of a member of his gang where defendant was also an intended victim, which allegedly motivated the charged crime, even though he was told that they were not there to discuss the case he was in custody on, but rather the prior shooting only. Defendant had invoked his right to counsel when arrested on the new case. The detectives here ignored his prior assertion of his *Miranda* rights, did not advise him of his rights after defendant reinitiated the questioning by asking to speak with them. Also, defendant had been left in an interview room wearing physical restraints for four and a half hours. When asking defendant questions relating to the prior murder where he was a co-victim, it was held that the detective should have known that this interview was likely to result in defendant incriminating himself by providing evidence of motive. However, the error was harmless, given the strength of the other evidence.

And see *People v. Tousant* (2021) 64 Cal.App.5th 804, 823-824; differentiating the facts of this case from those in *Anthony*, where the defendant (in custody on a weapons charge) was questioned by an Oakland police officer about his son's murder without a *Miranda* admonishment, resulting in defendant making statements relative to a Berkeley shooting that at the time, the officer knew nothing about. No *Miranda* admonishment was required, it being held that no "interrogation" occurred.

The "Beheler Admonishment" in the Jail Setting:

Interrogation Tactic: It is a common interrogation tactic to question a suspect without a *Miranda* admonishment, often at a police station, after giving the suspect what is referred to as a "*Beheler* admonishment;" i.e., an admonishment to the effect that the subject is *not* under arrest and is free to leave or otherwise terminate the questioning. (See *California v. Beheler* (1983) 453 U.S. 1121, 1124-1125 [103 S.Ct. 3517; 77 L.Ed.2nd 1275, 1278-1279], discussed above.)

The test, again, is how a *reasonable person*, under the circumstances, would have understood his position as far as whether he or she was "*in custody*," the idea being that by telling the subject he is free to leave (or free to terminate the conversation), no reasonable person would have believed he was in custody. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442 [82 L.Ed.2nd 317, 336]; *People v. Boyer* (1989) 48 Cal.3rd 247, 272.)

In the Jail Context: A jail inmate may also be "*Behelered*" by telling him that he is free to terminate the questioning and "*return to his cell*" at any time. (See *United States v. Menzer* (7th Cir. 1994) 29 F.3rd 1223, at pages 1232-1233.)

Beheler in the jail context has specifically been upheld where an inmate was questioned by a jail investigator some four days after defendant beat his cellmate, where the questioning took place in a "professional interview room" with the door left unlocked and slightly ajar, with handcuffs having been removed, the questioning was other than "accusatorial," and the defendant was told that he was not required to talk to the investigator and that he would be taken back to his cell whenever he wished. (*People v. Macklem* (2007) 149 Cal.App.4th 674.)

See also *United States v. Menzer*, *supra*, at pp. 1232-1233, and *Howes v. Fields* (2012) 565 U.S. 499 [132 S.Ct. 1181; 182 L.Ed.2nd 17], above.

During Wiretaps:

Rule: Statements obtained during a lawfully authorized wiretap (per **P.C. §§ 629.50 et seq.**) are not the product of a custodial interrogation nor the product of police coercion. Therefore, the **Fifth Amendment** self-incrimination privilege is not applicable. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1194.)

During Telephone Interviews:

Rule: Even with probable cause to arrest, interviewing a criminal suspect over the telephone is *not* a custody situation requiring a **Miranda** admonishment and waiver:

There is no coerciveness as in a face-to-face confrontation. (*People v. Murphy* (1982) 8 Cal.3rd 349; *People v. Strohl* (1976) 57 Cal.App.3rd 347.)

Cases:

In negotiations with a suspect over the telephone in a hostage situation, attempting to talk the suspect into surrendering, a **Miranda** admonishment was not necessary. (*People v. Mayfield* (1997) 14 Cal.4th 668, 733-735.)

Defendant, while in jail, telephoned the investigator and made incriminating statements. No custody for purposes of **Miranda** (*People v. Anthony* (1986) 185 Cal.App.3rd 1114.)

See also *Saleh v. Fleming* (9th Cir. 2008) 512 F.3rd 548, 550-551.

On Appeal:

The issue of “custody” on appeal involves a mixed question of *law and fact*, warranting independent review by a federal court on habeas. (*Thompson v. Keohane* (1995) 516 U.S. 99 [133 L.Ed.2nd 383].)

In determining whether an interrogation is custodial, an appellate court will accept the trial court’s factual findings if supported by “*substantial evidence*.” The Court will then independently determine, as a “*legal issue*,” whether the interrogation was custodial. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161.)

Chapter 3: The Custodial Interrogation

Interrogations:

Rule:

“A defendant who is in custody ... must be given *Miranda* warnings before police officers may interrogate him.’ (*People v. Haley* (2004) 34 Cal.4th 283, 300. . . . (fn. 2; see below) Custodial interrogation means ‘questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.’ (*Miranda, supra*, 384 U.S. at p. 444; accord, *Illinois v. Perkins* (1990) 496 U.S. 292, 296 [110 L.Ed.2nd 243; 110 S.Ct. 2394]; *People v. Thomas* (2011) 51 Cal.4th 449, 476. . . .) Statements obtained in violation of *Miranda* are generally inadmissible; they may be admitted for the limited purpose of impeachment if otherwise voluntarily made. (*Harris v. New York* (1971) 401 U.S. 222, 225 [28 L.Ed.2nd 1; 91 S.Ct. 643]; *People v. Case* (2018) 5 Cal.5th 1, 26. . . .)” (*People v. Alvarez* (2022) 75 Cal.App.5th 28, 32.)

Footnote 2: “As a prophylactic safeguard to protect a suspect's **Fifth Amendment** privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that “he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”” (*People v. Martinez* (2010) 47 Cal.4th 911, 947 . . .), quoting *Miranda, supra*, 384 U.S. at p. 479.)”

Note: Defense counsel in *Alvarez* was held to have forfeited the issue as to whether defendant’s response to a question asked by an arresting officer was admitted into evidence in violation of *Miranda*. It was presumed, without deciding, that defendant should have been *Mirandized* prior to the asking of the question in issue. (*Id.*, at p. ____)

The *Miranda* safeguards are required “not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation.” (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300 [64 L.Ed.2nd 297, 307].)

“*Miranda*’s rule has a limit: It only applies when the suspect-defendant was the subject of ‘custodial interrogation.’” (*People v. Orozco* (2019) 32

Cal.App.5th 802, at p. 811; citing *Miranda v. Arizona*, *supra*, at p. 444; see also *In re J.W.* (2020) 56 Cal.App.5th 355, 359.)

“Implicit in the definition of ‘interrogation’ is that (1) the suspect is talking to the police or an agent of the police, *and* (2) the suspect *is aware* that he is talking to the police or one of their agents.” (Italics in original; *People v. Orozco*, *supra*, at p. 813.)

“‘Absent such interrogation, there would have been no infringement of the right.’ (Citation) Accordingly, any statements sought to be suppressed must have been the product of interrogation.” (*Robertson v. Pichon* (9th Cir. 201) 849 F.3rd 1173, 1183-1184, citing *Rhode Island v. Innis*, *supra*, at pp. 485-486.)

Note: Contrary to the image perpetrated upon the public by television, the arrest itself is not the triggering occurrence to the *Miranda* requirement. A subject who is not then and there to be questioned (with the exception of juveniles; see below), need not be given a *Miranda* admonishment.

Definition: An “*interrogation*” is defined as:

“(Q)uestioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 530; citing *Miranda v. Arizona*, *supra*, at p. 444.)

Any “*words or actions*” by the police that the police knew or should have known are reasonably likely to elicit an incriminating response (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-302 [64 L.Ed.2nd 297, 307-308].)

“ . . . other than those normally attendant to arrest and custody . . . ” (*Kemp v. Ryan* (9th Cir. 2011) 638 F.3rd 1245, 1255; *People v. Elizalde et al.* (2015) 61 Cal.4th 523, 531; *People v. Torres* (2018) 25 Cal.App.5th 162, 173; *United States v. Smialek* (8th Cir. 2020) 970 F.3rd 1070; *In re J.W.* (2020) 56 Cal.App.5th 355, 360.)

An interrogation includes not only express questioning, but also applies to any “*words or actions*” on the part of the police that the police should know are reasonably likely to elicit an incriminating response. This definition focuses primarily upon the perception of the suspect rather than the intent of the police. But the intent of the police is not irrelevant to this issue. A police interrogator’s intent may well have a bearing on whether he the interrogator should have known that his words or actions were reasonably likely to evoke an incriminating response. (*People v. Gomez* (2011) 192 Cal.App.4th 609, 628; citing *Rhode Island v. Innis*, *supra*, at p. 301, fn. 10 [64 L.Ed.2nd 297, 307]; see also *People v. Tousant* (2021) 64

Cal.App.5th 804, 821; “focuses primarily upon the perceptions of the suspect, rather than the intent of the police.”

“Interrogation . . . must reflect a measure of compulsion above and beyond that inherent in custody itself.” (*Rhode Island v. Innis*, *supra*, at p. 300.)

See also:

- *People v. Abbott* (1970) 3 Cal.App.3rd 966, 969; words or actions that were “intended to elicit an incriminating statement.”
- *People v. Sanchez* (1967) 65 Cal.2nd 814, 823: Where the questioner has “*embarked upon a process of interrogation that lent itself to eliciting incriminatory statements;*” and
- *People v. Morse* (1970) 70 Cal.2nd 711, 722: Where “*inquisitorial techniques*” are used.
- *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1123-1124: Asking an in-custody defendant questions about him being the prior target of an attempted homicide which was relevant to his motive for committing a murder himself in retaliation, constituted an interrogation. Questions that relate to one’s motive are incriminating and require a *Miranda* admonishment and waiver if the suspect is in custody. (pg. 1124.)
- *People v. Tousant* (2021) 64 Cal.App.5th 804, 821: “(E)xpress questioning or its functional equivalent, including ‘any words or actions on the part of the police’ that the ‘police should know are reasonably likely to elicit an incriminating response from the suspect.’” (Quoting *Rhode Island v. Innis*, *supra*, at pp. 300–302.

Limitations:

“*No interrogation* occurs where the purpose behind *Miranda* is not implicated—preventing government officials from exploiting the ‘coercive nature of confinement to extract confessions that would not (otherwise) be given.’ (*Arizona v. Mauro* (1987) 481 U.S. 520, 530 [95 L.Ed.2nd 458, 468, . . .].)” *People v. Ray* (1996) 13 Cal.4th 313, 337.)

“(T)he rule in *Edwards* (i.e., *Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880; 68 L.Ed.2nd 378]; invoking one’s right to the assistance of counsel.) does not apply to all interactions with the police—it applies only to custodial interrogation. *Edwards*, 451 U.S. at 486. In other words, not all communications with the police after a suspect has invoked the right to counsel rise to the level of interrogation. “‘Interrogation,’ as

conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.’ *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). ‘[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.’ *Id.* at 300-01.” (*Martinez v. Cate* (9th Cir. 2018) 903 F.3rd 982, 993.)

Asking a subject in his own apartment whether he lived there and in which bedroom he lived was held to *not* be an interrogation requiring a *Miranda* admonishment and waiver. The former question was a request for routine information necessary for basic identification purposes because the officers were trying to understand and identify the defendant’s presence in the apartment they were about to search with the co-occupant’s permission. The latter did not constitute interrogation because the officers had a legitimate need for the information to ensure they were conducting a lawful consensual search. (*United States v. Tapia-Rodriguez* (8th Cir. 2020) 968 F.3rd 891.)

Defendant continually interrupting a special agent’s attempt to read him his *Miranda* rights, asking the agent what the date of the alleged bank robbery might be, and then providing an unsolicited alibi for his whereabouts on that day, did not constitute a custodial interrogation. The trial court properly refused to suppress defendant’s alibi in that it was not the product of an interrogation. (*United States v. Smialek* (8th Cir. 2020) 970 F.3rd 1070.)

Interrogation vs. Interview:

Use and Purpose: Citing “*The Reid Technique of Interviewing and Interrogation in Investigative Interviewing: Rights, Research, Regulation* (Williamson edition, 2005) the courts recognize a difference in use and purpose between an “*interrogation*” and an “*interview*:”

“(A)n ‘*interview*’ is ‘nonaccusatory,’ its purpose ‘is to gather information,’ it ‘may be conducted early during an investigation,’ it ‘may be conducted in a variety of environments,’ the conversation should be ‘free flowing and relatively unstructured,’ and ‘[t]he investigator should take written notes’ (*Inbau et al., Criminal Interrogation*, . . . , at pp. 3–4, italics omitted.)”

“On the other hand, an ‘*interrogation*’ is ‘accusatory’ and ‘involves active persuasion,’ it ‘is conducted in a controlled environment’ and ‘only when the investigator is reasonably certain of the suspect’s guilt,’ and the investigator ‘should not take any notes until after the suspect has told the truth and is fully

committed to that position.’ ([*Reid Technique*], at pp. 5–6, some italics omitted.)” (*In re Elias V.* (2015) 237 Cal.App.4th 568, 578, & 598; suggesting that an interview should precede an interrogation as a general rule.)

“(A)n “interview” is “nonaccusatory,” [and] its purpose “is to gather information,” while an “interrogation” is “accusatory” and involves active persuasion’]” (*In re Matthew W.* (2021) 66 Cal.App.5th 392, 403, fn. 5; quoting *In re Elias V.*, at p. 589.)

When an interview consists of “words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect,” the questioning becomes an interrogation. (*People v. Torres* (2018) 25 Cal.App.5th 162, 173; citing *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [64 L.Ed.2nd 297; 100 S.Ct. 1862].)

The Reid Interrogation Technique:

“*John E. Reid & Associates* was the largest national provider of training in interrogation techniques at the time *Miranda* was decided, and still is today. The basic course on “The Reid Technique” is predicated on the methodology first set forth in the initial edition of Inbau and Reid, *Criminal Interrogation and Confessions* (1962), a classic work which was quoted extensively by Chief Justice Earl Warren in *Miranda*. The current Reid training manual, which remains the leading law enforcement treatise on custodial interrogation, was published in 2013. (Inbau et al., *Criminal Interrogation and Confessions* (5th ed. 2013) . . .) It has been estimated that about two-thirds of police executives in this nation have had training in the “Reid Technique.” (Zalman & Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies* (2007) 97 *J. Crim. L. & Criminology* 873, 920.)” (*In re Elias V.* (2015) 237 Cal.App.4th 568, 579.)

In a footnote, it is noted that “(i)n California, local law enforcement agencies’ officers who may not have attended a Reid program receive training from academies whose curricula, mandated and approved by the Commission on Peace Officer Standards and Training (POST) (**Pen. Code, § 13510, subd. (a); Cal. Code Regs., tit. 11, § 1005, subd. (a)**), teach interrogation techniques similar to those promoted by the Reid program. (Weisselberg, *Mourning*

Miranda (2008) 96 Cal. L.Rev. 1519, 1533–1534 & appen.)” (*Id.*, at fn. 7.)

Under the Reid Technique:

“‘First, investigators are advised to isolate the suspect in a small private room, which increases his or her anxiety and incentive to escape. A nine-step process then ensues in which an interrogator employs both negative and positive incentives. On one hand, the interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials. On the other hand, the interrogator offers sympathy and moral justification, introducing “themes” that minimize the crime and lead suspects to see confession as an expedient means of escape.’ (Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations* (2010) 34 Law & Hum. Behav. 3, 7 (*Police-Induced Confessions*).)” (*In re Elias V.*, *supra*, at pp. 579-580; fn. omitted)”

“‘The first interrogation step is “a direct, positively presented confrontation of the suspect with a statement that he is considered to be the person who committed the offense.” . . . [¶] The second step introduces a theme for the interrogation, a reason for the commission of the crime, which may be a moral (but not legal) excuse or a way for the suspect to rationalize her actions. . . . The suspect may deny involvement in the offense, which leads to step three, overcoming denials. . . . The next steps, four through six, guide the investigator in overcoming the suspect’s reasons why he would not or could not commit the crime, keeping the suspect’s attention and handling a suspect’s passive mood. [¶] Step seven is critical. Here the officer formulates alternative questions, one of which is “more ‘acceptable’ or ‘understandable’ than the other.’ The question is followed by a statement of support for the more morally acceptable alternative. However, “[w]hichever alternative is chosen by the suspect, the net effect . . . will be the functional equivalent of an incriminating admission.” Steps eight and nine are taking the suspect’s oral statement and converting it to a written confession.’ (Weisselberg, *Mourning Miranda*, *supra*, 96 Cal. L.Rev. at pp. 1532–1533, fns. omitted.).) (*Id.*, at p. 580, fn. 8.)

The Court in *Elias V.* also notes in a footnote that; “(i)n response to the view of most behavioral scientists who study the subject that the purpose of interrogation is to induce confessions, the Reid text states: ‘A common misperception exists in believing that the purpose of an interrogation is to elicit a confession. Unfortunately, there are occasions when an innocent suspect is interrogated, and only after the suspect has been accused of committing the crime will his or her innocence become apparent. If the suspect can be eliminated based on his or her behavior or explanations offered during an interrogation, the interrogation must be considered successful because the truth was learned. Oftentimes an interrogation also will result in a confession, which again accomplishes the goal of learning the truth.’ (Inbau et al., *Criminal Interrogation*, *supra*, at p. 5.)” (*Id.*, at p. 580, fn. 9.)

Further Criticism:

See also *In re I.F.* (2018) 20 Cal.App.5th 735, 768, where it is noted that the Reid Technique “has been linked to a high number of false confessions.”

The “*maximization, minimization,*” interrogation tactic is an element of the Reid Technique. (*Id.*, at p. 768; see also p. 772, fn. 16.) See “*Juveniles and False Confessions,*” under “*Juveniles and Miranda*” (Chapter 10), below.

See also *People v. Torres* (2018) 25 Cal.App.5th 162, 177, where the Court defined “*minimization*” (or “*minimalization*”) as involving “‘tactics (that) are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question,’ a tactic that ‘communicates by implication that leniency in punishment is forthcoming upon confession.’” <https://advance.lexis.com/search/?pdmfid=1000516&crld=9f3f748c-e1c2-48a1-a201-034cf8d3e96d&pdsearchterms=2018+Cal.+App.+LEXIS+623&pdstartin=hlct%3A1%3A2&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqtype=and&pdpsf=&pdquerytemplateid=&ecom=rtpL9kk&earg=pdpsf&prid=90d908de-0b10-4dac-8c70-fefa5419c7c9> (Citing *In re Elias V.*, *supra*, at p. 583.)

When Not to Interrogate: Unless questioning is intended, there is absolutely no tactical advantage (nor legal reason) to administer a *Miranda* admonishment and seek a waiver. To the contrary, it may only compromise future attempts to

question the suspect. In a limited number of circumstances, an attempt to obtain a ***Miranda*** waiver should *not* be attempted:

Specialization Required: When the subject is to be questioned later: If according to a police department's internal policy, a type of criminal suspect is to be questioned later by a specialized unit or specially trained officer (e.g., homicide detective in a murder case), he should not be advised and/or questioned by anyone else prior to the actual initiation of the interrogation by that specialized officer.

Combative Subjects: A suspect who is combative and/or otherwise uncooperative, where a waiver is unlikely, should not be given a ***Miranda*** admonishment until he or she calms down.

But; see ***People v. Honeycutt*** (1977) 20 Cal.3rd 150, finding the intentional softening up of a suspect to be improper.

Exception; Juveniles: All juveniles taken into “temporary custody” (i.e., “arrested”) must be provided a ***Miranda***-style admonishment, per statute, whether or not questioned. (**W&I § 625**) (See “***Juveniles & Miranda***” (Chapter 10), below.)

Interrogation vs. Questioning: “Just as custodial interrogation can occur in the absence of express questioning (***Rhode Island v Innis***, *supra*, 446 U.S. 291, 300-301 [64 L.Ed.2nd 297, 307-308]; (i.e.; the “functional equivalent of an interrogation”), not all questioning of a person in custody constitutes an interrogation under ***Miranda***.” (***People v. Ray*** (1996) 13 Cal.4th 313, 338; no interrogation found where a prison official made “neutral inquiries” for the purpose of clarifying statements or points of defendant’s volunteered narrative. See also ***People v. Tousant*** (2021) 64 Cal.App.5th 804, 820-826; defendant in custody on a weapons arrest, questioned about his murdered son, made statements used against him in a shooting offense of which, at the time of questioning, the officer was unaware.)

Note: See “***Interrogation vs. Interview,***” above.

Non-Custodial Conversations: Not all conversation between a police officer and a suspect constitutes an interrogation.

The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response. (***People v. Clark*** (1993) 5 Cal.4th 950, 985; ***People v. Jiles*** (2004) 122 Cal.App.4th 504, 514.)

Casual conversation between a detective and a homicide suspect while awaiting treatment at a hospital, even though it included a discussion

about some of the people involved in the homicide, held not to be an interrogation. (*People v. Dement* (2011) 53 Cal.4th 1, 26-28.)

Note *People v. Caro* (2019) 7 Cal.5th 463, 489-495.), where the California Supreme Court noted that questioning a defendant without benefit of a *Miranda* admonishment and waiver, when the defendant is a hospital patient and hooked up to medical devices, is “*tread(ing) on perilous ground.*” However, the Court, under the circumstances, found this issue to be one that did not need deciding in that even if in violation of *Miranda*, the admission of the defendant’s resulting statements was harmless beyond a reasonable doubt.

But see the concurring opinion (at pp. 527 to 535) arguing that defendant was not only coerced into making incriminating admissions (a “due process” violation), but that she was also in custody and questioned without benefit of a *Miranda* admonishment or waiver.

A casual conversation with an in-custody suspect, done for the purpose of keeping the potentially explosive suspect calm and cooperative, does not constitute an interrogation. The resulting statements by the suspect are admissible in evidence despite an earlier invocation of the right to remain silent. (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 84-89.)

A mid-trial conversation between defendant and a court bailiff during a recess, in which defendant volunteered inculpatory statements about the details of his crime, held not to be an interrogation because the bailiff’s responses and questions to the defendant, albeit about the case, were not of the type that the bailiff would have reasonably believed were likely to elicit an incriminating response. Or, at least, the trial court was not unreasonable in so-finding. (*Hernandez v. Holland* (9th Cir. 2014) 750 F.3rd 843, 852-855.)

After defendant had invoked her right to counsel, officers asking her if she’d yet had the opportunity to find an attorney, and providing her with the means by which she could contact relatives and locate an attorney (i.e., giving her a telephone and a phone book), followed by the defendant’s own request to talk to the officers despite her earlier invocation, held to be a lawful reinitiation of the interrogation and not the product of the officers’ actions. An officer’s questions “principally aimed at finding the suspect an attorney” does not constitute an interrogation. (*Bachynski v. Stewart* (6th Cir. 2015) 813 F.3rd 241.)

“While the term ‘*interrogation*’ refers to any words or actions on the part of police that are reasonably likely to elicit an incriminating response, it

does not extend to inquiries . . . that are ‘essentially “limited to the purpose of identifying a person found under suspicious circumstances or near the scene of a recent crime.”’ [Citation.]” (*People v. Farnam* (2002) 28 Cal.4th 107, 180.)

Questioning a person who voluntarily came to the police station for the purpose of reporting himself to be the victim of an extortion plot was not a custodial interrogation under the circumstances, even after officers got into the subject of the person’s own criminal activity. (*United States v. Ludwikowski* (3rd Cir. 2019) 944 F.3rd 123.)

Defendant did not require *Miranda* warnings when he was being questioned by an officer in another matter concerning his son’s murder because the statements defendant made were not the product of an interrogation, given that he failed to demonstrate the officer knew or should have known at the time of questioning that such questioning would likely elicit incriminating statements. (*People v. Tousant* (2021) 64 Cal.App.5th 804, 820-826.)

As noted by the Court, there is “no authority for the proposition that *Miranda* requires an officer who questions a witness about one crime must determine whether a defendant is suspected by another police department of a crime for which he has not been charged.” (*Id.*, at p. 824.)

Note: See “*Interrogation vs. Interview*,” and “*Interrogation vs. Questioning*,” above.

The “Functional Equivalent” of an Interrogation: An interrogation need not always involve the actual questioning of a suspect.

Definition: Any words or actions which the police should know are reasonably likely to elicit an incriminatory response, even though not in the form of actual questions, may still constitute an interrogation. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600 [110 L.Ed.2nd 528; 110 S.Ct. 2638]; *People v. Underwood* (1986) 181 Cal.App.3rd 1223, 1231; see also *Rhode Island v. Innis* (1980) 446 U.S. 291 [64 L.Ed.2nd 297]; *Brewer v. Williams* (1977) 430 U.S. 387 [51 L.Ed.2nd 424]; *In re Albert R.* (1980) 112 Cal.App.3rd 783.)

Factors: Whether particular questioning is in fact an interrogation depends on the “totality situation,” including, but not limited to:

- The length, place, and time of the questioning;
- The nature of the questions;

- The conduct of the police;
- All other relevant circumstances.

(*People v. Terry* (1970) 2 Cal.3rd 362, 383.)

Examples:

Verbally degrading a juvenile suspect and adding, “That sure was a cold thing you did . . .,” eliciting a defensive, but incriminating response, was held to be an interrogation despite the lack of any questioning. (*In re Albert R.* (1980) 112 Cal.App.3rd 783.)

Showing an in-custody suspect stolen property without a *Miranda* admonishment was held to be the functional equivalent of an interrogation mandating suppression of the suspect’s resulting statements. (*People v. Taylor* (1986) 178 Cal.App.3rd 217.)

Describing the crime scene to the suspect was the functional equivalent of an interrogation. (*People v. Sims* (1993) 5 Cal.4th 405, 440-444.)

Sending a codefendant, who had already confessed, into a room with the defendant, who had invoked, with instructions to tell the defendant that he (the codefendant) had confessed and see how he responds, was held to be the functional equivalent of an interrogation. (*Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2nd 928.)

After defendant had invoked, commenting to him that his fingerprints were left on the murder weapon (i.e., an Uzi), and then leaving him in a room with two co-suspects where his responses were surreptitiously recorded, was the functional equivalent to an interrogation. However, because defendant responses were made after the officer had left, thus eliminating the “coercive, police-dominated atmosphere,” defendant’s responses were properly admitted against him at trial. (*People v. Davis* (2005) 36 Cal.4th 510, 552-553.)

Examples of No Interrogation:

Allowing a subject who had previously invoked to talk to his wife, in view of a tape recorder and in the presence of a police officer, is *not* the “functional equivalent” of an interrogation. (*Arizona v. Mauro* (1987) 481 U.S. 520, 526 [95 L.Ed.2nd 458, 466].)

Statements by the police to a suspect “*normally attendant to an arrest*” are not the “*functional equivalent*” of an interrogation. (*People v. Celestine*

(1992) 9 Cal.App.4th 1370, 1374-1375; telling defendant with what he is charged.)

Answering a suspect's questions relating to the possible punishments "would not reasonably be construed as calling for an incriminating response." (*People v. Clark* (1993) 5 Cal.4th 950, 985.)

A general, rhetorical question, such as, "*What did you get yourself into?*" was held to *not* be the functional equivalent of an interrogation. (*People v. Claxton* (1982) 129 Cal.App.3rd 638.)

A detective telling the defendant that he wanted to talk to a witness who defendant was calling on the telephone after invoking his right to counsel, and responding to defendant's volunteered statements concerning the potential penalties of his crime while they waited for defendant's attorney to call back, both leading to incriminating statements by the defendant, was *not* the functional equivalent of an interrogation. (*United States v. Cunningham* (8th Cir. 1998) 133 F.3rd 1070, 1074.)

Telling an in-custody murder suspect that the detective knew defendant had committed the murder because his fingerprints were found at the scene, without any other references to the homicide or any questions asked, is not an interrogation. (*People v. Haley* (2004) 34 Cal.4th 283, 300-303.)

Defendant's unsolicited statement that "I don't even own a computer" was uttered when told that he was being arrested for possession of child pornography, and not in response to any questioning. No interrogation. (*United States v. Sweeny* (1st Cir. MA, 2018) 887 F.3rd 529.)

Requiring defendant, arrested for driving while under the influence, to complete certain field sobriety tests ("FSTs") is not an interrogation. No *Miranda* admonishment or waiver is necessary. (*People v. Cooper* (2019) 37 Cal.App.5th 642.)

An officer's response to defendant's inquiry concerning whether his female friend was in trouble, prompting defendant to tell the officer that he would "*take the hit*" for an illegal gun and ammunition found on him and in their car, was held not to constitute an interrogation. Defendant's admission was admissible despite the lack of a *Miranda* admonishment. (*United States v. Greene* (3rd Cir. PA, 2019) 927 F.3rd 723.)

See also "*Use of an Undercover Police Agent*," and "*Pretext Telephone Calls in the *Miranda* Context*," under "*The Admonition*" (Chapter 6), below.

Functional Equivalent-Related Issues:

DUI (or DWI) Cases:

I.e.; “*Driving While Under the Influence of alcohol.*”

General, on the scene questions asked of a DUI suspect in preparation for a field sobriety test are, as a general rule, *not* an interrogation. (***People v. Bejasa*** (2012) 205 Cal.App.4th 26, 39-41.)

However, where probable cause to arrest has already developed, and the suspect would have reasonably been aware that there was enough to take him into custody (i.e., told that he was in violation of parole and where he was found to be in possession of a controlled substance), then a ***Miranda*** admonishment and waiver should have preceded any questioning concerning his state of sobriety. (***Id.***, at pp. 39-41.)

Also, testing the in-custody suspect’s ability to estimate 30 seconds as a part of the so-called “Romberg test,” was held to be “testimonial” in nature and also subject to suppression absent a ***Miranda*** waiver, at least under the facts of this case. (***Id.***, at pp. 41-44.)

But see ***People v. Cooper*** (2019) 37 Cal.App.5th 642, at pgs. 652-653, with the FSTs as administered including the Romberg test. The Court held that administering a Romberg test was not an interrogation under the circumstances, differentiating this case from ***Bejasa***. Here, defendant had not yet been arrested: The officer testified that he did not believe he had probable cause to arrest at that point, with the investigation still “ongoing.” In any case, it was also held to be “harmless error.”

While physical observations of an in-custody DUI suspect are not “testimonial,” and thus may be testified to despite the lack of a ***Miranda*** waiver, defendant’s inability to calculate the year of his sixth birthday is, and his inability to answer that question was held to be inadmissible. (***Pennsylvania v. Muniz*** (1990) 496 U.S. 582, 583-586 [110 L.Ed.2nd 528; 110 S.Ct. 2638].)

The question regarding the defendant’s sixth birthday called for a testimonial response because the question required the defendant to “communicate an express or implied assertion of fact or belief.” In such circumstances,

“the suspect confronts the ‘trilemma’ of truth, falsity, or silence” Because the defendant was in custody and had not been advised of his right to silence, the defendant’s only choices were to incriminate himself by admitting that he did not know the date of his sixth birthday or to answer falsely and possibly incriminate himself with an incorrect guess. “(H)ence the response . . . contain[ed] a testimonial component.” (*Id.*, at pp. 587-599.)

A police inquiry to a DUI suspect as to whether he she will submit to a chemical test is not an “interrogation” within the meaning of *Miranda*. (*South Dakota v. Neville* (1983) 459 U.S. 553, 564 [74 L.Ed.2nd 748]; *Pennsylvania v. Muniz*, *supra*, at pp. 604-605; *People v. Cooper*, *supra*, at p. 652.)

Consent to Search:

Requesting a consent to search is not an interrogation, does not implicate the **Fifth Amendment**, and does not require a *Miranda* admonishment. (*People v. Ruster* (1976) 16 Cal.3rd 690, 700; *People v. Woolsey* (1979) 90 Cal.App.3rd 994; *People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1559; *Doe v. United States* (1988) 487 U.S. 201 [101 L.Ed.2nd 184]; *United States v. Henley* (9th Cir. 1993) 984 F.2nd 1040, 1042-1043; *United States v. Hidalgo* (11th Cir. 1993) 7 F.3rd 1566; *United States v. Kon Yu Leung* (2nd Cir. 1990) 910 F.2nd 33, 38; *United States v. Shlater* (7th Cir. 1996) 85 F.3rd 1251; *United States v. Tapia-Rodriguez* (8th Cir. 2020) 968 F.3rd 891.)

Even if an in-custody suspect has already invoked his *Miranda* rights, he or she may still be asked for a consent to search. (*United States v. Kon Yu Leung* (2nd Cir. 1990) 910 F.2nd 33, 38; *United States v. Hidalgo* (11th Cir. 1993) 7 F.3rd 1566, 1570; *United States v. Shlater* (7th Cir. 1996) 85 F.3rd 1251; *United States v. Calvetti* (6th Cir. 2016) 836 F.3rd 654.)

“*Miranda* [is] not violated when an officer ask[s] for and obtain[s] consent to search after the defendant had exercised his privilege against self-incrimination.” (*People v. Johnson* (2022) 12 Cal.5th 544, at p. 568, fn. 1, quoting *People v. James* (1977) 19 Cal.3rd 99, 115.)

But see *United States v. Reilly* (9th Cir. 2000) 224 F.3rd 986, 994, where it was erroneously held that a defendant’s invocation of his right to an attorney precluded officers from asking him for his consent to search.

A suspect's consent to search her residence, obtained after invocation of her right to remain silent, held not to be a product of the officer's illegal continued questioning of the suspect, and was valid. (*United States v. Calvetti* (6th Cir. 2016) 836 F.3rd 654.)

Gang Affiliation Questions:

General questions concerning gang activity and gang membership, asked of a suspect who was in custody for a gang-related shooting, was held to be an interrogation. Such questions could be (and were) used to show defendant's gang membership for enhancement purposes. The questions were also likely to (and did) lead to incriminating responses concerning defendant's present charges despite the detectives' instructions to the defendant that there were not there to discuss his current charges. (*People v. Roquemore* (2005) 131 Cal.App.4th 11, 24-25.)

See "Routine Booking Questions," under "Lawful Exceptions to the *Miranda Rule*" (Chapter 5), below.

Booking Questions:

Neutral questions intended only to identify the suspect upon arrest (e.g., "booking questions") do not normally constitute an interrogation for purposes of *Miranda*. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600-602 [110 L.Ed.2nd 528; 110 S.Ct. 2638]; *People v Gomez* (2011) 192 Cal.App.4th 609; *United States v. Washington* (9th Cir. 2006) 462 F.3rd 1124; *People v. Hall* (1988) 199 Cal.App.3rd 914, 920-921; *People v. Elizalde et al.* (2015) 61 Cal.4th 523, 533-540; *United States v. Brown* (8th Cir. 1996) 101 F.3rd 1272; *United States v. Godinez* (6th Cir. 1997) 114 F.3rd 583, 589; *United States v. Sanchez* (1st Cir. 2016) 817 F.3rd 38.)

But there are exceptions: See "Routine Booking Questions," under "Lawful Exceptions to the *Miranda Rule*" (Chapter 5), below.

Brief Informational Questions: Questions that are not designed to elicit incriminating responses are generally not consider to constitute an interrogation. Examples:

The initial questions upon detaining a possible criminal suspect is not an interrogation. (*People v. Farnam* (2002) 28 Cal.4th 107, 180; citing *People v. Clair* (1992) 2 Cal.4th 629, 679-680.)

Initial questions about a suspect's background, even though done for the apparent purpose of establishing rapport with the suspect, do not require an admonishment or waiver. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1086-1087.)

Questions related to a *defendant's identity and residence* are generally allowed. (*United States v. Edwards* (7th Cir. 1989) 885 F.2nd 377, 386.)

Query: What if the defendant's residence could be usable as evidence against him, e.g., when narcotics is spread throughout the house? Would not seeking an admission that he lives there be something that would tend to incriminate him?

Although a detained suspect's **Fifth Amendment** right against self-incrimination *is not* generally violated by requiring him to identify himself, the United States Supreme Court noted that there *may be* circumstances (without identifying examples) where having to identify oneself *could be* incriminatory and thus subject to **Fifth Amendment** protections. (*Hiibel v. Sixth Judicial District of Nevada* (2004) 542 U.S. 177, 191 [159 L.Ed.2nd 292].)

Asking the *identity of others* present in the room at the time the suspect is arrested is lawful. (*United States v. Guiterrez* (7th Cir. 1996) 92 F.3rd 468, 471.)

An officer's question, "*What's this?*", in the course of a pat-down search; no interrogation. (*United States v. Yusuff* (7th Cir. 1996) 96 F.3rd 982, 988.)

An officer explaining the necessity of *providing a urine sample*, to which defendant volunteered that his urine "would probably not be clean;" no interrogation. (*United States v. Edmo* (9th Cir. 1998) 140 F.3rd 1289, 1293.)

Re-advising defendant of her **Miranda** rights off of a standard advisal form used for multiple purposes, processing the drugs seized from her vehicle in her presence, and taking her photograph standing behind the seized drugs, held not to constitute the "functional equivalent" of interrogation. (*United States v. Morgan* (9th Cir. 2013) 738 F.3rd 1002, 1005-1006.)

Requiring a sex registrant (per **P.C. § 290(a)**) to provide during registration his alias and gang monikers, being consistent with the

purposes of registering, does not infringe on the defendant's right against self-incrimination. (*People v. Sanchez* (2003) 105 Cal.App.4th 1240, 1245.)

Responding to the defendant's inquiries about the possible penalty for his offenses with a "causal estimate of possible penalties," resulting in incriminating statements by the defendant, was not an interrogation. (*People v. Clark* (1993) 5 Cal.4th 950, 985.)

But, see People v. Sims (1993) 5 Cal.4th 405, 443-444; where defendant asked about extradition and the officer responded instead by talking about the crime, the officer's questions served no legitimate purpose and were instead a technique of persuasion likely to induce the defendant to incriminate himself.

No interrogation found when police responded to defendant's question regarding the burial of his victims and the defendant subsequently lost his composure and made incriminating statements. (*People v. Mickey* (1991) 54 Cal.3rd 612, 645, 651.)

Telling defendant upon his arrest that he (the detective) knew defendant had committed a murder because his fingerprints were at the scene was not an interrogation because it could not have reasonably been expected to elicit an incriminating response. (*People v. Haley* (2004) 34 Cal.4th 283, 300-303.)

Informing two suspects in a vehicle that they would both be arrested for possession of a concealed firearm, prompting a response from defendant that he'd "take the charge," was not the functional equivalent of an interrogation that required a *Miranda* admonishment. (*United States v. Collins* (6th Cir. 2012) 683 F.3rd 697, 701-703.)

Reverse Lineups: While not absolutely condemned, the use of a "reverse lineup" has been questioned by the U.S. Supreme Court:

"The concern of the Court in *Miranda* was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. (*Miranda v. Arizona, supra*,) at 457-458. The police practices that evoked this concern included <https://advance.lexis.com/document/searchwithindocument/?pdmfid=1000516&crd=384ee69a-215b-471e-8a4d-7e600bca961b&pdsearchwithinterm=reverse&ecomp=Lg85k&prid=0cca114e-ab05-48b5-bc30-5bddf721d572> several that did not involve express

questioning. For example, one of the practices discussed in *Miranda* was the use of lineups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was in fact guilty as a predicate for further interrogation. *Id.*, at 453. A variation on this theme discussed in *Miranda* was the so-called “reverse line-up” in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution. *Ibid.*” (*Rhode Island v. Innis* (1980) 446 U.S. 291, 299 [64 L.Ed.2nd 297].)

Wiretaps: Statements obtained during a lawfully authorized wiretap (per **P.C. §§ 629.50 et seq.**) are not the product of a custodial interrogation nor the product of police coercion. Therefore, the **Fifth Amendment** self-incrimination privilege is not applicable. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1194.)

During Civil Proceedings: *Miranda* warnings are not necessary before questioning a defendant in the context of a civil deportation hearing. Such questioning is not an interrogation, within the meaning of *Miranda*. Therefore, his responses and the documentary products of those responses are admissible as evidence in a later criminal prosecution. (*United States v. Solano-Godines* (9th Cir. 1997) 120 F.3rd 957, 960-961.)

In fact, an immigration judge may draw an adverse inference from a defendant’s silence should he refuse to testify at his deportation hearing. (*Id.*, at p. 962.)

Questioning as a Witness: Questioning an in-custody subject about another incident to which the subject is believed to be but a witness does not require a *Miranda* admonishment or waiver. (*People v. Wader* (1993) 5 Cal.4th 610, 637; *United States v. Bogle* (D.C. Cir. 1997) 114 F.3rd 1271.)

However, where the person questioned is in custody (e.g., as an illegal alien unlawfully smuggled into the country), and there is a “heightened threat” that that person might himself be prosecuted for entering the country illegally, then use of his statements against him without a *Miranda* admonishment and waiver is illegal even though the interrogator had a dual purpose of attempting to collect evidence against the smuggler. (*United States v. Chen* (9th Cir. 2005) 439 F.3rd 1037.)

Note: Never suggest to a criminal suspect that cooperation could lead to his being “treated as a witness instead of a suspect.” Such

an admonition is likely to be considered an “*offer of leniency*,” invalidating any resulting statements. (See “*Offers of Leniency*,” under “*Voluntariness After Waiver*” (Chapter 9), below)

Volunteered Statements:

Rule: Volunteered statements of any kind are not barred by the **Fifth Amendment** or subject to the prophylactic requirements of ***Miranda***. (***People v. Ray*** (1996) 13 Cal.4th 313, 337; citing ***Miranda v. Arizona***, *supra*, at p. 478 [16 L.Ed.2nd at p. 726]; (***Rhode Island v. Innis*** (1980) 446 U.S. 291, 300 [64 L.Ed.2nd 297, 307].)

An interrogation does not occur when statements are volunteered; i.e., *not* made in response to any actions or questions by the police. (***People v. Owens*** (1980) 106 Cal.App.3rd 23, 28; defendant volunteered incriminating statements minutes after asking for an attorney; see also ***People v. Arauz*** (1970) 5 Cal.App.3rd 523; a confession blurted out to defendant’s parole officer.)

No interrogation occurs where the purposes behind ***Miranda*** are not implicated; i.e., preventing government officials from exploiting the coercive nature of an interrogation to extract confessions that would not otherwise be given. (See ***Arizona v. Mauro*** (1987) 481 U.S. 520, 530 [95 L.Ed.2nd 458, 468].)

Spontaneous, volunteered statements, not made in response to any questioning by law enforcement, are admissible despite the lack of a ***Miranda*** admonishment and waiver. (See ***People v. Dykes*** (2009) 46 Cal.4th 731, 754; ***Mickey v. Ayers*** (9th Cir. 2010) 606 F.3rd 1223, 1234-1235.)

In ***Mickey***, the Ninth Circuit upheld the trial court’s determination that spending three months in a Japanese prison and the detective giving defendant a breath mint from the defendant’s own wife’s house were not, under the circumstance, sufficient to constitute coercion. Defendant’s volunteered statements and his later ***Miranda*** waiver were voluntary.

Volunteered statements, not in response to an interrogation, are admissible. An “(i)nterrogation consists of express questioning, or words or actions on the part of the police that are reasonably likely to elicit an incriminating response from the suspect.” An interrogation, therefore, refers to questioning initiated by the police or its functional equivalent. It does not refer to casual conversation. Volunteered statements don’t count. Per the California Supreme Court, “smalltalk (sic) is permitted.” (***People v. Gamache*** (2010) 48 Cal.4th 347, 387-388.)

Examples:

Volunteered statements, *not* in response to any questioning are admissible even without a prior ***Miranda*** waiver. (***People v. Edwards*** (1991) 54 Cal.3rd 787, 814-816.)

Defendant's volunteered response that he had escaped from the California Youth Authority but that he did not kill the victim (such statements used against him at trial by the prosecutor for the purpose of impeaching the defendant's credibility), made after the officer, while plugging in the tape recorder in preparation for an interview, merely told defendant that they were there because he was a suspect in the victim's murder. (***People v. Huggins*** (2006) 38 Cal.4th 175, 197-198.)

An officer's response to a volunteered, incriminating comment made by an in-custody defendant, seeking clarification of the defendant's statement, is not an interrogation. (***United States v. Gonzales*** (5th Cir. 1997) 121 F.3rd 928, 939-940; an officer's question to defendant about what he was referring after defendant volunteered an admission of ownership of certain contraband, held not an interrogation.)

There was no interrogation when a prison official made "*neutral inquiries*" for the purpose of clarifying statements or points of defendant's volunteered narrative. (***People v. Ray*** (1996) 13 Cal.4th 313, 338; overruled on other grounds.)

See also ***People v. Davis*** (2005) 36 Cal.4th 510, where, after defendant had invoked, he was put into a holding tank with co-suspects in a robbery/murder case, falsely told that his prints were on the murder weapon, and then left alone. Defendant's resulting incriminating statements to his co-suspects were held to be admissible in that, although the officer's ruse was improper (i.e., the "*functional equivalent of an interrogation*"), defendant was not being interrogated when he made his statements. As "*volunteered*" statements, they were admissible. (pgs. 552-555.)

Similarly, placing a close relative in room with a defendant, without instructions as to what to ask (precluding the argument that the relative is acting as a police agent), is not an interrogation, nor even the "functional equivalent" of one. Any resulting inculpatory statements made by the defendant are admissible over a **Fifth Amendment** (i.e., ***Miranda***) objection. (***People v. Leonard*** (2007) 40 Cal.4th 1370, 1401; See also ***People v. Thornton*** (2007) 41 Cal.4th 391, 429-433, and ***People v. Mendez*** (2019) 7 Cal.5th 680, 700.)

See also *People v. Guilmette* (1991) 1 Cal. App. 4th 1534, where the defendant, who had already invoked his right to silence and to counsel, telephoned the victim from jail to try to talk her out of testifying. The police provided the victim with some questions, but most of the conversation was at the defendant's instigation. Despite the prior invocation, and despite the victim being held to be a "police agent" under the circumstances, the Court held that no "custodial interrogation" had taken place and that therefore, *Edwards* (see *Edwards v. Arizona* (1981) 451 U.S. 477, 483 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 386].) did not preclude the use of defendant's admissions made during this conversation against him.

After telling two co-suspects about certain incriminating evidence (known or suspected) implicating both in a drive-by shooting, and then, after each suspect invoked their right to silence, placing them together in a holding cell while surreptitiously recording their conversation, is not an interrogation, nor the "functional equivalent" of an interrogation, absent any direct questioning by the police. (*People v. Jefferson* (2008) 158 Cal.App.4th 830, 840-841; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 757-758.)

No interrogation when defendant was monitored in a telephone conversation to his mother, making admissions. (*People v. Terrell* (2006) 141 Cal.App.4th 1371.)

A mid-trial conversation between defendant and a court bailiff during a recess, in which defendant volunteered inculpatory statements about the details of his crime, held not to be an interrogation because the bailiff's responses and questions to the defendant, albeit about the case, were not of the type that the bailiff would have reasonably believed were likely to elicit an incriminating response. Or, at least, the trial court was not unreasonable in so-finding. (*Hernandez v. Holland* (9th Cir. 2014) 750 F.3rd 843, 852-855.)

After Already Invoking: Even when the subject has previously invoked, "if the defendant thereafter initiates a statement to police, 'nothing in the **Fifth** and **Fourteenth Amendments** . . . prohibit(s) the police from merely listening to his voluntary, volunteered statements and using them against him at the trial.' (Citation)" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034; see also *People v. Owens* (1980) 106 Cal.App.3rd 23, 28.)

"Nothing in *Miranda* is intended to prevent, impede, or discourage a guilty person, even one already confined, from freely admitting his crimes, whether the confession relates to matters for which he is already in police custody or to some other offense. . . . 'There is no requirement that police

stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the **Fifth Amendment**’ or subject to the prophylactic requirements of *Miranda* [Citations.]” (*People v. Haley* (2004) 34 Cal.4th 283, 303, quoting *People v. Ray* (1996) 13 Cal.4th 313, 337.)

Practice Note: When an In-Custody Suspect Wants to Talk: Police officers should be discouraged from interrupting a suspect to administer a *Miranda* admonishment when a suspect is attempting to volunteer, without being questioned, incriminating information. The suspect should be allowed to complete his remarks before an admonishment, waiver, and interrogation is performed.

Recording Interrogations:

General Rule: While recording an interrogation is certainly preferable, being the best evidence of what was said and the conditions under which a suspect’s statements are obtained, it is not constitutionally nor statutorily (at least as to non-murder adult suspects) required. (*People v. Gurule* (2002) 28 Cal.4th 557, 603; see also *People v. Holt* (1997) 15 Cal.4th 619, 664; *People v. Thomas* (2012) 54 Cal.4th 908, 928-930; *People v. Birden* (1986) 179 Cal.App.3rd 1020, 1024; see also *United States v. French* (8th Cir. 2013) 719 F.3rd 1002, 1007.)

See *Balbuena v. Sullivan* (9th Cir. Aug. 17, 2020) 970 F.3rd 1176, ___, where the Ninth Circuit noted that it helped in determining whether a 16-year-old defendant was coerced into confessing where the interview was videotaped and the Court was “not consigned to an evaluation of a cold record, or limited to reliance on the detectives’ testimony.”

But see **P.C. § 859.5**, relative to murder suspects, below.

Absent proof that an officer is intentionally attempting to deprive a defendant of exculpatory evidence, failure to tape-record the beginning of an interview, including the *Miranda* admonishment and waiver, is not a federal or state due process violation. *People v. Pearson* (2012) 53 Cal.4th 306, 317-318.)

It is not improper to *surreptitiously tape record* an interrogation. (*People v. Jackson* (1971) 19 Cal.App.3rd 95, 101.)

Practice Tip:

The more we tape-record (or videotape) the interrogations of criminal suspects (which, of course, is the best and most reliable

evidence of what was said and/or done), the more defense counsel tend to argue to juries that the police had something to hide by *not* tape recording (or videotaping) the interrogation of a defendant.

Therefore, where the facilities are available for taping a defendant's interview and/or statements, they should be used, or have an acceptable explanation as to why they were not. In the case of a murder suspect, such an explanation is mandated by state law and must be documented. (See **P.C. § 859.5(b)(1), (2) & (5).**)

Also note that it is *not* required for an interrogating police officer to even take notes. (*People v. Lucas* (1995) 12 Cal.4th 415, 443.) The practice of taking notes during an interrogation, as opposed to recording all that is said and done, may tend to slow down the questioning and interfere with the officer hearing or paying attention to everything that is said.

Other States: Several other states, citing either their own state constitutions or merely their courts' "supervisory power," have required the tape-recording of confessions under various circumstances. (E.g., see *Stephan v. State* (1985) 711 P.2nd 1156, Alaska; and *State v. Scales* (1994) 518 N.W.2nd 587, Minnesota.)

Note: Illinois has also enacted legislation requiring the recording of interrogations under circumstances similar to that required under Minnesota case law (i.e., *State v. Scales*, *supra*.)

Murder suspects, per P.C. § 859.5: The rules are different for murder suspects questioned in a "fixed place of detention."

Pen. Code § 859.5: Amended effective as of *January 1, 2017*, to include adults suspects, the pre-existing requirement that any interrogation of a juvenile murder suspect who is interrogated while held in a place of detention must be recorded (see "*Statutory Recording Requirements for Juveniles*," under "*Juveniles and Miranda*" (Chapter 10), below) has been extended, for the most part, to adults. The statutory rules are as follows:

(a) Except as otherwise provided in this section, a custodial interrogation of any person, *including an adult or a minor*, who is in a fixed place of detention, and suspected of committing murder, as listed in **Section 187** or **189** of this code, or **paragraph (1) of subdivision (b) of Section 707 of the Welfare and Institutions Code**, shall be electronically recorded in its entirety. A statement that is electronically recorded as required pursuant to this section creates a rebuttable presumption that the electronically recorded statement was, in fact, given and was accurately recorded by the prosecution's witnesses, provided that the electronic recording was

made of the custodial interrogation in its entirety and the statement is otherwise admissible.

(b) The requirement for the electronic recordation of a custodial interrogation pursuant to this section shall not apply under any of the following circumstances:

(1) Electronic recording is not feasible because of exigent circumstances. An explanation of the exigent circumstances shall be documented in the police report.

(2) The person to be interrogated states that he or she will speak to a law enforcement officer only if the interrogation is not electronically recorded. If feasible, that statement shall be electronically recorded. The requirement also does not apply if the person being interrogated indicates during interrogation that he or she will not participate in further interrogation unless electronic recording ceases. If the person being interrogated refuses to record any statement, the officer shall document that refusal in writing.

(3) The custodial interrogation occurred in another jurisdiction and was conducted by law enforcement officers of that jurisdiction in compliance with the law of that jurisdiction, unless the interrogation was conducted with intent to avoid the requirements of this section.

(4) The interrogation occurs when no law enforcement officer conducting the interrogation has knowledge of facts and circumstances that would lead an officer to reasonably believe that the individual being interrogated may have committed murder for which this section requires that a custodial interrogation be recorded. If during a custodial interrogation, the individual reveals facts and circumstances giving a law enforcement officer conducting the interrogation reason to believe that murder has been committed, continued custodial interrogation concerning that offense shall be electronically recorded pursuant to this section.

(5) A law enforcement officer conducting the interrogation or the officer's superior reasonably believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being interrogated, or another individual. An

explanation of the circumstances shall be documented in the police report.

(6) The failure to create an electronic recording of the entire custodial interrogation was the result of a malfunction of the recording device, despite reasonable maintenance of the equipment, and timely repair or replacement was not feasible.

(7) The questions presented to a person by law enforcement personnel and the person's responsive statements were part of a routine processing or booking of that person. Electronic recording is not required for spontaneous statements made in response to questions asked during the routine processing of the arrest of the person.

(8) The interrogation of a person who is in custody on a charge of a violation of **Section 187** or **189** of this code or **paragraph (1) of subdivision (b) of Section 707 of the Welfare and Institutions Code** if the interrogation is not related to any of these offenses. If, during the interrogation, any information concerning one of these offenses is raised or mentioned, continued custodial interrogation concerning that offense shall be electronically recorded pursuant to this section.

(c) If the prosecution relies on an exception in **subdivision (b)** to justify a failure to make an electronic recording of a custodial interrogation, the prosecution shall show by clear and convincing evidence that the exception applies.

(d) A person's statements that were not electronically recorded pursuant to this section may be admitted into evidence in a criminal proceeding or in a juvenile court proceeding, as applicable, if the court finds that all of the following apply:

(1) The statements are admissible under applicable rules of evidence.

(2) The prosecution has proven by clear and convincing evidence that the statements were made voluntarily.

(3) Law enforcement personnel made a contemporaneous audio or audio and visual recording of the reason for not making an electronic recording of the statements. This

provision does not apply if it was not feasible for law enforcement personnel to make that recording.

(4) The prosecution has proven by clear and convincing evidence that one or more of the circumstances described in **subdivision (b)** existed at the time of the custodial interrogation.

(e) Unless the court finds that an exception in **subdivision (b)** applies, all of the following remedies shall be granted as relief for noncompliance:

(1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress a statement of a defendant made during or after a custodial interrogation.

(2) Failure to comply with any of the requirements of this section shall be admissible in support of claims that a defendant's statement was involuntary or is unreliable, provided the evidence is otherwise admissible.

(3) If the court finds that a defendant was subject to a custodial interrogation in violation of **subdivision (a)**, the court shall provide the jury with an instruction, to be developed by the Judicial Council, that advises the jury to view with caution the statements made in that custodial interrogation.

(f) The interrogating entity shall maintain the original or an exact copy of an electronic recording made of a custodial interrogation until a conviction for any offense relating to the interrogation is final and all direct and habeas corpus appeals are exhausted or the prosecution for that offense is barred by law or, in a juvenile court proceeding, as otherwise provided in **subdivision (b) of Section 626.8 of the Welfare and Institutions Code**. The interrogating entity may make one or more true, accurate, and complete copies of the electronic recording in a different format.

(g) For the purposes of this section, the following terms have the following meanings:

(1) "*Custodial interrogation*" means any interrogation in a fixed place of detention involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses, and in which a reasonable person

in the subject's position would consider himself or herself to be in custody, beginning when a person should have been advised of his or her constitutional rights, including the right to remain silent, the right to have counsel present during any interrogation, and the right to have counsel appointed if the person is unable to afford counsel, and ending when the questioning has completely finished.

(2)

(A) For the purposes of the custodial interrogation of a minor, pursuant to **subdivision (a)** or **(b)**, “*electronically recorded*,” “*electronic recordation*,” and “*electronic recording*” refer to a video recording that accurately records a custodial interrogation.

(B) For the purposes of the custodial interrogation of an adult, pursuant to **subdivision (a)** or **(b)**, “*electronically recorded*,” “*electronic recordation*,” and “*electronic recording*” refer to a video or audio recording that accurately records a custodial interrogation. The Legislature encourages law enforcement agencies to use video recording when available.

(3) “*Fixed place of detention*” means a fixed location under the control of a law enforcement agency where an individual is held in detention in connection with a criminal offense that has been, or may be, filed against that person, including a jail, police or sheriff's station, holding cell, correctional or detention facility, juvenile hall, or a facility of the Division of Juvenile Facilities.

(4) “*Law enforcement officer*” means a person employed by a law enforcement agency whose duties include enforcing criminal laws or investigating criminal activity, or any other person who is acting at the request or direction of that person.

Case Law:

Because an adult defendant who made out-of-court statements is not similarly situated to juvenile murder suspects who are interrogated in custody in violation of this section, as it applied to minors prior to 2017, no equal protection concerns arose from

omitting an unrequested cautionary jury instruction regarding an adult defendant's out-of-court statements. (*People v. Diaz* (2015), 60 Cal.4th 1176; a pre-**P.C. § 859.5** case.)

It was error to instruct the jury to consider with caution defendant's unrecorded statements because defendant did not want the instruction and the trial court was not required to give it sua sponte. (*People v. Xiong* (2020) 54 Cal.App.5th 1046, 1049, 1078-1081.)

The 2017 amendments to **Pen. Code § 859.5**, which require, with limited exceptions, that the custodial interrogations of all persons suspected of committing murder, whether adult or minor, be recorded in their entirety, do not operate retroactively, as they do not alter or reduce criminal punishment or treatment and were not designed to provide a clear and significant benefit to defendants. Because the 2017 amendments to **P.C. § 859.5** applied only prospectively, defendant's confession in this case was not rendered inadmissible by the amendments. (*People v. Cervantes* (Oct. 14, 2020) 55 Cal.App.5th 927.)

See “*Recording Requirements for Juveniles*” under “*Juveniles & Miranda*” (Chapter 10), below.

Chapter 4: Law Enforcement

Law Enforcement and Agents of Law Enforcement:

Rule: For a *Miranda* admonishment to be necessary, the questioning must be done by *law enforcement*, or an “agent” of law enforcement. (*People v. Coblentz* (1981) 123 Cal.App.3rd 477, 479-480; *In re Deborah C.* (1981) 30 Cal.3rd 125, 130-131; *In re Paul P.* (1985) 170 Cal.App.3d 397, 401.)

The issue is “whether the investigator (or other private person) is acting as an agent of law enforcement officials or is primarily engaged in enforcing the law.” (*People v. Coblentz*, *supra*; holding that a private polygraph examiner hired by a private company was not a law enforcement agent.)

“A private citizen is not required to advise another individual of his rights before questioning him. Absent evidence of complicity on the part of law enforcement officials, the admissions or statements of a defendant to a private citizen infringe no constitutional guarantees. [Citations.] . . .” (*In re Deborah C.*, *supra*, at pp. 130-131.)

Questioning by non-law enforcement, not acting as an agent of law enforcement, does *not* subject the resulting incriminatory statements to suppression. (*People v. Panah* (2005) 35 Cal.4th 395, 471.)

Who is Law Enforcement or Agents of Law Enforcement?

Peace officers. (See P.C. §§ 830 et seq.)

Agents of Law Enforcement: “Law Enforcement” also includes *agents of law enforcement* and *other governmental officials* other than peace officers:

Anyone acting as an agent: i.e., working at the request of, or in conjunction with, law enforcement. (See *People v. Haydel* (1974) 12 Cal.3rd 190, 197; *People v. Mayfield* (1997) 14 Cal.4th 668, 758-759.)

Prosecutors. (*People v. Arnold* (1967) 66 Cal.2nd 438, 449.)

Psychiatrist used by a prosecutor to collect evidence for the prosecution. (*People v. Anderson* (1990) 52 Cal.3rd 453; *People v. Montgomery* (1965) 235 Cal.App.2nd 582, 589; *People v. Quirk* (1982) 129 Cal.App.3rd 618, 632; *People v. Ghent* (1987) 43 Cal.3rd 739, 750.)

See also *People v. Johnson* (2022) 12 Cal.5th 544, at p. 580, where the California Supreme Court noted “that the

district attorney's office had a “legitimate ‘purpose’” in “enlist[ing] Dr. Patterson’s (a psychiatrist) aid in observing appellant and gathering information relevant to his mental state, whether or not appellant wished to speak to him.” Defendant’s subsequent reinitiation to the psychiatrist of an interrogation—after having previously invoked his right to silence and to counsel on several occasions—was upheld.

Psychologist working as an agent of law enforcement. (People v. Nicolas (2004) 34 Cal.4th 614, 640; see also People v. Maury (2003) 30 Cal.4th 342, 409; questioning done in a non-custodial setting resulted in admissible statements.)

A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. (*Estelle v. Smith* (1981) 451 U.S. 454 [68 L.Ed.2nd 359].)

If, however, a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. (*Buchanan v. Kentucky* (1987) 483 U.S. 402 [97 L.Ed.2nd 336; *Williams v. Stewart* (9th Cir. 2006) 441 F.3rd 1030, 1050.

Psychiatrist appointed by the court on the issue of insanity.

The *Miranda* admonishment requirement *does not* apply to a prosecution psychiatrist who interviews defendant in rebuttal to an insanity defense. (*Hendricks v. Vasquez* (9th Cir. 1992) 974 F.2nd 1099, 1108.)

Limitation: The psychiatrist cannot testify at the guilt phase about any incriminating statements made until after defendant first presents evidence of his mental condition, and then only with limiting instructions. (*In re Spencer* (1965) 63 Cal.2nd 400, 410-413.)

Psychiatrist appointed by the court on the issue of defendant's competency to stand trial.

Cannot testify beyond the issue of defendant's competency. (*Estelle v. Smith* (1981) 451 U.S. 454 [68 L.Ed.2nd 359]; *People v. Arcega* (1982) 32 Cal.3rd 504, 520-523; *Petrocelli v. Baker* (9th Cir. 2017) 869 F.3rd 710, 725-728.)

In the case of a mental competency hearing conducted pursuant to **P.C. 1368** et seq., experts used by the defense may be impeached by inconsistencies and other documentation obtained by the prosecution as a result of such a competency evaluation and hearing. (*People v. Taylor* (2010) 48 Cal.4th 574, 618-621.)

Employees at a county mental health facility who had been enlisted, or volunteered, to act as law enforcement surrogates in eliciting confessions from troubled teens. (*United States v. D.F.* (7th Cir. 1997) 115 F.3rd 413, 420, incorporating its earlier decision in *United States v. D.F.* (7th Cir. 1995) 63 F.3rd 671.)

Probation (and *Parole*; see below) *Officers* are generally *not* required to **Mirandize** unarrested probationers (or parolees) before questioning about potential probation (or parole) violations, but only because such officials are questioning their probationers (or parolees) under circumstances which do not involve "custody." (*Minnesota v. Murphy* (1984) 465 U.S. 420 [79 L.Ed.2nd 409].), at least while the subject is not in custody. (*Id.* at fn. 5; *United States v. Saechao* (9th Cir. 2005) 418 F.3rd 1073.)

This is true, even with a threat to revoke the subject's probationary status, as long as not elicited for the purpose of charging the probationer with a new crime. (*United States Nieblas* (9th Cir. 1997) 115 F.3rd 703, 705.)

A **Miranda** admonishment is likely necessary if in-custody and the questions, although relevant to his probationary status, also call for answers that would incriminate him in a pending or later criminal prosecution. (*Ibid.*)

Otherwise, when the probationer is already in custody, **Miranda** is necessary. (See *People v. Jacobo* (1991) 230 Cal.App.3rd 1416, 1423.)

See *People v. Pacchioli* (1992) 9 Cal.App.4th 1331, 1340: Statements to a probation officer during a presentence interview, made in hopes of obtaining a favorable disposition, are not unconstitutionally compelled, and are therefore admissible at least

for purposes of impeachment should defendant withdraw his plea and testify at his later trial.

And see also ***People v. Goodner*** (1992) 7 Cal.App.4th 1324, 1332: Statements by defendant to a probation officer are admissible at his subsequent trial to prove the nature of a prior conviction.

But see ***People v. Scheller*** (2005) 136 Cal.App.4th 1143; incriminating admissions made to a probation officer after a plea bargain, when the plea bargain is later negated and the plea withdrawn, are *not* admissible in the People's case-in-chief. (See also ***United States v. Ventura-Cruel*** (1st Cir. 2003) 356 F.3rd 55.)

This is based upon the rule that “any incidental statements made in the course of plea negotiations” are not admissible, at least in the People's case-in-chief. (**P.C. §§ 1192.4, 1192.5**; ***People v. Crow*** (1994) 28 Cal.App.4th 440, 450; ***People v. Tanner*** (1975) 45 Cal.App.3rd 345, 350.)

Such evidence, however, is likely admissible for purposes of impeachment, should the defendant testify and lie. (***People v. Coleman*** (1975) 13 Cal.3rd 867; ***People v. Pacchioli*** (1992) 9 Cal.App.4th 1331, 1341.)

See also ***People v. Wall*** (2017) 3 Cal.5th 1048, 1069-1071; evidence of defendant's offer to plead guilty in exchange for the prosecution not seeking the death penalty was *not* improperly excluded as proposed **P.C. § 190.3** factor (k) mitigation at the penalty phase of a capital case.

A probation officer interviewing a defendant for purposes of a pre-sentence interview must advise the defendant of his right against self-incrimination. (***Williams v. Stewart*** (9th Cir. 2006) 441 F.3rd 1030, 1050-1051; ***Hoffman v. Arave*** (9th Cir. 2001) 236 F.3rd 523.)

Parole Officers:

Parole officers follow the same rules as probation officers (above). (***United States v. Lamberti*** (11th Cir. 1988) 847 F.2nd 1531, 1535; ***People v. Barry*** (1965) 237 Cal.App.2nd 154, 160.)

A finding that statements to a parole officer are the product of *coercion* will result in suppression of the statements and any products of those statements. (***People v. Gordon*** (1978) 84 Cal.App.3rd 913, 923-927.)

Custody was found where defendant's parole officer scheduled a meeting with him at the request of federal agents. Defendant was required to attend such a meeting and was not told that the federal agents would be present. Upon arrival for the meeting, defendant was searched and escorted through a locked door to his parole officer's office where, without the benefit of a ***Miranda*** admonishment, the two federal agents questioned defendant about an earlier undercover drug-buy. Defendant admitted his involvement only after listening to a recorded phone call, when he admitted to being involved. Then, after a ***Miranda*** admonishment and waiver, defendant confessed. Defendant's motion to suppress the confession was denied. On appeal, the Court held that defendant was in custody for the initial part of the interview, and that the agents engaged in a prohibited two-step interrogation under ***Missouri v. Seibert*** (2004) 542 U.S. 600 [159 L.Ed.2nd 643]. (***United States v. Barnes*** (9th Cir. 2013) 713 F.3rd 1200, 1203-1207.)

Private Citizens and other Non-Law Enforcement:

Rule: Like all other constitutional restrictions, the exclusion of a suspect's statements due to a **5th Amendment** Self Incrimination (or ***Miranda***) violation *does not* apply when private citizens do the questioning, acting on their own and not as an agent of law enforcement.

Examples of non-law enforcement:

A privately employed *fire investigator* working for an insurance company on a possible arson case. (***People v. Mangiefico*** (1972) 25 Cal.App.3rd 1041.)

High school principal (***In re Christopher W.*** (1973) 29 Cal.App.3rd 777.) and other school officials. (***In re Victor F.*** (1980) 112 Cal.App.3rd 673; ***In re Corey L.*** (1988) 203 Cal.App.3rd 1020, 1024.)

Family physician. (***People v. Ammons*** (1980) 103 Cal.App.3rd 20.)

Hospital security guard, even though the hospital was owned by a government entity and the guard was a government employee, but whose primary responsibility was to protect property; not to enforce the law. (***People v. Wright*** (1967) 249 Cal.App.2nd 692.)

News reporter. (***People v. Price*** (1965) 63 Cal.2nd 370.)

A doctor called to the jail to treat the defendant but not to investigate crime (***People v. Hagen*** (1969) 269 Cal.App.2nd 175.), or a doctor examining a defendant to determine whether defendant should be committed as a

narcotics addict. (*People v. Garcia* (1969) 268 Cal.App.2nd 712; *People v. Lipscomb* (1968) 263 Cal.App.2nd 59.)

An emergency room physician. (*People v. Salinas* (1982) 131 Cal.App.3rd 925, 943.)

A prosecution psychiatrist who interviewed defendant in rebuttal to an insanity defense. (*Hendricks v. Vasquez* (9th Cir. 1992) 974 F.2nd 1099, 1108.)

However, “(u)nder settled law, a psychiatric interview of a suspect is interrogation (by an agent of law enforcement) if the interview contains material later to be used in the prosecution’s case, including evidence about a suspect’s mental state. (*People v. Johnson* (2022) 12 Cal.5th 544, at pp. 581-582.)

Foreign officials, so long as there is no evidence of a coerced confession in violation of the traditional U.S. “*due process*” standards, and when the foreign officials are *not* acting as a U.S. law enforcement officer’s agent, *Miranda* is inapplicable. (*United States v. Chavarria* (9th Cir. 1971) 443 F.2nd 904, 905; *People v. Helfend* (1969) 1 Cal.App.3rd 873; see also *United States v. Martindale* (4th Cir. 1986) 790 F.2nd 1129; and see “*Foreign Officials*,” below.)

Victim of a crime with whom defendant requested to talk, post-invocation. (*People v. Holzer* (1972) 25 Cal.App.3rd 456.)

Store security guards. (*In re Victor F.* (1980) 112 Cal.App.3rd 673; *In re Deborah C.* (1981) 30 Cal.3rd 125.)

But note; In re Deborah C., supra, at pp. 133, 140-142, which hints, in dicta, that *off-duty police officers* moonlighting as private security guards, at least when they represent themselves as police officers, or perhaps merely appear to be police officers, may have to admonish a suspect arrested for shoplifting before questioning him.

The defendant’s employer. (*In re Eric J.* (1979) 25 Cal.3rd 522.)

The fact that the police were present is irrelevant where the officer did not participate in the questioning, “(a)bsent evidence of complicity on the part of law enforcement officials.” (*Id.*, at pp. 526-527.)

Group supervisor at Juvenile Hall, who is not a probation officer, and is a civilian with custodial or service responsibilities, rather than investigative duties. (*People v. Claxton* (1982) 129 Cal.App.3rd 638.)

Social worker (***People v. Battaglia*** (1984) 156 Cal.App.3rd 1058, 1064.), including a social worker working as a “*dependency investigator*,” at least when not acting as an agent of law enforcement. (***People v. Keo*** (2019) 40 Cal.App.5th 169, 180-184.)

In ***Keo***, the Court further rejected defendant's **Wel. & Inst. Code § 355.1(f)** privilege claim because this section is limited to dependency hearing “testimony.” (*Id.*, at p. __.)

Subd.(f) reads: “Testimony by a parent, guardian, or other person who has the care or custody of the minor made the subject of a proceeding under **Section 300** shall not be admissible as evidence in any other action or proceeding.”

Bounty hunters (or “*bail enforcement agents*”), arresting and questioning a bail-jumper. (***United States v. Rose*** (8th Cir. 1984) 731 F.2nd 1337, 1344-1345.)

An off-duty law enforcement officer may not, depending upon the circumstances, have to admonish a suspect before questioning so long as he or she is not acting in his or her official, governmental capacity.

A reserve law enforcement officer, while serving in his regular employment as a ship’s doctor on a cruise ship, at the request of the ship’s captain, did not have to admonish a homicide suspect before questioning him. (***United States v. Roston*** (9th Cir. 1993) 986 F.2nd 1287, 1292-1293; “*no government involvement.*”)

A newspaper man who was also a *part-time, unpaid deputy sheriff*, a former police officer and foreman of the coroner’s jury, while working for his newspaper employer, is not required to give a defendant a ***Miranda*** admonishment. (***United States v. Delay*** (8th Cir. 1974) 500 F.2nd 1360, 1364.)

A retired, 18-year veteran deputy sheriff, later working as a *private investigator*, need not ***Mirandize*** a suspect before questioning. (***United States v. Parr-Pla*** (9th Cir. 1977) 549 F.2nd 660, 663.)

But see ***In re Deborah C.*** (1981) 30 Cal.3rd 125, referenced above under “*Store security guards.*”

Parent of the Minor Suspect:

A child’s parent, in encouraging the minor to confess, may be held to be the “*de facto*” agent of law enforcement. (***In re I.F.*** (2018)

20 Cal.App.5th 735, 762; citing *In re D. W.* (1982) 108 Ill.App.3rd 1109, 1111 [64 Ill.Dec. 588, 440 N.E.2d 140, 141], where it was held that the minor's confession was inadmissible because his mother "was used as an agent of the police" and insisted he tell the police what happened.)

In *In re I.F.*, however, the fact that the suspect's father took part in at least one segment of the interrogation was held to be but one factor to take into account in the "totality of the circumstances." (*In re I.F.*, *supra*, at p. 766.)

Assuming for the sake of argument that I.F.'s father was not an agent of law enforcement, where an interrogation that was begun, and controlled by law enforcement, the fact that the father also pressed the minor for answers (for about 5 minutes of the interrogation) did not convert the interrogation into a private conversation. (*Id.*, at pp. 776-781.)

Foreign Officials:

The results of an interrogation of a suspect in a foreign country by foreign officials will not be suppressed in a United States court despite the lack of a *Miranda* admonishment unless the methods used were so violative of "fundamental due process as to undermine the truth of the evidence acquired." (*People v. Helfend* (1969) 1 Cal.App.3rd 873, 890.)

See also *United States v. Martindale* (4th Cir. 1986) 790 F.2nd 1129, 1133-1134: Questioning by Scotland Yard on a British case did not require a *Miranda* admonishment for his responses to be used in a later U.S. prosecution, absent proof of duress.

And see *United States v. Mundt* (10th Cir. 1974) 508 F.2nd 904, 906-907: Peruvian authorities who questioned the defendant without American participation, did not have to admonish the defendant despite the fact that the American agents were involved in the events leading up to the defendant's arrest.

However, if U.S. officials are involved in the interrogation, or a foreign officer acted on behalf of the U.S. officials, the laws of the U.S. jurisdiction in which the case is tried govern admissibility. (*People v. Neustice* (1972) 24 Cal.App.3rd 178, 187.)

Other Instances of Questioning by Non-Law Enforcement:

While on Supervised Release:

While serving a five-year term of supervised release that followed twelve months of imprisonment for failure to register as a sex offender in violation of **18 U.S.C. § 2250(a)**, defendant was required as a condition of supervised release to participate in sex-offender treatment. Use of admissions defendant made during the mandatory sex-offender treatment to revoke his supervised release did not violate his **Fifth Amendment** right against self-incrimination in that a proceeding to revoke supervised release is not a “criminal case” for purposes of the **Fifth Amendment**. (*United States v. Hulen* (9th Cir. 2018) 879 F.3rd 1015.)

Defendant, having served five years in prison and while on five years of subsequent supervised release, was to abide by certain conditions including that the was to refrain from committing any new crimes or use controlled substances, and to “answer truthfully all inquiries by [his] probation officer and [to] follow the instructions of [his] probation officer.” After twice testing positive for drugs in his system, he admitted to his probation officer, signing a statement to the effect, that he had been selling marijuana and cocaine. Defendant’s probation officer then petitioned the district court to revoke’s his term of supervised release pursuant to **18 U.S.C. § 3583(e)**, alleging that defendant had violated the condition of his supervision prohibiting him from breaking the law. Defendant appealed the district court’s ruling that he did in fact violate the conditions of his supervised release, arguing that the use of these statements violated the **Fifth Amendment**. The Fourth Circuit Court of Appeal affirmed, ruling that case authority (*United States v. Riley* (4th Cir. 2019) 920 F.3rd 200.) has already held that the **Self-Incrimination Clause** is violated “only if [the self-incriminating] statements are used in a criminal trial.” In *Riley*, the court concluded that supervised release revocation proceedings pursuant to **18 U.S.C. § 3583(e)** “are not part of the underlying criminal prosecution.” As a result, the Court held that the introduction of compelled self-incriminating statements in supervised release proceedings pursuant to **§ 3583(e)** does not violate a defendant’s rights under the **Self-Incrimination Clause**. Because of its previous holding in *Riley*, which remains valid law, the Court affirmed the district court’s denial of defendant’s motion to suppress. (*United States v. Ka* (4th Cir. 2020) 982 F.3rd 219.)

Indian Tribes:

The **Fifth Amendment** (as well as the **Sixth** and the **Fourteenth Amendments**) are *not* applicable to the application of Indian laws on Indian reservations, in that Indian tribes are distinct, independent

political communities, retaining their original rights. (*Talton v. Mayes* (1896) 163 U.S. 376 [41 L.Ed. 196]; *United States v. Doherty* (6th Cir. 1997) 126 F.3rd 769, 777-778.)

Reference must be made to the **Indian Civil Rights Act of 1968 (Pub.L. No. 90-284, § 202, 82 Stat. 73, 77**, codified at **25 U.S.C. § 1302**), imposing on the Indian tribes obligations that are substantially similar to those imposed on the states by the **Bill of Rights** and the **Fourteenth Amendment**.

Exception: Involuntary Statements:

An involuntary “*coerced*” confession, obtained by either the *police* or a *private citizen*, is inadmissible because statements induced by coercion are unreliable. (*People v. Haydel* (1974) 12 Cal.3rd 190, 197.)

See “*Coercive Interrogations*,” under “*Voluntariness After Waiver*” (Chapter 9), below.

Chapter 5: Lawful Exceptions to the Miranda Rule

Exceptions to Miranda: There are a number of lawful exceptions to the exclusionary rules of *Miranda* in cases involving in-custody suspects.

Impeachment:

Rule: The use of a defendant's "non-coerced" statements for purposes of impeaching his untruthful testimony is lawful. (*Harris v. New York* (1971) 401 U.S. 222 [91 S.Ct. 643; 28 L.Ed.2nd 1]; *People v. Hoyt* (2020) 8 Cal.5th 892, 936.)

An exception to the exclusionary rule of *Miranda* may be found "where the introduction of reliable and probative evidence would significantly further the truth-seeking function of a criminal trial and the likelihood that admissibility of such evidence would encourage police misconduct is but a 'speculative possibility.' [Citation]" (*James v. Illinois* (1990) 493 U.S. 307, 311 [107 L.Ed.2nd 676]; see also *People v. Johnson* (2010) 183 Cal.App.4th 253, 281.)

An exception to this rule, however, is when the defendant's statements had been coerced, making his admissions involuntary. (*People v. Jimenez* (2021) 72 Cal.App.5th 712, 725; quoting *Lego v. Twomey* (1972) 404 U.S. 477, 485 [30 L.Ed.2nd 618; 92 S. Ct. 619], fn. omitted.)

"An involuntary confession is inadmissible for any purpose, including impeachment." (*Ibid.*, citing *People v. Bey* (1993) 21 Cal.App.4th 1623, 1627–1628.)

However, per *James*, inculpatory statements made by the defendant but suppressed as a product of the defendant's illegal arrest *may not* be used to impeach other defense witnesses. (*James v. Illinois*, *supra*, at pp. 314-316.

It was noted in *James* that "[e]xpanding the class of impeachable witnesses from the defendant alone to all defense witnesses . . . would *not* promote the truth-seeking function to the same extent as did creation of the original exception (as described in *Harris v. New York*), and yet it would significantly undermine the deterrent effect of the general exclusionary rule." (*Id.*, at pp. 313-314.)

But the use of defendant's suppressed statements, obtained in violation of his invocation to the right to counsel, to impeach mental health expert witnesses during the sanity phase of defendant's murder trial was upheld, the Court finding the use of the suppressed statements "promotes the same truth-seeking function of a criminal trial as the impeachment exception of

a defendant who testifies.” (*People v. Edwards* (2017) 11 Cal.App.5th 759, 766-772.)

“Though there is little, if any, concern that expert witnesses would commit perjury (fn. omitted), the admission of this evidence prevents the defendant from turning the exclusionary rule into “a shield against contradiction of his untruths.”” (*Id.* at p. 768, citing *Harris v. New York*, *supra*, at p. 224, quoting *Walder v. United States* (1954) 347 U.S. 62, 65 [74 S.Ct. 354; 98 L.Ed. 503].) “Nor would the admission of the suppressed statements have a chilling effect on a defendant’s ability to present a defense. Defendants could avoid impeachment of the testimony of expert witnesses by not providing these witnesses with statements that contradict the suppressed statements. Defendants could reasonably expect that expert witnesses, given their professional qualifications, would not testify in a manner that intentionally or inadvertently invited impeachment. Expert witnesses also generally provide reports prior to trial, thereby allowing adequate preparation by defendants. Moreover, the number of expert witnesses at a criminal trial is usually fewer than other third party witnesses. Thus, in contrast to *James*, the expansion of the impeachment exception to the cross-examination of expert witnesses during the sanity phase would further the truth-seeking process with minimal loss of probative witness testimony.” (*Id.*, at pp. 768-769.)

The Issue of the Intentional Miranda Violation:

Contrary to some of the earlier Ninth Circuit Court of Appeal’s decisions (see *Henry v. Kernan* (9th Cir. 1999) 177 F.3rd 1152, amended at 197 F.3rd 1021.); and *California Attorneys for Criminal Justice v. Butts* (9th Cir. 1999) 195 F.3rd 1039), the Ninth Circuit has ruled that *it matters not whether the violation of Miranda is intentional*. So long as not “coerced” (see “*The Issue of Coercion*,” below), the defendant’s statements taken in violation of *Miranda* are admissible for impeachment purposes. (*Pollard v. Galaza* (9th Cir. 2002) 290 F.3rd 1030.)

But see “*The ‘Widespread Police Departmental Policy and Training’ Issue*,” below.

“A prior *coerced* confession can ‘taint’ a subsequent one. See *Oregon v. Elstad*, 470 U.S. 298, 310, 105 S.Ct. 1285, 84 L.Ed.2nd 222 (1985). In conducting a taint analysis, the court considers ‘the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators.’ *Id.* An *Edwards* violation, however, does not on its own render subsequent confessions involuntary. See *Elstad*, 470

U.S. at 308-10. Contrary to Bradford’s argument, the Supreme Court has not clearly established that a presumption of involuntariness attaches to statements taken in violation of **Edwards**, such that subsequent statements are tainted. The Court has held that statements taken in violation of **Edwards** may still be used for impeachment, **Oregon v. Hass**, 420 U.S. 714, 722-23, 95 S. Ct. 1215, 43 L. Ed. 2d 570; *see also* (**Michigan v. Harvey** (1990), 494 U.S. (344) at 350-351 ([108 L.Ed.2nd 293]), which means that such statements are not presumed to be involuntary by virtue of the **Edwards** violation alone. *See* (**Oregon v. Hass** (1974) 420 U.S. (714) at 722-723 ([43 L.Ed.2nd 570.]); **Mincey (v. Arizona)** (1978)) 437 U.S. (385) at 398 ([57 L.Ed.2nd 290, 304]).” (**Bradford v. Davis** (9th Cir. 2019) 923 F.3rd 599, 616.)

Note: “**Edwards**,” is referring to **Edwards v. Arizona** (1981) 451 U.S. 477, 483 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 386], and a violation of one’s attempt to invoke his right to counsel.

On the issue of the trial use of defendant’s prior statements taken in violation of **Miranda** for purposes of impeachment, the *defendant need not testify* to preserve the issue on appeal. (**People v. Brown** (1996) 42 Cal.App.4th 461, 471; *see also* **United States v. Chischilly** (9th Cir. 1986) 30 F.3rd 1144, 1150-1151.)

The California Supreme Court agrees (**People v. Peevy** (1998) 17 Cal.4th 1184.), at least if not accompanied by aggravating factors sufficient to constitute “coercion” and thus a **Fourteenth Amendment** “due process” violation. (**People v. Neal** (2003) 31 Cal.4th 63; **People v. DePriest** (2007) 42 Cal.4th 1, 29-36; *see also* **People v. Demetrulias** (2006) 39 Cal.4th 1, 29-30.)

See also **People v. Johnson** (2022) 12 Cal.5th 544, at p. 557.), where the California Supreme Court upheld defendant’s reinitiation of questioning although noting that it was a “close case,” after law enforcement’s repeated **Miranda** violations, and in a fact scenario where the court noted how it was “troubled by the earlier law enforcement conduct.”

Later in its decision, the California Supreme Court found it “concerning (italics added) the multiple clear violations of **Miranda** that occurred in this case through the repeated efforts of investigating officials to solicit defendant’s waiver of his rights to silence and counsel, after he had expressed his unwillingness to talk,” noting that “it is one thing to reapproach a suspect about his willingness to talk after a ‘significant period of time’ . . . ; it is another thing to reapproach the suspect to confront him or to inquire about

his willingness to talk no less than five times in a roughly three-hour span. (*Id.*, at p. ____.)

Per the Court in discussing the practice of an intentional *Miranda/Edwards* violation: “We emphasize the substantial costs to the justice system and the lives affected when law enforcement officials, however well-intentioned, do not conform their own conduct to the law.” (*Id.*, at p. ____.)

The Court further noted, at pp. ____-____, that this was a “*close case*” in that:

1. “(D)efendant never expressly revoked his (prior) invocations.”
2. “(D)efendant's medical condition—he had been shot, he was in pain, and had been given a ‘pretty heavy dose’ of perhaps ‘local anesthesia’ prior to his confession—raises concern about whether he would have been alert and cognizant during his encounters with Patterson (the psychiatrist).”
3. “(T)here is the possibility that law enforcement's prior violations of defendant's right to counsel may have put pressure on defendant and made him feel like he had to talk to law enforcement or Patterson despite his prior invocations of his right to silence and to counsel.”
4. “(T)here is the possibility that defendant was unclear as to whether Dr. Patterson was there to interrogate defendant or treat him.”

“Nonetheless, despite these countervailing concerns, the record overall establishes that defendant made a conscious choice to talk to Patterson despite knowing he was entitled to counsel and also knowing that, by talking to Patterson, he was acting against his legal interest.”

Lower California appellate courts have followed along:

Defendant’s motion to present third party culpability evidence concerning the commission of a robbery where he had confessed to doing the robbery himself, the confession

having been suppressed due to a **Miranda** violation, was properly denied by the trial court pursuant to **Evid. Code § 352**, as misleading evidence. Defendant was given the option of testifying to his belief that his look-alike cousin was the culprit, but told that if he did so, the prosecution would be allowed to cross-examine him about his illegally obtained confession to doing the crime himself. (**People v. Johnson** (2010) 183 Cal.App.4th 253, 281-285: Not improper for the trial court to rely upon the suppressed confession in evaluating the applicability of **E.C. § 352**.)

The United States Supreme Court’s decision in **Missouri v. Seibert** (2004) 542 U.S. 600 [159 L.Ed.2nd 643], condemning the so-called “two-step interrogation technique” (See “*Effects of Miranda Violation on a later valid Admonition and Waiver*,” under “*The Admonition*” (Chapter 6), below) did not abrogate the **Harris** rule of impeachment. (**People v. Riskin** (2006) 143 Cal.App.4th 234, 242-243; referring to **Harris v. New York** (1971) 401 U.S. 222 [91 S.Ct. 643; 28 L.Ed.2nd 1], which allows the use of non-coercive statements, even where obtained in violation of **Miranda**, to be used for impeachment purposes.)

The Issue of Coercion:

Rule: Statements obtained from a defendant under circumstances that are determined to be “involuntary” or “coerced,” are inadmissible for any purpose. (**People v. Cahill** (1993) 5 Cal.4th 478, 510-511; **Brown v. Mississippi** (1936) 297 U.S. 278, 285-286 [89 L.Ed. 682, 686-687]; **Schneckloth v. Bustamonte** (1973) 412 U.S. 218, 225 [36 L.Ed.2nd 854, 861]; **Pope v. Zenon** (9th Cir. 1996) 69 F.3rd 1018, 1020; **In re Anthony L.** (2019) 43 Cal.App.5th 438, 452.)

“The due process clause of the **Fourteenth Amendment** to the United States Constitution bars the admission of ‘any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion.’ (**People v. Neal** (2003) 31 Cal.4th 63, 79) So when the police obtain a suspect’s statements ‘by “techniques and methods offensive to due process . . .” . . . or under circumstances in which the suspect clearly had no opportunity to exercise “a free and unconstrained will,”’ the statements are inadmissible. (**Oregon v. Elstad** (1985) 470 U.S. 298, 304 [84 L.Ed.2nd 222; 105 S.Ct. 1285] . . . , quoting **Haynes v. Washington** (1963) 373 U.S. 503, 515, 514 [10 L.Ed.2nd 513, 83 S.Ct. 1336].)” (**People v. Mendez** (2019) 7 Cal.5th 680, 698.)

The issue is considered one of a **Fourteen Amendment** “due process” violation when statements are involuntarily obtained by state compulsion. (*People v. Jones* (2017) 7 Cal.App.5th 787, 809-810.)

Note: The rule of *Harris* (i.e., *Harris v. New York* (1971) 401 U.S. 222 [91 S.Ct. 643; 28 L.Ed.2nd 1], which allows the use of non-coercive statements, even where obtained in violation of *Miranda*, to be used for impeachment purposes) does not apply when the statements obtained from defendant were the product of “coercion.” What is, and what is not, “coercion,” however, is a continuing issue. (See “Rule,” under “Impeachment,” above.)

“(T)here is no such thing as an impeachment exception for compelled, coerced, or involuntary statements.” (*Cooper v. Dupnik* (9th Cir.1992) 963 F.2nd 1220, 1247-1250.)

“Under the federal Constitution, a person may not be compelled in any criminal case to be a witness against himself. **U.S. Const., 5th Amend.** The **Fifth Amendment** prohibits use by the prosecution in its case in chief only of compelled testimony. However, a defendant's compelled statements may be used for purposes of impeachment. The **due process clause** of the **Fourteenth Amendment, U.S. Const., 14th Amend.**, makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. Involuntary statements cannot be used for any purpose, including impeachment. Whether a statement is voluntary depends upon the totality of the circumstances surrounding the interrogation. A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and California Constitutions. A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence.” (*People v. McClinton* (2018) 29 Cal.App.5th 738, 762-764 (headnote 17); statements obtained at defendant's hearings as a Sexually Violent Predator (SVP), noting the distinction between a witness's “compelled” statements, which can be used for purposes of impeachment, and a witness's “involuntary” statements, which cannot be used for any purpose, and finding that statements obtained from defendant's testimony at his SVP trial to be “compelled,” only.)

What is Coercion?

No Coercion:

The fact of a simple **Miranda** violation, or ignoring a suspect's attempt to invoke his right to counsel (see **Edwards v. Arizona** (1981) 451 U.S. 477, 483 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 386].), does not “*inherently constitute coercion*” without evidence of actual coercion or other circumstances bearing on the suspect's free will. (**People v. Davis** (2009) 46 Cal.4th 539, 599, citing **People v. Bradford** (1997) 14 Cal.4th 1005, 1039-1040; see also **People v. Mendez** (2019) 7 Cal.5th 680, 698.)

It is clear that even intentional **Miranda** violations, so long as done without misleading the subject or using undue pressure, *do not* constitute coercion. (**People v. Peevy** (1998) 17 Cal.4th 1184, 1196-1198.)

All authorities clearly agree that unintentional **Miranda** violations *do not* involve the Constitution. (See **Moran v. Burbine** (1986) 475 U.S. 412, 424-425 [106 S.Ct. 1135; 89 L.Ed.2nd 410, 423]; **People v. Whitfield** (1996) 46 Cal.App.4th 947, 955.)

However, the courts do not like intentional **Miranda** violations (**People v. Peevy**, *supra*, a pp. 1202-1205.) and are quick to find coercion when it occurs. (See **Henry v. Kiernan** (9th Cir. 1999) 197 F.3rd 1021.)

Even so, it is (almost) universally recognized that simply ignoring a suspect's attempt to invoke, even though done intentionally but without any overt coercive conduct by law enforcement, does not prevent the use of a defendant's statements for impeachment purposes. (See **Bradford v. Davis** (9th Cir. 2019) 923 F.3rd 599, 616.)

(See “*Intentional Violations with Misleading or Minimal Pressure*,” below.)

Interrogations with Physical, Mental, or Psychological Coercion:

At the other end of the spectrum, most authorities consistently agree that custodial interrogations that involve overt physical, mental, or psychological coercion *do* constitute a **Fifth** and/or **Fourteenth Amendment** due process violation. (See **Cooper v. Dupnik** (9th Cir.1992) 963 F.2nd 1220, 1247-1250.)

Ignoring an in-custody defendant's *nine* attempts to invoke his right to an attorney, purposely seeking to obtain statements which would be usable as impeachment evidence, under circumstances where the defendant was young, inexperienced, with minimal education and intelligence, and was deprived of food, water, bathroom facilities, and any contact with non-custodial personnel overnight while remaining in custody, after a promise to help him if he cooperated and a threat that the "system" would "stick it to him" if he didn't, constituted a **Fourteenth Amendment** "*due process*" violation. The two resulting confessions were held to be inadmissible for any purpose, including impeachment. (*People v. Neal* (2003) 31 Cal.4th 63.)

However, threatening a suspect with the potential to file felony charges for covering for another (her son, in this case), where such charges are in fact a potential result, is not "coercion," and does not make inadmissible the suspect's incriminating responses. (*United States v. McNeal* (10th Cir. Colo. 2017) 862 F.3rd 1057.)

Intentional Violations with Misleading or Minimal Pressure: It is this area between the above extremes, such as . . .

At least in California, an intentional, but non-coercive, ***Miranda*** violation, but which involves the purposeful misleading of the subject as to the consequences of his answering questions outside of ***Miranda***; and

Various other forms of pressure, short of the physical, mental or psychological pressure described above;

. . . about which legal scholars are in disagreement, although the weight of authority tends to indicate that the answer is probably: *Yes*, at least in California. (E.g.; *People v. Bey* (1993) 21 Cal.App.4th 1623; and *People v. Montano* (1991) 226 Cal.App.3rd 914, 935.)

Merely *misleading* a suspect who has invoked by telling him that it is okay to talk in that anything said after that point cannot be used against him in court, which is an untrue statement of the law (e.g., it may still be used for *impeachment* purposes),

makes the resulting statements inadmissible for any purpose. (*People v. Bey*, *supra*.)

Also, an *intentional Miranda* violation when combined with other aggravating circumstances may be sufficient to constitute a **Fourteenth Amendment** “*due process*” violation, making the resulting reinitiation of an interrogation involuntary, and the statements subsequently obtained from the defendant inadmissible for any purpose, including impeachment. (*People v. Neal* (2003) 31 Cal.4th 63, 79; see above; “*Why Prosecutors and Police Officers Should be Concerned*,” above.)

The Court noted in *Neal* that in addition to the detective purposely ignoring the defendant’s attempts to invoke both his right to remain silent and, repeatedly (i.e., nine times), his right to an attorney, the defendant was also young, inexperienced, and had minimal education and intelligence, and he had been deprived of food, water, bathroom facilities, and any contact with non-custodial personnel overnight while remaining in custody. Also, undermining his will to resist, defendant was subjected to the detective’s promise to help him if he cooperated, but a threat that the “system” would “stick it to him” if he didn’t. This, all added together, constituted a **Fourteenth Amendment** “*due process*” violation. As the product of a constitutional “*due process*” violation that went well beyond simply ignoring an attempt to invoke one’s *Miranda* rights, the defendant’s later decision to reinitiate questioning and his resulting confessions were “*involuntary*” and inadmissible for *any* purpose (including impeachment).

Federal authority, on the other hand, seems to require more (See *Chavez v. Martinez* (2003) 538 U.S. 760 [155 L.Ed.2nd 984], requiring police tactics that “*shock the conscience*” before a “*due process*” violation will be found.

The Ninth Circuit has acknowledged Supreme Court authority to the effect that to constitute a **Fourteenth Amendment** substantive due process violation, coercive interrogation techniques qualify only where it is shown that “torture or its close equivalents are brought to bear.” (Citing *Chavez v.*

Martinez (2003) 538 U.S. 760, 789 [155 L.Ed.2nd 984].) “(O)nly the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense and therefore a violation of substantive due process.’” (*Stoot v. City of Everett* (9th Cir. 2009) 582 F.3rd 910, 928-929.)

The Ninth Circuit Court of appeal upheld the trial court’s determination that spending three months in a Japanese prison and the detective giving defendant a breath mint from the defendant’s own wife’s house were not, under the circumstance, sufficient to constitute coercion. Defendant’s volunteered statements and his later *Miranda* waiver were voluntary. (*Mickey v. Ayers* (9th Cir. 2010) 606 F.3rd 1223, 1234-1236.)

And note also: The federal Ninth Circuit Court of Appeal has indicated its belief that not only is there civil liability when it is proven that police officers had a *pre-existing plan* to intentionally ignore an in-custody suspect’s attempts to invoke his **Fifth Amendment** rights (an issue not discussed in *Chavez*), but such a plan might also trigger a federal *criminal prosecution* per **18 U.S.C. § 241** (10 yrs/\$10,000). (*Cooper v. Dupnik* (9th Cir. 1992) 963 F.2nd 1220, 1243, fn. 10.)

No Duty of the Court to Instruct: The trial court has no duty to instruct the jury that certain statements are admissible for impeachment purposes only, absent a defense request. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58-60; *People v. Nguyen* (2015) 61 Cal. 4th 1015, 1078.)

The “Widespread Police Departmental Policy and Training” Issue:

The California Supreme Court has warned law enforcement several times that a statement purposely elicited from an in-custody suspect who has invoked his right to counsel (or to silence), even though done for the purpose of obtaining admissible impeachment evidence, is still “*obtained illegally*,” and is not condoned by the Court. “(I)t is indeed police misconduct to interrogate a suspect in custody who has invoked the right to counsel.” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1075-1077; quoting *People v. Peevy* (1998) 17 Cal.4th 1184, 1205; reaffirming “that principle,” and warning that if it is found that such a practice becomes widespread or pursuant to an official police

department practice, a new exclusionary rule may be developed to resolve the problem.)

It is already a rule that an *intentional Miranda* violation, when combined with other aggravating circumstances, may be sufficient to constitute a **Fourteenth Amendment** “*due process*” violation, making the resulting reinitiation of an interrogation involuntary, and the statements subsequently obtained from the defendant inadmissible for any purpose, including impeachment. (e.g., see *People v. Neal* (2003) 31 Cal.4th 63, 79.)

The Court noted in *Neal* that in addition to the detective purposely ignoring the defendant’s attempts to invoke both his right to remain silent and, repeatedly (i.e., nine times), his right to an attorney, the defendant was also young, inexperienced, and had minimal education and intelligence, and he had been deprived of food, water, bathroom facilities, and any contact with non-custodial personnel overnight while remaining in custody. Also, undermining his will to resist, defendant was subjected to the detective’s promise to help him if he cooperated, but a threat that the “system” would “stick it to him” if he didn’t. This, all added together, constituted a **Fourteenth Amendment** “*due process*” violation. As the product of a constitutional “*due process*” violation that went well beyond simply ignoring an attempt to invoke one’s *Miranda* rights, the defendant’s later decision to reinitiate questioning and his resulting confessions were “*involuntary*” and inadmissible for *any* purpose (including impeachment). (*Id.*, at pp. 78-85.)

See *People v. Orozco* (2019) 32 Cal.App.5th 802, at pg. 816 where the Court termed “(t)he police conduct in this case (to be) deplorable.” The police conduct referred to involved repeatedly ignoring defendant’s attempts to invoke his right to counsel, asking him why he thought he needed an attorney, telling him that he would not be jailed if he confessed, and then using his girlfriend as a police agent by putting the two together in an interview room in the hopes he would confess to her (which he in fact did). The only thing that saved defendant’s eventual confession was the fact that the Court found the confession *not* to be the product of the earlier police misconduct.

Also, out of the Second District’s Division 6: “We share the views of division four of this court: ‘This is a very

troubling case, presenting a deliberate police violation of *Miranda*’ [Citation.] The holding of *Miranda* is not arcane and establishes a ‘bright line’ rule. [Citation.] When the police deliberately step over the line and disobey Supreme Court pronouncements, respect for the rule of law necessarily diminishes. Appellant’s confession should not have been admitted into evidence. Were we to reach a contrary determination, the police could deliberately and successfully ignore the pronouncements of the United States and California Supreme Courts.” (*In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602.)

The Court is making reference to *People v. Bey* (1993) 21 Cal.App.4th 1623, at p. 1628, where Division 4 of the Second District Court of Appeal comments: “This is a very troubling case, presenting a deliberate police violation of *Miranda* coupled with a misrepresentation to appellant about the legal consequences of that violation.”

Note footnote #1 in *People v. Neal*, *supra*, indicating that a finding of “coercion” in a criminal case requires less in the way of police misconduct than does a finding of “coercion” in a civil case. The Court did not cite any authority for its conclusion that what constitutes a “due process” violation depends upon the nature of the current court proceeding; i.e., *civil vs. criminal*. And, this conclusion in *Neal* is not consistent with other case law. E.g.; *United States v. Orso* (9th Cir. 2001) 266 F.3rd 1030, a criminal case.

Note: The Ninth Circuit Court of Appeal has since “abrogated” its decision in *Orso*, finding such two-step interrogation techniques as used against defendant Orso to be in violation of the rule of *Missouri v. Seibert* (2004) 542 U.S. 600 [159 L.Ed.2nd 643]. (*United States v. Williams* (9th Cir. 2005) 435 F.3rd 1148: See “The ‘Two-Step Interrogation’ Tactic,” under “The Admonition” (Chapter 6), below.)

And see *People v. Nguyen* (2015) 61 Cal. 4th 1015, 1074-1078, reaffirming “that principle,” and warning, again, that if it is found that such a practice has become widespread or pursuant to an official police department practice, an exclusionary rule may be developed.

The Ninth Circuit Court of Appeal, noting agreement with the California Supreme Court, termed an intentional *Miranda*

violation as, “*unethical and . . . strongly disapproved.*” (*Bradford v. Davis* (9th Cir. 2019) 923 F.3rd 599, 620.)

The California Supreme Court continues to find some law enforcement agencies’ practice of intentionally violating *Miranda* as troubling (“*. . . we are troubled by the earlier law enforcement conduct.*”), even though no sanctions (other than the suppression of any resulting statements for purposes of the People’s case-in-chief) are imposed. (See *People v. Johnson* (2022) 12 Cal.5th 544, at p. 567.)

Later in its decision, the California Supreme Court found it “*concerning* (italics added) the multiple clear violations of *Miranda* that occurred in this case through the repeated efforts of investigating officials to solicit defendant’s waiver of his rights to silence and counsel, after he had expressed his unwillingness to talk,” noting that “it is one thing to reapproach a suspect about his willingness to talk after a ‘significant period of time’ . . . ; it is another thing to reapproach the suspect to confront him or to inquire about his willingness to talk no less than five times in a roughly three-hour span. (*Id.*, at p. ____.)

Per the Court in discussing the practice of an intentional *Miranda/Edwards* violation: “We emphasize the substantial costs to the justice system and the lives affected when law enforcement officials, however well-intentioned, do not conform their own conduct to the law.” (*Id.*, at p. ____.)

And then again, at pg. __, fn. 4, the Court reiterated: “No one should take from this opinion the lesson that violations of constitutional rights carry no consequences. Every violation jeopardizes the ability to place before a jury anything a suspect might say, and jeopardizes any conviction that might be obtained if matters that should have been excluded are erroneously admitted.”

Although finding the issue to be “*close*,” the Court in *Johnson* upheld defendant’s later reinitiating of the questioning to be valid.

See “*Why Prosecutors and Police Officers Should be Concerned*,” under “*Miranda as a Constitutional Principle*” (Chapter 1), above.

Note: There is no authority from either the United States Supreme Court or the Ninth Circuit Court of Appeal supporting California's threatened sanctions on this issue.

Exceptions to the "Coercion" Rule:

The California Supreme Court has also held that if the misleading comments by law enforcement are *unintentional*, and especially when they result in *untrue statements* from the defendant, then those statements may be used against him. (*People v. Gutierrez* (2002) 28 Cal.4th 1083.)

Also, it has been found that where the defendant's incriminating statements are *not* the product of such misleading, the statements *may* be admissible for impeachment purposes. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58-60; defendant's incriminating statements made some time after the misleading, and as the result of other circumstances.)

See also *People v. Jablonski* (2006) 38 Cal.4th 774: Ignoring a defendant's attempt to invoke, and telling him that his responses cannot be used against him (an untrue statement), does not violate the defendant's constitutional rights if it doesn't lead to any statements usable for impeachment purposes.

Fruit of the Poisonous Tree:

Rule: The "*fruit of the poisonous tree*" doctrine does *not* apply to a *Miranda* violation. (*Michigan v. Tucker* (1974) 417 U.S. 433 [41 L.Ed.2nd 182]; *Oregon v. Elstad* (1985) 470 U.S. 298 [84 L.Ed.2nd 222; 105 S.Ct. 1285]; see also *United States v. Orso* (9th Cir. 2001) 266 F.3rd 1030; *United States v. Crowder* (6th Cir. 1995) 62 F.3rd 782.)

The so-called "*fruit of the poisonous tree*" doctrine, as it relates to **Fourth Amendment** search and seizure violations, generally requires the suppression of any evidence that is recovered as the direct product of a constitutional violation. (*Wong Sun v. United States* (1963) 371 U.S. 471 [9 L.Ed.2nd 441].)

See *People v. Flores* (2019) 38 Cal.App.5th 617, 633-636; defendant's confession suppressed as the product of an unlawful detention and an unlawful recovery of drugs from his bedroom.

However, when evaluating the results of a violation of one's *Miranda* rights, the rules of suppression are different: "When the police violate a suspect's *Miranda* rights, the statement immediately resulting from that

violation is inadmissible in the prosecution's case-in-chief. (*Miranda*, supra, 384 U.S. at pp. 444–445.) That violation may also warrant suppression of subsequent statements obtained as a result of the initial violation. (*People v. Storm* (2002) 28 Cal.4th 1007, 1027 . . .) However, because a violation of *Miranda* does not necessarily result in a confession that is ‘compelled’ within the meaning of the **Fifth Amendment** (*Dickerson* [v. *United States* (2000) 530 U.S. [428] at 444; [*Oregon v. Elstad* (1985) 470 U.S. [298] at p. 310), an initial *Miranda* violation does not ‘inherently taint[]’—and thus warrant suppression of—all subsequent statements (*Elstad*, at p. 307). Instead, a defendant seeking to suppress a statement as the tainted fruit of a *Miranda* violation must establish that any subsequent confession was involuntary. (*Storm*, at pp. 1029–1030; *People v. Case* (2018) 5 Cal.5th 1, 23–26 . . . ; *People v. Bradford* (1997) 14 Cal.4th 1005, 1039–1041 . . .) We adjudge whether a confession was voluntary by looking to the totality of the circumstances. (*Moran* [v. *Burbine* (1986)] 475 U.S. [412], at p. 421.)” (*People v. Orozco* (2019) 32 Cal.App.5th 802, 818.)

In contrast, see *People v. Montano* (1991) 226 Cal.App.3rd 914, at pp. 933-934; where it was held that a police officer’s repeated refusal to honor a suspect’s invocation of his right to remain silent under *Miranda* by itself constituted “coercion” that automatically rendered any subsequent confession the tainted “fruit” of that earlier violation; a theory that was later rejected by California’s Supreme Court when it ruled that “continued interrogation after a defendant has invoked his” *Miranda* “right[s]” does not “inherently constitute coercion.” (*People v. Bradford*, supra, at p. 1039; and *People v. Storm*, supra, at pp. 1031-1033, 1037, fn. 13; see *People v. Orozco*, supra.)

Examples:

Witness discovered as a result of a *Miranda* violation may testify against the defendant. (*Michigan v. Tucker* (1974) 417 U.S. 433, 446-447, fn. 19 [41 L.Ed.2nd 182, 194]: “We do not believe that *Wong Sun* [‘fruit of the poisonous tree’ doctrine] controls the case before us,” referring to *Wong Sun v. United States* (1963) 371 U.S. 471 [9 L.Ed.2nd 441].)

“We decline to hold that the murder weapon should be suppressed as the ‘fruit’ of a *Miranda* violation.” (*United States v. Cherry* (5th Cir. 1986) 794 F.2nd 201, 207-208.)

“A mere violation of *Miranda*’s ‘prophylactic’ procedures does not trigger the fruit of the poisonous tree doctrine.” (*United States v. Bengivenga* (5th Cir. 1988) 845 F.2nd 593, 601.)

“The derivative evidence rule operates only when an actual constitutional violation occurs.” (*United States v. Barte* (5th Cir. 1989) 868 F.2nd 773, 775.)

“We find that the (non-applicability of the fruit of the poisonous tree doctrine) reasoning of *Elstad* and *Tucker* applies to physical evidence obtained as a result of a *Miranda* violation” absent evidence of coercion or any ‘*due process*’ violation.” (*United States v. Gonzalez-Sandoval* (9th Cir. 1990) 894 F.2nd 1043, 1048; accord, *United States v. Sangineto-Miranda* (6th Cir. 1988) 859 F.2nd 1501, 1518.)

Weapons and other physical evidence, and the identity of a witness, all discovered as a result of unadmonished, but non-coercive questioning, were not subject to the fruit of the poisonous tree suppression doctrine. (*United States v. Elie* (4th Cir. 1997) 111 F.3rd 1135.)

Exception; Unlawfully Induced Testimony:

But see Harrison v. United States (1968) 392 U.S. 219 [20 L.Ed.2nd 1047]; where defendant’s in-court incriminatory testimony at a prior trial was induced by the need to counter three confessions made by the defendant which were introduced by the prosecution at trial #1, and which, on appeal, were determined to have been illegally obtained, is not admissible in trial #2 against the defendant; defendant’s testimony in trial #1 being tainted by the same illegality that rendered the confessions inadmissible.

See also *Lujan v. Garcia* (9th Cir. 2013) 734 F.3rd 917, 930-936: Defendant’s inculpatory confession made in testimony during trial, testified to in order to counter the prosecution’s evidence of defendant’s pretrial confession to law enforcement that should have been suppressed because obtained in violation of *Miranda*, requires reversal of defendant’s conviction in that the in-court testimony was “*fruit of the poisonous tree*.”

California Rule: California follows the federal rule.

Despite some earlier California authority to the contrary (See *People v. Superior Court [Zolnay]* (1975) 15 Cal.3rd 729, 733; *Green v. Superior Court* (1985) 40 Cal.3rd 126, 133; *People v. Mattson* (1990) 50 Cal.3rd 826, 851; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1161.), it is now clear that, following the federal rule, evidence seized as a product of a *Miranda* violation is not subject to suppression. (*People v. Whitfield* (1996) 46 Cal.App.4th 947, 955-957.)

Statements properly obtained after a *Miranda* waiver, even though occurring after a prior non-coerced statement taken in violation of *Miranda*, are admissible. (*People v. Torres* (1989) 213 Cal.App.3rd 1248, 1254-1257.)

But see *Missouri v. Seibert* (2004) 542 U.S. 600, 608-609 [159 L.Ed.2nd 643], under “*The ‘Two-Step Interrogation’ Tactic*,” under “*Effects of Miranda Violation on a later valid Admonition and Waiver*,” under “*The Admonition*” (Chapter 6), below.

California must abide by the federal rules relating to the extent of the sanctions which may be imposed as a result of a *Miranda* violation. (*People v. May* (1988) 44 Cal.3rd 309, 319.)

“California courts may not extend the *Miranda* rule beyond that stated by the United States Supreme Court.” (*People v. Gastile* (1988) 205 Cal.App.3rd 1376, 1386.)

See also *People v. Storm* (2002) 28 Cal.4th 1007, 1033, fn. 11, noting that *Dickerson v. United States* (2000) 530 U.S. 428 [120 S.Ct. 2326; 147 L.Ed.2nd 405] (below), did not change the general rule that the “fruit of the poisonous tree” doctrine does not apply to a *Miranda* violation.

Other Jurisdictions:

At least one other federal circuit court challenged this conclusion, arguing that *Eltstad* and *Tucker* are being misinterpreted, and that *Dickerson*’s recognition of *Miranda* as a constitutional rule does in fact require suppression of the products of a *Miranda* violation. (E.g., see *United States v. Faulkingham* (1st Cir. 2002) 295 F.3rd 85, 90-94.)

In contrast, the Third and Fourth Federal Circuit Courts have held that a *Miranda* violation, despite *Dickerson*, will never result in the suppression of the resulting evidence (other than the defendant’s statements). (*United States v. Sterling* (4th Cir. 2002) 283 F.3rd 216, 218-219; *United States v. De Summa* (3rd Cir. 2001) 272 F.3rd 176, 180-181.)

A suspect’s consent to search her residence, obtained after invocation of her right to remain silent, held *not* to be a product of the officer’s illegal continued questioning of the suspect, and was valid. (*United States v. Calvetti* (6th Cir. 2016) 836 F.3rd 654.)

Dickerson v. United States and the Fruit of the Poisonous Tree Doctrine:

Dickerson v. United States (2000) 530 U.S. 428 [120 S.Ct. 2326; 147 L.Ed.2nd 405], decided in June, 2000, was intended to resolve the issue whether *Miranda* imposed a *constitutional requirement* or merely a “*prophylactic*” rule of procedure, as had been touted for so many years. This is important because, generally, unless *Miranda* imposes a constitutional requirement, a simple *Miranda* violation would *not* result in

the suppression of any evidence other than the defendant's illegally obtained statements.

The U.S. Supreme Court in *Dickerson*, in a 7-to-2 decision, concluded that “*Miranda* announced a *constitutional rule* that Congress *may not* supersede legislatively” (Emphasis added; *Id.* at p. 444 [147 L.Ed.2nd at p. 420].), generating a legal debate as to whether the fruit of the poisonous tree doctrine maybe *does* apply to a *Miranda* violation.

Note, however, that the fruit of the poisonous tree doctrine does apply when it is the admissibility of the defendant's statements, as the product of a **Fourth Amendment** search or seizure violation, that is the issue. A suspect's incriminating statements may be inadmissible if they were obtained through the “exploitation of illegality;” i.e., as the direct product of an illegal search or seizure. (See *United States v. Ramirez* (9th Cir. 2020) 976 F.3rd 946, 959-962; see also *United States v. Johnson* (9th Cir. 1980) 626 F.2nd 753.)

In *Dickerson*, at p. 441, however, the Supreme Court also discussed the fact that the court-imposed sanctions for a **Fifth Amendment/Miranda** violation are not necessarily the same as must be imposed for a **Fourth Amendment/Search & Seizure** violation, hinting at the continuing validity of prior decisions which have upheld that the non-applicability of “*fruit of the poisonous tree*” doctrine and the lawful use of statements taken in violation of *Miranda* for purposes of impeachment.

The issue of whether *Dickerson* affected the general rule (i.e., that the “*fruit of the poisonous tree*” doctrine is not applicable to a *Miranda* violation) was finally resolved by the United States Supreme Court in *United States v. Patane* (2004) 542 U.S. 630 [159 L.Ed.2nd 667].

In *Patane*, *supra*, the in-custody defendant, a convicted felon, told police in a statement held to be in violation of *Miranda* that he did in fact possess a firearm and where the firearm could be found. While defendant's statement was inadmissible in the prosecution's case-in-chief, the firearm itself, although the product of the *Miranda* violation, was held *not* to be subject to suppression.

Per the *Patane* Court, because *Miranda* describes a “*trial right*” (i.e., the **Fifth Amendment** protection from self-incrimination at trial), a police officer ignoring *Miranda* during a pre-trial interrogation *does not* (absent “coercion”) violate the Constitution. Therefore, there is no *constitutional violation* of which derivative evidence is the product. (See also *United States v. Sterling* (4th Cir. 2002) 283 F.3rd 216; and the discussion under *Chavez v. Martinez* (2003) 538 U.S. 760 [155 L.Ed.2nd 984].)

The Supreme Court has made it clear that “the ‘fruits’ of an un-*Mirandized* statement can be admitted.” (*Vega v. Tekoh* (June. 23, 2022) __ U.S.__ [142 S.Ct. 2095; __ L.Ed.2nd __]; citing *Michigan v. Tucker* (1874) 417 U.S. 433, 450-452, fn. 26 [94 S.Ct. 2357, 41 L.Ed.2nd 182].)

See “*Dickerson’s Effect upon the Legal Exceptions to Miranda*,” under “*Miranda’s Relationship to the United States Constitution*,” under “*The Fifth Amendment and Miranda*” (Chapter 1), above.

Subsequent Case Law:

The California Supreme Court has also held that *Dickerson* has not changed the rules on using uncoerced statements, despite being taken in violation of *Miranda*, for impeachment purposes. (*People v. DePriest* (2007) 42 Cal.4th 1, 29-36; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 29-30.) (See below)

The victim’s body, shown to the police after the defendant had invoked his right to counsel, was admissible even if the renewed interrogation was improper. (*People v. Davis* (2009) 46 Cal.4th 539, 598.)

The admission into evidence of statements taken in violation of *Miranda* is harmless error when the defendant himself testifies consistent with his illegal obtained statements. His testimony is not the product of the illegally obtained statements in that the fruit of the poisonous tree doctrine does not apply. (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1403-1409.)

During what was held to be a custodial interrogation in violation of *Miranda* (there being no attempt at a *Miranda* admonishment), defendant (an illegal immigrant) admitted to possessing a firearm, and led officers to his vehicle where, with defendant’s permission, the firearm was seized. The trial court’s suppression of the firearm as a product of the *Miranda* violation was held to be error. (*United States v. Mora-Alcaraz* (9th Cir. 2021) 986 F.3rd 1151, 1157; the case remanded to the trial court for a determination whether, despite the *Miranda* violation, defendant’s consent to search his vehicle was voluntary. Pg. 1157-1158.)

“(A) *Miranda* violation does not alone warrant suppression of the physical fruits of the defendant’s inculpatory statements.” (*Id.*, at p. 1153; remanding the case to the trial court for a determining whether his consent to search the trunk of this car, where a firearm was recovered, was voluntary.)

See “*The Custodial Interrogation*” (Chapter 3), above.

See also *United States v. DeSumma* (3rd Cir. 2001) 272 F.3rd 176, and *United States v. Sterling* (4th Cir. 2002) 283 F.3rd 216; and *United States v. Orso* (9th Cir. 2001) 266 F.3rd 1030.

Statements in Violation of Miranda as Probable Cause in a Search Warrant Affidavit:

Statements taken in violation of *Miranda*, at least when otherwise voluntary, may be used as *probable cause* in a *search warrant affidavit*. (*United States v. Patterson* (9th Cir. 1987) 812 F.2nd 1188, 1193.)

Statements in Violation of Miranda as Probable Cause to Arrest:

Statements taken in violation of *Miranda*, at least when otherwise voluntary, may be used as *probable cause to arrest*. (*United States v. Morales* (2nd Cir. 1986) 788 F.2nd 883, 886.)

Statements in Violation of Miranda used to Establish Consent to Search:

“*Miranda* [is] not violated when an officer ask[s] for and obtain[s] consent to search after the defendant had exercised his privilege against self-incrimination.” (*People v. Johnson* (2022) 12 Cal.5th 544, at p. 568, fn. 1.) quoting *People v. James* (1977) 19 Cal.3rd 99, 115.)

Statements obtained in violation of *Miranda* due to a failure to admonish can be used to establish consent to a search. (*United States v. Lemon* (9th Cir. 1977) 550 F.2nd 467, 473.)

A suspect’s consent to search her residence, obtained after invocation of her right to remain silent, held *not* to be a product of the officer’s illegal continued questioning of the suspect, and was valid. (*United States v. Calvetti* (6th Cir. 2016) 836 F.3rd 654.)

Statements in Violation of Miranda used to Revoke Parole or Probation:

Statements taken in violation of *Miranda* are also admissible at a *parole revocation hearing*, unless such statements were involuntary or coerced. (*In re Martinez* (1970) 1 Cal.3rd 641; *In re Tucker* (1971) 5 Cal.3rd 171.)

In a probation revocation hearing, the probationer’s admissions, elicited by police officers absent *Miranda* warnings, are admissible. (*People v. Racklin* (2011) 195 Cal.App.4th 872, 878-881.)

Public Safety Exception:

Rule: It is universally accepted that questions asked of an in-custody suspect for the purpose of relieving a situation which poses a threat to the public safety *do not* require a **Miranda** admonishment or waiver to make the responses admissible. (*New York v. Quarles* (1984) 467 U.S. 649 [104 S.Ct. 2626; 81 L.Ed.2nd 550].)

Per the Supreme Court; “[T]he need for answers to questions in a situation posing a threat to the public safety, outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.” (*Id.* at p. 657.)

It also applies despite the fact that the interrogating officer’s intent in asking the questions might have been something other than the safety of the public. It might even have been to obtain incriminating responses. The officer’s intent in asking the questions is irrelevant. (*New York v. Quarles*, *supra*, at pp. 655-656; *United States v. Newton* (2nd Cir. 2004) 369 F.3rd 659, 677-678; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 27-28.)

Test: Whether there was an “*objectively reasonable need to protect the police or the public from any immediate danger.*” (*United States v. Brady* (9th Cir. 1987) 819 F.2nd 884, 888, fn. 3.)

“(T)he police must reasonably believe that there is a serious likelihood of harm to the public or fellow officers.” (*Allen v. Roe* (9th Cir. 2002) 305 F.3rd 1046, 1050.)

Examples:

Firearms and Other Weapons: Most commonly, the public safety exception involves situations where a suspect has discarded a gun (e.g.; *New York v. Quarles*, *supra*; *United States v. Lawrence* (8th Cir. 1992) 952 F.2nd 1034.) which the officer reasonably feels must to be located and secured before someone else finds it and either uses it or hurts himself.

To determine the location of a *gun* hidden by a suspected murderer (*People v. Sims* (1993) 5 Cal.4th 405, 449-451; see also *United States v. Ganter* (7th Cir. 1970) 436 F.2nd 364.) or the presence of a *gun* at a domestic violence scene. (*United States v. Simpson* (7th Cir. 1992) 974 F.2nd 845.)

To determine the location of a *gun* discarded by one suspected of shooting a *firearm*. (*People v. Gilliard* (1987) 189 Cal.App.3rd 285.)

Questions asked to verify the possible presence of a *gun* at a volatile crime scene where a crowd was gathering, in order to neutralize the danger and control the increasingly dangerous situation, justified under the Public Safety Exception. (*United States v. Brady* (9th Cir. 1987) 819 F.2nd 884, 888.)

To determine whether a person may be *armed* following the lawful observation of several .22 caliber cartridges during a traffic stop. (*United States v. Kelly* (7th Cir. 1993) 991 F.2nd 1308; see also *United States v. Knox* (8th Cir. 1991) 950 F.2nd 516; discovery of a loaded magazine warranted questioning concerning the location of the gun.)

Asking about some firearms found at the scene of a domestic violence situation was proper under the public safety exception. (*United States v. Martinez* (9th Cir. 2005) 406 F.3rd 1160, 1165-1166.)

Asking about a firearm after hearing illegal shooting at a campsite did not require a *Miranda* admonishment or waiver. (*United States v. Basher* (9th Cir. 2011) 629 F.3rd 1161, 1167.)

General, limited non-*Mirandized* questions concerning whether an arrested subject had a *firearm* or any other *weapons*, done for the purpose of protecting the officer's safety, are legal. (*United States v. Edwards* (7th Cir. 1989) 885 F.2nd 377, 384; *United States v. Diaz-Garcia* (S.Dist. Florida 1992) 808 F.Supp. 784.)

Asking an in-custody suspect who is about to be booked whether she has any weapons on her is lawful, despite the lack of a *Miranda* admonishment and waiver, in order to protect jail deputies and other inmates. (*People v. Ross* (2008) 162 Cal.App.4th 1184, 1191.)

To locate a *knife* discarded by a kidnapper. (*People v. Cole* (1985) 165 Cal.App.3rd 41, 52.)

Asking an armed-robbery suspect upon his arrest outside his home whether there were any dangerous items inside the residence, held to come within the public safety exception, thus not requiring a *Miranda* admonishment and waiver. (*United States v. Ochoa* (11th Cir. 2019) 941 F.3rd 1074.)

Officers' Safety: Being closely related to the above, the rule has been extended to allow officers to ask questions relative to *their own safety*:

Prior to serving a search warrant for any substantial quantity of illegal drugs, with an expert officer's testimony concerning the likelihood of encountering *firearms* at the scene, asking an in-custody resident about the presence of *firearms* on the premises does not require a *Miranda* admonishment. (*People v. Simpson* (1998) 65 Cal.App.4th 854.)

An officer asking a suspect about the possible presence of a *syringe* before searching him incident to arrest, to prevent from injuring himself, did not require a *Miranda* admonishment. (*People v. Cressy* (1996) 47 Cal.App.4th 981; see also *United States v. Carrillo* (9th Cir. 1994) 16 F.3rd 1046.)

It can also include when an officer needs to determine in a hurry whether other suspects in a violent crime are at large, out of concern for the officer's own safety. (*Fleming v. Collins* (5th Cir. 1992) 954 F.2nd 1109.)

To expediently determine who is the victim and who is the perpetrator at the scene of a *shooting*, and whether there are other suspects who might pose a danger to the responding officers. (*Fleming v. Collins* (5th Cir. 1992) 954 F.2nd 1109; see also *United States v. Gonzalez* (S.Dist. New York 1994) 964 F.Supp. 375.)

To determine the presence of victims at the scene of a shooting, and the possible presence of other *armed* suspects. (*United States v. Padilla* (10th Cir. 1987) 819 F.2nd 952; the non-*Mirandized* questioning of an arrested suspect at the scene held proper.)

See also *United States v. Edwards* (7th Cir. 1989) 885 F.2nd 377, 384; *United States v. Diaz-Garcia* (S.Dist. Florida 1992) 808 F.Supp. 784, under "*Firearms and Other Weapons*," above.

However, it has been held that this theory cannot be used to justify the asking of a prisoner's gang affiliation upon booking, even though such a question is relevant to the overall safety of prisoners and personnel within the jail. (*People v. Elizalde et al.* (2015) 61 Cal.4th 523, 533-541.)

The subject of a lawful felony hot traffic stop, and with the officers having prior knowledge that defendant possessed firearms, defendant was immediately patted down for weapons. Asked if he had anything on him, defendant responded that he had a pocket knife. Noticing something in one of his pockets, the officer asked, "What's that?" Defendant replied that it was, "just a little bit of fentanyl." Charged in federal court with drug-trafficking related

offenses, defendant objected to the government's use of his "fentanyl" statement. The First Circuit Court of Appeal upheld the admission into evidence of this statement ruling that under the "public safety exception," the officer having an objectively reasonable concern for his safety rather than some sort of sly effort to obtain testimonial evidence, defendant's statement did not require a *Miranda* admonishment or waiver to be admissible. (*United States v. Simpkins* (1st Cir. 2020) 978 F.3rd 1.)

Defendant's Safety:

Even if it is the *defendant's own safety* which is at risk, asking questions related to his or her wellbeing without a *Miranda* admonishment may be appropriate. (*People v. Stevenson* (1996) 51 Cal.App.4th 1234; questioning defendant about his possible ingestion of drugs, done for the purpose of determining the need for medical intervention to prevent an overdose.)

To determine whether an inebriated subject intends to drive a motor vehicle. (*United States v. Klein* (8th Cir. 1994) 13 F.3rd 1182.)

However, it has been held that this theory cannot be used to justify the asking of a prisoner's gang affiliation upon booking, even though such a question is relevant to safety within the jail. (*People v. Elizalde et al.* (2015) 61 Cal.4th 523, 533-540.)

Booking Questions:

Upon booking an arrestee into jail, and in order to determine the arrestee's placement where he won't be subjected to unnecessary jail violence (e.g., avoiding placing gang members amongst antagonistic gangsters), it is necessary to determine the arrestee's gang affiliation. Doing this is often necessary for the safety of both the arrestee and jail deputies. (*People v Gomez* (2011) 192 Cal.App.4th 609, 629.)

See "*Routine Booking Questions*," below.

However, the arrestee's responses may not be admissible in evidence:

Questions about defendant's gang affiliation are reasonably likely to elicit an incriminating response even if the federal RICO charges had not yet been filed. When a jail deputy asked defendant about his gang membership, defendant had

already been arrested on charges of murder and related offenses and had invoked his right to silence. That the questions may have been asked in the general interest of inmate safety (i.e., for jail classification purposes) does not mean that there was an urgent need to protect either the deputy or others against immediate danger. The narrow “public safety exception” therefore does not apply. (*United States v. Williams* (9th Cir. 2016) 842 F.3rd 1143.)

See also *People v. Elizalde et al.* (2015) 61 Cal.4th 523.

Other Instances:

To determine the location of a *bomb*. (*United States v. Dodge* (Conn. 1994) 852 F.Supp. 139; even though the bomb was not assembled at the time.)

Questions asked in order to neutralize the threat of explosion from a methamphetamine lab. (*United States v. Fairchild* (W.D. Mo. 1996) 943 F.Supp.1174, 1181-1182.)

To talk defendant into surrendering during a SWAT standoff, with defendant holding a *hostage* (*People v. Mayfield* (1997) 14 Cal.4th 668, 734.), or to determine the nature of a *hostage* situation. (*Howard v. Garvin* (New York 1994) 844 F.Supp. 173.)

Before or After an Invocation: The *Public Safety Exception* applies not only prior to admonishing the suspect, but also:

Where the subject has been advised, but has not yet waived his rights (*People v. Sims* (1993) 5 Cal.4th 405, 449-451.); and

Where the subject has previously invoked his rights. (*United States v. DeSantis* (9th Cir. 1989) 870 F.2nd 536, 538; *United States v. Mobley* (4th Cir. 1994) 40 F.3rd 688, 691-693.)

Exceptions: The *Public Safety Exception*, however, *does not* allow for the admission of defendant’s responses if:

Where the police wait an appreciable (“unreasonable” amount of) time to ask about a missing weapon, the court might find that the public’s safety was not being protected. (See *Trice v. United States* (D.C.1995) 662 A.2nd 891.)

The defendant’s responses are “involuntary.” Examples:

The subject is misled as to the admissibility of his responses. (*United States v. Veilleux* (NH 1994) 846 F.Supp. 149; subject's responses were held to be involuntary where he was purposely not advised of the *Miranda* rights and was told that he should tell them where the gun was because he could not be charged with its possession without a *Miranda* admonishment.)

The defendant's statements concerning the location of a gun were the product of physical coercion. (*United States v. Rullo* (Mass 1990) 748 F.Supp. 36.)

The Questioning is *not* motivated by any concern for the public's safety. Examples:

When there is no longer an exigency, such as where the scene has been secured and the defendant removed from the area. (*United States v. Veilleux*, *supra*; see also *United States v. Rodriguez* (Mass. 1996) 931 F.Supp. 907.)

When questioning concerning a firearm is not in fact prompted by a concern for safety. (*United States v. Castellana* (5th Cir. 1974) 488 F.2nd 65; but see below; "*Irrelevancy of The Intent of the Officer.*")

Irrelevancy of The Intent of the Officer:

The Public Safety exception applies despite the fact that the interrogating officer's intent in asking the questions might have been something other than the safety of the public. It might even have been to obtain incriminating responses. The officer's intent in asking the questions is irrelevant so long as, from an *objective standpoint*, the exception applies. (*New York v. Quarles* (1984) 467 U.S. 649 [104 S.Ct. 2626; 81 L.Ed.2nd 550]; *United States v. Newton* (2nd Cir. 2004) 369 F.3rd 659, 677-678; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 27-28.)

Continuing Validity: The United States Supreme Court, in *Dickerson v. United States* (2000) 530 U.S. 428, 441 [120 S.Ct. 2326; 147 L.Ed.2nd 405, 418], has specifically noted that the *Public Safety Exception* continues to be a valid exception to the rules of *Miranda* despite determining that *Miranda* is a constitutional requirement.

Rescue Doctrine:

Rule: Closely related to the "*Public Safety Exception*," it has been held that questions necessitated by the need to save a victim from death or serious harm need not be impeded by a *Miranda* admonishment or waiver. (*United States v*

Padilla (10th Cir. 1987) 819 F.2nd 952; **People v. Stevenson** (1996) 51 Cal.App.4th 1234; see also **People v. Modesto** (1965) 62 Cal.2nd 436, 446; a pre-**Miranda** case.)

Typically, a kidnapping suspect is arrested under circumstances where his victim is missing and concerns center on whether the victim may still be alive and can be saved. As noted by at least one state court; “*When life hangs in the balance, there is no room to require admonitions concerning the right to counsel and to remain silent.*” (**People v. Dean** (1974) 39 Cal.App.3rd 875, 880-882.)

See also **People v. Mayfield** (1997) 14 Cal.4th 668, 733-734, hostage negotiations; **People v. Stevenson** (1996) 51 Cal.App.4th 1234, 1239-1240, suspected drug overdose; **People v. Riddle** (1978) 83 Cal.App.3rd 563, 576, kidnapping; **People v. Willis** (1980) 104 Cal.App.3rd 433, 449, kidnapping, and after defendant had invoked.)

Test: A three-part test for the applicability of the Rescue Doctrine was first announced in **People v. Riddle** (1978) 83 Cal.App.3d 563, 576:

1. Urgency of need in that no other course of action promises relief;
2. The possibility of saving human life by rescuing a person whose life is in danger; *and*
3. Rescue as the primary purpose and motive of the interrogators.

However, the relevance of the interrogator’s subjective motives is no longer a consideration, the California Supreme Court, citing from the United States Supreme Court decision of **New York v. Quarles** (1984) 467 U.S. 649 [104 S.Ct. 2626; 81 L.Ed.2nd 550], finding that the test is an “*objective*” one, ignoring the subsection motives of the interrogator. (**People v. Davis** (2009) 46 Cal.4th 539, 594, and fn. 4, specifically overruling **Riddle** on this issue.)

Time Parameters of the Rule:

Even though the victim had been missing for a week, and the likelihood of finding her was slim, “this passage of time lessen(ed) but by no means eliminate(ed) the possibility that she remained alive.” Okay to ask about the whereabouts of the victim who had not yet been found, despite the defendant’s prior invocation. (**People v. Coffman and Marlow** (2004) 34 Cal.4th 1, 56-58; see also **People v. Panah** (2005) 35 Cal.4th 395, 469-471; Un-**Mirandized** statements admissible in that it was unknown whether victim was still alive.)

“(T)he length of time a kidnap victim has been missing is not, by itself, dispositive of whether a rescue is still reasonably possible.” (*People v. Davis* (2009) 46 Cal.4th 539, 594-595.)

The passage of time (4 days) did not detract from the urgency of the situation and thus detracting from the need to ask the defendant about whether the victim was still alive. (*People v. Davis, supra*, at p. 595; differentiating such a situation from the “public safety exception,” per *Trice v. United States* (D.C.1995) 662 A.2nd 891.)

Before or After an Invocation:

The fact that the defendant had already invoked his rights under *Miranda* is irrelevant to the admissibility of the defendant’s incriminatory response concerning the whereabouts of the victim. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 56-58.)

Defendant’s statements in response to questions after an invocation were held to be admissible in *People v. Riddle* (1978) 83 Cal.App.3d 563; and *People v. Davis* (2009) 46 Cal.4th 539, 594-595.)

Subject Reinitiates Questioning:

Rule: A suspect who has invoked his *Miranda* rights may certainly reinitiate questioning if he chooses to do so. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 386]; *People v. Gamache* (2010) 48 Cal.4th 347, 384-385; *People v. Tully* (2012) 54 Cal.4th 952, 985; *People v. Gonzalez* (2012) 210 Cal.App.4th 875, 882; see also *United States v. Valdez* (8th Cir. 1998) 146 F.3rd 547, 551; *People v. Molano* (2019) 7 Cal.5th 620, 654-658; *People v. Johnson* (2022) 12 Cal.5th 544, at pp. 579-580.)

“After a suspect has invoked the right to counsel, police officers may nonetheless resume their interrogation if “the suspect ‘(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.” (*People v. Davis* (2009) 46 Cal.4th 539, 596-597; *People v. Enraca* (2012) 53 Cal.4th 735, 752.)

“[I]t is presumed that any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of . . . ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.” (*Arizona v. Roberson* (1988) 486 U.S. 675, 681 [100 L.Ed.2nd 704; 108 S.Ct. 2093].)

“Thus, the People must show both that the defendant reinitiated discussions and that he knowingly and intelligently waived the

right he had invoked.” (*People v. Gamache* (2010) 48 Cal.4th 347, 385; see also *People v. Molano* (2019) 7 Cal.5th 620, 654.)

The California Supreme Court noted “that the district attorney’s office had a ‘legitimate ‘purpose’ in ‘enlist[ing] (psychiatrist) Dr. Patterson’s aid in observing appellant and gathering information relevant to his mental state, whether or not appellant wished to speak to him.’” Defendant’s subsequent reinitiation to the psychiatrist of an interrogation—after having previously invoked his right to silence and to counsel on several occasions—was upheld. (*People v. Johnson* (2022) 12 Cal.5th 544, at p. 580.)

“By this, the Attorney General can be understood to argue that because the district attorney’s office had another purpose (besides interrogation) in sending Patterson to visit defendant, which was to observe him, the office committed no constitutional violation. The Attorney General is correct, to an extent: Police officers routinely remain in the presence of suspects for custodial matters such as booking and transportation, even after the suspect has invoked his or her *Miranda* rights.” (*Ibid.*, citing *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1042 [77 L.Ed.2nd 405; 103 S.Ct. 2830]; transporting suspect to police station; and *People v. Enraca* (2012) 53 Cal.4th 735, 750; booking interview.)

Limitations:

Once the subject has invoked, his decision to reinitiate the conversation with police must be “*clearly and unequivocally*” indicated, with a heavy burden being placed on the prosecution to show that no one pressured the subject into doing so. (*Edwards v. Arizona, supra.*)

Note: Because of this rule, it is strongly recommended that when an in-custody suspect re-contacts his interrogators telling them that he has changed his mind, and that he now wants to talk with the police, *at the minimum*, a new ***Miranda*** admonishment be given and an express waiver obtained.

But see, “*The Need for a New Admonishment and Waiver,*” below.

The reinitiation of an interrogation after an invocation was held to be *involuntary* in *People v. Neal* (2003) 31 Cal.4th 63, where an intentional ***Miranda*** violation, when combined with other aggravating circumstances were sufficient to constitute a **Fourteenth Amendment** “*due process*” violation. This made the resulting reinitiation of an interrogation involuntary, and the statements subsequently obtained from the defendant inadmissible for any purpose, including impeachment.

Continued Applicability after Dickerson:

While this exception was not mentioned in ***Dickerson v. United States*** (2000) 530 U.S. 428, 441 [120 S.Ct. 2326; 147 L.Ed.2nd 405, 418], the California Supreme Court reiterated this rule shortly before ***Dickerson*** was decided, in ***People v. Waidla*** (Apr. 2000) 22 Cal.4th 690. In ***Waidla***, after the defendant had invoked his right to an attorney, an investigator from another agency contacted him. At various times during this contact, defendant volunteered statements such as; “*What can I do for you?*” “*What do you want from me?*” and “*What can I do to help you?*” The California Supreme Court ruled that these statements, made prior to any questioning, could be “*fairly said to represent a desire*” on the defendant’s part “*to open up a more generalized discussion relating directly or indirectly to the investigation.*” (***Id.***, at p. 731.) In other words, it was Waidla who re-initiated the questioning, and not the detective. Mr. Waidla now sits on death row as a result.

Also since ***Dickerson***, the Ninth Circuit Court of Appeal recognized a defendant’s right to reinitiate questioning in ***United States v. Michaud*** (9th Cir. 2001) 268 F.3rd 728, in an unusual set of circumstances. In ***Michaud***, it was the defendant’s cellmate who told law enforcement that Michaud wanted to talk after a prior invocation of her right to the assistance of an attorney. Defendant, who was emotionally upset, was present and stood by in silence. In a split decision, the Ninth Circuit found that defendant’s failure to contradict her cellmate, which was later followed by a full ***Miranda*** admonishment and waiver, indicated her intent to reinitiate questioning. Her subsequent confession, therefore, was admissible.

See “*Reinitiation of an Interrogation by the Defendant*” under “*Invocation of Rights*” (Chapter 7), below.

The Need for a New Admonishment and Waiver:

“(A)s a general rule, ‘where law enforcement officers have disregarded a suspect’s previously-invoked rights by continuing to interrogate him, a renewal of contact by the defendant will be considered an “initiation” only if the decision to renew contact was not a “response to” or “product of” the prior unlawful interrogation.’” (***People v. Johnson*** (2022) 12 Cal.5th 544, 584; quoting ***Mack v. State*** (Ga. 2014) 296 Ga. 239 [765 S.E.2d 896, 903].)

Note: A new admonishment and waiver helps immensely in the endeavor. See below.

At least one court has held that two things must happen in order for an interview to be begun again after an invocation of her right to silence: It must be shown (1) that the suspect said something indicating an intent to reinitiate a “generalized discussion relating directly or indirectly to the investigation,” and (2) the suspect also provided a valid waiver of the previously invoked right to counsel or the right to silence. (*In re Z.A.* (2012) 207 Cal.App.4th 1401, 1417-1419; noting also that the suspect’s waiver given previously at the initiation of the interrogation *did not* satisfy this requirement.

In finding the necessity of factor (2), the Fourth District Court of Appeal (Div. 1) in *In re Z.A.* cited *Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880; 68 L.Ed.2nd 378]; and *Oregon v. Bradshaw* (1983) 462 U.S. 1039 [77 L.Ed.2nd 1039]. However, neither case specifically holds that a new express waiver is required. Rather, the Supreme Court held in the listed cases only the following:

“(T)he question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so *under the totality of the circumstances*, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.” (Emphasis added.) (*Edwards v. Arizona*, *supra*, at p. 486, fn. 9; *Oregon v. Bradshaw*, *supra*, at p. 1045.)

And in fact, in *Oregon v. Bradshaw*, *supra*, the U.S. Supreme Court held that defendant validly reinitiated questioning after an invocation by merely expressing “a willingness and a desire for a generalized discussion about the investigation.” The officer in *Bradshaw* did not administer a new admonishment, but rather only “reminded the accused that ‘[you] do not have to talk to me,’ and only after the accused told him that he ‘understood’” (*Id.*, at p. 1046)

But, at the very least, the interrogating agent should have attempted to clarify whether the defendant was attempting to reinitiate the interrogation. (*In re Z.A.*, *supra*, at pp. 1419-1420.)

“Where a subsequent interrogation is ‘reasonably contemporaneous’ with the prior waiver, and the prior waiver was ‘knowing and intelligent,’ police need not undertake a *Miranda* advisement. [Citation.] In determining whether a subsequent interrogation is reasonably

contemporaneous, we consider the totality of the circumstances. Relevant considerations include: “1) the amount of time that has passed since the initial waiver; 2) any change in the identity of the interrogator or location of the interrogation; 3) an official reminder of the prior advisement; 4) the suspect's sophistication or past experience with law enforcement; and 5) further indicia that the defendant subjectively understands and waives his rights.”” (*People v. Suarez* (2020) 10 Cal.5th 116, 161; quoting *People v. Spencer* (2018) 5 Cal.5th 642, 668.)

In *Suarez*, defendant’s second interrogation was some 13 or 14 hours after the first. Before beginning the second interrogation, defendant was asked if he remembered his rights from before, saying that he understood them. The second interrogation was by different officers at a different location. Following the second interrogation, upon expressing some confusion, defendant’s rights were again explained to him, to which he said, one-by-one, he understood. Although defendant lacked experience with the criminal justice system, under the “totality of the circumstances,” the Court found that the second interrogation was “reasonably contemporaneous” with the earlier advisal of rights and his waiver. As such, no new *Miranda* advisement was necessary. (*Id.*, at p. 161-163.)

Also, the California Supreme Court found that no readvisal was necessary where the questioning was just minutes later, in the very same location as before, and by a detective specifically summoned by the defendant. Also, the defendant had been in prison four times before and was quite familiar with the criminal justice system. (*People v. Duff* (2014) 58 Cal.4th 527, 554-555; *People v. Jackson* (2016) 1 Cal.5th 269, 340-341.)

In determining whether a subject must be readvised of this rights, a court must consider (1) the amount of time that has elapsed since the first waiver, (2) changes in the identity of the interrogating officer and the location of the interrogation, (3) any reminder of the prior advisement, (4) the defendant’s experience with the criminal justice system, and (5) other indicia that the defendant subjectively understood and waived his rights. (*People v. Duff*, *supra*, at p. 555.)

Re-advisement despite an earlier invocation was unnecessary where defendant was interviewed in four successive interrogations, all within hours of each other and all on the same day. He was fully advised of his rights at the initiation of the first interview, at the end of which he invoked. *However*, he then reinitiated the interrogation himself to start the second interview several hours later. With each interview being contemporaneous in time, there was no need for a second admonishment

despite the intervening invocation. (*People v. Hensley* (2014) 59 Cal.4th 788, 815.)

See also *People v. McCurdy* (2014) 59 Cal.4th 1063, 1090: Upon reinitiating questioning, defendant's renewed waiver may be implied through his own words or conduct indicating a willingness to engage in a generalized discussion about the investigation.

See also *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1125-1126, where it was at the least inferred that had defendant been readvised of his *Miranda* rights after what was argued by the People to be an attempt by defendant to reinitiate questioning, the People's argument would have been stronger.

Practice Tip: Recognizing that it is the People's burden to show that a defendant's intent to re-initiate questioning after an invocation was both "clear and unequivocal" and decided upon freely and voluntarily (See *People v. Neal* (2003) 31 Cal.4th 63.), it is a good idea, whether required under the law or not, for an interrogating officer to re-advise the defendant of his rights under *Miranda* and obtain an "express" (as opposed to "implied") waiver of those rights.

Scope of the Rule:

Just as an invocation of one's *Miranda* right to counsel applies to all pending cases, the suspect's reinitiation of questioning also applies to all cases, absent law enforcement coercion or badgering, or other evidence of the suspect's contrary intent. (*People v. Thomas* (2012) 54 Cal.4th 908, 924-928.)

Examples where Reinitiation Upheld:

Volunteering to arresting officers that; "If this is about the missing serial number (on a gun found in his possession), I didn't know it was missing," held to be a reinitiation of questioning after a prior invocation. (*United States v. Jennings* (9th Cir. 2008) 515 F.3rd 980, 983, 985-986.)

When a talkative defendant, engaging officers in "small talk" during a lengthy extradition flight back to California, including a couple of incriminating comments, and told one of the officers that "*I would like to continue our conversation at a later time,*" defendant was held to have invited a second attempt to obtain a *Miranda* waiver after having previously invoked his right to the assistance of counsel. (*Mickey v. Ayers* (9th Cir. 2010) 606 F.3rd 1223, 1234-1236.)

After advising an in-custody murder suspect of his *Miranda* rights, the defendant responded: “*I want to have an attorney present.*” When told by the officer that they would provide him with an attorney, defendant responded; “*I will talk to you now until I think I need one. I don’t need one present at this time.*” Asked several times for clarification, defendant responded that he would talk until he thought he needed an attorney. The California Supreme Court later ruled that while defendant’s initial comment might have been an unequivocal invocation, after the officer offered to accommodate him, defendant voluntarily reinitiated the discussions by indicating that he would talk with them until he felt like he needed an attorney. Saying that he might need an attorney at some future time is not an invocation. Defendant was properly questioned after that point. (*People v. Cunningham* (2001) 25 Cal.4th 926, 993-994.)

After defendant had invoked her right to counsel, officers asking her if she’d yet had the opportunity to find an attorney, and providing her with the means by which she could contact relatives and locate an attorney (i.e., giving her a telephone and a phone book), followed by the defendant’s own request to talk to the officers despite her earlier invocation, held to be a lawful reinitiation of the interrogation and not the product of the officers’ actions. An officer’s questions “principally aimed at finding the suspect an attorney” does not constitute an interrogation. (*Bachynski v. Stewart* (6th Cir. Dec. 23, 2015) 813 F.3rd 241.)

After invoking his right to the assistance of an attorney, and questioning was terminated, the interrogating FBI agent told defendant that he had a search warrant to collect a DNA mouth swab. This resulted in defendant changing his mind and deciding to submit to an interrogation prior to talking with an attorney. The Court, in agreeing with the prosecution that defendant’s subsequent confession was admissible, noted that there was no reason to believe that the FBI agent’s statement about intending to take a DNA swab was a “psychological ploy” to get defendant to talk. On the contrary, the Court agreed with the magistrate judge who found that the officers ceased all questioning after defendant invoked his right to counsel and “took great pains to explain” that “the search warrant had nothing to do with [his] decision [about] whether to make a statement.” The “possibility” that defendant would respond by incriminating himself did not transform the Agent’s words and actions into interrogation. (*United States v. Zephier* (8th Cir. 2021) 989 F.3rd 629.)

Despite repeated violations of defendant’s right to silence and his right to counsel, defendant having invoked one or the other five times in the span of three hours while being treated for gunshot wounds in a hospital, the California Supreme Court upheld the trial court’s determination that defendant—talking to a psychiatrist retained by the prosecution—had

voluntarily reinitiated a discussion of his offense (murder of a police officer). (*People v. Johnson* (2022) 12 Cal.5th 544, 584, 578-598.)

Examples where Reinitiation Not Upheld:

The reinitiation of an interrogation after an invocation was held to be *involuntary* in *People v. Neal* (2003) 31 Cal.4th 63, where an intentional ***Miranda*** violation, when combined with other aggravating circumstances were sufficient to constitute a **Fourteenth Amendment** “*due process*” violation. This made the resulting reinitiation of an interrogation involuntary, and the statements subsequently obtained from the defendant inadmissible for any purpose, including impeachment.

Where defendant was re-arrested in the field shortly after having been released, searched, handcuffed, and brought back to the Sheriff’s station, the fact that his grandmother had criticized him for having invoked his right to counsel in an interrogation earlier that day, and that he always listens to his grandmother, does not warrant the conclusion that defendant intended to reinitiate the interrogation. (*People v. Bridgeford* (2015) 241 Cal.App.4th 887, 903.)

After clearly and unambiguously invoking his right to counsel, rather than “scrupulously” honoring that right, an interrogating detective made it appear that by waiving his right he might be able to escape being booked into jail for murder. (*Martinez v. Cate* (9th Cir. 2018) 903 F.3rd 982.)

Subject Released from Custody:

Rule: A break in custody will generally, subject to exceptions, allow for a law enforcement reinitiation of the attempt to obtain a waiver and an interrogation. (See below)

The whole purpose of a requiring a ***Miranda*** admonishment and waiver is to relieve or minimize the inherent coerciveness or pressure on an in-custody suspect of an incommunicado—sometimes referred to as a “*station house*”—interrogation. (*People v. Ray* (1996) 13 Cal.4th 313, 336.)

This being the case, when the pressure is relieved, the courts have told us we should be able to start all over even though the subject has previously invoked. For this reason, it has been held that releasing the suspect from custody, giving him a reasonable opportunity to contact and seek the advice of friends, relatives and counsel, as well as consider his own predicament, opens him up to another attempt at interrogation. A non-contrived, non-pretextual break in custody where the defendant has reasonable opportunity to contact his attorney dissolves an ***Edwards v.***

Arizona (1981) 451 U.S. 477 [101 S.Ct. 1880; 68 L.Ed.2nd 378] invocation claim. Once we satisfy the requirements of this exception, the subject is open to questioning not only about other cases but even the same case for which he was originally arrested. (*Dunkis v. Thigpen* (11th Cir. 1988) 854 F.2nd 394, 396-398.)

The California Supreme Court, in a five-to-two decision, upheld the validity of this rule. The defendant, after confessing to murdering his wife, during which confession he asked for the assistance of a lawyer, was released from custody. Two days later, defendant was re-contacted and asked to reiterate his explanation about how his wife had died. Defendant confessed a second time. His subsequent confession was used against him at trial. The California Supreme Court, while noting the lack of any direct authority from the U.S. Supreme Court on this issue, found that the break in custody was sufficient to offset the prior invocation, making the defendant available for a second attempt at obtaining an admissible confession. (*People v. Storm* (2002) 28 Cal.4th 1007, 1023-1027.)

The Court in *Storm* declined to decide whether the release had to be “non-pretextual” in nature, as held by prior cases (see above), finding that the defendant’s interrogators had no other evidence than his prior inadmissible confession, and therefore had no choice but to release him in this case. (*Id.*, at pp. 1025-1026.)

Limitation: The 14-Day Rule:

The United States Supreme Court found that an already incarcerated child molest suspect who had invoked his right to counsel, at which time the attempt to interrogate him was terminated, and was later released back into the general prison population, may be interrogated any time *after* an arbitrarily-set 14 days. Fourteen days “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.” (pg. 110.) The return of defendant to his normal life in prison was a break in “*Miranda* custody,” sufficient to allow for a second, police-initiated attempt to reinitiate the interrogation. (*Maryland v. Shatzer* (2010) 559 U.S. 98 [139 S.Ct. 1213; 175 L.Ed.2nd 1045]; the second interrogation occurring in this case 2½ years after the first.)

The Court further noted that should police officers engage in the “gamesmanship” of releasing him for the express purpose of being able to reinitiate questioning of a suspect who has invoked his right to an attorney, then the 14-day requirement and the defendant’s ability to invoke is rights once again takes any advantage out of such a police tactic. (*Id.*, at p. 111, and fn. 7.)

Defendant was detained and interviewed after a ***Miranda*** admonishment and waiver. Although told he was not in custody during this interview, defendant was handcuffed and ***Mirandized***, causing the Appellate Court to find that the trial court had “impliedly” ruled that he was in fact “in custody” during this first interview. However, defendant eventually invoked his right to counsel at which time the interview ceased. Not having probable cause to justify the arrest, he was released from custody. After further investigation helped establish probable cause, he was rearrested approximately three hours after his release. Upon this second arrest, he was ***Mirandized*** again and waived his rights, and confessed. The Court of Appeal reversed his murder conviction, finding the trial court erred in failing to apply ***Maryland v. Shatzer***’s requirement that law enforcement must wait 14 days before it may resume in-custody questioning, thus applying ***Shatzer*** to the pre-conviction, local custody situation. (***People v. Bridgeford*** (2015) 241 Cal.App.4th 887 900-903.)

See pgs. 902-903, citing other out-of-state court decisions applying ***Shatzer*** to the pre-conviction situation.

*Note, however, ***Trotter v. United States*** (Wash. D.C. 2015) 121 A.3rd 40, a case out of the federal appellate court for Washington D.C., ruling that the rule of ***Shatzer*** does not apply to the pre-trial detainee in that pending trial, he is not serving a sentence of imprisonment, as was the case in ***Shatzer***.*

*And note that the defendant in ***People v. Storm*** (2002) 28 Cal.4th 1007, which, although mentioned (see pg. 105), was not specifically overruled by ***Shatzer***, was *not* in custody when re-interviewed several days after his invocation and release, inferably indicating that the rule of ***Shatzer*** does not apply when the second interview occurs with an *out-of-custody* suspect.*

Shatzer’s 14-day rule was held to apply to a defendant, in prison on other charges for which he had invoked his right to counsel, and then was picked up at the prison by investigators, arrested for murder, and taken into custody 10 days after his invocation of his right to counsel. (***People v. Molano*** (2019) 7 Cal.5th 620, 656.)

Subject Invoked his “Right to Remain Silent” Only:

Rule: When an in-custody suspect invokes his “*right to remain silent*” (as opposed to his **Fifth Amendment** “*right to an attorney*”), police officers may lawfully reinitiate questioning themselves, at least in most cases. (See below)

As to a Different Case: The law is clear that officers may return on their own initiative, instead of waiting for the suspect to reinitiate questioning himself, and attempt to question him (after a new admonition and waiver) about any other case other than the case for which he has already invoked. (*Michigan v. Mosley* (1975) 423 U.S. 96, 103 [46 L.Ed.2nd 313, 321]; *McNeil v. Wisconsin* (1991) 501 U.S. 171 [115 L.Ed.2nd 158]; *People v. Martinez* (2010) 47 Cal.4th 911, 950; *People v. Parker* (2017) 2 Cal.5th 1184, 1221-1222.)

In *Martinez*, *supra*, the California Supreme Court found that when the officer's waited overnight, questioned defendant as to a different crime, reminded him of the rights he'd been previously read and insured that he remembered them, understood them, and was still willing to talk, reinitiating questioning was lawful.

As to the Same Case: The interesting issue is whether an officer, after an invocation of an in-custody suspect's *right to remain silent*, can return and reinitiate questioning about the *same case*. The available case law has consistently ruled that to do so is lawful. (See below)

Relevant Cases: There is one state (*People v. Warner* (1988) 203 Cal.App.3rd 1122.) and at least ten federal circuit court of appeal decisions on the issue, all of which hold (with no known cases to the contrary) that it is legal, depending upon the circumstances, to reinitiate questioning *on the same case*.

United States v. Oquendo-Rivas (1st Cir. 2014) 750 F.3rd 12: Defendant's motion to suppress inculpatory statements made during his formal interrogation was properly denied because his right to cut off questioning was appropriately preserved under the totality of the circumstances, and questioning was permissibly resumed 20 minutes later within defendant's control over his ability to choose to speak; [3]-The cessation of questioning was not required because defendant did not unambiguously invoke his right to counsel.

United States v. Finch (8th Cir. 1977) 557 F.2nd 1234, 1236: Reinitiation of questioning about the same case 20 hours after invoking, pointing out that whether different cases are involved is but one factor the court can consider.

United States v. Udey (8th Cir. 1984) 748 F.2nd 1231, 1241-1242: Special agents reinitiated questioning twice; once 6 hours after invocation at which time the defendant waived, and then again 48 hours after the defendant invoked a second time.

Grooms v. Keeney (9th Cir. 1987) 826 F.2nd 883, 885-886: Waiver four hours after the prior invocation, with the court stressing the importance of a fresh set of **Miranda** warnings, noting: “The fact that a subsequent interrogation pertains to the same crime is not important.”

United States v. Hsu (9th Cir. 1988) 852 F.2nd 407, 409-411: Defendant waived less than 30 minutes after a prior invocation to another DEA agent, on the same case. This court minimized the importance of the identity of subject matter and the amount of elapsed time, stressing instead the validity of the eventual waiver and the presence of a “fresh set of (**Miranda**) warnings.” (*Id.*, at p. 410.)

West v. Johnson (5th Cir. 1996) 92 F.3rd 1385: Reinitiation of interrogation 13 hours after an (*arguably*) invocation is okay.

United States v. Andrade (1st Cir. 1998) 135 F.3rd 104, 106-107: Without repeated attempts to reverse defendant’s invocation, and no undue pressure, reinitiation of the interrogation after 4 hours was proper.

Hatley v. Lockhart (8th Cir. 1993) 990 F.2nd 1070, 1073-1074: Questioning by a second officer who did not personally know about defendant’s prior invocation two hours earlier. Two hours was specifically held to be a “*significant amount of time.*”

United States v. Clinton (8th Cir. 1992) 982 F.2nd 278, 281-282: Officers questioned defendant some seven hours after defendant had invoked his right to remain silent when being questioned by other officers. The Court ruled that even if the charges were the same for both questioning periods (a defense contention not agreed to by the Court), the reinitiation of questioning by the second set of officers (who were unaware of the prior invocation) was lawful.

United States v. Schwensow (7th Cir. 1998) 151 F.3rd 650, 658-660: Reinitiation of questioning after a 36-hour break between the prior invocation and the subsequent **Miranda** admonishment and waiver was held to be proper.

In **People v. Warner**, *supra*, the Second District Court of Appeal held that the trial court properly admitted defendant’s inculpatory statements into evidence because there was no evidence of police misconduct when defendant invoked his right to silence, and where the second interview was conducted after an overnight interval and after defendant indicated his willingness to talk.

Factors:

Whether or not a suspect's **Fifth Amendment** right to remain silent was "*scrupulously honored*" and the legality of an officer's attempt to reinitiate questioning includes an analysis of the following factors (not all of which must necessarily be present) to be considered by the court (See ***Michigan v. Mosley***, *supra.*):

- The original interrogation was promptly terminated;
- The interrogation was resumed only after the passage of a significant period of time;

E.g.: Two hours, in ***Mosley***.

- The suspect was given a complete, "*fresh set*" of ***Miranda*** warnings at the outset of the second interrogation;
- A different officer resumed the questioning; *and*
- The second interrogation was limited to a crime that was not the subject of the first. (*But*, see ***People v. Warner***, *infra*, and other cases, listed above.)

People v. Warner, *supra* (at pp. 1129-1131), which, as opposed to ***Mosley***, dealt specifically with the reinitiation of questioning on the same case, describes the factors a bit differently:

- Whether a different officer is involved;
- Interviews on a different day;
- New admonition is given;
- Whether the first request not to answer questions was "*scrupulously honored*" by immediate cessation of questioning; and
- No intentional police trickery involved.

Limitations:

The above federal circuit court of appeal decisions uniformly stress the lack of *any pressure* on the suspect which might overcome his will to resist. (E.g., ***United States v. Schwensow***, *supra*, at p. 660; ". . . depends . . . on whether the police, in conducting the (subsequent)

interview, sought to undermine the suspect's resolve to remain silent."

Asking the in-custody suspect more than once to reconsider his prior invocation might be held to be undue pressure by law enforcement. However, see *United States v. Collins* (2nd Cir. 1972), 462 F.2nd 792, where the defendant had been interviewed *three times* in the twenty hours since his arrest. Each time he had been read his *Miranda* rights and each time he had refused to talk. The officers then appealed to the defendant, who was charged with a bank robbery in which a guard had been shot, to cooperate with them in capturing the other robbers so that they might prevent "more killings, more bloodshed and more bank robberies." A confession followed. The Court upheld the admissibility of his confession noting that the police conduct "amounted to no more than an exhortation that Collins reevaluate his decision not to talk."

This rule only applies when the right invoked was his *right to silence*. If in invoking, he specifically asks for the *assistance of an attorney*, he is off-limits to any further questioning about that case or *any other case* (*Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880; 68 L.Ed.2nd 378], *Michigan v. Harvey* (1990) 494 U.S. 344, 350 [110 S.Ct. 1176; 108 L.Ed.2nd 293, 302]), at least for the first 14 days of his incarceration. (See *Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2nd 1045], limiting the so-called "*Edwards Rule*" in the first 14 days of physical custody.

(See "Right to an Attorney," under "Invocation of Rights" (Chapter 7), below.)

An Anticipatory Invocation:

Rule: Any attempt by a suspect to invoke his rights under the *Miranda* decision prior to that point in time where he is *both* . . .

- *In custody; and*
- *An interrogation is either in progress or is imminent;*

. . . is legally ineffective. (*United States v. LaGrone* (7th Cir. 1994) 43 F.3rd 332, 339; *People v. Calderon* (1997) 54 Cal.App.4th 766, 770-771; *People v. Nguyen* (2005) 132 Cal.App.4th 350, 355-357; *Robertson v. Pichon* (9th Cir. 201) 849 F.3rd 1173, 1183-1185.)

Neither "*custody*" nor "*interrogation*," by itself, triggers a *Miranda* requirement. "It is the premise of *Miranda* that the danger of coercion

results from the interaction of custody *and* official interrogation.” (Italics added; *Illinois v. Perkins* (1990) 496 U.S. 292, 297 [110 L.Ed.2nd 243, 251].)

“(T)he rule in *Edwards* (i.e., *Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880; 68 L.Ed.2nd 378]; invoking one’s right to the assistance of counsel.) does not apply to all interactions with the police—it applies only to custodial interrogation. *Edwards*, 451 U.S. at 486. In other words, not all communications with the police after a suspect has invoked the right to counsel rise to the level of interrogation. “‘Interrogation,’ as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.’ *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). ‘[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.’ Id. at 300-01.” (*Martinez v. Cate* (9th Cir. 2018) 903 F.3rd 982, 993.)

Also, is a rule of law that: “*Most rights must be asserted when the government seeks to take the action they protect against.*” (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3. [115 L.Ed.2nd 158, 171].)

“We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than ‘custodial interrogation’” (*Ibid.*)

Case Law:

Being taken into custody for a “parole violation,” without telling the suspect more, but where he was suspected of an armed robbery, and then where the suspect responds “*Well, I want a lawyer. Right now*”, held to be an anticipatory invocation and legally ineffective. (*People v. Buskirk* (2009) 175 Cal.App.4th 1436.)

Any attempt by defense counsel to invoke a criminal defendant’s **Fifth** or **Sixth Amendment** rights merely by filing a document in court purporting to do so is legally ineffective. (*United States v. Grimes* (11th Cir. 1998) 142 F.3rd 1342, 1347-1348; *Alston v. Redman* (3rd Cir. 1994) 34 F.3rd 1237; *United States v. Thompson* (2nd Cir. 1994) 35 F.3rd 100; *People v. Avila* (1999) 75 Cal.App.4th 416; *People v. Beltran* (1999) 75 Cal.App.4th 425.)

Similarly, a defense attorney’s oral demand at his or her client’s arraignment to be present at any further law enforcement questioning on other charges is equally ineffective. (*United States v. Wright* (9th Cir. 1992) 962 F.2nd 953.)

See also *People v. Wyatt* (2008) 165 Cal.App.4th 1592, where the Court held that a county jail inmate's unsuccessful attempt to invoke his right to counsel during a jail disciplinary hearing (a right that does not apply to that type of proceeding; *Baxter v. Palmigiano* (1976) 425 U.S. 308, 315 [47 L.Ed.2nd 810, 819].), was (1) not made during a custodial interrogation and (2) an unclear attempt at invocation, thus making a sheriff deputy's later (5 days) *Miranda* advisal something akin to seeking clarification, and lawful.

Even when defendant attempts to invoke his right to counsel in response to a *Miranda* advisal during an out-of-custody interview, such an invocation is considered to be an ineffective anticipatory invocation. A new attempt to interrogate him five days later after taking him into custody was held to be lawful. (*Bobby v. Dixon* (2011) 565 U.S. 23, 29-32 [132 S.Ct. 26; 181 L.Ed.2nd 328].)

Defendant's request to talk to an attorney, made in response to the arresting officer's standard advisal of the legal requirements for taking a blood or breath test following his arrest for driving under the influence (see **Veh. Code § 23612**), was held to be legally ineffective as far as a *Miranda* invocation is concerned, at least as interpreted by state courts, (*Robertson v. Pichon* (9th Cir. 201) 849 F.3rd 1173, 1183-1187; noting that the U.S. Supreme Court has yet to decide the issue in this context.)

Limitation:

It is not necessary that the suspect have already been read his rights. So long as the interrogation is at least "*imminent*," an otherwise valid invocation must be respected. (*People v. Nguyen* (2005) 132 Cal.App.4th 350, 357.)

Counsel is Present:

Rule: A *Miranda* admonishment is not necessary where counsel accompanies the suspect. (See *Roberts v. United States* (1980) 445 U.S. 552, 560-561 [63 L.Ed.2nd 622, 631].)

Presence of counsel at interrogation made it unnecessary to inform defendant that whatever he said could be used against him. (*Government of Virgin Islands v. Ruiz* (Virgin Islands 1973) 354 F.Supp. 245.)

The *Miranda* decision itself states that an admonition is not necessary if some "*other fully effective means (is) devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it . . .*" (*Miranda v. Arizona*, *supra*, at p. 444 [16 L.Ed.2nd at p. 706].)

The U.S. Supreme Court then indicated that; “The presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His (the attorney’s) presence would insure that statements made in the government-established atmosphere are not the product of compulsion.” (*Id.*, at p. 466 [16 L.Ed.2nd at p. 719]; see also *Id.*, at p. 475 [16 L.Ed.2nd at p.724].)

In a footnote, the *Miranda* Court also provides that when a suspect indicates a desire to remain silent, but has an attorney present, “*there may be some circumstances in which further questioning would be permissible.*” The Court, however, does not describe those circumstances except to say that; “*In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of those statements.*” (*Id.*, at p. 474 fn. 44 [16 L.Ed.2nd at p. 723].)

Routine Booking Questions:

Rule: Routine booking questions *may*, depending upon the circumstances, be an exception to the *Miranda* rule. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600-602 [110 L.Ed.2nd 528; 110 S.Ct. 2638]; *United States v. Washington* (9th Cir. 2006) 462 F.3rd 1124; *People v. Hall* (1988) 199 Cal.App.3rd 914, 920-921; *People v. Elizalde et al.* (2015) 61 Cal.4th 523, 533-540; *United States v. Brown* (8th Cir. 1996) 101 F.3rd 1272; *United States v. Godinez* (6th Cir. 1997) 114 F.3rd 583, 589; *In re J.W.* (2020) 56 Cal.App.5th 355.)

“(R)outine biographical information elicited during the booking process does *not* constitute interrogation under a **Fifth Amendment *Miranda***-rights analysis.” (Italics added; *United States v. Godinez* (6th Cir. 1997) 114 F.3rd 583, 589; *Gladden v. Roach* (5th Cir. 1989) 864 F.2nd 1196, 1198; *People v. Powell* (1986) 178 Cal.App.3rd 36, 40; *People v. Herbst* (1986) 186 Cal.App.3rd 793, 798-800.)

“(A) suspect’s answers to express questions during the booking process regarding the suspect’s “name, address, height, weight, eye color, *date of birth*, and *current age*” are not barred by *Miranda*, even when not preceded by the above described *Miranda* warnings.” (*In re J.W.*, *supra*, at p. 360; citing *Pennsylvania v. Muniz*, *supra*, at p. 586.)

Case Law:

Where an officer’s comment to defendant during booking that he looked “like a traffic ticket,” prompting defendant’s unsolicited response that he was charged with murder which was followed up by an incriminating

description of the crime, defendant's statements, so long as he is not being questioned, were held to be admissible. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034-1035.)

However, purposely bringing up the subject of what the suspect is charged with may result in inadmissible responses. (*People v. Morris* (1987) 192 Cal.App.3rd 380, 387. E.g., “*Who are you accused of killing?*”)

Where defendant's defense to a federal charge of attempting to illegally re-enter the United States was that he was only intending to seek help for a jaw injury for which he believed he could get treatment in the U.S., it was held to be error to allow the Government to impeach this claim by introducing into evidence his failure to mention it in response to routine booking questions that did not directly call for that information. Allowing the evidence could only invite the jury to draw inferences that defendant did not approach the port of entry to seek help for his jaw injury from his post-invocation silence, violating his constitutional right to remain silent. (*United States v. Ramirez-Estrada* (9th Cir. 2014) 749 F.3rd 1129, 1133-1138; citing *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240; 49 L.Ed.2nd 91].)

The “‘routine booking question’ exception . . . exempts from *Miranda*’s coverage questions (needed) to secure the ‘biographical data necessary to complete booking or pretrial services.’” They typically involve questions “‘reasonably related to the police’s administrative concerns.’” The fact that a defendant’s responses to the booking questions turn out to be incriminating does not, by itself, affect the applicability of the exception. But by the same token, the existence of this exception does not mean that all questions asked during the booking process fall within the exception. Supposed booking questions that are really just a pretext for eliciting incriminating information are improper. (*People v Gomez* (2011) 192 Cal.App.4th 609, 629.)

Where defendant invoked his *Miranda* right to counsel mid-interrogation, at which time all questioning concerning the cause of defendant’s arrest ceased, it was held that it was not error to uphold the continued questioning for purposes of obtaining biographical information such as his name, birth date, and residence, and the names of his wife, parents, and children. As the detective was doing so, defendant changed his mind about having invoked, waived his rights anew, and made certain admissions that were used against him at trial. Noting that the “‘routine gathering of background biographical information, such as identity, age, and address, usually does not constitute interrogation,” the Court, in upholding the admissibility of defendant’s incriminating responses, invoked the “*booking exception*,” describing it as “‘an exemption from *Miranda*’s coverage for questions posed to secure the biographical data necessary to complete booking or

pretrial services.” (Internal quotes deleted.) (*United States v. Zapien* (9th Cir. 2017) 861 F.3rd 971.)

Where the in-custody defendant who had previously invoked his right to counsel asked what he was going to be booked for, and the detective told him that he was going down for a murder charge, noting specifically that it was “*because I only got one side of the story*,” it was held that this continued invitation to defendant to tell “his side of the story” constituted an interrogation, unrelated to the booking process, and likely to provoke a response about the case. By linking defendant’s decision not to provide his side of the story to being booked for murder, the routine booking questions evolved into an interrogation, “badgering” him into changing his mind about having his attorney present then and there. Defendant’s decision to reinitiate the questioning, under these circumstances, was held not to be free and voluntary. (*Martinez v. Cate* (9th Cir. 2018) 903 F.3rd 982, 994-996.)

See “*Responses to Booking Questions Upheld*,” below.

Factors:

The *Gomez* Court (*People v Gomez* (2011) 192 Cal.App.4th 609; above) established a set of “factors” to consider in determining whether specific questioning comes within this exception:

- (1) The nature of the questions, such as whether they seek merely identifying data necessary for booking;
- (2) The context of the interrogation, such as whether the questions were asked during a non-investigative, clerical booking process and pursuant to a standard booking form or questionnaire;
- (3) The knowledge and intent of the government agent asking the questions;
- (4) The relationship between the question asked and the crime the defendant was suspected of committing;
- (5) The administrative need for the information sought; *and*
- (6) Any other indications that the questions were designed, at least in part, to elicit incriminating evidence and merely asked under the guise or pretext of seeking routine biological information.

(*People v Gomez*, *supra*, at pp. 630-631; see also *People v. Williams* (2013) 56 Cal.4th 165, 187-188.)

In *Gomez*, it was determined that because it was not the booking deputy's intent to solicit incrimination information, and had no knowledge of the circumstances of the charges against the inmate, that asking him about his gang affiliation was a lawful "booking question," and that defendant's response was admissible in evidence against him. (*People v Gomez, supra.*)

But see *People v. Elizalde et al.*, *infra*, overruling *Gomez* on this point, at least as it relates to gang-affiliation questions.

The Ninth Circuit has gleaned other factors from its prior cases:

Whether the government agency conducting the questioning ordinarily booked suspects. (*United States v. Mata-Abundiz* (9th Cir. 1993) 717 F.2nd 1277, 1280.)

Whether officers knew that the questions were related to an element of the crime. (*United States v. Disla* (9th Cir. 1986) 805 F.2nd 1340, 1347.)

Whether a "true booking" had already occurred and the agency therefore already had access to the information. (*United States v. Salgado* (9th Cir. 2001) 292 F.3rd 1169, 1174.)

Whether the questions were separated in time and place from the incriminating statements. (*United States v. Foster* (9th Cir. 2000) 227 F.3rd 1096, 1103.)

Whether the questioning had an "investigatory purpose" or was conducted as part of "clerical processing" when a defendant is received into jail. (*United States v. Poole* (9th Cir. 1986) 794 F.2nd 462, 466-467 & n.3; *amended on denial of reh'g at* 806 F.2nd 853.)

(*United States v. Zapien* (9th Cir. 2017) 861 F.3rd 971, 975-976.)

See also *United States v. Paxton* (7th Cir. Ill. 2017) 848 F.3rd 803; upholding the admissibility of identification questions the agents asked the defendants as they entered a police van, which were later used to identify the speakers in the recorded conversations, finding that such questioning did not violate the **Fifth Amendment**. Although the defendants had not yet been given their *Miranda* warnings, the questions asked by the agents were similar to routine booking questions, which are not the type of questions that typically produce incriminating information.

Split of Authority Between the California Supreme Court and the Ninth Circuit Court of Appeals:

The Second District Court of Appeal (Div. 2), in *In re J.W.* (2020) 56 Cal.App.5th 355, at pp. 360-361, noted that there was a difference of opinion between the California Supreme Court and the Ninth Circuit Court of Appeal on the booking questions issue. In *J.W.*, the Court had to wrestle with whether “the routine booking question exception to *Miranda* still appl(ies) when the questions posed—here, date of birth and current age—fall squarely within *Muniz*’s core definition of ‘booking questions’ but, on the facts of the specific case, are nevertheless ‘reasonably likely to elicit an incriminating response from the suspect’” (Referring to *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600-602 [110 L.Ed.2nd 528; 110 S.Ct. 2638].) Noting that there is a difference of opinion (i.e., a “split of authority”) between the California Supreme Court (See *People v. Elizalde* (2015) 61 Cal.4th 523) and the Ninth Circuit Court of Appeal (see *United States v. Henley* (9th Cir. 1993) 984 F.2nd 1040.), the Court sided with the former. As noted by the Court, *Elizalde* involved prison officials asking in-coming gangster inmates for their gang affiliation for purposes of determining where to house them, hoping to avoid gang-related issues within the prison. The gangster’s response was often relevant and incriminating in his later prosecution in any gang case. Gang affiliation is not one of the seven categories of “basic identifying biographical data” set forth in *Muniz*, and was reasonably likely to elicit an incriminating answer. For this reason, a gangster’s responses to a gang affiliation question constitute an exception to the “booking questions” exception as described in *Muniz*, and (absent a preceding *Miranda* admonishment and waiver) are inadmissible in evidence. The Ninth Circuit in *United States v. Henley* expressed a different point of view, holding that any and all questions asked during the booking process—even if those questions seek any of the seven categories of “basic identifying biographical data” enumerated in *Muniz*—are subject to exclusion under *Miranda* in any circumstance where “a police officer has reason to know that [the] suspect’s answer may incriminate him.” (See also *United States v. Williams* (9th Cir. 2016) 842 F.3rd 1143, 1147 [applying this rule, albeit as to gang affiliation outside *Muniz*’s seven categories]; *United States v. Equihua-Juarez* (9th Cir. 1988) 851 F.2nd 1222, 1226–1227 [applying this rule, albeit as to name and place of birth]; *United States v. Gonzalez-Sandoval* (9th Cir. 1990) 894 F.2nd 1043, 1046–1047 [same]; and *United States v. Disla* (9th Cir. 1986) 805 F.2nd 1340, 1347, holding that a suspect’s answer to a booking question about his current address was inadmissible under *Miranda* because it could be used to implicate him for “cocaine and cash” police discovered at his residence during the execution of an unrelated search warrant.

In *J.W.*, the Second District Court of Appeal held that defendant's statements relative to his age and date of birth, obtained during his juvenile hall booking for being a minor in possession of a firearm, were lawfully admitted into evidence against him as coming under the *Muniz*-established "booking questions" exception.

Responses to Booking Questions Upheld:

Volunteered incriminating statements made during a defendant's booking process were not the product of an interrogation and therefore admissible against her. (*People v. Franzen* (2012) 210 Cal.App.4th 1193, 1199-1203.)

When defendant's cellphone rang while being booked, she told the booking officer; "*It's probably the guy looking for his money.*" When asked; "*What guy?*", she responded; "*The guy that gave my friend the drugs to sell, I guess.*" (*Id.*, at p. 1199.)

Asking defendant as he was being processed into prison questions about a threat that had been made against him, done for purposes of "jail security" and without any reason to believe they would prompt defendant to admit to having committed a double homicide, held to be akin to routine booking questions and not requiring a *Miranda* admonishment and waiver. (*People v. Williams* (2013) 56 Cal.4th 165, 186-188.)

Asking defendant during the booking process; "*Why is that?*", in response to his unsolicited comment about knowing he'd be caught when they took his DNA upon his most recent arrest, resulting in his admission that he'd left his DNA in his murder victim that he also raped, held not to be an "interrogation" requiring a *Miranda* admonishment and waiver. (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 21-23.)

Answers to routine booking questions by a local law enforcement officer after an arrest on state charges, which included defendant's place of birth and country of citizenship, were admissible at defendant's later federal criminal prosecution for being in the country illegally after a prior deportation despite the lack of a *Miranda* admonishment and waiver. (*United States v. Salgado* (9th Cir. 2002) 292 F.3rd 1169, 1172-1175.)

Questions relating to defendant's name, physical characteristics, and gang moniker and affiliation, obtained for purposes of verifying a suspect's identity and for prisoner classification to insure his safety while in custody, do not constitute an interrogation and therefore do not require a *Miranda* admonishment and waiver. (*United States v. Washington* (9th Cir. 2006) 462 F.3rd 1124, 1132-1133.)

A correctional officer's question to defendant inmate, asking him why he had been moved to protective custody, resulting in defendant's incriminating response about having killed the victim, was held *not* to be an interrogation under the circumstances. (*Kemp v. Ryan* (9th Cir. 2011) 638 F.3rd 1245, 1248-1249.)

Asking defendant during the booking process whether he was employed, to which defendant said he was a "drug dealer," allowed for the incriminating response to be used against him at trial. Questions concerning an arrestee's name, date of birth, social security number and employment status "rarely elicit an incriminating response, even when asked after arrest," and the booking officer, under the circumstances, was not seeking to strengthen the government's case. (*United States v. Sanchez* (1st Cir. 2016) 817 F.3rd 38.)

Where defendant invoked his *Miranda* right to counsel mid-interrogation, at which time all questioning concerning the cause of defendant's arrest ceased, it was held that it was not error to uphold the continued questioning for purposes of obtaining biographical information such as his name, birth date, and residence, and the names of his wife, parents, and children. As the detective was doing so, defendant changed his mind about having invoked, waived his rights anew, and made certain admissions that were used against him at trial. Noting that the "routine gathering of background biographical information, such as identity, age, and address, usually does not constitute interrogation," the Court, in upholding the admissibility of defendant's incriminating responses, invoked the "*booking exception*," describing it as "an exemption from *Miranda*'s coverage for questions posed to secure the biographical data necessary to complete booking or pretrial services." (Internal quotes deleted.) (*United States v. Zapien* (9th Cir. 2017) 861 F.3rd 971.)

However, recognizing the potential for abuse by law enforcement officers who might, under the guise of seeking "objective" or "neutral" information, deliberately elicit an incriminating statement from a suspect, the Court held that an "objective" test must be used to determine whether booking questions actually constituted an interrogation. Therefore, the Court held that the admissibility of a defendant's responses to what appear to be booking questions is dependent upon whether the officer should have known that his questions were reasonably likely to elicit an incriminating response. (*Id.*, at pp. 975.)

Also, the booking exception can apply to questioning even after a defendant has invoked his right to counsel. (*Id.*, at p. 976.)

Under the “*routine booking question*” exception to the *Miranda* rule, it was proper to admit an officer’s testimony about a minor’s answers to booking questions about his age and date of birth, even though being a minor was an element of the firearm offense with which he was charged (i.e., **Pen. Code § 29610**; minor in possession of a firearm), because both questions fell squarely within the *Muniz* categories of basic biographical data. (Referring to (*Pennsylvania. v. Muniz* (1990) 496 U.S. 582, 601–602, [110 L.Ed.2nd 528, 110 S.Ct. 2638].) With that evidence as part of the record, there was sufficient evidence to support the juvenile court’s adjudication. (*In re J.W.* (2020) 56 Cal.App.5th 355.)

Limitations; Gang Affiliation:

In *People v. Elizalde et al.* (2015) 61 Cal.4th 523, 538, the California Supreme Court rejected the use of the factors listed in *Gomez* when evaluating the asking of a prisoner’s gang affiliation as a part of the booking process, noting that the correct test in determining the admissibility of the prisoner’s response “must be measured under the general *Innis* test, which defines as ‘interrogation’ questions the police should know are ‘reasonably likely to elicit an incriminating response.’” (Citing *Rhode Island v. Innis* (1980) 446 U.S. 291, 301-302 [64 L.Ed.2nd 297].)

Where defendant had been arrested for murder, and while being booked, he admitted his gang affiliation in response to a jail classification officer’s routine question. The trial court admitted defendant’s statement at his murder trial. The California Supreme Court held that this was error. Generally, the prosecution may not use a defendant’s statements that stem from a custodial interrogation without the procedural safeguards of a *Miranda* advisement and waiver. Although there is an exception for booking questions, this exception is limited to answers regarding basic biographical data. While questions about gang affiliation have relevance to housing assignments, they are also reasonably likely to elicit an incriminating response and go beyond basic biographical data. “In-custody defendants generally retain their **Fifth Amendment** protections even if the police have good reasons for asking un-*Mirandized* questions.” However, in this case, the error was held to be harmless. (*People v. Elizalde et al.* (2015) 61 Cal.4th 523, 533-540.)

The *Elizalde* Court ruled that it is not improper to ask about an inmate’s gang affiliation. But the result is inadmissible in the People’s case-in-chief. (*People v. Elizalde et al.*, *supra.*, at p. 541.)

Note also that the *Elizalde* Court specifically limited its decision here to booking questions related to the inmate's gang affiliations, declining to comment on the "scope" of the booking questions exception (*Id.*, at p. 535.), thus leaving open the question whether *Gomez's* six-factor test was valid for other types of booking questions, or whether the "*reasonably likely to elicit an incriminating response*" test is the test for all booking questions.

Citing *Elizalde*, it has been held to be a **Fifth Amendment** (self-incrimination) error to allow into evidence a defendant's gang affiliation admissions made during booking because the circumstances made it reasonably likely that the gang affiliation question by the jail classification officer would elicit an incriminating response. *Miranda* warnings, therefore, were held to be required under the circumstances. (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1010-1016.)

Also, finding that defendant Leon did not have standing to challenge the admissibility of the results of similar booking questions asked of his co-conspirators, the Court rejected the defendant's concurrent argument that evidence of his co-conspirators' gang affiliations, obtained during their respective booking procedures, was improperly admitted into evidence, violating the defendant's "due process" right to a fair trial (see *People v. Badgett* (1995) 10 Cal.4th 330, 343-344), but declined to foreclose the possibility that future cases may hold that a defendant's due process rights are in fact violated under such circumstances. (*People v. Leon, supra*, at pp. 1016-1017.)

The Court, applying the **Sixth Amendment** (i.e., confrontation) rules as dictated by *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2nd 177], also found that because defendant's admissions were not "*testimonial*" in nature, they could be used by gang experts in supporting their opinions that defendant was indeed the member of a gang. (*People v. Leon, supra*, at pp. 1018-1020.)

Routine gang affiliation questions asked during the process of booking a defendant into jail amount to an interrogation for purposes of triggering his or her *Miranda* rights because such questions are reasonably likely to elicit an incriminating response in light of California's comprehensive scheme of penal statutes aimed at eradicating criminal activity by street gangs. Therefore, a defendant's un-*Mirandized* responses to such questioning are inadmissible against him or her during the prosecution's case-in-chief. (*People v. Lara* (2017) 9 Cal.App.5th 296, 335-337.)

The *Lara* Court also held that a defendant's admissions to his gang affiliation contained in response to a "Step notice" (**California Street Terrorism Enforcement and Prevention Act**; "STEP Act," P.C. §§ 186.20 et seq.), informing him he was associating with a known gang, were both inadmissible hearsay and, when used by a gang expert as a basis for his opinion that defendant was indeed a gang member, a violation of the defendant's **Sixth Amendment** right to confrontation under the *Crawford* decision. (*People v. Lara*, *supra*, at pp. 326, 336-337.)

See also *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 407-416: While it was hearsay error to admit information from gang informants through the testimony of a gang expert, no Confrontation Clause error occurred in that the statements were not testimonial. And the hearsay error was held to be harmless because there was also extensive admissible testimony about gang issues from former gang members.

In *People v. Villa-Gomez* (2017) 9 Cal.App.5th 527, the Third District Court of Appeal held that there was no **Fifth Amendment** error in admitting defendant's statements concerning his gang affiliation in response to jail classification questions while defendant was in custody on an immigration hold. The Court reasoned that because the questions were not reasonably likely to elicit an incriminating response given the fact that the crime for which defendant was later prosecuted had not yet been committed at the time he answered the classification deputy's questions. Secondly, any error committed in admitting the gang affiliation statements was harmless because the record contained convincing independent and uncontradicted evidence of his gang membership beyond any admissions made during the booking process, and regardless of gang membership, the evidence established the requirements for both of the alleged gang enhancements and the crime of active participation in a criminal street gang.

However, in *People v. Roberts* (2017) 13 Cal.App.5th 565, 572-579, the Fourth District Court of Appeal (Div.1) ruled that *Villa-Gomez* was limited to its facts, and held that *Elizalde* precludes the admission of certain un-*Mirandized* statements defendant made during custodial booking interviews that took place years before the charged crimes. The Court, as a result, reversed the jury's finding as to the gang enhancement: "[W]e conclude that a *Miranda* violation does not evaporate with the passage of time such that the statements become cleansed and admissible as to future misdeeds."

The Ninth Circuit Court of Appeal appears to agree with *Roberts*, holding that questions about defendant's gang affiliation are reasonably likely to

elicit an incriminating response even if the federal RICO charges had not yet been filed. When a jail deputy asked defendant about his gang membership, defendant had already been arrested on charges of murder and related offenses and had invoked his right to silence. That the questions may have been asked in the general interest of inmate safety (i.e., for jail classification purposes) does not mean that there was an urgent need to protect either the deputy or others against immediate danger. The narrow “public safety exception” therefore does not apply. (*United States v. Williams* (9th Cir. 2016) 842 F.3rd 1143.)

Additional Possible Limitation; Identity Theft Offenses:

The question has been raised—although yet unanswered—whether an exception to the “*booking question*” rule might apply to the situation when the defendant is being booked for an identity theft offense, per P.C. § 530.5(a). See *United States v. Bernal* (8th Cir. Dist. Ct. Neb. 2011) 2011 U.S. Dist. LEXIS 30484, where the federal district court, in a published decision, notes: “Although it may be a rare case indeed in which asking an individual his name, date of birth, and social security number would violate *Miranda*, there are situations where asking a person his name might reasonably be expected to elicit an incriminating response, for example in an arrest for impersonating a law enforcement officer or for some comparable offense focused on identity.”

Collection of Physical, Verbal (Non-Testimonial) or Visual Evidence Not Prevented by the Fifth Amendment:

Rule: The **Fifth Amendment** is *not* implicated during the collection of evidence (other than defendant’s admissions or confession) whether the evidence is physical, verbal or visual. Defendant is only protected from providing evidence that is “*testimonial or communicative* in nature.” (See below)

Examples:

- Obtaining *blood samples*. (*Schmerber v. California* (1966) 384 U.S. 757 [16 L.Ed.2nd 908].)

Defendant’s *refusal* to complete a *blood-alcohol test* in a DUI case may be used as evidence against him at trial. (*South Dakota v. Neville* (1983) 459 U.S. 553 [74 L.Ed.2nd 748].)

The **Fifth Amendment** “offers no protection against compulsion to submit to *fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.*” (*Schmerber v. California*, *supra*, at p. 764 [16 L.Ed.2nd at p. 916].)

- Obtaining a *urine sample* in a DUI (i.e., “*Driving Under the Influence*”) case. (*United States v. Edmo* (9th Cir. 1998) 140 F.3rd 1289, 1292-1293.)
- Obtaining *handwriting exemplars*. (*Gilbert v. California* (1967) 388 U.S. 263 [18 L.Ed.2nd 1178].)
- Standing in a *live lineup*, wearing certain items of clothing and repeating phrases spoken by the perpetrator of a robbery. (*United States v. Wade* (1967) 388 U.S. 218 [18 L.Ed.2nd 1149].)
- Compelling a defendant to *repeat words or phrases* used by the perpetrator. (*United States v. Leone* (8th Cir. 1987) 823 F.2nd 246, 249-250.)
- Requiring the defendant to *read aloud* from a wiretap transcript. (*United States v. Delaplane* (10th Cir. 1985) 778 F.2nd 570, 575.)
- *Trying on clothing* similar to that worn by the perpetrator. (*Holt v. United States* (1910) 218 U.S. 245 [54 L.Ed. 1021]; see also *State v. Williams* (Minn. 1976) 239 N.W.2d 222, 225–226; an order to “put on a hat found at the scene of the crime” was not testimonial because the police compelled the physical act for “the sole purpose of attempting to prove (the defendant’s) ownership of (an) incriminating article.”)
- Putting on a *stocking mask*. (*United States v. Roberts* (5th Cir. 1973) 481 F.2nd 892.)
- Requiring the defendant to *wear a fake goatee*. (*United States v. Hammond* (4th Cir. 1969) 419 F.2nd 166.)
- Compelling a defendant to *shave his beard and or mustache* for an in-court identification. (*United States v. Valenzuela* (9th Cir. 1983) 722 F.2nd 1431, 1433; *United States v. Lamb* (10th Cir. 1978) 575 F.2nd 1310; *People v. Carpenter* (1997) 15 Cal.4th 312, 372.)
- Read a transcript to provide a *voice exemplar*. (*United States v. Dionisio* (1973) 410 U.S. 1 [35 L.Ed.2nd 67].)
- Being forced to *reenact a robbery*. (*Avery v. Procunier* (5th Cir. 1985) 750 F.2nd 444.)
- *Standing and giving his name* in court. (*United States v. Silvestri* (1st Cir. 1986) 790 F.2nd 186, 189.)

- *Giving consent to search*, whether or not the subject has previously invoked his or her **Miranda** rights. (*People v. James* (1977) 19 Cal.3rd 99, 115; *United States v. Hidalgo* (11th Cir. 1993) 7 F.3rd 1566; *Doe v. United States* (1988) 487 U.S. 201 [101 L.Ed.2nd 184]; *People v. Wollsey* (1979) 90 Cal.App.3rd 994; *United States v. Calvetti* (6th Cir. 2016) 836 F.3rd 654; *People v. Johnson* (2022) 12 Cal.5th 544, 584, 568, fn. 1.)

But see *United States v. Reilly* (9th Cir. 2000) 224 F.3rd 986, 994, where it was erroneously held that a defendant's invocation of his right to an attorney precluded officers from asking him for his consent to search.

- *Tax and Corporate Records:*

Collection of defendant's tax records from an accountant by the Internal Revenue Service through legal process does not implicate the **Fifth Amendment**. (*Couch v. United States* (1973) 409 U.S. 322 [34 L.Ed.2nd 548].)

Defendant's personal tax records are admissible in trial, **Miranda** having little to do with disclosures on tax returns. (*Garner v. United States* (1976) 424 U.S. 648 [47 L.Ed.2nd 370].)

Defendant's corporate records are not immune from a grand jury subpoena, there being no **Fifth Amendment** protection for such records. (*Braswell v. United States* (1988) 487 U.S. 99 [101 L.Ed.2nd 98].)

- *Bank Records:* Directing defendant to sign a consent directive authorizing banks in the Cayman Islands and Bermuda to disclose records of his accounts. (*Doe v. United States* (1988) 487 U.S. 201, 219 [101 L.Ed.2nd 184].)
- *Hit and Run Statutes:* Requiring a person involved in a traffic collision to stop and identify himself (E.g., see **V.C. § 20002**) does *not* implicate the **Fifth Amendment**.

Being Required to Incriminate Oneself as a Probation or Parole Condition; Split of Authority:

It has been held by the federal Tenth Circuit Court of Appeal that requiring defendant as a condition of post incarceration supervised release (i.e., parole) to complete a sexual history polygraph, which required him to answer four questions regarding whether he had committed any new sexual crimes, was held to violate his **Fifth Amendment** right against self-incrimination. The **Fifth Amendment's** privilege against self-

incrimination applies not only to persons who refuse to testify against themselves at a criminal trial in which they are the defendant, but also allows persons to refuse to answer “official questions” asked to them in any other proceeding, where their answers might incriminate them in future criminal proceedings. To qualify for the **Fifth Amendment privilege**, a communication must be testimonial, incriminating, and compelled. The Court here held that such a “sexual history polygraph” involves a communicative act, which is testimonial. (*United States v. Von Behren* (10th Cir. 2016) 822 F.3rd 1139.)

However, the California Supreme Court held that a *probation condition* under **P.C. §1203.067(b)(3)**, requiring waiver of the privilege against self-incrimination and participation in polygraph examinations, *does not* violate the **Fifth Amendment** and is *not* overbroad, as interpreted to require that probationers answer all questions fully and truthfully, knowing that compelled responses cannot be used against them in a subsequent criminal proceeding. A probationer must be advised, before treatment begins, that no compelled statement (or the fruits thereof), elicited in the course of the mandatory sex offender management program, may be used against the probationer in a criminal prosecution. Also, mandating that sex offenders waive any psychotherapist-patient privilege does not violate the right to privacy as construed to intrude on the privilege only to the limited extent specified in the condition itself. (*People v. Garcia* (2017) 2 Cal.5th 792, at pp. 800-814.)

Defendant, having served five years in prison and while on five years of subsequent supervised release, was to abide by certain conditions including that the was to refrain from committing any new crimes or use controlled substances, and to “answer truthfully all inquiries by [his] probation officer and [to] follow the instructions of [his] probation officer.” After twice testing positive for drugs in his system, he admitted to his probation officer, signing a statement to the effect, that he had been selling marijuana and cocaine. Defendant’s probation officer then petitioned the district court to revoke’s his term of supervised release pursuant to **18 U.S.C. § 3583(e)**, alleging that defendant had violated the condition of his supervision prohibiting him from breaking the law. Defendant appealed the district court’s ruling that he did in fact violate the conditions of his supervised release, arguing that the use of these statements violated the **Fifth Amendment**. The Fourth Circuit Court of Appeal affirmed, ruling that case authority (*United States v. Riley* (4th Cir. 2019) 920 F.3rd 200.) has already held that the **Self-Incrimination Clause** is violated “only if [the self-incriminating] statements are used in a criminal trial.” In *Riley*, the court concluded that supervised release revocation proceedings pursuant to **18 U.S.C. § 3583(e)** “are not part of the underlying criminal prosecution.” As a result, the Court held that the introduction of compelled self-incriminating statements in supervised

release proceedings pursuant to § 3583(e) does not violate a defendant's rights under the **Self-Incrimination Clause**. Because of its previous holding in *Riley*, which remains valid law, the Court affirmed the district court's denial of defendant's motion to suppress. (*United States v. Ka* (4th Cir. 2020) 982 F.3rd 219.)

In a First Circuit Court of Appeal case, defendant had been convicted of possession of child pornography and sentenced to a term of imprisonment followed by a period of supervised release with a condition that he "submit to periodic random polygraph examinations." The condition provided that "[n]o violation proceedings will arise solely on the defendant's failure to pass a polygraph examination, or on the defendant's refusal to answer polygraph questions based on **5th amendment** grounds," but it added that "[s]uch an event could, however, generate a separate investigation." During one polygraph examination, defendant's negative responses to questions concerning whether he had viewed pornography on the Internet were considered to be deceptive. Afterward, he admitted to the examiner that he had viewed pornography on the Internet. Prior to a follow-up polygraph examination, defendant signed a consent form indicating that he "consent[ed] voluntarily" to the examination and understood that he did "not have to take this examination . . . and [he could] stop this examination at any time." Again, defendant admitted to the examiner that he had viewed pornography on the Internet and several of his answers to other pornography-related questions were deemed to be deceptive. Based on defendant's confessions, polygraph failures, and poor performance in sex offender treatment, his probation officer filed a petition to revoke his supervised release. After a hearing, the district court revoked defendant's supervised release, sentencing him to prison and eight additional years of supervised release. The court based its judgment on defendant's violations of the special conditions that he abide by the Computer and Internet Monitoring Program and that he fully participate in the sex offender treatment program. Defendant appealed, claiming that the polygraph examination condition of his supervised release and the examinations themselves compelled him to make incriminating statements in violation of the **Fifth Amendment**. First, the Court recognized that it is settled law in the First Circuit that a court can impose mandatory periodic polygraph examinations in connection with sex offender treatment programs as a condition of supervised release, where the condition prohibits basing any revocation in any way on the defendant's assertion of his **Fifth Amendment** privilege. Second, the Court noted that although the general rule is for testimony to be considered "*compelled*" within the meaning of the **Self Incrimination Clause** of the **Fifth Amendment**, "the privilege must be claimed when self-incrimination is threatened." If a person does not invoke the privilege and chooses to speak, any testimony will *not* be considered to have been "compelled," but rather "voluntary." Third, in accordance with this

general rule, a probationer's "obligation to appear and answer questions truthfully" does not automatically make a probationer's statements "compelled," unless the probationer invokes the privilege but is nevertheless required to answer questions. Fourth, there are several exceptions to the general rule that require an individual to invoke the privilege in order for any subsequent testimony to be considered compelled. One of these "self-executing" exceptions is called the "*penalty exception*." The penalty exception is triggered in situations where a person's right to invoke his **Fifth Amendment** privilege is penalized, such that he can be considered to have been deprived of a "free choice" between testifying and remaining silent. The Court recognized that one "classic penalty situation" is when the government, "either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation." In that situation, the exception would operate such that any testimony elicited from the probationer is "deemed compelled and inadmissible in a criminal prosecution." Against this backdrop, the Court held that defendant's **Fifth Amendment** privilege against self-incrimination was not violated because he never asserted or attempted to assert the privilege. The court rejected defendant's argument that it should create an exception to the general rule that the privilege should automatically apply to protect anyone undergoing a polygraph examination, on the grounds that such examinations inherently will elicit involuntary responses. The court found that Rogers's position was contradicted by First Circuit case law, which allows periodic polygraph examinations as a condition of supervised release, where the condition makes clear that the person under supervised release may invoke his **Fifth Amendment** privilege without penalty. In this case, the court noted that the polygraph condition of defendant's supervised release included this language. The Court further held that the penalty exception did not apply. The Court found the polygraph condition's qualifier that "[n]o violation proceedings will arise solely on the defendant's failure to pass a polygraph examination, or on the defendant's refusal to answer polygraph questions based on **5th Amendment** grounds" was sufficient to defeat any notion that defendant had that he would be penalized for asserting the privilege against self-incrimination. (*United States v. Rogers* (1st Cir. 2021) 988 F.3rd 106.)

Questioning by an Undercover Police Officer or Agent:

Rule: An undercover law enforcement officer posing as an inmate, or on the street, is not required to *Mirandize* the suspect before questioning him on a new case for which he has not yet been charged. (*Illinois v. Perkins* (1990) 496 U.S. 292 [110 L.Ed.2nd 243]; *People v. Webb* (1993) 6 Cal.4th 494, 525-526; *People v. Mayfield* (1997) 14 Cal.4th 668, 758; *People v. Rodriguez* (2019) 40 Cal.App.5th 194, 198.)

The same rule applies to conversations between a defendant and co-suspects or undercover agents of law enforcement. (*United States v. Birbal* (2nd Cir. 1997) 113 F.3rd 342, 346; *People v. Fayed* (2020) 9 Cal.5th 147, 164-165.)

As does questioning by officers posing as civilians. (*United States v. Whitcomb* (Vermont 1997) 968 F.Supp. 163.)

Defendant's phone calls to his wife from jail, recorded by the wife at the suggestion of law enforcement, does not require a *Miranda* admonishment. (*People v. Wojtokowski* (1985) 167 Cal.App.3rd 1077, 1081.)

It is not improper to *surreptitiously tape record* an interrogation. (*People v. Jackson* (1971) 19 Cal.App.3rd 95, 101.)

Defendant's incriminating statements made to an informant put into his holding cell, and who dressed and acted like an inmate, were held to be admissible. The Court rejected defendant's argument that his statements were involuntary because his will was overcome by an "older gang member" to whom defendant was obligated to "show respect to, gain respect from, and gain protection from." (*People v. Rodriguez* (2019) 40 Cal.App.5th 194, 198-199.)

Because questioning by an undercover agent does not involve the "inherent coerciveness" of an interrogation by law enforcement in a "police-dominated atmosphere" that *Miranda* was intended to offset, a *Miranda* advisal and waiver is not required. (*People v. Fayed* (2020) 9 Cal.5th 147, 164-165.)

Note: Not to mention that an undercover agent advising an in-custody suspect of his rights would tend to defeat the whole purpose of being undercover.

See "Use of an Undercover Police Agent," under "The Admonition" (Chapter 6), below.

Limitations: Questioning an in-custody suspect by undercover officers may be *illegal* under (at least) two specific circumstances:

Under the **Fifth Amendment**: If the suspect invoked his *Miranda* rights by specifically asking for an attorney when originally taken into custody, and there has been no break in custody (See "Subject Released from Custody," above), then he or she is off limits to all questioning concerning any potential charge for at least 14 days since his invocation. (*Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2nd 1045]; *People v. Crittenden*

(1994) 9 Cal.4th 83, 128; see also *People v. Sims* (1993) 5 Cal.4th 405, 440.)

Under the **Sixth Amendment**: Questioning a suspect about the specific case for which he or she has already been formally charged (i.e., arraigned in court) is a **Sixth Amendment** violation, and illegal, whether in or out of custody. (*Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2nd 246; *Maine v. Moulton* (1985) 474 U.S. 159 [88 L.Ed.2nd 481].)

Massiah, however, involved an undercover officer soliciting incriminating information from an out-of-custody defendant after the defendant's arraignment. The Supreme Court has ruled since then that had the officer first advised defendant of his **Sixth Amendment** right to counsel and obtained a waiver of that right (a procedure obviously not conducive to an undercover situation), there would have been no error in talking to the defendant without the presence of his attorney. (See *Montejo v. Louisiana* (2009) 556 U.S. 778 [173 L.Ed.2nd 955].)

Chapter 6: The Admonition

Miranda's Pre-Interrogation Admonition and Waiver Requirement:

Rule: “In order to assure protection of the **Fifth Amendment** right against self-incrimination under ‘*inherently coercive*’ circumstances, a suspect may not be subjected to an interrogation in official ‘*custody*’ unless he has previously been advised of, and has knowingly and intelligently waived, his rights to silence, to the presence of an attorney, and to appointed counsel if he is indigent.” (*People v. Boyer* (1989) 48 Cal.3rd 247, 271; citing *Miranda v. Arizona*, *supra*, at p. 467 [16 L.Ed.2nd 719]; See also *Berghuis v. Thompkins* (2010) 560 U.S. 370, 382-285 [130 S.Ct. 2250; 176 L.Ed.2nd 1098.]; *People v. Neal* (2003) 31 Cal.4th 63, 67.)

“Before being subjected to ‘custodial interrogation,’ a suspect ‘must be warned he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.’” (*People v. Kopatz* (2015) 61 Cal.4th 62, 80, quoting *People v. Lenard* (2007) 40 Cal.4th 1370, 1399-1400.).)

“To ensure that the use of such psychological tactics to exploit a suspect’s vulnerabilities do not run afoul of the **Fifth Amendment**, *Miranda* set a clear bright-line rule: ‘Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney. . . .’” (*Sessoms v. Grounds* (9th Cir. 2015) 776 F.3rd 615, 622; quoting *Miranda* at p. 444.)

“(P)rosecutors may not admit a suspect’s statements in their case in-chief against the suspect-defendant unless: (1) the defendant was advised that (a) ‘he has a right to remain silent,’ (b) anything he says ‘may be used as evidence against him,’ (c) ‘he has a right to the presence of an attorney,’ and (d) the defendant will be provided an attorney if he cannot afford one; (2) the defendant waived those rights, either expressly (by affirmatively indicating a waiver) or implicitly (by answering questions); and (3) prior to making the statements to be admitted, the defendant did not invoke either his right to remain silent or his *Miranda* right to an attorney.” (*In re J.W.* (2020) 56 Cal.App.5th 355, 359; quoting *People v. Orozco* (2019) 32 Cal.App.5th 802, 811; while noting that “*Miranda’s* protections apply to juveniles as well as adults,” citing *In re Roderick P.* (1972) 7 Cal.3rd 801, 810–811.)

“In a custodial interrogation, ‘the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.’ (*Miranda*, *supra*, 384 U.S. at p. 467.) ‘[F]ailure to give the prescribed warnings and obtain a waiver of rights before custodial

questioning generally requires exclusion of any statements obtained.’ ((*Missouri v. Seibert* ((2004)) 542 U.S. (600,) at p. 608 ([124 S.Ct. 2601; 159 L.Ed.2nd 643].))” (*People v. Sumagang* (2021) 69 Cal.App.5th 712, 725.)

The Necessity of Custody:

Absent custody, there is no need to admonish a suspect of his rights under *Miranda*. (*United States v. Bassignani* (9th Cir. 2009) 575 F.3rd 879, 883, citing *United States v. Kim* (9th Cir. 2002) 292 F.3rd 969, 973: “An officer’s obligation to give a suspect *Miranda* warnings before interrogation extends only to those instances where the individual is ‘in custody.’”)

(See “*Custody*” (Chapter 2), above.)

The Necessity of an Interrogation:

Absent an intent to question an in-custody suspect, there is no need to administer a *Miranda* advisal. (see *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-302 [64 L.Ed.2nd 297, 307-308].)

Exception: Some jurisdictions, including California and federal, require all juveniles to be *Mirandized* upon being taken into custody, whether or not they are ever interrogated. (E.g., **18 U.S.C. § 5033, Calif. Wel. & Insti. Code, § 625.**)

Note: Absent some tactical (or department policy) reason for not doing so, there is never any good reason for a peace officer who takes a criminal suspect into custody not to admonish and (upon a waiver) question him or her concerning the cause of the arrest.

(See “*The Custodial Interrogation*” (Chapter 3), above.)

Exceptions to Necessity of an Admonition: See “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

Form of the Admonition:

There are *Four Distinct Rights* involved in a *Miranda* admonishment:

1. “*Right not to incriminate oneself;*” expressly provided for under the **Fifth Amendment**;
2. . . . *and* that anything the person might say can and will be used against him or her in a court of law; *and*

3. “*Right to the assistance of an attorney;*” impliedly provided for under the **Fifth Amendment**;
4. . . . *and* that if the person cannot afford an attorney, one will be provided for him, before and during questioning, free of charge.

(*Miranda v. Arizona*, *supra*, at p. 479; *Connecticut v. Barrett* (1987) 479 U.S. 532 [93 L.Ed.2nd 920]; *People v. Martinez* (2010) 47 Cal.4th 911, 947; *People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 215; *United States v. IMM* (9th Cir. 2014) 747 F.3rd 754, 764.)

Note: The **Sixth Amendment** “*right to an attorney*” is a completely separate, unrelated issue. (See “**Sixth Amendment Right to Counsel**,” under “*Suppression Issues and Procedures*” (Chapter 13), below.)

No Specific Wording Required: **Miranda** does not require any specific language to be used, so long as the *suspect's constitutional rights are reasonably conveyed*. (*Duckworth v. Eagan* (1989) 492 U.S. 195, 197-205 [109 S.Ct. 2805; 106 L.Ed.2nd 166, 173-178]; *United States v. Loucious* (9th Cir. 2017) 847 F.3rd 1146, 1149; *People v. Suarez* (2020) 10 Cal.5th 116, 158-160.)

Miranda does not require a “*talismanic incantation*” or “*precise formulation*.” Warnings in a form equivalent to the language in the **Miranda** decision are sufficient. (*California v. Prysock* (1981) 453 U.S. 355, 359-360 [69 L.Ed.2nd 696, 701].)

“The essential inquiry is simply whether the warnings reasonably ‘[c]onvey to [a suspect] his rights as required by **Miranda**.’” (*People v. Wash* (1993) 6 Cal.4th 215, 236-237; officer forgot to indicate that he could have counsel *during* the interrogation; no violation.)

A reviewing court need not examine the **Miranda** warnings “as if it were construing a will or defining the terms of an easement.” (*People v. Kelly* (1990) 51 Cal.3rd 931, 948-949.)

There is no requirement that the suspect be told that he “can decide at anytime to exercise these (**Miranda**) rights and stop talking.” (*Mock v. Rose* (6th Cir. 1972) 472 F.2nd 619, 621-622.)

Note: In order to simplify, and make more accurate, the **Miranda** admonition, the trend is to recommend the use of the phrase “*may be*

used” as opposed to “*can and will be used*,” when telling the suspect about the possible use of his statements against him later in court.

Chief Justice Warren uses “*may*” at one point in the *Miranda* decision (p. 444 [16 L.Ed.2nd at p. 707], “*can and will*” in another (p. 469 [16 L.Ed.2nd at pp. 720-721], and “*can*” in yet a third. (p. 479 [16 L.Ed.2nd at p. 726].

However, telling a defendant that what he says “*will not necessarily be held against him*” is improper, and will likely invalidate any subsequent waiver. (*People v. Hinds* (1984) 154 Cal.App.3rd 222, 230, 234-235.)

A detective told defendant: “You have the right to the presence of an attorney *before and during* any questioning. Do you understand that?” After defendant responded affirmatively, the detective made the following statement: “If you cannot afford an attorney, one will be appointed for you free of charge before any questioning, if you want. Do you understand that?” Defendant responded, “Yes, sir,” and did not invoke his right to counsel. Later, he was advised again, but told only that he had a right to counsel *before questioning*. The Court held this to be legally sufficient. (*People v. Sta Ana* (2021) 73 Cal.App.5th 44, 53-55.)

Suggested Wording:

Per the below-listed case law, and while it is risky to play with *the wording* of the admonishment, *the manner and method of delivery* may be altered, particularly if it serves to simplify and make the warning more understandable. For instance:

- “*You have the right to remain silent. Do you understand that right?*”
- “*If you give up the right to remain silent, anything you say may be used against you in a court of law. Do you understand that right?*”
- “*You have the right to have an attorney present before and during any questioning. Do you understand that right?*”
- “*If you cannot afford an attorney, one will be appointed for you by the court at no cost to you. Do you understand that?*”

Note: Asking after each listed right whether the subject understands is not required by the case law, but is a good practice, making it clear that there is no confusion, and giving the officer an opportunity to further explain a right where there is some confusion. (E.g., see **People v. Suarez** (2020) 10 Cal.5th 116, 154.) Such a technique is particularly valuable when the suspect has some problem understanding what is going on, e.g., he is under the influence of alcohol or drugs, is injured, is mentally impaired, or in the case of juveniles.

- “*Then, do you wish to talk to me?*” (or “*. . . answer my questions?*”) (or “*. . . give me your version of what happened?*”), etc.

At the very least, an in-custody suspect, prior to interrogation, must be told “*that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to (and during) any questioning if he so desires.*” (**Berghuis v. Thompkins** (2010) 560 U.S. 370 [130 S.Ct. 2250; 176 L.Ed.2nd 1098]; citing **Miranda v. Arizona**, *supra*, at p. 479; see also **People v. Lujan** (2001) 92 Cal.App.4th 1389.)

Providing an Attorney:

Note, however, there is no actual obligation on the part of law enforcement to provide defendant with an attorney at the interrogation. Upon invoking his right to counsel, it is not improper for the police to tell defendant that he will not see his appointed counsel until his arraignment. (**People v. Enraca** (2012) 53 Cal.4th 735, 756.)

The Supreme Court in **Miranda** did not intend for police departments to have a “station house lawyer” present and available should an in-custody suspect invoke ask for the assistance of an attorney. (**Duckworth v. Eagan** (1989) 492 U.S. 195, 204 [109 S.Ct. 2805; 106 L.Ed.2nd 166].)

“If the police cannot provide appointed counsel, **Miranda** requires only that the police not question a suspect unless he waives his right to counsel.” (**People v. Smith** (2007) 40 Cal.4th 483, 503.)

However, effective January 1, 2018, **Wel. & Inst. Code § 625.6** was added (**SB 395**), providing juveniles 17 years of age and

younger with mandatory access to an attorney prior to being advised of their rights, for the purpose of advising the suspect.

See “W&I § 625.6; *Minors Age 17 and Younger, and Mandatory Attorney Consultations*,” under “*Juveniles & Miranda*” (Chapter 10), below.

Providing an Attorney “Before” and “During” Questioning:

Miranda warnings that advised the defendant he had the right to the services of an attorney *before* questioning without also specifying that he also had the right to counsel *during* questioning, have been held to be legally insufficient. (See ***United States v. Noti*** (9th Cir. 1984) 731 F.2nd 610, 615; and ***United States v. Bland*** (9th Cir. 1990) 908 F.2nd 471, 474; see also ***People v. Sta Ana*** (2021) 73 Cal.App.5th 44, 53-55.)

Failing to advise an in-custody suspect that he has the right to the assistance of an attorney either “*during*” or “*before*” his interrogation, may result in a legally insufficient admonishment. (***People v. Lujan*** (2001) 92 Cal.App.4th 1389; but see below.)

Although the ***Lujan*** Court pointed out that we can probably get away with failing to tell the suspect of his right to the assistance of an attorney *during* questioning (see ***People v. Wash*** (1993) 6 Cal.4th 215, 236-237.), or that he can have an attorney *before* questioning (see ***People v. Kelly*** (1990) 51 Cal.3rd 931, 947-949.), telling him only that he has a right to the assistance of an attorney without specifying at least one of the two; “*before*” or “*during*,” is legally insufficient.

The Supreme Court has never specifically decided this issue. However, in ***Florida v. Powell*** (2010) 559 U.S. 50, 60 [130 S.Ct. 1195; 175 L.Ed.2nd 1009], while noting that the “Court has not dictated the words in which the essential information [of ***Miranda***] must be conveyed,” the Court upheld the admonishment where defendant was advised that he had “the right to talk to a lawyer before answering any of our questions” and “the right to use any of these rights at any time [he] want[ed] during this interview.” (***Id.*** at p. 54.)

See also See ***Duckworth v. Eagan*** (1989) 492 U.S. 195, 202 [109 S.Ct. 2805; 106 L.Ed.2nd 166].)

Merely telling a suspect that; “. . . if you don't have money to hire an attorney, one's appointed to represent you free of charge” is legally insufficient to convey to the suspect that he has the right to the assistance of counsel before and/or during an interrogation. (*Lujan v. Garcia* (9th Cir. 2013) 734 F.3rd 917, 930-933.)

More recently, the courts tend to be more lenient. For instance, where defendant was advised that he had the right to an attorney “prior to” questioning, and was also advised that he “ha[d] the right to an attorney,” the admonishment was upheld over defendant’s objection that he was not specifically told that he had the right to counsel “during” the questioning, finding that as read to him, his rights were “reasonably conveyed.” (*Balbuena v. Sullivan* (9th Cir. Aug. 17, 2020) 970 F.3rd 1176, __; citing *Florida v. Powell*, *supra*.)

And see *United States v. Clayton* (6th Cir. MI 2019) 937 F.3rd 630, where it was held that failing to tell defendant that he had the right to assistance of counsel “during” questioning” held to be irrelevant, in that by telling him that he had the right to counsel “before” questioning reasonably conveyed to him his constitutional rights; noting that *Miranda* requires only that a suspect be told that he has the right to counsel, without necessarily specifying either “before” or “during” the interrogation.

Advisements That Have Fallen Short:

Telling an in-custody suspect, in response to the suspect’s question about an attorney, that he would see one “tomorrow,” is improper and negates the effect of the admonishment itself. (*Pope v. Zenon* (9th Cir. 1995) 69 F.3rd 1018, 1024.)

Similarly, failing to advise an in-custody suspect that what he says can and will be used against him in court is reversible error. (*People v. Bradford* (2008) 169 Cal.App.4th 843.)

The Court in *Bradford* also noted the long-standing rule that evidence to the effect the suspect had prior knowledge of his rights is irrelevant. Although circumstantial evidence of that knowledge might be admissible to substantiate his understanding of an ambiguously worded right as provided in the admonishment, where the right is not discussed at all in the admonishment, such evidence is irrelevant. “No amount of circumstantial evidence that the person may have been aware of (the omitted) right will

suffice to stand in its stead.” (*Id.*, at p. 851; quoting *Miranda v. Arizona*, *supra.*, at pp. 471-472.)

A foreign language *Miranda* admonishment, telling a suspect that he had the right to “*solicit*” the court for a lawyer if he could not afford one, was held to be legally insufficient. (*United States v. Perez-Lopez* (9th Cir. 2003) 348 F.3rd 839.)

Similarly, in a Spanish-language admonishment, using the term “*libre*,” intending to tell the defendant that he could have a “free” attorney, is insufficient in that “*libre*” actually means “*to be available or at liberty to do something*.” Also, telling defendant “*that a lawyer who is free could be appointed*” is legally inadequate. Phrased like this makes it sound like the right to appointed counsel is contingent on the approval of a request or on the lawyer’s availability, rather than the government’s absolute obligation to provide one. Lastly, the fact that an earlier English *Miranda* advisal was also given doesn’t help in that the defendant is not expected to be able to tell which one of the two conflicting admonishments is correct. (*United States v. Botello-Rosales* (9th Cir. 2013) 728 F.3rd 865.)

See “*Foreign Language Advisements*,” below.

Telling a suspect that the *Miranda* admonishment is “*not meant to scare him*” and not to “*take them out of context*,” and then particularly; “*I don’t want you to feel that because I’m reading this to you that we necessarily feel that you’re responsible for anything*,” tends to infer that the warnings are a mere formality and that he need not take them seriously. Such an attempt to minimize the importance of the rights weakens the value of the admonishment and risks suppression of the resulting statements. (*Doody v. Ryan* (9th Cir. 2011) 649 F.3rd 986, 1002-1007.)

The Court further held that the interrogator’s comments inferring that an attorney was really only necessary if he was guilty was also improper, but not enough, by itself and under the circumstances, to invalidate the defendant’s waiver. (*Id.*, at pp. 1026, 1029.)

Advisements That Have Been Upheld:

Telling a defendant that a lawyer would be appointed for him “if and when you go to court,” was held not to violate *Miranda* in light of the other warnings given. (*Duckworth v. Eagan* (1989) 492 U.S. 195, 197-205 [109 S.Ct. 2805; 106 L.Ed.2nd 166, 173-178].)

A Spanish translator's version held to be sufficient, so long as the warnings given conveyed the substance of the suspect's rights. (*United States v. Hernandez* (10th Cir. 1996) 93 F.3rd 1493, 1501-1502.)

An erroneous recitation of his *Miranda* rights given by the defendant to the interrogator did not invalidate the defendant's subsequent statements where the record reflected his knowledge and understanding of his rights. (*People v. Nitschmann* (1995) 35 Cal.App.4th 677, 682.)

An ambiguous admonition was cured by other direct evidence of defendant's knowledge of his rights. (*People v. Winkler* (1986) 178 Cal.App.3rd 750.)

Leaving out the words "*in court*," held to be of no significance in light of the circumstances, where the evidence showed that defendant was otherwise fully advised and acknowledged that he understood his rights. He was told that his responses would be used against him. He was an ex-felon who would have been familiar with the *Miranda* admonishment. Also, the detective conspicuously took detailed notes as the interview progressed. (*People v. Samayoa* (1997) 15 Cal.4th 795, 831.)

Failing to make it clear to defendant that he was entitled to a free attorney *both before and during* questioning did *not* invalidate the admonishment. (*People v. Thompson* (1990) 50 Cal.3rd 134, 165.)

Reading a defendant's rights from a preprinted form in the first person (e.g.; "Anything I say can and will be used against me in court.") was not so confusing so as to make the admonishment legally inadequate. (*People v. Mayfield* (1993) 5 Cal.4th 142, 170.)

The United States Supreme Court found that telling a suspect that he has "the right to talk to a lawyer before answering any of our questions" and then; "[y]ou have the right to use any of these rights at any time you want during this interview," although not the "*clearest possible formulation*" of the suspect's rights, was legally sufficient. (*Florida v. Powell* (2010) 559 U.S. 50 [175 L.Ed.2nd 1009].)

At the initiation of an interrogation, following up a standard request for an express waiver with the more specific, "*I want to talk to you about what you've been doing over the last couple of days. Can I talk to you about that?*" does not improperly dilute the

required admonishment. Noting that “**Miranda** and its progeny have never mandated some sort of talismanic recitation,” the California Supreme Court ruled simply that there was nothing improper about the detective’s two requests for a waiver even if different language was used. (*People v. Hensley* (2014) 59 Cal.4th 788, 809.)

An interrogating officer should not “*downplay*” the importance of the **Miranda** admonishment. To do so might mislead the defendant as to what he is giving up upon a waiver. However, telling the suspect that the admonishment is something the officer “*has to do*” because it “*is the law*” was held to be appropriate, impressing upon the defendant the importance of the admonishment and, in effect, apprising him that he was in custody. (*Juan H. v. Allen* (9th Cir. 2005) 408 F.3rd 1262, 1271-1272.)

It has been held that “a defendant need not be informed of a right to stop questioning after it has begun.” (*United States v. Crumpton* (6th Cir. 2106) 824 F.3rd 593; also holding that while the words “*in court*” should follow the admonition that his statements will be used against him, it is not reversible error to admit these words. The Court further held that telling defendant that they were not going to court that day was not misleading.

Before the start of a custodial interrogation, defendant received warnings informing him he had the right to remain silent; he had the right to the presence of an attorney “during questioning;” and that if he could not afford an attorney, “an attorney would be appointed before questioning.” Defendant moved to suppress the statements he made during the custodial interrogation, arguing that the **Miranda** warnings he received were constitutionally deficient because they did not tell him of his right to “*consult*” with an attorney “before questioning.” The district court’s granting of that motion was reversed on appeal, the Ninth Circuit ruling that **Miranda** warnings need not follow a precise formulation, and that the admonition as given, which included the fact that an attorney would be appointed “before questioning,” reasonably conveyed to defendant that he had the right to consult an attorney before questioning. (*United States v. Loucious* (9th Cir. 2017) 847 F.3rd 1146, 1149-1151; citing as its authority the Court’s own prior decisions of *United States v. Noa* (9th Cir. 1971) 443 F.2nd 144; and *People of the Territory of Guam v. Snaer* (9th Cir. 1985) 758 F.2nd 1341.)

A Spanish-language admonishment form, where some of the words in the advisement form could have been more precise, was held to

have adequately conveyed to defendant his rights as required by the *Miranda* decision. (*People v. Suarez* (2020) 10 Cal.5th 116, 158-160.)

When Combined with Other Admonishments:

Care needs to be taken to separate a *Miranda* admonishment from any other admonishment that might contain contradicting information. For instance, giving an undocumented alien an “Administrative Rights” admonishment, pertaining to the subject’s immigration status, during which he is told that the government will *not* supply him with a free attorney, followed closely by a *Miranda* admonishment where he is told that a free attorney *will* be appointed for him, is confusing and, potentially, legally insufficient. (*United States v. San Juan-Cruz* (9th Cir. 2002) 314 F.3rd 384.)

In *San Juan-Cruz*, defendant’s *Miranda* admonishment was closely preceded by reading him his Administrative Rights, per 8 C.F.R. § 287.3, where he was told that he was *not* entitled to a free attorney in civil deportation proceedings. Expecting defendant to know the difference between the two sets of rights without clarifying the difference for him was held to be “an unfair burden to impose on an individual already placed in a position that is inherently stressful. (*Id.*, at p. 388.)

But, a *Miranda* admonishment, followed by an “INS Form I-867A” admonishment, explaining to the defendant why the Immigration and Naturalization Service was questioning him and that also told him that “any statement you make may be used against you in this or any subsequent administrative proceeding,” did not mislead the defendant. There was nothing in the second admonishment that limited or negated the original *Miranda* warning. (*United States v. Superville* (Virgin Islands, 1999) 40 F.Supp.2nd 672, 689-690.)

It was held to be error to admit into evidence a 10-year-old minor’s pre-*Miranda* custodial admission of guilt made in response to questions from a detective relating to whether he understood the wrongfulness of his actions and had the capacity to commit a crime, as required by P.C. § 26. However, the error was harmless because the minor repeatedly told officers that he had shot his father in other admissible statements. The minor’s subsequent waiver was voluntary. (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 529-533.)

The so-called “*Gladys R.*” admonishment, per *In re Gladys R.* (1970) 1 Cal.3rd 855 and P.C. § 26, done for the purpose of establishing by “clear evidence” that a minor under the age of 14 years understands the wrongfulness of his act, should be administered only *after* the minor is advised of his *Miranda* rights. (*In re Joseph H.*, *supra*, at p. 532.) If the minor invokes his rights, then while the admonishment should still be administered, it is understood that his responses will not be admissible against him at trial on the issue of guilt or innocence.

Note: This problem might be an issue in those cases where a local law enforcement officer advises a suspect arrested for driving while under the influence of alcohol of his duty to submit to a blood or breath test, per Veh. Code § 23612, such advisal being closely followed or preceded by an advisal of the subject’s *Miranda* rights. In the former, he may be told that he does not have the right to the assistance of an attorney, where in the later, he is told the opposite. This inconsistency should be explained to him and noted in the arrest report.

Discouraging an Invocation:

Discouraging a suspect from obtaining the assistance of counsel by telling him that, “*a lawyer, he’s gonna say forget it. You know, don’t talk to the police,*” only serves to demean the pre-trial role of counsel, and is an “unauthorized legal opinion regarding whether [the suspect] should remain silent and exercise his right to counsel.” (*Collazo v. Estelle* (9th Cir. 1991) 940 F.2nd 411, 414.)

See also *Lujan v. Garcia* (9th Cir. 2013) 734 F.3rd 917, 932, where a police interrogator telling suspect; “*I doubt that if you hire an attorney they’ll let you make a statement, usually they don’t,*” held to be the same type of unauthorized legal opinion, and improper.

However, *after* an admonishment and waiver, and after the officer described the facts of the case as he believed them to be, exhorting defendant to tell his “side of the story,” and telling him that if “(y)ou don’t take this chance right now, you may never get it again. And if you don’t think I can’t prove this case, if you don’t think I can’t fry you, you’re sadly mistaken, Chris. Now, don’t let these guys lay it all on you ‘cause that’s what’s happening. You get a chance to lay some back and say exactly what happened. Whose idea was it?”, was held to be a proper interrogation tactic, and not coercion. (*People v. Spencer* (2018) 5 Cal.5th 642, 671-675.)

But note that after defendant invoked his right to counsel, telling defendant that he was to be booked for murder while inferring that it was because he (the detective) hadn't yet heard his (the defendant's) side of the story, held to be the functional equivalent of an interrogation as opposed to mere booking questions, causing defendant to agree to reinitiate the questioning, held to be "badgering," and legally improper. Defendant decision to reinitiate the questioning was not free and voluntary. (*Martinez v. Cate* (9th Cir. 2018) 903 F.3rd 982, 994-996.)

Detectives telling defendant during an interrogation that they would be "*precluded*" from talking to him again if he chose to take a break until the next day and he spoke with a lawyer—that they would not be able to speak with him again, "period,"—"was certainly an exaggeration" The court noted that represented suspects can, of course, speak with law enforcement officials if they choose, and that it was unclear whether the detectives intended to deceive defendant on this point. "(W)hat the detectives may have meant to convey is that a lawyer would likely advise against speaking with detectives, meaning that, from their perspective, they almost certainly would not have another opportunity to speak with defendant." Defendant contended that the detectives' statements were deceptive and that their deception undermined the voluntariness of his statements. The Court held, however, that "(w)hile the use of deception or communication of https://advance.lexis.com/search/?pdmfid=1000516&crd=711b56a3-864a-4466-b1b4-0dc6a13f4d02&pdsearchterms=8+Cal.5th+892&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqtype=and&pdquerytemplatedid=&ecomp=973_9kk&earg=pdsf&prid=042043d0-d4ae-472a-9b30-1e2a044ce856 false information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness." (citing *People v. Hogan* (1982) 31 Cal.3rd 815, 840–841. Here, however, the detectives had previously reminded defendant that he had the right to remain silent and the right to speak with a lawyer. Defendant responded to the exchange by asking for clarification about when a lawyer would contact him, then went on to ask whether he had been helpful to the detectives, and the conversation continued from there. Based upon this, the record does not support defendant's claim that he was coerced into continuing to speak with detectives after he had asked for a break. (*People v. Hoyt* (2020) 8 Cal.5th 892, 934.)

Foreign Language Advisements:

Advisement of rights in a foreign language may result in an insufficient advisement if the proper words are not used. (*People v. Diaz* (1983) 140 Cal.App.3rd 813, 822; Spanish word for “to get” was used instead of “to afford” an attorney; advisement held to be legally insufficient.)

The lack of experience on the part of an interpreter, not understanding the legal significance of a complete advisement, may also complicate issues later in court. (See *United States v. Farouil* (7th Cir. 1997) 124 F.3rd 838, 841-843; civilian interpreter in French did not remember giving a *Miranda* admonishment or seeing defendant sign a waiver.)

“A translation of a suspect’s *Miranda* rights need not be perfect if the defendant understands that he or she need not speak to the police, that any statement made may be used against him or her, that he or she has a right to an attorney, and that an attorney will be appointed if he or she cannot afford one.” (*United States v. Hernandez* (10th Cir. 1996) 93 F.3rd 1493, 1502.)

The fact that defendant had been educated in the English language did not overcome the fact that his ability to speak and understand the spoken word was “rudimentary.” A Mandarin Chinese interpreter’s failure to correctly translate the fact that anything defendant said could be used in court against him, that he had a right to an attorney before or during the interrogation, and that the court would appoint one for him if he couldn’t afford it, resulted in a legally inadequate admonition. (*People v. Jiang* (2005) 131 Cal.App.4th 1027, 1034-1044.)

A foreign language *Miranda* admonishment, telling a suspect that he had the right to “solicit” the court for a lawyer if he could not afford one, was held to be legally insufficient. (*United States v. Perez-Lopez* (9th Cir. 2003) 348 F.3rd 839.)

Similarly, in a Spanish-language admonishment, using the term “*libre*,” intending to tell the defendant that he could have a “free” attorney, is insufficient in that “*libre*” actually means “to be available or at liberty to do something.” Also, telling defendant “that a lawyer who is free could be appointed” is legally inadequate. Phrased like this makes it sound like the right to appointed counsel is contingent on the approval of a request or on the lawyer’s availability, rather than the government’s absolute

obligation to provide one. Lastly, the fact that an earlier English *Miranda* advisal was also given doesn't help in that the defendant is not expected to be able to tell which one of the two conflicting admonishments is correct. (*United States v. Botello-Rosales* (9th Cir. 2013) 728 F.3rd 865.)

An officer may normally testify to a third party's translation of the defendant's statements without use of the interpreter in court. (**Evid. Code § 1222**)

“(T)he translator is normally to be viewed as an agent of the defendant; hence the translation is attributable to the defendant as his own admission.” (*United States v. DaSilva* (2nd Cir. 1983) 725 F.2nd 828, 832-832; see also *People v. Torres* (1989) 213 Cal.App.3rd 1248, 1258-1259.)

However, when the accuracy of the translation becomes the issue, requiring the interpreter to testify in court would seem to be inevitable. Using an untrained, civilian interpreter may cause serious litigation over the legal sufficiency of the admonishment as given. (See *United States v. Hernandez* (10th Cir. 1996) 93 F.3rd 1493, 1501-1502.)

It is therefore good practice to use an interpreter who is credible, available to testify in court, and not antagonistic to the prosecution's efforts.

On appeal, the trial court's findings concerning the sufficiency of a foreign language advisement will be upheld if supported by the record. (*People v. Marquez* (1992) 1 Cal.4th 553, 570; trial court's findings upheld despite conflicting possible interpretations of advisement used by police detective.)

A Spanish-language admonishment form, where some of the words in the advisement form could have been more precise, was held to have adequately conveyed to defendant his rights as required by the *Miranda* decision. (*People v. Suarez* (2020) 10 Cal.5th 116, 158-160.)

The language used in the form complained about by defendant on appeal was as follows: The word “civil” in the form's title did not encompass criminal; the word “*silencio*” in the first sentence could mean “to be still [or] quiet”; the word “*consultar*,” which means “to seek advice,” should have been used to explain the right to an attorney, rather than “*hablar*,” which means “to talk, to

carry on conversation”; and the word “*discutir*” in the fifth sentence could mean “to discuss” or “to argue or debate.” The last sentence—“[c]ualquiera de las declaraciones que yo haga en este momento son libres y voluntarias, con ninguna promesa de indulgencia (severidad) o recompensa”—also could be interpreted in multiple ways. (*Id.*, at pp. 158-159.)

Admonishing From “The Card.”

Use of a ***Miranda*** admonishment in written form, read to the suspect rather than being recited from memory, is preferred. Attempts to admonish a suspect from memory often result in errors in the admonishment, or difficulties in remembering the details of an admonishment, creating unnecessary legal issues in court concerning the adequacy of the warnings. (See *United States v. Frankson* (4th Cir. 1996) 83 F.3rd 79, 81-82; *United States v. Loucious* (9th Cir. 2017) 847 F.3rd 1151.)

Note: Admonishing from a card or other pre-printed form also allows the officer to read from the same card or form while testifying, as opposed to having to testify from memory.

Defendant’s Awareness of his Rights Prior to Advisal:

An in-custody suspect must be admonished even though he is already aware of, or familiar with, his rights. (*Miranda v. Arizona*, *supra*, at pp. 468-469 [16 L.Ed.2nd at p. 720].)

“No amount of circumstantial evidence that the person may have been aware of this right (to a lawyer) will suffice to stand in its stead.” (*Id.*, at pp. 471-472 [16 L.Ed.2nd at p. 722].)

Even a lawyer, who presumably is aware of his rights, must still be admonished prior to questioning. (*United States v. Farinacci-Garcia* (Puerto Rico 1982) 551 F.Supp. 465.)

However, a suspect's “*criminal sophistication*” is a factor the court may consider in curing an otherwise defective admonition. (*People v. Samayoa* (1997) 15 Cal.4th 795.)

Successive Admonishments:

Need to Readmonish in Successive Interrogations: Does a subject who has been admonished once need to be admonished at each subsequent, follow-up interrogation? *It depends:*

Readmonishment at each subsequent interrogation is unnecessary so long as each interrogation is done “*within a reasonably contemporaneous period of time.*” (***People v. Johnson*** (1973) 32 Cal.App.3rd 988, 997; see also ***Wyrick v. Fields*** (1982) 459 U.S. 42 [74 L.Ed.2nd 214]; ***People v. Lewis*** (2001) 26 Cal.4th 334, 386-387; ***People v. San Nicolas*** (2004) 34 Cal.4th 614, 640; ***People v. Mickle*** (1991) 54 Cal.3rd 140, 169-171.)

There is no need to readmonish a suspect for each successive interrogation *if*:

Each is done within a reasonably contemporaneous period of time (***People v. Johnson***, *supra*; ***Wyrick v. Fields***, *supra*; ***People v. Smith*** (2007) 40 Cal.4th 483, 504; ***People v. Lewis***, *supra*; ***People v. San Nicolas***, *supra*; ***People v. Hensley*** (2014) 59 Cal.4th 788, 815.), *and*;

The subject still has his rights in mind. (See ***People of the Territory of Guam v. Pena*** (9th Cir. 1995) 72 F.3rd 767; 15 hour delay held to be okay: See “*Subject Has His Rights in Mind*,” below.)

Asking him, upon reinitiation of the interrogation, whether he still has his rights in mind and getting an affirmative response will normally suffice to overcome this issue. (See ***United States v. Rodriguez-Preciado*** (9th Cir. 2005) 399 F.3rd 1118, 1128-1130; as amended at 416 F.3rd 939; no need to readvise defendant of his rights the next day (16 hours later), particularly when defendant admitted to remembering his rights from the day before. “(T)he issue is whether (defendant) could have reasonably believed that the ***Miranda*** rights . . . of which he was apprised the night before [were still effective], in light of the changed circumstances.”

See also ***People v. Spencer*** (2018) 5 Cal.5th 642, 668-672, where defendant initially waived when questioned about a robbery, and then less than five hours later, was questioned by another detective about a separate robbery/murder. Prior to the second interrogation, defendant was asked if he had understood his rights as previously read to him, and verified that he was again willing to talk with the detective.

A suspect who has validly waived **Miranda** is subject to interrogation “*until and unless*” he clearly makes it known that he wishes the assistance of an attorney. (**Davis v. United States** (1994) 512 U.S. 452, 461 [129 L.Ed.2nd 362, 373].)

The same theory applies to a post-waiver assertion of the right to remain silent; i.e., until he asks to remain silent. (**Coleman v. Singletary** (11th Cir. 1994) 30 F.3rd 1420, 1424.)

Factors: Whether or not a person needs to be readvised of his **Miranda** rights upon the reinitiation of an interrogation depends upon an analysis of five factors:

- (1) The amount of time between the two interrogations;
- (2) Any change in the identity of the interrogator and/or the location of the interrogation;
- (3) Whether the suspect was officially reminded of the prior advisement;
- (4) The suspect’s sophistication or past experience with law enforcement; *and*
- (5) Any further indicia that the suspect subjectively understands and waives his rights.
- (6) Any misconduct by the police in reinstituting the interrogation.

(**People v. Riva** (2003) 112 Cal.App.4th 981, 993-994; **People v. Smith** (2007) 40 Cal.4th 483, 504-505; **People v. Stallworth** (2008) 164 Cal.App.4th 1079, 1089; 16 hours between interrogations; **People v. Williams** (2010) 49 Cal.4th 405, 434; 40 hours; **People v. Mickle** (1991) 54 Cal.3rd 140, 169-171; **People v. Spencer** (2018) 5 Cal.5th 642, 668.)

See also **United States v. Weekley** (6th Cir. 1997) 130 F.3rd 747, 750-751, listing federal circuit court cases on the issue.

People v. Jackson (2016) 1 Cal.5th 269, 361-362; defendant questioned during car ride while looking for where defendant had dumped the body, immediately following the in-station interrogation.

Different Crimes: The fact that the renewed questioning involves a *different crime* does not necessarily make readmonishment necessary. For instance:

It is not legally required that the police inform a defendant of all the crimes about which they intend to question him for a waiver to be valid. (*Colorado v. Spring* (1987) 479 U.S. 564 [107 S.Ct. 851; 93 L.Ed.2nd 954]; defendant's waiver on a firearms case permitted questioning about a homicide case without a new warning.

A properly administered warning for a misdemeanor charge was held to be valid as well for a multiple murder-related interview done later that same day. (*People v. Duren* (1973) 9 Cal.3rd 218, 242.)

Defendant waived for questioning about drugs after which the questioning shifted to a homicide. (*United States v. D'Antoni* (7th Cir. 1988) 856 F.2nd 975.)

Defendant was told that the officers wished to talk with him about a stolen car and a woman who had been hurt in the incident. In reality, the woman's car was taken after she was murdered. Defendant's waiver of his *Miranda* rights was held to be valid despite the minimizing the seriousness of the crime under investigation. (*People v. Tate* (2010) 49 Cal.4th 635, 680-685.)

In a case where detectives intimated that they only wanted to talk to the imprisoned defendant about his **P.C. § 290** (sex registrant) obligations, when in fact they intended to ask him about a six-year-old murder case, the California Supreme Court held that the intentional use of a ruse to obtain a waiver was not coercive, and did not invalidate the waiver. (*People v. Molano* (2019) 7 Cal.5th 620, 648-654.)

Defective Admonishment Following Proper Admonishment: A proper admonishment *may* cure a subsequent defective admonishment.

Failing to tell a suspect that anything he says "*may*" be used against him three days after a complete and correct admonishment; resulting statements were held to be admissible. (*People v. Booker* (1977) 69 Cal.App.3rd 654; see also *People v. Wader* (1993) 5 Cal.4th 610, 637.)

Subject Has His Rights in Mind: The issue is whether the suspect still has his rights in mind upon reinitiation of an interrogation. So long as the suspect *still has his rights in mind*, readmonishment is not necessary, and the shorter the time between interrogations the more likely he did. Examples:

People v. Lewis (2001) 26 Cal.4th 334, 386-387; five hour interval did not require a readvisal of the 13-year-old homicide suspect.

People v. Visciotti (1992) 2 Cal.4th 1, at page 54; where a taped interview six hours after admonishment was admissible.

People v. Miller (1996) 46 Cal.App.4th 412; where the interview was continued without readmonishment after a 5-hour break; statements admissible.

People v. Sievers (1967) 255 Cal.App.2nd 34: Renewed questioning without readmonishment the next day is okay.

People of the Territory of Guam v. Pena (9th Cir. 1995) 72 F.3rd 767: Admonishment and waiver when not in custody, followed by renewed questioning 15 hours later when in custody, but without a new admonishment (although reminded of his prior waiver); confession admissible.

People v. Mickle (1991) 54 Cal.3rd 140, at pages 169 to 171; upholding an unadmonished second interview 36 hours later.

United States v. Rodriguez-Preciado (9th Cir. 2005) 399 F.3rd 1118, 1128-1130; as amended at 416 F.3rd 939: No need to readvise defendant of his rights the next day (16 hours later), particularly when defendant admitted to remembering his rights from the day before. “(T)he issue is whether (defendant) could have reasonably believed that the ***Miranda*** rights . . . of which he was apprised the night before [were still effective], in light of the changed circumstances” (i.e., a change in the location and one of the interrogators).

See also ***People v. Pearson*** (2012) 53 Cal.4th 306. 315-317; where there’s “*continuous*” off and on contact between the interrogating detectives and the suspect during the time period between the first and second interrogation, even if sporadic, has also been mentioned as a factor to consider.

With 27 hours between the advisement in defendant’s first interview and the initiation of the second interview, where defendant not only remained in continuous custody but was, for much of the time, in contact with the investigating officers. Also, before agreeing to the second interview, defendant was asked if he remembered his ***Miranda*** rights, and he said he did. Despite defendant’s lack of familiarity

with the criminal justice system, having no prior convictions, there was more than sufficient evidence here that defendant still had his rights in mind at the time of the second interview. (*Ibid.*)

A second interrogation—“having occurred approximately 40 hours later in the same location as the first, and was conducted by one of the previous interrogators”—was held to be reasonably contemporaneous with the waiver. (*People v. Williams* (2010) 49 Cal.4th 405, 434-435.)

See also *United States v. Weekley* (6th Cir. 1997) 130 F.3rd 747, 750-751, listing federal circuit court cases on the issue; and *People v. Riva* (2003) 112 Cal.App.4th 981, 993-994.

Where Readmonishment Held to be Necessary:

People v. Bennett (1976) 58 Cal.App.3rd 230, 238: Six weeks is *not* “a reasonably contemporaneous” period of time.

Questioning by Different Sovereigns: Successive questioning by two officers representing separate sovereigns (E.g., state vs. federal) does not, by itself, mean the second officer must readmonish the suspect. (*United States v. Baron* (9th Cir. 1996) 94 F.3rd 1312, 1320; see also *People v. Spencer* (2018) 5 Cal.5th 642, 668-672.)

As noted in *Spencer, Id.*, at p. 660, it has been observed in a different context that “the large majority of suspects . . . see the uniform only as a symbol of police authority, [and] neither know nor care about the precise jurisdictional competence of their interrogators.” (See *People v. Pettingill* (1978) 21 Cal.3rd 231, 245.)

Suggested Tactics:

As a rule of thumb, if the interval between interrogations is longer than 36 hours, a new admonishment and waiver is likely to be required. (See above)

It is a good idea for the interrogating officer, at the initiation of a second interrogation, to *at the very least* ask the defendant whether he is still aware of, and continues to understand, the rights as they were previously explained to him. (See *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1088-1090.)

In *Stallworth*, it was held that the police were not obligated to readvise an 18-year-old suspect with an 11th grade education even though the record did not establish whether the suspect's "juvenile proceedings gave him experience with *Miranda* warnings."

If questioning is reinitiated with a suspect who had previously indicated that he did not wish to speak further "*right now*," interrogators should administer a new advisal and seek an express waiver, although depending upon the other circumstances, failing to do so might not be fatal to the admissibility of any new statements. (See *People v. Riva* (2003) 112 Cal.App.4th 981.)

Relevance of Defendant's Prior Knowledge:

Defendant's Awareness of the Charges Prior to Advisal:

It is not necessary to tell the suspect with what he is being charged, how serious it may be, or what evidence there is against him, prior to an admonishment or solicitation of a waiver. (*People v. Neely* (1979) 95 Cal.App.3rd 1011, 1017; see also *People v. Mitchell* (1982) 132 Cal.App.3rd 389, 405; *People v. Sanders* (1990) 51 Cal.3rd 471, 512; *People v. Hill* (1992) 3 Cal.4th 959, 982.)

"There is no requirement that, before a person may validly waive his privilege against self-incrimination, he must be apprised of the evidence against him, the 'severity of his predicament,' or the chances he will be charged." (*People v. Suff* (2014) 58 Cal.4th 1013, 1070.)

"(A) suspect's awareness of all possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily waived his Fifth Amendment privilege." (*Colorado v. Spring* (1987) 479 U.S. 564, 577 [93 L.Ed.2nd 954, 968]; *Moran v. Burbine* (1986) 475 U.S. 412, 422 [106 S.Ct. 1135; 89 L.Ed.2nd 410, 421]; see also *People v. Molano* (2019) 7 Cal.5th 620, 648-654.)

The same rule applies to a *pre-admonishment, non-custodial* interview of a suspect. Failing to tell the suspect the nature of the offenses about which the officers wish to question him does not render the suspect's statements involuntary. (*United States v. Howard* (4th Cir. 1997) 112 F.3rd 777, 783-784.)

There is some authority, however, to the effect that if a suspect asks, and failing to tell him would be misleading, then an officer might have a duty to correctly inform him. (See *United States v. Okwumabua* (2nd Cir. 1987) 828 F.2nd 950, 953.)

See also **18 U.S.C. § 3501(b)**: Defendant's knowledge of the nature of the offense with which he is being charged is one factor the court may consider when determining whether the defendant's statements were the product of *coercion*.

Note also **P.C. § 841**: “The person making the arrest must, on request of the person he is arresting, inform the latter of the offense for which he is being arrested.”

Note: While there appears to be no sanctions for violating these sections, it is good practice, and more professional, to comply with these statutory provisions unless circumstances make it impossible or impractical to do so.

Defendant's Awareness of the Legal or Penal Consequences of the Charges: There is no legal requirement that the subject be informed, as a part of the admonition, of the *legal or penal consequences* of the charges he is facing. (***People v. Hill*** (1992) 3 Cal.4th 959; ***United States v. Johnson*** (8th Cir. 1995) 47 F.3rd 272, 277.)

It is not necessary to tell a defendant that the charges against him might lead to a penalty of death. (***People v. Medina*** (1995) 11 Cal.4th 694, 752; ***People v. Rountree*** (2013) 56 Cal.4th 823, 848; citing ***People v. Sanders*** (1990) 51 Cal.4th 471, 512-513.)

On the other side of that same coin, it is a rule of law that “law enforcement does not violate due process by informing a suspect of the likely consequences of the suspected crimes or of pointing out the benefits that are likely to flow from cooperating with an investigation.” (***People v. Orozco*** (2019) 32 Cal.App.5th 802, 820.)

Effects of Miranda Violation on a Later Valid Admonition and Waiver:

Rule: It is clear that while statements obtained from an in-custody interrogation without a ***Miranda*** admonishment and waiver, or after a defective waiver, must be suppressed. But “the admissibility of any subsequent (properly ***Mirandized***) statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.” (***Oregon v. Elstad*** (1985) 470 U.S. 298, 309 [84 L.Ed.2nd 222; 105 S.Ct. 1285]; ***Tankleff v. Senkowski*** (2nd Cir. 1998) 135 F.3rd 235, 244; ***People v. Delgado*** (2018) 27 Cal.App.5th 1092, 1105.)

“[T]he court [in ***Elstad***] rejected the notion that the failure to administer ***Miranda*** warnings ‘unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect’s ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.’”

(*People v. Harris* (1989) 211 Cal.App.3rd 640, 650; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1033, 1039.)

In *Elstad*, there was minimal questioning; “Do you know why we’re here?”, “Do you know (the victim)?”, and “I think you were involved,” followed by moving defendant to the police station where a *Miranda* advisal was given and a waiver obtained.

“(T)he ‘cat out of the bag’ theory does not apply where a confession is voluntarily made, under circumstances not requiring a *Miranda* warning, subsequent to a technical *Miranda* violation.” (*Saleh v. Fleming* (9th Cir. 2008) 512 F.3rd 548, 551-552.)

The Rule of Elstad Debated:

United States v. Orso (9th Cir. 2001) 266 F.3rd 1030: The rule of *Elstad* was taken, perhaps, to an extreme where the defendant’s interrogators admittedly, in pre-admonishment discussions, intentionally “attempted to elicit ‘breakthrough’ incriminating information from the suspect (for the purpose of) us(ing) that information as a ‘beachhead’ to later undermine the effect of the (subsequent) *Miranda* warning and to compel the suspect to confess in spite of them.” These discussions included false representations of the evidence they had against her. Defendant later waived her *Miranda* rights and fully confessed. Although finding the pre-admonishment “discussion” to be an “interrogation,” and referring to this interrogation tactic as “reprehensible,” the Court still *did not* believe that it constituted “unconstitutional coercion.” Thus, following *Elstad*, while recognizing that the even if what the interrogators did was improper, the “fruit of the poisonous tree” doctrine does not apply to *Miranda*. Therefore, because it was not shown that the tactics used in the pre-admonishment questioning constituted “unconstitutional coercion,” defendant’s subsequent waiver was valid, and her later confession was admissible in evidence against her.

See also *United States v. Esquilin* (1st Cir. 2000) 208 F.3rd 315, 318-321, with a ruling consistent with the majority in *Orso*, noting that a deliberate *Miranda* violation does not come within the definition of an “improper tactic,” as condemned in *Elstad*.

However, in a written “impassioned” dissent from the Ninth Circuit’s denial of a second en banc hearing (See 275 F.3rd 1190.), Justice Stephen Trott, disagreeing with the Court’s interpretation of *Elstad*, argued that such tactics “overbear (a suspect’s) will to resist and bring about (a) confession,” and cannot result in a free and voluntary waiver. (See “Waiver of Constitutional Rights,” below.)

Note that prior California law (see *People v. Honeycutt* (1977) 20 Cal.3rd 150; the “*clever softening up*” case) appears to be in accord with Justice Trott’s reasoning. While *Honeycutt* did not involve pre-admonishment questioning, it did involve an intentional pre-admonishment ploy to put a hostile defendant in a better frame of mind, increasing the likelihood of a waiver.

The California Supreme Court continues to cite *Honeycutt* as legal authority on issues of pre-admonishment questioning, although the Court has found that some limited pre-admonishment questioning, intentionally done to put the defendant at ease, does not necessarily amount to a “*Honeycutt violation*.” (See *People v. Gurule* (2002) 28 Cal.4th 557, 603.)

And see *People v. Storm* (2002) 28 Cal.4th 1007, at pp. 1027-1038, where the California Supreme Court followed a reasoning very similar to that in *Orso* while applying the rule of *Elstad*, upholding the defendant’s confession (after a *Beheler* admonishment), finding both his first statement taken after an invocation of his right to an attorney, and his later statement obtained after he was released from custody, to be voluntary. As a result, his second statement was properly admitted into evidence against him.

Telling an in-custody homicide suspect that the officers knew he committed the murder because his fingerprints were found at the scene, even if such a comment was an interrogation, did not invalidate defendant’s later waiver and confession under the rule of *Elstad*. (*People v. Haley* (2004) 34 Cal.4th 283, 303-304.)

See also *Pope v. Zenon* (9th Cir. 1995) 69 F.3rd 1018 (also authored by Justice Trott), where officers showed defendant documentary evidence of his guilt and obtained an admission before advising him of his rights pursuant to *Miranda*. Such an interrogation tactic was held to be improper.

The “Two-Step Interrogation” Tactic; the Rule of Missouri v. Seibert:

Elstad Limited to its Facts: The United States Supreme Court has limited *Elstad* to its facts, noting that whether or not preadmonishment questioning affects the validity of a later waiver of *Miranda* rights depends upon whether the eventual admonishment, under the circumstances, “adequately and effectively apprise(s)” the suspect of his rights pursuant to the *Miranda* decision. (*Missouri v. Seibert* (2004) 542 U.S. 600 [124 S.Ct. 2601; 159 L.Ed.2nd 643].)

In *Seibert*, the Supreme Court ruled that purposely interrogating an in-custody defendant without a *Miranda* advisal and waiver, getting admissions from the suspect, and then advising her of her

rights and obtaining a waiver, followed by a second interrogation and confession (all the while referring back to the non-*Mirandized* admissions), failed this test and was an illegal interrogation tactic.

Interpreting *Seibert*, the Ninth Circuit Court of Appeal has held that to be a *Seibert* violation, this “two-step interrogation” tactic must have been done deliberately. (*United States v. Williams* (9th Cir. 2005) 435 F.3rd 1148; in accord, *People v. Rios* (2009) 179 Cal.App.4th 491, 505; *United States v. Reyes-Bosque* (9th Cir. 2010) 596 F.3rd 1017, 1031-1032; *United States v. Barnes* (9th Cir. 2013) 713 F.3rd 1200, 1206-1207; *People v. Delgado* (2018) 27 Cal.App.5th 1092, 1105-1106.)

Factors to consider include:

- (1) The completeness and detail of the pre-warning interrogation;
- (2) The overlapping content of the two rounds of interrogation;
- (3) The timing and circumstances of both interrogations;
- (4) The continuity of police personnel;
- (5) The extent to which the interrogator’s questions treated the second round of interrogation as continuous with the first;

(*People v. Sumagang* (2021) 69 Cal.App.5th 712, 727, 730.)

- (6) Whether any curative measures were taken.

(*United States v. Williams*, *supra*, at p. 1160; *United States v. Barnes*, *supra*, at p. 1206; *People v. Sumagang*, *supra*, at pp. 727, 729.)

- (7) Whether the *Seibert* two-step interrogation tactic was deliberate.

(*United States v. Williams*, *supra*; *People v. Rios* (2009) 179 Cal.App.4th 491, 505; *United States v. Reyes-Bosque* (9th Cir. 2010) 596 F.3rd 1017, 1031-1032; *United States v. Barnes*, *supra*. See also Justice Kennedy’s concurring opinion in *Seibert* (at p. 662) and *People v. Sumagang*, *supra*, at pp. 727-728.)

Case Law Where Seibert Held to be Applicable:

Custody was found where defendant's parole officer scheduled a meeting with him at the request of federal agents. Defendant was required to attend such a meeting and was not told that the federal agents would be present. Upon arrival for the meeting, defendant was searched and escorted through a locked door to his parole officer's office where, without the benefit of a **Miranda** admonishment, the two federal agents questioned defendant about an earlier undercover drug-buy. Defendant admitted his involvement only after listening to a recorded phone call, when he admitted to being involved. Then, after a **Miranda** admonishment and waiver, defendant confessed. Defendant's motion to suppress the confession was denied. On appeal, the Court held that defendant was in custody for the initial part of the interview, and that the agents engaged in a prohibited two-step interrogation under **Missouri v. Seibert**. (*United States v. Barnes* (9th Cir. 2013) 713 F.3rd 1200, 1204-1205.)

A waiver was held to be involuntary and the later confessions to be inadmissible for any purpose (including impeachment), despite defendant's own reinitiation of the questioning, where the defendant's federal **Fourteenth Amendment** "due process" rights had been violated due to "coercion" during a prior attempt at interrogation (*People v. Neal* (2003) 31 Cal.4th 63, under circumstances similar to those in *Gavin v. Farmon* (9th Cir. 2001) 258 F.3rd 951, but with a contrary result. See *Gavin v. Farmon*, below.)

The California Court of Appeal was held to have applied a rule that is contrary to federal law as clearly established by the United States Supreme Court in **Missouri v. Seibert**, *supra*, when it concluded that defendant's post-warning confession was admissible solely on the ground that it was voluntary. Defendant's confession should have been suppressed because police officers deliberately employed a two-step interrogation technique, and failed to take appropriate curative measures, in violation of **Seibert**. (*Reyes v. Lewis* (9th Cir. 2016) 833 F.3rd 1001.)

The trial court erred in admitting post-**Miranda** warning portion of two-part interrogation concerning a murder, violating the rule of **Missouri v. Seibert** (2004) 542 U.S. 600 [124 S.Ct. 2601; 159 L.Ed.2nd 643]. The trial court credited the detective's testimony that he did not believe he was violating the defendant's **Miranda** rights at the start of the interrogation, where he questioned defendant without a **Miranda** admonishment. But, regardless of any good faith mistake at the outset, at some point the detective

determined he needed to give the warning. Thus, the question became whether the government proved by a preponderance of evidence that after coming to that realization (i.e., that an admonition was required) he didn't deliberately withhold the requisite warnings as part of a calculated strategy to foil **Miranda**. The Court held the Attorney General did not meet this burden as the record lacked evidence of the detective's subjective mental processes (the trial court sustaining objections to defense counsel's questions as to whether the defendant was trying to obtain statements without a **Miranda** warning that could be used for impeachment purposes) but supported the inference of deliberateness. During the post-warning interrogation the detective referred to defendant's pre-warning statement, which was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. Also, no curative measures suggested were used; e.g., there was no break in time or circumstances between the two parts of the interview, no other circumstance that would permit the accused to distinguish the two contexts and that the interrogation had "taken a new turn," no other admonishments at the start of the post-warning interrogation, and no advisal that the prior statements could not be used against the defendant if he chose to remain silent at that point. Additionally, the use of the two-step interrogation, whether deliberate or not, did not serve any legitimate purpose. The completeness and detail of the questions and answers pre-warning weighed in favor of exclusion, as did the overlapping content of the two statements, the similar timing and setting of the two parts, the continuity of police personnel, and the degree to which the questions treated the second round as continuous with the first. The Court therefore concluded that the two-stage interrogation violated **Seibert**. Further, the admission of the post-warning statement was not harmless because the balance of circumstances did not establish premeditation beyond a reasonable doubt. (*People v. Sumagang* (2021) 69 Cal.App.5th 712.)

The Court compared this case with the circumstances under both **Seibert** and *Oregon v. Elstad* (1985) 470 U.S. 298 [105 S.Ct. 1285; 84 L.Ed.2nd 222], where the first un-**Mirandized** admissions were *not* obtained for the intended purpose of provoking a subsequent confession, finding the circumstances here to be closer to **Seibert**. (*Id.*, at pp. 725-727.)

Case Law Where Seibert Held Not to be Applicable:

The police purposely ignored a murder suspect's invocation of her right to an attorney under **Miranda**, and then told her that; (1) she could avoid a capital murder charge by confessing to a robbery (which in fact would have triggered the felony murder rule had she done so), (2) her co-conspirator would get a better lawyer than her so she better help herself, (3) nothing she said in the interrogation to follow could be used against her, (4) they had fingerprints and skin from under the victim's fingernails (which was a false statement), and (5) if she didn't cooperate, she would be charged with murder while her co-conspirator would be charged only with being an accessory. None of this persuaded the defendant to admit any culpability. Three days later, she reinitiated questioning herself and, after a full **Miranda** admonishment and waiver, confessed. Under the reasoning of *Elstad* (although pre-**Seibert**), her eventual confession, obtained voluntarily, was properly admitted into evidence, unaffected by the prior **Miranda** violation, as "egregious" as it was, where she had denied any culpability. (*Gavin v. Farmon* (9th Cir. 2001) 258 F.3rd 951, 954-958.)

But see *People v. Neal* (2003) 31 Cal.4th 63, above, for a contrary result under similar circumstances.

An un-admonished interview where the suspect is not in custody does not preclude his later arrest and, after a **Miranda** advisal, a second interrogation. (*In re Kenneth S.* (2005) 133 Cal.App.4th 54, 58, 63-66.)

Minimal prior questioning, characterized as miscellaneous small talk, without a **Miranda** advisal or waiver but without coercion, did not affect a later **Miranda** waiver and confession. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 637-641.)

A two-minute in-custody interview without a **Miranda** waiver, culminating in asking whether the pornography found in the defendant's home was his, did not poison a full post-**Miranda** confession two hours later. (*United States v. Brobst* (9th Cir. 2009) 558 F.3rd 982, 995-998.)

When first questioned, defendant was considered a witness only. As the questioning proceeded, however, the detective began to realize that defendant might have some culpability under the "provocative act" theory (i.e., where a person may be charged in the death of an accomplice if that person commits a provocative act that provokes a third party into killing the accomplice). Upon this realization, the questioning was stopped until defendant could be read his **Miranda** rights. The Court sustained the trial court's

ruling that the post-warning part of the interview was admissible because the officer did not deliberately use a two-step process to circumvent *Miranda*. (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1368-1376.)

A defendant who refuses to admit culpability during a first, un-*Mirandized* interrogation, but then comes back four hours later telling detectives that he'd consulted with an attorney and that he was ready to confess, has not been subjected to an improper two-step interrogation technique. (*Bobby v. Dixon* (2011) 565 U.S. 23, 27-33 [132 S.Ct. 26; 181 L.Ed.2nd 328].)

The Court further held that just because the defendant was purposely not informed of his rights under *Miranda* during the first interrogation, did not in itself make it involuntary. "The relevant inquiry is whether, in fact, the second [warned] statement was also voluntarily made." (*Id.* at p. 29.)

No *Seibert* violation was found where defendant was finally admonished after he admitted his involvement in a double homicide in pre-admonishment questioning where there was no deliberate attempt to side-step the *Miranda* requirements. Defendant, who was a mature and savvy youth, never appeared to be cowed or browbeaten. The questioning was not abusive, and defendant had three restroom breaks, was given water twice, and was given a snack. During the post-warning period, entirely on his own initiative, defendant acted out the murders complete with sound effects. Nothing in the video indicates that defendant felt coerced in the constitutional sense of the term at any time while he was being questioned. (*People v. Delgado* (2018) 27 Cal.App.5th 1092, 1105-1109.)

Seibert was found *not* to apply where the Appellate Court the court noted there was no extended questioning before the *Miranda* warnings. Further, defendant's pre-warning responses were vague and nonspecific, and there was a change of setting before defendant made the confession. Moreover, prior to the confession, the questioning officer administered the *Miranda* warnings in a detailed way that informed defendant he had a "real choice" whether to follow up on his earlier statements. Applying Justice Kennedy's test in his concurring opinion in *Seibert*, the Court concluded the questioning officer did not deliberately seek to undermine the *Miranda* warnings. Most significantly, the court noted that the officer administered the *Miranda* warnings before defendant confessed. The court also credited the officer's

testimony that defendant was not in custody for the killings when he confessed. (*People v. Krebs* (2019) 8 Cal.5th 265, 308-312.)

In a 10th Circuit case, defendant was not advised of his *Miranda* rights during questioning until confronted with the physical evidence that he had constructed a bomb and put it under this former girlfriend's bed, intending to kill her. The Court ruled that by the time he finally admitted his culpability, he was in fact in custody and should have been *Mirandized*. The Court held that based on the totality of the circumstances, however, defendant was not in custody when the agent initially questioned him. However, the situation evolved when agent confronted him with the mounting information and evidence discovered during the search and then pressed him, despite his repeated denials that he had made the bomb. At this point, the court found that a reasonable person in defendant's position would not have felt free to leave or otherwise end the interview, and was therefore in custody for *Miranda* purposes when he finally told the agent; "Yes, I made it." After defendant admitted he made the bomb, the agent immediately provided *Miranda* warnings, and obtained a waiver. Defendant then provided details about how he created the device and planted it under the girlfriend's bed. The issue at that point was whether the failure to advise defendant before his initial admission poisoned the subsequent waiver and confession. To determine the admissibility of a confession that is obtained after an initial confession is deemed to be inadmissible due to a *Miranda* violation, a court must determine: 1) if the officers engaged in a deliberate two-step interrogation, designed to undermine *Miranda*, and if they did not, 2) whether the defendant's post-warning statement was voluntary. Here, the court held that the agent did not deliberately avoid providing *Miranda* warnings with the hope of getting an unwarned confession and then obtain the same confession again after providing the *Miranda* warnings. To support this finding, the Court noted that after defendant admitted to making the bomb, the agent immediately stopped questioning him and provided *Miranda* warnings. After waiving his rights, defendant's post-warning confession was not just a repetition of his initial admission but contained far more details. The Court reasoned that if the agent had intended to obtain a "damning" confession first, give *Miranda* warnings, and then re-obtain the confession, he would have asked defendant about those incriminating details earlier. The Court then held that defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights and gave a voluntary statement to the agent. To support this holding, the Court found that defendant indicated that defendant understood his *Miranda* rights and continued to speak to the agent.

In addition: 1) defendant was an 18 year old high school student who had taught himself how to build a sophisticated explosive device from homemade materials; 2) he displayed “fortitude” when he asked the agents if they had a warrant to enter his home; 3) defendant was questioned in his home and he was not subject to any physical punishments or threats; and, 4) the interview was relatively short in duration and conducted in a conversational tone. (*United States v. Guillen* (10th Cir. N.M. 2021) 995 F.3rd 1095.)

Case Law Where a Seibert Issue was Left Undecided:

The lawfulness of playing a taped telephone conversation for defendant where he admitted to multiple murders before advising him of his *Miranda* rights, following which he commented that “*You heard it all,*” after referring to whether or not this tactic was *Seibert* error as defendant’s “more substantial argument,” was left undecided in that it was held to be “harmless error beyond a reasonable doubt” under the circumstances. (*People v. Young* (2019) 7 Cal.5th 905, 925-926.)

Curing a Seibert Violation:

A potential “*Seibert* violation,” may likely be “cured” by:

- (1) advising the suspect that his prior, un-admonished statements are likely inadmissible against him, or
- (2) when there is a “substantial break in time and circumstances” between the two interrogations.

(*Missouri v. Seibert*, *supra*, at p. 622; see also *People v. Rios* (2009) 179 Cal.App.4th 491, 501-504; holding that *Seibert* did not abrogate the rule allowing for “implied waivers.”)

California’s Former “Presumptive Invalidity” Rule:

California law once made the second, properly obtained statements “*presumptively inadmissible*” whenever it followed a statement taken in violation of *Miranda*, whether it was constitutionally coercive or not. (See *United States v. Bayer* (1947) 331 U.S. 532, 540-542 [91 L.Ed. 1654].) However, California now follows the federal rule. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1034, 1038-1040; *People v. Hogan* (1982) 31 Cal.3rd 815.)

See *People v. Terrell* (2006) 141 Cal.App.4th 1371, where the court distinguished the “*presumptive invalidity*” rule (citing *People*

v. Hogan, supra.) where defendant, after officers violated his **Miranda** rights by ignoring his repeated attempts to invoke, on his own initiative, asked to call his mother and to whom he made admissions of culpability. Defendant's voluntary act of talking to his mother held to be an "*independent intervening act*" that cut off the casual connection between the officer's violation of his **Fourteenth Amendment** "due process" rights (by ignoring his attempts to invoke) and the defendant's recorded admissions to his mother.

Use of an Undercover Police Agent:

Issue: When an undercover police agent (e.g., an undercover officer, informant, or other inmate) is put into contact with an in-custody criminal suspect, the question arises whether being questioned by that police agent constitutes a custodial interrogation (or at least the "*functional equivalent of an interrogation*," see **Rhode Island v. Innis** (1980) 446 U.S. 291, 301 [64 L. Ed. 2d 297].) performed without a **Miranda** admonishment and waiver in violation of the rules on **Miranda**, despite the defendant's ignorance concerning the official status of that agent.

Rule: The answer from the courts have consistently been that no "*interrogation*" takes place under these circumstances, making a defendant's statements admissible despite the lack of a **Miranda** admonishment and waiver, even when the questioning occurs after an invocation of the defendant's **Miranda** rights. (See below)

As a general rule, a person acting as an agent of law enforcement, such as in questioning a criminal suspect, is held to the same standards as a law enforcement officer. (See **People v. Coblenz** (1981) 123 Cal.App.3rd 477, 479-480; **In re Deborah C.** (1981) 30 Cal.3rd 125, 130-131; **People v. Panah** (2005) 35 Cal.4th 395, 471.)

An inmate, however, who collects incriminating information (written "kites," in this case) on his own, without promise of any benefits, particularly after specifically being told that he was not to even discuss the pending charges with the defendant, is not acting as a government agent when he goes ahead on his own and "interrogates" the defendant. "The requirement of agency is not satisfied when law enforcement officials 'merely accept information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement, or guidance.'" (**People v. Dement** (2011) 53 Cal.4th 1, 28-35.)

Examples:

Defendant, in custody after telling others that he'd committed a murder, invoked his right to counsel following an advisal of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2nd 694]. Defendant's wife, who was also interviewed by the police, insisted on talking with her husband. During the ensuing conversation that took place in the presence of a police officer and a tape recorder in plain sight, defendant made incriminating admissions. Defendant's admissions were admitted against him at trial. The United States Supreme Court, overruling the Arizona Supreme Court, held that use of defendant's statements at trial did not violate either the **Fifth Amendment** nor *Miranda*. (*Arizona v. Mauro* (1987) 481 U.S. 520, 525-530 [95 L.Ed.2nd 458].)

Per the Court, allowing the defendant's wife to talk to him in the presence of the police, even after defendant had invoked his right to counsel, was *not* the functional equivalent of an interrogation and therefore did not implicate *Miranda*. (*Ibid.*)

"The fundamental import of the (**Fifth Amendment**) privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the **Fifth Amendment** and their admissibility is not affected by our holding today. (*Id.*, at p. 529, citing *Miranda v. Arizona*, at p. 478.)

Defendant, a suspect in a murder but in custody on other charges, was placed with an undercover government agent who purposely asked defendant whether he'd killed anyone. Defendant incriminated himself in the murder that was under investigation. Defendant's statements were held to be admissible. (*Illinois v. Perkins* (1990) 496 U.S. 292, 296-300 [110 L.Ed.2nd 243].)

"Where the suspect does not know that he is speaking to a government agent, there is no reason to assume the possibility that the suspect might feel coerced. . . . We hold that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response." (*Id.*, at p. 297.)

Defendant was in-custody and charged with four murders. He contacted another inmate and planned with him an escape and other crimes. The other inmate went to the authorities with this information and eventually testified against defendant. Defendant argued that the use of the inmate/informant violated his *Miranda* rights. The California Supreme

Court rejected this argument. (*People v. Williams* (1988) 44 Cal.3rd 1127, 1141-1142.)

Miranda has never been applied to conversations between a defendant and another inmate. “When a defendant talks to a fellow inmate, the coercive atmosphere of custodial interrogation is absent.” (*Id.*, at p. 1142.)

A defendant made incriminatory statements to an acquaintance and possible co-suspect who worked with the police to get defendant to incriminate himself both over the telephone and during jail visits (pgs. 508-509.). Citing *Illinois v. Perkins* (1990) 496 U.S. 292, 296-300 [110 L.Ed.2nd 243], the California Supreme Court rejected defendant’s arguments that the use of this person as a police agent violated his **Fifth Amendment** and *Miranda* rights. (*People v. Webb* (1993) 6 Cal.4th 494, 526.)

“We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent.” (*Id.*, at p. 526; quoting *Illinois v. Perkins*, *supra*, at p. 300.)

“Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a ‘police-dominated’ atmosphere and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. . . . When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking.” (*People v. Webb*, *supra*, at p. 526.)

An in-custody defendant who had previously invoked his right to counsel under *Miranda*, was given the opportunity (or told) to telephone an acquaintance who, unbeknownst to defendant, was working with the police and who had a tape recorder set up on her telephone. In a first telephone call, the friend/police agent unsuccessfully attempted to get defendant to incriminate himself. In a second call a couple of days later, without being prompted, defendant made incriminating admissions. The recording of the second call was used against defendant at trial. The Appellate Court upheld the legality of the use of recording of the second telephone call. (*People v. Plyler* (1993) 18 Cal.App.4th 535, 540-541, 544-545.)

Citing *Illinois v. Perkins*, *supra*, p. 297, the Appellate Court noted that: “‘It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. . . . When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners.’ [Citation] ‘Questioning by captors, who appear to control the suspect’s fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect’s will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist.’” (*People v. Plyler*, *supra*, at p. 545.)

The Court further noted that the trial court had erred in suppressing the first telephone call, finding there also that *Miranda* was not implicated despite the fact that the police agent had sought incriminating responses from him. (*Id.*, at p. 545, fn. 7.)

In a murder case, defendant invoked his right to counsel upon being interrogated. Subsequently, while still in custody, defendant asked to talk with his father. When he did so, defendant made some incriminating statements that were used at trial. Defendant argued that (1) letting him talk to his father was “a form of interrogation because it was conduct that was reasonably likely to elicit an incriminating response,” as prohibited under *Rhode Island v. Innis*, *supra*, and that (2) because he had already invoked his right to counsel, using his father as an “unwitting or implied police agent” violated his *Miranda* rights. The California Supreme Court rejected both arguments. (*People v. Mayfield* (1997) 14 Cal.4th 668, 757-758.):

First, the Court ruled that “it is clear that defendant’s conversations with his own visitors are not the constitutional equivalent of police interrogation. [Citations] This is particularly true here because defendant had specifically and repeatedly asked to be allowed to speak with his father. The meeting occurred on defendant’s initiative, not that of the police. Granting defendant’s request cannot be equated with custodial interrogation.” (*Id.* a p. 758.)

The Court further rejected defendant’s second argument for two reasons: “First, as the United States Supreme Court has explained, [c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*.” (Citing *Illinois v. Perkins*, *supra*, and *People v. Webb*, *supra*.) Second, (defendant’s father) was not a police agent sent to elicit incriminating information from defendant. [Citation]. ‘None of the police agent

cases cited by defendant indicates that it would have been improper for the officers to grant an inmate's relatives special visitation privileges in the unspoken hope that they might elicit statements from defendant and inform the officers thereof.'" (*Id.*, at pp. 758-759.)

Placing defendant, the suspect in a murder case, into an interview room with a possible co-suspect who, at the request of the police, carried a tape recorder, was not improper. (*People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1173-1174.)

"(T)here was nothing improper or coercive about placing defendant and (the co-suspect) alone together in the holding cell and secretly tape-recording their conversation. Defendant was unaware that (the co-suspect) was taping their conversation; from his perspective he was talking to a friend. The element of coercion therefore was missing. (Citing *Illinois v. Perkins*, *supra*; '*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust.')." (*Ibid.*)

After defendant had invoked his *Miranda* rights, he was put into a holding tank with co-suspects in a robbery/murder case and falsely told that his fingerprint was on the murder weapon. He was then left alone with his two co-suspects and a hidden tape recorder. Defendant rose to the occasion and made incriminating remarks about his print being on the firearm. The Court found the officer's statements relating to his print to be the functional equivalent to an interrogation and that defendant's resulting comment to the officer (acknowledging the murder weapon) should have been suppressed. But then after being left alone, defendant made more incriminating statements to his co-suspects. These statements were held to be admissible in that, although the officer's ruse was improper (i.e., the "*functional equivalent of an interrogation*"), defendant was not being interrogated when he made these later statements. As "volunteered" statements, they were admissible. (*People v. Davis* (2005) 36 Cal.4th 510, 551-555.).

"In deciding whether police conduct was 'reasonably likely' to elicit an incriminating response from the suspect, we consider primarily the perceptions of the suspect rather than the intent of the police. [Citations] Because the dual elements of a police-dominated atmosphere and compulsion are absent when the defendant is unaware that he is speaking to a law enforcement officer (via a hidden tape recorder in this case), however, *Miranda* is inapplicable when the defendant does not know that the person he is talking to is an agent of the police." (*Id.*, at p. 554.)

Defendant was arrested on six counts of murder, but not yet advised of his *Miranda* rights. While in custody, defendant's father came to the police station and asked to talk with him. He was allowed to do so in a video-taped 20-minute conversation during which defendant made some incriminating remarks. At trial, defendant moved to suppress those statements arguing that allowing his father to talk with him constituted the functional equivalent of an interrogation without the benefit of a *Miranda* waiver. The California Supreme Court, citing *Arizona v. Mauro*, *supra*, rejected defendant's argument. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1401-1402.)

While finding that an officer's intent in videotaping a conversation between an in-custody defendant and a visitor was to obtain incriminating statements is irrelevant to the issue, the Court noted that: "Officers do not interrogate a suspect simply by hoping that he will incriminate himself." [Citation] A defendant's 'conversations with his own visitors are not the constitutional equivalent of police interrogation.' [Citations] In short, '[p]loys . . . that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns.'" (*Id.*, at p. 1402.)

Defendant was arrested on weapons charges in Reno, Nevada, and extradited to California from there to answer to a murder case. Before being formally charged in California, police arranged for defendant's grandmother to talk with him, hoping defendant (who had waived his *Miranda* rights) would volunteer some incriminating information. Defendant did in fact make some "consciousness of guilt" statements that the prosecution eventually used against him at trial. The California Supreme Court upheld the use of the statements finding that having defendant's grandmother talk with him did not constitute an interrogation. *People v. Thornton* (2007) 41 Cal.4th 391, 429-433.)

Citing the previous California Supreme Court case of *People v. Mayfield*, *supra*, at page 758, the Court ruled that, "it is clear that defendant's conversations with his own visitors are not the constitutional equivalent of police interrogation." The fact that in *Mayfield* the defendant had requested the contact with his father, and in this case the police had set up the meeting between defendant and his grandmother, was held to be irrelevant. Neither constitutes a "custodial interrogation." (*Id.*, at p. 433.)

Defendants were in custody and had invoked their rights, per *Miranda*. Placed into a jail cell together, with a hidden tape recorder, defendants discussed their crimes. At trial, over the defendants' objections that they were subjected to the "functional equivalent" of an interrogation under the circumstances, the trial court admitted their recorded statements into

evidence against them. The Appellate Court rejected the defendant's arguments as well, holding that there was no "interrogation," the "functional equivalent" or otherwise. (*People v. Jefferson* (2008) 158 Cal.App.4th 830, 839-841.)

The "*functional equivalent*" of express questioning includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Id.*, at p. 840; citing *Rhode Island v. Innis* (1980) 466 U.S. 291, 301 [64 L.Ed.2nd 297].) .)

"'Interrogation' requires 'a measure of compulsion above and beyond that inherent in custody itself.' [Citation] That compulsion is missing when a suspect speaks freely to someone the suspect thinks is a fellow cellmate. 'When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking.'" (*People v. Jefferson*, *supra*, citing *Illinois v. Perkins*, *supra*, at pp. 296, 300.)

After waiving his *Miranda* rights, defendant denied committing a murder. Eventually, a friend was allowed (or was asked) to talk with defendant, during which conversation defendant made some statements that were used against him at trial. The Court ruled that use of these statements did not require a new *Miranda* admonishment and waiver to make the suspect's responses admissible against him. (*People v. Tate* (2010) 49 Cal.4th 635, 685-687.)

"(D)efendant's conversations with his own visitors are not the constitutional equivalent of [forbidden] police interrogation." (*Id.*, at p. 685.)

Before being charged with the murders at issue, and before a *Miranda* admonishment, while in custody on other unrelated charges, defendant made admissions concerning his participation in the murders to another prisoner who was wearing a wire provided by the police. Defendant's statements were held to be admissible. (*People v. Gonzales & Soliz* (2011) 52 Cal.4th 254, 283-285.)

"(T)he United States Supreme Court has rejected "'the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent.'"" (*Id.* at p. 284, citing *People v. Webb* (1993) 6 Cal.4th 494, 526, which quotes *Illinois v. Perkins*, *supra*, at p. 297.)

Miranda was *not* intended to prohibit the “mere strategic deception” of “taking advantage of a suspect’s misplaced trust in one he supposed to be a fellow prisoner.” The deception used in having a fellow inmate, as a police agent, pump defendant for answers did not prevent defendant’s responses from being “voluntary and free of compulsion.” No *Miranda* warnings, therefore, were necessary. (*People v. Gonzales & Soliz*, *supra*.)

The same rules apply to conversations between a defendant and co-suspects or undercover agents of law enforcement (*United States v. Birbal* (2nd Cir. 1997) 113 F.3rd 342, 346.) as well as by officers posing as civilians. (*United States v. Whitcomb* (Vermont 1997) 968 F.Supp. 163.)

Also, where defendant’s cellmate volunteers to law enforcement incriminating statements made by a defendant, without any instruction by law enforcement to do any more than merely listen to, and report, what defendant says about his crime, is not a *Massiah* error. (*People v. Almeda et al.* (2018) 19 Cal.App.5th 346, 355-361, referring to *Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2nd 246]; undercover questioning of a charged criminal suspect who is already represented by counsel.)

Defendant’s incriminating statements made to an informant put into his holding cell, and who dressed and acted like an inmate, were held to be admissible. The Court rejected defendant’s arguments that (1) he should have been *Mirandized* before the undercover officer questioned him about a shooting, and (2) his statements were involuntary because his will was overcome by an “older gang member” to whom defendant was obligated to “show respect to, gain respect from, and gain protection from.” (*People v. Rodriguez* (2019) 40 Cal.App.5th 194, 197-199.)

Using defendant’s cellmate to question him about his involvement with his wife’s murder was upheld. (*People v. Fayed* (2020) 9 Cal.5th 147, 164-165; finding both that the undercover cellmate was not obligated to provide defendant with a new *Miranda* advisal and that the questioning by the cellmate was not coercive and that defendant showed a willingness to implicate himself.)

Where the Defendant has Already Invoked:

For a law enforcement officer (and/or his agent), the rule is that when an in-custody suspect clearly and unequivocally invokes his right to the assistance of counsel, he remains off-limits to any and all questioning for as long as he remains in custody. (*Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880; 68 L.Ed.2nd 378].)

The United States Supreme Court has placed a time limit on this rule, however, holding that after a *Miranda* invocation of a suspect's right to counsel, the interrogation may be reinitiated following a 14-day break in custody. The defendant in this case was a prison inmate, serving time on a prior conviction. Recognizing the uniqueness of this type of situation, the Court further held that retuning the defendant to the general prison population is such a break in custody. (*Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2nd 1045].)

See *People v. Bridgeford* (2015) 241 Cal.App.4th 887, 900-903, applying the 14-day rule of *Shatzer* to the pre-trial situation, where the defendant was released from physical custody (i.e., back into society) and then re-arrested and re-interviewed.

Note also, however, *Trotter v. United States* (Wash. D.C. 2015) 121 A.3rd 40, a case out of the federal appellate court for Washington D.C., ruling that the rule of *Shatzer* *does not* apply to the pre-trial detainee in that pending trial, he is not serving a sentence of imprisonment, as was the case in *Shatzer*, and is still under the pressures of a pending prosecution.

Note: In the California Supreme Court case of *People v. Fayed* (2020) 9 Cal.5th 147, the record in this capital murder case is confusing as to whether defendant had involved his **Fifth Amendment/Miranda** “right to counsel” when initially taken into federal custody (see pg. 164), where he remained in continuous custody until questioned by his cellmate. When ruling that his prior invocation was no longer effective, the Court *may* have been talking about a separate invocation to his *Miranda* “right to remain silent” upon first being arrested for murder, and then released immediately that same day. His federal custody on separate federal charges was a separate arrest, not occurring until several days after he was released from state custody. The 14-day rule of (*Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2nd 1045] (see “*Miranda and the Jail Inmate*,” under “*Custody*” (Chapter 2), above.), as it applies to invocations of one’s right to counsel, was not discussed in *Fayed*. Whether or not *Shatzer*’s 14-day rule applies to pre-conviction situations remains an open issue, and would have been relevant to this case if, as defendant contended on appeal, he had invoked his right to counsel upon first being taken into federal custody.

The question becomes whether an undercover police agent may then surreptitiously question an in-custody suspect who has previously, while remaining in continuous custody, invoked his **Fifth Amendment** right to

counsel and/or to remain silent. The few cases that have addressed this issue have uniformly, at least by implication, rejected the argument that any resulting statements should be suppressed.

The defendant in *Arizona v. Mauro* (1987) 481 US 520, 525-530 [95 L.Ed.2nd 458], had invoked his right to counsel prior to the officers allowing defendant's wife, at her insistence, to speak with him. The discussion took place in the presence of a police officer and with a tape recorder in plain sight on the table. In discussing whether allowing defendant's wife to speak with him constituted the "*functional equivalent of an interrogation*," the Court noted that the officers did not send the wife into the defendant for the purpose of obtaining incriminating statements. And telling defendant that his wife was going to be allowed to speak with him did not constitute any form of coercion. The police knowing that defendant may possibly incriminate himself during such a discussion is not enough to turn the situation into an interrogation. (*Id.*, at pp. 525-529.)

In finding no interrogation under the circumstance, the Court concluded as follows: "In deciding whether particular police conduct is (an) interrogation, we must remember the purpose behind our decisions in *Miranda* and *Edwards* (*Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880; 68 L.Ed.2nd 378]): preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. The government actions in this case do not implicate this purpose in any way. Police departments need not adopt inflexible rules barring suspects from speaking with their spouses, nor must they ignore legitimate security concerns by allowing spouses to meet in private. In short, the officers in this case acted reasonably and lawfully by allowing Mrs. Mauro to speak with her husband. In this situation, the Federal Constitution does not forbid use of Mauro's subsequent statements at his criminal trial. (*Id.*, at pp. 529-530.)

Note: This language as noted above provides a defendant with a colorable argument that where the police do in fact send an undercover agent to talk to a defendant who has previously invoked his rights under *Miranda* (as opposed to a mere visitor with no instructions from the police), it might in fact constitute the "*functional equivalent to an interrogation*," preventing the result from being used in evidence. However, to date, no case has so-held. To the

contrary, the cases cited above have held that there is no interrogation at all, the “functional equivalent” or otherwise.

In a murder case, defendant invoked his right to counsel upon being interrogated. Subsequently, while still in custody, defendant asked to talk with his father. When he did so, defendant made some incriminating statements that were used at trial. Defendant argued that (1) letting him talk to his father was “a form of interrogation because it was conduct that was reasonably likely to elicit an incriminating response,” as prohibited under *Rhode Island v. Innis*, *supra*, and that (2) because he had already invoked his right to counsel, using his father as an “unwitting or implied police agent” violated his *Miranda* rights. The California Supreme Court rejected both arguments. (*People v. Mayfield* (1997) 14 Cal.4th 668, 757-758.):

First, the Court ruled that “it is clear that defendant’s conversations with his own visitors are not the constitutional equivalent of police interrogation. [Citations] This is particularly true here because defendant had specifically and repeatedly asked to be allowed to speak with his father. The meeting occurred on defendant’s initiative, not that of the police. Granting defendant’s request cannot be equated with custodial interrogation.” (*Id.* a p. 758.)

The Court further rejected defendant’s second argument for two reasons, the first reason being most relevant to the “prior invocation” issue: “(A)s the United States Supreme Court has explained, [c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*.” (Citing *Illinois v. Perkins*, *supra*, and *People v. Webb*, *supra*). (*Ibid.*)

Unfortunately, this comment was not accompanied by any further discussion or elaboration.

The second reason related to the fact that defendant’s father, visiting his son at defendant’s own request, was not a police agent in the first place. (*People v. Mayfield*, at pp. 758-759.)

In *People v. Plyler* (1993) 18 Cal.App.4th 535, 540-541, 544-545, defendant had invoked his right to counsel under *Miranda* during a previous interrogation and, while still in custody, had been

specifically questioned by a friend acting as a police agent in telephone calls set up by the police. The Court, however, never discussed whether or not the prior invocation to his right to counsel was an issue.

However, another decision directly addresses the issue of what effect a prior invocation might have on these rules, and appears to say that a defendant's prior invocation of his right to counsel is irrelevant under these circumstances; (*People v. Guilmette* (1992) 1 Cal.App.4th 1534.):

Where police made it possible for defendant to call the victim and recorded the call, after an invocation of defendant's *Miranda* right to silence and to counsel, the Court held the resulting statements to be admissible. Per the Court: "[T]he fact that the conversation occurred after an invocation of rights is without legal significance." (*Id*, a pp. 1537-1542.)

Under these circumstances, "*Edwards*, therefore, does not prohibit all questioning by police but rather questioning that constitutes under *Miranda* 'custodial interrogation.'" (*Id*, at pg. 1541.)

However, note the unique circumstances in *Guilmette*: "Here, appellant initiated the telephone contact and sought conversation with the crime victim. He was not forced to speak with the victim and, in fact, had been admonished by Eskridge (an officer) not to do so." (*Id*, at pg. 1540.)

Also, although the police did in fact give the victim some guidance on what to ask, some of the questions asked were initiated by the victim herself, and defendant volunteered a number of admissions. (*Id*, at pg. 1538.)

Defendant's confession to beating to death his own six-month-old daughter, made to his girlfriend and the mother of the victim, was held to be admissible despite it being ruled that the girlfriend was an agent of law enforcement; a fact unknown to defendant. "Implicit in the definition of 'interrogation' is that (1) the suspect is talking to the police or an agent of the police, *and* (2) the suspect *is aware* that he is talking to the police or one of their agents." (Italics in original; *People v. Orozco* (2019) 32 Cal.App.5th 802, 813.)

Using defendant's cellmate to question him about his involvement with his wife's murder was upheld. Defendant's prior invocation(s), occurring some six weeks earlier, was (or were) no longer effective. (*People v. Fayed* (2020) 9 Cal.5th 147, 164-165; finding both that the undercover cellmate was not obligated to provide defendant with a new *Miranda* advisal and that the questioning by the cellmate was not coercive and that the defendant showed a willingness to implicate himself.)

Note: The record in this capital murder case, as reported by the California Supreme Court, is confusing as to whether defendant had involved his **Fifth Amendment/Miranda** “right to counsel” when initially taken into federal custody, where he remained in continuous custody until questioned by his cellmate. When ruling that his prior invocation was no longer effective, the Court *may* have been talking about a separate invocation to his *Miranda* “right to remain silent” upon first being arrested for murder, and then released immediately that same day. His federal custody on separate federal charges was a separate arrest, not occurring until several days after he was released from state custody. The 14-day rule of (*Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2nd 1045] (see “*Miranda and the Jail Inmate*,” under “*Custody*” (Chapter 2), above.), as it applies to invocations of one's right to counsel, was not discussed in *Fayed*. Whether or not *Shatzer's* 14-day rule applies to pre-conviction situations remains an open issue, and would have been relevant to this case if, as defendant contended on appeal, he had invoked his right to counsel upon first being taken into federal custody.

See “*Questioning by an Undercover Police Officer or Agent*,” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

The Sixth Amendment: The above is not to be confused with when the suspect has been formally charged with the offense about which he is to be questioned:

Where a defendant has already been formally charged; i.e., after the filing of a “*formal charge, preliminary hearing, indictment, information, or arraignment*,” the use of an undercover police agent to elicit incriminating information from the charged suspect is illegal. (*Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2nd 246]; i.e., “*Massiah Error*.”)

It is generally accepted that being “*formally charged*” includes the filing of a “*complaint*.” (*People v. Viray* (2005) 134 Cal.App.4th 1186.)

Intentionally creating a situation likely to induce an in-custody defendant, represented by counsel appointed at his arraignment, to make incriminating statements by having an undercover agent engage defendant in conversation, is a **Sixth Amendment** violation. (*United States v. Henry* (1980) 447 U.S. 264 [65 L.Ed.2nd 115].)

Such a defendant is off limits to all questioning, in or out of custody, including by an undercover police agent, absent the participation of his attorney (*Massiah v. United States*, *supra.*) or upon the defendant's formal waiver of his right to an attorney under the **Sixth Amendment**. (*Montejo v. Louisiana* (2009) 556 U.S. 778 [173 L.Ed.2nd 955].)

However, where defendant's cellmate volunteers to law enforcement incriminating statements made by a defendant, without any instruction by law enforcement to do any more than merely listen to, and report, what defendant says about his crime, is not a *Massiah* error. (*People v. Almeda et al.* (2018) 19 Cal.App.5th 346, 355-361.)

Pretext Telephone Calls in the Miranda Context:

Rule: The courts have commonly discussed the lack of “custody,” or the lack of an “interrogation,” and thus the lack of a need for a *Miranda* admonishment and waiver, in the context of a suspect in telephone call situations. As a rule, *Miranda* is inapplicable in such situations. (See below)

Case Law:

Defendant calling the detective on the telephone from the jail is not “custody” for purposes of *Miranda*. (*Saleh v. Fleming* (9th Cir. 2008) 512 F.3rd 548.)

Defendant was held *not* to be in custody for purposes of *Miranda* when he telephoned the investigator from the jail and made incriminating remarks. (*United States v. Turner* (9th Cir. 1994) 28 F.3rd 981, 983-984.)

A jail inmate who calls the police and subjects himself over the telephone to interrogation cannot later complain that he was “in custody” for purposes of *Miranda*. (*People v. Anthony* (1986) 185 Cal.App.3rd 1114, 1117: “Appellant's conversations with the police were hardly the sort of “incommunicado interrogation . . . in a police-dominated atmosphere” that operates to “overcome free choice” at which the *Miranda* rule was aimed.”

See also *People v. Guilmette* (1991) 1 Cal. App. 4th 1534, where the defendant, who had already invoked his right to silence and to counsel,

telephoned the victim from jail to try to talk her out of testifying. The police provided the victim with some questions, but most of the conversation was at the defendant's instigation. Despite the prior invocation, and despite the victim being held to be a "police agent" under the circumstances, the Court held that no "custodial interrogation" had taken place and that therefore, *Edwards* (see *Edwards v. Arizona* (1981) 451 U.S. 477, 483 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 386].) did not preclude the use of defendant's admissions made during this conversation against him.

Where police made it possible for defendant to call the victim and recorded the call, after an invocation of defendant's *Miranda* right to silence and to counsel, the Court held the resulting statements to be admissible. Per the Court: "[T]he fact that the conversation occurred after an invocation of rights is without legal significance." (*Id.*, at pp. 1537-1542.)

Under these circumstances, "*Edwards*, therefore, does not prohibit all questioning by police but rather questioning that constitutes under *Miranda* 'custodial interrogation.'" (*Id.*, at pg. 1541.)

However, note the unique circumstances in *Guilmette*: "Here, appellant initiated the telephone contact and sought conversation with the crime victim. He was not forced to speak with the victim and, in fact, had been admonished by Eskridge (an officer) not to do so." (*Id.*, at pg. 1540.)

Also, although the police did in fact give the victim some guidance on what to ask, some of the questions asked were initiated by the victim herself, and defendant volunteered a number of admissions. (*Id.*, at pg. 1538.)

The Court further noted that the trial court had erred in suppressing the first telephone call, finding there also that *Miranda* was not implicated despite the fact that the police agent had sought incriminating responses from him. (*Id.*, at p. 545, fn. 7.)

No interrogation when defendant was monitored in a telephone conversation to his mother, making admissions. (*People v. Terrell* (2006) 141 Cal.App.4th 1371.)

A defendant made incriminatory statements to an acquaintance and possible co-suspect who worked with the police to get defendant to incriminate himself both over the telephone and during jail visits (pgs. 508-509.). Citing *Illinois v. Perkins* (1990) 496 U.S. 292, 296-300 [110 L.Ed.2nd 243], the California Supreme Court rejected defendant's

arguments that the use of this person as a police agent violated his **Fifth Amendment** and *Miranda* rights. (*People v. Webb* (1993) 6 Cal.4th 494, 526.)

““We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent.”” (*Id.*, at p. 526; quoting *Illinois v. Perkins*, *supra*, at p. 300.)

An in-custody defendant who had previously invoked his right to counsel under *Miranda*, was given the opportunity (or told) to telephone an acquaintance who, unbeknownst to defendant, was working with the police and who had a tape recorder set up on her telephone. In a first telephone call, the friend/police agent unsuccessfully attempted to get defendant to incriminate himself. In a second call a couple of days later, without being prompted, defendant made incriminating admissions. The recording of the second call was used against defendant at trial. The Appellate Court upheld the legality of the use of recording of the second telephone call. (*People v. Plyler* (1993) 18 Cal.App.4th 535, 540-541, 544-545.)

Citing *Illinois v. Perkins*, *supra*, p. 297, the Appellate Court noted that: ““It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. . . . When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners.’ [Citation] ‘Questioning by captors, who appear to control the suspect’s fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect’s will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist.”” (*People v. Plyler*, *supra*, at p. 545.)

Chapter 7: Invocation of Rights

Defendant's Invocation of Rights Under the Fifth Amendment and Miranda:

Rights Available to Invoke: There are *two* separate rights involved in a *Miranda* admonishment:

1. “*Right not to incriminate oneself*,” expressly provided for under the **Fifth Amendment**;

. . . *and* that anything the person might say can and will be used against him or her in a court of law; *and*

2. “*Right to the assistance of an attorney before and during questioning*,” impliedly provided for under the **Fifth Amendment**.

. . . *and* that if the person cannot afford an attorney, one will be provided for him, before and during questioning, free of charge.

(*Miranda v. Arizona*, *supra*, at p. 479; *Connecticut v. Barrett* (1987) 479 U.S. 532 [93 L.Ed.2nd 920]; *People v. Martinez* (2010) 47 Cal.4th 911, 947; *People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 215; *United States v. IMM* (9th Cir. 2014) 747 F.3rd 754, 764.)

Note: The *Sixth Amendment* “*right to an attorney*” is a completely separate, unrelated issue. (See “*Sixth Amendment Right to Counsel*,” under “*Suppression Issues and Procedures*” (Chapter 13), below.)

Statutory Protections: A person’s **Fifth Amendment** right against self-incrimination encompasses “two separate and distinct testimonial privileges.” (See *Cramer v. Tyars* (1979) 23 Cal.3rd 131, 137.) These privileges are statutorily recognized in the **California Evidence Code**:

Evid. Code § 930: “To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a *privilege not to be called as a witness and not to testify*.”

Evid. Code § 940: “To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a *privilege to refuse to disclose any matter that may tend to incriminate him*.”

General Rule: Should a suspect, after the warnings are given, indicate that he wishes to remain silent, the interrogation must cease. Similarly, if the suspect states that he wants the assistance of an attorney, the interrogation must cease

until an attorney is present. (*Maryland v. Shatzer* (2010) 559 U.S. 98, 104 [175 L.Ed.2nd 1045].)

Should a suspect invoke, but fail to specifically ask for an attorney, it will be considered an invocation of his *right to silence* only. The interrogating officer has *no duty* to clarify which right a suspect is attempting to invoke. (*United States v. Muhammad* (7th Cir. 1997) 120 F.3rd 688, 698; citing *Davis v. United States* (1994) 512 U.S. 452, 461 [129 L.Ed.2nd 362, 373]; *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1322; see also *People v. DeLeon* (1994) 22 Cal.App.4th 1265, 1269-1272.)

Practice tip: Because an officer's options at reinitiating an interrogation are greater where a suspect invokes his right to silence only, as opposed to when he invokes his right to counsel, it is better not to seek clarification. (See “Subject Invoked his ‘Right to Remain Silent,’ Only,” under “Lawful Exceptions to the *Miranda Rule*” (Chapter 5), above, and “Legal Effects of Each,” below.)

The Fifth Amendment Self-Incrimination vs. Fifth Amendment Right to Counsel:

The “**Fifth Amendment Right to Remain Silent**” is, of course, *expressly* provided for in the **Fifth Amendment**.

“No person . . . shall be compelled in any Criminal Case to be a witness against himself. ”

The “**Fifth Amendment Right to Counsel:**” Although not specifically mentioned in the U.S. Constitution, it has been held that there is a *right to counsel* during questioning *implied* by the **Fifth Amendment** which, in order for a law enforcement officer to lawfully question an in-custody defendant, must be waived. (*McNeil v. Wisconsin* (1991) 501 U.S. 171 [115 L.Ed.2nd 158].)

The right to an attorney as specified in the **Sixth Amendment** is completely separate from the right to an attorney implied under the **Fifth Amendment** discussed here. (See “**Sixth Amendment Right to Counsel**,” under “*Suppression Issues and Procedures*” (Chapter 13), below.)

Legal Effects of Each: The difference between the legal significance of an invocation of one's **Fifth Amendment** right against *self-incrimination* (i.e., to “*remain silent*”) and an invocation of the subject's **Fifth Amendment** right to the *assistance of counsel* is important:

Fifth Amendment Right to Remain Silent: If, after a *Miranda* admonishment, a suspect invokes his **Fifth Amendment** right *not to*

incriminate himself, the officers must stop the interrogation, “scrupulously honoring” his right to remain silent. (See *Miranda v. Arizona*, *supra*, at p. 474 [16 L.Ed.2nd at p. 723]; and *Michigan v. Mosley* (1975) 423 U.S. 96 [46 L.Ed.2nd 313]; *People v. Superior Court (Corbett)* (2017) 8 Cal.App.5th 670, 679-680.)

Reinitiation of Interrogation: An interrogation, however, may generally be reinitiated by the law enforcement officer.

Officers may, on their own initiative, return and attempt to question the suspect about (at least) *any other case*, so long as defendant’s right to remain silent had been previously “scrupulously honored.” (*Michigan v. Mosley*, *supra*, at p. 103 [46 L.Ed.2nd at p. 321]; *McNeil v. Wisconsin* (1991) 501 U.S. 171 [115 L.Ed.2nd 158]; *People v. Warner* (1988) 203 Cal.App.3rd 1122; *People v. DeLeon* (1994) 22 Cal.App.4th 1265, 1269-1272.)

“An invocation of the right to remain silent does not mean that questioning can never be resumed . . . (¶) . . . (A)dmisibility of any . . . subsequent statements depends on whether (the subject’s) ‘right to cut off questioning’ was ‘scrupulously honored.’” (*United States v. Cody* (8th Cir. 1997) 114 F.3rd 772, 775.)

See “*Subject Invoked his ‘Right to Remain Silent,’ Only,*” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

Fifth Amendment Right to an Attorney: If, after a *Miranda* admonishment, a suspect invokes his **Fifth Amendment** *right to counsel*, the officer must cease questioning (See *Taylor v. Maddox* (9th Cir. 2004) 366 F.3rd 992.) and may *never* (but see *Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2nd 1045], below) come back and question him or her again about *that case or any other case* as long as he or she remains in custody. (*Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880; 68 L.Ed.2nd 378]; sometimes called the “*Edwards Rule*.” See also *People v. Johnson* (2022) 12 Cal.5th 544, 579; “(A)ll efforts at interrogation must cease once the right to counsel is invoked;” citing *Edwards*, *supra*, at p. 485, while referring to this rule as a “bright-line rule.”)

See *Robertson v. Pichon* (9th Cir. 2017) 849 F.3rd 1173, 1183, for a description of the reasoning behind the “*Edwards Rule*.”

“The prohibition applies, of course, when the subsequent interrogation pertains to a different crime, [citation], when it is conducted by a different law enforcement authority, [citation], and even when the suspect has met with an attorney after the first interrogation.” (*Maryland v. Shatzer* (2010) 559 U.S. 98, 108-109 [130 S.Ct. 1213; 175 L.Ed.2nd 1045].)

This is true even if the officer conducting the second interrogation is *unaware* of the prior invocation of the subject’s rights. (*Arizona v. Roberson* (1988) 486 U.S. 675, 687 [100 L.Ed.2nd 704, 717].)

This is also true even though before the officer’s return, the in-custody defendant has had the opportunity to, or did in fact consult with an attorney. (*Minnick v. Mississippi* (1990) 498 U.S. 146 [111 S.Ct. 486; 112 L.Ed.2nd 489].)

“*Edwards v. Arizona* added a second layer of protection to the *Miranda* rules, holding that ‘when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [Citation]’” (*Michigan v. Harvey* (1990) 494 U.S. 344, 350 [110 S.Ct. 1176; 108 L.Ed.2nd 293, 302].)

The *Miranda* decision itself described this right as “*indispensable*” to the protection of the **Fifth Amendment** privilege against self-incrimination. (*Martinez v. Cate* (9th Cir. 2018) 903 F.3rd 982, 992; citing *Miranda* at p. 469.)

“A prior *coerced* confession can ‘taint’ a subsequent one. See *Oregon v. Elstad*, 470 U.S. 298, 310, 105 S.Ct. 1285, 84 L.Ed.2nd 222 (1985). In conducting a taint analysis, the court considers ‘the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators.’ *Id.* An *Edwards* violation, however, does not on its own render subsequent confessions involuntary. See *Elstad*, 470 U.S. at 308-10. Contrary to (defendant) Bradford’s argument, the Supreme Court has not clearly established that a presumption of involuntariness attaches to statements taken in violation of *Edwards*, such that subsequent statements are tainted. The

Court has held that statements taken in violation of **Edwards** may still be used for impeachment, **Oregon v. Hass**, 420 U.S. 714, 722-23, 95 S. Ct. 1215, 43 L. Ed. 2d 570; *see also* (**Michigan v. Harvey** (1990), 494 U.S. (344) at 350-351 ([110 S.Ct. 1176; 108 L.Ed.2nd 293])), which means that such statements are not presumed to be involuntary by virtue of the **Edwards** violation alone. *See* (**Oregon v. Hass** (1974) 420 U.S. (714) at 722-723 ([43 L.Ed.2nd 570.]); **Mincey (v. Arizona)** (1978)) 437 U.S. (385) at 398 ([57 L.Ed.2nd 290, 304]).” (**Bradford v. Davis** (9th Cir. 2019) 923 F.3rd 599, 616.)

But see Maryland v. Shatzer (2010) 559 U.S. 98 [175 L.Ed.2nd 1045], applying a 14-break in custody rule before officers may reinitiate an attempt to talk to a defendant who has invoked his right to counsel. (See “Where the Defendant has Already Invoked,” above, and “How Long is Forever?”, below.)

Did the Suspect Invoke?

Rule: A suspect may invoke his **Miranda** rights by *any words or conduct* reasonably inconsistent with a present willingness to discuss the case freely and completely. (**People v. Crittenden** (1994) 9 Cal.4th 83, 129; **People v. Scaffidi** (1992) 11 Cal.App.4th 145, 152-153.)

Waiver vs. Invocation of Rights: “The requirements for a valid waiver of rights differ from the requirements for a valid invocation of rights. (**Smith v. Illinois** (1984) 469 U.S. 91, 98 [83 L. Ed. 2d 488, 105 S. Ct. 490] . . . [‘Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together’].) ‘A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the **Miranda** decision.’” (**People v. Flores** (2020) 9 Cal.5th 371, 417, citing **People v. Cruz** (2008) 44 Cal.4th 636, 667.)

A valid *waiver of rights* (requiring evidence that the suspect knowingly and voluntarily waived his rights and necessitating an evaluation of the defendant's state of mind) involves a different analysis than when analyzing whether an *invocation of rights* is legally effective. To be legally effective, an *invocation of rights* must be clear and unequivocal; the test being whether a reasonable officer under the circumstances should have known that the suspect was in fact trying to invoke his rights. (**People v. Flores**, *supra*.)

Interpreting the Response: It must first be determined whether the subject's response to a **Miranda** admonishment was in fact an invocation of his or her rights.

An invocation of a suspect's *right to remain silent* need not be express. It may be implied under the circumstances. "(N)o particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent." (**People v. Crittenden** (1994) 9 Cal.4th 83, 129.)

A suspect may invoke his **Miranda** rights by *any words or conduct* reasonably inconsistent with a present willingness to discuss the case freely and completely. (*Ibid.*)

Whether a suspect's conduct or words constitutes an invocation is a question of fact to be determined in light of all the circumstances. (**People v. Hayes** (1985) 38 Cal.3rd 780, 784; see below.)

Note, however, a request for the *assistance of counsel* or to *remain silent*, at least after a prior waiver, must be clear and unambiguous to be effective. (**Davis v. United States** (1994) 512 U.S. 452, 459-461 [129 L.Ed.2d 362, 371-373] **Berghuis v. Thompkins** (2010) 560 U.S. 370, 381-389 [130 S.Ct. 2250; 176 L.Ed.2nd 1098].) (See below)

However, once a suspect makes a clear and unequivocal invocation, statements he makes later during an illegally continued interrogation cannot be used to argue that his prior invocation was equivocal. (**Jones v. Harrington** (9th Cir. 2016) 829 F.3rd 1128, 1136-1141.)

Also, showing some reluctance to cooperate with law enforcement does not necessarily reflect an attempt to invoke one's **Fifth Amendment** rights, although the "*totality of the circumstances*" have to be considered. (See examples below)

"(T)he protective purpose of the **Miranda** rule is not impaired if the authorities are permitted to pose a limited number of followup questions to render more apparent the true intent of the defendant." (**People v. Flores** (2020) 9 Cal.5th 371, 418.)

Important Note: More recent cases indicate that equivocal attempts to invoke are only legally valid when done at the initiation of an interrogation, and apply to both invocations of one's right to silence and to an attorney, while equivocal attempts to invoke after an earlier

waiver, and when done during an ensuing interrogation, must be clear and unambiguous in order to be legally effective. (See discussion below under “*Invocations Upon the Initial (or Prior to) Admonishment of Rights*,” and “*Invocations After an Initial Waiver and During an Interrogation*,” below.)

No Invocation; Examples:

Refusal to sign a waiver or to be taped; not an invocation. (*People v. Maier* (1991) 226 Cal.App.3rd 1670, 1677-1678; see also *United States v. Thurman* (7th Cir. IL 2018) 889 F.3rd 356.)

Declining to provide a written statement until an attorney arrived, where the suspect otherwise makes clear his willingness to talk about a crime, is not an invocation. (*Connecticut v. Barrett* (1987) 479 U.S. 523 [93 L.Ed.2nd 920].)

Answering, “*Yeah, Can I talk to you later?*” is not an invocation, at least under the circumstances when 30 minutes later the suspect freely discussed his offenses. (*People v. Bolden* (1996) 44 Cal.App.4th 707.)

After admitting he shot the victim, in response to an inquiry for more detail, defendant asked; “*Do I gotta still tell you after I admitted?*” This was *not* an invocation, under the circumstances. (*People v. Hayes* (1985) 38 Cal.3rd 780, 785.)

“*That's all I have got to say*” was interpreted by the court as an indication that defendant was not going to waiver from his story and not as an invocation of the right to remain silent. (*In re Joe R.* (1980) 27 Cal.3rd 496, 516.)

Indicating that he realized he would need an attorney, but that the officer could go ahead and ask him questions, was not a request for an attorney at the present time. No invocation. (*People v. Maynarich* (1978) 83 Cal.App.3rd 476, 481.)

Asking that a room be swept for concealed electronic recording devices while requesting that he be allowed to speak with one interrogator alone because he did not trust the others, at least when other officers later returned to the room without protest, did not constitute an invocation. (*People v. Memro* (1995) 11 Cal.4th 786, 832-834; but see *People v. Braeseke* (1979) 25 Cal.3rd 691, 702.)

Merely complaining of stomach pains after the admonition while ignoring the officer's questions is not an invocation. (*Evans v. DeMosthenes* (9th Cir. 1996) 98 F.3rd 1174.)

Defendant's statement that; "*I'm not going to talk. . . . That's it. I shut up,*" merely reflected a "momentary frustration and animosity" toward one of the officers and was not an invocation of his right to remain silent. (*People v. Jennings* (1988) 46 Cal.3rd 963, 977-978.)

Defendant's statement that; "*I don't know what you, I don't want to talk about this. You are getting me confused,*" was not an attempt at invocation. (*People v. Musselwhite* (1998) 17 Cal.4th 216, 1239-1240.)

The defendant requesting clarification of the rights explained to him is not an invocation. (*People v. Bestmeyer* (1985) 166 Cal.App.3rd 520, 527; *People v. Maynarich*, *supra*.)

After waiver, merely refusing to answer certain questions is *not* tantamount to an invocation. (*United States v. Mikell* (11th Cir. 1996) 102 F.3rd 470; *People v. Silva* (1988) 45 Cal.3rd 604, 629-630; *People v. Davis* (1981) 29 Cal.3rd 814, 825.)

After waiver, refusing to demonstrate the fatal shooting or submit to a polygraph test did not constitute an invocation. (*People v. Hurd* (1998) 62 Cal.App.4th 1084, 1092-1094.)

"*I can't, I can't talk no more man, it hurts man, it hurts,*" was held, under the circumstances, *not* to be an invocation but rather a statement "convey(ing) to the offices his difficulty speaking because of the pain of accepting responsibility for the victim's death." (*People v. Castille* (2003) 108 Cal.App.4th 469, 488-489.)

The defendant asking for an attorney upon law enforcement's request for a consent to search is not an invocation of the defendant's *Miranda* rights. (*United States v. LaGrone* (7th Cir. 1994) 43 F.3rd 332.)

Defendant's statement made during the interrogation, when confronted with questions about the actual murder of the victim during a robbery; "*Do I have to talk about this right now?*", held not to be an invocation of the defendant's right to silence but rather merely showing discomfort with the particular question asked. (*People v. Castille* (2005) 129 Cal.App.4th 863, 884-885.)

Note: The officer’s response to defendant’s question was: “*Yeah. I’m afraid you have to.*” The Court of Appeal did not comment on either this response or even the officer’s failure to seek clarification.

“*I haven’t even gotten a chance to get a lawyer or anything,*” held *not* to be a clear and unequivocal invocation. (***United States v. Hampton*** (7th Cir. IL 2018) 885 F.3rd 1016.)

“*I don’t want to dig a hole. I need to speak to a lawyer;*” held *not* to be an invocation in light of defendant himself continuing the discussion, creating an ambiguity as to whether he had in fact invoked, and in light of his subsequent comment, “*Do I need a lawyer?*” Later, when defendant said; “*I’m screwed. I need a lawyer,*” defendant had effectively invoked. (***United States v. Sweeny*** (1st Cir. MA, 2018) 887 F.3rd 529.)

While defendant may have mentioned an attorney and may have asked if he needed one, he never requested to actually have an attorney present and he never told the officers that he wanted to stop the interview to wait for an attorney to arrive. As neither of defendant’s comments established that he unambiguously requested a lawyer, the court held that he did not validly invoke his right to counsel and the officers were not required to stop questioning him. (***United States v. Potter*** (6th Cir. TN, 2019) 927 F.3rd 446.)

Commenting that he “*would be more comfortable*” with “*sit(ting) down and talk(ing) to my PD first, then talk with you all,*” held *not* to be a clear and unequivocal invocation to defendant’s right to the assistance of counsel. (***People v. Molano*** (2019) 7 Cal.5th 620, 659.)

“*Do you mind if I go back to my cell and think about tonight and talk to you guys tomorrow . . . ?*” held *not* to “an unambiguous and unequivocal invocation of the right to cut off questioning.” (***People v. Hoyt*** (2020) 8 Cal.5th 892, 932-933.)

Nor was his later comment when the detectives asked defendant what happened next, he responded: “*You guys know what happened. I think I’m going to stop there for now. Can I get some more water, please?*” (***Id.***, at p. 933.)

“*Nah,*” (or “*No*”) held *not* to be a clear and unequivocal invocation of his right to remain silent when considered in the context of the officer’s question; i.e., where the question was “imprecise,” coming after the officer told defendant he would “tell [defendant]

how [the police] got called out on [the case] in a minute” immediately before asking whether defendant “want[ed] to take a few minutes to talk a little bit *about that*.”) Also, the officer knew that defendant had already waived his *Miranda* rights and there was no reason to suspect that he had changed his mind. (*People v. Flores* (2020) 9 Cal.5th 371, 416-424; but see dissent at pp. 433-441.)

Invocation; Examples:

“*Off the Record*.” A defendant who asks to “*speak off the record*,” or who otherwise exhibits some expectation that his or her statements will remain confidential, may be attempting to invoke his or her rights:

Asking to speak with an officer alone and “*off the record*,” after having already invoked, does “not constitute a knowing and intelligent waiver of rights which include the advisement that ‘anything (a suspect) says can be used against him in a court of law.’ [Citation]” (*People v. Braeseke* (1979) 25 Cal.3rd 691, 702, vacated and remanded sub nom; *California v. Braeseke* (1980) 446 U.S. 932 [64 L.Ed.2nd 784], reiterated in *People v. Braeseke* (1980) 28 Cal.3rd 86.)

Remaining silent during ten minutes of questioning after the admonition was an attempt to invoke. (*United States v. Wallace* (9th Cir. 1988) 848 F.2nd 1464, 1475.)

But see *Berghuis v. Thompkins* (2010) 560 U.S. 370 [130 S.Ct. 2250; 176 L.Ed.2nd 1098], and *Salinas v. Texas* (2014) 570 U.S. 178 [133 S.Ct. 2174; 186 L.Ed.2nd 376], below: Silence alone is not an invocation.

Defendant silently pointing at a sign in the jail indicating that conversations may be monitored may be an attempt to invoke. (*Franklin v. Duncan* (9th Cir. 1995) 70 F.3rd 75, adopting facts as described at 884 F. Supp. 1435.)

A juvenile’s, or criminally unsophisticated adult’s request to have a parent present, may, depending upon the circumstances, be an attempt at an invocation. (See *People v. Soto* (1984) 157 Cal.App.3rd 694, where a 19-year old, criminally unsophisticated adult’s request to talk with a parent was held, under the circumstances, to be an invocation.)

Defendant's response; "Yes, regarding my . . . citizenship," held to be an unequivocal invocation of his right to remain silent on all issues except his citizenship. (*United States v. Soliz* (9th Cir. 1997) 129 F.3rd 499, 503.)

Making a phone call to an attorney, whether or not defendant's interrogators know who defendant called, may be an invocation. (*People v. Randall* (1970) 1 Cal.3rd 948; a questionable decision in light of subsequent authority that a request for an attorney must be unequivocal. (see below))

Denying ownership of the illegal contents of a duffle bag, profanely refusing to permit a search of his apartment, and responding to the interrogating officer's comment about the seriousness of the offense by noting that he was "dying of a progressive liver disease," was held to be sufficient to be an invocation of the defendant's right to remain silent. (*United States v. Schwensow* (7th Cir. 1998) 151 F.3rd 650, 658, fn. 5.)

After initially waving his rights, defendant told detectives, "I refuse to talk to you guys" clearly and unequivocally invoking his right to silence. Counsel's inaction in failing to object to admission of defendant's recorded confession to murder resulted in a prejudicial denial of effective assistance of counsel as to defendant's first degree murder conviction, as the prosecutor relied upon the confession heavily in her arguments to the jury. (*People v. Bichara* (2017) 7 Cal.App.5th 1261, 1277-1284.)

In response to a question about whether he had been at a trailer park the day a murder had occurred there, defendant's response; ". . . uh, want to, speak to an attorney first, because I, I take responsibility for me, but there's other people that . . .," was held to be a clear and unequivocal invocation, overruling the trial court's conclusion that defendant might have been limiting his reluctance to incriminating others. (*People v. Henderson* (2020) 9 Cal.5th 1013, 1020-1029.)

Problem: Requests to Turn Off the Tape Recorder:

"It is well-established . . . that a suspect does *not* invoke his or her right to remain silent merely by refusing to allow the tape recording of an interview, unless that refusal is accompanied by other circumstances disclosing a clear intent to speak privately and in confidence to others. [Citation]" (Emphasis added; *People v. Samayoa* (1997) 15 Cal.4th 795, 829-830.)

Defendant's waiver was valid despite his reluctance to allow his statements to be tape-recorded. (*Ibid.*)

Defendant was advised and validly waived his rights despite an earlier comment; "*No tape recorder. I don't want to incriminate myself.*" (*People v. Johnson* (1993) 6 Cal.4th 1, 25-26.)

A request to turn off the tape recorder, while defendant was emotionally distraught, held *not* to be an invocation under the circumstances but rather merely to give the defendant an opportunity to get himself in control again. (*People v. Castille* (2003) 108 Cal.App.4th 469, 488-498.)

However:

A request that the tape recorder be turned off and that two of the three interrogating officers leave the room, while seeking assurances that the room was not "bugged," all which followed a questioning period, including inappropriate references to the death penalty, calculated to "break the defendant's will," was held to constitute an invocation. (*People v. Nicholas* (1980) 112 Cal.App.3rd 249, 267-268.)

See also *People v. Hinds* (1984) 154 Cal.App.3rd 222, 236: A request to turn off a tape recorder indicating "a continuing reluctance to discuss the case *'freely and completely,'*" was held to be an invocation.

A defendant's refusal to talk on tape after a prior waiver, and his repeated "*no comment*" to each of a series of substantive questions, held to be a "selective" invocation of his right to silence. (*Arnold v. Runnels* (9th Cir. 2005) 421 F.3rd 859.)

Talking a Suspect Out of Invoking His Rights:

Although "the protective purpose of the *Miranda* rule is not impaired if the authorities are permitted to pose a limited number of followup questions to render more apparent the true intent of the defendant" (See *People v. Flores* (2020) 9 Cal.5th 371, 418.), it is improper to talk a defendant out of an attempt to invoke. For example:

Telling the defendant; "*If you didn't do this, you don't need a lawyer, . . .*" is improper. A subsequent waiver is invalid. (*People v. Russo* (1983) 148 Cal.App.3rd 1172, 1177.)

Attempting to dissuade a suspect from seeking counsel by suggesting that it would be counter to his interests constitutes a *Miranda* violation. (*People v. Hinds* (1984) 154 Cal.App.3rd 222, 235.)

Trivializing the rights accorded suspects by the *Miranda* decision, by “playing down” or minimizing their legal significance, may suggest a species of prohibited trickery resulting in an involuntary waiver. (*People v. Musselwhite* (1998) 17 Cal.4th 216, 1237; inferring to a suspect before admonition that they were going to advise him of his rights just as a precaution did not invalidate his waiver.)

Telling a suspect that if he or she refuses to talk, the suspect’s lack of cooperation will be reported to the prosecutor and may nullify, or at least undermine, the subsequent waiver. (*Collazo v. Estelle* (9th Cir. 1991) 940 F.2nd 411, 417; *United States v. Beale* (11th Cir. 1991) 921 F.2nd 1412, 1435; *United States v. Harrison* (9th Cir. 1994) 34 F.3rd 886, 890-892.)

In *Harrison*, the Ninth Circuit concluded that a single question during interrogation—asking if defendant Sonja Harrison “thought it would be better if the judge were told that she had cooperated or had not cooperated”—was unconstitutionally coercive, rendering Harrison’s subsequent confession involuntary. (*Id.* at 890-892.)

The Ninth Circuit, in *Tobias v. Arteaga* (9th Cir. 2021) 996 F.3rd 571, at p. 581, quoting *Harrison* at pp. 891-892, notes that “(a)ny suggestion by a law enforcement officer ‘that a suspect’s exercise of the right to remain silent may result in harsher treatment by a court or prosecutor’ is unconstitutionally coercive.”

As noted in *Tobias* (at p. 582), other cases have similarly held: E.g., see *United States v. Leon Guerrero* (9th Cir. 1988) 847 F.2nd 1363, 1366 fn. 2; “[T]hreatening to inform the prosecutor of a suspect’s refusal to cooperate violates her **fifth amendment** right to remain silent.” See also *United States v. Tingle* (9th Cir. 1981) 658 F.2nd 1332, 1336 fn. 5; “Although it is permissible for an interrogating officer to represent, under some circumstances, that the fact that the defendant cooperates will be communicated to the proper authorities, the same cannot be said of a

representation that a defendant's failure to cooperate will be communicated to a prosecutor."

See also *Lujan v. Garcia* (9th Cir. 2013) 734 F.3rd 917, 932, where a police interrogator telling suspect; "*I doubt that if you hire an attorney they'll let you make a statement, usually they don't,*" held to be the same type of unauthorized legal opinion, and improper.

After defendant invoked his right to counsel, telling defendant that he was to be booked for murder while inferring that it was because he (the detective) hadn't yet heard his (the defendant's) side of the story, held to be the functional equivalent of an interrogation as opposed to mere booking questions, causing defendant to agree to reinitiate the questioning, held to be "badgering," and legally improper. Defendant decision to reinitiate the questioning was not free and voluntary. (*Martinez v. Cate* (9th Cir. 2018) 903 F.3rd 982, 994-996.)

While using a *ruse or misrepresentation* to trick a suspect into waiving his rights is generally held to be improper, "the voluntariness of a suspect's waiver is not called into question when . . . the police use a misrepresentation to lure a suspect into custody, yet reveal the misrepresentation before the suspect (is admonished, waives, and) makes a statement." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1207.)

But see *People v. Molano* (2019) 7 Cal.5th 620, 648-654, where the intentional use of a ruse to obtain a waiver was held *not* to be coercive, and did not invalidate the waiver. (See "*Misrepresentations (Ruse or Subterfuge) Made to the Suspect,*" below.)

"Under *Miranda*, custodial interrogation of a defendant must be preceded by the advice that he has the rights, among others, to remain silent and to have an attorney present. If a defendant requests counsel, 'the interrogation must cease until an attorney is present.' (*Arizona v. Miranda*, *supra*,) 384 U.S. at 474. If a defendant invokes his right to counsel, a subsequent waiver must be voluntary, knowing, and intelligent. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2nd 378 (1981). It is insufficient to show 'only that [the defendant] responded to further police-initiated custodial interrogation' to establish a waiver of counsel. *Id.* at 484. Once a defendant requests counsel, he should not be subject to further interrogation 'until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' *Id.* at 484-85. Thus, *Edwards* established a 'prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda*

rights.’ *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2nd 293 (1990).” (*Bradford v. Davis* (9th Cir. 2019) 923 F.3rd 599, 615.)

In *Bradford*, an interrogator’s admonition to defendant that if he postponed his interrogation until after speaking with an attorney, he would be “*stuck*,” was criticized by a federal magistrate, but held to be relatively insignificant in the totality of the circumstances by the Ninth Circuit. (*Id.*, at p. 617.)

Query: Does it make a difference (1) which right is invoked, and (2) at what stage of the Interrogation?

Recent cases indicate that it does, at least as to (2), the stage of the interrogation, while not so as to (1), which right is involved. See below.

The Current Rule: It appears that invocations of both rights (i.e., right to silence and the right to the assistance of counsel) are to be treated the same, as far as how the invocation must be worded in order to be legally effective:

The United States has ruled that there is no reason *not* to apply the same rule to *both* equivocal attempts to invoke one’s *right to an attorney* as well as one’s *right to remain silent*. Either type of invocation must be clear and unequivocal to be legally effective. There is no need for the interrogating officers to either terminate an interview or seek clarification. (*Berghuis v. Thompson* (2010) 560 U.S. 370, 381-389 [130 S.Ct. 2250; 176 L.Ed.2nd 1098]; defendant’s act of remaining silent over a three-hour interview, answering only a few of the officer’s questions with short “yes” or “no” answers, held, after an implied waiver, *not* to be a clear and unequivocal invocation of his right to silence.)

See also *People v. Villasenor* (2015) 242 Cal.App.4th 42, 60-61.

The Ninth Circuit now concedes that invocation-of-counsel precedents apply equally to right-to-silence cases. (See *Garcia v. Long* (9th Cir. 2015) 808 F.3rd 771, 777, fn. 1; and *Jones v. Harrington* (9th Cir. 2016) 829 F.3rd 1128, 1137, and dissenting opinion at p. 1146.)

As for attempted equivocal invocations upon initially being advised of one’s *Miranda* rights, the cases are somewhat inconsistent. It may even be that there is no difference between equivocal invocations attempted before a waiver and after a waiver (see “*Argument that Ambiguous Invocations are Legally Insufficient Only After an Initial Waiver*,” below.). However, it appears that the general rule is that attempted invocations at the initiation of an interrogation *are* legally effective even though ambiguous, thus requiring an interrogator to seek clarification before

continuing on with the questioning. And to the contrary, attempted invocations *after* an initial waiver, and during the ensuing interrogation, to be legally effective, must be clear and unambiguous.

See “*Invocations After an Initial Waiver and During an Interrogation*,” below.

See also “*Argument that Ambiguous Invocations are Legally Insufficient Only After an Initial Waiver*,” below.

Invocations Upon the Initial (or Prior to) Admonishment of Rights:

Rule: Once warnings have been given, if the individual indicates “*in any manner and at any stage of the process*,” immediately prior to or during questioning, that he wishes to remain silent or to consult with an attorney, his request to terminate the questioning or obtain counsel must be “*scrupulously honored*.” (*Miranda v. Arizona*, *supra*, at pp. 444-445, 473-474, 479 [16 L.Ed.2nd at pp. 706-707, 723, 726-727]; see also *People v. Enraca* (2012) 53 Cal.4th 735, 752; *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1414-1415; *People v. Superior Court (Corbett)* (2017) 8 Cal.App.5th 670, 679-680.)

Right to Remain Silent: The *right to remain silent* or to the *assistance of counsel* may be invoked at the initiation of an interrogation by any words or conduct which reflect an unwillingness to discuss the case, even if unclear and ambiguous. (*People v. Scaffidi* (1992) 11 Cal.App.4th 145, 152-153.)

Right to the Assistance of Counsel:

A suspect’s right to the assistance of counsel, as implied under the **Fifth Amendment**, at one time, was treated differently. Early on, attempting to invoke one’s right to the assistance of counsel had to be by a clear, express, and *unambiguous* invocation, or the attempt was legally ineffective, allowing for the continued interrogation of the suspect. (See *Davis v. United States* (1994) 512 U.S. 452 [129 L.Ed.2nd 362]; *People v. Williams* (2010) 49 Cal.4th 405, 424-431.)

Recent authority indicates that the rules for invoking one’s right to counsel and his right to silence should be interpreted by the same standards. (See *Berghuis v. Thompson* (2010) 560 U.S. 370, 381-389 [130 S.Ct. 2250; 176 L.Ed.2nd 1098]; *Jones v. Harrington* (9th Cir. 2016) 829 F.3rd 1128, 1137, and dissenting opinion at p. 1146.)

Legally Effective Invocations to Right to Remain Silent:

Defendant pointing at a sign on the wall warning jail inmates that their conversations may be monitored, held to be an invocation of his right to remain silent. (*Franklin v. Duncan* (9th Cir. 1995) 70 F.3rd 75; adopting the facts as described at 844 F.Supp. 1435.)

After being advised of his rights in a written admonition form, including his right to the assistance of an attorney, defendant writing “no” after the question on the form that stated; “Having these rights in mind, do you wish to talk to us now?”, was held to be an invocation to defendant’s right to counsel as well as his right to silence. (*United States v. Scott* (6th Cir. 2012) 693 F.3rd 715.)

Whether a suspect’s conduct or words constitutes an invocation is a question of fact to be determined in light of all the circumstances. (*People v. Hayes* (1985) 38 Cal.3rd 780, 784.)

Defendant’s confession to sexual misconduct with a minor was held to have been improperly admitted into evidence when defendant, upon being advised of his rights pursuant to *Miranda*, answered with a simple “no” when asked if he wished to talk with the detective. The interrogation should have ceased at that time. Defendant’s clear invocation was not rendered equivocal or ambiguous by other statements made prior to, or after the interrogation proceeded. (*Garcia v. Long* (9th Cir. 2015) 808 F.3rd 771, 776-784.)

Legally Ineffective Equivocal Invocations to Right to Remain Silent:

Defendant’s statement that his attorney had already advised him to “*keep his mouth shut*” held to be an equivocal attempt at invocation to his right to silence, and did not preclude questioning in the officer’s attempt to clarify his intentions. (*Sechrest v. Ignacio* (9th Cir. 2008) 549 F.3rd 789, 805-806.)

Defendant’s later statement: “*I will tell you what, I will make a deal—no, I won’t make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won’t.*”, also held to be equivocal. Further attempts to clarify defendant’s intentions upheld. (*Id.*, at p. 806.)

Telling investigators in a post-waiver statement to police, *to leave him alone* because they were “*getting on me for something I didn’t do*” is not an invocation. (*People v. Nelson* (2012) 53 Cal.4th 367, 376-384.)

Also, a reasonable officer in the circumstances would not have viewed any of the defendant’s requests to call his mother as an unambiguous assertion of the right to counsel or the right to end the interrogation. (*Id.* at p. 382.)

Defendant's statement; "*I'm not going to say nothing more*," was held, in the context, *not* to be an unambiguous invocation of his right to remain silent. Instead, the statement showed impatience to take a voice stress analyzer test that was offered to him. Other than the one statement, defendant was cooperative during that interview and always willing to talk. (*People v. Sanchez* (2019) 7 Cal.5th 14, 48.)

Legally Effective Invocations to Right to the Assistance of Counsel:

"*Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer*;" was "not [an] equivocal or ambiguous" request for an attorney." (*Smith v. Endell* (9th Cir. 1988) 860 F.2nd 1528, 1529, 1531.)

"*Can I call my attorney?*" was held to be unequivocal. (*United States v. de la Jara* (9th Cir. 1992) 973 F.2nd 746, 750, 752.)

A suspect's comment; "*my attorney does not want me to talk to you*," which followed his refusal to sign a written waiver, held to be a clear and unequivocal invocation of his right to counsel. (*United States v. Cheely* (9th Cir. 1994) 36 F.3rd 1439, 1448.)

When considered together, the defendant's three questions: "*Can I get an attorney right now, man?*" "*You can have attorney right now?*" and "*Well, like right now you got one?*" were clear and unequivocal. (*Alvarez v. Gomez* (9th Cir. 1999) 185 F.3rd 995, 998.)

After being advised of his rights in a written admonition form, including his right to the assistance of an attorney, defendant writing "*no*" after the question on the form that stated; "Having these rights in mind, do you wish to talk to us now?", was held to be an invocation to defendant's right to counsel as well as his right to silence. (*United States v. Scott* (6th Cir. 2012) 693 F.3rd 715.)

See *Sessoms v. Runnels* (9th Cir. 2012) 691 F.3rd 1054, where the Ninth Circuit held that defendant's statement made before being advised of his rights; "*There wouldn't be any possible way that I could have a – a lawyer present while we do this? . . . Yeah, that's what my dad asked me to ask you guys . . . un, give me a lawyer*," was unequivocal. However, the United States Supreme Court vacated this ruling and remanded it to the Ninth Circuit to reconsider in light of its decision in *Salinas v. Texas* (2014) 570 U.S. 178 [133 S.Ct. 2174; 186 L.Ed.2nd 376]. (*Grounds v. Sessoms* (2013) 570 U.S. 928 [133 S.Ct. 2886; 186 L.Ed.2nd 930].)

On remand, the Ninth Circuit again found defendant's attempt at an invocation to be unequivocal. (*Sessoms v. Grounds* (9th Cir. 2015) 776 F.3rd 615, 625-629.)

"My—my step-dad got a lawyer for me. . . . I'm going to—can—can you call him and have my lawyer come down here?" held to be clear and unequivocal, even though he "phrased his request deferentially but unambiguously." (*Mays v. Clark* (9th Cir. 2015) 807 F.3rd 968, 977-981; the error held to be harmless in light of the other evidence of defendant's guilt.)

"Could I have an attorney? Because that's not me" (referring to a video of the shooter in a gang murder case); held to be a legally effective invocation. When the plaintiff's later (coerced) confession was used against him at trial, the detectives involved were not entitled to qualified immunity in that it should have been clear to them that the 13-year-old plaintiff was invoking his right to counsel. (*Tobias v. Arteaga* (9th Cir. 2021) 996 F.3rd 571, 580-581; see also *In re Art T.* (2015) 234 Cal.App.4th 335, 349-357.)

Legally Ineffective Equivocal Invocations to Right to the Assistance of Counsel:

Where defendant did not unequivocally state that he wanted an attorney, but simply asked a question, and then declined to respond when the police repeated the advisement that he was entitled to an attorney, it was held that he simply indicated that he wished to ascertain whether he had heard the officer correctly. Upon being informed that he had heard correctly, defendant did not make a statement "that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." (*People v. Crittenden* (1994) 9 Cal.4th 83, 130-131.)

Crittenden, at p.129, provides a comprehensive summary of pre-**Proposition 8** (June, 1982) California cases where equivocal comments concerning the need for an attorney were held to be effective invocations. However, the Supreme Court recognized in *Crittenden* that California now abides by the federal rule as announced in *Davis*. (*Id.*, at pp. 124, 129-131, where it was held in a post-waiver comment that "*Did you say I could have a lawyer?*" was *not* an effective invocation.

"I just thinkin', maybe I shouldn't say anything without a lawyer and then I thinkin' ahh." Although defendant's comment was made at the initiation of the interrogation, the Court found that because defendant did not clearly and unambiguously request an attorney, there was no legally effective invocation. (*People v. Bestelmeyer* (1985) 166 Cal.App.3rd 520, 528.)

“Do you think I need a lawyer?” No invocation. (*Diaz v. Senkowski* (2nd Cir. 1996) 76 F.3rd 61, 63; see also *People v. Davis* (2009) 46 Cal.4th 539, 586-588.)

Note: The answer to this question is always to be: “That’s a choice YOU have to make. I cannot make it for you.”

“I think I need a lawyer.” No invocation. (*Burket v. Angelone* (4th Cir. 2000) 208 F.3rd 172, 198.)

People v. Sapp (2003) 31 Cal.4th 240, 264-269: “Maybe I should have an attorney.” Too ambiguous, even though as to pre-**Proposition 8** offenses (June 8, 1982), such a comment is legally effective, it is clearly *not* sufficient for any offenses occurring after that date.

United States v. Younger (9th Cir. 2005) 398 F.3rd 1179, 1187-1188: “But, excuse me, if I’m right, I can have a lawyer present . . . through all this, right?” No invocation.

Announcing, while being arrested, that she intended to call her lawyer was held *not* to be a clear and unequivocal invocation in *People v. Nguyen* (2005) 132 Cal.App.4th 350, 357-358.

Defendant’s response to the *Miranda* advisal that he was “willing to listen (to the FBI agents) without an attorney present” was neither an invocation of this right to an attorney nor to his right to remain silent. (*United States v. Washington* (9th Cir. 2006) 462 F.3rd 1124, 1133-1134.)

Where, after being advised of his rights, defendant asked; “(If I don’t talk to you now, how long will it take for me to talk to you ‘fore a person sent a lawyer to be here?” and “I could wait ‘til next week sometime,” was not an invocation. His unequivocal waiver right after these comments was upheld. It was also noted that the detective’s response to the defendant’s comments; “Yeah, maybe,” was not an intentional attempt to mislead defendant as to when he could talk to a lawyer. (*People v. Smith* (2007) 40 Cal.4th 483, 502-504.)

“I don’t have a lawyer. I guess I need to get one, don’t I?” and “I guess you better get me a lawyer then,” both held to be equivocal, and legally ineffective. (*United States v. Havlik* (8th Cir. 2013) 710 F.3rd 818, 821-822.)

“I don’t know. Sometimes they say it’s—it’s better if I have a—a lawyer,” conceded by the defendant to be an equivocal, and legally ineffective, attempt to invoke. (*People v. Duff* (2014) 58 Cal.4th 527, 552-553.)

Defendant's comments during the admonition that: "*They always tell you get a lawyer. . . . I don't know why,*" held to be too vague to put his interrogators on notice that he was invoking his right to counsel. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1086-1088.)

The detective's comments: "*You know what we're trying to do is we're trying to help you,*" and "*our motivation is not to give you grief or punishment,*" held not to make defendant's incriminatory comments any less voluntary. (p. 1088.)

The California Supreme Court's decision in *People v. Williams* (2010) 49 Cal.4th 405, at pp. 426-428, blurred the distinction between an ambiguous invocation at the time of the *Miranda* admonishment and another made later during the interrogation. After being admonished, and upon being asked: "*Do you want an attorney here while you talk to us?*", defendant answered: "*Yeah.*" Not sure, under the circumstances, that defendant understood that an attorney wouldn't be immediately available, necessitating a delay in the interrogation, this fact was explained to him. Defendant therefore decided to talk with the officers without the need for an attorney. The Court determined that this was no more than the officers seeking clarification of an ambiguous response. And then later, at pp. 431 to 433, when defendant clearly said that "*I want to see my attorney 'cause you're all bullshitting now,*" the Court noted here that any change of heart must be clearly and unequivocally expressed, and that in this case, defendant was merely expressing his frustration with the one detective who openly accused him of murder.

Telling a court-appointed psychiatrist that; "*I'd sort of like to know what my lawyer wants me to do,*" was held *not* to be an unambiguous invocation of the right to counsel. (*Petrocelli v. Baker* (9th Cir. 2017) 869 F.3rd 710, 721-724.)

The Eight Circuit Court of Appeal held that an in-custody did not validly invoke his right to counsel by asking whether the interview would end if he wanted an attorney, because, by defendant's express admission, he was "kidding." Second, the remaining conversation between defendant and the officer did not establish that he wanted an attorney present during the interview. Instead, defendant made it clear that he only wanted an attorney present if he was charged with a crime. Once defendant realized that waiving his right to counsel only applied during the interview, he apologized for his confusion, stated that he would talk to the officer, and initialed the waiver. The Court found that defendant's statements were, at best, ambiguous as to whether he wanted to have an attorney present for the interview. As a result, defendant failed to sufficiently invoke his right to counsel and the officer was not required to stop questioning him. (*United States v. Giboney* (8th Cir. 2017) 863 F.3rd 1022.)

Seeking Clarification of Ambiguous Invocation Made at Initiation of the Interrogation:

Rule: It is incumbent upon a police officer to attempt to clarify the accused's ambiguous answer when necessary (*People v. Thompson* (1990) 50 Cal.3rd 134.), so long as it is not done in an attempt to talk a suspect into changing his or her mind after what was really an invocation. (*People v. Carey* (1986) 183 Cal.App.3rd 99; see also *People v. Williams* (2010) 49 Cal.4th 405, 428; see also *People v. Duff* (2014) 58 Cal.4th 527, 551-553.)

Nothing in *Miranda* precludes the clarification of ambiguous answers. "It is just as important for police to make certain that a suspect means what he says in his answer which asserts his rights as it is to ascertain if he understands the question sufficiently to knowingly and intelligently waive those rights." (*In re Brian W.* (1981) 125 Cal.App.3rd 590, 600.)

See also *People v. Box* (2000) 23 Cal.4th 1153, 1194, where it was held that; "(i)f a suspect's request for counsel or invocation of the right to remain silent is ambiguous, the police may 'continue talking with him for the limited purpose of clarifying whether he is waiving or invoking those rights.'" (Quoting *People v. Johnson* (1993) 6 Cal.4th 1, 27.)

Defendant's comments to a police officer who was attempting to detain him, to the effect that the defendant was "*not going to answer any of your f__ing questions*," was found to be ambiguous and subject to an investigator's later attempts at clarification. (*People v. Farnam* (2002) 28 Cal.4th 107, 181.)

The Ninth Circuit Court of Appeal, in *United States v. Rodriguez* (9th Cir. 2008) 518 F.3rd 1072, explicitly ruled that an officer is required to clarify a suspect's intentions when the equivocal invocation is made before initiating substantive questioning. "Prior to obtaining an unambiguous and unequivocal waiver, a duty rests with the interrogating officer to clarify any ambiguity before beginning general interrogation." (pg. 1080.)

In *People v. Duff* (2014) 58 Cal.4th 527, at p. 553, citing *People v. Williams* (2010) 49 Cal.4th 405 at p. 427, the California Supreme Court noted that the rules "referenc(ing) . . . a lawyer occur(ing) at the beginning of questioning" are distinct to those made post-waiver. "Thus, the postwaiver rule rejecting any duty to clarify ambiguous invocations and permitting an officer to continue subjective questioning until and unless the suspect *clearly* requests

an attorney” do not apply when the ambiguous reference to counsel is made upon the initial advisal of rights. (*Italics in original; internal quotation marks eliminated.*)

Defendant’s statement that his attorney had already advised him to “*keep his mouth shut*” held to be an equivocal attempt at invocation to his right to silence, and did not preclude questioning in the officer’s attempt to clarify his intentions. (*Sechrest v. Ignacio* (9th Cir. 2008) 549 F.3rd 789, 805-806.)

Defendant’s later statement: “*I will tell you what, I will make a deal—no, I won’t make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won’t.*”, also held to be equivocal. Further attempts to clarify defendant’s intentions upheld. (*Id.*, at p. 806.)

The Court further noted that although it is “*good police practice for the interviewing officers to clarify*” a defendant’s ambiguous attempts to invoke his right to silence, there is no legal duty to do so. (*Id.*, at pp. 805-806.)

Ambiguity as a Precedent: Assuming that an attempt to invoke at the beginning of an interrogation need not be clear and unambiguous to be legally effective, it has been held that an attempt by the police to clarify a suspect’s response “requires ambiguity as a precedent. . . .” (*People v. Carey* (1986) 183 Cal.App.3rd 99, 102.) Manufacturing ambiguity by questioning the suspect’s otherwise clear invocation is not allowed.

Also, a mid-interrogation invocation to the assistance of counsel, if unambiguous, may not be questioned. The interrogation must cease. (*Mays v. Clark* (9th Cir. 2015) 807 F.3rd 968, 977; “If the police do not cease questioning, the suspect’s ‘postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel.’” Citing *Smith v. Illinois* (1985) 469 U.S. 91 [105 S.Ct. 490; 83 L.Ed.2nd 488]; see also *People v. Henderson* (2020) 9 Cal.5th 1013, 1028.)

““No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.”” (*People v. Henderson* (2020) 9

Cal.5th 1013, 1025, quoting *Smith v. Illinois*, *supra*, at p. 99.)

On review from a denial of habeas relief, per **28 U.S.C. § 2254**, the Ninth Circuit Court of Appeal agreed with the district court that the California Court of Appeal had applied *Miranda* and its progeny in an objectively unreasonable manner. Contrary to the California Court of Appeal’s ruling, defendant plainly requested a lawyer to be sent to the interrogation to represent him. Reliance on defendant’s post-request statements, used to cast doubt on the clarity of defendant’s request for a lawyer, was contrary to, or an unreasonable application of, the U.S. Supreme Court’s decision in *Smith v. Illinois*, *supra*. (*Mays v. Clark*, *supra*, at pp. 977-979; also finding that the error was not prejudicial, however, in that defendant would have been convicted even without the use of his statements; pp. 979-981.)

An attempt at clarification cannot be used to mask a continued interrogation or pressure to waive. (*People v. Williams* (1979) 93 Cal.App.3rd 40.)

An unambiguous request for an attorney must result in an immediate cessation of questioning. Continued questioning in an attempt to cast doubt on the clarity of the suspect’s request is improper. (*Smith v. Illinois* (1985) 469 U.S. 91 [105 S.Ct. 490; 83 L.Ed.2nd 488].)

Asking defendant “why?” after he had invoked, causing him to eventually change his mind, held to be improper. (*People v. Peracchi* (2001) 86 Cal.App.4th 353.)

Defendant’s confession to sexual misconduct with a minor was held to have been improperly admitted into evidence when defendant, upon being advised of his rights pursuant to *Miranda*, answered with a simple “no” when asked if he wished to talk with the detective. The interrogation should have ceased at that time. Defendant’s clear invocation was not rendered equivocal or ambiguous by other statements made prior to, or after the interrogation proceeded. (*Garcia v. Long* (9th Cir. 2015) 808 F.3rd 771, 776-784; holding that; “(A)n unambiguous and unequivocal *Miranda* invocation ‘cuts off’ questioning—even questioning intended to clarify that the accused is invoking his *Miranda* rights.” (pg. 778.)

Defendant's statement: "*If you can bring me a lawyer, that way I, I with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me,*" held to be ambiguous. The officer's attempt to clarify his intent was upheld. (*People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 215-220.)

Telling his interrogators that "*I don't want to talk no more*" was held to be an unequivocal invocation of the defendant's right to silence. In so ruling, the Ninth Circuit Court of Appeal overruled the California state courts' ruling that subsequent statements, made when the officers ignored defendant's invocation, cast doubt upon whether defendant was actually invoking. "When a suspect invokes his right to silence, the officers' interrogation must cease. Period. . . . That means the government cannot use against (defendant) anything he said after his invocation. And that includes using (defendant's) subsequent statements to 'cast retrospective doubt on the clarity of [his] initial request itself.'" (*Jones v. Harrington* (9th Cir. 2016) 829 F.3rd 1128, 1132.)

Jones is a 2-to-1 decision, using *Smith v. Illinois* (1985) 469 U.S. 91 [105 S.Ct. 490; 83 L.Ed.2nd 488] as its justification for ruling that subsequent statements may not be used to create ambiguity in an invocation that on its face is clear and unambiguous. But see the dissent in *Jones*, making a strong argument that *Smith* is sufficiently dissimilar to the circumstances in *Jones* that it cannot be said that the California state courts' ruling that when taken in context, defendant's comment about not wanting to talk any more was ambiguous, "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." (*Jones v. Harrington*, *supra*, at pp. 1142-1152; likening the situation in *Jones* more to the Ninth Circuit's unpublished decision in *United States v. Winsor* (9th Cir. 2013) 549 F. App'x 630, where there was no intervening interrogation between defendant's apparent invocation and his subsequent comments indicating that he was not attempting to invoke.)

Invocations After an Initial Waiver and During an Interrogation:

Rule: Recent cases have been holding that unless clear and unequivocal, a defendant's attempt to invoke his right to remain silent is legally ineffective, at least when the attempt to invoke is made *during* the interrogation after an initial waiver, which is the same rule for when a suspect is attempting to invoke his

Fifth Amendment right to counsel. (*People v. Henderson* (2020) 9 Cal.5th 1013, 1022, citing *People v. Stitely* (2005) 35 Cal.4th 514, 535.)

“Ambiguous or equivocal references to an attorney are not sufficient.”
(*People v. Henderson*, *supra*.)

See discussion in *People v. Parker* (2017) 2 Cal.5th 1184, 1220, where it is noted that while in pre-**Proposition 8** cases (i.e., June, 1982), “‘no particular form of words or conduct is necessary’ for a suspect to invoke his *Miranda* rights,” (citing *People v. Randall* (1970) 1 Cal.3rd 948, 955.), but that post-**Proposition 8**, “‘the suspect “must *unambiguously*” assert his right to silence or counsel.’” (citing *People v. Stitely* (2005) 35 Cal.4th 514, 535.)

After a prior waiver, any attempts to invoke one’s *right to silence* or to the *assistance of counsel* can only be invoked by a clear and unequivocal request to remain silent or for an attorney. (*Davis v. United States* (1994) 512 U.S. 452 [129 L.Ed.2nd 362; *Berghuis v. Thompkins* (2010) 560 U.S. 370, 381-389 [130 S.Ct. 2250; 176 L.Ed.2nd 1098]; *People v. Hoyt* (2020) 8 Cal.5th 892, 931.)

“(W)hen, as in this case, a defendant has waived his *Miranda* rights and agreed to talk with police, any *subsequent* invocation of the right to counsel or the right to remain silent must be unequivocal and unambiguous.” (Italics in original; *People v. Sanchez* (2019) 7 Cal.5th 14, 49; citing *Berghuis v. Thompkins* (2010) 560 U.S. 370, 381–382 [130 S.Ct. 2250; 176 L.Ed.2nd 1098; 130 S.Ct. 2250] [right to remain silent]; and *Davis v. United States* (1994) 512 U.S. 452, 461–462 [129 L.Ed.2nd 362; 114 S.Ct. 2350] [right to an attorney].)

Legally Effective Invocations to Right to Remain Silent:

By demanding to be taken home thirteen times within a fourteen minute period, to have his parents called to pick him up, and to wait out the 48 hours before he might be released, the 17-year-old defendant gang member had effectively invoked his right to remain silent. His interrogation should have stopped at that time. However, the admission into evidence of his subsequent statements, although in violation of his rights under *Miranda*, was not prejudicial given the overwhelming evidence of defendant’s guilt. His statements were not involuntary under the totality of the circumstances because there was no coercion used by the officers. (*People v. Villasenor* (2015) 242 Cal.App.4th 42, 62-68.)

Telling his interrogators that “*I don’t want to talk no more*” was held to be an unequivocal invocation of the defendant’s right to silence. In so ruling, the Ninth Circuit Court of Appeal overruled the California state courts’

ruling that subsequent statements, made when the officers ignored defendant's invocation, cast doubt upon whether defendant was actually invoking. "When a suspect invokes his right to silence, the officers' interrogation must cease. Period. . . . That means the government cannot use against (defendant) anything he said after his invocation. And that includes using (defendant's) subsequent statements to 'cast retrospective doubt on the clarity of [his] initial request itself.'" (*Jones v. Harrington* (9th Cir. 2016) 829 F.3rd 1128, 1132.)

Legally Ineffective Equivocal Invocations to Right to Remain Silent:

Defendant's request to be taken back to jail held *not* to be an invocation of his right to silence. (*DeWeaver v. Runnels* (9th Cir. 2009) 556 F.3rd 995, 1000-1002.)

"Okay. I'll tell you. I think it's about time for me to stop talking," held *not* to be a sufficient invocation, at least in light of the officer's follow-up statement that if defendant wished to remain silent, he could do so; advice defendant ignored and continued talking. (*People v. Stitely* (2005) 35 Cal.4th 514, 534-536.)

Defendant's statement made during the interrogation, when confronted with questions about the actual murder of the victim during a robbery; "*Do I have to talk about this right now?*", held *not* to be an invocation of the defendant's right to silence but rather merely showing discomfort with the particular question asked. (*People v. Castille* (2005) 129 Cal.App.4th 863, 884-885.)

Note: The officer's response to defendant's question was: "*Yeah. I'm afraid you have to.*" The Court of Appeal did not comment on the propriety of either this response or even the officer's failure to seek clarification.

The California Supreme Court again applied the same rule applicable to ambiguous attempts to invoke one's right to counsel to when the issue is an invocation to the right to silence, including the lack of any legal need to seek clarification. Per the Court, to apply different rules would be too difficult to apply, particularly when the attempted invocation involved a mix of both a right to counsel and to silence. E.g., "*Maybe I should stop talking and get a lawyer,*" held *not* to be an invocation. (*People v. Martinez* (2010) 47 Cal.4th 911, 947-948.)

"*I don't want to talk about it*" held *not* to be an invocation of the defendant's right to silence, but merely an expression of defendant's frustration with the detectives refusing to accept his denial to knowing the victim. (*People v. Williams* (2010) 49 Cal.4th 405, 433-434.)

After having previously waived his rights, defendant said; “*I don’t, I don’t want it, I don’t wanna . . .*” Taken in context, this was merely a refusal to admit his guilt, and not an attempt to invoke his right to silence. The detectives were under no legal obligation to stop and seek clarification. Defendant, at the very least, did not clearly and unequivocally invoke his right to silence. (*People v. Scott* (2011) 52 Cal.4th 452, 481-482.)

After having previously waived his *Miranda* rights, the co-defendant’s statement, mid-interrogation, that: “*I ain’t talking no more and we can leave it at that,*” held to be merely a momentary expression of frustration that the detectives were not accepting his version of the facts. As such, there was no invocation. (*People v. Thomas* (2012) 211 Cal.App.4th 987, 1004-1007.)

Defendant’s failure to inquire as to the condition of the victims in a car that he had broadsided, where one of the occupants died, was held to be the equivalent of an equivocal attempt to invoke his right to silence, and legally ineffective absent an express and unequivocal invocation. His silence on this topic, therefore, was admissible as substantive evidence showing a consciousness of guilt. (*People v. Tom* (2014) 59 Cal.4th 1210, 1222-1237.)

However, on remand in an unpublished opinion, it was noted by the First District Court of Appeal (Div. 3) that defendant did in fact specifically invoke his right to remain silent and to counsel, both before and after he was advised of his *Miranda* rights; a fact not initially reported. Then, at trial, because the prosecutor’s questions concerning his silence were not specifically directed to defendant’s silence prior to these invocations, thus necessarily including that time period after defendant had invoked, it was error to admit the fact of his silence into evidence. Not being harmless error, defendant conviction was reversed. (*People v. Tom* (2015) 2015 Cal.App.Unpub. LEXIS 2887.)

The dissenting opinion in the Ninth Circuit Court of Appeals decision of *Arnold v. Runnels* (9th Cir. 2005) 421 F.3rd 859, at p. 870, points out that a number of federal Circuit Courts of Appeal have extended the rule of *Davis v. United States* (1994) 512 U.S. 452 [129 L.Ed.2nd 362] (requiring a clear and unequivocal invocation of one’s right to an attorney, under *Miranda*, in order to be legally effective; see below) to attempts to invoke one’s right to silence.

“(W)hy would I want to talk to you about something that occurred back then?,” and “I can’t . . . imagine why I would want to talk

with the Costa Mesa Police Department.”, held *not* to be a clear and unequivocal invocation, upholding defendant’s implied waiver. (*People v. Parker* (2017) 2 Cal.5th 1184, 1215-1217.)

Legally Effective Invocations to Right to the Assistance of Counsel:

A thirteen-year-old juvenile’s comment during interrogation; “*Could I have an attorney? Because that’s not me,*” held to be a clear, unequivocal invocation, requiring the officer to stop the interrogation. (*In re Art T.* (2015) 234 Cal.App.4th 335, 349-357.)

Note: In a resulting civil suit, where Art T. (i.e., Art Tobias) sued the officers for violating his **Fourteenth Amendment** due process rights as well as his **Fifth Amendment/Miranda** rights, the Ninth U.S. Circuit Court of Appeals held that the three Los Angeles police detectives who interrogated him were *not* entitled to qualified immunity on the **Fifth Amendment** right to counsel claims, but were entitled to qualified immunity on the **Fourteenth Amendment** substantive due process claims. The latter was based upon the fact that the detectives’ interrogation tactics did not “*shock the conscience.*” (*Tobias v. Arteaga* (9th Cir. 2021) 996 F.3rd 571.)

In response to a question about whether he had been at a trailer park the day a murder had occurred there, defendant’s response; “. . . uh, want to, speak to an attorney first, because I, I take responsibility for me, but there’s other people that . . . ,” was held to be a clear and unequivocal invocation, overruling the trial court’s conclusion that defendant might have been limiting his reluctance to incriminating others. “A defendant who has waived his *Miranda* rights may reinvoke them during the interrogation. If he clearly and unequivocally does so, police must stop questioning.” *People v. Henderson* (2020) 9 Cal.5th 1013, 1020-1023; citing (*Edwards v. Arizona* (1981) 451 U.S. 477, 478–479, 482, 485 [101 S.Ct. 1880; 68 L.Ed.2nd 378], and *Miranda v. Arizona*, *supra*, at pp. 473–474.)

Legally Ineffective Equivocal Invocations to the Assistance of Counsel:

Davis v. United States (1994) 512 U.S. 452, 459 [129 L.Ed.2nd 362]: The defendant’s statement that; “*Maybe I should talk to a lawyer,*” made after an initial waiver and during the progress of the interrogation, was held to be ambiguous as an invocation and subject to clarification.

Even before *Davis*, the California Supreme Court recognized the issue. “*Maybe I ought to talk to my lawyer, you might be bluffing, you might not have enough to charge murder.*” With this comment being made mid-interrogation, it was held not to be an invocation. (*People v. Johnson* (1993) 6 Cal.4th 1, 27-30.)

People v. Gonzalez (2005) 34 Cal.4th 1111: After an initial waiver, and in response to an interrogator’s question about whether defendant would submit to a polygraph examination, defendant’s comment: “*(O)ne thing I want to ask you to that, if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing.*” No invocation. This was reasonably understood by the officer to mean that defendant only wanted an attorney for charges filed in court.

“*I don’t know if I should without a lawyer,*” together with defendant’s later comment, “*Okay, that one,*” held not to be an invocation when taking into consideration the circumstances (i.e., defendant’s later comment about “*that one*” held to be referring to a particular question, and not one of his enumerated rights) and his later actions. (*People v. Michaels* (2002) 28 Cal.4th 486, 510.)

Clark v. Murphy (9th Cir. 2003) 317 F.3rd 1038: Defendant’s statement; “*I think I would like to talk to a lawyer,*” held to be equivocal, and ineffective as an invocation. Also, his later statement; “*Should I be telling you or should I talk to a lawyer*” was found to not even be close.

People v. Roquemore (2005) 131 Cal.App.4th 11, 23-25: “*Can I call a lawyer or my mom to talk to you?*” No invocation.

See pages 24 to 25, where the Court cites a dozen state and federal Circuit Court of Appeal decisions from other jurisdictions on close cases, but all of which were held to be insufficient to be an invocation of the suspect’s right to an attorney.

After a waiver, and during the ensuing interrogation, defendant asking: “*How long would it take for a lawyer to get here for me?*” several times is not an invocation. (*People v. Simons* (2007) 155 Cal.App.4th 948, 953-959.)

The in-custody defendant, after waiving his rights, told his interrogators: “*Well then book me and let's get a lawyer and let's go for it, you know.*” Then saying that while he didn’t mind answering routine questions, he didn’t like being accused of the victim’s abduction. This was followed by “*Let’s s__t or get off the pot,*” and “*Well, let's go for it. That's the end, the end.*” All this was held not to be a clear and unambiguous invocation. (*People v. Davis* (2009) 46 Cal.4th 539, 586-588.)

“I think it’d probably be a good idea for me to get an attorney” held to be equivocal, at least under the circumstances (including a prior waiver) where the defendant repeatedly told the detective afterwards to *“talk to me.”* (**People v. Bacon** (2010) 50 Cal.4th 1082, 1104-1105.)

Post waiver, defendant stated during his interrogation: *“Then I think I would behoove me to consult a lawyer.”* Also, later; *“I think it best that if, if I wanted to face [it], I think it’d be best if I consult a lawyer.”* And still later; *“I don’t know [so] that’s why I’d like to talk to somebody who does,”* all statements during a discussion about whether defendant would submit to a polygraph, were *not* invocations of his right to counsel, particularly in light of defendant’s reaffirmation later that he did not want the assistance of a lawyer. (**People v. Tully** (2012) 54 Cal.4th 952, 988, 990-991.)

“I need to know, am I being charged with this, because if I’m being charged with this I think I need a lawyer,” held to be an ambiguous attempt at an invocation, at least after a prior waiver. (**People v. Suff** (2014) 58 Cal.4th 1013, 1068-1070.)

“I think I probably should change my mind about the lawyer now. I, I need advice here. Don’t you guys think I need some advice here? I think I need some advice here.” held to be an equivocal statement which, under the circumstances, an officer could reasonably believe that defendant was no more than thinking about changing his mind about his prior waiver. (**People v. Shamblin** (2015) 236 Cal.App.4th 1, 17-21.)

Defendant’s post-waiver statement: *“I committed an armed robbery yes. Should I have somebody here talking for me, is this the way it’s supposed to be done?”* held *not* to be a clear and unequivocal right to counsel, and did not require the officers to clarify what he meant. (**People v. Cunningham** (2015) 61 Cal.4th 609, 645-647.)

The California Supreme Court’s decision in **People v. Williams** (2010) 49 Cal.4th 405, at pp. 426-428, blurred the distinction between an ambiguous invocation at the time of the **Miranda** admonishment and another made later during the interrogation. After being admonished, and upon being asked: *“Do you want an attorney here while you talk to us?”*, defendant answered: *“Yeah.”* Not sure, under the circumstances, that defendant understood that an attorney wouldn’t be immediately available, necessitating a delay in the interrogation, this fact was explained to him. Defendant therefore decided to talk with the officers without the need for an attorney. The Court determined that this was no more than the officers seeking clarification of an ambiguous response. And then later, at pp. 431 to 433, when defendant clearly said that *“I want to see my attorney ‘cause you’re all bullshitting now,”* the Court noted here that any change of heart

must be clearly and unequivocally expressed, and that in this case, defendant was merely expressing his frustration with the one detective who openly accused him of murder.

After an initial (implied) waiver, defendant interjected into the conversation: “*Then charge me sir. I, I can get a lawyer.*” When asked if he was asking for a lawyer, defendant responded: “*Yeah, yeah. Do, do I, if anything . . .*” When asked again if he wanted to talk to a lawyer, defendant said: “*Listen, listen. If you're gonna charge me, charge me. If not, let me go. Or, or call ... immigration and say I'm here illegally. . . Okay, okay. You, you, but you read me my rights, but what I under arrest for?*” The Court held that defendant’s reference to getting a lawyer was objectively ambiguous because from the start of the interrogation, defendant responded to almost every statement and question posed by the detectives by saying, “*yeah, yeah.*” (*People v. Johnson* (2019) 32 Cal.App.5th 26, 56-57.)

The following colloquy held *not* to be a clear and unequivocal invocation of defendant’s right to counsel: Defendant: “*Can I ask you a question?*” Detective: “*Sure.*” Defendant: “*They’ll assign me a PD, right?*” Detective: “*Right.*” Defendant: “*I can sit down and talk to my PD first, then talk with you all?*” Detective: “*Yeah.*” Defendant: “*Can I do that?*” Detective: “*Yeah. I mean, that’s one of your options and that’s why we’re here, you know.*” Defendant: “*That’s, I would, I would* (unintelligible; defendant later claiming that he said he would “*feel more comfortable*” if he spoke to a public defender first,” (*People v. Molano* (2019) 7 Cal.5th 620, 658-660.)

No Duty to Seek Clarification of Ambiguous Invocations Made Mid-Interrogation:

The California Supreme Court further held in *Gonzalez* (2005) 34 Cal.4th 1111, at pp. 1124-1125, again citing *Davis v. United States* (1994) 512 U.S. 452, 461-462 [129 L.Ed.2nd 362], that while it would be “*good police practice*” to seek clarification, law enforcement interrogators were not required to do so. (See also *Berghuis v. Thompson* (2010) 560 U.S. 370, 381 [130 S.Ct. 2250; 176 L.Ed.2nd 1098]; *People v. Bacon* (2010) 50 Cal.4th 1082, 1104-1105; *People v. Nelson* (2012) 53 Cal.4th 367, 377; *People v. Tully* (2012) 54 Cal.4th 952, 990; *People v. Suff* (2014) 58 Cal.4th 1013, 1068; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1087; *People v. Cunningham* (2015) 61 Cal.4th 609, 645.)

“[W]e decline to adopt a rule requiring officers to ask clarifying questions. If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.” (*Davis v. United States, supra.*)

“(C)larification, while advisable, is not required.” (*People v. Molano* (2019) 7 Cal.5th 620, 660.)

In *People v. Duff* (2014) 58 Cal.4th 527, at p. 553, citing *People v. Williams* (2010) 49 Cal.4th 405 at p. 427, the California Supreme Court noted that the rules “referenc(ing) . . . a lawyer occur(ing) at the beginning of questioning” are distinct to those made post-waiver. “Thus, the postwaiver rule rejecting any duty to clarify ambiguous invocations and permitting an officer to continue subjective questioning until and unless the suspect *clearly* requests an attorney” do not apply when the ambiguous reference to counsel is made upon the initial advisal of rights. (Italics in original; internal quotation marks deleted.)

Argument that Ambiguous Invocations are Legally Insufficient Only After an Initial Waiver:

Apparent Rule: As of late, courts have recognized that the rule of *Davis* (i.e., invocations of one’s right to counsel must be clear and unequivocal to be legally effective) applies *only* after an initial waiver and when the attempted invocation occurs during the ensuing interrogation. It is apparent that the rule is the same for attempts to invoke one’s right to silence, as well (see above). (*United States v. Rodriguez* (9th Cir. 2008) 518 F.3rd 1072; *People v. Rundle* (2008) 43 Cal.4th 76, 114-115; and see discussion in *DeWeaver v. Runnels* (9th Cir. 2008) 556 F.3rd 995, 1001, fn. 1.)

Examples:

“Issues of post-waiver invocation are governed by *Davis v. United States* (1994) 512 U.S. 452 [129 L.Ed.2nd 362, . . .]” (*People v. Villasenor* (2015) 242 Cal.App.4th 42, 60.)

In *Davis v. United States* (1994) 512 U.S. 452 [129 L.Ed.2nd 362], the defendant had waived his *Miranda* rights and answered questions for a period of time before unsuccessfully attempting to invoke this right to an attorney.

Some of the language in *People v. Gonzalez* (2005) 34 Cal.4th 1111 at pp. 1123-1124, where the defendant had also waived his rights and answered some questions before raising the issue of his right to an attorney, could be interpreted as requiring a prior waiver before the rule of *Davis* is applicable.

The California Supreme Court, in *People v. Stitely* (2005) 35 Cal.4th 514, 534-536 (a “*right to silence*” case), although not discussing the issue, infers strongly that there is in fact a requirement for a prior waiver before an equivocal attempt at an invocation to the defendant’s right to remain silent will be held to be legally insufficient.

More recently, the California Supreme Court, quoting *Davis v. United States*, specifically says: “In order to invoke the **Fifth Amendment** privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect ‘must unambiguously’ assert his right to silence or counsel.” (*People v. Rundles* (2008) 43 Cal.4th 76, 114-116; asking to stop the questioning because he had a headache held not to be an invocation.)

Citing *People v. Stitely*, *supra*, the California Supreme Court discussed an ineffective equivocal attempt to invoke one’s right to silence “*after it has been waived.*” (*People v. Scott* (2011) 52 Cal.4th 452, 481-482; “*I don’t, I don’t want it, I don’t wanna . . .*”)

A defendant’s ambiguous attempts to invoke his right to silence (“*That’s all I can tell you.*” and “*I don’t want to talk anymore right now.*”), and to counsel (“*I think I should talk to a lawyer before I decide to take a polygraph.*”) held to be contingent, at least partially, on defendant’s prior waivers. (*People v. Martinez* (2010) 47 Cal.4th 911, 947-953.)

Defendant’s statement; “*I ain’t talking no more and we can leave it at that,*” was held not to be an unambiguous invocation of his right to remain silent, but rather merely an expression of momentary frustration, but only because he had previously waived his rights under *Miranda*. (*People v. Thomas* (2012) 211 Cal.App.4th 987, 1005.)

In *People v. Nelson* (2012) 53 Cal.4th 367, 376-384, the California Supreme Court makes it very clear that the rule that an invocation of either the defendant’s right to remain silent or to the assistance of counsel must be clear and unequivocal to be legally effective applies only *after* a prior waiver and an alleged attempt to invoke mid-interrogation.

“In order to invoke the **Fifth Amendment** privilege *after it has been waived*, and in order to halt police questioning *after it has begun*, the suspect ‘must unambiguously’ assert his right to silence

or counsel. [Citation.] It is not enough for a reasonable police officer to understand that the suspect might be invoking his rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda*, *supra*, 384 U.S. 436, either to ask clarifying questions or to cease questioning altogether.” (Italics added; *People v. Suff* (2014) 58 Cal.4th 1013, 1068; quoting *People v. Stitely*, *supra*, at p. 535.)

“While the determination of whether an accused has knowingly and voluntarily waived his or her *Miranda* rights requires consideration of the totality of the circumstances to determine the accused’s *subjective state of mind* (Citation), evaluation of whether an accused *after a waiver* has unequivocally requested an attorney requires *an objective inquiry*.” (Italics added; *In re Art T.* (2015) 234 Cal.App.4th 335, 352.)

“(W)e find that this analysis requires consideration of whether a reasonable officer in light of the circumstances known to the officer, or that would have been objectively apparent to a reasonable officer, including the juvenile’s age, would understand the (mid-interrogation, after a prior waiver) statement by the juvenile to be a request for an attorney.” (*Id.*, at p. 355.)

“Once a defendant has waived his or her right to counsel, as defendant impliedly did at the outset of the interview, if that defendant has a change of heart and subsequently invokes the right to counsel during questioning, officers must cease interrogation unless the defendant’s counsel is present or the defendant initiates further exchanges, communications, or conversations.” (*People v. Cunningham* (2015) 61 Cal.4th 609, 645.)

In *People v. Duff* (2014) 58 Cal.4th 527, at p. 553, citing *People v. Williams* (2010) 49 Cal.4th 405, 427, the California Supreme Court noted that the rules “referenc(ing) . . . a lawyer occur(ing) at the beginning of questioning” are distinct to those made post-waiver. “Thus, the postwaiver rule rejecting any duty to clarify ambiguous invocations and permitting an officer to continue subjective questioning until and unless the suspect *clearly* requests an attorney” does not apply when the ambiguous reference to counsel is made upon the initial advisal of rights. (Italics in original; internal quotation marks eliminated.)

But see *Garcia v. Long* (9th Cir. 2015) 808 F.3rd 771, 776-784; using the “unambiguous and unequivocal *Miranda* invocation” rule of *Davis* under the circumstance of defendant’s initial advisal

of rights, and not recognizing, or even discussing, the issue of whether **Davis** requires an earlier waiver and subsequent, mid-interrogation, attempt to invoke.

“‘[W]hen, as in this case, a defendant has waived his **Miranda** rights and agreed to talk with police, any *subsequent* invocation of the right to counsel or the right to remain silent must be unequivocal and unambiguous.’” (*People v. Hoyt* (2020) 8 Cal.5th 892, 931; quoting *People v. Sanchez* (2019) 7 Cal.5th 14, 49.)

The United States Supreme Court has yet to rule on this argument. However, the U.S. Supreme Court has held that “*silence*” alone is not an invocation.

In *Berghuis v. Thompkins* (2010) 560 U.S. 370 [130 S.Ct. 2250; 176 L.Ed.2nd 1098], applying the rule of **Davis** to equivocal attempts to invoke one’s right to silence, and involving an “*implied* (as opposed to an *express*) *waiver*,” i.e., where defendant never specifically invoked his right to silence, but rather simply remained silent during his interrogator’s **Miranda** admonition and attempts to question him, found that silence alone is insufficient to constitute an invocation. The Court found that a clear waiver need not always precede questioning because “(t)he **Miranda** rule and its requirements are met if a suspect receives adequate **Miranda** warning, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.”

Also, when during a non-custodial interview with no **Miranda** admonishment having been given, defendant, who otherwise was answering all questions but then silently “[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up” when asked about whether shotgun shells left at the scene of a murder would be shown by ballistics to have come from his gun, his silence was held *not* to be an invocation of his right to remain silent. Defendant has an obligation “to put the Government (and the Court) on notice” of his intent to invoke his right to silence by specifically doing so. (*Salinas v. Texas* (2014) 570 U.S. 178, 183-191 [133 S.Ct. 2174; 186 L.Ed.2nd 376].)

See also California Supreme Court’s holding on “*silence*”: Defendant’s “momentary” silence (i.e., “less than a minute”) after being told that his wife had told officers that defendant had indeed been at the scene of the murder, held *not* to be an invocation of his right to silence. (*People v. Tully* (2012) 54 Cal.4th 952, 991-992.)

Miscellaneous Invocation Rules:

The “Reasonable Officer” Test:

Where ambiguity is an issue, whether or not a defendant’s comments are an invocation depends upon how a “*reasonable officer*” would have understood what he said, under the circumstances. (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1123-1124; citing *Davis v. United States*, *supra*, at p. 461. See also *People v. Wyatt* (2008) 165 Cal.App.4th 1592, 1599; *People v. Williams* (2010) 49 Cal.4th 405, 428; *People v. Nelson* (2012) 53 Cal.4th 367, 376-385; *People v. Tully* (2012) 54 Cal.4th 952, 990; *People v. Suff* (2014) 58 Cal.4th 1013, 1068-1070; *In re Art T.* (2015) 234 Cal.App.4th 335, 349-350; *People v. Henderson* (2020) 9 Cal.5th 1013, 1022.)

A defendant’s attempt to invoke must be taken in context. “‘In certain situations, words that would be plain if taken literally actually may be equivocal under an objective standard, in the sense that *in context* it would not be clear to the reasonable listener what the defendant intends.’” (Italics in original; *Id.*, at p. 1023; quoting *People v. Williams* (2010) 49 Cal.4th 405, 429.)

“With respect to what constitutes a request for counsel triggering the prophylactic rule of *Edwards*, the *Davis* court explained, ‘this is an objective inquiry,’ and held ‘the suspect . . . must articulate his [or her] desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.’” (*People v. Villasenor* (2015) 242 Cal.App.4th 42, 60; quoting (*Davis v. United States*, *supra*, at p. 459.)

Anticipatory Invocations: This does *not* mean, however, that a person can effectively invoke his rights *prior to being taken into custody*. Any attempt to do so will be held to be ineffective, and will *not* preclude a later attempt by law enforcement to obtain a waiver. (See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3 [115 L.Ed.2nd 158, 171]: “We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than ‘custodial interrogation’ . . .” and *United States v. Hines* (9th Cir. 1992) 963 F.2nd 255, 256; “It is well established . . . that the **Fifth Amendment** right to counsel under *Miranda* does not vest until a defendant is taken into custody.”)

See also *People v. Calderon* (1997) 54 Cal.App.4th 766; and *People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1448-1449.)

In *People v. Calderon*, *supra*, a defendant’s attempt to invoke his right to an attorney when questioned by a private investigator was

held not to preclude a later admonishment and waiver by law enforcement.

“It is well established . . . that the **Fifth Amendment** right to counsel under *Miranda* does not vest until a defendant is taken into custody.” (*United States v. Hines* (9th Cir. 1992) 963 F.2nd 255, 256: Reference to his attorney during questioning *prior* to being taken into custody “cannot be considered an invocation of *Miranda* rights.”)

Questioning that is “essentially limited to the purpose of identifying a person found under suspicious circumstances or near the scene of a recent crime,” during a detention only, are not considered an “interrogation” requiring a *Miranda* advisal. (*People v. Farnam* (2002) 28 Cal.4th 107, 180; citing *People v. Clair* (1992) 2 Cal.4th 629, 679-680.)

In *Farnam*, the Court *inferred* that defendant’s refusal to answer questions (“*I’m not going to answer any of your f__ing questions*”) was legally ineffective, and therefore did not preclude a later admonishment and waiver following the defendant’s arrest.

However, it is not necessary that an in-custody suspect have yet been read his rights for him effectively invoke his rights under *Miranda*. (*People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1448.)

See “*An Anticipatory Invocation*,” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

Selective Invocations: An in-custody suspect may choose to answer some questions while refusing to answer others:

A defendant’s refusal to talk on tape after a prior waiver, and his repeated “*no comment*” to each of a series of substantive questions, held to be a “*selective*” invocation of his right to silence. (*Arnold v. Runnels* (9th Cir. 2005) 421 F.3rd 859.)

A suspect may make a selective invocation of his **Fifth Amendment** right to silence without making a general invocation. Refusal to reenact an occurrence (the shooting of his wife) while continuing to answer other questions is such a selective invocation. Despite defendant’s general waiver, using his selective refusal against him as substantive evidence of his guilt is a violation of *Miranda* and *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240; 49 L.Ed.2nd 91], and is improper. (*Hurd v. Terhune* (9th Cir. 2010) 619 F.3rd 1080, 1085-1089.)

But conditioning a waiver on the possible filing of charges is not a selective invocation. A defendant “cannot avoid the rule of *Davis v.*

United States (1994) 512 U.S. 452, 461 [129 L.Ed.2nd 362, 373] (requiring a clear and unequivocal invocation), by characterizing an ambiguous reference to counsel as a limitation on his waiver of his *Miranda* rights.” (*People v. Suff* (2014) 58 Cal.4th 1013, 1070.)

Post-arrest, after admonishment and waiver, a defendant’s selective refusal (i.e.; “*partial silence*”) to answer certain questions *may be used* for impeachment purposes *except* where such refusal is made under circumstances indicating that such refusal is in fact an attempt to invoke his or her *Miranda* rights. (*People v. Hurd* (1998) 62 Cal.App.4th 1084, 1093.)

The fact of a defendant’s selective silence to certain questions was held to be admissible as “*adoptive admissions*” per **E.C. § 1221**, but only because defendant’s failure to answer these questions *did not*, under the circumstances, infer an intent to rely upon his **Fifth Amendment** right to silence. (*People v. Bowman* (2011) 202 Cal.App.4th 353, 361-365, and cases cited at p. 364.)

“If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the **Fifth Amendment** to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.” (*Id.*, at p. 365.)

Defendant's conviction for attempted transport of aliens in violation of **8 U.S.C. § 1324(a)(1)(A)(ii)**, was affirmed since the prosecution did not commit misconduct by introducing evidence of, and commenting on, his post-arrest silence at trial. Because defendant did not selectively invoke his right to silence, it was not error for the prosecution to introduce evidence of, and comment on, that part of the interrogation where it was shown that defendant was evasive about other people involved in smuggling. Because the prosecution tied its arguments characterizing defendant as evasive to the evidence, and given the holding that he was not silent, the prosecution did not commit misconduct by characterizing him as being evasive about the other people involved in alien smuggling. (*United States and Garcia-Morales* (9th Cir. 2019) 942 F.3rd 474.)

By defendant’s willingness to talk to an investigator about a murder, but selectively refusing to answer questions concerning a different event and about who else might have been involved, “(d)efendant clearly knew how to exercise his right to remain silent selectively,” choosing only to talk

about the murder in issue. (*People v. Flores* (2020) 9 Cal.5th 371, 425-426.)

Defendant's comment; "[Want,] uh, want to, speak to an attorney first, because I, I take responsibility for me, but there's other people that . . .", held *not* to be a "selective invocation," overruling the trial court's conclusion that its reference to "other people" could be understood as a limited invocation of the right to counsel only as to those questions that could potentially implicate others. but rather, in the context, a clear and unequivocal of his right to counsel. (*People v. Henderson* (2020) 9 Cal.5th 1013, 1020, 1026-1028.)

Defendant being asked if he was willing to talk after being admonished of his *Miranda* rights, and responding that he was, "*to a point.*" Later being asked about his friend to whom he had provided a fatal drug overdose, telling the agent that: "I mean, don't really want to talk about that aspect without my lawyer . . . that's a serious situation," was held to be an effective invocation as to that topic only. But then after telling defendant that he (the agent) respected that right, and changing the subject back to defendant's drug supplier, the agent sought from defendant information that would help in pursuing the supplier, asking for information that would help in "going up the ladder" after the supplier and others like him. The agent's comments prompted defendant to state that drug dealers are "killing my friends just as much as, right now, you're trying to say that I killed" the victim; his friend. The Court held that when defendant made this statement, he voluntarily re-initiated the discussion about the victim's death and thereby established his willingness to have a generalized discussion about the issue despite his earlier attempt to invoke. The Court added that the agent's questions about his interest in pursuing drug suppliers and "going up the ladder," concerned subjects distinct from the circumstances surrounding the victim and were not ones that the agent should have reasonably anticipated would prompt defendant to renew discussions about the victim's death. (*United States v. Rought* (3rd Cir. PA, 2021) 11 F.4th 178.)

Juveniles:

Rule: "(T)he same objective standard for determining whether an adult suspect has invoked his or her *Miranda* rights also applies to juvenile suspects." (*People v. Villasenor* (2015) 242 Cal.App.4th 42, 61, citing *People v. Nelson* (2012) 53 Cal.4th 367, 378-380.)

Juveniles, in respect to *Miranda*, are treated the same as adults. (*Fare v. Michael C.* (1979) 442 U.S. 707, 722-724 [61 L.Ed.2nd 197, 211]; *People v. Hector* (2000) 83 Cal.App.4th 228.)

“(O)nce a juvenile suspect has made a valid waiver of the *Miranda* rights, any subsequent assertion of the right to counsel or right to silence during questioning must be articulated sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of such rights.” (*People v. Nelson*, *supra*, at pp. 379–380; *People v. Villasenor*, *supra*.)

See “*Juveniles & Miranda*” (Chapter 10), below.

Reinitiation of Interrogation:

Reinitiation of an Interrogation by the Police After an Invocation of the Right to Silence:

Rule: An invocation of one’s “right to silence” does *not* preclude the later questioning of the subject about *other offenses*, or even *the same offense*, so long as the subject’s wish to cut off questioning is “*scrupulously honored*” when he first invokes. (*People v. Warner* (1988) 203 Cal.App.3rd 1122; *People v. Parker* (2017) 2 Cal.5th 1184, 1221-1222; *United States v. Oquendo-Rivas* (1st Cir. 2014) 750 F.3rd 12; *United States v. Finch* (8th Cir. 1977) 557 F.2nd 1234, 1236; *United States v. Udey* (8th Cir. 1984) 748 F.2nd 1231, 1241-1242; *Grooms v. Keeney* (9th Cir. 1987) 826 F.2nd 883, 885-886; *United States v. Hsu* (9th Cir. 1988) 852 F.2nd 407, 409-411; *West v. Johnson* (5th Cir. 1996) 92 F.3rd 1385; *United States v. Andrade* (1st Cir. 1998) 135 F.3rd 104, 107; *Hatley v. Lockhart* (8th Cir. 1993) 990 F.2nd 1070, 1073-1074; *United States v. Clinton* (8th Cir. 1992) 982 F.2nd 278, 281-282; and *United States v. Schwensow* (7th Cir. 1998) 151 F.3rd 650, 658-660.)

See “*Subject Invoked his ‘Right to Remain Silent,’ Only*,” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

See also (*Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2nd 1045], applying a 14-break in custody rule when talking about invoking one’s “right to counsel.” (See “*Where the Defendant has Already Invoked*,” above, and “*How Long is Forever?*,” below.)

Reinitiation of an Interrogation by Police After a Miranda Invocation of the Right to the Assistance of Counsel:

The Edwards Rule: As opposed to when a suspect invokes his right to silence (above), a suspect who invokes his “right to counsel” cannot be questioned about any offense unless and until:

An attorney is provided. (*Edwards v. Arizona* (1981) 451 U.S. 477, 483 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 386]; *Minnick v.*

Mississippi (1990) 498 U.S. 146 [111 S.Ct. 486; 112 L.Ed.2nd 489]; *People v. Peevy* (1998) 17 Cal.4th 1184, 1187-1188; *Sechrest v. Ignacio* (9th Cir. 2008) 549 F.3rd 789, 807; *People v. Henderson* (2020) 9 Cal.5th 1013, 1022.)

Thus establishing “the *Edwards Rule*.”

Or he is released from custody. (*People v. Storm* (2002) 28 Cal.4th 1007, 1023-1027.) and has been free from “*Miranda* custody” for at least 14 days. (*Maryland v. Shatzer* (2010) 559 U.S. 98, 106 [175 L.Ed.2nd 1045].)

Or, the subject himself reinitiates the interrogation. (See “*Reinitiation of an Interrogation by the Defendant*,” below.

Once the subject effectively invokes his right to an attorney, police officers may not reinitiate questioning about that case or any other case, *so long as the subject remains in custody*. (*Minnick v. Mississippi, supra*.)

In *Minnick v. Mississippi*, the court held that the *Edwards* rule applied even when the second interview was conducted by a different law enforcement agency than the agency conducting the first interview and even if the suspect had a chance to consult with an attorney in the time between the first and second interview.

See “*How Long is Forever?*” below.

This rule is applicable to minors as well as adults. (*In re Bonnie H.* (1997) 56 Cal.App.4th 563, 579-585.)

“Under *Miranda*, custodial interrogation of a defendant must be preceded by the advice that he has the rights, among others, to remain silent and to have an attorney present. If a defendant requests counsel, ‘the interrogation must cease until an attorney is present.’ (*Arizona v. Miranda, supra*.) 384 U.S. at 474. If a defendant invokes his right to counsel, a subsequent waiver must be voluntary, knowing, and intelligent. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2nd 378 (1981). It is insufficient to show ‘only that [the defendant] responded to further police-initiated custodial interrogation’ to establish a waiver of counsel. *Id.* at 484. Once a defendant requests counsel, he should not be subject to further interrogation ‘until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.’ *Id.*

at 484-85. Thus, **Edwards** established a ‘prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.’ **Michigan v. Harvey**, 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2nd 293 (1990).” (**Bradford v. Davis** (9th Cir. 2019) 923 F.3rd 599, 615; see also **People v. Molano** (2019) 7 Cal.5th 620, 654-658.)

Note, however, it is not a violation of **Edwards** to merely place a law enforcement officer (or an agent of law enforcement; e.g., a psychiatrist) into defendant’s presence for the purpose of observing the in-custody defendant, without questioning him. (**People v. Johnson** (2022) 12 Cal.5th 544, 581.)

Why a different rule?

“‘The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations . . . that it “requir[es] the special protection of the knowing and intelligent waiver standard.”’” (**Sechrest v. Ignacio** (9th Cir. 2008) 549 F.3rd 789, 807.)

“The purpose of the rule in **Edwards** is to preserve ‘the integrity of an accused’s choice to communicate with police only through counsel,’ [citation], by ‘prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights,’ [citation].” (Citation) It ‘is not a constitutional mandate, but judicially prescribed prophylaxis.’ (Id. at p. 105.)” (**People v. Bridgeford** (2015) 241 Cal.App.4th 887, 900; citing **Maryland v. Shatzer** (2010) 559 U.S. 98, 106 [175 L.Ed.2nd 1045], limiting the “**Edwards Rule**” to the first 14 days of physical custody.)

Different Offense: The **Edwards** rule applies even where the subsequent interrogation pertains to a different crime. And this holds true even where the second agency was unaware of the previous invocation. (**Arizona v. Roberson** (1988) 486 U.S. 675, 687 [100 L.Ed.2nd 704, 716].)

For purposes of this so-called “**Edwards Rule**”, prohibiting the reinitiation of an interrogation after an invocation of one’s right to counsel under *Miranda*, it is irrelevant whether the proposed reinitiation of an interrogation relates to a different crime, whether it involves different law enforcement officers, whether the suspect has in fact met with an attorney between the interrogations, or whether the subsequent interrogators were even aware of the prior invocation. (**Maryland v. Shatzer** (2010) 559 U.S. 98, 109, & fn.5 [130 S.Ct. 1213; 175 L.Ed.2nd 1045], limiting the “**Edwards Rule**” to the first 14 days of physical custody.)

How Long is Forever? Up until recently, there was no case that could be cited locally (i.e., California) telling us whether the Court really intended for this protection to be indefinite.

“The prohibition applies, of course, when the subsequent interrogation pertains to a different crime, [citation], when it is conducted by a different law enforcement authority, [citation], and even when the suspect has met with an attorney after the first interrogation.” (*Maryland v. Shatzer* (2010) 559 U.S. 98, 108-109 [130 S.Ct. 1213; 175 L.Ed.2nd 1045].)

However, see *United States v. Green* (D.C. App. 1991) 592 A.2nd 985, cert. granted, (1992) 504 U.S. 908; (1993) 507 U.S. 545 [123 L.Ed.2nd 260]; vacating order granting cert. Arguments heard, 52 Crim. L. Rev. (BNA) 3096-97 (Nov. 30, 1992); where the lower appellate court found that interviewing an in-custody juvenile about a separate, uncharged offense, *five months* after he invoked his right to an attorney on the prior, charged case, but *before* being sentenced, was a violation of the *Edwards* rule. (The appeal was never resolved by the Supreme Court because the defendant was murdered before a decision could be reached.)

And see *Clark v. State* (2001) 140 Md.App. 540, 584-600, in a detailed analysis of the issue, holding that after a defendant is *convicted and sentenced*, the inherent pressures of incarceration dissipate to the extent that the purposes behind the *Edwards* rule are no longer applicable. Questioning on a prior, uncharged case, therefore, should be permissible.

Also, it is generally assumed (without benefit of any relevant case law) that when the subject commits *new offenses* while in custody, he is not immune from questioning on the new cases.

The United States Supreme Court recently solved this dilemma in *Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2nd 1045], where it was held that after a *Miranda* invocation of a suspect's right to counsel, the interrogation may be reinitiated following a 14-day break in custody. The defendant in this case was a prison inmate, serving time on a prior conviction. Recognizing the uniqueness of this type of situation, the Court further held that retuning the defendant to the general prison population is such a break in custody.

See *People v. Bridgeford* (2015) 241 Cal.App.4th 887, 900-903, applying the 14-day rule of *Shatzer* to the pre-trial situation, where the defendant was released from physical custody (i.e., back into society) and then rearrested hours later and re-interviewed.

Note also, however, *Trotter v. United States* (Wash. D.C. 2015) 121 A.3rd 40, a case out of the federal appellate court for Washington D.C., ruling that the rule of *Shatzer* *does not* apply to the pre-trial detainee in that pending trial, he is not serving a sentence of imprisonment, as was the case in *Shatzer*, and is still under the pressures of a pending prosecution.

The *Edwards* rule itself is limited to circumstances when a defendant initially invokes his right to counsel within the context of a custodial interrogation. (See *People v. Avila* (1999) 75 Cal.App.4th 416, 421-422.) And even in the context of a custodial interrogation, the *Edwards* rule does not bar recontacting a defendant who only asserts his *right to silence* (see *People v. DeLeon* (1994) 22 Cal.App.4th 1265, 1269-1270) or simply declines to waive his *Miranda* rights without specifying that he wishes to invoke his right to counsel (see *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1322). Finally, the *Edwards* rule is not triggered simply because a defendant's **Sixth Amendment** right to counsel has attached. (*Montejo v. Louisiana* (2009) 556 U.S. 778 [173 L.Ed.2nd 955].)

Query: How about the situation where a suspect invokes his right to counsel, is released, and before the expiration of the 14-day *Shatzer*-imposed time period, he reoffends in a new case. Is it an *Edwards* violation to question him on the new case? No known case answers this question.

Reinitiation of an Interrogation by the Defendant:

Rule: A subject who has invoked either right may always reinitiate questioning himself. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 386]; *People v. McClary* (1977) 20 Cal.3rd 218, 226; *People v. Marshall* (1990) 50 Cal.3rd 907, 925-926; *People v. Jiles* (2004) 122 Cal.App.4th 504, 512-515; *People v. Gamache* (2010) 48 Cal.4th 347, 384-387; (*People v. Hensley* (2014) 59 Cal.4th 788, 810; *People v. Jackson* (2016) 1 Cal.5th 269, 338-341; *People v. Molano* (2019) 7 Cal.5th 620, 654-658; *People v. Hoyt* (2020) 8 Cal.5th 892, 932; *People v. Johnson* (2022) 12 Cal.5th 544, 591-592.)

“An accused ‘initiates’ such dialogue when he speaks words or engages in conduct that can be ‘fairly said to represent a desire’ on his part ‘to open up a more generalized discussion relating directly or indirectly to the investigation.’” (*People v. Mickey* (1991) 54 Cal.3rd 612, 648; see also *People v. Molano*, *supra*, at p. 656.)

Reinitiation of questioning may be no more than the defendant's exercise of his right to control the time at which questioning will occur. (*United States v. Glover* (10th Cir. 1997) 104 F.3rd 1570, 1580-1581.)

Defendant being asked if he was willing to talk after being admonished of his *Miranda* rights, and responding that he was, “*to a point.*” Later being asked about his friend to whom he had provided a fatal drug overdose, telling the agent that: “I mean, don’t really want to talk about that aspect without my lawyer . . . that’s a serious situation,” was held to be an effective invocation as to that topic only. But then after telling defendant that he (the agent) respected that right, and changing the subject back to defendant’s drug supplier, the agent sought from defendant information that would help in pursuing the supplier, asking for information that would help in “going up the ladder” after the supplier and others like him. The agent’s comments prompted defendant to state that drug dealers are “killing my friends just as much as, right now, you’re trying to say that I killed” the victim; his friend. The Court held that when defendant made this statement, he voluntarily re-initiated the discussion about the victim’s death and thereby established his willingness to have a generalized discussion about the issue despite his earlier attempt to invoke. The Court added that the agent’s questions about his interest in pursuing drug suppliers and “going up the ladder,” concerned subjects distinct from the circumstances surrounding the victim and were not ones that the agent should have reasonably anticipated would prompt defendant to renew discussions about the victim’s death. (*United States v. Rought* (3rd Cir. PA, 2021) 11 F.4th 178.)

Defendant’s reinitiation of questioning was upheld as free and voluntary, despite earlier invocations of both his right to silence and to an attorney, where a prosecution-retained psychiatrist merely remained in defendant’s presence as he was being treated at a hospital for gunshot wounds, and it was defendant, not the psychiatrist, who kept reinitiating the discussions about the shooting where defendant had killed a police officer. (*People v. Johnson* (2022) 12 Cal.5th 544, 591-592.)

In *Johnson*, the California Supreme Court noted that when evaluating the legal effectiveness of a defendant's apparent reinitiation of an interrogation after a prior invocation, the Court must consider "whether defendant's decision to speak with (law enforcement or its agents) was in 'response to' or 'product of' the prior unlawful interrogation." (*Id.*, at p. __; quoting *Mack v. State* (Ga. 2014) 296 Ga. 239 [765 S.E.2d 896, 903].)

Limitation:

Rule: Any reinitiation of questioning, at least when the suspect has invoked his right to the assistance of counsel, must be on the subject's own initiative. Any reopening of the dialogue about the facts of the case, resulting in the suspect changing his mind, will not likely result in admissible statements. (*Edwards v. Arizona*, *supra*, at p. 486, fn. 9 [101 S.Ct. 1880; 68 L.Ed.2nd at p. 387]; *People v. Boyer* (1989) 48 Cal.3rd 247, 273; *People v. Bradford* (1997) 14 Cal.4th 1005, 1036; *People v. Enraca* (2012) 53 Cal.4th 735, 752; (*People v. Hensley* (2014) 59 Cal.4th 788, 810-811; *Rodriguez v. McDonald* (9th Cir. 2017) 872 F.3rd 908, 920-926.)

"[I]f the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." (*Smith v. Illinois* (1984) 469 U.S. 91, 95 [105 S. Ct. 490, 83 L. Ed. 2d 488]; citing *Edwards v. Arizona*, *supra*, at 485-486, n.9. See also *Martinez v. Cate* (9th Cir. 2018) 903 F.3rd 982, 992-993.)

But see *Maryland v. Shatzer* (2010) 559 U.S. 98, 108 [175 L.Ed.2nd 1045], establishing an arbitrary 14-day rule, where, after defendant has been released from "*Miranda* custody" (even if only to the general population of a prison) for at least 14 days, law enforcement may reinitiate an attempt to interview him despite a prior invocation of the right to counsel.

Once a suspect is advised of his *Miranda* rights, he may waive those rights and consent to an interrogation. If the suspect invokes his right to counsel at any point during the interrogation, all questioning must cease either until an attorney is present or until the suspect initiates further communication with the officers. However, not all subsequent communications initiated by a suspect will

allow police officers to resume investigation-related questioning. For example, requests for a telephone, food or water, or access to a restroom are not considered communications that permit officers to resume questioning a suspect. On the other hand, a suspect opens the door to further questioning if his comments show “a willingness and a desire for a generalized discussion about the investigation.” (*United States v. Carpentino* (1st Cir. 2020) 948 F.3rd 10; defendant held to have reinitiated the interrogation despite also asking about the telephone call to his attorney he had requested earlier.)

Law Enforcement Encouragement to Reinitiate: A defendant’s apparent attempt to reinitiate questioning after asking for an attorney which is in response to words or actions (other than those normally attendant to arrest and custody) on the part of the police, and that the police should know are reasonably likely to elicit an incriminating response, *may not* be effective. (See *People v. Johnson* (2022) 12 Cal.5th 544, 567; defendant’s reinitiation of questioning upheld in what was described as a “*close case*,” after law enforcement’s repeated *Miranda* violations, and in a fact scenario where the court noted how it was “*troubled by the earlier law enforcement conduct*.”

Later in its decision, the California Supreme Court found it “*concerning* (italics added) the multiple clear violations of *Miranda* that occurred in this case through the repeated efforts of investigating officials to solicit defendant’s waiver of his rights to silence and counsel, after he had expressed his unwillingness to talk,” noting that “it is one thing to reapproach a suspect about his willingness to talk after a ‘significant period of time’ . . . ; it is another thing to reapproach the suspect to confront him or to inquire about his willingness to talk no less than five times in a roughly three-hour span. (*Id.*, at p. 582.)

Other Examples:

An apparent reinitiation of interrogation by a suspect which was induced by threats and intimidation during a first interrogation will be held to be involuntary. (*People v. McClary* (1977) 20 Cal.3rd 218, 226-230.)

“Once the *Miranda* right to counsel has been invoked, no valid waiver of the right to silence and counsel may be found absent the ‘*necessary fact* that the accused, not the police,

reopened the dialogue with the authorities.” (Emphasis in original; **People v. Boyer** (1989) 48 Cal.3rd 247, 273, citing **Edwards v. Arizona**, *supra*, at p. 486, fn. 9 [68 L.Ed.2nd at p. 387]; see also **People v. Bradford** (1997) 14 Cal.4th 1005, 1036.)

Asking a subject “*why?*” after he had invoked, causing him to eventually change his mind, is not permissible. (**People v. Peracchi** (2001) 86 Cal.App.4th 353.)

“The **Edwards** rule (where the defendant invokes his right to the assistance of an attorney) renders a statement invalid if the authorities initiate *any* ‘communication, exchanges, or conversations’ relating to the case, other than those routinely necessary for custodial purposes. [Citations]” (Emphasis added; **People v. Boyer**, *supra*, at p. 274.)

In **Boyer**, the investigator set defendant down to “tell him a couple of things” after invocation, causing defendant to blurt out that; “I did it.” The investigator’s comments held to be the “*functional equivalent*” of an interrogation, as described in **Rhode Island v. Innis** (1980) 446 U.S. 291, 301 [64 L.Ed.2nd 297, 308]. (**People v. Boyer**, *supra*, at pp. 274-275, fn. 15.)

Sitting a defendant, who had already invoked his right to silence, in a room for several hours with, hanging on the walls, a diagram of a timeline for his case and photographs of the murdered homicide victim that defendant was accused of killing, and then engaging defendant in some general conversation after which defendant began to cry, did *not* make his subsequent waiver proper and confession admissible. (**United States v. Tyler** (9th Cir. 1998) 164 F.3rd 150, 152-154.)

But see **People v. Daniels** (1969) 1 Cal.App.3rd 367, 373-376: After defendant invoked, officers told him his wife and son were also arrested, that his daughter (with whom he had had intercourse) was pregnant, and his other children were in Juvenile Hall. Defendant reinitiated the interrogation nine hours later. On appeal, defendant argued that his decision to reinitiate questioning was the product of these disclosures made after he had invoked. The court ruled that his confession was admissible in that after the initial invocation, there was no attempt to question him, no deception, trickery

or cajolery was used, and that defendant's decision to initiate the second interview was impelled by his own impression of the law gained from a criminal law course he had taken.

And United States v. Roman-Zarate (10th Cir. 1997) 115 F.3rd 778, 781-783: After defendant invoked his **Fifth Amendment** right to counsel, an agent asked another agent if defendant was cooperating. Defendant asked what that meant. When told that he might help himself out by assisting with the investigation, defendant (after a second admonishment) waived and incriminated himself. The court ruled that defendant himself had reinitiated questioning.

And see United States v. Cunningham (8th Cir. 1998) 133 F.3rd 1070, 1074: A detective telling defendant that he wanted to talk to a witness who defendant was calling on the telephone after invoking his right to counsel, and responding to defendant's volunteered statements concerning the potential penalties of his crime while they waited for defendant's attorney to call back, both leading to incriminating statements by the defendant, was not the functional equivalent of an interrogation.

Defendant asking about the condition of his wife (the victim) where the officer told him that he'd have to ask the investigator, and then the officer telling the investigator that defendant wanted to know about his wife, was not a reinitiation of questioning by the investigator. (*People v. Jiles* (2004) 122 Cal.App.4th 504, 512-515.)

After defendant had invoked, commenting to him that his fingerprints were left on the murder weapon (i.e., an Uzi), and then leaving him in a room with two co-suspects where his responses were surreptitiously recorded, was the functional equivalent to an interrogation. However, because defendant responses were made after the officer had left, thus eliminating the "coercive, police-dominated atmosphere," defendant's responses were properly admitted against him at trial. (*People v. Davis* (2005) 36 Cal.4th 510, 552-553.)

After defendant had invoked his right to counsel, instead of immediately ceasing their interrogation, the detectives told defendant that he was "going to be charged with murder today," and to "remember that [they] tried to give (defendant) the opportunity . . . to straighten things out."

Following this, one of the detectives then explicitly asked defendant about the case: i.e., “Do you know Easy from Highland Park? You don't know him? (Defendant answered “no.”) You don't know him? This one here? You don't know him? (“No,” again) “The girl that died, that's his girlfriend.” Defendant's subsequent reinitiation of the interrogation held to be the product of this continued questioning. (*Rodriguez v. McDonald* (9th Cir. 2017) 872 F.3rd 908, 918-926.)

Facilitating a telephone call between defendant and his mother by allowing him to make a collect call does not constitute coercion, and does not preclude a trial court's finding that it was defendant himself who reinitiated an interrogation after having previously invoked his right to counsel. (*People v. Hoyt* (2020) 8 Cal.5th 892, 932.)

And note: Police may sometimes reinitiate questioning when the defendant only invoked his right to remain silent, failing to specifically request the assistance of counsel. (See “Subject Invoked his ‘Right to Remain Silent,’ Only,” under “Lawful Exceptions to the *Miranda* Rule” (Chapter 5), above.

Decision Clearly and Unequivocally Indicated: The decision to reinitiate must be “clearly and unequivocally” indicated. *For example:*

Simply looking at the tape recorder, and agreeing to talk if it were turned off after having previously invoked, is *not* conduct that is tantamount to the initiation of further communication. (*In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602.)

Voluntarily and spontaneously talking about the crime, after a prior invocation, is not in itself a reinitiation of questioning allowing officers to restart the interrogation. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1035.)

But see *Stanley v. Schriro* (9th Cir. 2010) 598 F.3rd 612, 618-619, where reinitiation of the interrogation after defendant's invocation of his right to silence and to an attorney held to be lawful because, under the circumstances, defendant was not in custody.

The detective telling the defendant that: “*It's up to you if you, you know, if you want an attorney, I mean I'm, I'm giving you the opportunity to talk,*” held not to be “badgering” defendant into not invoking. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1104-1105.)

Because defendant didn't like his initial interrogator, but appreciated the courtesy of the officer who did his booking interview, defendant volunteered to make a statement to this second officer after initially having invoked his right to counsel. (*People v. Enraca* (2012) 53 Cal.4th 735, 752-756.)

Upon defendant's invocation to his right to counsel, adding that he was being "set up," the detective's denial that the officers were setting him up, was not an improper interrogation after an invocation in that it was not something the detective should have understood might elicit an incriminating response. (*People v. Hensley* (2014) 59 Cal.4th 788, 810-811.)

Upon reinitiating questioning, defendant's renewed waiver may be implied through his own words or conduct indicating a willingness to engage in a generalized discussion about the investigation. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1090.)

"(E)"ven if a [post-invocation] conversation . . . is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the **Fifth Amendment** right to have counsel present during the interrogation;" (*Rodriguez v. McDonald* (9th Cir. 2017) 872 F.3rd 908, 921; citing *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 [103 S. Ct. 2830, 77 L.Ed.2nd 405].)

In *Rodriguez*, the Court noted that by suggesting to defendant that he would be imminently charged with murder but that cooperation would result in more lenient treatment from the court, the probation office, and from the police themselves, the officers "effectively told [defendant] he would be penalized if he exercised rights guaranteed to him under the Constitution of the United States." (*Id.*, a p. 924.)

After Defendant is Arraigned; Sixth Amendment:

Reinitiation by the defendant of an interview with police after he has been arraigned on the charge about which an interrogation is contemplated must necessarily involve *both* a waiver of his **Fifth Amendment** *right to remain silent* and (if attempted without the presence and/or consent of his attorney) and his **Sixth Amendment** *right to counsel*. (*People v. Dickson* (1985) 167 Cal.App.3rd 1047.)

The U.S. Supreme Court has recently ruled that if an officer first advises a defendant of his **Sixth Amendment** right to counsel and obtains a waiver of that right, there is no error in talking to the defendant without the presence of his attorney, even after his arraignment. (See *Montejo v. Louisiana* (2009) 556 U.S. 778 [173 L.Ed.2nd 955].)

Burden of Proof:

The prosecution has the burden of proving:

That it is the defendant's decision, made freely and voluntarily, to reinitiate questioning (*People v. Sims* (1993) 5 Cal.4th 405, 440.); *and*

That it was "an intentional relinquishment or abandonment of a known right or privilege." (*Brewer v. Williams* (1977) 430 U.S. 387, 404 [51 L.Ed.2nd 424, 439]; see also *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 [77 L.Ed.2nd 405, 411-412]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1036; *People v. Johnson* (2022) 12 Cal.5th 544, 582.)

A complete readmonishment would seem to be the *minimum* an officer should do when a subject attempts to reinitiate questioning. (See *Patterson v. Illinois* (1988) 487 U.S. 285, 293 [101 L.Ed.2nd 261, 272]; and *People v. Johnson* (2022) 12 Cal.5th 544, 584 "After a suspect has invoked the right to counsel, police officers may nonetheless resume their interrogation if 'the suspect "(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked;"'" quoting *People v. Enraca* (2012) 53 Cal.4th 735 at p. 752.)

In *Johnson*, defendant's question to a psychiatrist, hired by the prosecution, asking him: "*Still here, huh?*," followed by defendant's question to the psychiatrist if he wanted to "*talk about it*," held to be a free and voluntary reinitiation of questioning after defendant's repeated invocations. Despite the lack of a new advisal of his rights, the Court noted that defendant "initiated the conversation, controlled the conversation, directed the conversation and took it to the places he wished to go." (*Id.*, at p. __.)

While noting that "an express *Miranda* waiver would certainly make this an easier case," The Court held that "it is well settled that a suspect initiates "further communication, when his words or

conduct ‘can be “fairly said to represent a desire” on his part “to open up a more generalized discussion relating directly or indirectly to the investigation.”’” (Id., at p. __; quoting *People v. Molano* (2019) 7 Cal.5th 620, 656.)

Failing to readmonish a suspect who is attempting to reinitiate the interrogation is but one factor to consider, and is not necessarily fatal “if the ‘totality of the circumstances’ shows the suspect’s waiver remains voluntary, knowing and intelligent. [Citation]” (*People v. Jiles* (2004) 122 Cal.App.4th 504, 515.)

Upon defendant’s stated desire to reinitiate an interrogation that had ceased upon him invoking his right to silence, and “(a)fter a valid *Miranda* wavier (obtained when the interrogation had originally begun), readvisement prior to continued custodial interrogation is unnecessary so long as a proper warning has been given, and the subsequent interrogation is reasonably contemporaneous with the prior knowing and intelligent waiver.” (Internal quotation marks deleted; *People v. Jackson* (2016) 1 Cal.5th 269, 339-341; quoting *People v. Duff* (2014) 58 Cal.4th 527, 555.)

However, an “express waiver” is not necessarily required. “[A]n express waiver is not required where a defendant’s actions make clear that a waiver is intended.” (*People v. Johnson* (2022) 12 Cal.5th 544, 591; quoting *People v. Frederickson* (2020) 8 Cal.5th 963, 1010.)

Defendant’s Invocation as Evidence of Guilt:

Rule: Testimony concerning a criminal defendant’s invocation of rights under the *Miranda* decision is inadmissible in court as evidence tending to prove guilt. (See *People v. Cockrell* (1965) 63 Cal.2nd 659, 669.)

“(I)t is impermissible to penalize an individual for exercising his **Fifth Amendment** privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. [Citations]” (*Miranda v. Arizona*, *supra*, at p. 468, fn. 37 [16 L.Ed.2nd at p. 720].)

Evid. Code § 913: Comment on, and inferences from, exercise of privilege

(a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

Case Law:

The fact of an in-custody suspect's request for an attorney is inadmissible at trial. Where such evidence is brought before a jury, the defense is entitled to a "curative instruction" to the jury, telling them not to infer guilt by a defendant's request for an attorney. (*United States v. Daoud* (1st Cir. 1984) 741 F.2nd 478; error held to be harmless due to the prosecutor not making reference to the defendant's invocation.)

A prosecutor's repeated references to the defendant's retention of counsel and pre-trial silence was error, and a violation of the defendant's "*due process*" rights. The error was found *not* to be harmless in that "(t)he prosecutor's line of questioning and closing remarks were not inadvertent but were calculated so that an inappropriate 'inference of guilt from silence was stressed to the jury.' [Citation.]" (*United States v. Kallin* (9th Cir. 1995) 50 F.3rd 689, 692-695; the court's curative instruction, given late and reemphasizing the improper evidence, was insufficient under the circumstances.)

Defendant testifying on direct that he had invoked his right to remain silent, and that he asked the arresting officer what he was being charged with, does *not* "open the door" to a prosecutor's questions or argument concerning defendant's failure at that point to deny the accusation. (*People v. Evans* (1994) 25 Cal.App.4th 358, 369-370.)

But where defendant does waive his rights and gives the police a statement, failure to volunteer an alibi about which defendant testifies at trial may be attacked in testimony, and commented on in argument. (*People v. Jaspal*

(1991) 234 Cal.App.3rd 1446, 1456; *People v. Love* (1977) 75 Cal.App.3rd 928, 934; *People v. Hill* (1980) 110 Cal.App.3rd 937.)

Testimony to the effect that defendant had asked for a public defender, so long as not admitted for the purpose of inferring a consciousness of guilt, may be appropriate: (*People v. Huggins* (2006) 38 Cal.4th 175, 198-199; offered solely for the purpose of showing the jury that the interview had ended after defendant's denial of knowing the victim, where the prosecutor never made any reference to defendant's invocation on the issue of guilt. "(T)his brief and mild reference to the fact that defendant asked for an attorney did not prejudice defendant.")

Defendant's conviction for attempting to transport aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) was affirmed in that the prosecution *did not* commit misconduct by introducing evidence of, and commenting on, defendant's post-arrest silence at trial. Defendant did not selectively invoke his right to silence. Therefore, it was not error for the prosecution to introduce evidence of, and comment on, that part of the interrogation, including argument characterizing defendant as being evasive about other people involved in smuggling, and because the prosecution limited its arguments to characterizing defendant as *evasive* to the evidence. Given the trial court's holding that defendant had not invoked his right to silence, the prosecution did not commit misconduct by characterizing him as being evasive about the other people involved in alien smuggling. (*United States and Garcia-Morales* (9th Cir. 2019) 942 F.3rd 474.)

A defendant's right not to testify is not violated merely because his testimony is necessary to lay an adequate foundation for the admissibility of testimony from an expert witness hired by the defense. (*People v. Hoyt* (2020) 8 Cal.5th 892, 937-938.)

Once a defendant places her mental state at issue, she has waived her **Fifth** and **Sixth Amendment** rights to object to the prosecution's examinations. (citing *People v. Gonzales* (2011) 51 Cal.4th 894, 929.) Subsequent testimony about a defendant's refusal to cooperate does not violate those rights. (Citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1190.) The jury may properly consider the refusal. (Citing *People v. Carpenter* (1997) 15 Cal.4th 312, 413.) (*People v. Nieves* (2021) 11 Cal.5th 404, 436.)

In *Nieves*, over defense objections, a prosecution expert testified that he had been told that defendant refused to be evaluated by him. On cross-examination, the defense attempted to ask the expert whether he would have any concerns about the conditions defendant requested for examination by a prosecution expert. The trial court sustained objections to this questioning and admonished

the jury: “I am going to tell the jury at this point that the defendant—when the defendant submits their mental state as an issue in the case, the defendant must submit to examination by the prosecution experts without any conditions. That was not forthcoming in this case.” Two more prosecution experts then testified that defendant refused their requests for an examination. This procedure was held *not* to be error, rejecting defendant's argument that the trial court's admonition and the prosecutors' arguments violated her constitutional rights and her rights under **Evidence Code section 913**.

Miranda For “Use as a Shield; Not a Sword:”

The **Fifth Amendment** does not give defendant a license to lie. Once advised, an in-custody suspect has a single choice to make; *to invoke or to waive*. This does not entitle the suspect to lie. (*People v. Ross* (2008) 162 Cal.App.4th 1184, 1191, citing *Brogan v. United States* (1998) 522 U.S. 398, 404 [139 L.Ed.2d 830]; “While the **Fifth Amendment** provides [suspects] with a shield against compelled self-incrimination, it does not provide them with a sword upon which to thrust a lie.”)

Where a defendant presents evidence to the effect that he was prevented from talking to police, the prosecution may rebut the misimpression with evidence of defendant's refusal to respond to police questioning. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1611-1612.)

Defendant's testimony on direct examination that he was never given the opportunity to tell his denials may be rebutted with evidence that he was in fact interrogated by police but invoked his right not to talk, at least with a limiting instruction to the jury that such evidence may be used for impeachment purposes only. (*People v. Champion* (2005) 134 Cal.App.4th 1440.)

Also, defendant's testimony that he had cooperated with the police, making himself available, and falsely portraying himself as a law-abiding citizen, when in fact he refused to cooperate and invoked his rights, may in some cases be rebutted by evidence of his invocation as impeachment of his testimony, but not as evidence of his guilt. (*United States v. Gant* (7th Cir. 1994) 17 F.3rd 935.)

When a defendant testifies to reasons for his post-*Miranda* silence in response to his own attorney's questioning before the prosecution has made reference to the issue, it has been held that the prosecutor is not thereafter precluded from exploring “the soundness of that explanation” by cross-examining him about his *Miranda* invocation and his real motivation for invoking. (*Saulsbury v. Greer* (7th Cir. 1984) 702 F.2nd 651, 656.)

After a defense attorney argues to the jury that the government has unfairly denied defendant the opportunity to explain his actions, it is proper for the prosecutor to respond in argument with the fact that the “defendant could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.” (*United States v. Robinson* (1988) 485 U.S. 25, 28 [99 L.Ed.2nd 23, 29].)

Cross-examining the defendant about his prior *Miranda* invocation was held to be proper when done to counter his testimony on direct examination that he had “wanted the truth to come out,” when in fact he made his limited admissions of culpability only after he had learned that other co-suspects had named him as the actual killer. (*People v. Carter* (2003) 30 Cal.4th 1166, 1205-1208.)

Following conviction for special circumstance murder, defendant challenged his conviction alleging the unconstitutionality of the jury instruction **CALCRIM No. 361** that permitted jury to draw negative inferences from the testifying defendant’s failure to explain or deny the evidence against him. Despite defense counsel’s failure to object to the instruction, the court of appeal reviewed the issue on the merits and observed that it found no inconsistency between the defendant’s right to testify and the attendant risk of being confronted with evidence calling into question his testimony. “The failure to explain or deny adverse evidence can be a basis for disbelieving any witness’s testimony and is always relevant to credibility.” Accordingly, **CALCRIM No. 361** is constitutional. (*People v. Vega* (2015), 246 Cal.App.4th 484, 494-500; citing *People v. Saddler* (1979) 24 Cal.3rd 671, 675, 678–681, and *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1067–1068.)

However, **CALCRIM No. 361** applies only when the defendant completely fails to explain or deny incriminating evidence or claims a lack of knowledge, and it appears from the evidence that he could reasonably be expected to have that knowledge. (*People v. Cortez* (2016) 63 Cal.4th 101, 110-122.)

Use in evidence of a defendant’s refusal to submit to a chemical test as evidence in a DUI trial does not violate the defendant’s **Fifth Amendment** privilege against self-incrimination. (*South Dakota v. Neville* (1983) 459 U.S. 553 [74 L.Ed.2nd 748].)

The Prosecution was allowed to impeach defendant’s expert witnesses during the sanity phase of defendant’s murder trial with his statements that were suppressed because they were elicited after he invoked his right to counsel. “[T]he use of defendant’s illegally obtained statements to

impeach the expert witnesses during the sanity phase promotes the same truth-seeking function of a criminal trial as the impeachment exception of a defendant who testifies” and “the admission of this evidence prevents the defendant from turning the exclusionary rule into a ‘a shield against contradiction of his untruths.’” (*People v. Edwards* (2017) 11 Cal.App.5th 759, 766-772.)

See “*No Privilege to Lie*,” under “*Defendant’s Concurrent Right to Testify*,” under “*Defendant’s Refusal To Testify under the Fifth Amendment*,” below.

“(D)ue process is not violated when the prosecutor’s reference to post-*Miranda* silence (after defendant invoked his right to counsel) is ‘a fair response to [a] defendant’s claim or a fair comment on the evidence.’ (Citation) The right to remain silent is a shield; it cannot be used as a sword to cut off the prosecution’s fair response to defense evidence or argument. (Citation)” (*People v. Campbell* (2017) 12 Cal.App.5th 666, 669, 671-673; “[T]he prosecutor’s reference to [defendant’s] post-*Miranda* silence was a fair response to [defendant’s] trial testimony that he cooperated fully with police.”

On Appeal:

The improper use in evidence of the fact of a defendant’s invocation of his rights, however, may be harmless error where other evidence of guilt is sufficient to convict. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 64-66; see also *People v. Hinton* (2006) 37 Cal.4th 839, 867-868.)

The Inadmissibility of Words of Invocation:

Rule: An in-custody suspect’s words of invocation are inadmissible as a general rule. (See below)

Case Law:

The Ninth Circuit Court of Appeal found, in *United States v. Bushyhead* (9th Cir. 2001) 270 F.3rd 905, that not only is evidence of the fact of a defendant’s invocation of *Miranda* rights inadmissible, but also any other words which are a part of that invocation. In *Bushyhead*, an in-custody murder suspect, seeing the approach of an FBI agent with a waiver form in hand, blurted out; “*I have nothing to say. I’m going to get the death penalty anyway.*” The trial court allowed testimony about this entire statement, although the judge attempted to take the sting out of it by a very ineffective jury instruction. The Ninth Circuit ruled on appeal that not only was the “*I have nothing to say*” improperly admitted into evidence,

but also the “*I’m going to get the death penalty anyway,*” in that both were part of his invocation of rights.

A defendant’s response to questioning; “*F__k you. I want to talk to my lawyer,*” even if limited to the first two words (i.e., the expletive only), can not lawfully be used as an “*admission by silence.*” The two halves of the statement are “*inextricably intertwined,*” and both clearly reflect the defendant’s intent to end the questioning. (*People v. Lopez* (2005) 129 Cal.App.4th 1508.)

A suspect may make a selective invocation of his **Fifth Amendment** right to silence without making a general invocation. Refusal to reenact an occurrence (the shooting of his wife) while continuing to answer other questions is such a selective invocation. Despite defendant’s general waiver, using his selective refusal against him as substantive evidence of his guilt is a violation of *Miranda* and *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240; 49 L.Ed.2nd 91], and is improper. (*Hurd v. Terhune* (9th Cir. 2010) 619 F.3rd 1080, 1085-1089.)

But conditioning a waiver on the possible filing of charges is not a selective invocation. A defendant “cannot avoid the rule of *Davis v. United States* (1994) 512 U.S. 452, 461 [129 L.Ed.2nd 362, 373] (requiring a clear and unequivocal invocation), by characterizing an ambiguous reference to counsel as a limitation on his waiver of his *Miranda* rights.” (*People v. Suff* (2014) 58 Cal.4th 1013, 1070.)

A defendant’s stated reason for refusing to answer questions (i.e., that his family would be killed if he did) was held to be admissible at his trial in the Government’s rebuttal case when defendant testified at trial that he didn’t know that drugs were hidden in his car when he crossed the border from Mexico. (*United States v. Gomez* (9th Cir. 2013) 725 F.3rd 1121.)

Per the Court, to be admissible, such statements must be (1) voluntary and (2) “arguably” inconsistent with his testimony at trial. (*Id.*, at p. 1126.)

But, where defendant’s tone of voice is relevant, his taped invocation might be admissible. (*People v. Crandell* (1988) 46 Cal.3rd 833, 879.)

Defendant’s Invocation as Evidence of Sanity:

Rule: It is error to admit evidence of defendant’s invocation for the purpose of showing that defendant was in control of his faculties, refuting his claim of insanity. (*Wainwright v. Greenfield* (1986) 474 U.S. 284 [88 L.Ed.2d 623].)

However, there is no “*Greenfield error*” by the mere mention of a defendant’s exercise of his *Miranda* rights. (*Lindgren v. Lane* (7th Cir. 1991) 925 F.2nd 198, 202.)

It is the prosecutor’s exploitation of a defendant’s exercise of his rights, such as arguing it as evidence of sanity, which is prohibited. (*Jones v. Stotts* (10th Cir. 1995) 59 F.3rd 143, 146; *Noland v. French* (4th Cir. 1998) 134 F.3rd 208, 216-217.)

But, a prosecution psychiatrist was properly allowed to testify that defendant had told him that he would not talk with the psychiatrist on advice of counsel, to rebut defendant’s evidence of his own uncommunicativeness as proof that he suffered from a mental illness. (*People v. Jones* (1997) 15 Cal.4th 119, 170-174.)

Exception for Mental Competence Hearing:

Defendant’s invocation of his right to counsel (along with his statement that he understood his rights) may be used against him in a later trial to determine his competency to stand trial, per **P.C. §§ 1367, 1368**, in that such a hearing does not involve self-incrimination issues. (*Nguyen v. Garcia* (2007) 477 F.3rd 716.)

On Appeal:

Eliciting testimony that defendant had invoked his right to remain silent may be reversible error in those cases where it seriously affects the fairness, integrity or public reputation of the judicial proceedings. (*People of the Territory of Guam v. Veloria* (9th Cir. 1998) 136 F.3rd 648.)

Invocation as a Violation of Probation or Parole:

Rule: Requiring a probationer, as a condition of probation, to admit to other violations of the law (i.e., possession of child pornography in this case), revoking his probation and imposing further punishment upon his refusal to do so, is a violation of the probationer’s **Fifth Amendment** self-incrimination rights. (*United States v. Antelope* (9th Cir. 2005) 395 F.3rd 1128.)

Case Law:

A parolee’s **Fifth Amendment** self-incrimination rights were violated when, as a condition of post-release treatment, he was required to reveal past illegal sex acts with minors that were then considered by the sentencing court in a

subsequent case. The trial court erroneously considered the parolee's incriminating statements which were made during the course of compliance with a required treatment program, were made under a threat of future prosecution, and the penalty of revocation of supervised release and further incarceration were sufficiently coercive that it amounted to compulsion. (*United States v. Bahr* (9th Cir. 2013) 730 F.3rd 963, 965-867.)

For a defendant who had pled "no contest" to a charge of possessing child pornography, requiring a waiver of the privilege against self-incrimination, a mandated condition of probation for sex offenders under **P.C. § 1203.067(b)(3)**, is prohibited by the **Fifth Amendment**. The Court therefore struck the language "waive any privilege against self-incrimination" from the defendant's probation conditions. (*People v. Friday* (2014) 225 Cal.App.4th 8.)

Note: A grant of review was ordered in this case by the California Supreme Court, making it unavailable for citation (2014 Cal. LEXIS 5285; July 6, 2014.), and eventually (May 10, 2017) transferred to the Court of Appeal for the Sixth Appellate District for reconsideration in light of the decision in *People v. Garcia* (2017) 2 Cal.5th 792.

In *People v. Garcia* (2017) 2 Cal.5th 792, at pp. 800-814, the California Supreme Court held that a probation condition under **P.C. § 1203.067(b)(3)**, requiring waiver of the privilege against self-incrimination and participation in polygraph examinations, *does not* violate the **Fifth Amendment** and is not overbroad, as interpreted to require that probationers answer all questions fully and truthfully, knowing that compelled responses cannot be used against them in a subsequent criminal proceeding. A probationer must be advised, before treatment begins, that no compelled statement (or the fruits thereof), elicited in the course of the mandatory sex offender management program, may be used against the probationer in a criminal prosecution. Also, mandating that sex offenders waive any psychotherapist-patient privilege does not violate the right to privacy as construed to intrude on the privilege only to the limited extent specified in the condition itself.

It violates the **Fifth Amendment** self-incrimination privilege to require a probationer to waive his self-incrimination rights even if related to a sex-offender management program as mandated by **P.C. § 1203.067**. However, when a mandatory waiver of the defendant's psychotherapist-patient privilege is construed as requiring waiver only insofar as necessary to enable communication between the probation officer and the psychotherapist, such a condition was held to *not* be overbroad or in

violation of defendant's constitutional right to privacy. (*People v. Rebulloza* (2015) 234 Cal.App.4th 1065.)

Note: A grant of review was ordered in this case by the California Supreme Court, making it unavailable for citation. (2015 Cal. LEXIS 4162; June 10, 2015.) The matter was then transferred to the Court of Appeal for the Sixth Appellate District for reconsideration in light of the decision in *People v. Garcia* (2017) 2 Cal.5th 792 (2017 Cal. LEXIS 3308.)

In *People v. Garcia* (2017) 2 Cal.5th 792, at pp. 800-814, the California Supreme Court held that a probation condition under **P.C. §1203.067(b)(3)**, requiring waiver of the privilege against self-incrimination and participation in polygraph examinations, *does not* violate the **Fifth Amendment** and is not overbroad, as interpreted to require that probationers answer all questions fully and truthfully, knowing that compelled responses cannot be used against them in a subsequent criminal proceeding. A probationer must be advised, before treatment begins, that no compelled statement (or the fruits thereof), elicited in the course of the mandatory sex offender management program, may be used against the probationer in a criminal prosecution. Also, mandating that sex offenders waive any psychotherapist-patient privilege does not violate the right to privacy as construed to intrude on the privilege only to the limited extent specified in the condition itself.

Requiring defendant as a condition of post incarceration supervised release (i.e., parole) to complete a sexual history polygraph, which required him to answer four questions regarding whether he had committed any new sexual crimes, was held to violate his **Fifth Amendment** right against self-incrimination. The **Fifth Amendment's** privilege against self-incrimination applies not only to persons who refuse to testify against themselves at a criminal trial in which they are the defendant, but also allows persons to refuse to answer "official questions" asked to them in any other proceeding, where their answers might incriminate them in future criminal proceedings. To qualify for the **Fifth Amendment privilege**, a communication must be testimonial, incriminating, and compelled. The Court here held that such a "sexual history polygraph" involves a communicative act, which is testimonial. (*United States v. Von Behren* (10th Cir. 2016) 822 F.3rd 1139.)

Defendant, having served five years in prison and while on five years of subsequent supervised release, was to abide by certain conditions including that he was to refrain from committing any new crimes or use controlled substances, and to "answer truthfully all inquiries by [his] probation officer and [to] follow the instructions of [his] probation

officer.” After twice testing positive for drugs in his system, he admitted to his probation officer, signing a statement to the effect, that he had been selling marijuana and cocaine. Defendant’s probation officer then petitioned the district court to revoke’s his term of supervised release pursuant to **18 U.S.C. § 3583(e)**, alleging that defendant had violated the condition of his supervision prohibiting him from breaking the law. Defendant appealed the district court’s ruling that he did in fact violate the conditions of his supervised release, arguing that the use of these statements violated the **Fifth Amendment**. The Fourth Circuit Court of Appeal affirmed, ruling that case authority (*United States v. Riley* (4th Cir. 2019) 920 F.3rd 200.) has already held that the **Self-Incrimination Clause** is violated “only if [the self-incriminating] statements are used in a criminal trial.” In *Riley*, the court concluded that supervised release revocation proceedings pursuant to **18 U.S.C. § 3583(e)** “are not part of the underlying criminal prosecution.” As a result, the Court held that the introduction of compelled self-incriminating statements in supervised release proceedings pursuant to **§ 3583(e)** does not violate a defendant’s rights under the **Self-Incrimination Clause**. Because of its previous holding in *Riley*, which remains valid law, the Court affirmed the district court’s denial of defendant’s motion to suppress. (*United States v. Ka* (4th Cir. 2020) 982 F.3rd 219.)

Invocation during Civil Proceedings:

Rule: The privilege against self-incrimination “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . .” if it might subject the person to potential criminal liability. (*Kastigar v. United States* (1972) 406 U.S. 441, 444 [32 L.Ed.2nd 212, 217]; *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 714.)

See **Evid. Code § 940** under “*Invocation by a Witness in a Criminal Case,*” below.

Determining Applicability of the Privilege: “(A)ssertion of the privilege in a civil proceeding cannot be sustained—that is, the court must conclude that an answer to the challenged question or production of a withheld document cannot possibly have a tendency to incriminate the person invoking the privilege—*unless* the person who invokes the privilege demonstrates that his or her fear of incrimination is reasonable and not advanced fancifully or merely imagined. (fn. omitted)” (*Warford v. Medeiros* (1984) 160 Cal.App.3rd 1035, 1044.)

In other words, the trial court does not have to take a person’s word that answering a particular question might subject him or her to criminal prosecution. A witness must satisfy the court that the claim of privilege is

justified and not a mere subterfuge. (*United States v. Mandujano* (1976) 425 U.S. 564, 575 [48 L.Ed.2nd 212, 221].)

The standards may differ in circumstances where the one asserting the privilege is an actual litigant to the civil proceeding, as opposed to a non-party witness, depending upon what the litigant has placed in issue in the civil case. (See *Alvarez v. Sanchez* (1984) 158 Cal.App.3rd 709; claiming a **Fifth Amendment** privilege subjects the litigant to appropriate sanctions.)

Invocation by a Witness in a Criminal Case:

Rule: A witness may not be required to testify if the proposed testimony would tend to incriminate him. (*People v. Seijas* (2005) 36 Cal.4th 291, 304; see also E.C. § 940.)

Evid. Code § 940: “To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.”

See also **Evid. Code § 404:** “Whenever the proffered evidence is claimed to be privileged under **Section 940**, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.”

Case Law:

The **Fifth Amendment** right against self-incrimination “must be accorded liberal construction in favor of the right it was intended to secure.” (*Hoffman v. United States* (1951) 341 U.S. 479, 486 [95 L.Ed. 1118].)

“A witness may assert the privilege who has ‘reasonable cause to apprehend danger from a direct answer.’” (*People v. Seijas, supra*; quoting *Hoffman v. United States, supra*.)

“To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” (*Hoffman v. United States, supra*, at pp. 486-487.)

“(T)he person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it *clearly appears* to the court that the proffered

evidence *cannot possibly have a tendency* to incriminate the person claiming the privilege.” (Italics in original; ***People v. Seijas***, *supra*, at p. 305; quoting from E.C. § 404.)

“(T)he privilege against self-incrimination does not require, or even permit, the court to assess the likelihood of an actual prosecution in deciding whether to permit the privilege. The court may not force a witness to make incriminating statements simply because it believes an actual prosecution is unlikely. The test is whether the statement might tend to incriminate, not whether it might tend to lead to an actual prosecution, or, stated slightly differently, whether the statement *could*, not *would*, be used against the witness.” (Italics in original; ***People v. Seijas***, *supra*.)

However, when a witness in a criminal case seeks to invoke his own **Fifth Amendment** right to silence, allowing him to do this in front of the jury “serves no legitimate purpose and may cause the jury to draw an improper inference of the witness’s guilt or complicity in the charged offense. (Citations)” (***People v. Smith*** (2007) 40 Cal.4th 483, 516-517; defendant’s brother, who had potential criminal liability in a double homicide as an accessory after the fact.)

The Supreme Court, however, has “stopped short of declaring it error” when a witness does this. A jury instruction not to draw any negative inferences about the defendant is also helpful to avoid any potential prejudice to the defendant. (*Id.*, at p. 517.)

But lower courts have held that it is “improper to require (a witness) . . . to invoke the privilege in front of a jury; such a procedure encourages inappropriate speculation on the part of jurors about the reasons for the invocation.” (***People v. Morgain*** (2009) 177 Cal.App.4th 454, 466; ***People v. Perez*** (2016) 243 Cal.App.4th 863, 883, fn. 15.)

There is no such thing as “*anticipatory perjury*.” Allowing a witness in court to invoke his or her right to silence when the invocation is based upon the belief the witness may commit perjury is error. (***Earp v. Cullen*** (9th Cir. 2010) 623 F.3rd 1065, 1070-1071; citing ***United States v. Vavages*** (9th Cir. 1998) 151 F.3rd 1185, 1192.)

Immunity:

A witness called under the authority of an immunity statute cannot decline to testify by asserting the privilege against self-incrimination, and upon testifying, is entitled to the immunity without the necessity of first claiming the protection of his constitutional privilege where there is no statutory requirement that he do so. (***People v. King*** (1967) 66 Cal.2nd 633.)

Note: What happens in practice is that upon a witness invoking his self-incrimination right to silence, the trial court will appoint independent counsel to confer privately with the witness, and to then advise that witness while testifying when he may or may not lawfully invoke his self-incrimination rights.

Statements received under circumstances such as under an “immunity agreement” are “involuntary,” and inadmissible for any purpose:

New Jersey v. Portash 440 U.S. 450, 458-459 [59 L.Ed.2nd 501, 509-510]: Compelled statements, with the witness (later defendant) given “use immunity,” made during a grand jury hearing; statements *not* admissible for purposes of impeaching his testimony at his trial.

People v. Quartermain (1997) 16 Cal.4th 600, 616-621: Use of defendant’s statements, even for purposes of impeachment, in violation of the prosecutor’s agreement not to use the statements for any purpose, is a “due process” violation and improper.

See “Immunity,” under “Waiver (and Expiration) of **Fifth Amendment Rights**,” “Waiver of Rights” (Chapter 8), below.

Defense Attorney’s Intervention:

Rule: Refusal to allow an attorney to stop the police from interrogating his client is of no constitutional significance so long as the defendant himself (or herself) gives a free and voluntary waiver. (***Moran v. Burbine*** (1986) 475 U.S. 412 [106 S.Ct. 1135; 89 L.Ed.2nd 410].)

“(T)he suggestion that the existence of an attorney-client relationship itself triggers the protections of the **Sixth Amendment** misconceives the underlying purposes of the right to counsel. The **Sixth Amendment’s** intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more that it is to protect a suspect from the consequences of his own candor.” (***Moran v. Burbine***, *supra*, at p. 430 [89 L.Ed.2nd at p. 427].)

This means that an attorney’s attempt to insulate his client from questioning during a police investigation, prior to indictment, by “warning” the police not to talk to his client has no legal effect. (*Ibid.*)

Sixth Amendment Right to Counsel: A criminal suspect’s **Sixth Amendment** rights do not attach until the he or she has been charged (i.e., formal charge, indictment, information, arraignment, or the suspect’s first appearance in court; see ***Michigan v. Jackson*** (1986) 475 U.S. 625, 633 [89 L.Ed.2nd 631, 640].), and

therefore does not prevent police from questioning a suspect until that point, even when the un-appointed (or un-retained) attorney calls police beforehand and commands officers not to question his or her client. (See *People v. Stephens* (1990) 218 Cal.App.3rd 575, 585.)

The **Sixth Amendment** right is not applicable until defendant has been charged in court (i.e., *arraigned*). (*United States v. Gouveia* (1984) 467 U.S. 180, 187-188 [81 L.Ed.2nd 146, 153-154].)

Note: A suspect/defendant's express right to counsel under the **Sixth Amendment** are a whole separate topic that must be treated independently from his or her right to the assistance to counsel as implied under the **Fifth Amendment**. The rules under both constitutional protections must be satisfied before law enforcement may question a criminal suspect. A separate outline on the **Sixth Amendment** is available upon request.

Fifth Amendment Implied Right to Counsel: An attorney's attempt to invoke his or her clients' **Fifth Amendment** rights does not shield the defendant and may be ignored by law enforcement:

Only the defendant may invoke the protections of the **Fifth Amendment**, and then only at the time questioning is attempted. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3 [115 L.Ed.2nd 158, 171]; *United States v. Wright* (9th Cir. 1992) 962 F.2nd 953, 955; *People v. Calderon* (1997) 54 Cal.App.4th 766.)

His or her attorney cannot do it for him. (*Moran v. Burbine* (1986) 475 U.S. 412 [106 S.Ct. 1135; 89 L.Ed.2nd 410].)

Events occurring outside the presence of a suspect, such as an attempt by the suspect's attorney to contact him, and entirely unknown to him, can have no bearing on the suspect's capacity to comprehend and knowingly relinquish a constitutional right. (*Moran v. Burbine*, *supra*, at p. 422 [89 L.Ed.2nd at p. 421].)

California's prior contrary rule, under *People v. Houston* (1986) 42 Cal.3rd 595, was abrogated by **Proposition 8**. (*People v. Ledesma* (1988) 204 Cal.App.3rd 682, 689.)

Also, per *Ledesma* (at pp. 695-696, and fn. 8), ignoring the statutory requirement per **P.C. § 825(b)** to allow an attorney retained by the defendant or the defendant's family to see the defendant upon demand is not a constitutional violation requiring the suppression of the defendant's statements where the defendant has otherwise waived his rights under *Miranda*.

But see “**P.C. § 825(b)**,” below.

But see *United States v. Santistevan* (10th Cir. 2012) 701 F.3rd 1289, where defendant’s attorney provided defendant with a letter that purported to invoke defendant’s right to counsel. Upon handing the letter to an FBI agent, at the agent’s request, the Court found that defendant had in fact adopted the invocation as indicated in the letter and that obtaining a waiver from him and questioning him after that point was illegal.

Notification to Defense Counsel: There is no requirement that the police notify defendant’s retained attorney before beginning any questioning that is otherwise constitutionally allowable (e.g., before arraignment and/or absent an invocation by the defendant himself). (*People v. Duck Wong* (1976) 18 Cal.3rd 178, 187; *People v. Sultana* (1988) 204 Cal.App.3rd 511, 521.)

Note: Notification to defense counsel prior to initiating a lawful questioning of a criminal suspect is commonly done as a courtesy only.

P.C. § 825(b): However, note that it is a *misdemeanor* for an officer having a prisoner in his or her custody to refuse to allow any properly licensed attorney, at the request of the prisoner or any relative of the prisoner, to visit that prisoner. The section also provides for a \$500 civil fine.

Defendant’s Refusal To Testify under the Fifth Amendment:

Rule: A criminal defendant has a constitutional right under the **Fifth Amendment**, self-incrimination clause to an instruction to the jury that they are not to draw any adverse inferences where a defendant has elected not to testify. (*Carter v. Kentucky* (1981) 450 U.S. 288 [67 L.Ed.2nd 241].)

However, the trial court’s refusal to instruct the jury during the penalty phase of a bifurcated death penalty prosecution that they may not draw any adverse inferences from a defendant’s decision not to testify does *not* constitute a **Fifth Amendment** violation in that it is an open question whether some such inferences may be drawn at the penalty phase of a death penalty case (e.g., the lack of remorse). (*White v. Woodall* (2014) 572 U.S. 415 [134 S. Ct. 1697; 188 L.Ed.2nd 698]; citing *Mitchell v. United States* (1999) 526 U.S. 314 [143 L.Ed.2nd 424].)

Defendant’s Refusal to Testify as Evidence of Guilt:

Defendant’s Choice Not to Testify: Defendant, of course, is not required to testify should he choose not to do so. (*Salinas v. Texas* (2013) 570 U.S. 178 [133 S.Ct. 2174; 186 L.Ed.2nd 376]; see **E.C. § 930**; and below, “*Defendant’s Concurrent Right to Testify.*”)

The defendant's right not to be called as a witness includes at an insanity "commitment extension trial," per **P.C. § 1026.5**, particularly since **subd. (b)(7)** specifically provides that "[t]he person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings." (*People v. Haynie* (2004) 116 Cal.App.4th 1224.)

Similarly, a minor has a **Fifth Amendment** privilege not to testify at a trial to extend defendant's commitment to the California Youth Authority, pursuant to **W&I §§ 1800 et seq.** (*In re Luis C.* (2004) 116 Cal.App.4th 1397.)

However, there is no duty placed upon the trial court to advise a defendant that he has a right to testify if he so chooses, and to take an on-the-record waiver of that right should he choose not to testify. (*People v. Enraca* (2012) 53 Cal.4th 735, 762.)

Testifying Defendant's Refusal to Submit to Cross-Examination:

"A criminal defendant's due process right to defend against the state's accusations includes the right to testify in his or her own behalf. (*Chambers v. Mississippi* (1973 410 U.S. 284, 294 [35 L.Ed.2nd 297, 93 S.Ct. 1038]; *People v. Robles* (1970) 2 Cal.3rd 205, 215 . . . ; *People v. Reynolds* (1984) 152 Cal.App.3rd 42, 45-46 . . .) However, a defendant's right to take the witness stand to offer his or her account of the events in question coexists with the prosecutor's right to fairly test that testimony through cross-examination. (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733-734 . . . ; *People v. Reynolds*, at p. 46; see generally *Chambers v. Mississippi*, at p. 295.) And it is well settled furthermore that '[a] defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, . . . limit the cross-examination to the precise facts concerning which he testifies.' (*People v. Cooper* (1991) 53 Cal.3rd 771, 882 . . . ; accord, *People v. Cornejo* (1979) 92 Cal.App.3rd 637, 655 . . .) Courts have long recognized that when a defendant refuses to answer some or all of a prosecutor's relevant questions during cross-examination, the trial court has discretion to strike the defendant's direct testimony, either in part or in its entirety. (*People v. Miller* (1990) 50 Cal.3rd 954, 999 . . . ; *People v. Reynolds*, at pp. 47; *People v. McGowan* (1926) 80 Cal.App. 293, 298-299 . . .) (¶) In *People v. Reynolds*, *supra*, 152 Cal.App.3rd 42, the Court of Appeal was mindful that the trial court's order striking all of the defendant's direct testimony in that case 'prevented [the] defendant from exercising a fundamental right.' (*Id.* at p. 47.) Accordingly, the appellate court recommended that a court exercising its discretion to strike testimony consider first whether the witness has refused to submit to cross-examination altogether, rather than refused to answer only one or more questions. In the latter circumstance, the Court of

Appeal suggested, the witness's direct testimony need not be stricken in its entirety in every case, and the court should consider both the motive for the refusal to answer and the materiality of the answer. The Court of Appeal also suggested that the court consider solutions short of striking a defendant's entire testimony, such as striking only a portion of the testimony, or instructing the jurors that they may take into account the refusal to answer when assessing the defendant's credibility. (*Id.* at pp. 47–48.) (¶) We find that the decision in *People v. Reynolds* provides a useful framework, not only for a trial court to follow in exercising its discretion in these circumstances, but also for a reviewing court to use when assessing an appellant's challenge to the trial court's ruling on a motion to strike his or her direct testimony." (*People v. Brooks* (2017) 3 Cal.5th 1; the Court ruling that the trial court's suppression of large portions of defendant's direct examination testimony due to his refusal to answer specific questions, if error, was harmless error under the circumstances. *Id.*, at pp. 30.)

A defendant is not privileged to testify and then refuse to submit to cross-examination. The sanction is for the trial court to strike the defendant's direct examination testimony. (*People v. Lena* (2017) 8 Cal.App.5th 1145, 1149-1151.)

Jury Instructions: A defendant is entitled to a jury instruction from the court directing the jury not to consider his or her failure to testify as evidence of guilt. (*Carter v. Kentucky* (1981) 450 U.S. 288 [67 L.Ed.2nd 241]; *People v. Trinh* (2014) 59 Cal.4th 216, 234-235.)

It is not required that this instruction be given "*sua sponte*;" i.e., without being requested. (*People v. Gardner* (1969) 71 Cal.2nd 843, 852-854.)

Although constitutionally entitled to an instruction concerning his or her right not to testify, failure to so instruct the jury is subject to a harmless error analysis on appeal. (*People v. Evans* (1998) 62 Cal.App.4th 86.)

And once instructed accordingly, the failure to include a copy of the instructions in the packet of written instructions provided to the jury during deliberations is not reversible error. (*People v. Trinh, supra.*)

A juvenile, in a jury trial for an extension of his time in the California Youth Authority due to continued dangerousness (pursuant to **W&I §§ 1800 et seq.**), is also entitled to such an instruction upon request. (*In re Luis C.* (2004) 116 Cal.App.4th 1397, 1302-1403.)

However, the trial court's refusal to instruct the jury during the penalty phase of a bifurcated death penalty prosecution that they may not draw any adverse inferences from a defendant's decision not to testify does *not* constitute a **Fifth Amendment** violation in that it is an open question whether some such

inferences may be drawn at the penalty phase of a death penalty case (e.g., the lack of remorse or an acceptance of responsibility). (*White v. Woodall* (2014) 572 U.S. 415 [134 S. Ct. 1697; 188 L.Ed.2nd 698]; citing *Mitchell v. United States* (1999) 526 U.S. 314 [143 L.Ed.2nd 424].)

Also, it is not jury misconduct for purposes of a motion for a new trial pursuant to **P.C. § 1181, subd. 3**, where jurors discussed a criminal defendant's failure to testify before the trial court had instructed the jury not to discuss this issue. The discussion had by the jury did not violate the court's rules in that they had not yet been instructed not to discuss the defendant's failure to testify, to consider only the evidence introduced at trial, not to conduct an independent investigation, or on the presumption of innocence and the burden of proof. (*People v. Alaniz* (2017) 16 Cal.App.5th 1.)

Comment to the Jury; "Griffin Error:"

Rule: Commenting to a jury, directly or indirectly, on a defendant's election to not testify at trial is reversible error. (*Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2nd 106]; i.e., "*Griffin Error*.")

The United States Supreme Court in *Griffin* held the California provision permitting this comment by the prosecutor was unconstitutional because the **Fifth Amendment** protection against self-incrimination "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (*Id.* at p. 615.).

A prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided only by the defendant, who therefore would be required to take the witness stand." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.)

In a criminal proceeding, a fact finder may not infer guilt from the accused's exercise of his **Fifth Amendment** right against self-incrimination. (*People v. Frierson* (1991) 53 Cal.3rd 730, 743.)

"The **Fifth Amendment** to the United States Constitution provides that '[n]o person ... shall be compelled in any criminal case to be a witness against himself.' This provision 'forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.' (*Griffin, supra*, 380 U.S. at p. 615; see *People v. Thompson* (2016) 1 Cal.5th 1043, 1117." (*People v. Lopez* (2018) 5 Cal.5th 339, 368.)

Case Law:

Defendant was convicted of the brutal murders of two young sisters in their home while the parents were gone. The girls had been struck in the head with a metallic object, possibly a sledgehammer. Suspicion immediately focused on defendant—a family friend—who knew the parents were not at home. A half hour after the discovery of the murders, the defendant was arrested wearing only bloody shorts. The bloody underpants of one of the girls was found in a closed toy box in their bedroom. The defendant did not testify at trial. The prosecutor argued in closing: “These little girls didn’t take the pants over there. But whoever did had blood on him because there was a pool of blood by the toy box. Who was the only person who had blood on him besides the two little girls? You know who he is. He is sitting here in this courtroom – *and just sitting.*” (Italics in original.) The Court of Appeal found **Griffin** error, stating, “(W)e cannot ignore the transparent implications of the words chosen by the prosecution in the instant case.” In other words, the defendant, the only person who knew the facts, “sat” in the courtroom, never taking the stand to testify. **People v. Modesto** (1967) 66 Cal.2nd 695, 711.)

In a trial where defendant did not testify, the prosecutor argued in closing, “*Now as far as how the bottle was broken . . . there would only be two people possibly who could answer that, and one of them, of course, is dead.*” The Court of Appeal concluded the prosecutor’s remarks were “an implied invitation to draw a damaging inference from the defendant’s failure to testify.” (**People v. Giovannini** (1968) 260 Cal.App.2nd 597, 604-605.)

Defendant was convicted of grand theft of copper wire. He was found by police at 3 a.m. in a secured Southern California Edison yard, hiding in the wheel well of one of the company’s trucks. A spool of copper wire belonging to the company was on the ground nearby, along with wire cutters. Defendant did not testify at trial. The prosecutor concluded his rebuttal argument by stating: “*Ladies and gentlemen, as we sit here today, the defendant is still in that wheel well in a very real sense, and this time he’s hiding from all of you. . . . Pull him out of that wheel well one last time.*” The Court of Appeal found these remarks were **Griffin** error because “[t]he most reasonable interpretation of the comment is that defendant was ‘hiding’ from the jury in a figurative sense by not testifying; he was hiding because he refused to get on the stand and tell the jury why he was in the SCE yard the night of the incident.” (**People v. Sanchez** (2014) 228 Cal.App.4th 1517, 1523, 1527.)

“Pursuant to *Griffin*, it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or rebutted by anyone other than the defendant testifying on his or her own behalf.” (*People v. Carr* (2010) 190 Cal.App.4th 475, 483; quoting *People v. Hughes* (2002) 27 Cal.4th 287, 371.)

It is equally improper to comment on *anyone’s* exercise of the privilege, even a non-defendant witness. (*People v. Padilla* (1995) 11 Cal.4th 891, 947-948; see also E.C. § 913(a).)

The source of the improper comment is irrelevant. Counsel for a testifying co-defendant should be admonished by the court not to comment on the other defendant’s failure to testify. (*People v. Haldeen* (1968) 267 Cal.App.2nd 478.)

Whether it is proper to comment to a jury at the penalty phase of a capital case, after defendant testifies, concerning the defendant’s failure to testify at the guilt phase, is subject to a split of authority:

- *Unlawful Griffin Error: Lesko v. Lehman* (3rd Cir. 1991) 925 F.2nd 1527, 1542; *State v. Cazes* (Tenn. 1994) 875 S.W.2nd 253, 265-266.)
- *Lawful: Com. V. Clark* (Pa. 1998) 710 A.2nd 31, 40; *Tucker v. Francis* (11th Cir. 1984) 723 F.2nd 1504, 1515.

California has no direct authority on this issue. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 768-770; discussing, but not deciding, the issue in that the prosecutor withdrew his questions on this topic.)

A defendant cannot complain of a *Griffin* error for the first time on appeal. The defendant must object to the trial court and request a curative admonition unless neither of those would have cured the harm. Failure to do so forfeits the defendant’s claim of prosecutorial misconduct on appeal. (*People v. Mesa* (2006) 144 Cal.App.4th 1000.)

The prosecutor’s comments about the defendant having never expressed remorse, which was not improper, held to be different than comments about defendant’s failure to take the stand and testify, which would have been improper. (*People v. Lopez* (2018) 5 Cal.5th 339, 368.)

A detective's trial testimony that defendant, when questioned, "knew facts of the case which had not been revealed to the press"—namely, that the victims' "wallets were missing," held not to be **Griffin** error in that there were other forms in which that evidence could have been addressed other than through the defendant's testimony. The evidence, therefore, did not necessarily refer to defendant's failure to testify. (*People v. Gomez* (2018) 6 Cal.5th 243, 299.)

In a jury trial for indecent exposure, in violation of **Pen. Code, § 314**, it was not **Griffin** error for the prosecutor to refer in closing argument to defendant's decision not to testify by commenting that the evidence was uncontroverted because defendant could have presented other witnesses to support his counsel's version of events. The prosecutor's argument was fair response after defense counsel argued, without supporting evidence, that defendant was merely a student leaving campus who had to urinate. (*People v. Hubbard* (2020) 52 Cal.App.5th 555, 562-566.)

References to Evidence That Only Defendant Could Refute or Contradict:

"The prosecutor's argument cannot refer to the absence of evidence that only the defendant's testimony could provide." (*People v. Brady* (2010) 50 Cal.4th 547, 565-566; defendant held to have been able to present exonerating evidence from sources other than the defendant.)

Defendant committed two hand-to-hand drug transactions with an undercover police officer. The defendant did not testify at trial. There were no other witnesses. In closing argument, the prosecutor stated, "*Looking at the evidence, which incidentally, has not been refuted by the defendant, there is no controverting evidence from the other side. . . . There was no evidence offered by the defendant controverting what the People offered.*" Finding these remarks to be **Griffin** error, the Court of Appeal said; "it is difficult to interpret (them) as anything but a direct reference to defendant's failure to take the witness stand." (*People v. Northern* (1967) 256 Cal.App.2nd 28, 30.)

The two defendants were convicted of murdering two young women. The primary witnesses against the two defendants were three other persons who had been present at the time of the crimes and were accomplices to the murders, but had been granted conditional immunity in exchange for their testimony. In closing argument, the prosecutor pointed out that there were five percipient witnesses to what occurred at the scene of the murders, and three

of them were subjected to cross examination. The Appellate Court note that; “(t)he other two possible witnesses left unaccounted for could not have been anyone other than the defendants.” The prosecutor told the jury that these three witnesses were not of “sterling character”. . . . “but their testimony is unrefuted. No one has come forward and said that it is false. No one has come before you to show you it wasn't that way. You have not heard that.” The Court of Appeal concluded the prosecutor committed **Griffin** error by urging “the jury to believe the testimony of the three accomplices because the defendants, who were the only ones who could have refuted the testimony, did not take the stand and subject themselves to cross examination.” (*People v. Medina* (1974) 41 Cal.App.3rd 438, 457.)

Harmless Error: However, not every comment on a defendant’s failure to testify will be held to be reversible **Griffin** error:

Indirect, brief and mild references to a defendant's failure to testify, without amplification, and without any suggestion that an inference of guilt be drawn therefrom, particularly when the jury is instructed not to draw any inference of guilt from defendant's exercise of his right not to testify, is uniformly held to constitute “harmless error.” (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1245; *People v. Boyette* (2002) 29 Cal.4th 381, 455-456; *People v. Monterroso* (2004) 34 Cal.4th 743, 770.)

A prosecutor’s comment in opening statement, explaining why an already-convicted co-defendant was subpoenaed to testify (i.e., “*because we did not have access to testimony from the defendants [in a first trial]*”), was held to be harmless beyond a reasonable doubt because “*the reference was brief and mild and did not suggest that the jury should draw an inference of guilt from defendant's failure to testify.*” No **Griffin** error. (*People v. Turner* (2004) 34 Cal.4th 406, 419-420.)

“While a direct comment about the defendant’s failure to testify always violates **Griffin**, a prosecutor’s indirect comment violates **Griffin** only ‘if it is manifestly intended to call attention to the defendant’s failure to testify, or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.’” (*Hovey v. Ayers* (9th Cir. 2006) 458 F.3rd 892, 911-913, where the prosecutor’s comments, being “isolated” and “minimal in comparison with the weight of

the evidence” of guilt, were held to be harmless error; citing *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2nd 805, 809.)

And see *United States v. Robinson* (1988) 485 U.S. 25, 32 [99 L.Ed.2nd 23, 31]: Prosecutor’s argument relating to defendant’s failure to take the stand and explain his actions (normally considered “*Griffin error*”) was not improper when done in rebuttal to defense counsel’s prior argument that the government had unfairly deprived the defendant of an opportunity to explain.

Where in response to the prosecutor’s question to a rape victim (“So what made you decide to tell us about it today?”) the victim responded; “Because I just don’t like the fact that he knows what he did. . . . And he still wants to sit here and deny everything,” the response was held not to be *Griffin error*. Generally, the self-incrimination clause of the **Fifth Amendment** prohibits *prosecutors* from commenting on a defendant’s failure to testify. Defendant cited two federal circuit court cases to support his claim that a *witness’s* testimony can also constitute *Griffin error*. But because lower federal court opinions are merely persuasive authority, they are not binding upon California courts. The Court declined, therefore, to extend *Griffin* beyond its plain language to include a witness’s testimony. (*People v. Noriega* (June 17, 2015) 237 Cal.App.4th 991, 1002-1003.)

The cases cited by defendant where it was held to be *Griffin error* for a witness to comment on the defendant’s failure to testify were *United States v. Sylvester* (5th Cir. 1998) 143 F.3rd 923, 927; and *United States v. Rocha* (5th Cir. 1990) 916 F.2nd 219, 232. Such authority, as noted by the Court, is “persuasive” only, and not binding. (See *People v. Zapien* (1993) 4 Cal.4th 929, 989.)

The prosecutor’s closing argument to the jury (i.e.: “The defendant clearly does not want to take responsibility for his actions. He has put it upon [Rosa] to testify to get himself convicted. He has not taken responsibility himself. That is the kind of man he is. And that is typical of someone who is using or who has used [drugs], as [Rosa] testified to. There is no accountability, no responsibility, and that’s why he cruelly made [Rosa] testify in identifying him, yet again.”) was held to be improper comment upon the defendant’s failure to testify, but harmless under the

circumstances. (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1019-1023.)

Where possible **Griffin** error occurs, its effects may be neutralized by a timely objection and a reinstruction to the jury concerning the defendant's right not to testify. (See *People v. Carter* (2005) 36 Cal.4th 1215, 1266-1267.)

The trial judge's comment to defense counsel in front of the jury; "*You are resting without calling your client?*", while "imprudent," was held to be harmless in that (1) the trial court's comment consisted of just a single short query. (2) The court's comment did not directly suggest the jury should draw an inference of guilt from defendant's decision not to testify. (3) The jury was also instructed that "[a] defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact a defendant does not testify." The California Supreme Court assumed the jury followed this instruction. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1117-1118.)

Also, it is not jury misconduct for purposes of a motion for a new trial pursuant to **P.C. § 1181, subd. 3**, where jurors discussed a criminal defendant's failure to testify before the trial court had instructed the jury not to discuss this issue. The discussion had by the jury did not violate the court's rules in that they had not yet been instructed not to discuss the defendant's failure to testify, to consider only the evidence introduced at trial, not to conduct an independent investigation, or on the presumption of innocence and the burden of proof. (*People v. Alaniz* (2017) 16 Cal.App.5th 1.)

Exception: Comments on the State of the Evidence:

Griffin does not preclude the prosecutor's comments concerning the *state of the evidence* or the *failure of the defense to introduce material evidence* or to *call logical witnesses*. (*People v. Hovey* (1988) 44 Cal.3rd 543, 572; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1050-1051; *People v. Cornwell* (2005) 37 Cal.4th 50, 90-91.)

Eliciting evidence to the effect that the defense had failed to request a live lineup, and then arguing that the defense had not attempted to develop reasonably expected exculpatory evidence, is not a violation of the defendant's **Fifth Amendment** right to remain silent and is not prosecutorial misconduct. (*People v. Lewis* (2004) 117 Cal.App.4th 246.)

“As a general principle, prosecutors may allude to the defense’s failure to present exculpatory evidence, and such commentary does not ordinarily violate *Griffin* or erroneously imply that the defendant bears a burden of proof.” (*Id.*, at p. 257; see also *People v. Carr* (2010) 190 Cal.App.4th 475, 483.)

Noting that defendant’s fingerprints were at the scene of the crime, and that “(t)here’s been no explanation offered as to how they possibly could have been there,” held to be nothing more than “a fair on the state of the evidence, rather than a comment on defendant’s failure to personally provide an alternative explanation.” (*People v. Lancaster* (2007) 41 Cal.4th 50, 84.)

Following conviction for special circumstance murder, defendant challenged his conviction alleging the unconstitutionality of jury instruction **CALCRIM No. 361** that permitted jury to draw negative inferences from the testifying defendant’s failure to explain or deny the evidence against him. Despite defense counsel’s failure to object to the instruction, the court of appeal reviewed the issue and observed that it found no inconsistency between the defendant’s right to testify and the attendant risk of being confronted with evidence calling into question his testimony. “The failure to explain or deny adverse evidence can be a basis for disbelieving any witness’s testimony and is always relevant to credibility.” Accordingly, **CALCRIM No. 361** is constitutional. (*People v. Vega* (2015), 246 Cal.App.4th 484, 496-498.)

However, **CALCRIM No. 361** applies only when the defendant completely fails to explain or deny incriminating evidence or claims a lack of knowledge, and it appears from the evidence that he could reasonably be expected to have that knowledge. (*People v. Cortez* (2016) 63 Cal.4th 101, 110-122.)

A prosecutor’s comments during closing argument about defendant’s failure to express any remorse when confessing to a police interrogator does *not* constitute a comment on defendant’s failure to testify. (*People v. Spencer* (2018) 5 Cal.5th 642, 687.)

“Calling attention to the fact that ‘there was no evidence that [the] defendant had ever expressed remorse’ does not violate *Griffin*.” (*Ibid.*, quoting *People v. Zambrano* (2007) 41 Cal.4th 1082, at p. 1173.)

During the prosecutor's opening argument at the guilt phase where defendant did not testify, he reviewed the evidence against defendant and exculpatory testimony presented by the defense. Following his review of the evidence, the prosecutor stated: "*That is the evidence in this case. The evidence in this case is not contradicted by any other evidence in this case. It is very clear. It is proof beyond a reasonable doubt that the defendant committed those crimes that he is charged with.*" The Supreme Court found there was no **Griffin** error, stating: "The prosecutor's statement that the evidence was uncontradicted simply reflected his view that the exculpatory evidence was not true; it was not a comment upon defendant's failure to testify." (**People v. Castaneda** (2001) 51 Cal.4th 1292, 1333.)

Where defendant was convicted of murder and attempted murder, and the defense was misidentification, defendant's counsel challenged the victim's identification testimony, implicitly contending defendant was elsewhere on the night of the crime. However, the defense presented no alibi witness to support this argument. In closing argument the prosecutor argued: "*The uncontradicted evidence is that the defendant was there, that the defendant did kill Willie Womble, that the defendant did shoot Angela Womble. That is uncontradicted.*" The Supreme Court held that although the defendant claimed he was elsewhere on the night of the crime, "he presented no alibi evidence to support the contention. Thus, the prosecutor's argument merely reflected the state of the evidence." (**People v. Johnson** (1992) 3 Cal.4th 1183, 1229.)

Caution: A comment on the state of the evidence which infers, directly or indirectly, or which may be construed by the jury as, a comment on defendant's failure to testify may be **Griffin** error. (**People v. Hovey** (1988) 44 Cal.3rd 543.)

"Under the **Fifth Amendment** of the federal Constitution, a prosecutor is prohibited from commenting directly or indirectly on an accused's invocation of the constitutional right to silence. Directing a jury's attention to a defendant's failure to testify at trial runs the risk of inviting the jury to consider the defendant's silence as evidence of guilt. [Citations]" (**People v. Lewis** (2001) 25 Cal.4th 610, 670.)

"It is error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide" (**People v. Hughes** (2002) 27 Cal.4th 287, 372.)

The prosecutor's comment that; "there is no denial at all that (certain witnesses) were there," held to be a comment on defendant's failure to personally deny the accusation. (*People v. Vargas* (1973) 9 Cal.3rd 470, 475-476.)

A prosecutor's comment that testimony by prosecution witnesses was "*unrefuted*" held to be unfair comment (i.e., "*Griffin error*") under the circumstances. (*People v. Medina* (1974) 41 Cal.App.3rd 438, 457-460.)

A prosecutor telling a jury that certain evidence is "uncontradicted" when contradiction would have required the defendant to take the stand and testify, draws attention to the defendant's failure to testify and is "*Griffin error*." (*People v. Murtishaw* (1981) 29 Cal.3rd 733, 757-758; such error probably being correctable if the defense had made a timely objection.)

Where the prosecutor's remark is ambiguous (e.g., "(Y)ou haven't heard from the defense"), the court must inquire as to "(w)hether there is a reasonable likelihood that the jury construed or applied any of the complained of remarks in an objectionable fashion. (*People v. Carr* (2010) 190 Cal.App.4th 475, 484; any possible error in this case cured by the court's admonition to the jury to disregard the comment.)

"Its holding (referring to *Griffin*) does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.)

The courts "have distinguished . . . between permissible 'comments about the lack of explanation provided by the *defense*' and impermissible 'comments about the lack of explanation furnished by the *defendant*.' (*United States v. Mayans*, 17 F.3rd 1174, 1185 (9th Cir. 1993). A prosecutor's remark thus can 'call attention to the defendant's failure to present exculpatory evidence,' *id.*, so long as it is not 'of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify,' *Lincoln v. Sunn*, 807

F.2nd 805, 809 (9th Cir. 1987).” (*Demirdjian v. Gipson* (9th Cir. 2016) 832 F.3rd 1060, 1067-1071.)

Comments by a Witness:

The **Griffin** rule has been held not extend beyond its plain language to include a *witness's* testimony concerning the defendant's silence. For example, where defendant did not testify, the court concluded there was no **Griffin** error when, in a prosecution for aggravated sexual assault of child, the prosecutor asked the victim's sister, “*So what made you decide to tell us about it today?*” The witness answered, “*Because I just don't like the fact that he knows what he did. It wasn't just me, it was also my sister. And he still wants to sit here and deny everything.*” Defendant conceded there was no California authority supporting his claim that a *witness's* testimony concerning a defendant's failure to testify constitutes **Griffin** error. (*People v. Noriega* (2015) 237 Cal.App.4th 991, 1003.)

When Defendant Does Testify:

A trial court may instruct a jury pursuant to **CALCRIM No. 361** that it can draw an unfavorable inference from defendant prisoner's failure to explain or deny incriminating evidence at trial when defendant testifies. (*People v. Grandberry* (2019) 35 Cal.App.5th 599, 605-611.)

CALCRIM No. 361 reads as follows: “If the defendant failed in his testimony to explain or deny evidence against him, and if he could have reasonably been expected to do so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The people must still prove the defendant guilty beyond a reasonable doubt. If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

Defendant's Concurrent Right to Testify:

Rule: “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.” (*Harris v. New York* (1971) 401 U.S. 222, 225 [28 L.Ed.2nd 1, 4].)

A criminal defendant has a “*fundamental right*” under the Constitution (**Fifth, Sixth and Fourteenth Amendments**) to testify on his own behalf. (*Rock v. Arkansas* (1987) 483 U.S. 44, 49-53 [97

L.Ed.2nd 37, 44-47]; *People v. Johnson* (1998) 62 Cal.App.4th 608, 617; *People v. Guzman* (1988) 45 Cal.3rd 915, 962; *People v. Webb* (1993) 6 Cal.4th 494, 534-535; *People v. Nakahara* (2003) 30 Cal.4th 705, 717.)

Whether or not a defendant chooses to testify is his or her decision: Defense counsel has no power to prevent his or her client from testifying. (*People v. Lucky* (1988) 45 Cal.3rd 259, 281; *People v. Robles* (1970) 2 Cal.3rd 205, 215; *People v. Lucas* (1995) 12 Cal.4th 415, 444; *People v. Johnson*, *supra*, at p. 618.)

“A defendant is ‘presumed to assent to his attorney’s tactical decision not to have him testify.’” (*United States v. Pino-Noriega* (9th Cir. 1999) 189 F.3rd 1089, 1094.)

“When a defendant remains ‘silent in the face of his attorney’s decision not to call him as a witness,’ he waives the right to testify. (*United States v. Pino-Noriega*, *supra*, at p. 1095, citing *United States v. Nohara* (9th Cir. 1993) 3 F.3rd 1239, 1244.)

“(W)aiver of the right to testify may be inferred from the defendant’s conduct and is presumed from the defendant’s failure to testify or notify the court of his desire to do so.” (*United States v. Joelson* (9th Cir. 1993) 7 F.3rd 174, 177.)

“Although tactical decisions at trial are generally counsel’s responsibility, the decision whether to testify, a question of fundamental importance, is made by the defendant after consultation with counsel.” (*People v. Hines* (1997) 15 Cal.4th 997, 1032.)

“The right (to testify) is personal, and ‘may only be relinquished by the defendant, and the defendant’s relinquishment of the right must be knowing and intentional.’ (Citation) (However), it need not be explicit.” (*United States v. Pino-Noriega* (9th Cir. 1999) 189 F.3rd 1089, 1094; citing *United States v. Joelson* (9th Cir. 1993) 7 F.3rd 174, 177.)

“When the record fails to disclose a timely and adequate demand to testify, ‘a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.’” (*People v. Alcalá* (1992) 4 Cal.4th 742, 805-806.)

Waiting until after the verdict has been read is too late to assert the right to testify. (*United States v. Edwards* (9th Cir. 1990) 897 F.2nd 445, 446. Waiting until the verdict has been reached, even though not yet read, is also too late. (*United States v. Pino-Noriega*, *supra*, at pp. 1095-1096)

Although a civil proceeding, “due process” dictates that a defendant has a constitutional right to testify at a Sexually Violent Predator (SVP; **W&I §§ 6600 et seq.**) trial, even over his attorney’s objection. (*People v. Allen* (2008) 44 Cal.4th 843; but held to be harmless error.)

The fact that the defendant may exercise his right to testify in order to ask a jury to impose a sentence of death does not render a penalty trial unconstitutionally unreliable. (*People v. Trinh* (2014) 59 Cal.4th 216, 251.)

The trial court did not abuse its discretion by refusing to reopen the evidence to allow defendant to testify because defendant’s motion to reopen the evidence after the government’s closing argument was untimely and granting his untimely request would likely have cause at least some disruption to the trial process. Also, defendant failed to offer any excuse for his late request to testify, let alone a reasonable one. (*United States v. Orozco* (9th Cir. 2014) 764 F.3rd 997, 1001-1002.)

However, a defendant is not privileged to testify and then refuse to submit to cross-examination. The sanction is for the trial court to strike the defendant’s direct examination testimony. (*People v. Lena* (2017) 8 Cal.App.5th 1145, 1149-1151.)

“A criminal defendant has the right to testify at trial, ‘a right that is the mirror image of the privilege against compelled self-incrimination and accordingly is of equal dignity.’ (*People v. Barnum* (2003) 29 Cal.4th 1210, 1223 . . . ; see *People v. Nakahara* (2003) 30 Cal.4th 705, 717.) ‘The defendant may exercise the right to testify over the objection of, and contrary to the advice of, defense counsel. [Citations.] ‘When the decision is whether to testify [citation] . . . at the guilt phase of a capital trial [citation] it is only in case of an express conflict arising between the defendant and counsel that the defendant’s desires must prevail. In the latter situation, there is no duty to admonish and secure an on the record waiver unless the conflict comes to the court’s attention.’ (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332 . . . ; see *People v. Enraca* (2012) 53 Cal.4th 735, 762) Absent an express conflict, ‘a trial judge may safely assume that

a defendant, who is ably represented and who does not testify is merely exercising his **Fifth Amendment privilege** against self-incrimination and is abiding by his counsel's trial strategy’ (*People v. Bradford* (1997) 14 Cal.4th 1005, 1053)” (*People v. Duong* (2020) 10 Cal.5th 36, 55; rejecting defendant's argument that his decision to forgo testifying was not knowing, intelligent, and voluntary because he was misled to believe he could appeal the trial court's tentative ruling regarding the admissibility of uncharged crimes evidence even if he did not testify. (pp. 55-56.)

Admonishment by the Court to Self-Represented Defendants:

Old Rule: A trial court, for years, had been required to admonish a person who represents himself, whether in a criminal (*People v. Kramer* (1964) 227 Cal.App.2nd 199.) or a civil (*Killpatrick v. Superior Court* (1957) 153 Cal.App.2nd 146.) case, of his or her privilege against compelled self-incrimination before testifying in his own defense, or when called as a witness by the opposing party.

New Rule: The California Supreme Court has overruled these cases, finding that there is no such obligation to so advise a self-represented litigant in a criminal or civil case. (*People v. Barnum* (2003) 29 Cal.4th 1210.)

The court does not have a *sua sponte* duty to advise a criminal defendant of his right to testify. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1052-1053; *United States v. Edwards* (9th Cir. 1990) 897 F.2nd 445, 447.)

There is no duty placed upon the trial court to advise a defendant that he has a right to testify if he so chooses, and to take an on-the-record waiver of that right should he choose not to testify. (*People v. Enraca* (2012) 53 Cal.4th 735, 762.)

There is no constitutional requirement that defendant receive “an array of admonishments” as a prerequisite to his testifying. (*People v. Nakahara* (2003) 30 Cal.4th 705.), even if that testimony is against his lawyer's advice and indicates a preference for his own execution. (*Id.*, at p. 717; *People v. Guzman* (1988) 45 Cal.3rd 915, 961-963; *People v. Webb* (1993) 6 Cal.4th 494, 534-535.)

No Privilege to Lie: Does the **Fifth Amendment** give a criminal defendant the right to lie with impunity? *NO:*

“It is well established that a criminal defendant’s right to testify does not include the right to commit perjury. [Citations]” (*LaChance v. Erickson* (1998) 522 U.S. 262, 266 [139 L.Ed.2nd 695, 700].)

A defense attorney, with prior knowledge that the defendant intends to perjure him or herself, may not ethically participate in the perjury. Allowing the client to testify in the narrative, without direct examination, and without advancing the defendant’s falsehoods to the jury, is usually considered the best method of handling such situations. (*People v. Johnson* (1998) 62 Cal.App.4th 608, 618-634

“Our legal system provides methods for challenging the Government’s right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with falsehood.” (*Bryson v. United States* (1969) 396 U.S. 64, 72 [24 L.Ed.2nd 264, 271].)

There is no constitutional (**Fifth Amendment**) exception to the criminal liability of **18 U.S.C. § 1001** (making false statements to a federal investigator) for an “*exculpatory no*,” i.e., a denial of guilt. The guilty criminal suspect must choose between his other options; admitting guilt or remaining silent. *Brogan v. United States* (1998) 522 U.S. 398 [139 L.Ed.2nd 830].)

See “*Miranda For ‘Use as a Shield; Not a Sword,’*” under “*Defendant’s Invocation as Evidence of Guilt,*” above.

Defendant’s Pre-Trial Silence as Substantive Evidence of Guilt or for Purposes of Impeachment:

Rule: The *Miranda* decision itself, in a footnote, says that; “In accord with our decision today, it is impermissible to penalize an individual for exercising his **Fifth Amendment** privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.*” (Italics added; *Miranda v. Arizona*, *supra*, at p. 468, fn. 37 [16 L.Ed.2nd at p. 720].)

But there are exceptions, apparently depending upon whether the defendant’s silence, under the circumstances, was intended as an attempt to exercise his self-incrimination privilege. (See below)

Issue: Failure to Offer Excuse, Alibi or Defense when Accused of Crime: When a defendant is accused of a crime and had an opportunity to offer an excuse, alibi, or other defense, but did not, may his silence be used against him at trial either as:

Substantive evidence of his guilt, in the People's case-in-chief; or

As impeachment evidence after he testifies and offers an excuse or alibi?
(See below)

Doyle Error: The following rules commonly come under the heading of “**Doyle error**,” based upon the landmark case decision of **Doyle v. Ohio** (1976) 426 U.S. 610 [96 S.Ct. 2240; 49 L.Ed.2nd 91]; see below.

As Impeachment Evidence: Where defendant testifies at trial, and is cross-examined, may he be impeached with the fact that he failed to respond when confronted with an accusation of guilt or otherwise did not reveal an excuse offered at the time of trial?

*Pre-arrest silence, before a **Miranda** admonishment:*

Should defendant elect to testify and thereby offers exonerating evidence for the first time, he may generally be impeached with the fact of his prior muteness. (**Jenkins v. Anderson** (1980) 447 U.S. 231, 237-238 [65 L.Ed.2nd 86, 93]; **People v. Redmond** (1981) 29 Cal.3rd 904, 910-911.)

A defendant's pre-arrest, pre-**Miranda** silence *is admissible* as impeachment evidence so long as there was no inference of the defendant's reliance on his **Fifth Amendment** right to silence. (**People v. Free** (1982) 131 Cal.App.3rd 155, 162.)

Use of defendant's silence between the time of the crime and his eventual arrest was lawful “(b)ecause the prosecutor's inquiry (cross-examination) did not make use of “the arrested person's [post-**Miranda**] silence . . . to impeach an explanation subsequently offered at trial.” No **Doyle** error. (**People v. Earp** (1999) 20 Cal.4th 826, 855-857.)

The use of a defendant's pre-arrest, pre-**Miranda** silence is permissible as both impeachment evidence *and* as evidence of substantive guilt. (Citing **United States v. Oplinger** (9th Cir. 1998) 150 F.3d 1061, 1067-1068.) No error resulted from the government's summation commentary on Beckman's silence. **United States v. Beckman** (9th Cir. 2002) 298 F.3rd 788, 795.)

However, where a suspect's silence is held to be an attempt to invoke his or her right to silence, then impeaching the

defendant with such silence is a **Fifth Amendment** violation. (*People v. Givans* (1985) 166 Cal.App.3rd 793, 801; *People v. Free* (1982) 131 Cal.App.3rd 155, 166.)

“At a minimum the same rule should apply to substantive use of pre-custody/pre-*Miranda* silence in the prosecution’s case-in-chief.” *People v. Ramos* (2013) 216 Cal.App.4th 195, 207.)

*Post-arrest silence, but before a **Miranda** admonishment is given:*

An arrested suspect’s silence either in the face of an accusation or with an opportunity to relate to police an exculpatory version, *may be used* to impeach a defense offered at trial (*Fletcher v. Weir* (1982) 455 U.S. 603 [71 L.Ed.2nd 490]; *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1840-1843.)

However, the jury must be instructed that the defendant’s silence refers only to that time period before a *Miranda* admonishment was given. Otherwise, it might still be error to comment on a defendant’s silence without such an explanation. (*United States v. Baker* (9th Cir. 1993) 999 F.2nd 412, 414-416.)

*Post-arrest silence, after a **Miranda** admonishment (the classic **Doyle** situation):*

There are three prerequisites to “*Doyle error*” (*Greer v. Miller* (1987) 483 U.S. 756, 762-765 [97 L.Ed.2nd 618, 628-630]; see also *People v. Evans* (1994) 25 Cal.App.4th 358, 367-370.):

Defendant received the “implicit assurance” by a *Miranda* admonishment that his or her silence would carry no penalty;

The prosecution makes use of defendant’s silence against him, such as in an attempt to impeach the defendant’s in-court exculpatory testimony; *and*

The trial court allows the prosecutor to use defendant’s silence for impeachment purposes.

A defendant's silence in the face of an accusation made by law enforcement after arrest and after being admonished pursuant to *Miranda*, is *inadmissible* impeachment evidence in the defendant's trial as a "*due process*" violation. (*Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240; 49 L.Ed.2nd 91]; *United States v. Lopez* (9th Cir. 2007) 500 F.3rd 840, 844-845.)

It was error for prosecutor to be allowed to cross-examine defendant about his post-*Miranda* silence. (*United States v. Hale* (1975) 422 U.S. 171, 175-180 [45 L.Ed.2nd 99].)

"*Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.' [Citation omitted.]" (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 291 [88 L.Ed.2nd 623, 629]; *People v. Clark* (2011) 52 Cal.4th 856, 959.)

Defendant's post arrest *behavior* and *demeanor*, however, may be used against him. (*Wainwright v. Greenfield*, *supra*, at p. 295, fn. 13 [88 L.Ed.2nd at p. 632].)

Similarly, where defendant's tone of voice is relevant, his taped invocation might be admissible. (*People v. Crandell* (1988) 46 Cal.3rd 833, 879.)

But evidence of his failure to react or failure to ask who the victim was after an invocation is inadmissible as *Doyle* error. (*People v. Clark*, *supra*, at pp. 958-959. However, because of the trial court's prompt admonition to the jury not to consider such evidence, the error was harmless.)

It is an unsettled issue, however, how long after a *Miranda* admonishment the subject's silence continues to indicate an attempt to exercise those rights. (*United States v. Ross* (9th Cir. 1997) 123 F.3rd 1181, 1188; defendant cross-examined at his third trial concerning a new defense not advanced during the time period between his first and second trials, both of which ended in hung juries.)

See also *United States v. Balter* (3rd Cir. 1996) 91 F.3rd 427, 439; "It may be that a defendant's silence

immediately after receiving **Miranda** warnings is more likely to represent the exercise of **Miranda** rights than is a defendant's silence for an extended period of time after the receipt of warnings"

Asking the defendant's interrogator on direct examination whether, during an interview after defendant's arrest, defendant provided any statements that were of evidentiary significance to the investigation, held, under the circumstances, not to be a question that was designed to impeach defendant's later statements to the police by inferring that he had invoked his rights, and thus not to be **Doyle** error. (*People v. Riggs* (2008) 44 Cal.4th 248, 298-299.)

Where defendant's defense to a federal charge of attempting to illegally re-enter the United States was that he was only intending to seek help for a jaw injury for which he believed he could get treatment in the U.S., it was held to be error to allow the Government to impeach this claim by introducing into evidence his failure to mention it in response to routine booking questions that did not directly call for that information. Allowing the evidence could only invite the jury to draw inferences that defendant did not approach the port of entry to seek help for his jaw injury from his post-invocation silence, violating his constitutional right to remain silent. (*United States v. Ramirez-Estrada* (9th Cir. 2014) 749 F.3rd 1129, 1133-1138.)

However, "due process is not violated when the prosecutor's reference to post-**Miranda** silence (after defendant invoked his right to counsel) is 'a fair response to [a] defendant's claim or a fair comment on the evidence.' (Citation) The right to remain silent is a shield; it cannot be used as a sword to cut off the prosecution's fair response to defense evidence or argument. (Citation)" (*People v. Campbell* (2017) 12 Cal.App.5th 666, 669, 671-673; "[T]he prosecutor's reference to [defendant's] post-**Miranda** silence was a fair response to [defendant's] trial testimony that he cooperated fully with police."

*Post-arrest silence, after a **Miranda** admonishment, in the face of an accusation made by non-law enforcement:*

*Post-arrest silence, after a **Miranda** admonishment, in the face of an accusation made by a private citizen may be admissible against the accused unless the silence, under the circumstances, is held to be an assertion of the defendant's rights to silence and/or counsel. (**People v. Eshelman** (1990) 225 Cal.App.3rd 1513, 1520-1523; see also **People v. Preston** (1973) 9 Cal.3rd 308, 313-314; (**People v. Hollinquest** (2010) 190 Cal.App.4th 1534, 1554-1561.)*

In **Hollinquest**, however, a defendant's post-arrest, post-**Miranda** admonition silence, used by the prosecution to infer guilt, was held to be **Doyle** error even though the failure to offer an innocent explanation was proven through defendant's statements to non-law enforcement. (*Ibid.*)

Post-arrest, after admonishment and waiver, a Selective Refusal to Answer Questions:

*Post-arrest, after admonishment and waiver, a defendant's selective refusal (i.e.; "partial silence") to answer certain questions may be used for impeachment purposes except where such refusal is made under circumstances indicating that such refusal is in fact an attempt to invoke his or her **Miranda** rights. (**People v. Hurd** (1998) 62 Cal.App.4th 1084, 1093.)*

But see **United States v. Canterbury** (10th Cir. 1993) 985 F.2nd 483, 486, where the defendant, when arrested, answered only three questions. At trial, it was held to be error to allow the prosecutor to cross-examination defendant concerning his claim of entrapment, raised for the first time at trial, because the questioning was intended to draw attention to his post-arrest silence and not merely to impeach his inconsistent statements.

"Thus, a suspect may speak to the agents, reassert his right to remain silent or refuse to answer certain questions, and still be confident that **Doyle** will prevent the prosecution from using his silence against him. [Citation]" (**United States v. Scott** (7th Cir. 1995) 47 F.3rd 904.)

The California Supreme Court declined to decide the issue where the error, if any, in using a defendant's selective silence to certain questions as substantive evidence of guilt in

the People's case-in-chief, was not prejudicial. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118-119.)

The fact of a defendant's selective silence to certain questions was held to be admissible as "*adoptive admissions*" per E.C. § 1221, but only because defendant's failure to answer these questions *did not*, under the circumstances, infer an intent to rely upon his **Fifth Amendment** right to silence. (*People v. Bowman* (2011) 202 Cal.App.4th 353, 361-365, and cases cited at p. 364.)

"If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the **Fifth Amendment** to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." (*Id.*, at p. 365.)

Impeachment by Cross-Examination or Rebuttal Evidence:

Such impeachment evidence, when admissible, may be in the form of cross-examination of the defendant or rebuttal evidence through other witnesses. (*People v. O'Sullivan* (1990) 217 Cal.App.3rd 237, 240.)

Evidence in the sanity phase that the defendant had not described being in a state of depersonalization or derealization before her psych eval was not inadmissible under *Doyle* as a comment on the exercise of the right to remain silent under *Miranda*, nor did single mention of defendant "invoking" followed by agreement that the defendant did not have a chance to make an official statement prior to the psych eval warrant a pinpoint instruction amount to *Doyle* error. (*People v. Smith* (2021) 70 Cal.App.5th 298.)

As Substantive Evidence of Guilt:

Pre-Arrest and Pre-Miranda Admonishment:

The use of a defendant's pre-arrest, pre-*Miranda* silence is permissible as impeachment evidence *and* as evidence of substantive guilt. (Citing *United States v. Oplinger* (9th Cir. 1998) 150 F.3d 1061, 1067-1068.) No error resulted from the government's summation commentary on Beckman's silence. *United States v. Beckman* (9th Cir. 2002) 298 F.3rd 788, 795.)

E.g.: Evidence of the defendant's act of hiding in the bedroom, knowing that the police were talking to his fiancée, admissible as evidence of guilt. (*Abby v. Howe* (6th Cir. 2014) 742 F.3rd 221.)

The majority rule appears to be that "(n)either due process, fundamental fairness, nor any more explicit right contained in the Constitution is violated by the admission of the silence of a person, not in custody or under indictment, in the face of accusations of criminal behavior." (*United States v. Giese* (9th Cir. 1979) 597 F.3rd 1170, 1197.)

An argument can be made that a suspect's silence, when in response to an accusation of guilt, is admissible under the "adoptive admission" exception to the hearsay rule (**E.C. § 1221**). (See *People v. Castille* (2003) 108 Cal.App.4th 469, 485-488.) However, such cases commonly involve situations where the subject has not yet been arrested. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1189; quoting *People v. Preston* (1973) 9 Cal.3rd 308, 313, 314; Admissibility of an adoptive admission is appropriate when "a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the **Fifth Amendment** to the United States Constitution")

California authority consistently admits such evidence under authority of **Evidence Code section 1221** (Adoptive Admission), holding that; "If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the **Fifth Amendment** to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation

may be offered as an implied or adoptive admission of guilt. [Citations]” (*People v. Preston* (1973) 9 Cal.3rd 308, 313, 313-314; see also *People v. Edmondson* (1976) 62 Cal.App.3rd 677, 680-681.)

See also *United States v. Zanabria* (5th Cir. 1996) 74 F.3rd 590, 593; *United States v. Rivera* (11th Cir. 1991) 944 F.2nd 1563, 1568; and *United States v. Oplinger* (9th Cir. 1998) 150 F.3rd 1061, 1065-1067; all of which agree with the California rule.

However, the Fourth District Court of Appeal has specifically held that there are limits. While a defendant’s refusal to respond to one or two requests by the police for an interview may be used as substantive evidence of guilt, similar evidence that defendant ignored *repeated* phone calls and displayed a pattern of apparent evasiveness shows an attempt to invoke his **Fifth Amendment** self-incrimination rights and is inadmissible in the People’s case-in-chief. (*People v. Waldie* (2009) 173 Cal.App.4th 358, 364-367; harmless error under the circumstances.)

Several federal circuit court opinions, disagreeing with the majority opinions above, have held that any refusal to talk with police, even before arrest, is an invocation of the person’s self-incrimination rights. (See *United States v. Burson* (10th Cir. 1991) 952 F.2nd 1196, 1200-1201; *Coppola v. Powell* (1st Cir. 1989) 878 F.2nd 1562, 1565-1568; and *United States ex rel. Savory v. Lane* (7th Cir. 1987) 832 F.2nd 1011, 1018; *Combs v. Coyle* (6th Cir. 2000) 205 F.3rd 269, 283.)

These cases, however, have likely been overruled by implication by the United States Supreme Court in *Salinas v. Texas* (2014) 570 U.S. 178 [133 S.Ct. 2174; 186 L.Ed.2nd 376].), where it was held that when, during a non-custodial interview with no *Miranda* admonishment having been given, defendant, who otherwise was answering all questions but then silently “[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up” when asked about whether shotgun shells left at the scene of a murder would be shown by ballistics to have come from his gun, held *not* to be an invocation of his right to remain silent. Defendant

has an obligation to put the Government and the Court on notice of his intent to invoke his right to silence by specifically doing so.

Note also , where the California Supreme Court notes that the **Fifth Amendment** privilege “is not self-executing” and “may not be relied upon unless it is invoked in a timely fashion” (citing **Roberts v. United States** (1980) 445 U.S. 552, 559 [63 L.Ed.2nd 622]). It is the defendant’s burden to establish that he clearly invoked the privilege. (**People v. Tom** (2014) 59 Cal.4th 1210, 1225.)

Post-arrest, Pre-Admonishment:

Where the subject *has* been arrested, however, until lately it has generally been held that silence in the face of an accusation is inadmissible in the People’s case-in-chief. (**United States v. Velarde-Gomez** (9th Cir. 2001) 269 F.3rd 1023; **United States v. Whitehead** (9th Cir. 2000) 200 F.3rd 634, admission into evidence held to be harmless error.)

After arrest, even prior to a **Miranda** admonishment, a defendant’s refusal to answer questions may not be used as evidence of guilt. (**Douglas v. Culp** (9th Cir. 1978) 578 F.2nd 266.)

However, in **People v. Tom** (2014) 59 Cal.4th 1210, while noting a split of authority on this issue (p. 1225), the California Supreme Court held that defendant’s post-arrest, pre-admonishment failure to inquire as to the condition of the occupants of a vehicle he had hit, was admissible as substantive evidence of his guilt.

Citing the United States Supreme Court’s decision in **Salinas v. Texas** (2014) 570 U.S. 178 [133 S.Ct. 2174; 186 L.Ed.2nd 376].), a majority (4 to 3) of the California Supreme Court held that the general rule being “that a witness must assert the privilege to subsequently benefit from it,” the defendant here, “after his arrest but before he had received his **Miranda** warnings, needed to make a timely and unambiguous assertion of the privilege in order to benefit from it.” (**People v. Tom**, *supra*, at pp. 1222-1227.)

However, on remand, in an unpublished opinion, it was noted by the First District Court of Appeal (Div. 3) that defendant did in fact specifically invoke his right to remain silent and to counsel, both before and after he was advised of his *Miranda* rights. Then, at trial, because the prosecutor's questions concerning his silence were not specifically directed to defendant's silence prior to these invocations, thus necessarily including that time period after defendant had invoked, it was error to admit the fact of his silence into evidence. Not being harmless error, defendant conviction was reversed. (*People v. Tom* (2015) 2015 Cal.App.Unpub. LEXIS 2887.)

Post-Arrest, After Invocation:

The prosecution may not use a defendant's post-*Miranda* silence as direct evidence of guilt in the People's case-in-chief. (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2nd 694]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.)

After a waiver and a partial statement, followed by an invocation, a prosecutor's argument that defendant's testimony was inconsistent with her prior statements and left out other details held to be *Doyle* error. (*United States v. Caruto* (9th Cir. 2008) 532 F.3rd 822; argument "invited the jury to draw meaning from (her) silence.")

Post-Arrest, After Waiver:

A post-arrest statement provided after a waiver may be used against a defendant who gives an inconsistent statement in his testimony at trial as substantive evidence of guilt. (*Anderson v. Charles* (1980) 447 U.S. 404 [65 L.Ed.2nd 222]; see also *United States v. Ochoa-Sanchez* (9th Cir. 1982) 676 F.2nd 1283, 1287.)

A defendant's momentary silence after waiving his rights, and after responding to other questions, was not an attempt to reinvoke his right to remain silent, and was properly introduced into evidence against him. (*United States v. Pino-Noriega* (9th Cir. 1999) 189 F.3rd 1089, 1097-1098.)

A suspect may make a selective invocation of his **Fifth Amendment** right to silence without making a general invocation. Refusal to reenact an occurrence (the shooting of his wife) while continuing to answer other questions is such a selective invocation. Despite defendant's general waiver, using his selective refusal against him as substantive evidence of his guilt is a violation of **Miranda** and **Doyle v. Ohio** (1976) 426 U.S. 610 [96 S.Ct. 2240; 49 L.Ed.2nd 91], and is improper. (**Hurd v. Terhune** (9th Cir. 2010) 619 F.3rd 1080, 1085-1089.)

At Sentencing, When Used in a Subsequent Case as Proof of Defendant's Prior Conviction:

Upon being accused by the sentencing judge of "breaking just about every bone in the victim's body," and failing to deny the truth of this statement, defendant's silence can be used as an "adoptive admission" (**E.C. § 1221**) when this conviction, including the "great bodily injury" allegation, is used as a prior "three strike" conviction in a later case. (**People v. Thoma** (2005) 128 Cal.App.4th 676.)

Doyle Error on Appeal:

"**Doyle error**" is subject to the "*harmless error*" doctrine, on appeal (**People v. Evans** (1994) 25 Cal.App.4th 358, 370-372; **People v. Coffman and Marlow** (2004) 34 Cal.4th 1, 118-119; **United States v. Lopez** (9th Cir. 2007) 500 F.3rd 840, 845-847.) requiring reversal only when the error "had substantial and injurious effect or influence in determining the jury's verdict." (**Hurd v. Terhune** (9th Cir. 2010) 619 F.3rd 1080, 1089-1091; **Franklin v. Duncan** (9th Cir. 1995) 70 F.3rd 75, adopting facts as described at 884 F.Supp.1435; and citing **Brecht v. Abrahamson** (1993) 507 U.S. 619 [123 L.Ed.2nd 353]; **People v. Earp** (1999) 20 Cal.4th 826, 857; the jury, under the circumstances, was not likely to have focused on defendant's silence after his arrest and receipt of a **Miranda** warning. See also **People v. Hollinquest** (2010) 190 Cal.App.4th 1534, 1554-1561.)

Chapter 8: Waiver of Rights

Waiver and Expiration of Fifth Amendment Rights: One's "Fifth Amendment Privilege" will evaporate as a result of any one of five happenings:

1. **Express (or Implied) Waiver**, to law enforcement, during Interrogation: (See "Express (or Implied) Waivers," below.)

2. **In-Court Waiver:**

Through Testimony: A criminal defendant has a fundamental right to testify on his own behalf, even if contrary to the advice of counsel. (**People v. Nakahara** (2003) 30 Cal.4th 705, 717; **People v. Guzman** (1988) 45 Cal.3rd 915, 962; **People v. Webb** (1993) 6 Cal.4th 494, 534-535; **Rock v. Arkansas** (1987) 483 U.S. 44, 49-53 [97 L.Ed.2nd 37, 44-47].)

"The right of an accused to testify in his own defense is well established, and is a 'constitutional right of fundamental dimension.' (**United States v. Joelson** (9th Cir. 1993) 7 F.3rd 174, 177; **Rock v. Arkansas** (1987) 483 U.S. 44, 51 [97 L.Ed.2nd 37 . . .].) The right stems from several provisions of the Constitution, including the **Fourteenth Amendment's** Due Process Clause, the **Sixth Amendment's** Compulsory Process Clause, and the **Fifth Amendment's** privilege against self-incrimination. (**Rock**, 483 U.S. at 51-52.) The right is personal, and 'may only be relinquished by the defendant, and the defendant's relinquishment of the right must be knowing and intelligent.' (**Joelson**, 7 F.3rd at 177.)" (**United States v. Pino-Noriega** (9th Cir. 1999) 189 F.3rd 1089, 1094.)

See "Defendant's Concurrent Right to Testify," under "Invocation of Rights" (Chapter 7), above.

The in-court warnings the trial court must provide the defendant who is seeking to testify contrary to his counsel's advice is not as extensive as must be given to a defendant who wants to represent himself. (**People v. Nakahara**, *supra*.)

But, a criminal defendant who takes the stand in his own defense cannot claim the privilege against self-incrimination when the prosecution seeks to cross-examine him. (**Brown v. Walker** (1896) 161 U.S. 591, 597-598 [16 S.Ct. 644; 40 L.Ed. 556, 557]; **Brown v. United States** (1958) 356 U.S. 148, 154-155 [2 L.Ed.2nd 589, 596-597].)

"A defendant who takes the stand during his own trial to deny (or admit) guilt, waives the privilege as to that

proceeding, as does a defendant who pleads guilty. But in neither case does he waive the privilege as to subsequent proceedings against other defendants” (*People v. Fonseca* (1995) 36 Cal.App.4th 631, 637.)

While a defendant’s waiver of his right to testify must be knowing and voluntary, it need not be explicit. It is assumed that the defendant is assenting to his attorney’s advice not to testify, absent evidence to the contrary. The Court is not under a duty to advise a criminal defendant of his right to testify nor to inquire whether he is waving that right. (*United States v. Pino-Noriega* (9th Cir. 1999) 189 F.3rd 1089, 1094-1095.)

Attempting to assert his right to testify after a verdict was reached, although not yet submitted to the court, was too late. (*Id.*, at pp. 1095-1096.)

Attempting to exercise his right to testify after the close of evidence, but before the attorney’s arguments are made to the jury, is also too late. (*United States v. Jones* (8th Cir. 1989) 880 F.2nd 55, 60.)

Cross-examination of the defendant, however, is still limited to those areas that are within the scope of his direct examination. (*People v. Ing* (1967) 65 Cal.2nd 603; *People v. Fauber* (1992) 2 Cal.4th 792, 859.)

Those areas found to be within the “*scope of direct examination*,” however, are likely to be pretty broad. (See *People v. Perez* (1967) 65 Cal.2nd 615.)

The privilege is waived “to the extent of all inquiries which would be proper on cross-examination and is subject to impeachment the same as any other witness.” (*People v. Stanfill* (1986) 184 Cal.App.3rd 577, 581.)

Refusal to submit to cross-examination is grounds *to strike* the defendant’s testimony on direct, with an instruction to the jury to disregard it. (*Williams v. Borg* (9th Cir. 1998) 139 F.3rd 737, 740-743.)

Also, “in the criminal context, a defendant may not selectively invoke the **Fifth Amendment** to avoid cross-examination. (See *Mitchell v. United States* (1999) 526 U.S. 314, 322 [143 L.Ed.2nd 424,] [‘The illogic of allowing a witness to offer only self-selected testimony

should be obvious even to the witness, so there is no unfairness in allowing cross-examination when testimony is given without invoking the privilege.'].” (*Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1100.)

A defendant who testifies in his own defense, and is convicted, may not later insist upon immunity as a condition of providing testimony against other co-principals in a later trial concerning the same offenses. (*In re Terry L.* (1992) 10 Cal.App.4th 1454, 1465-1466.)

A witness, however, does not waive his or her constitutional privilege against self-incrimination by furnishing testimony prior to trial. “On the contrary, . . . a witness is free to assert the privilege at trial even though he or she had given testimony during pretrial proceedings. [Citations]” (*Alvarez v. Sanchez* (1984) 158 Cal.App.3rd 709, 715.)

Testifying at a preliminary examination does not prevent the witness from asserting a **Fifth Amendment** right not to testify at the trial of the same matter. (*People v. Seijas* (2005) 36 Cal.4th 291, 303.)

Note also: Voluntary participation in a clemency hearing, where defendant necessarily waives his **Fifth Amendment** privilege by testifying, does not violate his self-incrimination privilege. (*Ohio Adult Parole Authority v. Woodward* (1998) 523 U.S. 272, 285-288 [140 L.Ed.2nd 387, 399-401.]

Testifying consistently with a statement taken in violation of **Miranda** also waives the court’s error in admitting evidence of the illegally obtained statement. (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1403-1404.)

By “*Tendering an Issue*,” A defendant cannot expect to make certain facts or circumstances an issue in trial without inviting cross-examination or rebuttal evidence on that issue. For Example:

Defendant's testimony can “*open the door*” to an issue, such as an illegally obtained and previously suppressed confession, which was otherwise off limits to the prosecution. (*People v. Robinson* (1997) 53 Cal.App.4th 270, 282.)

“(I)n the criminal context, a defendant may not selectively invoke the **Fifth Amendment** to avoid cross-examination. (See *Mitchell v. United States* (1999) 526 U.S. 314, 322 [143 L.Ed.2nd 424, . . .]

[‘The illogic of allowing a witness to offer only self-selected testimony should be obvious even to the witness, so there is no unfairness in allowing cross-examination when testimony is given without invoking the privilege.’].” (*Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1100.)

At one time the rule was: “There is ample authority that even in the absence of an authorizing statute, a trial court possesses the inherent power to order a defendant who has imposed a defense of insanity or of diminished capacity to submit to an examination of a psychiatrist selected by the People.” (*People v. Danis* (1973) 31 Cal.App.3rd 782, 786; see also *People v. McPeters* (1992) 2 Cal.4th 1148, 1190.)

The request by the prosecution for such an examination by the People’s experts was referred to as a “*Danis Motion*.”

By tendering his mental condition as an issue in the penalty phase of a capital case, defendant waived his **Fifth** and **Sixth Amendment** rights to the extent necessary to permit a proper examination of that condition by a prosecution expert. (*People v. Carpenter* (1997) 15 Cal.4th 312, 412-413; defendant's refusal to submit to such tests subject to comment by the prosecution and adverse jury instructions by the court.

However, the California Supreme Court has more recently held that with the passage of **Proposition 115**, providing for the exclusive means by which discovery may be granted (**P.C. § 1054(e)**), it is error for the trial court to allow “the prosecution access to (a defendant) for the purpose of having a prosecution expert conduct a mental examination is a form of discovery that is not authorized by the criminal discovery statutes (e.g., **P.C. § 1054 et seq.**) or any other statute, nor is it mandated by the United States Constitution.” (*Verdin v. Superior Court [People]* (2008) 43 Cal.4th 1096, 1116.)

Use of defendant’s refusal to submit to the prosecution’s psychological expert’s attempts to subject him to a mental evaluation after defendant made his psychological stability an issue held to be error under *Verdin*, but the error was harmless given the strength of other evidence. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1084-1088.)

By claiming to be mentally retarded, and therefore not subject to the death penalty (See *Atkins v. Virginia* (2002) 536 U.S. 304 [153 L.Ed.2nd 335]; and **P.C. § 1376**), defendant waives his rights under the **Fifth** and **Sixth Amendments** and necessarily subjects himself to a pretrial examination on this issue by a prosecution

expert. (*Centeno v. Superior Court [Los Angeles]* (2004) 117 Cal.App.4th 30.)

The federal circuit courts are in accord. (See *United States v. Byers* (D.C. Cir. 1984) 740 F.2nd 1104, 1111; *Karstetter v. Caldwell* (9th Cir. 1975) 526 F.2nd 1144, 1145; *Pope v. United States* (8th Cir. 1967) 372 F.2nd 710, 720-721.)

Upon a Plea or Verdict of Guilty: A person waives his Fifth Amendment self-incrimination rights by entering a plea of guilty. (*Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2nd 274]; *People v. Brown* (1988) 45 Cal.3rd 1247, 1260; *People v. Fonseca* (1995) 36 Cal.App.4th 631, 637.)

However, by merely agreeing to plead guilty to reduced charges, until the plea agreement is executed, does not waive a defendant's right against self-incrimination. (*People v. Woods* (2004) 120 Cal.App.4th 929, 939.)

However, see “Expiration,” below, referencing “Upon Exhaustion of Appeal.”

Defendant further alleged in post-conviction habeas corpus proceedings that his waiver of the *privilege against self-incrimination*, made when he plead guilty to first degree murder, was not knowing and voluntary because he was unaware of the fact that his admission, during the plea colloquy, that the victim was conscious when he raped her, could be used to prove cruelty at a later penalty phase. Affirming the denial of relief as to this claim, the state's post-conviction review court observed that the United States Supreme Court has not yet held that the trial court must affirmatively discuss during the plea colloquy the potential impact of a defendant's factual admissions may have on capital sentencing proceedings. The Ninth Circuit Court of Appeal upheld this ruling. (*Sansing v. Ryan* (9th Cir. 2021) 997 F.3rd 1018, 1039-1040.)

3. Expiration: When the defendant is no longer subject to prosecution, he cannot claim the self-incrimination privilege.

Upon Exhaustion of Appeal: A suspect retains his or her right against self-incrimination under the **Fifth Amendment** after conviction but while still awaiting sentencing, as well as during the pendency of an appeal. (*People v. Fonseca* (1995) 36 Cal.App.4th 631, 635; *People v. Lopez* (1980) 110 Cal.App.3rd 1010, 1021.)

Therefore, after a defendant's appeal rights have been expended, and he or she is no longer subject to the possibility of a retrial, the subject can no longer claim a privilege not to testify.

Upon Running of the Statute of Limitations: Expiration of the statute of limitations, making the defendant immune from prosecution, eliminates that defendant's right to invoke his privilege against self-incrimination. (**Brown v. Walker** (1896) 161 U.S. 591, 597-598 [16 S.Ct. 644; 40 L.Ed. 819, 821].)

4. *Immunity:*

Rule: Where a witness is given immunity from use, direct or indirect, of his testimony in any future criminal proceeding, he cannot avoid testifying based upon a claim of the privilege against self-incrimination. (**Brown v. Walker** (1896) 161 U.S. 591 [16 S.Ct. 644; 40 L.Ed. 819]; see **P.C. § 1324**)

The immunity "privilege extends not only 'to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.' [Citation.] 'It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' [Citation.]" (**Ohio v. Reiner** (2001) 532 U.S. 17, 20-21 [149 L.Ed.2nd 158, 162].)

The privilege "extends only to witnesses who have "reasonable cause to apprehend danger from a direct answer. . . . A danger of 'imaginary and unsubstantial character' will not suffice." [Citation.] (**Id.**, at p. 21 [149 L.Ed.2nd at p. 162].)

The fact that a witness denies any criminal culpability does not mean that he or she is not entitled to assert the **Fifth Amendment** privilege against self-incrimination. (**Ibid.**)

Penal Code § 1324 provides the District Attorney with the authority to request, in writing, for "use" or "transactional" immunity for anyone called to testify in any felony proceeding or any investigation or proceeding before a grand jury.

"*Transactional immunity*" is that kind of immunity which "immunizes the defendant from prosecution for any offense which is implicated by the compelled testimony whether or not the testimony is in fact used."

“*Use immunity*” “precludes punishment for the compelled disclosures by cutting the causal link between the incriminating testimony and its use through the exclusion of the compelled testimony or any evidence derived from it.” (*People v. Campbell* (1982) 137 Cal.App.3rd 867, 872-873.)

See *Kastigar v. United States* (1972) 406 U.S. 441 [32 L.Ed.2nd 212], for a discussion concerning the relationship of “*use*” verses “*transactional*” immunity; “*use and derivative use immunity*” held to be “coextensive with the scope of the (Fifth Amendment) privilege,” and therefore sufficient to protect a witness’s self-incrimination privilege.

See also 18 U.S.C. §§ 6001-6005, for federal immunity statutes.

Compelled Use Immunity: Although immunity grants are typically the done at the discretion of the prosecutor (P.C. § 1324, above), judicially compelled use immunity, which requires the prosecution to grant immunity to a witness or face dismissal, may be available in the right circumstances, all of which require as a prerequisite some form of “prosecutorial overreaching.”

The requirements for allowing judicially compelled use immunity vary from jurisdiction to jurisdiction. (See *United States v. Quinn* (3rd Cir. 2013) 728 F.3rd 243, 261-262; *United States v. Mackey* (1st Cir. 1997) 117 F.3rd 24, 27; *United States v. Abbas* (4th Cir. 1996) 74 F.3rd 506, 512; *Blissett v. Lefevre* (2nd Cir. 1991) 924 F.2nd 434, 441-442; *United States v. Frans* (7th Cir. 1983) 698 F.2nd 188, 191.)

California authority requires evidence that “the prosecution intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence, thereby distorting the judicial fact-finding process.” (*People v. Stewart* (2004) 33 Cal.4th 425, 470.)

The Ninth Circuit, on the other hand, requires only that the prosecution’s refusal to grant a defense witness immunity had the effect of distorting the fact-finding process, even if the prosecution’s purpose in denying use immunity as not to distort the fact-finding process. (*United States v. Straub* (9th Cir. 2008) 538 F.3rd 1147.)

Standing:

A criminal defendant generally has no standing to object to the granting of immunity to a witness against him. (*People v. Wisely* (1990) 224 Cal.App.3rd 939, 943-944; *People v. Joseph* (1990) 226 Cal.App.3rd 289, 298-299.)

A defendant has no right to demand immunity for a prospective defense witness. (*In re Williams* (1994) 7 Cal.4th 572, 609-610; *People v. Cudjo* (1993) 6 Cal.4th 585, 620; *In re Weber* (1974) 11 Cal.3rd 703, 720.)

“There should be no requirement that the district attorney offer immunity upon the request of a defendant who wishes to produce exculpatory evidence. One need not speculate as to the long line of potential witnesses who would, upon a guarantee of immunity, then ‘take the rap.’” (*People v. Estrada* (1986) 176 Cal.App.3rd 410, 418.)

But see *Government of Virgin Islands v. Smith* (3rd Cir. 1980) 615 F.2nd 964, at page 974, where it was suggested that the judge may immunize a defense witness where his testimony is essential to the vindication of the defendant’s constitutional right to a fair trial, and the government has no strong countervailing interest.

California, so far, has declined to follow this theory. (See *People v. Cooke* (1993) 16 Cal.App.4th 1361.)

Case Law:

A state witness granted immunity under **section 1324** may be compelled to testify despite a claim he might be subjected to federal prosecution. The federal government is prohibited from making any use of the compelled testimony or its fruits in a later criminal prosecution against the witness. (*Nelson v. Municipal Court* (1972) 28 Cal.App.3rd 889, 892.)

A grant of immunity after conviction (for purposes of testifying against co-principals in a second trial), such conviction being by way of trial or plea, does not preclude a court from sentencing the defendant on his prior conviction. (*In re Terry L.* (1992) 10 Cal.App.4th 1454, after trial; *People v. Stewart* (1969) 1 Cal.App.3rd 339, plea.)

A defense witness (absent immunity) has a **Fifth Amendment** privilege not to testify when to do so might lead to his incrimination

as to “collateral matters;” i.e., the fact of prior convictions, the admission to which might be used against him in his own pending criminal trial. (*Arredondo v. Ortiz* (9th Cir. 2004) 365 F.3rd 778.)

Other Statutory Immunity Provisions:

Ins. Code § 12924(b): Provides witnesses forced to testify before the insurance commissioner concerning “any subject touching insurance business” with transactional immunity. (See *People v. King* (1967) 66 Cal.2nd 633.)

A defendant has immunity when a psychiatrist is appointed by the court to examine a defendant for competency to stand trial, per **P.C. § 1368**. “(N)either statements of [the defendant] to the psychiatrist appointed under **section 1369** nor the fruits of such statements may be used in trial of the issue of [the defendant’s] guilt, under either the plea of not guilty or that of not guilty by reason of insanity.” (*Tarantino v. Superior Court* (1975) 48 Cal.App.3rd 465, 470; see also *People v. Arcega* (1982) 32 Cal.3rd 504, 522; *People v. Jablonski* (2006) 37 Cal.4th 774, 801-803.)

W&I Code § 355.1(f), providing that the testimony of a parent who has the care and custody of a minor who is the subject of a **W&I § 300** (dependency) hearing, shall not be admissible as evidence in any other action or proceeding, does not provide the parent with “*derivative use*” immunity, and therefore cannot be used by a trial court to force he parent to testify over a **Fifth Amendment**, self-incrimination, objection. (*Orange County Social Services Agency v. Alfred A.* (2007) 156 Cal.App.4th 1124.)

See “Immunity,” under “*Invocation by a Witness in a Criminal Case*,” under “*Invocation of Rights*” (Chapter 7), above.

5. Induced Waivers:

Rule: Circumstances where a person has a choice, even though maybe an unpleasant one, and/or when an important governmental interest is involved, will sometimes justify pressure applied by government officials to a person to make admissions without necessarily violating the **Fifth Amendment** self-incrimination privilege.

Examples:

A prison inmate, forced to choose between admitting culpability in offenses for which he was already convicted *and* for uncharged offenses as well, as the price for being admitted to a prison

rehabilitative program, or face transfer to a higher security facility with the concurrent loss of privileges, in light of the prison's strong interest in attempting to rehabilitate the prisoner, is not a **Fifth Amendment**, self-incrimination, violation. The inmate has a choice, and is threatened with no more restrictions than a prison administration has a right to impose. (*McKune v. Lile* (2002) 536 U.S. 24 [153 L.Ed.2nd 47].)

A state procedural discovery requirement that requires a defendant, on written demand of the prosecuting attorney, to give notice in advance of trial if the defendant intends to claim an alibi and to furnish the prosecuting attorney with information as to the place where he claims to have been and with the names and addresses of the alibi witnesses he intends to use or forfeit the right to present such evidence at trial, is not a **Fifth Amendment**, self-incrimination violation in that the defendant is not “*compelled*” to comply. (*Williams v. Florida* (1970) 399 U.S. 78, 79-86 [26 L.Ed.2nd 446, 448-452].)

A defendant's pre-arrest silence, used to impeach his testimony when he offers a defense at trial, is not a violation of the **Fifth Amendment**. (*Jenkins v. Anderson* (1980) 447 U.S. 231 [65 L.Ed.2nd 86].)

See “*Pre-arrest silence, before a **Miranda** admonishment,*” under “*Invocation of Rights*” (Chapter 7), above.

At a prison disciplinary hearing, an inmate's refusal to answer questions may be used as cause to impose time in punitive segregation. The “correctional process and important state interests other than conviction of crime” warrant the use of the inmate's silence as grounds to impose punishment, and do not violate the **Fifth Amendment**. (*Baxter v. Palmigiano* (1976) 425 U.S. 308 [47 L.Ed.2nd 810].)

The practice of plea bargaining does not violate the **Fifth Amendment**, even though criminal defendants may feel considerable pressure to admit guilt in order to obtain more lenient treatment. (E.g., see *Bordenkircher v. Hayes* (1978) 434 U.S. 357 [54 L.Ed.2nd 604].)

But, statements made during plea negotiations are not admissible. (*People v. Brock* (2006) 141 Cal.App.4th 1320.)

See “*Other Hearings*,” under “*Suppression Issues and Procedures*” (Chapter 13), below.

The **Vehicle Code** requirements, pursuant to **section 20002**, requiring a person who is involved in a traffic accident to immediately stop and, among other duties, identify himself, do not violate the constitutional **Fifth Amendment** right against self-incrimination protections. (*California v. Byers* (1971) 402 U.S. 424 [29 L.Ed.2nd 9].)

It has similarly been held that the reporting requirements for a motorboat accident (**Har. & Nav. Code § 656.2**) do not violate a person’s constitutional right against self-incrimination since liability arises only in the absence of compliance. (*People v. Guzman* (2011) 195 Cal.App.4th 1396, 1402-1408.)

A defense attorney’s decision not to contest one or more charges of murder at the guilt phase of a capital trial does not amount to a guilty plea requiring admonitions and waivers of the accused’s constitutional rights. (*People v. Cook* (2006) 39 Cal.4th 566, 590-591; citing *People v. Griffin* (1988) 46 Cal.3rd 1011, 1029.)

Waiver as a Condition of Probation:

A probationer’s admissions to new, uncharged crimes, being compelled by a probation condition that he be truthful with his probation officer in all matters, were not obtained in violation of the **Fifth Amendment** self-incrimination protections despite the probationer’s fear that he could be returned to prison for 16 months if he remained silent. (*Minnesota v. Murphy* (1984) 465 U.S. 420 [79 L.Ed.2nd 409].)

A probation condition compelling defendant to waive his **Fifth Amendment** privilege against self-incrimination and submit to polygraph examinations as part of a sex offender management program was impermissibly coercive. Shorn of that **Fifth Amendment** waiver requirement, however, the condition that he submit to polygraph examinations was valid. (*People v. Forney* (2016) 3 Cal.App.5th 1091, 1096-1108.)

Petition for review of this case was granted by the California Supreme Court on December 14, 2016, at 384 P.3rd 1241. On May 10, 2017, the matter was transferred to the Court of Appeal for the First Appellate District, Division One, for reconsideration in light of the decision in *People v. Garcia, infra*.

The probation condition under **P.C. §1203.067(b)(3)**, requiring waiver of the privilege against self-incrimination and participation in polygraph examinations, does not violate the **Fifth Amendment** and is not overbroad, as interpreted to require that probationers answer all questions fully and truthfully, knowing that compelled responses cannot be used against them in a subsequent criminal proceeding. A probationer must be advised, before treatment begins, that no compelled statement (or the fruits thereof), elicited in the course of the mandatory sex offender management program, may be used against the probationer in a criminal prosecution. Also, mandating that sex offenders waive any psychotherapist-patient privilege does not violate the right to privacy as construed to intrude on the privilege only to the limited extent specified in the condition itself. (*People v. Garcia* (2017) 2 Cal.5th 792, 800-814.)

See “*Invocation as a Violation of Probation or Parole*,” under “*Invocation of Rights*” (Chapter 7), above.

Express (or Implied) Waivers:

Rule: Before being questioned, a suspect must first understand and waive his **Fifth Amendment** rights. (*Miranda v. Arizona*, *supra*, at p. 444 [16 L.Ed.2nd at p. 707].)

A criminal suspect may validly waive his *Miranda* rights, including his right to the assistance of counsel, when, based upon the totality of circumstances, his waiver was freely and voluntarily obtained. (*Wyrick v. Fields* (1982) 459 U.S. 42 [74 L.Ed.2nd 214]; *United States v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3rd 1118, 1127-1128.)

“First, the 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. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.” (*People v. Molano* (2019) 7 Cal.5th 620, 648; quoting (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [89 L.Ed.2nd 410; 106 S.Ct. 1135].)

“In general, if a custodial suspect, having heard and understood a full explanation of his or her *Miranda* rights, then makes an uncoerced and uncoerced decision

to <https://advance.lexis.com/search/?pdmfid=1000516&crd=f71dc440-0a4b-4925-a939-4cb81d1f3c9b&pdsearchterms=2021+Cal.App.+LEXIS+811&pdtypeofsearch=searchbox>

[click&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqtype=and&pdquerytemplateid=&ecom= zs5kkk&earg=pdsf&prid=9256acfa-e1e5-4a72-a0e6-0833deee8f9d](#) talk, he or she has thereby knowingly, voluntarily, and intelligently waived them.’ (*People v. Cunningham* (2015) 61 Cal.4th 609, 642 . . .)” (*People v. Sumagang* (2021) 69 Cal.App.5th 712, 725.)

There is a *presumption* against waiver. (*United States v. Bernard S.* (9th Cir. 1986) 795 F.2nd 749, 752.)

On appeal, the appellate court reviews independently the trial court’s legal determinations of whether a *Miranda* waiver was knowing, intelligent, and voluntary, while reviewing the trial court’s factual findings regarding the circumstances surrounding the interrogation and waiver under a substantial evidence standard. (*People v. Sumagang*, *supra*, at p. 725; citing *People v. Krebs* (2019) 8 Cal.5th 265, 299.)

However: “Once it is determined that a suspect knew he could stand mute and request a lawyer, and that he was aware of the State’s intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.” (*Moran v. Burbine* (1986) 475 U.S. 412, 422-423 [106 S.Ct. 1135; 89 L.Ed.2nd 410, 422]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1036.)

See “*Express v. Implied Waivers*,” below.

Burden of Proof:

“The government has the burden of proving that the defendant has knowingly and voluntarily waived his *Miranda* rights.” (*United States v. Heldt* (9th Cir. 1984) 745 F.2nd 1275, 1277; *Cox v. Papa* (9th Cir. 2008) 542 F.3rd 669, 675; *People v. Nelson* (2012) 53 Cal.4th 367, 374-375; *In re M.S.* (2019) 32 Cal.App.5th 1177, 1189; *People v. Flores* (2020) 9 Cal.5th 371, 417, 426; *People v. Suarez* (2020) 10 Cal.5th 116, 160; *People v. Sumagang* (2021) 69 Cal.App.5th 712, 725.)

The state’s burden of proof on this issue is merely a “*preponderance of the evidence*.” (*Colorado v. Connelly* (1986) 479 U.S. 157, 168 [107 S.Ct. 515; 93 L.Ed.2nd 473]; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1401; *People v. Molano* (2019) 7 Cal.5th 620, 648; *People v. Hoyt* (2020) 8 Cal.5th 892, 931.)

For crimes committed before passage of **Proposition 8** (June 9, 1982), the burden of proof for the People is “*beyond a reasonable doubt*” that a waiver was freely and voluntarily obtained. (*People v. Parker* (2017) 2 Cal.5th 1184, 1214; *People v. Sapp* (2003) 31 Cal.4th 240, 267.)

“‘The date of the crime, and not the date of the confession, is the controlling benchmark’ for the proper burden of proof.” (*People v. Parker*, *supra*, quoting *People v. Weaver* (2001) 26 Cal.4th 876, 921, fn. 5.)

But see concurring opinion in *People v. Parker*, *supra*, at pp. 1234-1235, where it is questioned (but did not decide) whether **Proposition 8’s** “Right to Truth-in-Evidence” provision, including the burden of proof issue, is not retroactive, despite the holding in *People v. Smith* (1983) 34 Cal.3rd 251, which ruled that it is not.

For crimes committed on or after June 9, 1982, the government bears the burden of proving by a *preponderance of the evidence* that the waiver was voluntary. A waiver is voluntary if the *totality of the circumstances* demonstrate that:

- The waiver was a product of a free and deliberate choice rather than intimidation, coercion, or deception; *and*
- The waiver was made in full awareness of the nature of the right being waived and the consequences of waiving.

(*United States v. Roman-Zarate* (10th Cir. 1997) 115 F.3rd 778, 782; see also *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1401.)

The prosecution must be ready to show that the accused had the ability to reason, comprehend, or resist to the degree that he or she was capable of a free or rational choice. (*In re Cameron* (1968) 68 Cal.2nd 487, 498.)

Waiver vs. Invocation of Rights: “The requirements for a valid waiver of rights differ from the requirements for a valid invocation of rights.” (*Smith v. Illinois* (1984) 469 U.S. 91, 98 [83 L. Ed. 2d 488, 105 S. Ct. 490] . . . [“Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together”].) “A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision.” (*People v. Flores* (2020) 9 Cal.5th 371, 417, citing *People v. Cruz* (2008) 44 Cal.4th 636, 667.)

A valid *waiver of rights* (requiring evidence that the suspect knowingly and voluntarily waived his rights and necessitating an evaluation of the defendant’s state of mind) involves a different analysis than when analyzing whether an *invocation of rights* is legally effective. To be

legally effective, an *invocation of rights* must be clear and unequivocal; the test being whether a reasonable officer under the circumstances should have known that the suspect was in fact trying to invoke his rights. (*People v. Flores*, *supra*.)

“A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights.’ (Citation.) ‘The critical question with respect to waiver is whether it was knowing and voluntary, which is ‘directed at an evaluation of the defendant's state of mind.’” (*People v. Flores*, *supra*, quoting *People v. Williams* (2010) 49 Cal.4th 405, 428.)

“In contrast, a suspect’s invocation of *Miranda* rights must be ‘unambiguous[]’ from the perspective of a reasonable officer. (*Berghuis v. Thompson* (2010) 560 U.S. 370, 381 [176 L.Ed.2nd 1098; 130 S.Ct. 2250].) If ‘a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right,’ then the officer need not cease all questioning immediately. (*Davis v. United States* (1994) 512 U.S. 452, 459 [129 L.Ed.2nd 362; 114 S.Ct. 2350].) Whether or not a reasonable officer would perceive a suspect’s statement as ambiguous may depend on context. (*People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 218 . . . ; *Williams*, *supra*, 49 Cal.4th at pp. 428–429; *People v. Sanchez* (2019) 7 Cal.5th 14, 49–50) “‘[W]hen a suspect under interrogation makes an ambiguous statement that could be construed as an invocation of his or her *Miranda* rights, ‘the interrogators may clarify the suspect's comprehension of, and desire to invoke or waive, the *Miranda* rights.’”” (*Williams*, at p. 428.)” (*People v. Flores*, *supra*.)

Two Components: There are “two distinct dimensions” to finding a valid waiver of one’s rights under *Miranda*:

Voluntariness: As held in *Colorado v. Connelly* (1986) 479 U.S. 157, 170 [107 S.Ct. 515; 93 L.Ed.2nd 473], “(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 (instigated by law enforcement).” (Quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135; 89 L.Ed.2nd 410].)

See “*Voluntariness*,” below.

Knowing and Intelligent Waiver: “(T)he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” (*United States v. Jones* (8th Cir. 1986) 23 F.3rd 1307, 1313; *United States v. Turner* (8th Cir. 1998) 157

F.3rd 552, 554-555; see also *Colorado v. Spring* (1987) 479 U.S. 564 [93 L.Ed.2nd 954].)

See “*Understanding The Rights*,” below.

“The waiver must be ‘*voluntary* in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception’ [citation], and *knowing* in the sense that it was ‘made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’” (Italics added; *People v. Suarez* (2020) 10 Cal.5th 116, 157; quoting *People v. McCurdy* (2014) 59 Cal.4th 1063, 1086.)

General Rules:

“It is reasonably clear under our cases that waivers of counsel (and self-incrimination) must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right.” (*Edwards v. Arizona* (1981) 451 U.S. 477, 482 [101 S.Ct. 1880; 68 L.Ed.2nd 378, 385].)

Only if the ‘totality of the circumstances surrounding the interrogation’ reveal *both* an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.” (*Cox v. Papa* (9th Cir. 2008) 542 F.3rd 669, 675; quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135; 89 L.Ed.2nd 410].)

“*Miranda* makes clear that in order for defendant’s statements to be admissible against him, he must have knowingly and intelligently waived his rights to remain silent and to the presence and assistance of counsel.” (*People v. Cruz* (2008) 44 Cal.4th 636, 667; *People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 217.)

“We read *Connelly*, therefore, as holding only that police coercion is a necessary prerequisite to a determination that a waiver was involuntary and not as bearing on the separate question whether the waiver was knowing and intelligent.” (*United States v. Bradshaw* (D.C. Cir. 1991) 935 F.2nd 295, 299.)

“(W)hatever doubt remained after *Connelly* concerning the distinct nature of the knowing and intelligent prong of the waiver inquiry was removed by the (United States Supreme) Court’s decision in *Colorado v. Spring*.” (*Derrick v. Peterson* (9th Cir. 1990) 924 F.2nd 813, 820.)

Derrick was specifically overruled in **United States v. Preston** (9th Cir. 2014) 751 F.3rd 1008, 1019.

Connelly did not “demonstrate an intent by the Supreme Court to eliminate this distinction between voluntariness and knowing waivers.” (**Miller v. Dugger** (11th Cir. 838 F.2nd 1530, 1539.)

Whether or not a suspect had the ability to understand his rights depends upon the “*totality of the circumstances*” surrounding the interrogation. (**In re Cameron** (1968) 68 Cal.2nd 487, 498; **People v. Benson** (1990) 52 Cal.3rd 754, 779.)

“A waiver is knowing and intelligent if, under the totality of the circumstances, it is made with a ‘full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’” (**United States v. Doe** (9th Cir. 1998) 155 F.3rd 1070, 1074; citing **Moran v. Burbine** (1986) 475 U.S. 412, 421 [106 S.Ct. 1135; 89 L.Ed.2nd 410].)

Per the U.S. Supreme Court, as stated in **Moran v. Burbine** (*supra*, at pp. 423-424: “Granting that the ‘deliberate or reckless’ withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.”

Factors to consider in determining whether there was a legally valid waiver *include* (but are not necessarily limited to) whether:

- The defendant signed a written waiver;
- The defendant was advised of his rights in his native tongue;
- The defendant appeared to understand his rights;
- The defendant had the assistance of a translator (if needed);
- The defendant's rights were individually and repeatedly explained to him;
and
- The defendant had prior experience with the criminal justice system.
- Defendant’s mental capacity.

(*United States v. Garibay* (9th Cir. 1998) 143 F.3rd 534, 538; *United States v. Amano* (9th Cir. 2000) 229 F.3rd 801, 804-805; *United States v. Price* (9th Cir. 2019) 921 F.3rd 777, 792; *People v. Suarez* (2020) 10 Cal.5th 116, 160.)

Understanding The Rights:

Rule: “To establish a valid waiver of *Miranda* rights, the prosecution must show by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary.” (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 533; citing *People v. Nelson* (2012) 53 Cal.4th 367, 374–375; see also *In re T.F.* (2017) 16 Cal.App.5th 202, 210.)

In the absence of any evidence to prove that a defendant “*knowingly and intelligently*” waived his rights; i.e., that he understood those rights he was giving up, any later statements will be found to be inadmissible. (*Tague v. Louisiana* (1980) 444 US. 469 [62 L.Ed.2nd 622]; no evidence that defendant was asked whether he understood his rights.)

There is no authority for upholding a waiver of rights under an argument that the suspect impliedly understood them. However, where there is no express statement from the suspect that he understood his rights, such an understanding may be found based upon the “*totality of the circumstances*.” (*People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1090-1091.)

In *Stallworth*, defendant asked if he understood his right to have counsel present, and signed a waiver form listing all his rights, but was not asked if he understood his right to remain silent. Defendant, however, had been previously advised properly three weeks earlier and there were no attempts at trickery by the police.

It can be inferred, under the circumstances, that a criminal suspect understood his rights despite the lack of any direct acknowledgement that he did. (See *In re Eduardo G.* (1980) 108 Cal.App.3rd 745, 757; *People v. Hurlic* (1971) 14 Cal.App.3rd 122.)

After an in-custody murder suspect indicates that he understood his rights, showing some confusion as to when an attorney might be provided did not make his subsequent clear and unequivocal waiver invalid. (*People v. Smith* (2007) 40 Cal.4th 483, 503-504.)

However, the better procedure is obviously to ask for an express acknowledgement that the subject understands his rights. (See *In re Paul A.* (1980) 111 Cal.App.3rd 928, 936.)

Despite defendant making the ambiguous response; “. . . *that I can have an attorney, it says?*”, in response to an agents’ question whether he understood his rights, the Court held that based upon the “*totality of the circumstances*,” the defendant made a knowing and intelligent waiver. Specifically; (1) defendant’s initial affirmation that he understood his right to an attorney prior to or during interrogation, (2) the video of him signing the Spanish translated waiver, (3) his second affirmation that he understood his rights, and (4) his agreement to speak with the agents. (*United States v. Alvarado-Palacio* (5th Cir. 2020) 951 F.3rd 337.)

Practice Note: Despite an apparent impediment (see “*Impediments to Understanding the Miranda Rights*,” below) for an individual defendant to being able to understand his or her rights; “*nothing ventured, nothing gained*.” It is incumbent upon a police officer to recognize such an impediment, take it into account, and make the extra effort to insure that the subject understands his or her rights. Such an impediment must be documented in the relevant reports, along with the efforts made to insure that this particular suspect understood what he or she was giving up by waiving his rights, and then be ready to testify concerning the particular problem and what was done to resolve it.

Impediments to Understanding the Miranda Rights: While recognizing that under the federal rule, necessarily followed by California since implementation of **Proposition 8** in June, 1982 (*People v. Cox* (1990) 221 Cal.App.3rd 980, 987; see “*Federal Principles vs. “Independent State Grounds,”*” under “*Applicability of the Fifth Amendment to the States*” (Chapter 1), above), a mental impairment alone does not preclude a knowing and intelligent waiver of rights or otherwise voluntary confession absent some form of police over-reaching or coercion (*Colorado v. Connelly* (1986) 479 U.S. 157 [107 S.Ct. 515; 93 L.Ed.2nd 473].), the number and types of potential impediments to a suspect’s ability to understand his or her rights are unending. For instance:

Drugs and Alcohol:

Where medication was administered at the request of the police, the defendant's statements were held to be involuntary. (*In re Cameron* (1968) 68 Cal.2nd 487, 498.)

Defendant confessed after receiving an injection of phenobarbital mixed with hyoscine. An expert testified that hyoscine acts as a “*truth serum*,” and phenobarbital could enhance the effect. His confession was held to be involuntary. (*Townsend v. Sain* (1963) 372 U.S. 293 [9 L.Ed.2nd 770].)

But see United States v. Williams (7th Cir. 1997) 128 F.3rd 1128; defendant confessed after being administered

phenobarbital as a treatment for withdrawal from heroin addiction; confession voluntary under the circumstances.

When morphine was administered for medical purposes, where the defendant was suffering from gunshot wounds, the defendant was able to give a valid waiver of his rights. (*People v. Breaux* (1991) 1 Cal.4th 281, 299-301.)

When the suspect has voluntarily ingested alcohol or drugs, the courts seem to be less sympathetic to a defense claim that defendant did not understand and intelligently respond to the advisal of his rights. (*People v. Loftis* (1984) 157 Cal.App.3rd 229.)

See *People v. Jackson* (1989) 49 Cal.3rd 1170, at pages 188 to 189; drug ingestion did not preclude valid waiver.

And *People v. Ventura* (1985) 174 Cal.App.3rd 784, 791; waiver valid despite ingestion of alcohol and marijuana by 16-year old minor.

Defendant, while hysterical, crying and irrational, grief stricken at having killed his wife, and while under the influence of alcohol and heroin, validly waived his rights. (*People v. Gurley* (1972) 23 Cal.App.3rd 536, 552.)

Statements voluntary when defendant had a .268% blood/alcohol level, under the circumstances. (*United States v. Muniz* (10th Cir. 1993) 1 F.3rd 1018.)

Also, experiencing *drug withdrawal* does not necessarily render statements involuntary, but is one factor the court will consider. (*People v. Hernandez* (1988) 204 Cal.App.3rd 639, 648.)

Defendant's waiver valid despite claims of crack cocaine use, sleep deprivation and a hand injury. (*United States v. Brooks* (7th Cir. 1997) 125 F.3rd 484, 491.)

Being under the influence of drugs and being exhausted did not preclude a valid waiver. (*United States v. Korn* (8th Cir. 1998) 138 F.3rd 1239, 1240.)

PCP intoxication, where the circumstances otherwise indicated that defendant was able to understand what was happening, did not preclude a knowing and intelligent waiver of his *Miranda* rights. (*United States v. Turner* (8th Cir. 1998) 157 F.3rd 552, 555-556.)

Being a heroin addict, allegedly in withdrawals, under the influence of anti-depressants at the time of his interrogation, and while being the victim of a prior child molest, even if believed by the Court, was insufficient to prevent defendant's free and voluntary waiver. (*United States v. Palmer* (1st Cir. 2000) 203 F.3rd 55, 59-62.)

Being under the influence of marijuana and sleeping pills, "suffering from the effects of his suicide attempt," and the resulting "intrusive medical procedures," did not preclude a free and voluntary waiver. (*People v. Panah* (2005) 35 Cal.4th 395, 471-472.)

It was not error to admit portions of defendant's tape-recorded confession despite defendant's argument that it was involuntary due to his consumption of alcohol, mixed with prescription drugs, and that he had "blacked out," where the evidence supported the trial's conclusion that defendant knowingly and voluntarily waived his *Miranda* rights and, at worst, "had been drinking" only. "Intoxication alone does not render a confession involuntary." (*People v. Debouver* (2016) 1 Cal.App.5th 972, 978-979; citing *People v. Maury* (2003) 30 Cal.4th 342, 411.)

Mental Impediments, such as *youth*, *low intelligence*, *brain damage* or *mental illness*: In determining whether a defendant understood his rights, an otherwise knowing waiver will only be invalidated where it is shown that the disability is extreme:

General Rules:

Being mentally slow, uneducated, drunk, injured and/or criminally unsophisticated does not mean we cannot get a valid waiver out of a person if the problem is recognized and extra precautions are made to insure the suspect understands what it is he is giving up. (See *People v. Boyette* (2002) 29 Cal.4th 381, 410-412.) Factors to take into consideration include, but are not limited to, the following:

- Any actual coercion used by the police.
- The length of the interrogation.
- The location of the interrogation.
- The defendant's maturity, education, physical condition and mental health. (*Id.*, at p. 411.)

See also *Blackburn v. Alabama* (1960) 361 U.S. 199 [4 L.Ed.2nd 242]; and *Payne v. Arkansas* (1958) 356 U.S. 560 [2 L.Ed.2nd 975], for discussions on the issue.)

Requirement of Coercive Police Conduct:

A defendant's mental infirmity is irrelevant to a **Fifth** (or **Fourteenth**) **Amendment**, *due process*, *voluntariness* analysis absent coercive police conduct. (See *Colorado v. Connelly* (1986) 479 U.S. 157 [107 S.Ct. 515; 93 L.Ed.2nd 473]; *Nickel v. Hannigan* (10th Cir. 1996) 97 F.3rd 403; *People v. Kelly* (1990) 51 Cal.3rd 931, 947-951; *People v. Haskett* (1990) 52 Cal.3rd 210, 244; *People v. Smith* (2007) 40 Cal.4th 483, 502; *People v. Richardson* (2008) 43 Cal.4th 959, 993; *People v. Jackson* (2016) 1 Cal.5th 269, 340; *People v. Cox* (1990) 221 Cal.App.3rd 980, 984-987.)

“(W)hile mental condition is relevant to an individual's susceptibility to police coercion, a confession must result from coercive state activity before it may be considered involuntary.” (*People v. Smith*, *supra*; quoting *Colorado v. Connelly*, *supra*.)

However, severe mental impairment could result in an **Evidence Code section 352** exclusion. (See *People v. Cox* (1990) 221 Cal.App.3rd 980, 984-987.)

Youth and/or Inexperience:

Defendant's claim that he was young, immature and relatively uneducated was not enough to invalidate his waiver. (*People v. Boyette* (2002) 29 Cal.4th 381, 410-412.)

Defendant's young age (14 years) and low intelligence, plus a later diagnosis as a paranoid schizophrenic, was not enough, by itself, to support a presumption of a lack of understanding, incompetency, or other inability to voluntarily waive his *Miranda* rights. (*People v. Lewis* (2001) 26 Cal.4th 334, 384.)

A 15-year-old defendant with an I.Q. of 81, and the mental age of an 11 or 12-year-old, can sufficiently understand his rights to legally waive them. (*In re Brian W.* (1981) 125 Cal.App.3rd 590, 603.)

A 15-year-old female accused of killing her newborn baby to avoid the embarrassment of having carried on a sexual relationship with her boyfriend was able to validly waive

her *Miranda* rights. (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1189.)

The Court further rejected defendant's arguments that she was "physically exhausted from having given birth (to the baby she murdered) 10 days prior" to the interview, that she "suffered from posttraumatic stress disorder," "that the detectives used coercive tactics" and that "she had no prior experience with law enforcement." (*Ibid.*)

There was "nothing about defendant's age (of 23 that) prevented him from validly waiving his rights and talking to the police." (*People v. Rountree* (2013) 56 Cal.4th 823, 848.)

"(S)ubstantial memory deficits as well as his limited experience, education, young age (21), and below average intelligence" not substantiated by the record (and waived for not having raised the issue below). (*People v. Hoyt* (2020) 8 Cal.5th 892, 932.)

See **Welf. & Insti. Code § 625.6**, requiring minors 17 years of age and younger, be given access to an attorney prior to being advised of his or her *Miranda* rights and authorizing a trial court to consider a failure to do so as a factor in determining the admissibility of the minor's statements. Despite these statutory provisions, however, due to enactment of California's **Proposition 8 (Cal. Const. art. I, § 28(d))**, it has been held that **Section 625.6** does not allow for the suppression of statements so long as those statements are admissible under federal law. (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 448.)

Low Intelligence:

Defendant with IQ of 64 held to be mentally capable of understanding and waiving his *Miranda* rights under the circumstances; e.g., having been through the system before and knowing enough to have invoked his rights 4 out of 7 times. (*People v. Jenkins* (2004) 122 Cal.App.4th 1160.)

But in *People v. Watson* (1977) 75 Cal.App.3rd 384, defendant, with an IQ of 65, exhibited signs of chronic organic brain damage and schizophrenia that impaired his judgment and memory and rendered him incapable of being aware of what he was doing at a given time, with evidence of

ingestion of alcohol and LSD that would accentuate his incapacity. His waiver was valid.

Defendant, with an IQ of in the mid-70's, and with no prior law enforcement contacts, was still able to waive her *Miranda* rights. (*United States v. Rosario-Diaz* (1st Cir. 2000) 202 F.3rd 54, 69.)

Defendant with an IQ of 67, barely literate, and suffering from mental retardation, validly waived his rights. (*Branscomb v. Norris* (8th Cir. 1995) 47 F.3rd 258.)

Defendant with an IQ of 77, placing him in the “borderline” range of intellectual ability, was able to sufficiently understand and waive his rights. (*United States v. Bad Hand* (So. Dakota, 1996) 926 F.Supp. 891.)

18-year old, criminally sophisticated defendant with IQ of 64, with evidence that he understood what was going on, particularly in light of his prior refusal to answer questions, could validly waive his rights. (*Henderson v. DeTella* (7th Cir. 1996) 97 F.3rd 942.)

15-year old minor with an IQ of 47 (about that of a 7 or 8-year old) validly waived his rights under circumstances showing he knew what was going on, what an attorney was, and that he knew he did not have to talk to the police unless he wanted to. (*In re Norman H.* (1976) 64 Cal.App.3rd 997, 1002-1003.)

But, see *Cooper v. Griffin* (5th Cir. 1972) 455 F.2nd 1142, 1146; 15-year old boy with an IQ in the 61 to 67 range, with testimony from teachers that defendant was “uneducatable,” was unable to validly waive his rights.

Defendant with an IQ of 64 validly waived his *Miranda* rights, despite expert testimony tending to indicate that he would have difficulty comprehending what a *Miranda* admonishment was all about. (*People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1171-1173.)

See *People v. Lewis* (2001) 26 Cal.4th 334, 384, above, where defendant's young age (14 years) and low intelligence, plus a later diagnosis as a paranoid schizophrenic, was not enough, by itself, to support a presumption of a lack of understanding,

incompetency, or other inability to voluntarily waive his ***Miranda*** rights.

A 15-year-old defendant with an I.Q. of 81, and the mental age of an 11 or 12-year-old, can sufficiently understand his rights to legally waive them. (*In re Brian W.* (1981) 125 Cal.App.3rd 590, 603.)

Defendant's low-average to borderline intelligence range, even when aggravated by PCP intoxication, did not preclude a knowing and intelligent waiver of his ***Miranda*** rights. (*United States v. Turner* (8th Cir. 1998) 157 F.3rd 552, 555.)

Defendant juvenile's youth (15 years old), mild mental retardation, with an I.Q. of between 50 and 70, even though complicated with ADHD (Attention Deficit Hyperactivity Disorder), did not make the defendant's statements involuntary under the circumstances. (*People v. Thomas* (2012) 211 Cal.App.4th 987, 1012-1013.)

Defendant's low intelligence (an overall I.Q. of 87 and individual I.Q.'s in various areas of between 62 and 99), past drug use, and pain he claimed to be experiencing from his arrest where he resisted, held to be insufficient, under the circumstances (where he claimed self-defense) to make involuntary his admissions. (*People v. Duff* (2014) 58 Cal.4th 527, 555-556.)

But see *United States v. Preston* (9th Cir. 2014) 751 F.3rd 1008, 1015-1028, where an en banc panel overruled its prior decision where an 18-year-old defendant's I.Q. of around 64, showing a "mild retardation," was interrogated by officers using questionable techniques that, per the Court, were designed to confuse the mentally impaired defendant and coax him into admitting to anything the officers wanted him to. Such an interrogation technique overcame the will of the defendant, resulting in an involuntary confession.

Brain Damage:

See *People v. MacPherson* (1970) 2 Cal.3rd 109, above; schizophrenic defendant with a pencil penetrating his brain through an eye.

Mental Illness:

“Official conduct that does not constitute impermissible coercion when employed with nondisabled persons may impair the voluntariness of the statements of persons who are mentally ill or mentally retarded.” (**ABA Criminal Justice Mental Health Standards, Standard 7-5.8(b)**; available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html.)

Defendant, who was schizophrenic and suffering from a pencil wound after having jammed the pencil into the orbit of his eye, and which was penetrating his brain, could not give a valid waiver. (*People v. MacPherson* (1970) 2 Cal.3rd 109.)

Defendant, diagnosed as a psychotic paranoid schizophrenic, was found to have validly waived under circumstances indicating he knew what he was doing, despite an expert’s opinion to the contrary. (*People v. Villarreal* (1985) 167 Cal.App.3rd 450, 457.)

Defendant, with a history of mental illness, could validly waive his rights. Without evidence of police coercion, defendant’s statements were held to be admissible. (*Nickel v. Hannigan* (10th Cir. 1996) 97 F.3rd 403.)

See *People v. Lewis* (2001) 26 Cal.4th 334, 384, above, where defendant’s young age (14 years) and low intelligence, plus a later diagnosis as a paranoid schizophrenic, was not enough, by itself, to support a presumption of a lack of understanding, incompetency, or other inability to voluntarily waive his *Miranda* rights.

Drug Influence:

Defendant’s low-average to borderline intelligence range, even when aggravated by PCP intoxication, did not preclude a knowing and intelligent waiver of his *Miranda* rights. (*United States v. Turner* (8th Cir. 1998) 157 F.3rd 552, 555.)

Where the defendant claimed that a “combination of [his] drug-impaired, sleep-deprived and medically-weakened condition weigh(ed) heavily in favor of a finding that [his] statements to the officers were involuntary, the record does not support defendant’s claims. Also, ”(w)hile mental condition is surely relevant to an individual’s susceptibility to police coercion, coercive police actions is a necessary

predicate to the finding that a confession is not voluntary under the due process clause. In this case, there was no police coercion involved. (*People v. Hensley* (2014) 59 Cal.4th 788, 814-815.)

Sleep Deprivation:

Waiver by murder suspect okay despite being awake for 30 hours. (*People v. Anderson* (1990) 52 Cal.3rd 453, 469-470.)

See also *People v. Hensley* (2014) 59 Cal.4th 788, 814-815, above.

Education:

Defendant's education, particularly if completed in this, or another English-speaking country, is a factor the court must consider. (*United States v. Vue* (8th Cir. 1994) 13 F.3rd 1206; *United States v. Ho* (N.Y., 1996) 930 F.Supp. 858.)

Physical Injuries:

Gunshot wounds:

Statements Admissible:

Defendant suffering from *gunshot wounds* and injected with morphine could make an intelligent waiver. (*People v. Breaux* (1992) 1 Cal.4th 281, 299-301.)

Waiver was valid despite pain from a recent gunshot wound. (*People v. Barker* (1986) 182 Cal.App.3rd 921, 934.)

Statements Inadmissible:

See *Beecher v. Alabama* (1972) 408 U.S. 237 [33 L.Ed.2nd 317]; defendant, shot by police, was in extreme pain, and had been given large injections of morphine; confession held to be the product of gross coercion.

And *Mincey v. Arizona* (1978) 437 U.S. 385, 398-399 [57 L.Ed.2nd 290, 304]; finding that defendant's statement could not have been voluntary when obtained from a defendant who was in the hospital, in a near coma from having suffered gunshot wounds and in great pain, while fastened to tubes, needles, and a breathing apparatus.

Issue Not Decided:

See *People v. Caro* (2019) 7 Cal.5th 463, 489-495, where the California Supreme Court noted that questioning a defendant without benefit of a *Miranda* admonishment and waiver, when the defendant is a hospital patient with head injuries from a self-inflicted firearm wound and hooked up to medical devices, is “*tread(ing) on perilous ground.*” However, the Court, under the circumstances, found this issue to be one that did not need deciding in that even if in violation of *Miranda*, the admission of the defendant's resulting statements were harmless beyond a reasonable doubt.

But see the concurring opinion (at pgs. 527 to 535), where it was noted that the detective “conducted a three-hour (un-*Mirandized*) interview of Caro in the intensive care unit (ICU) a few hours after Caro had undergone emergency surgery for a gunshot wound to her head. Throughout the interview, Caro was bedridden, isolated from family and friends, in continuous pain, intermittently unconscious, under the influence of medication, encumbered by tubes, monitors, and intravenous lines, and suffering from a major foot fracture that had not yet been treated. Encountering Caro in this weakened state, (the detective) sought to establish rapport by acting as Caro's caregiver and medical advocate, without revealing to Caro (until the end of the interview) that Caro was a murder suspect and that (the detective) was there to take recorded statements that could be used, and were used, against Caro

in a capital trial.” Based upon these circumstances, the concurring opinion believed that admissions made by the defendant should have been ruled not only in violation of *Miranda*, but coerced, and thus not usable as either direct or impeachment evidence. The justice’s concurrence was based on the conclusion that any error in admitting into evidence defendant’s statements was harmless.

Other Injuries:

See *People v. MacPherson* (1970) 2 Cal.3rd 109, where defendant, who was schizophrenic and suffering from a pencil wound which he had jammed into the orbit of his eye and which was penetrating his brain, could *not* give a valid waiver.

Defendant’s waiver was valid during an interview in the intensive care unit, with defendant suffering from stab wounds, had tubes running out of his body, and with pain medication in his system. Despite complaints of pain and dizziness, defendant was alert and awake. Further, the admonishment was given in English with defendant having a limited command of the English language. (*Campaneria v. Reid* (2nd Cir. 1989) 891 F.2nd 1014, 1020.)

Defendant (allegedly) suffering from acute psychosis, under the influence of drugs, suffering from the effects of a botched suicide attempt, did not preclude a voluntary waiver of his rights. Also, claims that he was heavily affected by intrusive medical procedures, including the use of a catheter to extract a urine sample, injection with a tranquilizer, and the injection of charcoal into his system to absorb some ingested sleeping pills, were insufficient to overcome evidence that, although defendant might have been alternately rational and irrational, his waiver and resulting incriminating statements were voluntary. (*People v. Panah* (2005) 35 Cal.4th 395, 471-472; no evidence of police coercion.)

Physical injuries (broken ribs, ruptured spleen, bleeding in the brain), while still on medications, did not affect the voluntariness of the defendant’s admissions to investigators when interviewed four days after a traffic accident and

when the interrogators handled the interview in a subdued, non-coercive manner. (*People v. Perdomo* (2007) 147 Cal.App.4th 605.)

Language Difficulties are more apt to cause an invalid waiver, but can be overcome if special time and care is taken to make the admonition clear.

See *United States v. Bernard S.* (9th Cir. 1986) 795 F.2nd 749; carefully explaining the *Miranda* rights to a 17-year-old suspect, whose primary language was Apache, and to his mother, asking whether or not he understood each of the rights and whether he (or his mother) had any questions, helped to prove in a later court motion that defendant had indeed understood and validly waived his rights.

But where the content of defendant's responses indicate a lack of comprehension of his rights, despite his statement to the contrary, his incriminating answers are subject to suppression. (*People v. Diaz* (1983) 140 Cal.App.3rd 813.)

Even when a criminal defendant said that he understood English, evidence that the defendant had a limited mental capacity, English was his second language, and that he often claimed to understand and pretended to comprehend English when under stress, resulted in a finding that his waiver was invalid. (*United States v. Garibay* (9th Cir. 1998) 143 F.3rd 534.)

Defendant's waiver of his *Miranda* rights was not clearly erroneous as defendant seemed to understand English and the translation into Spanish did not need to be perfect so long as the defendant understands that he does not need to speak to police and that any statement he makes may be used against him. (*United States v. Hernandez* (10th Cir. 1990) 913 F.3rd 1506, 1510.)

Language difficulties are also relevant to the issue whether a reasonable person in the defendant's shoes would have believed he was in custody, for purposes of a *Miranda* admonishment. (*Thatsaphone v. Weber* (8th Cir. 1998) 137 F.3rd 1041, 1045-1046.)

The officer should take special care to insure that defendant's rights are communicated in simple and direct language. (*United States v. Granados* (Kansas, 1994) 846 F.Supp. 921.)

See also *United States v. Hernandez* (10th Cir. 1996) 93 F.3rd 1493, describing the difficulties inherent in using an untrained interpreter in attempting to describe defendant's rights.

United States v. Lugo (9th Cir. 1999) 170 F.3rd 996, 1004: “While Mr. Lugo’s first language is Spanish and he received a ninth grade education, his responses to Trooper Shields’ questions demonstrated sufficient understanding of the English language for purposes of the interrogation. Second, Mr. Lugo was not subjected to an unreasonably long detention and interrogation. The delay from 1:00 a.m., when Mr. Lugo was arrested, until 5:45 a.m., when the interview took place, is not presumptively prejudicial.”

United States v. Guay (4th Cir. 1997) 108 F.3rd 545, 549-550: Defendants, French-Canadians, sufficiently understood the English language to validly waive their rights.

United States v. Amano (9th Cir. 2000) 220 F.3rd 801, 804-805; Japanese national found to understand English well enough to understand and waive his rights and consent to a search where defendant never complained of a language problem through several interrogations, there was a variety of English language materials in his home, and he later filed a written affidavit in court in English.

Absent some evidence tending to show that the defendant did not understand English, the courts are not likely to have much sympathy for the argument that the defendant did not understand. (See ***United States v. Rodriguez-Preciado*** (9th Cir. 2005) 399 F.3rd 1118, 1127-1128; defendant told the officers he understood English, and nothing happened that would have indicated to the contrary.)

The fact that defendant had been educated in the English language did not overcome the fact that his ability to speak and understand the spoken word was “rudimentary.” Despite the defendant’s ability to hear the detective’s English admonishment, a Mandarin Chinese interpreter’s failure to correctly translate the fact that anything defendant said could be used in court against him, that he had a right to an attorney before or during the interrogation, and that the court would appoint one for him if he couldn’t afford it, resulted in a legally inadequate admonition. (***People v. Jiang*** (2005) 130 Cal.App.4th 1512, 1519-1529.)

Whether or not defendant’s statements, made through an interpreter, are admissible as a “party admissions,” or inadmissible hearsay, is dependent upon whether the statements may fairly be considered those of the defendant and not the interpreter’s. Four factors are to be taken into consideration when making this determination: (1) which party supplied the interpreter, (2) whether the interpreter had any motive to mislead or distort, (3) the interpreter’s qualifications and language skill, and (4) whether

actions taken subsequent to the conversation were consistent with the statements as translated.” In other words, were the statements those of the interpreter, or was he properly determined to be a “mere conduit” for the defendant’s statements. (*United States v. Romo-Chavez* (9th Cir. 2012) 681 F.3rd 955, 959-950; Petition for certiorari filed at 12/17/2012; No. 12-7828.)

A Spanish-language *Miranda* warning was administered to defendant before he was interrogated. The warning, however, was found to fail to reasonably convey the government’s obligation to appoint an attorney for an indigent suspect who wished to consult one. The detective used the word “libre” to indicate “free.” However, “libre” means being available or at liberty to do something. The phrasing of the warning suggested that the right to appointed counsel was contingent on the approval of a request or on the lawyer’s availability, rather than the government’s absolute obligation. (*United States v. Botello-Rosales* (9th Cir. 2013) 728 F.3rd 865.)

The fact that the defendant is a Mexican National and unfamiliar with the criminal justice system in the United States, while a factor to consider in determining whether a suspect understood his rights, is not likely to be enough to warrant suppression in the face of other evidence that he did in fact understand. (*United States v. Labrada-Bustamante* (9th Cir. 2005) 428 F.3rd 1252, 1260.)

Defendant, being a Cuban immigrant, argued that his limited command of the English language prevented him from understanding the admonishment. The Court found that his waiver was valid. (*Campaneria v. Reid* (2nd Cir. 1989) 891 F.2nd 1014, 1020.)

In a capital murder trial, defendant’s statement was properly admitted into evidence because his *Miranda* waiver was knowing and intelligent. Having been admonished in his own language (Spanish), defendant, an adult, repeatedly affirmed his understanding of the *Miranda* rights and his desire to waive them, and although he claimed that he lacked the intellectual capacity to make a knowing and intelligent waiver, he was not so inattentive or distracted during questioning that he could not formulate a false account of what happened. (*People v. Leon* (2020) 8 Cal.5th 831, 839-845.)

Where defendant was asked by FBI agents to read each line of a *Miranda* admonishment form out loud and write his initials next the line if he understood it, which he proceeded to do, and where the agents offered explanations of the rights as defendant read

them out loud, where he also asked questions about the meaning of his rights which the agents answered, and where the agents discussed defendant's rights with him for approximately ten minutes before he signed the waiver form, all of which was recorded on videotape which showed that defendant appeared to understand English and was heard speaking English clearly, the Court held that defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights. (*United States v. Ramamoorthy* (6th Cir. 2020) 949 F.3rd 955.)

Understanding the Subject Matter of the Interrogation:

It is not legally required that the police inform a defendant of all the crimes about which they intend to question him for a waiver to be valid. (*Colorado v. Spring* (1987) 479 U.S. 564 [93 L.Ed.2nd 954]; see also *People v. Molano* (2019) 7 Cal.5th 620, 648-654.)

“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.’” (*Id.*, at pp. 576-577, fn. omitted [93 L.Ed.2nd at p. 966]; *People v. Boyette* (2002) 29 Cal.4th 381, 411.)

“A suspect need not . . . understand the tactical advantage of remaining silent in order to effectuate a valid waiver.” (*United States v. Hernandez* (10th Cir. 1990) 913 F.3rd 1506, 1510; citing *United States v. Yunis* (D.C. Cir. 1988) 859 F.2nd 953, 965.)

It is not necessary to inform a suspect as a prerequisite to a *Miranda* admonishment and waiver that the case he is about to be questioned is a potential death-penalty case. (*People v. Salcido* (2008) 44 Cal.4th 93, 129.)

“A valid wavier does not require that an individual be informed of all information ‘useful’ in making his decision.” (*People v. Molano* (2019) 7 Cal.5th 620, 648-654; where defendant was led to believe he was going to be told about the conditions of his **P.C. § 290** registration, and not that he was to be questioned about a six-year old murder for which he was a suspect..)

Understanding the Charges: There is no requirement that the defendant be informed of the charges against him or the potential punishment:

“(T)he Constitution does not 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.’” (*People v. Hawthorne* (2009) 46 Cal.4th

67, 88; quoting *Moran v. Burbine* (1986) 475 U.S. 412, 422 [106 S.Ct. 1135; 89 L.Ed.2nd 410].)

Per the U.S. Supreme Court, as stated in *Moran v. Burbine* (*supra*, at pp. 423-424: “Granting that the ‘deliberate or reckless’ withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.”

It is not legally required that the police inform a defendant of all the crimes about which they intend to question him for a waiver to be valid. (*Colorado v. Spring* (1987) 479 U.S. 564 [93 L.Ed.2nd 954]; see also *People v. Molano* (2019) 7 Cal.5th 620, 648-654.)

“If a suspect need not be informed of the possible charges against him, there is no basis for concluding that he must be advised of the possible punishment for those charges if proven.” (*People v. Hill* (1992) 3 Cal.4th 959, 982.)

It is not necessary to inform a suspect as a prerequisite to a *Miranda* admonishment and waiver that the case he is about to be questioned is a potential death-penalty case. (*People v. Salcido* (2008) 44 Cal.4th 93, 129.)

Expert testimony may be admissible, and perhaps necessary, on the issue of a suspect’s ability to comprehend his or her rights. (See *People v. MacPherson* (1970) 2 Cal.3rd 109.)

Necessity of a Court Hearing: The trial court does *not* have a *sua sponte* duty to order a hearing regarding a defendant’s cognitive ability to waive his *Miranda* rights, even in a case where the defendant had previously, between arrest and trial, been declared incompetent to stand trial and was hospitalized before mental competence had been regained. (*Cox v. Papa* (9th Cir. 2008) 542 F.3rd 669.)

Voluntariness Issues:

Rule: The decision to waive must be “*the product of a free and deliberate choice, rather than intimidation, coercion or deception.*” (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135; 89 L.Ed.2nd 410, 421].)

Caveat: It is recognized that under the federal rule, necessarily followed by California since implementation of **Proposition 8** in June, 1982 (*People v. Cox* (1990) 221 Cal.App.3rd 980, 987; see “*Federal Principles vs. “Independent State Grounds,”* under “*Applicability of the Fifth Amendment to the States*” (Chapter 1), above), a mental impairment alone

does not preclude a knowing and intelligent waiver of rights or otherwise voluntary confession absent some form of police over-reaching or coercion. (*Colorado v. Connelly* (1986) 479 U.S. 157 [107 S.Ct. 515; 93 L.Ed.2nd 473].)

“A confession is involuntary under the federal and state guaranties of due process when it has been extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence. [Citation.] Coercive police activity is a necessary predicate to a finding that a confession was involuntary under both the federal and state Constitutions. [Citations.]” (*People v. Delgado* (2018) 27 Cal.App.5th 1092, 1107; quoting *In re Joseph H.* (2015) 237 Cal.App.4th 517, 534.)

“Under the federal Constitution, a person may not be compelled in any criminal case to be a witness against himself. **U.S. Const., 5th Amend.** The **Fifth Amendment** prohibits use by the prosecution in its case in chief only of compelled testimony. However, a defendant's compelled statements may be used for purposes of impeachment. The **due process clause** of the **Fourteenth Amendment, U.S. Const., 14th Amend.**, makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. Involuntary statements cannot be used for any purpose, including impeachment. Whether a statement is voluntary depends upon the totality of the circumstances surrounding the interrogation. A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and California Constitutions. A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence.” (*People v. McClinton* (2018) 29 Cal.App.5th 738, 762-764 (headnote 17); statements obtained at defendant's hearings as a Sexually Violent Predator (SVP), noting the distinction between a witness's “compelled” statements, which can be used for purposes of impeachment, and a witness's “involuntary” statements, which cannot be used for any purpose, and finding that statements obtained from defendant's testimony at his SVP trial to be “compelled,” only.)

“‘[T]he due process voluntariness test . . . examines “whether a defendant's will was overborne” by the circumstances surrounding the giving of a confession. [Citation.] The due process test takes into consideration “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” [Citations.] The determination “depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.” [Citation.]’” (*People v. Jimenez* (2021) 72 Cal.App.5th 712,

725; quoting *Dickerson v. United States* (2000) 530 U.S. 428, 433-434 [147 L.Ed.2nd 405: 120 S.Ct. 2326].)

“““[C]oercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the **Due Process Clause** of the **Fourteenth Amendment**.” [Citations.] Coercive police activity, however, “““does not itself compel a finding that a resulting confession is involuntary.” [Citation.] The statement and the inducement must be causally linked. [Citation.]’ [Citation.]’”” (*Id.*, at p. 726; quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1093. See also *People v. Jimenez*, *supra*, at p. 726.)

“Voluntariness;” Before vs. After Waiver: *Voluntariness*, as it relates to a waiver, often involves different issues than “*voluntariness*” as it relates to the actual giving of a confession or admission after a valid waiver is obtained.

The *former* most often involves aggravated *Miranda* violations and the **Fifth Amendment** right against self-incrimination. However, it may also involve a continuing interrogation after a suspect’s attempt to invoke and, if aggravated enough, involve a “due process” violation. (See *Bradford v. Davis* (9th Cir. 2019) 923 F.3rd 599.)

The *latter* is determined under **Fifth** and **Fourteenth Amendment** “*due process*” standards. (See below.)

Note: Physical or psychological coercion, threats, *or* offers of leniency or some other benefit, whether express or implied, are “*due process*” issues to consider whether the offending law enforcement act is committed before or after waiver (*People v. Jimenez* (1978) 21 Cal.3rd 595, 611; *People v. Jackson* (1980) 28 Cal.3rd 264, 299.) and are evaluated as actions by law enforcement which are reasonably likely to cause the suspect to provide an untrue statement.

Necessity of a Free, Voluntary, and Intelligent Waiver: Waiver of a subject’s **Fifth Amendment** rights must be made *freely*, *voluntarily* and *intelligently*. (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135; 89 L.Ed.2nd 410, 421]; *People v. Kelly* (1990) 51 Cal.3rd 931, 950.)

The prosecution bears the burden of establishing, by a preponderance of the evidence, the voluntariness of an accused person’s waiver of his *Miranda* rights. (*In re T.F.* (2017) 16 Cal.App.5th 202, 210 ; citing *People v. Whitson* (1998) 17 Cal.4th 229, 248; *People v. Flores* (2020) 9 Cal.5th 371, 417.)

A determination of whether a confession is coerced takes into consideration several factors, “including any element of police coercion,

the length of the interrogation and its location and continuity, and the defendant's maturity, education, and physical and mental health.” (*People v. Peoples* (2016) 62 Cal.4th 718, 740; citing *People v. Massie* (1998) 19 Cal.4th 550, 576.)

“The suspect may waive his right to counsel, ‘provided the waiver is made voluntarily, knowingly and intelligently.’” (*Mays v. Clark* (9th Cir. 2015) 807 F.3rd 968, 977; citing *Miranda v. Arizona*, *supra*, at p. 444.)

“A waiver is knowing and intelligent if, under the totality of circumstances, it is made with a ‘full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’” (*United States v. Doe* (9th Cir. 1998) 155 F.3rd 1070, 1074; citing *Moran v. Burbine*, *supra*.)

Per the U.S. Supreme Court, as stated in *Moran v. Burbine* (*supra*, at pp. 423-424: “Granting that the ‘deliberate or reckless’ withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.”

“(A)ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.” (*Miranda v. Arizona*, *supra*, at p. 476 [16 L.Ed.2nd at p. 725].)

“In evaluating voluntariness, the test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect’s will was overborne.” (*United States v. Male Juvenile* (9th Cir. 2002) 280 F.3rd 1008; *United States v. Bautista* (9th Cir. 2004) 362 F.3rd 584, 589.)

“In evaluating voluntariness, the test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect’s will was overborne.” (*United States v. Male Juvenile* (9th Cir. 2002) 280 F.3rd 1008; *United States v. Bautista* (9th Cir. 2004) 362 F.3rd 584, 589; *People v. Caro* (2019) 7 Cal.5th 463, 492.)

Anything done by law enforcement which might “overbear (the suspect’s) will to resist and bring about (a) confession . . . not freely self-determined” will create a voluntariness issue. (*People v. Thompson* (1990) 50 Cal.3rd 134, 166.)

“‘The question is whether defendant’s choice to confess was not “*essentially free*” because his will was overborne.’ (Citation)” (***People v. Massie*** (1998) 19 Cal.4th 550, 576.)

“A statement is involuntary if it is not the product of ‘a rational intellect and free will.’” (***People v. Maury*** (2003) 30 Cal.4th 342, 404, citing ***Mincy v. Arizona*** (1978) 437 U.S. 385, 398 [57 L.Ed.2nd 290]; ***People v. Sanchez*** (2019) 7 Cal.5th 14, 50.)

But, telling defendant that he was just one of many that they had to interview, and that they were just getting into the case and needed to find out what defendant knew, without evidence that these were false statements, does not constitute police “*trickery*.” (***People v. Musselwhite*** (1998) 17 Cal.4th 1216, 1233-1235.)

The fact that the defendant was in jail on murder charges and that he erroneously believed that his retained attorney no longer represented him and his belief that he needed the police investigator to do investigatory work for him did not make the defendant’s waiver involuntary. (***People v. Sultana*** (1988) 204 Cal.App.3rd 511, 516-518;

“A valid waiver does not require that an individual be informed of all information ‘useful’ in making his decision.” (*Id.*, at p. 517, quoting ***Colorado v. Spring*** (1987) 479 U.S. 564, 576 [93 L.Ed.2nd 954, 967]; see also ***People v. Molano*** (2019) 7 Cal.5th 620, 648-654.)

To be admissible, a defendant’s incriminatory statements must be, upon considering the totality of the circumstances, “*the product of his free and rational choice*.” (***Greenwald v. Wisconsin*** (1968) 390 U.S. 519, 521 [20 L.Ed.2nd 77].)

The validity of a waiver of ***Miranda*** rights depends upon whether the eventual admonishment, under the circumstances, “*adequately and effectively apprise(s)*” the suspect of his rights pursuant to the ***Miranda*** decision. (***Missouri v. Seibert*** (2004) 542 U.S. 600 [159 L.Ed.2nd 643].)

“The waiver of ***Miranda*** rights must be voluntary in the sense that it was the product of a free and deliberate choice, and was made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. (***People v. Smith*** (2007) 40 Cal.4th 483, 501–502, . . .) ‘[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.’” (*In re T.F.* (2017) 16 Cal.App.5th 202, 210; quoting ***Miranda v. Arizona***, *supra*, 384 U.S. at p. 475.)

Incriminating statements made to a prison staff psychiatrist following a group therapy session, where he had been promised only that the group communications would be held in confidence, were not “*involuntary*.” Participation in the group therapy sessions was voluntary, the subjects were encouraged *not* to talk about their crimes, and the statements at issue were made after the therapy session had ended. (*Beaty v. Schiriro* (9th Cir. 2007) 509 F.3rd 994.)

The absence of any physical signs or other evidence that defendant had been mistreated by Mexican officials prior to being transferred to American authorities, together with the recorded admonition and the defendant’s denial upon waiving his rights that he’d been mistreated, were held to be inconsistent with his in-court claims that his waiver was involuntary. (*People v. Salcido* (2008) 44 Cal.4th 93, 129-130.)

Also, it was held that the trial court did not abuse its discretion by denying defendant’s motion for a “commission” (pursuant to **P.C. §§ 1349 to 1362**) to travel to Mexico to take depositions concerning the treatment defendant had received while in custody in that country where other evidence tended to indicate that defendant had not been abused and that Mexican officials were not going to cooperate with such efforts anyway. (*Id.*, at pp. 130-132.)

Telling the in-custody that he was about to be booked and would then be able exercise his right to make some phone calls and see his lawyer was not a deception that might lead to any incriminating statements. Also, telling defendant that if he invoked his right to counsel that the detective would not be able to talk to him anymore did not falsely inform defendant that if he exercised his right to counsel he could *never* speak with the officers again. Nor, taken in context, did they undermine defendant’s right to terminate questioning if he so desired. (*People v. Hensley* (2014) 59 Cal.4th 788, 813-814.)

Discouraging a suspect from obtaining the assistance of counsel by telling him that, “*a lawyer, he’s gonna say forget it. You know, don’t talk to the police,*” only serves to demean the pre-trial role of counsel, and an “unauthorized legal opinion regarding whether [the suspect] should remain silent and exercise his right to counsel.” (*Collazo v. Estelle* (9th Cir. 1991) 940 F.2nd 411, 414.)

See also *Lujan v. Garcia* (9th Cir. 2013) 734 F.3rd 917, 932, where a police interrogator telling suspect; “*I doubt that if you hire an attorney they’ll let you make a statement, usually they don’t,*” held to be the same type of unauthorized legal opinion, and improper.

But note that after defendant invoked his right to counsel, telling defendant that he was to be booked for murder while inferring that it was because he (the detective) hadn't yet heard his (the defendant's) side of the story, held to be the functional equivalent of an interrogation as opposed to mere booking questions, causing defendant to agree to reinitiate the questioning, held to be "badgering," and legally improper. Defendant decision to reinitiate the questioning was not free and voluntary. (*Martinez v. Cate* (9th Cir. 2018) 903 F.3rd 982, 994-996.)

Use of a ruse (i.e., two homicide detectives telling the in-custody defendant that they were "290 [sex registrant] investigators"), to help obtain a waiver, and without telling defendant they were actually there to question him about a murder that had occurred six years earlier, held under the circumstances to *not* have invalidated defendant's waiver of his *Miranda* rights. Per the Court, "(t)he officers' ruse, that their purpose was to interview defendant regarding his sex offender registration status, was not coercive." (*People v. Molano* (2019) 7 Cal.5th 620, 648-654; "(M)erely withholding certain information from a defendant does not invalidate a *Miranda* waiver."

Quoting *Moran v. Burbine* (1986) 475 U.S. 412, at pp. 422-423 [106 S.Ct. 1135; 89 L.Ed.2nd 410.]), the *Molano* Court noted that: "(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. [Citations.] Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Id.*, at p. 649.)

Where defendant was advised of his rights and expressly waived them, and his decision to do so were motivated by the same "compunction arising from his own conscience," the record supported the lower courts' (trial and California Supreme Court) respective findings that defendant's waiver of rights was freely and voluntarily made. (*Benson v. Chappell* (9th Cir. 2020) 958 F.3rd 801, 819.)

"The waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception' [citation], and *knowing* in the sense that it was 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" (Italics added; *People v. Suarez* (2020) 10

Cal.5th 116, 157; quoting *People v. McCurdy* (2014) 59 Cal.4th 1063, 1086.)

In Suarez, the Court found no coercion. “When he said he was cold, he was given a shirt. He did not indicate that he was hungry or otherwise uncomfortable. Nor did he indicate that his nervousness or sleeplessness affected his ability to understand his rights or the questions. Instead, the trial court found that he was ‘calm and cooperative,’ and there was no evidence ‘of discomfort or stress’ or that ‘he was forced to sign anything or to waive his rights.’ Finally, the fact that he lacked experience with the criminal justice system did not invalidate his waiver or render his subsequent statements involuntary in the circumstances here.” (*Id.*, at p. 161.)

Legal Effect of Pre-Admonishment Discussions:

If a waiver is obtained by putting the suspect in a more appropriate frame of mind before admonishment, such as through “*ingratiating conversation*,” a *Honeycutt* “*clever softening-up*” issue arises. (*People v. Honeycutt* (1977) 20 Cal.3rd 150, 160; angry suspect purposely calmed down prior to admonishment and waiver; waiver held to be invalid.)

But not all pre-admonition discussions with the in-custody suspect are prohibited, so long as not done for the purpose of “softening him (or her) up.” (See *People v. Patterson* (1979) 88 Cal.App.3rd 742, 750-752; and *People v. Kyllingstad* (1978) 85 Cal.App.3rd 562, 566-567.)

Limited pre-admonishment questioning will not invalidate post-admonishment admissions so long as the responses obtained prior to the admonishment were not involuntary and the eventual waiver was not the product of a “softening up” as condemned in *Honeycutt, supra*. (*People v. Scott* (2011) 52 Cal.4th 452, 476-477.)

Not all casual discussions between police and a suspect, even though resulting in incriminatory statements, cause a *Honeycutt* problem. (*People v. Mickey* (1991) 54 Cal.3rd 612, 650; conversations during extradition transportation.)

See also *People v. Gray* (1982) 135 Cal.App.3rd 859, 864-865; five minute pre-admonishment conversation okay.

Merely telling a suspect that; “There are two sides to every story,” is *not* a comment designed to soften him up and induce a confession. (*People v. Michaels* (2002) 28 Cal.4th 486, 511.)

But see *People v. Munoz* (1978) 83 Cal.App.3rd 993, 997, where defendant was “softened up” when, after defendant made an ambiguous reference to needing an attorney, the officer offered to first tell him why the officers were there, and what information they had. After doing so, defendant waived. The waiver was held to be invalid because of the officer’s intentional attempt to avoid dealing with defendant’s request for an attorney.

An officer’s alleged disparaging of the victim (i.e., “she was no angel”) in an alleged attempt to minimize the crime and ingratiate themselves with defendant held, in this case, to be insufficient to create a *Honeycutt* issue. (*People v. Molano* (2019) 7 Cal.5th 620, 661-663.)

Note: In *Melano*, there was no “pre-admonishment” softening up, so no *Honeycutt* issue.

After defendant asked to be read his rights, but before his *Miranda* rights were in fact read to him, the detective’s suggestion to him that he might be able to make a deal and then by playing on his responsibility as a father, while neither expressly or impliedly indicating that defendant could get a deal, held to be neither a *Honeycutt* softening up, nor an offer of leniency. Nor was references to being a good example for his son sufficient to overbear defendant’s will by employing a particular psychological vulnerability. (*People v. Young* (2019) 7 Cal.5th 905, 924-927.)

Grumbling Waivers may also be valid, depending upon the circumstances.
Examples:

Waiver:

Refusal to sign a written wavier or to be taped; *not* an invocation. (*People v. Maier* (1991) 226 Cal.App.3rd 1670, 1677-1678; see also *United States v. Thurman* (7th Cir. IL 2018) 889 F.3rd 356.)

Defendant did not want to put anything in writing without an attorney being present; not an invocation. (*Connecticut v. Barrett* (1987) 479 U.S. 523 [93 L.Ed.2nd 920].)

No Wavier:

Refusal to allow an interview to be tape recorded, with other facts indicating an intent to speak privately and in confidence with officers, may be an invocation. (*People v. Hinds* (1984) 154

Cal.App.3rd 222, 235-236; *People v. Nicholas* (1980) 112 Cal.App.3rd 249, 268.)

A request to speak with the officer “*off the record*” might also be an invocation. (*People v. Braeseke* (1979) 25 Cal.3rd 691, 702-703.)

Offering to turn off a tape recorder to encourage further comments by the suspect, after the suspect has invoked, will result in an involuntary statement. (*In re Gilbert E.* (1995) 32 Cal.App.4th 1598.)

Conditional and Selective Waivers are valid. “Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.” (*Michigan v. Mosley* (1975) 423 U.S. 96, 103-104 [46 L.Ed.2nd 313, 321].) Examples:

Agreeing to talk but refusing to put anything in writing is okay. (*Connecticut v. Barrett* (1987) 479 U.S. 523 [93 L.Ed.2nd 920].)

Answering some questions but not others is only an invocation as to the questions defendant declines to answer. (*United States v. Eaton* (1st Cir. 1989) 890 F.2nd 511, 513; *United States v. Mikell* (11th Cir. 1996) 102 F.3rd 470; *People v. Silva* (1988) 45 Cal.3rd 604, 629-630; *People v. Clark* (1992) 3 Cal.4th 41, 122.)

Defendant's waiver, saying; “*Well, ask your questions, and I will answer those I see fit,*” was held to be a *valid selective waiver*. (*Bruni v. Lewis* (9th Cir. 1988) 847 F.2nd 561, 563.)

Defendant's response; “*Yes, regarding my . . . citizenship,*” held to be an unequivocal invocation of his right to remain silent on all issues *except* his citizenship. (*United States v. Soliz* (9th Cir. 1997) 129 F.3rd 499, 503.)

Use of a “False Friend” to Extract a Confession:

The use of a long-time friend (i.e., a “*false friend*”) of the defendant’s to pry a confession out of him, after the defendant had repeatedly declined to talk without the presence of his retained lawyer, with the friend playing on the defendant’s sympathies, was found to be a **Fourteenth Amendment** “*due process*” violation in *Spano v. New York* (1959) 360 U.S. 315 [79 S.Ct. 1202; 3 L.Ed.2nd 1265]; a pre-*Miranda* decision.

“The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as

much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.” (*Id.*, at pp. 320-321.)

But just because a friend of the defendant’s is used to fingerprint, photograph and interview the defendant for purposes of a booking personal history, where the friend does not attempt to obtain a confession, does *not* implicate the “false friend” theory of *Spano*. (*United States v. Posada-Rios* (5th Cir. 1998) 158 F.3rd 832, 866.)

Note: The continuing validity of this antiquated theory, although never specifically overruled, is questionable, there being no recent cases espousing such a theory, and with newer cases allowing for the use of friends and acquaintances to talk with in-custody suspects as well as pretext phone calls.

But see the recent case of *People v. Caro* (2019) 7 Cal.5th 463, 492, at pg. 531, where California Supreme Court Justice Goodwin Liu (in a concurring opinion) is highly critical of a detective’s use of some ingratiating interrogation tactics on a seriously injured murder suspect shortly after she came out of surgery, criticizing any form of such psychological pressure including what is often referred to as being a “false friend,” where the officer misleads the suspect into believing the officer is protecting her best interests (*State v. Rettenberger* (1999) 1999 UT 80 [984 P.2d 1009, 1016–1017].), and through another related tactic involving manipulation through misrepresentation of fundamental aspects of the interrogation. (*State v. Eskew* (2017) 2017 MT 36 [386 Mont. 324, 390 P.3d 129, 135–136].)

See “*Questioning by an Undercover Police Officer or Agent*,” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

See also “*Use of an Undercover Police Agent*,” and “*Pretext Telephone Calls in the Miranda Context*,” under “*The Admonition*” (Chapter 6), above.

Express v. Implied Waivers:

Issue: Is an “*implied waiver*” legally sufficient, or must an interrogator seek an “*express waiver*.”

An “*express waiver*” involves a police interrogator asking an in-custody suspect, after reading him his *Miranda* rights, whether he understood those rights and, more importantly, whether he is willing to waive them prior to questioning; e.g.: “*Having in mind and understanding your rights, are you willing to talk to me?*”

An “*implied waiver*” typically involves a police interrogator providing an in-custody suspect with a complete and legal admonishment, but (sometimes) failing to ask the subject whether he understood the rights enumerated, and then (in all cases) failing to obtain an express waiver of those rights, but rather moving right on into the questioning.

General Rule: There is a threshold presumption against finding a waiver of *Miranda* rights. (*People v. Cruz* (2008) 44 Cal.4th 636, 667.)

However: “Once the defendant has been informed of his rights, and indicates that he understood his rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them.” (*People v. Johnson* (1969) 70 Cal.2nd 541, 558; see also *United States v. Franklin* (4th Cir. 1996) 83 F.3rd 79, 82, adopting facts as described at 884 F.Supp.1435; see also *People v. Medina* (1995) 11 Cal.4th 694, 752.)

“A suspect’s expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights.” *People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 218-219; citing *People v. Medina*, *supra*.)

A finding of an implied waiver is dependent upon the totality of the circumstances. Depending upon those circumstances; “A suspect’s expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citation]” (*People v. Hawthorne* (2009) 46 Cal.4th 67, 84-88.)

“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. (Citations)” (*People v. Parker* (2017) 2 Cal.5th 1184, 1216; “(W)hy would I want to talk to you about something that occurred back then?,” and “I can’t . . . imagine why I would want to talk with the Costa Mesa Police Department.”, held not to be a clear and unequivocal invocation, upholding defendant’s implied waiver.

The rule on implied waivers applies to minors as well: “(A) minor may waive *Miranda* ‘implicitly by willingly answering questions after acknowledging that he understood those rights.’” (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 451; quoting *People v. Lessie* (2010) 47 Cal.4th 1152, at p. 1169.)

The Problem:

The United States Supreme Court, in ***Miranda v. Arizona***, *supra*, referring to the prosecution's "heavy burden" to establish a waiver, has specifically held that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." (***Miranda v. Arizona***, *supra*, at p. 475 [16 L.Ed.2nd 724].)

"While such request [for a lawyer] affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." (***Id.***, at p. 470 [16 L.Ed.2nd 721].)

There is a "presumption against finding a waiver of ***Miranda*** rights" that must be overcome by the prosecution before defendant's admissions will be allowed into evidence. (***People v. Hawthorne*** (2009) 46 Cal.4th 67, 84-88; implied waiver upheld based upon an evaluation of the totality of the circumstances.)

While commonly approved by the appellate courts (see below), the use of an implied waiver is also not uncommonly discouraged by these same courts whenever the circumstances are such that the suspect's intent to waive is at issue. (See ***People v. Riva*** (2003) 112 Cal.App.4th 981; interrogation reinitiated after a prior invocation of the subject's right to remain silent.)

Recent Trends: Since ***Miranda***, however, the High Court has backed off a little and held that while mere silence alone is not enough, silence (i.e., not specifically invoking his rights) plus a course of conduct indicating waiver "might" be sufficient to prove a waiver. (***North Carolina v. Butler*** (1979) 441 U.S. 369, 373-376 [60 L.Ed.2nd 286, 292-294].)

While a waiver will not be presumed; "(t)hat does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. . . . (I)n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." (***People v. Whitson*** (1998) 17 Cal.4th 229, 246; quoting ***North Carolina v. Butler***, *supra*.)

In ***Whitson***, defendant, despite being in pain from a traffic accident, had prior criminal contacts, told investigators that he understood his rights while acting accordingly, and never hesitated in cooperating

with his interrogators through several questioning sessions. *Implied waiver valid. (People v. Whitson, supra.)*

A clear statement of understanding, with an absence of any evidence that the interrogating officers coerced or misled the defendant, constitutes a valid, implied waiver despite defendant's difficulty in understanding the English language. (*United States v. Cazares* (9th Cir. 1997) 112 F.3rd 1391, 1243-1244.)

With defendant having a rational reason for choosing not to remain silent, and with facts indicating that he was not a "reluctant detainee," defendant's implied waiver was upheld. (*United States v. Andrade* (1st Cir. 1998) 135 F.3rd 104, 107-108.)

Defendant who, after indicating that he understood his rights, failed to invoke them, and who volunteered that the illegal items found in his home were his and that his girlfriend had nothing to do with them, held to have impliedly waived his *Miranda* rights. (*United States v. Younger* (9th Cir. 2005) 398 F.3rd 1179, 1185-1186.)

An implied waiver will be upheld when the "totality of the circumstances" show that the defendant knew what he was doing and nothing was done by the police to overcome any reluctance on the defendant's part to tell his side of the story. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 84-88.)

"(D)ecisions of the United States Supreme Court have held an express waiver is not required where the defendant's conduct makes clear a waiver is intended. (fn.) The question is not whether the proper form was used but whether the defendant voluntarily, knowingly and intelligently waived his **Fifth** and **Sixth Amendment** rights as delineated in *Miranda*. (fn.) This question is answered by reviewing "the totality of the circumstances" surrounding the interrogation. (fn) If this review shows the defendant chose to speak with police after he was informed of his rights, understood the information he was given and was not tricked or coerced into surrendering those rights, a valid waiver will be implied. (fn)" (*People v. Riva* (2003) 112 Cal.App.4th 981, 988-989; see also *United States v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3rd 1118, 1127.)

The Ninth Circuit Court of Appeal has even ruled recently that a suspect's silence after indicating that he understood his rights, absent evidence of any governmental over-reaching, may very well constitute a waiver. (*United States v. Labrada-Bustamante* (9th Cir. 2005) 428 F.3rd 1252, 1262.)

See also Berghuis v. Thompson (2010) 560 U.S. 370 [130 S.Ct. 2250; 176 L.Ed.2nd 1098], and *Salinas v. Texas* (2014) 570 U.S.

178 [133 S.Ct. 2174; 186 L.Ed.2nd 376].): Silence alone is not an invocation.

And, it has been held that a waiver may be implied when an in-custody suspect initiates the conversation himself. (*Williams v. Stewart* (9th Cir. 2006) 441 F.3rd 1030, 1039.)

Advising a suspect of his *Miranda* rights, obtaining an acknowledgment that he understood those rights, and then leaving him alone for 5 to 10 minutes before initiating the actual questioning, does not preclude the finding that the implied waiver was valid. (*People v. Rios* (2009) 179 Cal.App.4th 491, 499-507; holding that the decision in *Missouri v. Seibert* (2004) 542 U.S. 600 [159 L.Ed.2nd 643] did not abrogate the rules on implied waivers.)

Finally, the United States Supreme Court held that: “If the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is sufficient to demonstrate ‘a valid waiver of *Miranda* rights. (Citation)” If, along with this, the prosecution proves by a preponderance of the evidence that the accused understood his rights, then the resulting statements will be admissible in evidence. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 387-389 [130 S.Ct. 2250; 176 L.Ed.2nd 1098].)

“Once a suspect is advised of his or her rights, the suspect can be found to have waived those rights by continuing to answer questions.” (*In re Art T.* (2015) 234 Cal.App.4th 335, 349; citing *Berghuis v. Thompkins*, *supra*, defendant waived *Miranda* rights where he received and understood *Miranda* warnings, did not invoke his rights, and made a voluntary statement to the police; and *North Carolina v. Butler* (1979) 441 U.S. 369, 373 [60 L.Ed.2nd 286], a defendant’s waiver of *Miranda* rights in some cases can be “inferred from the actions and words of the person interrogated,” without an explicit waiver].)

“In general, if a custodial suspect, having heard and understood a full explanation of his or her *Miranda* rights, then makes an uncompelled and uncoerced decision to talk, he or she has thereby knowingly, voluntarily, and intelligently waived them. (*Colorado v. Spring* (1987) 479 U.S. 564, 574 [93 L. Ed.2nd 954, 107 S.Ct. 851].) Law enforcement officers are not required to obtain an express waiver of a suspect’s *Miranda* rights prior to a custodial interview. (See *North Carolina v. Butler* (1979) 441 U.S. 369, 373 [60 L. Ed. 2d 286, 99 S. Ct. 1755] . . . [‘An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver.’].) Rather, a valid waiver of *Miranda* rights may, as here, be inferred from the defendant’s words

and actions. (*Butler*, at p. 373.) As the detectives who interrogated defendant were not required to obtain an express waiver of the right to silence from him, the intentional failure to do so was not a deliberate *Miranda* violation requiring the suppression of his subsequent statements.” (*People v. Cunningham* (2015) 61 Cal.4th 609, 642.)

Defendant was a 16-year old high school student. More importantly, he had been through the system before, having prior arrests for battery, grand theft, unlawful taking of a vehicle, and marijuana possession. The record reflects that defendant was able to understand the detectives’ questions and to provide coherent responses to those questions. Although defendant did not expressly waive his *Miranda* rights during the interview, he did so implicitly by acknowledging that he understood those rights and then voluntarily answering the detectives’ questions without hesitation. The Court therefore ruled that defendant’s implied waiver of his *Miranda* rights was legally valid. (*People v. Jones* (2017) 7 Cal.App.5th 787, 811.)

Caution Advised: The problem with implied waivers, however, is that without an express waiver, a court must then look to the rest of the surrounding circumstances of the custody and interrogation to determine whether or not a suspect actually intended to waive. The result could go either way.

Absent an express waiver, “(a) court should look at whether the minor ‘was exposed to any form of coercion, threats, or promises of any kind, trickery, or intimidation, or that he was questioned or prompted by . . . anyone else to change his mind.’ [Citation]” (*People v. Rios* (2009) 179 Cal.App.4th 491, 500.)

A “lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so.” (*Miranda v. Arizona*, *supra*, at p. 476 [16 L.Ed.2nd at pp. 724-725].)

In *Westover v. United States* (No. 761), one of the three companion cases to *Miranda v. Arizona*, defendant’s conviction was reversed by the Supreme Court despite his being advised of his rights by the FBI because no express waiver had been sought and because defendant had been previously questioned at length (almost 14 hours) by local authorities without a prior admonishment of rights. (See *Miranda v. Arizona*, *supra*, at pp. 494-497 [16 L.Ed.2nd at pp. 735-736].)

“[S]ilence . . . followed by grudging responses to leading questions” tends to indicate a lack of a waiver. (*People v. Johnson* (1969) 70 Cal.2nd 541, 558; *United States v. Hayes* (4th Cir. 1967) 385 F.2nd 375, 378.)

Remaining silent for “several minutes” (which may have been as long as ten minutes) after admonishment *did not* show an intent to waive his rights despite making what otherwise appeared to be voluntary incriminating statements after his silence. (*United States v. Wallace* (9th Cir. 1988) 848 F.2nd 1464, 1475.)

After an advisal of rights, and having defendant acknowledge that he understood each of his rights individually, telling him (without an express waiver) that the detective was then going to, “kind of go back over a lot of these things that we talked about and make sure that again, I understand the right story,” was held to be “sufficient,” “although not ideal, . . .” allowing for the admission of his subsequent confession. The Court did note, however, that, (a)lthough the better practice is to obtain an explicit waiver of *Miranda* rights, an explicit waiver is not required.” (*People v. Delgado* (2018) 27 Cal.App.5th 1092, 1108.)

On Appeal:

When a trial court finds an implied waiver to be valid, the appellate court, whether or not it agrees, seldom reverses the trial judge’s call on this issue finding simply that: “We conclude that the (federal) district (trial) court did not clearly err in finding that the defendant’s conduct” constituted an implied waiver. (See *United States v. Younger* (9th Cir. 2005) 398 F.3rd 1179, 1186.)

An appellate court will review independently the trial court’s legal determinations, evaluating the trial court’s factual findings regarding the circumstances surrounding the defendant’s statements and waivers, and accept the trial court’s resolution of disputed facts and inferences and its evaluations of credibility of the witnesses, if supported by substantial evidence. (*People v. Dykes* (2009) 46 Cal.4th 731, 751-752.)

On review of a trial court’s decision on a *Miranda* issue, the appellate court will accept the trial court’s determination of disputed facts if supported by substantial evidence, but it will independently decide whether the challenged statements were obtained in violation of *Miranda*. (*In re Art T.* (2015) 234 Cal.App.4th 335, 348; citing *People v. Hensley* (2014) 59 Cal.4th 788, 809; *People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033; and *People v. Thomas* (2012) 211 Cal.App.4th 987, 1006.)

Also, a court will apply federal standards in reviewing a defendant’s claim that the challenged statements were elicited from him in violation of *Miranda*. (*People v. Bradford, supra*, at p. 1033.)

On appeal, the determination of a trial court as to the ultimate issue of the voluntariness of a confession is reviewed independently in light of the record in its entirety, including all the surrounding circumstances. (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 534.)

Implied waivers will not always be upheld by an appellate court, even when the trial court had no problem with it. (See *In re T.F.* (2017) 16 Cal.App.5th 202, 211-213, where a criminally unsophisticated, crying, 15-year-old minor, diagnosed with an “intellectual disability,” was told by his interrogator that “*before we talk*” (presuming that the minor would waive his rights), he was going to read him his *Miranda* rights. Under these circumstances, plus the officer mixing in an unrelated discussion of an outstanding warrant, the Court held that the trial court had erred in finding that defendant minor, absent an express waiver, understood what he was giving up.)

Conclusion: An “*express waiver*” should be the rule, with “*implied waivers*” being used where there is some tactical (*yet legal*) reason for doing so.

An express waiver is “*strong proof of the validity of that waiver.*” (*North Carolina v. Butler* (1979) 441 U.S. 369, 373 [60 L.Ed.2nd 292].)

“(G)iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver.” (*Missouri v. Seibert* (2004) 542 U.S. 600, 608-609 [159 L.Ed.2nd 643].)

There is a “*strong presumption against waiver*” and the People must be prepared to meet the “*high standards of proof needed to overcome this presumption.*” (*United States v. Hayes*, *supra*, at p. 377; *North Carolina v. Butler*, *supra*, at pp. 372-373 [60 L.Ed.2nd 291-292].)

Despite finding an implied waiver where defendant had demonstrated his understanding that he could ask for an attorney when he felt the need, and where he was intent upon offering an alibi, the Court noted its displeasure with the officers’ failure to ask for an express waiver in a footnote: “We note that this omission has resulted in the expenditure of unnecessary time and effort by two state courts, a federal district court, and two panels of this court.” (*Terrovona v Kincheloe* (9th Cir. 1990) 912 F.2nd 1176, 1179-1180, fn. 13.)

“[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. [Citations.] This court has always set high standards of proof for the waiver of

constitutional rights [citation], and we re-assert these standards as applied to in-custody interrogation.” (*Miranda v. Arizona*, *supra*, at p. 475 [16 L.Ed.2nd at 724]; but see *Berghuis v. Thompson* (2010) 560 U.S. 370 [130 S.Ct. 2250; 176 L.Ed.2nd 1098], above.)

Chapter 9: Voluntariness After Waiver

Coercive Interrogations:

Rule: An “involuntary statement,” obtained by coercion or offers of leniency, cannot be used against the accused in a criminal proceeding for any purpose. (*Jackson v. Denno* (1964) 378 U.S. 368, 385-86 [84 S.Ct. 1774; 12 L.Ed.2nd 908]; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225 [36 L.Ed.2nd 854, 861]; *People v. Haydel* (1974) 12 Cal.3rd 190; see lengthy discussion concerning various aspects of voluntariness in *People v. Bradford* (1997) 14 Cal.4th 1005, 1024-1046; see also *People v. Jones* (1998) 17 Cal.4th 279, 296; *United States v. Haswood* (9th Cir. 2003) 350 F.3rd 1024; *People v. Spencer* (2018) 5 Cal.5th 642, 674-675; *Balbuena v. Sullivan* (9th Cir. Aug. 17, 2020) 970 F.3rd 1176, __.)

“‘The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles.’ [Citation.]” (*People v. Jimenez* (2021) 72 Cal.App.5th 712, 725; quoting *Lego v. Twomey* (1972) 404 U.S. 477, 485 [30 L.Ed.2nd 618; 92 S. Ct. 619], fn. omitted.)

“An involuntary confession is inadmissible for any purpose, including impeachment.” (*Ibid.*, citing *People v. Bey* (1993) 21 Cal.App.4th 1623, 1627–1628.)

“The due process clauses of the federal and California constitutions bar courts from admitting involuntary confessions. (*Withrow v. Williams* (1993) 507 U.S. 680, 688–689 [123 L.Ed.2nd 407; 113 S. Ct. 1745]; *People v. Boyette* (2002) 29 Cal.4th 381, 411 . . .) To determine whether Rodriguez’s confession was involuntary, we assess the circumstances to see if his will was overborne. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225–226 [36 L.Ed.2nd 854; 93 S.Ct. 2041]; *People v. Boyette*, *supra*, 29 Cal.4th at p. 411.)” (*People v. Rodriguez* (2019) 40 Cal.App.5th 194, 199; rejecting defendant’s argument that by putting an undercover police officer in his jail cell with him, with the officer posing as an older gang member to whom he had to “show respect to, gain respect from, and gain protection from,” resulted in a coerced confession.

Note: The Court did note, however, that, “(d)eference to seniority could be a factor in some factual settings, but we will not embrace this theory as a universal principle based only on anecdotal speculation.” (*Ibid.*)

See also *Balbuena v. Sullivan* (9th Cir. Aug. 17, 2020) 970 F.3rd 1176, __; the Court noting that telling a suspect to speak truthfully does not amount to police coercion, nor does police deception alone, nor is it coercive to recite “potential penalties or sentences,”

including the potential penalties for lying to the interviewer, even when the defendant is a criminally unsophisticated teenager.

“Both the federal and state Constitutions bar prosecutors from introducing into evidence a defendant's involuntary statement to government officials. (*People v. Holloway* (2004) 33 Cal.4th 96, 114) This prohibition bars the admission of an involuntary confession, as well as an involuntary admission. (*People v. Haydel* (1974) 12 Cal.3rd 190, 197. . . .) In determining whether a statement is involuntary, ‘we consider the totality of the circumstances to see if a defendant's choice to confess was not “essentially free” because his will was overborne by the coercive practices of his interrogator.’ (*People v. Spencer* (2018) 5 Cal.5th 642, 672.) Coercive police conduct includes physical violence, threats, direct or implied promises, or any other exertion of improper influence by officers to extract a statement. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176.) The presence of coercion is a necessary, but not always sufficient, predicate to finding a confession was involuntary. (*People v. Caro* (2019) 7 Cal.5th 463, 492.) We also consider other surrounding circumstances apparent from the record, including both the details of the interrogation and the characteristics of the accused. (*Ibid.*)” (*People v. Battle* (2021) 11 Cal.5th 749, 790.)

“When a defendant challenges the admission of a statement on the grounds that it was involuntarily made, the state bears the burden of showing by a preponderance of the evidence that a defendant’s statement was, in fact, voluntary. (See *Linton*, *supra*, 56 Cal.4th at p. 1176.) On appeal, we accept the trial court’s factual findings as to the circumstances surrounding the confession, provided they are supported by substantial evidence, but we review de novo the ultimate legal question of voluntariness. (See *People v. Scott* (2011) 52 Cal.4th 452, 480.)” (*Ibid.*: “On de novo review, (the Court) conclude(d) that (defendant’s) admission was voluntary.”)

““An involuntary confession may not be introduced into evidence at trial.”” (*People v. Hoyt* (2020) 8 Cal.5th 892, 931; quoting *People v. Carrington* (2009) 47 Cal.4th 145, 169.)

Under the federal rule, necessarily followed by California since implementation of **Proposition 8** in June, 1982 (*People v. Cox* (1990) 221 Cal.App.3rd 980, 987; see “*Federal Principles vs. “Independent State Grounds,”* under “*Applicability of the Fifth Amendment to the States*” (Chapter 1), above), a judicial finding that there is a knowing and intelligent waiver of rights or otherwise voluntary confession requires the absence of police over-reaching or coercion. (*Colorado v. Connelly* (1986) 479 U.S. 157 [107 S.Ct. 515; 93 L.Ed.2nd 473].)

“The **Fourteenth Amendment** of the federal Constitution and **article I, section 7** of the California Constitution make ‘inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion.’ [Citation.] The prosecution must prove by a preponderance of the evidence that a defendant freely and voluntarily gave police statements before the statements can be admitted. [Citation.] ‘Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the ‘totality of [the] circumstances.’ [Citation.] The test considers several factors, including any element of police coercion, the length of the interrogation and its location and continuity, and the defendant’s maturity, education, and physical and mental health. [Citation.] The determinative question ‘is whether defendant’s choice to confess was not ‘essentially free’ because his will was overborne.’” (*People v. Suarez* (2020) 10 Cal.5th 116, 157-158, 162-163; quoting *People v. Peoples* (2016) 62 Cal.4th 718, 740.)

General Case Law:

A determination of whether a confession is coerced takes into consideration several factors, “including any element of police coercion, the length of the interrogation and its location and continuity, and the defendant’s maturity, education, and physical and mental health.” (*People v. Peoples* (2016) 62 Cal.4th 718, 740; citing *People v. Massie* (1998) 19 Cal.4th 550, 576.)

Even after a valid waiver is obtained, confessions and admissions may be lost as “*involuntary*” whenever obtained under circumstances where defendant’s “‘*will was overborne*’ or if his confession was *not ‘the product of a rational intellect and a free will . . .*’” (Citations omitted; *People v. Haydel*, *supra*, at p. 198; *People v. Rundle* (2008) 43 Cal.4th 76, 114; *People v. Linton* (2013) 56 Cal.4th 1146, 1167; *In re Elias V.* (2015) 237 Cal.App.4th 568, 576-577; *People v. Villasenor* (2015) 242 Cal.App.4th 42, 71.)

“A confession is involuntary if the influences brought to bear upon the accused were ‘such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined. (*People v. Maury* (2003) 30 Cal.4th 342, 404 . . .) A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. (*People v. McWhorter* (2009) 47 Cal.4th 318, 347 . . .) However, no single factor is dispositive in determining voluntariness . . . rather, courts consider the totality of circumstances. (*People v. Williams* (1997) 16 Cal.4th 635, 661 . . .)” (Internal quotes omitted; *People v. Wall* (2017) 3 Cal.5th 1048, 1065-1066.)

“We have found a confession not ‘essentially free’ when a suspect’s confinement was physically oppressive, invocations of his or her *Miranda* rights were flagrantly ignored, or the suspect’s mental state was visibly compromised.” (*People v. Spencer* (2018) 5 Cal.5th 642, 672.)

“The use of an involuntary confession for any purpose in a criminal or delinquency proceeding violates a defendant’s or minor’s rights under the **Fourteenth Amendment**. [Citation.] [¶] “... A minor can effectively waive his constitutional rights [citations] but age, intelligence, education and ability to comprehend the meaning and effect of his confession are factors in that totality of circumstances to be weighed along with other circumstances in determining whether the confession was a product of free will and an intelligent waiver of the minor’s **Fifth Amendment** rights [citation].” [Citation.] [¶] The federal and state Constitutions both require the prosecution to show the voluntariness of a confession by a preponderance of the evidence. [Citations.] Voluntariness turns on all the surrounding circumstances, “both the characteristics of the accused and the details of the interrogation” [citation]; it does not depend on whether the confession is trustworthy. [Citation.] While a determination that a confession was involuntary requires a finding of coercive police conduct [citations], ““the exertion of any improper influence”” by the police suffices.”” (*In re Elias V.* (2015) 237 Cal.App.4th 568, 576–577) However, ““mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.”” (*In re T.F.* (2017) 16 Cal.App.5th 202, 214; quoting *In re Shawn D.* (1993) 20 Cal.App.4th 200, 210.)

“State and federal constitutional principles prohibit a conviction based on an involuntary confession. (*Lego v. Twomey* (1972) 404 U.S. 477, 483 [30 L. Ed.2nd 618, 92 S. Ct. 619]; *People v. Massie* (1998) 19 Cal.4th 550, 576 [79 Cal. Rptr. 2nd 816, 967 P.2nd 29].) ‘The prosecution has the burden of establishing by a preponderance of the evidence that a defendant’s confession was voluntarily made. [Citations.] In determining whether a confession was voluntary, “[t]he question is whether defendant’s choice to confess was not “essentially free” because his [or her] will was overborne.”’ [Citation.]’ (*People v. Carrington* (2009) 47 Cal.4th 145, 169 [97 Cal. Rptr. 3rd 117, 211 P.3rd 617].) To be considered involuntary, a confession must have resulted from coercive police conduct rather than outside influences. (*Colorado v. Connelly* (1986) 479 U.S. 157, 164–167 [107 S.Ct. 515; 93 L. Ed. 2nd 473, 107 S. Ct. 515].)” (*People v. Winbush* (2017) 2 Cal.5th 402, 452.)

Note: The same rules apply to pre-admonishment setting: The rules described in this section apply equally to an interview of a suspect in a pre-

admonishment, non-custodial setting. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093; see also *United States v. Howard* (4th Cir. 1997) 112 F.3rd 777; and *United States v. Guerrero* (1st Cir. 1997) 114 F.3rd 332, 338-339; Defendant's responses to questions during boarding by the Coast Guard of defendant's ship smuggling contraband, held to be voluntary.)

Although a confession accompanied by physical violence is per se involuntary, whether or not there was any psychological coercion depends upon a consideration of the totality of the circumstances. (*United States v. Haswood* (9th Cir. 2003) 350 F.3rd 1024, 1027.)

Involuntary statements may not be used for any purpose, including impeachment of the defendant's prior conflicting testimony. (*Mincy v. Arizona* (1978) 437 U.S. 385 [57 L.Ed.2nd 290].) See "Voluntariness," under "Waiver of Rights (Chapter 8), above.

E.g.: Ignoring an in-custody defendant's *nine* attempts to invoke his right to an attorney, purposely seeking to obtain statements which would be usable as impeachment evidence, under circumstances where the defendant was young, inexperienced, with minimal education and intelligence, and was deprived of food, water, bathroom facilities, and any contact with non-custodial personnel overnight while remaining in custody, after a promise to help him if he cooperated and a threat that the "system" would "stick it to him" if he didn't, constituted a **Fourteenth Amendment** "due process" violation. The two resulting confessions were held to be inadmissible for any purpose, including impeachment. (*People v. Neal* (2003) 31 Cal.4th 63.)

"It long has been held that the due process clause of the **Fourteenth Amendment** to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. (E.g., *Jackson v. Denno* (1964) 378 U.S. 368, 385-386 [12 L.Ed.2nd 908, . . .]; see, e.g., *Brown v. Mississippi* ((1936) 297 U.S. 278) at pp. 285-286 [80 L.Ed.2nd 682, . . .]); *People v. Weaver* (2001) 26 Cal.4th 876, 920 . . . ; *People v. Benson* (1990) 52 Cal.3rd 754, 778 . . . ; see generally 2 LaFave et al., *Criminal Procedure* (2nd ed. 1999) § 6.2, pp. 441-467.) A statement is involuntary (e.g., *Malloy v. Hogan* (1964) 378 U.S. 1, 7 [12 L.Ed.2nd 653; 84 S.Ct. 1489].) when, among other circumstances, it 'was "extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight"' (*Hutto v. Ross* (1976) 429 U.S. 28, 30 [50 L.Ed.2nd 194, . . .] (by the court); accord, e.g., *Malloy v. Hogan*, *supra*, 378 U.S. at p. 7; *People v. Benson*, *supra*, 52 Cal.3rd at p. 778.) Voluntariness does not turn on any one fact, no matter how

apparently significant, but rather on the “totality of [the] circumstances.’ (*Withrow v. Williams* (1993) 507 U.S. 680, 688-689 [123 L.Ed.2nd 407, . . . ; accord, e.g., *Haynes v. Washington* (1963) 373 U.S. 503, 514 [10 L.Ed.2nd 513, . . .]; *People v. Weaver*, *supra*, 26 Cal.4th at p. 920; *People v. Williams* (1997) 16 Cal.4th 635, 660 . . . ; see generally 2 LaFave et al., Criminal Procedure, *supra*, § 6.2, pp. 441-467.)” (*People v. Neal*, *supra*, at p. 79.)

“The use in a criminal prosecution of a confession, admission or statement which is obtained by force, fear, promise of immunity or reward is a denial of the state and federal constitutional guarantees of due process of law. (*Malloy v. Hogan* (1964) 378 U.S. 1, 7 [12 L.Ed.2nd 653, 685; 84 S.Ct. 1489].)” (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1483.)

“A statement is involuntary if it is not the product of “*a rational intellect and free will.*” [Citation.] The test for determining whether a confession is voluntary is whether the defendant’s ‘will was overborne at the time he confessed.’ [Citation.] “The question posed by the *due process clause* in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were ‘such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined.’ [Citation.]” [Citation.] In determining whether or not an accused’s will was overborn, “an examination must be made of ‘all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.’ [Citation.]” [Citation.]” (Emphasis in original; *People v. Maury* (2003) 30 Cal.4th 342, 404; see also *People v. Smith* (2007) 40 Cal.4th 483, 501.)

Overt physical brutality is not a necessary element of a “*due process*” violation. “Coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.” (*Blackburn v. Alabama* (1960) 361 U.S. 199, 206 [4 L.Ed.2nd 242, 247]; see also *Haynes v. Washington* (1963) 373 U.S. 503 [10 L.Ed.2nd 513].)

“The police are allowed to play on the suspect’s ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible.” (*United States v. Rutledge* (7th Cir. 1990) 900 F.2nd 1127, 1131.)

A “(p)rolonged interrogation in the absence of counsel is inherently coercive. (*Blackburn v. Alabama* (1960) 361 U.S. 199, 206 [4 L.Ed.2nd 242, 247, 80 S.Ct. 274]; (Additional citations omitted.)” (*People v. Alfieri* (1979) 95 Cal.App.3rd 533, 545; see also *Arizona v. Roberson* (1988) 486 U.S. 675, 686 [100 L.Ed.2nd 704, 716].)

While youth (i.e., being a minor) by itself does not invalidate the minor's confession, the age of the minor and his subnormal intelligence are factors to be weighed in determining the voluntariness of his confession.

(*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [36 L.Ed.2nd 854]; *People v. Alfieri*, *supra*.)

Yelling at the defendant, while calling him a liar, even when “in concert with his fragile mental state,” did not reach the level of coerciveness necessary to find his statements involuntary. (*United States v. Santos* (1st Cir. 1997) 131 F.3rd 16, 18-19.)

A parent's “*conflict of interest*” in advising his or her child to cooperate with police, may create a coerciveness sufficient to warrant the suppression of a subsequent confession or admission:

Where an adult who participates in an interrogation of a child suspect is also the parent of the child victim, a “serious conflict of interest” may occur that is a factor to consider in the totality of the circumstances in determining the coerciveness of an interrogation. (*In re I.F.* (2018) 20 Cal.App.5th 735 760-766, 778-779; see also dissent in denial of certiorari in *Little v. Arkansas* (1978) 435 U.S. 957, 959-961 [55 L.Ed.2nd 809, 98 S. Ct. 1590]; finding that such a conflict of interest, rather than providing a rule of suppression as a matter of law, is to be considered as one factor in the totality of the circumstances.

At pages 778-779, the *In re I.F.* Court noted that a father's urging the minor to cooperate with police, placing the minor “on a collision course” with the minor's **Fifth Amendment** rights, and thus contributing to the creation of a coercive atmosphere, far from demonstrated that the interview was noncustodial and would have convinced a reasonable 12 year old that he had no choice but to submit to questioning.

Where the 15-year-old minor's mother was present during the interrogation, but not a victim or even acquainted with the victim, there was no conflict what might have caused the minor to waive his rights. (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 451.)

The Court rejected out of hand defendant's “patronizing assumptions” about the wisdom and life experience of a single mother who worked as a janitor for a modest wage, as relevant to the validity of defendant's waiver. Noting that defendant's mother was rightly concerned that her son

was heading down the wrong track, the Court found this fact to be irrelevant in that it was defendant's understanding of the *Miranda* admonishment to be the only issue, and not the mother's. (*Id.*, at p. 452.)

The Court further rejected the argument that the detective's request to defendant's mother to encourage defendant to give up the names of others who had participated in defendant's crime constituted "coercion," noting that her encouragement to do so failed to achieve the intended results. The detective also, by merely asking why defendant was not in school, did not falsely present himself as a father figure nor did he misrepresent the purpose of the interview. (*Id.*, at pp. 454-455.)

A police interrogator's erroneous comment that California does not have a death penalty was held *not* to constitute an offer of leniency and, under the circumstances, did not induce defendant to confess. (*Benson v. Chappell* (9th Cir. 2020) 958 F.3rd 801, 819.)

Where defendant's interrogator repeatedly told defendant that he did not have to answer any questions, that it was "completely up to (him)," defendant actively engaged in the interview, was calm, voluntarily acting out the murder, and where his "clear understanding of his right to remain silent (was) evidence by his selective refusal to answer certain questions throughout the interview," the officer respecting that choice, defendant's complete confession was held to be voluntary. (*People v. Flores* (2020) 9 Cal.5th 371, 426-428; defendant explaining that he shot his victim for disrespecting his mother.)

After being arrested (taken into custody and handcuffed) in his home during an investigation of a shooting, during which officers used the ram of an Emergency Response Unit's rescue vehicle to open the door, defendant was taken to an unmarked police car and unhandcuffed. Told 45 minutes later that illegal firearms were found in his home, he was also told that he was not under arrest despite his stated belief that he was. Defendant made incriminating statements at this point. After being advised of his rights, defendant indicated "Not really" when asked if he wished to waive his rights, but continued on with the interview anyway, further incriminating himself. Three hours later, defendant was finally arrested. Despite these circumstances, defendant's motion to suppress his statements was denied; the denial being upheld by the Eighth Circuit Court of Appeal. The Appellate Court concluded that the officers' assurances to defendant that he was not under arrest and his decision not to terminate the interview suggested that defendant knew that he had the ability to exercise his free will and that he was not restrained to the degree

associated with a formal arrest. Defendant also argued that his statements were involuntary because the officers: (1) pressured him to cooperate by offering to help him avoid eviction if he cooperated; (2) made it clear the only way to avoid arrest and potential prosecution as a shooter was to cooperate; (3) confronted him with the possibility of federal charges and losing his children and his job; (4) and halted the arrest process during the interrogation because defendant “had more he wants to say.”

Acknowledging that a person’s statements to police officers will be deemed involuntary when they are obtained by “threats, violence, or express or implied promises sufficient to overbear the defendant’s will and critically impair his capacity for self-determination,” the Court held here that none of the tactics utilized by the officers amounted to improper threats or promises that overbore defendant’s will. As the officers testified, they believed that defendant merely drove the vehicle the night of the shooting but did not shoot the victim himself. As a result, in the interview, they tried to persuade him to become a witness against the shooters and put psychological pressure on him to do so. The court concluded that defendant understood his rights and carefully weighed the risks and benefits of incriminating cooperation throughout the protracted interview, showing that his will was not overcome at any point. As such, his statements were not involuntary. (*United States v. Roberts* (8th Cir. 2020) 975 F.3rd 709.)

“‘A coercive interrogation exists when the totality of the circumstances shows that the officer's tactics undermined the suspect's ability to exercise his free will,’ rendering his statements involuntary.” (*Tobias v. Arteaga* (9th Cir. 2021) 996 F.3rd 571, 581; quoting *Cunningham v. City of Wenatchee* (9th Cir. 2003) 345 F.3rd 802, 810.)

In a case where the defendant was convicted of multiple counts of lewd acts upon a child under the age of 14 and additional sexual offenses, the trial court’s ruling under **Evid. Code § 352**, to exclude a defense expert’s testimony about defendant’s susceptibility possible coercion and to give a false confession was an abuse of discretion, given the testimony’s probative value to the defense and the lack of any countervailing reason to exclude the evidence. The proffered defendant-specific testimony was clearly relevant to whether defendant’s statements to the arresting officer were reliable, and nothing in the record supported a determination that it would have wasted time or confused or misled the jury. However, the error in excluding the testimony was held to be harmless under the circumstances. The prosecution was not a close case. The two victims testified about the abuse, and each had previously revealed the abuse to a close friend. The jury also listened to a recording of the pretext call in which defendant admitted to one of the victims that he molested her. Defendant, therefore, was not denied the right to present a defense by the

exclusion of part of the expert's proffered testimony. (*People v. Caparaz* (June 30, 2022) __ Cal.App.5th __, __ [2022 Cal.App. LEXIS 579].)

Coercive Psychological Ploys:

"In assessing allegedly coercive police tactics, '[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' (*People v. Ray* (1996) 13 Cal.4th 313, 340.)" (*People v. Smith* (2007) 40 Cal.4th 483, 501.)

However, *after* an admonishment and waiver, and after the officer described the facts of the case as he believed them to be, exhorting defendant to tell his "side of the story," and telling him that if "(y)ou don't take this chance right now, you may never get it again. And if you don't think I can't prove this case, if you don't think I can't fry you, you're sadly mistaken, Chris. Now, don't let these guys lay it all on you 'cause that's what's happening. You get a chance to lay some back and say exactly what happened. Whose idea was it?", was held to be a proper interrogation tactic, and not coercion. (*People v. Spencer* (2018) 5 Cal.5th 642, 671-674.)

References to One's Children:

Defendant's confession was held to be involuntary in light of his limited education, relatively young age (twenty-one years), repeated references to his unborn child, and lengthy custodial interrogation. (*Brown v. Horell* (9th Cir. 2011) 644 F.3rd 969, 980-982.)

"(T)he Ninth Circuit has previously concluded that '[t]he relationship between parent and child embodies a primordial and fundamental value of our society.' *United States v. Tingle*, 658 F.2nd 1332, 1336 (9th Cir. 1981). When interrogators 'deliberately prey upon the maternal [or paternal] instinct and inculcate fear in a [parent] that [he or] she will not see [his or] her child in order to elicit "cooperation," they exert the "improper influence" proscribed by *Malloy [v. Hogan]*, 378 U.S. 1, 7, 84 S.Ct. 1489, 12 L. Ed. 2d 653 (1964)].'" (*Id.*, at p. 980; citing *Tingle*, 658 F.2nd at 1336.")

"The Supreme Court has twice before addressed the admissibility of confessions extracted through threats or promises relating to a suspect's children. In *Haynes v. Washington*, the Court ruled that a written confession was coerced and involuntary where the police obtained it through the 'threat of continued incommunicado detention' if the suspect did not confess and the 'promise of

communication with and access to family’ if he did. 373 U.S. 503, 514, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); *see also Hutto v. Ross*, 429 U.S. 28, 30, 97 S. Ct. 202, 50 L. Ed. 2d 194 (1976) (per curiam) (holding that confessions “‘obtained by any direct or implied promises, however slight’” may be involuntary (quoting *Bram v. United States*, 168 U.S. 532, 542-43, 18 S. Ct. 183, 42 L. Ed. 568 (1897))). Similarly, in *Lynum v. Illinois*, the Supreme Court found that it was ‘abundantly clear that the petitioner’s oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not “cooperate.”’ 372 U.S. 528, 534, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963). The Court held ‘that a confession made under such circumstances must be deemed not voluntary, but coerced.’ *Id.* (*Id.*, at pp. 979-980.)

In *Balbuena v. Sullivan* (9th Cir. Aug. 17, 2020) 970 F.3rd 1176, at pp. ___ - ___, however, the Ninth Circuit held that defendant’s interrogator’s reference to being able to see his as yet unborn baby (i.e., “*so maybe you can be there for your kid in a few years.*” p. ___.) did not affect defendant at all, and did not cause the Court to find that his confession had been coerced. Specifically, “the video recording reveals that the tone of the interview was non-threatening. (Defendant) spoke easily with the detectives, displayed a calm demeanor with no indication of fear or intimidation, and did not react when the detectives referred to his unborn child. He even spontaneously offered to show the detectives his tattoo. The interview lasted ninety minutes, including breaks and an approximately thirty-minute period when (defendant) was left alone in the room. The same two detectives conducted the interview and (defendant) was not subjected to ‘tag team’ questioning, nor was he surrounded by multiple officers. (Defendant) sat in a chair next to a table in a relaxed posture with his hands behind his head or with one arm slung over the back of chair for a large portion of the interview. About an hour into the interview, (defendant) yawned and leaned on the table when the detectives left the room, but he returned to a more upright posture and alternated between leaning on the table and sitting upright for the remainder of the interview.”

Threatening to charge defendant’s two young sons (ages 14 and 17) with murder if he didn’t confess to a homicide resulted in the Court finding that defendant’s subsequent confession was involuntary, having been coerced under these circumstances. (*People v. Jimenez* (2021) 72 Cal.App.5th 712.)

Reasons for Excluding Coerced Confessions: “Coerced confessions are excluded as evidence . . . ;

. . . because they are inherently untrustworthy (see e.g., *Spano v. New York* (1959) 360 U.S. 315, 320 [3 L.Ed.2nd 1265, 1269-1270, 79 S.Ct. 1202]; *Stein v. New York* (1953) 346 U.S. 156, 192 [97 L.Ed.2nd 1522, 1546-1547, 73 S.Ct. 1077]; *Lyons v. Oklahoma* (1944) 322 U.S. 596, 605 [88 L.Ed. 1481, 1487] and . . .

. . . because their use degrades our system of justice. (See *Escobedo v. Illinois* (1964) 378 U.S. 478, 488-490 [12 L.Ed.2nd 977, 984-986, 84 S.Ct. 1758].)” (*People v. Montano* (1991) 226 Cal.App.3rd 914, 940.; see also *Rogers v. Richmond* (1961) 365 U.S. 534, 540-541 [5 L.Ed.2nd 760, 766-767].); and

“(E)ven if reliable, a free society cannot condone police methods that outrage the rights and dignity of a person whether they include physical brutality or psychological coercion.” (*People v. Castillo* (1997) 53 Cal.App.4th 416, 430; citing *People v. Anderson* (1980) 101 Cal.App.3rd 563, 574-576, and *People v. Garner* (1961) 57 Cal.2nd 135, 156.)

“*Due process*,” not the actual truth or falsity of the defendant’s statements, is the issue. (*Rogers v. Richmond*, *supra*.)

Other Products of Coerced Confessions: Other evidence recovered as a product of a coerced (i.e., involuntary) admission (or confession), as a **Fourteenth Amendment** “*due process*” violation, is also *inadmissible*. (*People v. Haydel* (1974) 12 Cal.3rd 190, 201; *People v. Gordon* (1978) 84 Cal.App.3rd 913, 923-927.)

But see “*The Issue of the Intentional Miranda Violation*,” under “*Impeachment*,” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

However, where an involuntary confession discloses other evidence, such evidence may be admitted if the prosecution is able to prove an *independent source* of the evidence. (*Murphy v. Waterfront Commission* (1964) 378 US 52, 79, fn. 18 [84 S.Ct. 1594; 12 L.Ed.2nd 678, 695].)

Test: “The test for the voluntariness of a custodial statement is whether the statement is ““the product of an essentially free and unconstrained choice”” or whether the defendant’s ““will has been overborne and his capacity for self-determination critically impaired”” by coercion. (*People v. Cunningham* (2015) 61 Cal.4th 609, 642; quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225 [36 L. Ed. 2d 854, 93 S. Ct. 2041].)

“(I)n enforcing the **Fourteenth Amendment**, [it is impossible] to attempt precisely to delimit . . . the power of interrogation allowed to state law enforcement officers in obtaining confessions[; n]o single litmus-paper test for constitutionally impermissible interrogation has been evolved.”

Rather, the only “clearly established test [is that of] voluntariness.” (*Culombe v. Connecticut* (1961) 367 U.S. 568, 601-602 [6 L.Ed.2nd 1037].)

Burden of Proof:

The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176; citing *People v. Carrington* (2009) 47 Cal.4th 145, 169; *People v. Winbush* (2017) 2 Cal.5th 402, 452; *People v. Wall* (2017) 3 Cal.5th 1048, 1966; *People v. Hoyt* (2020) 8 Cal.5th 892, 931.)

Factors:

In determining voluntariness, the courts will look to the “*totality of the circumstances*,” examining both the characteristics of the accused and the details of the interrogation.” (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1484; see also *Withrow v. Williams* (1993) 507 U.S. 680 [123 L.Ed.2nd 407]; *United States v. Haswood* (9th Cir. 2003) 350 F.3rd 1024 1027; and **18 U.S.C. § 3501(b)**.) This will necessarily include:

- The length, location and continuity of the detention and the interrogation;
- The suspect's maturity, education, physical condition and mental health;
- Whether the *Miranda* warnings were given; *and*
- Whether the suspect was aware of the nature of the offense with which he is being charged.

See also *People v. Haley* (2004) 34 Cal.4th 283, at p. 299, where the California Supreme Court noted that voluntariness involves a consideration of the following factors:

- The existence of police coercion.
- The length of the interrogation.
- Its location.
- Its continuity.
- Defendant’s maturity.
- Defendant’s educational level.
- Defendant’s physical condition.
- Defendant’s mental health.

And see *People v. Dykes* (2009) 46 Cal.4th 731, 752:

- Whether or not the defendant was coerced by the police;

- The length of the interrogation;
- Its location; *and*
- Its continuity.

Also to be considered are the defendant's:

- Maturity;
- Education;
- Physical condition; *and*
- Mental health.

(See also *People v. Villasenor* (2015) 242 Cal.App.4th 42, 71; and *People v. Winbush* (2017) 2 Cal.5th 402, 452.)

- The youth of the accused;
- His intelligence;
- The lack of any advice to the accused of his constitutional rights;
- The length of detention;
- The repeated and prolonged nature of the questioning; *and*
- The use of physical punishment such as the deprivation of food or sleep.

(*Tobias v. Arteaga* (9th Cir. 2021) 996 F.3rd 571, 581; citing *United States v. Haswood* (9th Cir. 2003) 350 F.3rd 1024, 1027.)

The *Tobias* Court also notes that “(a)ny suggestion by a law enforcement officer ‘that a suspect’s exercise of the right to remain silent may result in harsher treatment by a court or prosecutor’ is unconstitutionally coercive.” quoting *United States v. Harrison* (9th Cir. 1994) 34 F.3rd 886, 891-892. (*Ibid.*)

Threats, or direct or implied promises of leniency are also an issue. (See below)

“The presence of police coercion is a necessary, but not always sufficient, element. (Citation.) We also consider other factors, such as the location of the interrogation, the interrogation's continuity, as well as the defendant's maturity, education, physical condition, and mental health. (Citation.)” (*People v. Caro* (2019) 7 Cal.5th 463, 492; citing *People v. Williams* (2010) 49 Cal.4th 405, 437.)

See also *People v. Linton* (2013) 56 Cal.4th 1146, 1168-1169, where the Court determined that the alleged “*repetitive nature*” of the questions asked, the length of the interrogation (two and a quarter hours, with multiple breaks between sessions), and defendant’s personal psychological characteristics (20 years old but looked to be 15, lived with his parents,

unemployed, no driver's license, learning disabilities, no experience in the criminal justice system, and suffered from depression, anxiety, and headaches, possible attention deficit disorder, and a history of methamphetamine and marijuana use) did not constitute coercion.

Continuing an interrogation after defendant's repeated requests to be taken home, held in the decision to be an unequivocal invocation of his right to silence and thus a violation of *Miranda*, was held not to constitute coercion. (*People v. Villasenor* (2015) 242 Cal.App.4th 42, 71-72; "Assuming, without deciding, that a *Miranda* violation alone may rise to the level of 'coercive police tactics' in an appropriate case, in this case, the violation was not so coercive [as to] produce a statement that is both involuntary and unreliable." Internal quotes deleted.)

Causation:

It must be shown that a police officer's coercive tactics (an implied offer of leniency in this case) was the motivating cause of the defendant's confession; i.e., there must be a causal connection. (*People v. Linton* (2013) 56 Cal.4th 1146, 1167-1178; detective's assertions that admitting a prior attempted sexual assault was "water under the bridge," and not punishable, found not to be the motivating cause of the defendant's later admission to having attempted to rape a homicide victim.)

A defendant's statements are not subject to suppression where it is apparent that any deception used or possible offers of leniency failed to be the motivating factor, as evidenced by his continual denial of culpability and his eventual invocation of his right to counsel. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1088.)

Implying that defendant "would only 'do a little time in camp' if he admitted his involvement in the shootings" was held not to be the motivating cause of the few incriminating statements that defendant did make. (*People v. Jones* (2017) 7 Cal.App.5th 787, 812-813.)

However, where an involuntary confession discloses other evidence, such evidence may be admitted if the prosecution is able to prove an *independent source* of the evidence. (*Murphy v. Waterfront Commission* (1964) 378 US 52, 79, fn. 18 [84 S.Ct. 1594; 12 L.Ed.2nd 678, 695].)

Due Process:

The use in a criminal prosecution of a confession, admission, or statement which is obtained by *force, fear, promise of immunity or reward* is a denial of the state and federal constitutional guarantees of due process of

law (**Fourteenth** and **Fifth Amendments**, respectively). (*Malloy v. Hogan* (1964) 378 U.S. 1, 7 [84 S.Ct. 1489; 12 L.Ed.2nd 653, 658].)

No person may be denied their right to life, liberty or property without “*due process of law*.” (**U.S. Const., Fifth** (as applied to the federal government) and **Fourteenth** (as applied to the states) **Amendments**.)

In determining “*voluntariness*,” a court must use applicable standards under the **Fifth** and **Fourteenth Amendments**’ “*Due Process*” clauses. (*People v. Boyette* (2002) 29 Cal.4th 381, 411; *Doody v. Ryan* (9th Cir. 2011) 649 F.3rd 986, 1008-1021.)

“A confession is involuntary under the federal and state guaranties of due process when it has been extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence.” (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 534.)

“(I)n enforcing the **Fourteenth Amendment**, [it is impossible] to attempt precisely to delimit . . . the power of interrogation allowed to state law enforcement officers in obtaining confessions[; n]o single litmus-paper test for constitutionally impermissible interrogation has been evolved.” Rather, the only “clearly established test [is that of] voluntariness.” (*Culombe v. Connecticut* (1961) 367 U.S. 568, 601-602 [6 L.Ed.2nd 1037].)

However, it is the **Fifth Amendment** right against self-incrimination, as opposed to the **Fourteenth Amendment**’s “more generalized notion of substantive due process,” that is implicated when it is the use of a coerced confession in trial that is the issue. (*Hall v. City of Los Angeles* (9th Cir. 2012) 697 F.3rd 1059, 1068.)

Also, threatening a suspect with the potential to file felony charges for covering for another (her son, in this case), where such charges are in fact a potential result, is not “coercion,” and does not make inadmissible the suspect’s incriminating responses. (*United States v. McNeal* (10th Cir. Colo. 2017) 862 F.3rd 1057.)

Detectives telling defendant during an interrogation that they would be “*precluded*” from talking to him again if he chose to take a break until the next day and he spoke with a lawyer—that they would not be able to speak with him again, “*period*,”—“was certainly an exaggeration” The court noted that represented suspects can, of course, speak with law enforcement officials if they choose, and that it was unclear whether the detectives intended to deceive defendant on this point. “(W)hat the

detectives may have meant to convey is that a lawyer would likely advise against speaking with detectives, meaning that, from their perspective, they almost certainly would not have another opportunity to speak with defendant.” Defendant contended that the detectives' statements were deceptive and that their deception undermined the voluntariness of his statements. The Court held, however, that “(w)hile the use of deception or communication

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information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness.” (citing *People v. Hogan* (1982) 31 Cal.3rd 815, 840–841. Here, however, the detectives had previously reminded defendant that he had the right to remain silent and the right to speak with a lawyer. Defendant responded to the exchange by asking for clarification about when a lawyer would contact him, then went on to ask whether he had been helpful to the detectives, and the conversation continued from there. Based upon this, the record does not support defendant’s claim that he was coerced into continuing to speak with detectives after he had asked for a break. (*People v. Hoyt* (2020) 8 Cal.5th 892, 934.)

On Appeal:

The trial court’s resolution of disputed facts and inferences, its evaluation of credibility, and its findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence. (*People v. Dykes* (2009) 46 Cal.4th 731, 752-753.)

On appeal; “when a reviewing court considers a claim that a confession has been improperly coerced, if the evidence conflicts, the version most favorable to the People must be relied upon if supported by the record.” (*People v. McWhorter* (2009) 47 Cal.4th 318, 357; *People v. Tully* (2012) 54 Cal.4th 952, 993.)

Specific Issues Affecting or Involving Voluntariness:

General Rule:

The administration of drugs, physical or psychological coercion, threats, and/or offers of leniency, whether express or implied, will invalidate a resulting confession as a due process violation, as will any other action by law enforcement, considering the “totality of the circumstances, that is reasonably likely to overbear a defendant’s will, or otherwise cause an untrue statement, even though the defendant was properly admonished and waived his *Miranda* rights. (See *Schneckloth v. Bustamonte* (1973) 412

U.S. 218, 226 [36 L.Ed.2nd 854, 862]; **Moran v. Burbine** (1986) 475 U.S. 412, 421 [106 S.Ct. 1135; 89 L.Ed.2nd 410, 420-421]; **Blackburn v. Alabama** (1960) 361 U.S. 199, 206 [4 L.Ed.2nd 242, 247]; **Arizona v. Roberson** (1988) 486 U.S. 675, 686 [100 L.Ed.2nd 704, 716]; **People v. McWhorter** (2009) 47 Cal.4th 318, 346-347; **People v. Duff** (2014) 58 Cal.4th 527, 555-556; **People v. Cunningham** (2015) 61 Cal.4th 609, 642-643.)

Issues:

Administration of Drugs or Use of a “Truth Serum:”

The recent use of drugs, or introducing “*tongue-lessening drugs*” into the defendant's system, may make any resulting statement involuntary. (**Townsend v. Sain** (1963) 372 U.S. 293 [83 S.Ct. 745; 9 L.Ed.2nd 770].)

Alcohol:

Defendant's consumption of alcohol did not so impair his reasoning that “he was incapable of freely and rationally choosing to waive his rights and speak with the officers.” (**People v. Frye** (1998) 18 Cal.4th 894, 988.)

Mental State of the Defendant:

Defendant, who throughout the lengthy interview sounded lucid, spoke clearly if somewhat slowly, and at times “engaged in animated, jocular, prideful, indignant or defiant conversation” with the detectives, was not mentally impaired when he made his audiotaped statement. (**People v. Mayfield** (1993) 5 Cal.4th 142, 204.)

Defendant suffering from PTSD (Post Traumatic Syndrome Disorder) held not to affect the voluntariness of his confession. (**People v. Cunningham** (2015) 61 Cal.4th 609, 645:

“(D)efendant's incriminating statements were not rendered involuntary by any mental disease or defect. Even if some of defendant's behavior was irrational or bizarre, there is no evidence his ‘abilities to reason or comprehend or resist were in fact so disabled that he was incapable of free or rational choice;’” quoting **In re Cameron** (1968) 68 Cal.2nd 487, 498.)

Threats, sufficient to *overcome the will* of the defendant, may invalidate any resulting statements. (**People v. Brommel** (1961) 56 Cal.2nd 629; threatening to inform the judge that the defendant was a liar.)

Threatening the “*death penalty*,” particularly when the person’s crime is a capital case, is likely to be held to be an unlawful threat. (*People v. McClary* (1977) 20 Cal.3rd 218, 229.)

However, “(a)lthough confessions procured by threats of prosecution for a capital crime have been held inadmissible (*People v. Thompson* (1990) 50 Cal.3rd 134, 169.), mere ‘[r]eference to the death penalty does not necessarily render a statement involuntary.’ (*People v. Williams* (2010) 49 Cal.4th 405, 443.) A constitutional violation arises ‘only where the confession results directly from the threat [capital] punishment will be imposed if the suspect is uncooperative, coupled with a “promise [of] leniency in exchange for the suspect’s cooperation” [citation].’ (*People v. Holloway* (2004) 33 Cal.4th 96, 116.)” (*People v. Winbush* (2017) 2 Cal.5th 402, 453.)

Also, where the officer brought up the death penalty—remarking only that, “(If you don’t think I can’t fry you, you’re sadly mistaken”—the statement was made in isolation and the defendant did not appear cowed by the remark, it was held that this did *not* constitute coercion. (*People v. Spencer* (2018) 5 Cal.5th 642, 675.)

Police threats to jail a minor if he lied, but promised a citation if he told the truth, was improper. (*In re J. Clyde K.* (1987) 192 Cal.App.3rd 710, 716.)

Police told defendant that “the system (was) going to stick it to (him) as hard as they can,” and that refusing to cooperate was only going to earn him a heavier charge. (*People v. Neal* (2003) 31 Cal.4th 63, 68, 73.)

Threatening to take one’s children away from him or her will likely result in the later confession being held to be involuntary. (*Lynnum v. Illinois* (1963) 372 U.S. 528 [9 L.Ed.2nd 922]; *United States v. Tingle* (9th Cir. 1981) 658 F.2nd 1332, 1335-1337.)

Telling a suspect that his lack of cooperation will be reported to the prosecutor may be improper, in that every criminal suspect has a constitutional right not to cooperate. (*United States v. Tingle*, *supra*, at p. 1336, fn. 5.)

Telling defendant that they were going to arrest and book him for murder after he asked for an attorney, if this threat was not what motivated him to ask to continue the interview, does not make his

resulting statements involuntary. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1095-1096.)

However, loud, aggressive interrogative techniques, at least within limits so as to not constitute a threat, will not necessarily invalidate the defendant's resulting statements. (*In re Joe R.* (1980) 27 Cal.3rd 496, 515; use of loud, aggressive accusations of lying, held to be proper under the circumstances.)

Also: Informing a child molest suspect that lying to a federal officer was a crime for which he could be separately punished, in an otherwise routine interrogation, is *not* a coercive tactic such as would invalidate a the suspect's confession that followed. (*United States v. Haswood* (9th Cir. 2003) 350 F.3rd 1024.)

A threat made to defendant by another prison inmate, prompting defendant to ask for protection, and admitting to prison officials that the reason why he had been threatened is that he had “killed two Hispanics” (the mother and sister of the inmate who made the threat), using this admission against defendant in his trial for the victims' murder was not error. The prison officials did not make the threat, nor did they capitalize on the inmate's threat because they had no idea at the time why the threat had been made. (*People v. Williams* (2013) 56 Cal.4th 165, 183-186.)

It was further held that the inmate who made the threat was not an agent of law enforcement in that although he had earlier been assisting prison officials with interviewing new inmates, he'd been relieved of that position by the time the threat had been made and acted solely on his own initiative. (*Id.*, at p. 184.)

Threatening a suspect with the potential to file felony charges for covering for another (her son, in this case), where such charges are in fact a potential result, is not “coercion,” and does not make inadmissible the suspect's incriminating responses. (*United States v. McNeal* (10th Cir. Colo. 2017) 862 F.3rd 1057.)

The officers' reminders to defendant that the penalty for causing his infant child's death was severe, their threat to arrest him immediately if he did not “explain what happened” (by promising not to immediately arrest him if he did), and their reminder that he and his girlfriend were “looking at going to jail” for the baby's death, was held to have *not* violated due process. “Law enforcement does not violate due process by informing a suspect of the likely consequences of the suspected crimes or of pointing out

the benefits that are likely to flow from cooperating with an investigation.” (*People v. Orozco* (2019) 32 Cal.App.5th 802, 820.)

The Court found the officers’ promise not to arrest defendant immediately if he confessed, inferring that a confession would lead to his release, presented a “closer question.” However, absent a “causal link” between that promise to give defendant a temporary reprieve from custody if he confessed, there was no due process violation “for the simple reason that that promise did not produce any confession.” To the contrary, defendant steadfastly stuck to his initial denials and did not confess until pressured by his girlfriend to tell her what had happened. (*Id.*, at pp. 820-821.)

A police interrogator’s erroneous comment that California does not have a death penalty was held *not* to constitute an offer of leniency and, under the circumstances, did not induce defendant to confess. (*Benson v. Chappell* (9th Cir. 2020) 958 F.3rd 801, 819.)

The Ninth Circuit Court of appeals set down a “bright-line rule in *United States v. Harrison* (9th Cir. 1994) 34 F.3rd 886, 891-892: “There are *no* circumstances in which law enforcement officers may suggest that a suspect’s exercise of the right to remain silent may result in harsher treatment by a court or prosecutor.”

Under this clearly established law, the detective in *Tobias v. Arteaga* violated the 13-year-old minor’s **Fifth Amendment** rights when he repeatedly threatened the minor with the assertion that the court would consider the minor to be a “cold blooded killer” and “might throw the book at [him]” if he did not confess. (See *Tobias v. Arteaga* (9th Cir. 2021) 996 F.3rd 571, 582.)

Other detectives, who did not themselves make such threats, still “may have had a duty to intercede to stop the constitutional violation and would not be entitled to qualified immunity.” (*Id.*, at p. 583.)

“By 2013, we had clearly established that ‘police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen.’ *Cunningham v. Gates*, 229 F.3rd 1271, 1289 (9th Cir. 2000) (quoting *United States v. Koon*, 34 F.3rd 1416, 1447 n.25 (9th Cir. 1994), . . . If an officer fails to intercede, ‘the constitutional

right violated by the passive defendant is analytically the same as the right violated by the person who performed the offending action. **Koon**, 34 F.3rd at 1447 n.25.” (*Id.*, at pp. 583-584.)

Threats To Others:

Threats to Close Family Members:

The police may not use the threat of imprisoning a relative to coerce a defendant into confessing. (**People v. Mellus** (1933) 134 Cal.App. 219, 225.)

Police told defendant if he confessed, his wife would be released to care for their children. (**People v. Trout** (1960) 54 Cal.2nd 576, 580.)

Police told defendant unless he confessed, they would take him and his wife to jail and their children would go to juvenile hall. (**People v. Rand** (1962) 202 Cal.App.2nd 668, 674.)

Promising to not charge defendant’s wife with the possession of drugs if defendant turned over drugs that officers suspected were somewhere in his house was held to have resulted in a coerced, involuntary confessions. “A confession secured by a promise of reward or other inducement cannot be received into evidence. [Citation.] . . . Clearly, defendant’s admission that he possessed narcotics in addition to those sold to the informer, and defendant’s delivery of these additional narcotics to the officers, were induced by the promise that, if he did so, his wife would be released and not prosecuted.” (**People v. Manriquez** (1965) 231 Cal.App.2nd 725, and at pg. 730.)

Threats to arrest a suspect’s family members can render a confession involuntary. (**People v. Weaver** (2001) 26 Cal.4th 876, 920.)

Police told defendant unless she cooperated her children would be taken and strangers would have them. (**Lynnum v. Illinois** (1963) 372 U.S. 528, 531-532 [9 L.Ed.2nd 922, 925].)

Sheriff threatened to lock up defendant’s mother unless he confessed. (**People v. Mellus** (1933) 134 Cal.App. 219, 224-226.)

The threat of an officer to “bring the rest of the family in” which was expressly made in order to, and did, induce defendant to “tell us where the jewelry was,” was improper. “A confession coerced by a threat to arrest a near relative is not admissible.” (*People v. Matlock* (1959) 51 Cal.2nd 682, 697.)

Pressure applied to defendant (by private security guards) to cooperate in order to obtain the release from custody of his wife and child. (*People v. Haydel* (1974) 12 Cal.3rd 190, 201.)

Threats made to arrest defendant’s girlfriend. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 212; see below.)

Threatening to hold in custody and charge with murder defendant’s two sons until it could be determined what had happened was held (in a two-to-one decision) to be a threat that made defendant’s confession coerced, and inadmissible. (*People v. Jimenez* (2021) 72 Cal.App.5th 712.)

The Court noted (at pg. 716) that “(t)here is an exception to this general rule when the police have probable cause to charge the relative. In other words, when it is simply a fact that they could charge the relative, it is not unduly coercive to point that out.” However, the exception was not applicable in this case, there being no probable cause to arrest defendant’s two sons.

It was also noted in *Jimenez* that “where no express or implied promise or threat is made by the police, a suspect’s belief that his cooperation will benefit a relative will not invalidate an admission.” [Citations.]” (*Ibid.*; quoting *People v. Steger* (1976) 16 Cal.3rd 539, 550.)

Exceptions:

Not all discussions about the potential criminal liability of family members and/or “significant others” will make defendant’s statements involuntary. (E.g.; see *People v. Ray* (1966) 13 Cal.4th 313, 339-340.)

Where there is reason to believe that defendant's wife was in fact involved in defendant's crime, intimating that she was subject to arrest absent defendant providing evidence of her lack of involvement was held *not* to have resulted in a coerced confession. (*People v. Boggs* (1967) 255 Cal.App.2nd 693.)

“The fact that the confession of Boggs may have been motivated by a desire to clear his wife does not render his confession inadmissible unless the uncontradicted facts show that the police held Mrs. Boggs in custody for the purpose of securing a confession from Boggs.” (*Id.*, at p. 701; noting that there was evidence supporting the detective's belief that defendant's wife was in fact involved.)

Promise to let defendant's wife go if he gave a truthful and detailed confession was not coercive, in part because “there were reasonable grounds for the detention of defendant's wife” as an accessory. (*People v. McWhorter* (2009) 47 Cal.4th 318, 352-358.)

Officer's statement that he would not release the defendant's girlfriend “unless something else comes forward that can show that she's totally uninvolved” was held *not* to be coercive, in part because the police had reasonable grounds to detain her as an accessory. (*People v. Thompson* (1990) 50 Cal.3rd 134, 160, 167-169 & 168, fn. 13.)

Threat to prosecute defendant's wife was not coercive, in part because “there were reasonable grounds for the detention of defendant's wife” (*People v. Jackson* (1971) 19 Cal.App.3rd 95, 100-101.)

Comments to defendant about mending his relationship with his children was not a threat of prosecution of his children or other harm if he failed to confess. (*People v. Molano* (2019) 7 Cal.5th 620, 663.)

See *People v. Jimenez* (2021) 72 Cal.App.5th 712, at p. 716: “There is an exception to this general rule when the police have probable cause to charge the relative. In other words, when it is simply a fact that they could charge the relative, it is not unduly coercive to point that out.” However, the

exception was not applicable in this case, there being no probable cause to arrest defendant's two sons.

Other federal Circuit Courts of Appeal have similarly held:

Threatening to seize defendant's mother's house because cocaine was found in it did *not* amount to coercion, and was no more than truthfully explaining to him the potential legal consequences of the discovery of the drugs. (*Patterson v. United States* (8th Cir. 1998) 133 F.3rd 645.)

Where "the police . . . threatened to arrest [the defendant] and his girlfriend if he asked for an attorney or exercised his right to remain silent, . . ." the Court held that the resulting confession was *not* involuntary, because "[t]he police had probable cause to arrest them both. . . . An objectively unwarranted threat to arrest or hold a suspect's paramour, spouse, or relative without probable cause could be the sort of overbearing conduct that society discourages by excluding the resultant statements. [Citation.] But a factually accurate statement that the police will act on probable cause to arrest a third party unless the suspect cooperates differs from taking hostages. [Citation.]" (*United States v. Miller* (7th Cir. 2006) 450 F.3rd 270, 272-273.)

The Sixth Circuit Court of Appeal has held that "whether the threat to prosecute [the defendant's half-sister] was coercive turns on the issue of whether the threat could have been lawfully executed." Reviewing the evidence, the Court concluded that "the police officers . . . ha[d] probable cause to arrest [the half-sister]." The threat therefore was not "objectively coercive." (*United States v. Johnson* (6th Cir. 2003) 351 F.3rd 254, 260-263.)

See also *Thompson v. Haley* (11th Cir. 2001) 255 F.3rd 1292, 1297: "(W)hether a threat to prosecute a third party [i]s coercive depends upon whether the state had probable cause to believe that the third party had committed a crime at the time that the threat was made."

A confession induced by threat to arrest the defendant's wife was not involuntary where there was probable cause to arrest her. (*Allen v. McCotter* (5th Cir. 1986) 804 F.2d 1362, 1364.)

Other States:

“It is widely accepted that a threat by law enforcement to arrest an accused's family member is not coercive if there is probable cause to arrest the family member. [Citations.]” (*State v. Grimes* (2015) 23 Neb.App. 304, 316–317 [870 N.W.2d 162].)

Offers of Leniency:

Rule: For an interrogator to in effect “*plea bargain*” with a defendant, offering him or her some benefit in exchange for either a waiver of rights or to confess after a valid waiver, raises some serious issues and may, depending upon the circumstances, invalidate a resulting confession

Offering a benefit to a person in exchange for their cooperation, whether done to secure the person's testimony against another or to encourage him to admit his own guilt, is a power that comes exclusively within the domain of a prosecutor, as approved by the court. (See *People v. Orin* (1975) 13 Cal.3rd 937, 942; P.C. §§ 1192.1, 1192.2.)

“The law is well established that a criminal defendant's statements to law enforcement officers are ‘involuntary and inadmissible when the motivating cause of the decision to speak was an express or clearly implied promise of leniency or advantage.’” (*People v. Perez* (2016) 243 Cal.App.4th 863, 866; citing *People v. McCurdy* (2014) 59 Cal.4th 1063, 1088.)

The **Fourteenth Amendment** “due process” clause (as well as **Art. I, §§ 7 & 15**, of the California Constitution) dictates that an involuntary confession or admission may *not* be admitted into evidence against the accused. Threatening a suspect, or offering leniency to him in exchange for the suspect incriminating himself, may result in an involuntary confession. The same rule applies to threats to, or offers of leniency made for the benefit of,

someone who is close to the defendant. “[T]he question in each case is whether the defendant’s will was overborne at the time he confessed. [Citations.] If so, the confession cannot be deemed ‘the product of a rational intellect and a free will.’” (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1400-1401; quoting *Lynumn v. Illinois* (1963) 372 U.S. 528 [9 L.Ed.2nd 922]; see also *People v. Sanchez* (2019) 7 Cal.5th 14, 47-51.)

“(A) confession has been held involuntary and inadmissible where it was obtained as a result of . . . such inducements as a promise to do for an accused all that could be done [citation] or to protect the accused’s family from retaliation [citation] or a statement that if the accused confessed the punishment would be lighter [citation] or that it would be better for him to confess [citation] or by threats to hold the accused’s mother.” (*People v. Cunningham* (2015) 61 Cal.4th 609, 643; quoting *People v. Kendrick* (1961) 56 Cal.2nd 71, 84.)

“In general, a confession is considered voluntary ‘if the accused’s decision to speak is entirely ‘self-motivated’ [citation], i.e., if he freely and voluntarily chooses to speak without ‘any form of compulsion or promise of rewards. . . .’ [Citation.]” [Citation.] However, where a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law.” (*People v. Perez* (2016) 243 Cal.App.4th 863, 871; quoting *People v. Tully* (2012) 54 Cal.4th 952, 985.)

In making this determination, “all the surrounding circumstances,” including both “the characteristics of the accused and the details of the interrogation,” must be considered. (*People v. Tully, supra*, 985-986; *People v. Perez, supra*.)

Impermissible Offers of Leniency:

“(W)hile pointing out a benefit which is merely that which flows naturally from a truthful and honest course of conduct is okay, ‘if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a

statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible” (*People v. Westmoreland* (2013) 213 Cal.App.4th 602, 609, quoting *People v. Holloway* (2004) 33 Cal.4th 96, 115.)

In *Westmoreland* (at pp. 608-614.) the defendant’s confession was suppressed after the detective inferred during an interrogation that if the victim was not killed with premeditation, defendant would not be subject to a life sentence when in fact the victim’s death, whether accidental or not, was caused during the commission of a robbery; a special circumstance which, if found true, is subject to a sentence of life without parole per **P.C. § 1902(a)(17)**.

Telling defendant that he should learn by his mistake, and that he could go to prison for a long time unless he told the truth, was held to be an offer of leniency, necessitating the suppression of his admissions to being one of the shooters in a drive-by shooting. (*People v. Chun* (2007) 155 Cal.App.4th 170.)

A parole agent telling defendant who had already invoked his right to counsel when earlier interrogated by investigators, that he, the agent, didn’t want to have to write in his report that defendant did not cooperate with investigators and to recommend a maximum time in custody, causing defendant to reinitiate questioning and confess, held to be an improper offer of leniency, making his confession inadmissible. (*People v. Gonzalez* (2012) 210 Cal.App.4th 875, 882-884; as modified Nov. 14, 2012)

Telling a 14-year-old murder suspect, with limited IQ, that they (the officers) would take ‘what you tell us’ to the district attorney ‘and say, hey man, you know what, this guy — we think — he’s — you know, he’s 14 maybe there was a little bit of influence from the other guys the older guys, you know, he still — we can still save him he’s not an entirely bad dude.” Even more explicitly, they suggested that cooperating was the only way to “save [his] life”: “I mean, that’s it what’s done is done, but this is like the rest of your life now, this is the difference, you[‘re] only 14, man. It’s not like you[‘re] 18, 19 and you know, you’re 14 years old, man, you can still save your life. You still have a lifetime.” Further: “You got a chance to set things right,

take responsibility for what you did, and then whatever happens, happens but be assured that what we would like to do is talk to the district attorney tell him that you were cooperative and being truthful and [accept] the responsibility,” held to be an impermissible offer of leniency under these circumstances. (*Rodriguez v. McDonald* (9th Cir. 2017) 872 F.3rd 908, 918-926.)

Held Not to be an Offer of Leniency:

Telling a defendant that “by his cooperation and assistance, . . . that it would benefit him in the judicial process,” held *not* to be an improper offer of leniency, under the circumstances. (*People v. Ramos* (2004) 121 Cal.App.4th 1194.)

“Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise . . . does not . . . make a subsequent confession involuntary.” (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1401; quoting *People v. Boyde* (1988) 46 Cal.3rd 212, 238.)

Noting that “(t)he line ‘can be a fine one’ between urging a suspect to tell the truth by factually outlining the benefits that may flow from confessing, which is permissible, and impliedly promising lenient treatment in exchange for a confession, which is not,” the California Supreme Court held that telling a defendant that “*the truth cannot hurt you*,” while pointing out the benefits of telling the truth, so long as a lighter sentence was not being offered, was *not* an offer of leniency. (*People v. Holloway* (2004) 33 Cal.4th 96, 118-121.)

Encouraging defendant to “*get it all out in the open*” and “*get it off [his] chest*,” and to admit any unlawful sexual conduct because “[i]t ain’t going to make a difference to anything that happens,” and then encouraging defendant to say whether he had sexually assaulted the victim, at one point commenting, “[i]t ain’t gonna make a hill of beans as far as what goes on if you go to trial,” held *not* to amount to an impermissible offer of leniency. (*People v. Davis* (2009) 46 Cal.4th 539, 600.)

Describing the moral or psychological advantages of telling the truth does not raise an implication of leniency or

favorable treatment at the hands of the authorities. (*People v. Carrington* (2009) 47 Cal.4th 145, 172.)

Further, promising to help defendant explain the “whole thing” to other officers, in the context of defendant’s questions about why she was arrested and other factors, was *not* an offer of leniency. Also, the fact that defendant didn’t confess until about an hour after the officer’s statements indicates that the confession was not the product of anything she was told. (*Id.*, at pp 169-171.)

Also, telling defendant that admitting to a second murder would not make any difference, when in the context that there was enough other evidence to convict her of the second murder with or without her confession, also was *not* an offer of leniency or other form of coercion that caused her to confess. Also, other statements of defendant indicated that she fully understood that admitting to a second murder would make it harder on her. Also, nothing else in the evidence (e.g., an eight-hour interview) suggests that defendant’s will was overborne. (*Id.* at pp. 171-175.)

Officers telling defendant, “[w]e are here to listen and then to help you out” and “the court . . . wants to know what the real story is and you’re the only one that can provide that,” held not to be an improper offer of leniency. The court found the only benefit promised was the peace of mind from doing the right thing and characterized the officers’ statements as “brief and bland references” which do not rise to the level of coercion or promises of leniency. (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1212.)

A female detective’s statements reassuring defendant that if he was telling the truth, and if he was innocent, she could help him get cleared, were not implicit promises of leniency. Absent threats or promises, mere psychological appeals to the defendant’s conscience were not enough to overcome his will. (*Ortiz v. Uribe* (9th Cir. 2011) 671 F.3rd 873.)

Telling a witness to a crime of the advantages to telling the truth, and that cooperating may help to avoid the witness’s

own criminal liability, is *not* unlawful in itself. (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 79.)

Telling a suspect that; “(t)here are two sides to every story, okay? And we’re real anxious to get your side of what happened okay? . . . And that if you weren’t entirely involved in this situation, that it’s important that we hear from you . . . your version of what happened,” was not an offer of leniency, but rather no more than an indication of the detective’s willingness to listen to defendant and encouragement to tell what happened. (*People v. Hensley* (2014) 59 Cal.4th 788, 812-813.)

Telling a murder suspect in an interview that if he “[told] the truth” and was “honest,” then, “we are not gonna charge you with anything,” and that he was either a “suspect that we are gonna prosecute,” or a “witness,” and adding that the defendant had “witnessed something terrible that somebody did,” followed up by telling him that if he was honest and told the truth during the interview, “[Y]ou’ll have your life, maybe you’ll go into the Marines . . . and you’ll chalk this up to a very scary time in your life,” was held to be an offer of leniency, making the resulting confession inadmissible. (*People v. Perez* (2016) 243 Cal.App.4th 863, 866-867, 871-879.)

Note: The common interrogation tactic of suggesting to a suspect that he had the option of being treated as a “witness, as opposed to a suspect,” if he cooperated, is always a dangerous tactic in its suggestion that talking with officers will prevent the suspect from being criminally charged; i.e., an “offer of leniency.”

A police interrogator telling a homicide suspect that “it’s in your best interest to be cooperative with us today here, okay?”, and “I have a feeling you know what I’m talking about, and I’m just hoping that you’ll be honest with me, because it shows that you’re being cooperative with our investigation. And with everything you got going on, the judge is going to look at that and say, you know, that you’re being cooperative,” held not to be an improper offer of leniency. (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1248-1251.)

“Courts have made clear that investigating officers may freely encourage honesty and lawfully discuss any ‘naturally accru[ing]’ benefit, advantage or other consequence of the suspect’s truthful statement.” (*Id.*, at p. 1250.)

In a potential death penalty case, “only where the confession results directly from the threat [capital] punishment will be imposed if the suspect is uncooperative, coupled with a ‘promise [of] leniency in exchange for the suspect’s cooperation’ [citation],” is it reversible error to discuss the death penalty. (*People v. Winbush* (2017) 2 Cal.5th 402, 453, quoting *People v. Holloway* (2004) 33 Cal.4th 96, 116, and finding that the trial court’s determination that the death penalty being a potential punishment was not used as a tool to coerce a confession was supported by substantial evidence.)

Offering to obtain counseling for a 15-year old minor (who was already in counseling) who was accused of killing her newborn baby was not an offer of leniency under the circumstances. (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1189.)

After defendant asked to be read his rights, but before his *Miranda* rights were in fact read to him, the detective’s suggestion to him that he might be able to make a deal and then by playing on his responsibility as a father, while neither expressly or impliedly indicating that defendant could get a deal, held to be neither a *Honeycutt* softening up, nor an offer of leniency. Nor was references to being a good example for his son sufficient to overbear defendant’s will by employing a particular psychological vulnerability. (*People v. Young* (2019) 7 Cal.5th 905, 924-927.)

A police interrogator’s erroneous comment that California does not have a death penalty was held *not* to constitute an offer of leniency and, under the circumstances, did not induce defendant to confess. (*Benson v. Chappell* (9th Cir. 2020) 958 F.3rd 801, 819.)

The detectives’ limited references to defendant’s unborn child, inferring that by cooperating he might be able to see his baby someday, plus the use of “alternative scenarios,” and “implied” offers of leniency, were not coercive under

the circumstances. (*Balbuena v. Sullivan* (9th Cir. 2020) 970 F.3rd 1176, 1188-1189.)

Defendant's confession to officers was held to be properly admitted into evidence in a robbery trial because coercion was not established under **Fifth Amendment**. An interrogating officer's statements informing defendant that his full cooperation might be beneficial in an unspecified way was held not to be an officer of leniency. The officer truthfully told defendant that sometimes it works in your favor to be honest and up front and admit involvement, and sometimes it does not. (*People v. Zabelle* (July 11, 2022) __ Cal.App.5th __, __ [2022 Cal.App. LEXIS 599].)

Offers of Leniency for the Benefit of a Third Persons:

Offering leniency for the benefit of a third person, to an interrogated suspect, may invalidate resulting admissions or a confession. (See *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1401.)

“A threat by police to arrest or punish a close relative, or a promise to free the relative in exchange for a confession, may render an admission invalid.” (*Ibid*; quoting *People v. Steger* (1976) 16 Cal.3rd 539, 550.)

That part of defendant's statements, confessing to a double homicide, that came after telling defendant that if he confessed (i.e., “*be truthful*”) they would release his wife, was held to be inadmissible. Those portions of his confession coming prior to offering leniency to the wife were held to be admissible. (*People v. McWhorter* (2009) 47 Cal.4th 318, 347-348, 350-358.)

But telling defendant that his mother might have to testify if he used her as his alibi, which was a true statement, and also mentioning his brother, did not constitute coercion. (*Id.*, at pp. 348-349.)

Also, defendant's statements obtained in a subsequent interview some eight days later were sufficiently attenuated from the earlier promise to release defendant's wife to be admissible. Factors relevant to this conclusion included:

- Defendant was re-***Mirandized*** prior to obtaining this statement.
- More than a week had transpired between interviews.
- The second interview was conducted by a different officer who had had no prior contact with defendant and who had not reviewed defendant's prior statements.
- There was not attempt to exploit the prior inadmissible statements.
- Defendant demonstrated a "maturity and ability to again handle himself in a fashion that reflects maturity and sophistication and articulation."
- Defendant's second statement was furnished in an effort to recant his earlier confession. (*Id.*, at pp. 358-361.)

Imploring defendant to corroborate his pregnant girlfriend's statement that a gun used in a robbery-kidnapping was only a toy, so as to lessen her culpability and potential sentence, constituted "*clearly implied*" promises of leniency for the girlfriend, and were therefore improper. However, the Court further found that such promises were not what caused defendant to confess. ***People v. Dowdell*** (2014) 227 Cal.App.4th 1388, 1401-1405.)

In making this determination, the Court took into consideration defendant's criminal sophistication, his prior experience with the criminal justice system, and his emotional state. In fact, in this case, the defendant specifically told his interrogators that he didn't believe that they had the authority to do anything for his girlfriend. (*Id.*, at p. 1404; citing ***In re Shawn D.*** (1993) 20 Cal.App.4th 200, 209.)

Telling defendant that his girlfriend was in custody and whether or not she was charged depended upon what defendant told them was not the motivating cause of defendant's later waiver of his ***Miranda*** rights and subsequent confession. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 643-644: "(E)ven assuming, as the trial court found, the detectives engaged in improper 'softening up' at the outset of the first interview by claiming defendant's companion . . . was in custody and implying defendant could exonerate her by speaking to them, the totality of the

circumstances of the interrogation support the conclusion defendant's statements given after he was later advised of his *Miranda* rights were voluntary and not the product of psychological inducement.”)

Implying that his father, in whose bedroom a firearm had been found, may be in trouble, but then telling the defendant that his father did not match the description of a shooting suspect, was not a threat made to the father that would have caused a false confession. (*People v. Jones* (2017) 7 Cal.App.5th 787, 814.)

Causation Requirement:

In evaluating a possible offer of leniency, a court must consider two questions: Was a promise of leniency either expressly made or implied, and if so; did that promise motivate the subject to speak? (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873; *People v. Tully* (2012) 54 Cal.4th 952, 986.)

In *Tully*, *supra*, an officer's statement to defendant that he wouldn't use his admissions (of his drug use and that he supported his habit by committing burglaries) against him were made *after* defendant volunteered the information, and while they were awaiting the arrival of a narcotics officer to evaluate defendant as a possible informant, and therefore not an offer of leniency that could have induced defendant to making admissions.

Also in *Tully*, at pages 993-994, with information that a murder, of which defendant was a suspect, might have actually been committed by a member of the Hells Angels, explaining to defendant that he and his wife “might” be eligible for a state or federal witness protection program, particularly when told that no promises were being made was not an offer of leniency.

Lastly, the Court in *Tully* rejected defendant's arguments that the police had manipulated his wife to persuade him into making a statement, that they had threatened to prosecute his wife on check charges, turning their children over to Foster care, and that the officers had already made up their

minds that defendant was guilty before questioning him, as contrary to evidentiary findings made by the trial court, such findings being supported by the evidence. (*Id.*, at p. 994.)

Even comments by police that might be interpreted as an offer of leniency will not cause a defendant's statements to be suppressed if the offer was not the "*motivating cause*" of defendant's decision to confess. (*People v. Rundle* (2008) 43 Cal.4th 76, 117-120; *People v. Cunningham* (2015) 61 Cal.4th 609, 643.)

An alleged offer of leniency will not invalidate a later admission absent a causal connection between the two. Where defendant continually denied his guilt, even after the complained-of comments from the detectives, there is no causal connection. Also, defendant's admissions were separated from the detective's challenged statement by a break in the questioning and a change in interrogators. As such, the causal connection, if any, was broken. (*People v. Scott* (2011) 52 Cal.4th 452, 478-480.)

The interrogator's alleged offer of leniency: "We, we want you to level with us okay. It's very important that you level with us. Now you know, and we know, how that [DNA] test is going to come out. Now it's going to be a whole lot better, you're gonna feel a lot better about yourself, ... you're gonna be more like a man if you fess up to what you did. It's very[,] very important that you be truthful with us right now. *If you're truthful with us and you tell us exactly what happened, it'll make things go much better, cuz we both know what happened.*" (*Id.*, at p. 479.)

In considering the totality of the circumstances, telling defendant that he wouldn't be in trouble for having had sexual contact on a prior occasion with the 12-year-old homicide victim prior to her murder was *not* an "offer of leniency" that precipitated defendant's confession to murder the next day. When defendant volunteered to confess the following day, he was advised of his *Miranda* rights, including the fact that anything he said could be used against him in court. When told again that defendant's prior sexual contacts with the victim were "water under the bridge," defendant responded; "*That's*

until today,” indicating his expectation that as advised, anything he admitted to could be used against him. (*People v. Linton* (2013) 56 Cal.4th 1146, 1168-1169.)

Imploring defendant to corroborate his pregnant girlfriend’s statement that a gun used in a robbery-kidnapping was only a toy, so as to lessen her culpability and potential sentence, constituted “*clearly implied*” promises of leniency for the girlfriend, and were therefore improper. However, the Court further found that such promises were not what caused defendant to confess. *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1401-1405.)

In making this determination, the Court took into consideration defendant’s criminal sophistication, his prior experience with the criminal justice system, and his emotional state. In fact, in this case, the defendant specifically told his interrogators that he didn’t believe that they had the authority to do anything for his girlfriend. (*Id.*, at p. 1404; citing *In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.)

At trial and on appeal, defendant argued that the detectives provided an improper promise of leniency when they told him that he was at a crossroads; that if he continued to deny involvement, he would be “stuck all your life,” but if he took the other path; i.e., if he told the truth, he could “go on with [his] life” and “be with [his] wife and . . . child and start fresh.” Defendant argued that these statements were more than “proper exhortations to tell the truth,” but rather an improper “offer of leniency.” The Court did not rule that the detective’s statements weren’t an offer of leniency, but rather that they were not the cause of defendant’s eventual confession; i.e., it “*must be causally linked.*” It was specifically noted that before the detective began his statement about the “two directions” he could go, defendant had already begun to tell them about the events in the victims’ home. Defendant used almost exactly the same opening sentence when he began describing the events at the victims’ house after the alleged promise of leniency as before: “He (the co-suspect) kind of pressured me into it” and “[h]e sort of ah, pressured me into this,” referring to a double homicide. (*People v. Wall* (2017) 3 Cal.5th 1048, 1065-1067.)

A police interrogator's erroneous comment that California does not have a death penalty was held *not* to constitute an offer of leniency and, under the circumstances, did not induce defendant to confess. (***Benson v. Chappell*** (9th Cir. 2020) 958 F.3rd 801, 819.)

Misrepresentations (Ruse or Subterfuge) Made to the Suspect:

General Rule: Making false representations of facts (i.e., “*deceptions*”) to a suspect under interrogation, although sometimes creating issues, is generally lawful.

The use of deceptions in an interrogation are generally lawful so long as it was not the kind of deception that would be reasonably likely to procure an untrue statement. (***People v. Davis*** (2009) 46 Cal.4th 539, 600-601, fn. 5; ***People v. Quiroz*** (2013) 215 Cal.App.4th 65, 79; ***People v. Scott*** (2011) 52 Cal.4th 452, 481; ***People v. Jones*** (2017) 7 Cal.App.5th 787, 813-815.)

Case Law:

See ***People v. Spencer*** (2018) 5 Cal.5th 642, 675, falsely telling defendant that his fingerprints were found at the scene of a robbery-murder did not make defendant's confession involuntary. (See also ***People v. Musselwhite*** (1998) 17 Cal.4th 1216, 1241.)

“Lies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary.” (***People v. Farnam*** (2002) 28 Cal.4th 107, 182; see also ***People v. McWhorter*** (2009) 47 Cal.4th 318, 349-350; “(D)eception alone does not necessarily invalidate a confession.”)

Defendant claimed that detectives improperly exaggerated the strength of the evidence against him when they told him that others had told them that defendant gagged and shot the victim and dug the grave. This prompted defendant to blurt out, “*The only thing I did was kill him.*” However, “the use of deceptive comments does not necessarily render a statement involuntary. Deception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is ‘of a type reasonably likely to procure an untrue statement.’” (***People v. Hoyt*** (2020) 8

Cal.5th 892, 935; citing *People v. Williams* (2010) 49 Cal.4th 405 at p. 443.)

Telling the suspect that he was seen leaving the victim's residence when she was murdered, and that his semen was found in the victim, neither fact being true, was not, when considering the surrounding circumstances, sufficient to establish that defendant's statements were involuntary. (*People v. Richardson* (2008) 43 Cal.4th 959, 992-993.)

Telling the suspect that the victim had semen stains on her body, when the officer honestly believed that to be the case, held not to be an impermissible misleading of the suspect. "[G]ood faith confrontation is an interrogation technique possessing no apparent constitutional vice." (*People v. Davis* (2009) 46 Cal.4th 539, 600-601, quoting *People v. Andersen* (1980) 101 Cal.App.3rd 563, 576.)

The *Davis* Court also noted that even if the untrue information about the victim having semen on her were made while knowing they were false, it was not the kind of deception that would be reasonably likely to procure an untrue statement, and therefore permissible. (*People v. Davis, supra.*, at p. 601, fn. 5.)

An examiner/detective's empathetic and parental-like questioning of a defendant who had already waived his *Miranda* rights did not render a confession involuntary. Her advice that defendant had to tell the truth to pass a polygraph test was not coercive. Her motherly or parental tone in preparing him for the examination did not violate the **Fifth Amendment**. She may have made statements suggesting she was not a law enforcement officer, but she never suggested she was acting solely in his interest. A reasonable person would have understood that she was acting at the request of the detectives; i.e., the polygraph was to be conducted at the sheriff's headquarters, and was arranged by detectives after defendant had volunteered to take a lie detector test. While defendant may have been deceived into believing that she was not a member of the Sheriff's Department, that type of "deception" was well within the range of permissible interrogation tactics necessary to secure a lawful confession. Her statements reassuring him that if he was telling the truth, and if he was innocent, she could help him get cleared, were not implicit

promises of leniency. Absent threats or promises, mere psychological appeals to the inmate's conscience were not enough to overcome his will. (*Ortiz v. Uribe* (9th Cir. 2011) 671 F.3rd 873.)

Telling a suspect that it is to his advantage to cooperate in that an accomplice is providing more useful information (an untrue assertion), and that; "if Tim (the accomplice) starts cutting a deal over there, this is kind a like a bus leaving. The first one that gets on it is the only one that's gonna get on," was held *not* to be an improper interrogation tactic. (*Bobby v. Dixon* (2011) 565 U.S. 23 [132 S.Ct. 26, 29-30; 181 L.Ed.2nd 328]; citing *Oregon v. Elstad* (1985) 470 U.S. 298, 317 [84 L.Ed.2nd 222; 105 S.Ct. 1285]; "[T]he Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily.")

Use of a deception by an informant, purposely placed with the suspect in an adjoining jail cell, held not to be improper so long as the deception used is not of the type reasonably likely to produce a false confession. (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 79.)

Telling a juvenile suspect that the police already knew what happened, and that cameras likely recorded the incident, both falsehoods, did not make the defendant's admissions involuntary. (*People v. Thomas* (2012) 211 Cal.App.4th 987, 1009-1012.)

However, falsely telling a 12-year-old troubled minor that his grandfather, who the minor looked up to as his father, saw him sexually abuse his six-year-old cousin, was a factor adding to the coerciveness of the minor's interrogation, leading to the Court's conclusion that the minor was in custody for purposes of *Miranda* and should have been read his rights prior to the interrogation. (*United States v. IMM* (9th Cir. 2014) 747 F.3rd 754, 764-768.)

Telling a child molest suspect that the victims' clothing was being checked for DNA, when it ("apparently") was not, criticized as possibly helping to trigger defendant's eventual untrustworthy admissions. (*People v. Saldana* (2018) 19 Cal.App.5th 432, 446.)

Use of a ruse (i.e., two homicide detectives telling the in-custody defendant that they were “**290** [sex registrant] investigators”), to help obtain a waiver, and without telling defendant they were actually there to question him about a murder that had occurred six years earlier, held under the circumstances to *not* have invalidated defendant’s waiver of his *Miranda* rights. Per the Court, “(t)he officers’ ruse, that their purpose was to interview defendant regarding his sex offender registration status, was not coercive.” (*People v. Molano* (2019) 7 Cal.5th 620, 648-654.)

The use of photographic lineups falsely marked as if witnesses had identified defendant as the shooter, falsely telling him that casings left at two shooting scenes matched a gun found in defendant’s father’s bedroom, and falsely telling defendant that his fingerprints were on the gun, were not deceptions that would cause an innocent person to falsely confess or provide an unreliable confession. No error. (*People v. Jones* (2017) 7 Cal.App.5th 787, 814-815.)

Police deception alone does not normally result in what can be considered a “coerced” confession, even when the defendant is a criminally unsophisticated teenager. (*Balbuena v. Sullivan* (9th Cir. Aug. 17, 2020) 970 F.3rd 1176, __; noting that defendant, although young, was hardly unsophisticated, he being “well versed in the gang activities in his neighborhood.”

Rule Criticized:

“Studies demonstrate that the use of false evidence enhances the risk of false confessions. (*Kassin, On the Psychology of Confessions: Does Innocence Put Innocents at Risk?* (2005) 60 Am. Psychologist 215, 218.) ‘Confronting innocent people with false evidence—laboratory reports, fingerprints or footprints, eyewitness identification, failed polygraph tests—may cause them to disbelieve their own innocence or to confess falsely because they believe that police possess overwhelming evidence. Innocent suspects may succumb to despair and confess to escape the rigors of interrogation in the naïve belief that later investigation will establish their innocence rather than seek to confirm their guilt.’ (*Feld, Police Interrogation of Juveniles: An Empirical Study of Policy and Practice* (2006) 97 J. Crim. L. & Criminology 219,

313, fns. omitted.)” (*In re Elias V.* (2015) 237 Cal.App.4th 568, 584.)

In discussing the use of deception when interrogating juveniles, the Appellate Court noted that; “although the use of deception, including the use of ‘fictitious evidence which implicates the subject’ (*Inbau et al., Criminal Interrogation (and Confessions)* (5th ed. 2013)), at p. 255), has been upheld by the courts (see, e.g., *Frazier v. Cupp* (1969) 394 U.S. 731, 739 [22 L.Ed.2nd 684]; *People v. Smith* (2007) 40 Cal.4th 483 505), “this technique should be avoided when interrogating a youthful suspect with low social maturity ...’ because such suspects ‘may not have the fortitude or confidence to challenge such evidence and depending on the nature of the crime, may become confused as to their own possible involvement if the police tell them evidence clearly indicates they committed the crime. Factors such as the adolescent’s level of social responsibility and general maturity should be considered before fictitious evidence is introduced.’ (*Inbau et al., Criminal Interrogation, supra*, at p. 255.)” (*Id.*, at p. 579.)

Notable Exception:

The trial court’s refusal to grant defendant’s suppression motion was reversed by the Ninth Circuit Court of Appeal in a 2-to-1 decision where FBI agents’ use of deceit to seize and search defendant and his vehicle violated the **Fourth Amendment**. The FBI agents, with a warrant to search defendant’s home, posed as police officers and played on defendant’s trust and reliance on their story that his home had been burglarized to trick him into coming home, bringing his car and his person within the ambit of the warrant when it was not otherwise within its ambit. The FBI agents’ use of a ruse to seize and search the defendant was held to have violated the **Fourth Amendment**. Balancing the Government’s justification for its actions against the intrusion into the defendant’s **Fourth Amendment** interests, the Ninth Circuit concluded that the Government’s conduct was clearly unreasonable. The Court rejected the Government’s arguments that the agents never seized the defendant, holding that the seizures of the defendant’s person and the electronic devices in his car

were the direct result of the FBI agents' unreasonable ruse. The Court further held (at pp, 959-962) that the Government failed to carry its burden to show that the defendant's incriminating statements, made after an agent revealed the true purpose of the investigation and asked to speak with him, were not obtained through exploitation of an illegality rather than by means sufficiently distinguishable to be purged of the primary taint. (*United States v. Ramirez* (9th Cir. 2020) 976 F.3rd 946.)

Practice Note: The Public Trust: Police officers must also consider the effects upon the public trust of law enforcement when deciding whether to use deception or any subterfuge in obtaining statements, even when legally proper to do so.

Absent some necessity for using a deception, law enforcement officers are discouraged from using such an interrogation tactic. Aside from some experts' opinion as to the connection between law enforcement's use of deceptions and the possibility of causing a false confession (see above), juries don't like deceptions when used by law enforcement.

Expect the defense to characterize a "*deception*," "*ruse*" or "*subterfuge*" as nothing more than a "*lie*," an "*unprofessional*" use of an officer's power, or just "*unfair*," all arguments to which juries sometimes respond.

Reverse Lineups:

While not absolutely condemned, the use of a "*reverse lineup*" has been questioned by the U.S. Supreme Court: "The concern of the Court in *Miranda* was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. (*Miranda v. Arizona*, *supra*,) at 457-458. The police practices that evoked this concern included <https://advance.lexis.com/document/searchwithindocument/?pdmfid=1000516&crd=384ee69a-215b-471e-8a4d-7e600bca961b&pdsearchwithinterm=reverse&ecomp=Lg85k&prid=0cca114e-ab05-48b5-bc30-5bddf721d572> several that did not involve express questioning. For example, one of the practices discussed in *Miranda* was the use of lineups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was in fact guilty as a predicate for further interrogation. *Id.*, at 453. A variation on this theme

discussed in *Miranda* was the so-called “*reverse line-up*” in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution. *Ibid.*” (*Rhode Island v. Innis* (1980) 446 U.S. 291, 299 [64 L.Ed.2nd 297].)

Religion:

Rule: Using one’s religious beliefs to extract a confession is frowned upon. (*People v. Montano* (1991) 226 Cal.App.3rd 914, 935; see also *Brewer v. Williams* (1977) 430 U.S. 387 [51 L.Ed.2nd 424]; *People v. Adams* (1983) 143 Cal.App.3rd 970, 989, 992, fn. 22.)

Where Use of Religion was Held to be Improper:

“[A] state law enforcement officer conducting an interrogation of one accused of crime may not use his own or the suspect’s personal religious beliefs as a tool to extract admissions of guilt. . . . [¶] Religious beliefs are not matters to be used by government authorities to manipulate a suspect to say things he or she otherwise would not say.” (*People v. Adams* (1983) 143 Cal.App.3rd 970, 989, 992, fn. 22.)

Where Use of Religion was Excused:

Although it is improper to exploit a suspect’s religious anxieties, comments by the police that “are not ‘calculated to exploit a particular psychological vulnerability of [the] defendant,’ (and there is) ‘no acute religious anxiety or sense of guilt (that) was apparent from prior questioning,’ appeals to religion are unlikely to be a motivating cause of a defendant’s subsequent confession.” (*People v. Carrington* (2009) 47 Cal.4th 145, 176; citing *People v. Kelly* (1990) 51 Cal.3rd 931, 953; and commenting on the detective’s statement that “there’s someone up above bigger than both of us looking down saying Celeste (defendant), you know that you shot that person in San Carlos and it’s time to purge it all.”)

Asking defendant if he believed in God, and if he’d prayed for the victim, resulting in an otherwise uncommunicative defendant’s admission that he did, held not to make defendant’s statements involuntary. (*Berghuis v. Thompkins* (2010) 560 U.S. 370 [130 S.Ct. 2250; 176 L.Ed.2nd 1098].)

Length of the Interrogation:

Rule: The length of an interrogation is a factor in determining whether a particular interrogation was unduly coercive. (See below)

Where Held Not to be Unduly Coercive:

While the length of an interrogation is a factor to consider in determining voluntariness, a series of separate, relatively short interviews did not establish that a defendant's confession was coerced. (***People v. Rundle*** (2008) 43 Cal.4th 76, 122-123.)

Eight hours of interrogation involving two murders and an attempted murder, with three separate police agencies involved, was *not* excessive under the circumstances. The questioning was neither aggressive nor accusatory, the officers choosing to build rapport with defendant and gain her trust, and there was no indication that defendant was induced by fear to confess. She appeared to be lucid and aware, spoke with confidence, with coherent answers, and never sought to end the interrogation. Defendant was also provided with food and drink, given frequent breaks, and allowed to meet in private with her partner. (***People v. Carrington*** (2009) 47 Cal.4th 145, 175.)

Three hours held not to be excessive. (***Berghuis v. Thompkins*** (2010) 560 U.S. 370 [130 S.Ct. 2250; 176 L.Ed.2nd 1098].)

Two and a quarter hours, with several breaks in the interrogation, held not to be excessive. (***People v. Linton*** (2013) 56 Cal.4th 1146, 1178-1179.)

Four hours held not to be excessive. (***People v. Cunningham*** (2015) 61 Cal.4th 609, 644; "(N)either the length nor physical circumstances of the interrogation appear to have been coercive; the initial interview was spread over a four-hour period with the detectives offering defendant both food and drink. Nor was the tone of the questioning as evidenced in the transcript particularly harsh or accusatory.)

An interrogation in a four-victim murder case that lasted over 12 hours, the first 10 hours being without interruption and with defendant showing signs of exhaustion, while held to be “*substantial*,” did not invalidate defendant’s eventual incriminatory statements in light of other factors. Those factors consisted of defendant being given numerous breaks, drinks, and food, and being offered the chance to speak with a lawyer numerous times. He was also given the opportunity to speak with his wife, which he declined. Under the “*totality of the circumstances*,” the Court found that defendant’s statements were not coerced. (*People v. Peoples* (2016) 62 Cal.4th 718, 740-741.)

A sixteen-hour interrogation was not coercive when all of defendant’s needs (bathroom breaks, food, etc.) were met, the interrogation was broken up into seven parts with breaks between each, and he confessed after the first six hours. The Court also rejected defendant’s arguments that the breaks in interrogation were intended to “exploit” his “slowly mounting fatigue,” noting that the police are not obligated to “provide defendant with entertainment or diversion.” (*People v. Winbush* (2017) 2 Cal.5th 402, 452-454.)

Where Held to be Unduly Coercive:

A 12½ hour interrogation of a 17-year-old minor who had never before been involved with the law, where the defendant was peppered with demands that he answer questions and that they were not going anywhere until he told the truth, belying the rights explained in *Miranda* admonishment itself, particularly when combined with an admonishment that included attempts to minimize the importance of the warnings, held to be a due process violation. (*Doody v. Ryan* (9th Cir. 2011) 649 F.3rd 986, 1008-1021.)

Violation of the Law Enforcement Agency’s Written Policies:

The failure to follow an agency’s policies does not necessarily constitute a violation of the Constitution requiring suppression of the resulting admissions obtained from the defendant. (*United States v. Haswood* (9th Cir. 2003) 350 F.3rd 1024, 1028-1029; alleged violation of the FBI’s policy on tape recording an interrogation.)

Combination of Improper Interrogative Techniques: Involuntariness may be found from a combination of police interrogative techniques that individually would not have invalidated a confession.

See ***People v. Esqueda*** (1993) 17 Cal.App.4th 145; Eight hours of intense interrogation, including the use of lies, accusations, exhaustion, isolation, threats, and appeals to his manhood and religion.

See also ***In re Shawn D.*** (1993) 20 Cal.App.4th 200; where an unsophisticated, naive minor, suffering from posttraumatic stress disorder, lied to by the interrogating officers about whether another person implicated him in a burglary, urged to “*be a man*” while being told he could be tried as an adult, and that his girlfriend would be in trouble if he did not confess: Statements inadmissible.

See also ***Doody v. Ryan*** (9th Cir. 2011) 649 F.3rd 986, 1008-1021.

See “*The Reid Interrogation Technique*,” under “*The Custodial Interrogation* (Chapter 3), above.

Acceptable Interrogative Techniques: It is usually *not improper* to do the following:

Explanations of the Defendant’s Legal Status:

Comment on the realities of the accused’s position and the courses of conduct open to him, pointing out the benefits that would flow naturally from a truthful statement, is okay. (***People v. Anderson*** (1980) 101 Cal.App.3rd 563, 583.)

Telling a suspect in a non-coercive manner of the realistically expected penalties is not improper. (***United States v. Tingle*** (9th Cir. 1981) 658 F.2nd 1332, 1336, fn. 3, citing ***United States v. Ballard*** (5th Cir. 1978) 586 F.2nd 1060, 1063.)

Discussions of realistic penalties are normally insufficient to preclude a defendant’s free choice. (***United States v. Quinn*** (11th Cir. 1997) 123 F.3rd 1415, 1424.)

Showing defendant a newspaper article describing the sentencing of a subject for lying to an F.B.I. agent was not improper, in that informing a subject of the potential penalties involved is not coercion. (***United States v. Hawwood*** (9th Cir. 2003) 350 F.3rd 1024, 1029.)

Admonishments to Tell the Truth:

Merely advising a suspect to tell the truth (*People v. Belmontes* (1988) 45 Cal.3rd 744, 773) or that it would be better for him to tell the truth, is not improper. (*People v. Higareda* (1994) 24 Cal.App.4th 1399, 1407-1409; *People v. Hill* (1967) 66 Cal.2nd 536, 549.)

Caution: An argument could be made that it is seldom (if ever) to the defendant's personal benefit to talk to his interrogators at all, and an admonishment indicating that it is, may be, in some circumstances, misleading or an offer of leniency.

Suggesting benefits which would naturally flow from pursuing a truthful and honest course of conduct does not make the responses involuntary. (*People v. Spears* (1991) 228 Cal.App.3rd 1, 27-28; *People v. Riley* (1996) 45 Cal.App.4th 351, 374-375.)

Telling a suspect to tell the truth, or pointing out the consequences "flowing naturally from a truthful course of conduct," does not make the defendant's statements involuntary. (*People v. Howard* (1988) 44 Cal.3rd 375, 398; *People v. Esqueda* (1993) 17 Cal.App.4th 145, 1484.)

Repeatedly telling a defendant that; "*You're not coming clean*," and that he was facing five years for not "coming clean," was a truthful statement about the potential consequences of making a false statement to federal law enforcement officers during an investigatory interview (see **18 U.S.C. § 1001**), and therefore "not the type of 'coercion' that threatens to render a statement involuntary." (*United States v. Howard* (4th Cir. 1997) 112 F.3rd 777, 782.)

"(M)ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." (*People v. Holloway* (2004) 33 Cal.4th 96, 112-117; Telling the defendant: "The truth cannot hurt you, if it's known. The longer you sit there and not say anything and you just ride with it, and you're just, you're gone.", was held not to be improper. See also *People v. Jones* (2017) 7 Cal.App.5th 787, 811.)

Other Inducements:

After defendant invoked, allowing him to talk to his girlfriend for five minutes, after which he changed his mind and agreed to talk with investigators, waving his rights; statements admissible. (*People v. Morris* (1991) 53 Cal.3rd 152.)

Refusing to allow defendant to talk to his father after he had surrendered under the belief that he would be allowed to talk to his father was not an implied demand that he cooperate by making incriminating statements. (*People v. Mayfield* (1997) 14 Cal.4th 668, 734; preadmonishment volunteered statements held to be admissible.)

Telling a suspect that his cooperation will be made known to the prosecutor is not improper. (*United States v. Tingle* (9th Cir. 1981) 658 F.2nd 1332, 1336, fn. 4, citing *Untied States v. Glasgow* (9th Cir.1971) 451 F.2nd 557, 558.)

Statements obtained from a trio of drug smugglers was held *not* to be obtained involuntarily merely because two of them had been “paddling around for several minutes in rough waters,” one of the defendants was dressed only in shorts and without a shirt, and one of them had not been asked if he could read or write. (*United States v. Rosario-Peralta* (1st Cir. 1999) 199 F.3rd 552, 564.)

After an admonishment and waiver, and after the officer described the facts of the case as he believed them to be, exhorting defendant to tell his “side of the story,” and telling him that if “(y)ou don’t take this chance right now, you may never get it again. And if you don’t think I can’t prove this case, if you don’t think I can’t fry you, you’re sadly mistaken, Chris. Now, don’t let these guys lay it all on you ‘cause that’s what’s happening. You get a chance to lay some back and say exactly what happened. Whose idea was it?”, was held to be a proper interrogation tactic, and not coercion. (*People v. Spencer* (2018) 5 Cal.5th 642, 671-675.)

A Coerced Confession as Fabricated Evidence:

Rule: An officer fabricating evidence against a suspect raises **Fifth** and **Fourteenth** Amendment due process issues, subjecting the officer to potential civil liability. (See *Devereaux v. Abbey* (9th Cir. 2001) 263 F.3rd 1070.)

Exception: However, the Ninth Circuit has held that coerced confession claims are *not* cognizable under a *Devereaux* fabrication-of-evidence theory. (*Tobias v. Arteaga* (9th Cir. 2021) 996 F.3rd 571, 575, fn. 1; citing *Hall v. City of Los Angeles* (9th Cir. 2012) 697 F.3rd 1059, 1069-1070.)

As noted in *Tobias, supra*: “[O]fficers are entitled to qualified immunity under (42 U.S.C.) § 1983 unless . . . they violated a federal statutory or constitutional right.” *District of Columbia v. Wesby* (2018) __ U.S. __, __ [138 S. Ct. 577, 589, 199 L. Ed. 2d 453].)

Chapter 10: Juveniles & Miranda

Miranda Protections as They Relate to Juveniles:

General Rule: Juveniles, in respect to *Miranda*, are (for the most part) treated the same as adults. (*Fare v. Michael C.* (1979) 442 U.S. 707, 722-724 [61 L.Ed.2nd 197, 211]; *People v. Hector* (2000) 83 Cal.App.4th 228.)

Juveniles are entitled to the constitutional protections of the **Fifth Amendment** privilege against self-incrimination and due process. (*In re Gault* (1967) 387 U.S. 1 [18 L.Ed.2nd 527; 87 S.Ct. 1428].)

“(T)he same objective standard for determining whether an adult suspect has invoked his or her *Miranda* rights also applies to juvenile suspects.” (*People v. Villasenor* (2015) 242 Cal.App.4th 42, 61, citing *People v. Nelson* (2012) 53 Cal.4th 367, 378-380.)

However, “(w)hen a juvenile’s waiver is at issue, consideration must be given to factors such as the juvenile’s age, experience, education, background and intelligence, and whether he or she has the capacity to understand the *Miranda* warnings, the nature of their **Fifth Amendment** rights, and the consequences of waiving those rights.” (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1189; citing *Fare v. Michael C.* (1979) 442 U.S. 707, 725 [61 L. Ed. 2d 197; 99 S. Ct. 2560].)

Also noting that the “*totality of the circumstances*” must be considered. (*In re M.S.*, *supra*, citing *People v. Nelson* (2012) 53 Cal.4th 367, 375.)

“*Miranda*’s protections apply to juveniles as well as adults.” (*In re J.W.* (2020) 56 Cal.App.5th 355, 359; citing *In re Roderick P.* (1972) 7 Cal.3rd 801, 810–811.)

Juveniles and False Confessions:

The Problem: Juveniles present a unique problem when considering the obtaining of incriminatory statements in that it is estimated that of the false confessions obtained, more than one third (35%) of proven false confessions are from individuals under the age of 18. (*In re Elias V.* (2015) 237 Cal.App.4th 568, 578, 587-600; citing *Drizin & Leo, The Problem of False Confessions in the Post-DNA World* (2004) 82 N.C. L.Rev. 891, 902, 944–945, fn. 5.)

“It has also long been established that the constitutionality of interrogation techniques is judged by a higher standard when police interrogate a minor.” (*Tobias v. Arteaga* (9th Cir. 2021) 996

F.3rd 571, at p. 584; quoting *Crowe v. County of San Diego* (9th Cir. 2010) 593 F.3rd 841, at 431.)

In *Tobias*, the Court and a concurring opinion held that because the interrogation, as coercive as it was, lasted only for two hours; a fact that differentiates this case from *Crowe* and *Cooper v. Dupnik* (9th Cir. 1992) 963 F.2nd 1220, it failed to put the detectives on notice. The two-hour interrogation did not “shock the conscience,” and the detectives, therefore, were entitled to qualified immunity. (*Id.*, at pp. 584-586, and 594-596.)

In discussing the use of deception when interrogating juveniles, the Appellate Court noted that; “although the use of deception, including the use of ‘fictitious evidence which implicates the subject’ (*Inbau et al., Criminal Interrogation (and Confessions)* (5th ed. 2013)), at p. 255), has been upheld by the courts (see, e.g., *Frazier v. Cupp* (1969) 394 U.S. 731, 739 [22 L.Ed.2nd 684]; *People v. Smith* (2007) 40 Cal.4th 483, 505), “this technique should be avoided when interrogating a youthful suspect with low social maturity ...’ because such suspects ‘may not have the fortitude or confidence to challenge such evidence and depending on the nature of the crime, may become confused as to their own possible involvement if the police tell them evidence clearly indicates they committed the crime. Factors such as the adolescent’s level of social responsibility and general maturity should be considered before fictitious evidence is introduced.’ (*Inbau et al., Criminal Interrogation, supra*, at p. 255.)” (*In re Elias V.*, *supra*, at p. 579.)

“The Supreme Court ‘has emphasized that admissions and confessions of juveniles require special caution.’” (*Doody v. Ryan* (9th Cir. 2011) 649 F.3rd 986, 1008; quoting *In re Gault* (1967) 387 U.S. 1, 45 [18 L.Ed.2nd 527; 87 S.Ct. 1428]; see also *In re I.F.* (2018) 20 Cal.App.5th 735, 763; and *Balbuena v. Sullivan* (9th Cir. Aug. 17, 2020) 970 F.3rd 1176, 1186.)

“When a confession by a minor is involved and ‘counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary’” (*In re Gault, supra*, at p. 55; see also *In re T.F.* (2017) 16 Cal.App.5th 202, 211.)

In-custody interrogations are recognized as inherently coercive. “[T]hat risk is all the more troubling—and recent studies suggest,

all the more acute—when the subject of custodial interrogation is a juvenile.” (*United States v. IMM* (9th Cir. 2014) 747 F.3rd 754, 764.)

“The pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. (Citation) The risk is all the more troubling and acute when the subject of custodial interrogation is a juvenile.” (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 531; citing *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 269 [180 L.Ed.2nd 310; 131 S.Ct. 2394].)

“Admissions and confessions of juveniles require special caution, and courts must use special care in scrutinizing the record to determine whether a minor’s custodial confession is voluntary.” (*In re Joseph H.*, *supra*, at pp. 533-534, and see fn. 11.)

“A minor can effectively waive his constitutional rights (*People v. Lara* (1967) 67 Cal.2nd 365, 390-391.), but age, intelligence, education and ability to comprehend the meaning and effect of his confession are factors in that totality of circumstances to be weighed along with other circumstances in determining whether the confession was a product of free will and an intelligent waiver of the minor’s **Fifth Amendment** rights. (Citation)” (*In re Elias V.* (*supra*, at p. 576, quoting *People v. Maestas* (1987) 194 Cal.App.3rd 1499, 1508.)

While it is not the rule that a minor cannot waive his constitutional rights as a matter of law, “(a)ge may be a factor in determining the voluntariness of a confession. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209) This is because threats, promises, confinement, and lack of food or sleep, are all likely to have a more coercive effect on a child than on an adult. (*In re Aven S.* (1991) 1 Cal.App.4th 69, 75) Similarly, the mental subnormality of an accused does not ipso facto render his confession inadmissible; it is but one factor, albeit a significant one, to be considered with all others bearing on the question of voluntariness. (*People v. Lara* (1967) 67 Cal.2d 365, 386)” (*In re Joseph H.*, *supra*, at pp. 534.)

“(T)he Supreme Court has ‘observed that children “generally are less mature and responsible than adults,” [citation]; that they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” [citation]; that they “are more vulnerable or susceptible to . . . outside pressures”

than adults [citations]; and so on.’” (*In re Art T.* (2015) 234 Cal.App.4th 335, 354.)

“When a juvenile’s confession is involved, courts must use special care in scrutinizing the record to evaluate a claim that a juvenile’s custodial confession was not voluntarily given.” (Internal quotes deleted; (*People v. Jones* (2017) 7 Cal.App.5th 787, 810.)

Even after a valid waiver is obtained, a court may consider whether the juvenile gave a confession after being “exposed to any form of coercion, threats, or promises of any kind, [or] trickery or intimidation. The constitutional safeguard of voluntariness ensures that any custodial admission flows from the volition of the juvenile, and not the will of the interrogating officers. (*Ibid.*)

“As the Supreme Court has repeatedly recognized, youth are particularly susceptible to pressure from police. See, e.g., *J.D.B. v. North Carolina*, 564 U.S. 261, 272-73, 131 S. Ct. 2394, 180 L.Ed.2nd 310 (2011) (‘[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go’); *Gallegos v. Colorado*, 370 U.S. 49, 52-54, 82 S. Ct. 1209, 8 L.Ed.2nd 325 (1962) (stating that a juvenile ‘cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions ‘for purposes of determining whether a confession was obtained in violation of due process’); *Haley v. Ohio*, 332 U.S. 596, 599-600, 68 S. Ct. 302, 92 L.Ed. 224 (1948) (plurality opinion) (‘What transpired would make us pause for careful inquiry if a mature man were involved[, a]nd when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used’).” *Rodriguez v. McDonald* (9th Cir. 2017) 872 F.3rd 908, 922.)

See also *In re I.F.* (2018) 20 Cal.App.5th 735, 768, where it is noted that use of the Reid Technique “has been linked to a high number of false confessions,” particularly when the suspect is a juvenile.

The “*Reid Technique*” is an interrogation method, employing among other theories, the use of “maximization, minimization,” which is intended to obtain confessions, and has been criticized for obtaining false confessions in some cases. (See “*Interrogation vs. Interview*,” under “*The Custodial Interrogation*” (Chapter 3), above.)

“The use of an involuntary confession in a delinquency proceeding violates a minor’s **Fourteenth Amendment** rights. ((*In re Elias V.* ((2015)) 237 Cal.App.4th (565) at p. 576.) ‘A statement is involuntary if it is not the product of “a rational intellect and free will.” [Citation.] The test for determining whether a confession is voluntary is whether the defendant’s “will was overborne at the time he confessed.” (*People v. McWhorter* (2009) 47 Cal.4th 318, 346–347 . . . ; accord, (*People v.*) *Linton* 56 Cal.4th (1146) at p. 1176.) A confession that is obtained through threats or violence, direct or implied promises, or improper influence may be found involuntary. (*McWhorter*, at p. 347.) We look at the totality of the circumstances to determine whether a confession was voluntary, including the characteristics of the accused and the details of the interrogation. (*Ibid.*)” (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 452.)

Coercive Interrogative Tactics:

In a wardship proceeding alleging that, at 13 years of age, the defendant committed a lewd and lascivious act upon a three-year-old child, the defendant’s statements to police should have been suppressed under the **Fifth** (self-incrimination) and **Fourteenth** (due process) **Amendments** in that the statements were involuntary. This conclusion was based upon the defendant’s youth, the absence of corroborating evidence, and the use in evidence of involuntary and untrustworthy admissions that were induced by the detective’s interrogation tactics, including interrogating the juvenile at school, positing his guilt quickly and dispositively, engaging in deceptive maximization tactics that included the use of false evidence, threatening to subject him against his will to a lie detector test, and employing a “false choice” strategy, where alternative explanations for improperly touching the victim were used. The error here was held to be prejudicial. (*In re Elias V.* (2015) 237 Cal.App.4th 568, 576-600.)

““The use of an involuntary confession for any purpose in a criminal or delinquency proceeding violates a defendant’s or minor’s rights under the **Fourteenth Amendment**. [Citation.] [¶] “... A minor can effectively waive his constitutional rights [citations] but age, intelligence, education and ability to comprehend the meaning and effect of his confession are factors in that totality of circumstances to be weighed along with other circumstances in determining whether the confession was a product of free will and an intelligent waiver of the minor’s **Fifth Amendment** rights [citation].” [Citation.] [¶] The federal and state Constitutions both require the prosecution to show the

voluntariness of a confession by a preponderance of the evidence. [Citations.] Voluntariness turns on all the surrounding circumstances, “both the characteristics of the accused and the details of the interrogation” [citation]; it does not depend on whether the confession is trustworthy. [Citation.] While a determination that a confession was involuntary requires a finding of coercive police conduct [citations], ““the exertion of any improper influence”” by the police suffices.” (*In re Elias V.* (2015) 237 Cal.App.4th 568, 576–577) However, ““mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.”” (*In re T.F.* (2017) 16 Cal.App.5th 202, 214, quoting *In re Shawn D.* (1993) 20 Cal.App.4th 200, 210.)

In *T.F.*, at pp. 215-218, and citing *In re Elias V.*, *supra*, the Court talks about an interrogation tactic called “*maximization/minimization.*” This technique, per the Court, has been criticized, particularly when used against juveniles, “particularly adolescents,” as causing false confessions. The technique involves the use of a cluster of tactics designed to convey two things. The first is the interrogator’s rock-solid belief that the suspect is guilty and that all denials will fail. Such tactics include making an accusation, overriding objections, and citing evidence, real or manufactured, to shift the suspect’s mental state from confident to hopeless. In contrast, minimization tactics are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question, a tactic that communicates by implication that leniency in punishment is forthcoming upon confession. (Quotations deleted).

Defendant’s confession was found to be the product of an unconstitutional (due process) coercive interrogation by the detective, where the “maximization/minimization” technique was used during an hour and a half of “relentless” interrogation, wearing the 15-year old minor down until he finally confessed. (*Ibid.*)

Note: In other contexts, at least with a mature adult suspect and after a *Miranda* admonishment and waiver, the use of a “maximization/minimization” interrogation technique has been referred to as “good police work.” (See *People v. Saldana* (2018) 19 Cal.App.5th 432, 460.)

Coercive Interrogative Tactics Not Found:

Elias V. and *T.F.* were distinguished (i.e., finding no coercion) in the case of *In re Anthony L.* (2019) 43 Cal.App.5th 438, where, questioned at home in his own bedroom, defendant was read his *Miranda* rights which he said he understood, his mother was present in the room with him, the detective did not insist on defendant's guilt despite having good evidence that he was (i.e., defendant on video committing an assault), and where defendant was not making "persistent denials." Defendant immediately admitted doing something he wasn't "supposed to do," describing the victim and, generally at least, the crime he and his cohorts had committed. Also, the detective's tone was calm and appropriate throughout. (*Id.*, at pp. 452-455; discounting the facts that defendant (whose experience with law enforcement was limited, and having just been woken up) had put his pants on in the presence of his mother and the officers, his bedroom was small, an officer stood between him and the door, defendant spoke in a low, sometimes barely audible voice, and that at one point he had indicated that he not feel like talking.)

The Court further rejected the argument that the detective's request to defendant's mother to encourage defendant to give up the names of others who had participated in defendant's crime constituted "coercion," noting that her encouragement to do so failed to achieve the intended results. The detective also, by merely asking why defendant was not in school, did not falsely present himself as a father figure nor did he misrepresent the purpose of the interview. (*Id.*, at pp. 454-455.)

California's Solution: As a means of protective potentially vulnerable minors, California has enacted a number of statutory protections, limiting what law enforcement is able to do when questioning minors. See "*Statutory Protections*," below.

Waiver vs. Invocation of Rights in Juvenile Cases:

General Rule: "Juveniles, like adults, may validly waive their *Miranda* rights." (*People v. Jones* (2017) 7 Cal.App.5th 787, 809.)

A minor is legally capable of waiving his rights. (*Fare v. Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2nd 197, 212-213]; *People v. Lara* (1967) 67 Cal.2nd 365, 383; *People v. Maestas* (1987) 194 Cal.App.3rd 1499, 1508-1509.)

Factors to Consider:

When waiver (as opposed to “custody,” see below) is the issue, the U.S. Supreme Court has dictated that in considering the “*totality of the circumstances*,” a juvenile’s age, experience, education, background, intelligence, his capacity to understand the *Miranda* warnings, the nature of the **Fifth Amendment** rights, and the consequences of waiving them, must all be taken into consideration. (*People v. Lessie* (2010) 47 Cal.4th 1152, 1167; citing *Fare v. Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2nd at p. 212]; *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1414; *In re Joseph H.* (2015) 237 Cal.App.4th 517, 533; *People v. Jones*, *supra*.)

“(A)nd . . . whether he has the capacity to understand the warnings given him, the nature of his **Fifth Amendment** rights, and the consequences of waiving those rights.” (*In re T.F.* (2017) 16 Cal.App.5th 202, 211; quoting *Fare v. Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2nd 197, 99 S. Ct. 2560].)

Factors to consider include, but are not limited to:

- The minor’s age;
- The minor’s criminal experience;
- The minor’s educational level;
- The minor’s background;
- The minor’s intelligence; *and*
- Whether the minor has the capacity to understand the warnings given, the nature of his or her **Fifth Amendment** rights, and the consequences of waiving them.

(*In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577-579, citing *Fare v. Michael C.*, *supra*, at p. 725 [61 L.Ed.2nd at p. 212]; *People v. Lessie*, *supra*.)

The defendant’s youth and lack of criminal experience are recognized as factors that must be taken into consideration in determining the *voluntariness of a waiver* and statements made under pressure from law enforcement. (*Woods v. Clusen* (7th Cir. 1986) 794 F.2nd 293, 297.)

A juvenile’s age is considered when determining if he made an unequivocal request for an attorney. Here, after confirming an understanding of each of the *Miranda* rights, a detective began questioning a 13-year-old suspect about a gang murder. During questioning, and after seeing a video of the shooting, defendant said, “*Could I have an attorney? Because that’s not me.*” The interrogation continued and defendant eventually incriminated himself. Whether the request was unequivocal or not is based on the totality of circumstances,

including the juvenile's age if reasonably apparent or known to the officers. Here, the detective knew defendant's age. "In this context, Art's statement after viewing the video of the shooting . . . was an unequivocal request for an attorney." (*In re Art T.* (2015) 234 Cal.App.4th 335, 349-357.)

"(W)e find that this analysis requires consideration of whether a reasonable officer in light of the circumstances known to the officer, or that would have been objectively apparent to a reasonable officer, *including the juvenile's age*, would understand the (mid-interrogation, after a prior waiver) statement by the juvenile to be a request for an attorney." (Italics added; *Id.*, at p. 355.)

Case Law:

By demanding to be taken home thirteen times within a fourteen minute period, the 17-year-old defendant gang member had effectively invoked his right to remain silent. His interrogation should have stopped at that time. However, the admission into evidence of his subsequent statements, although in violation of his rights under *Miranda*, was not prejudicial given the overwhelming evidence of defendant's guilt. His statements were not involuntary under the totality of the circumstances because there was no coercion used by the officers. (*People v. Villasenor* (2015) 242 Cal.App.4th 42, 59-72.)

A suspect who has validly waived *Miranda* is subject to interrogation "*until and unless*" he clearly makes it known that he wishes the assistance of an attorney. (*Davis v. United States* (1994) 512 U.S. 452, 461 [129 L.Ed.2nd 362, 373].) The same theory applies to a post-waiver equivocal assertion of the right to remain silent by the 15-year-old defendant. (*Coleman v. Singletary* (11th Cir. 1994) 30 F.3rd 1420, 1424.)

On the issue of the validity of a 16-year-old juvenile's waiver, the Court noted that defendant was a 16-year old high school student. More importantly, he had been through the system before, having prior arrests for battery, grand theft, unlawful taking of a vehicle, and marijuana possession. The record reflected that defendant was able to understand the detectives' questions and to provide coherent responses to those questions. Although defendant did not expressly waive his *Miranda* rights during the interview, he did so implicitly by acknowledging that he understood those rights and then voluntarily answering the detectives' questions without hesitation. The Court therefore ruled that defendant's implied waiver of his *Miranda* rights was legally valid. (*People v. Jones* (2017) 7 Cal.App.5th 787, 809-810.)

Being 19 years old was not a major factor in considered the voluntariness of defendant's confession in light of the fact that he had been in trouble with the law since his early teens, having spent four years in the California Youth Authority. (*People v. Winbush* (2017) 2 Cal.5th 402, 453.)

Defendant's pre-arrest statements to police were made during a custodial interrogation without the required *Miranda* advisements. Considering the interplay and combined effect of all of the circumstances surrounding the police interrogation, the Court found, on balance, that the police officers created a coercive atmosphere such that a reasonable 17-year-old would have experienced a restraint tantamount to arrest. The juvenile court therefore erred in admitting evidence related to the pre-arrest interrogation of defendant. The error in admitting defendant's pre-arrest statements was held to be prejudicial. Because the appellate court was unable to confidently say that the evidence of guilt was so overwhelming that the juvenile court's true findings were surely unattributable to the admission of the statements, the error was not harmless beyond a reasonable doubt. (*In re Matthew W.* (2021) 66 Cal.App.5th 392.)

Miscellaneous Issues Unique to Juveniles:

Requesting an Adult's Assistance:

Rule: A minor's request for the assistance of a parent, probation officer, or other adult figure is *not*, as a general rule, an invocation.

Contrary to prior case law in California (See *People v. Burton* (1971) 6 Cal.3rd 375, 383-384; *In re Michael C.* (1978) 21 Cal.3rd 471, 476.), a request for a *parent* or *probation officer* is *not*, per se (i.e., "*as a matter of law*") an invocation of his right to remain silent. The "*totality of the circumstances*" must be considered. (*People v. Lessie* (2010) 47 Cal.4th 1152; see also *People v. Lewis* (2001) 26 Cal.4th 334.)

However, such a request should not be ignored. Whether or not a request by *any* person, whether or not he or she is a minor (see *People v. Soto* (1984) 157 Cal.App.3rd 694; 19-year-old, criminally unsophisticated adult), to talk to a parent, probation officer, or any other adult figure, should be interpreted as an attempt at an invocation depends upon the "*totality of the circumstances*," with the suspect's level of "*criminal sophistication*" but one factor to consider. (*People v. Hector* (2000) 83 Cal.App.4th 228, 232-237.)

"Where the age and experience of a juvenile indicate that his request for his . . . parents is, in fact, an invocation of his right to remain silent, the totality (of the circumstances)

approach will allow the court the necessary flexibility to take this into account in making a waiver determination.” (*Fare v. Michael C.*, *supra*, at p. 725 [61 L.Ed.2nd at p. 212]; see also *People v. Lessie*, *supra*, at p. 1168.)

A minor’s request to speak with a parent, however, is not necessarily an invocation of his **Fifth Amendment Miranda** rights. When such an invocation is attempted after an initial waiver, the validity of the attempt depends upon how a reasonable officer would have interpreted the suspect’s efforts. The same rule applies to the minor’s apparent attempt to invoke his right to silence as well as to an attorney. (*People v. Nelson* (2012) 53 Cal.4th 367, 374-385.)

See *In re Art T.* (2015) 234 Cal.App.4th 335, 351-352, citing *Fare v. Michael C.*, *supra*, at pp. 725-726, noting that a minor’s request for his probation officer, in light of all the surrounding circumstances, may in fact be an attempt to invoke his right to silence.

The Legal Consequences of a Parent’s Presence:

Effect of a Parent’s Presence at an Interrogation:

“There may be . . . circumstances in which a parent might be motivated to encourage cooperation with police to the detriment of his child’s legal interests. For example, the parent may be the victim of the crime, or may himself be a suspect. (Citation) Less obviously, a parent may urge cooperation with law enforcement as a matter of moral responsibility. (Citation) Some parents, believing their children to be innocent, may encourage cooperation out of a desire to promote good citizenship or to aid in the investigation of a crime. Others, believing their children to be guilty, may urge cooperation out of a desire to teach their children life lessons about personal responsibility or respect for authority. Suffice to say, there may be any number of circumstances in which a parent may urge cooperation with law enforcement, raising the possibility that the parent’s interests may conflict with those of his child given the adversarial structure of our criminal justice system.” (*In re I.F.* (2018) 20 Cal.App.5th 735, 761; citing *Farber, The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?* (2004) *41 Am. Crim. L.Rev.* 1277, 1294.)

“It requires no stretch of judicial imagination to see that a parent's broad authority could easily extend into the

interrogation room, combining with police authority to produce a coercive atmosphere.” (*Id.*, at p. 762.)

Parent as a De Facto Agent of Law Enforcement:

A child’s parent, in encouraging the minor to confess, may be held to be the “de facto” agent of law enforcement. (*In re I.F.*, *supra*, at p. 762; citing *In re D. W.* (1982) 108 Ill.App.3rd 1109, 1111 [64 Ill.Dec. 588, 440 N.E.2d 140, 141], where it was held that the minor’s confession was inadmissible because his mother “was used as an agent of the police” and insisted he tell the police what happened.)

See “*Private Citizens and other Non-Law Enforcement*,” in “*Law Enforcement*” (Chapter 4), above.

Conflict of Interest:

Where an adult who participates in an interrogation of a child suspect is also the parent of the child victim, a “serious conflict of interest” may occur that is a factor to consider in the totality of the circumstances, in determining the coerciveness of an interrogation. (*In re I.F.*, *supra*, at pp. 760-766, 778-779; see also dissent in denial of certiorari in *Little v. Arkansas* (1978) 435 U.S. 957, 959-961 [55 L.Ed.2nd 809, 98 S. Ct. 1590]; finding that such a conflict of interest, rather than providing a rule of suppression as a matter of law, is to be considered as one factor in the totality of the circumstances.

At pages 778-779, the *In re I.F.* Court noted that a father’s urging the minor to cooperate with police, placing the minor “on a collision course” with the minor’s **Fifth Amendment** rights, and thus contributing to the creation of a coercive atmosphere, far from demonstrated that the interview was noncustodial and would have convinced a reasonable 12 year old that he had no choice but to submit to questioning.

A Parent’s Attempt to Invoke for a Minor: There is no direct authority for (or against) the argument that the parent of a minor may interfere with an interrogation and invoke the minor’s rights for the minor. The available case law, however, tends to indicate that such an attempt is legally ineffective. For example:

Only the defendant may invoke the protections of the **Fifth Amendment**, and then only at the time questioning is attempted.

(*McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3 [115 L.Ed.2nd 158, 171]; *United States v. Wright* (9th Cir. 1992) 962 F.2nd 953, 955; *People v. Calderon* (1997) 54 Cal.App.4th 766.)

As a general rule, juveniles, in respect to *Miranda*, are treated the same as adults. (*Fare v. Michael C.* (1979) 442 U.S. 707, 722-724 [61 L.Ed.2nd 197, 211]; *People v. Hector* (2000) 83 Cal.App.4th 228.)

A minor is legally capable of waiving his rights. (*Fare v. Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2nd 197, 212-213]; *People v. Lara* (1967) 67 Cal.2nd 365, 383; *People v. Maestas* (1987) 194 Cal.App.3rd 1499, 1508-1509.)

“P.O.S.T.” (Commission on “*Peace Officer Standards and Training*”) is responsible for preparing guidelines establishing standard procedures that may be followed by police agencies and prosecutors in interviewing minors. (**P.C. § 13517.5**) P.O.S.T. has not indicated that a minor’s parent may invoke the minor’s rights for him.

A court may *not* institute any rules prohibiting, impeding, or restricting law enforcement’s right to conduct legitimate investigations, including the interrogating of minors, temporarily removing a minor from a detention facility, or placing the minor in a live lineup. (86 *Op.Cal.Atty.Gen* 146 (2003).)

There is no constitutional (state or federal) requirement that a law enforcement officer advise a minor that he or she has a right to contact his parents (or other adult) or to have them present during questioning. (*In re Aven S.* (1991) 1 Cal.App.4th 69, 76.)

A juvenile need not be told of his right to talk to a parent, or to have a parent present. (*In re Jessie L.* (1982) 131 Cal.App.3rd 202, 215; “A minor has the capacity to make a voluntary confession.”)

This is true even if his parents are present and asking to see him. (*In re John S.* (1988) 199 Cal.App.3rd 441; “A mere failure of the authorities to seek the consent of an adult cannot be held to outweigh, in any given circumstance, an evidentially supported finding that such a waiver (by the minor) was actually made.”)

But see In re I.F. (2018) 20 Cal.App.5th 735, where the Court just assumes that a 12-year-old minor’s father’s actions were relevant

to the issue of whether the minor was in custody for purposes of *Miranda*.

However, in the same decision, in discussing a subsequent interrogation, the Court acknowledges that “(b)ecause the ultimate issue is whether a reasonable child in (the minor’s) position would have understood he was free to leave, we cannot impute (his father’s) subjective understanding of the circumstances of the interview to (the minor.)” (*Id.*, at p. 771.)

And then, in yet another (the fourth) interview, it was noted that “(a)lthough (the minor’s father) clearly understood that he was free to leave, nothing in the record suggests that (the minor) agreed to an interview, understood the interview to be voluntary, or understood (his father’s) role in making the necessary arrangements. . . . (W)e cannot impute (the father’s) understanding of the circumstances of the interview to (the minor).” (*Id.*, at p. 774.)

Interviewing a child victim on a school campus without the parents’ consent required a search warrant or other court order, or exigent circumstances, as a **Fourth Amendment** seizure, and did not meet the requirements of a “*special needs*” seizure. (*Greene v. Camreta* (9th Cir. 2009) 588 F.3rd 1011; certiorari granted.)

This case was overruled by the United States Supreme Court in *Camreta v. Greene* (2011) 563 U.S. 692 [131 S.Ct. 2020; 179 L.Ed.2nd 1118], and vacated, making it unavailable for citation, but also leaving the issue unresolved.

See **P.C. § 11174.3(a)**, setting out a statutory procedures police officers are to use in interviewing child victims while at school.

Need for a Clear and Unequivocal Invocation After a Prior Waiver:

“(T)he same objective standard for determining whether an adult suspect has invoked his or her *Miranda* rights also applies to juvenile suspects.” (*People v. Villasenor* (2015) 242 Cal.App.4th 42, 61, citing *People v. Nelson* (2012) 53 Cal.4th 367, 378-380.)

“(O)nce a juvenile suspect has made a valid waiver of the *Miranda* rights, any subsequent assertion of the right to counsel or right to silence during questioning must be articulated sufficiently clearly that a reasonable police officer in the circumstances would

understand the statement to be an invocation of such rights.” (*Id.* at pp. 379–380; *People v. Villasenor*, *supra*.)

“A defendant who has waived his *Miranda* rights may reinvoke them during the interrogation. If he clearly and unequivocally does so, police must stop questioning.” (*People v. Henderson* (2020) 9 Cal.5th 1013, 1022.)

See “*Invocation of Rights*” (Chapter 7), above.

W&I § 707 Fitness Hearings As a Prerequisite to being Tried as an Adult: A minor, charged with a serious offense, may be declared unfit under certain circumstances to be tried as a juvenile. (**W & I Code, 707(a), (b), (c)**) As a part of the People’s burden to establish a “prima facie” case, if the minor challenges the voluntariness of incriminating statements obtained from him, a hearing must be held by the Juvenile Court on this issue. (*Marcus W. v. Superior Court [People]* (2002) 98 Cal.App.4th 36: Minor, although advised of his *Miranda* rights, never waived them before providing incriminating statements.)

Note the amendment to **subd. (b)** of **W&I Code § 707**, effective 1/1/2019: The prosecution of a minor as an adult who was 14 or 15 years old when he or she committed one or more of the offenses listed in **W&I § 707(b)**, except where he or she is “not apprehended prior to the end of juvenile court jurisdiction,” is now prohibited.

Previously, a 16- or 17-year old could be prosecuted in adult court for any felony crime, and a 14- or 15-year-old could be prosecuted in adult court for any offense specifically listed in **W&I § 707(b)**. Now **W&I § 707** permits only 16- and 17-year olds to be prosecuted in adult court for any felony, unless a 14- or 15-year-old who commits a **W&I § 707(b)** offense is not apprehended before the end of juvenile court jurisdiction.

Statutory Protections:

W&I Code § 625; Reading A Juvenile His *Miranda* Rights: Per statute, any juvenile “*taken into temporary custody*” (i.e., has been “*arrested*”) per **W&I §§ 601 or 602**, or for having violated a court order or escaping confinement, must be read a *Miranda*-style admonishment by the arresting officer at some time prior to release, *whether or not* the juvenile is to be questioned.

W&I § 625: “In any case where a minor is taken into temporary custody on the ground that there is reasonable cause for believing that such minor is a person described in **Section 601 or 602**, or that he has violated an order of the juvenile court or escaped from any commitment ordered by the juvenile court, the officer shall advise such minor that anything he says can be used against him and shall advise him of his constitutional rights,

including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel.”

Note: Neither the statute, nor case law, specifies at what point after being taken into custody the officer is to read the minor his constitutional rights. Certainly, that should be accomplished either (1) immediately preceding questioning (as with any adult), or (2) at some point before the minor is released to a parent or guardian, or to Probation (i.e., Juvenile Hall).

Taking a juvenile into “*temporary custody*” is “equivalent to an arrest.” (See *In re Ian C.* (2001) 87 Cal.App.4th 856, 860; *In re Thierry S.* (1977) 19 Cal.3rd 727, 734, fn. 6.)

Federal law also requires all juveniles to be *Mirandized* upon being taken into custody, whether or not they are ever interrogated. (18 U.S.C. § 5033)

Section 5033 further requires that federal law enforcement agents notify the parents of a juvenile’s rights, and that it be done “*immediately*” after the child is taken into custody. While the parents or guardian of a minor taken into custody by state officials must be notified (**W&I Code, § 627(a)**), there is no state requirement that the arresting officer inform the parent or guardian of the minor’s rights.

However, pursuant to **W&I Code, § 627.5**, should the minor be taken to Juvenile Hall (i.e., “taken before a probation officer”) “pursuant to the provisions of **Section 626** . . . (where) it is alleged that such minor is a person described in **Section 601** or **602**, *the probation officer shall immediately advise the minor and his parent or guardian that anything the minor says can be used against him and shall advise them of the minor’s constitutional rights, including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel. If the minor or his parent or guardian requests counsel, the probation officer shall notify the judge of the juvenile court of such request and counsel for the minor shall be appointed pursuant to **Section 634**.*” (Italics added)

A one-hour delay in notifying the parents of the juvenile’s *Miranda* rights was not unreasonable given the fact that it was done as soon as it was discovered that the arrested subject was a juvenile. (*United States v. Wendy G.* (9th Cir. 2001) 255 F.3rd 761.)

Minors and Mandatory Attorney Consultations: Effective January 1, 2021 (**SB 203**), section **625.6** of the **Welfare and Institutions Code** was amended to provide the following protections for all minors (17 years of age and younger) from potentially coercive interrogations by requiring the following:

Welf. & Inst. § 625.6:

(a) Prior to a custodial interrogation, and before the waiver of any ***Miranda*** rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.

(b) The court shall, in adjudicating the admissibility of statements of a youth 17 years of age or younger made during or after a custodial interrogation, consider the effect of failure to comply with **subdivision (a)** and, additionally, shall consider any willful violation of **subdivision (a)** in determining the credibility of a law enforcement officer under **Section 780** of the **Evidence Code**.

(c) This section does not apply to the admissibility of statements of a youth 17 years of age or younger if both of the following criteria are met:

(1) The officer who questioned the youth reasonably believed the information he or she sought was necessary to protect life or property from an imminent threat.

(2) The officer's questions were limited to those questions that were reasonably necessary to obtain that information.

(d) This section does not require a probation officer to comply with **subdivision (a)** in the normal performance of his or her duties under **W&I §§ 625, 627.5, or 628**.

The Legislature's Reasoning:

In the uncodified portion of **Senate Bill 395**, through which **Pen. Code § 625.6** was enacted, the Legislature explained the reasons why it felt that **Pen. Code § 625.6** was necessary, making certain findings and conclusions. Specifically the Legislature found that “(d)evelopmental and neurological science concludes that the process of cognitive brain development continues into adulthood, and that the human brain undergoes ‘dynamic changes throughout adolescence and well into young adulthood.’” Children “generally are less mature and responsible than adults.” “(T)hey ‘often lack the experience, perspective, and judgment to recognize and avoid

choices that could be detrimental to them” to be “more vulnerable or susceptible to . . . outside pressures” than adults.” “(T)hey ‘have limited understandings of the criminal justice system and the roles of the institutional actors within it.’” Children “characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.” (See *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272, 277 [180 L.Ed.2nd 310; 131 S.Ct. 2394].) and *Graham v. Florida* (2010) 560 U.S. 48 [176 L.Ed.2nd 825; 130 S. Ct. 2011].) The Legislature also found that juveniles are less able than adults to understand the meaning of their *Miranda* rights and the consequences of waiving them, that adolescents tend to “ignore or discount future outcomes and implications” and disregard long-term consequences of important decisions, and that juveniles are more vulnerable to “psychologically coercive interrogations” than adults experienced with the criminal justice system. For these reasons, the Legislature concluded, “in situations of custodial interrogation and prior to making a waiver of rights under [*Miranda*], youth under 18 years of age should consult with legal counsel to assist in their understanding of their rights and the consequences of waiving those rights.” (See *In re Anthony L.* (2019) 43 Cal.App.5th 438, 447-448.)

Case Law:

A minor’s statement to police was not rendered inadmissible by the failure of his police interrogators to arrange for him to consult with counsel, as required by **Welf. & Inst. Code, § 625.6**, because the minor’s rights under the United States Constitution were not violated. The 15-year-old minor validly waived his *Miranda* rights because he willingly answered questions after acknowledging that he understood his rights, and nothing in the record persuaded the court that he did not understand his rights to silence and counsel and the consequences of waiving those rights. (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 444-455.)

Pen. Code § 859.5(a) and Welf. & Inst. Code § 626.8; Recording Requirements: See “*Recording Requirements for Juveniles*,” below, describing the statutory recording requirements of an interrogation of a juvenile murder suspect pursuant to **P.C. § 859.5(a)** and **W&I. Code § 626.8**.

See “*Statutory Recording Requirements for Juveniles*,” below.

Pen. Code § 26; Capacity to Commit a Crime for a Minor Under the Age of 14:

Per P.C. § 26, “(c)hildren under the age of 14 (are presumed incapable of committing crime), in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.

Note: As a result, law enforcement officers (and later, the prosecution) must establish by “*clear proof*” that a minor under the age of 14 understood the wrongfulness of his or her criminal act.

It’s been held to be error to admit into evidence a 10-year-old minor’s pre-***Miranda*** custodial admission of guilt made in response to questions from a detective relating to whether he understood the wrongfulness of his actions and had the capacity to commit a crime, as required by **P.C. § 26**. However, the error was harmless because the minor repeatedly told officers that he had shot his father in other admissible statements. The minor’s subsequent waiver was voluntary. (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 529-533.)

The so-called “***Gladys R.***” admonishment, per *In re Gladys R.* (1970) 1 Cal.3rd 855 and **P.C. § 26**, done for the purpose of establishing by “clear evidence” that a minor under the age of 14 years understands the wrongfulness of his act, should be administered only after the minor is advised of his ***Miranda*** rights. (*In re Joseph H.*, *supra*, at p. 532.)

See “*The Gladys R. Inquiry*,” below.

Note: If the minor invokes his rights, then while the admonishment should still be administered, it is understood that his responses will not be admissible against him at trial on the issue of guilt or innocence.

Custody of a Juvenile:

Problem: Whether or not a suspect/minor is in custody, just as with adults, must be determined in order to decide whether a ***Miranda*** admonishment and waiver must precede an interview or interrogation. (See “*Custody*” (Chapter 2), above.)

The Juvenile’s Age: Whether or not a person is in “*custody*” is an *objective issue*, and does *not* take into consideration *subjective* factors as to a particular person. (*Yarborough v. Alvarado* (2004) 541 U.S. 652 [158 L.Ed.2nd 938].)

However, although the age of a suspect is generally considered a subjective factor that is not to be considered in determining whether a person is in custody (*Yarborough v. Alvarado*, *supra*.), the Supreme Court has since determined that in the case of a minor, where a minor’s age is either known, or apparent, to an interrogator, this factor becomes an objectively perceived one, and must be taken into consideration when determining whether the minor is in custody for purposes of ***Miranda***.

(*J.D.B. v. North Carolina* (2011) 564 U.S. 261, 268-281 [180 L.Ed.2nd 310; 131 S.Ct. 2394]; see also *In re Joseph H.* (2015) 237 Cal.App.4th 517, 531; and *In re Matthew W.* (2021) 66 Cal.App.5th 392, 405-406.)

The Gladys R. Inquiry: The fact that a police officer begins an interview of a minor under the age of 14 years with a *Gladys R.* questionnaire, done in order to determine by “clear evidence” whether a minor under the age of 14 years understood the wrongfulness of his act (see *In re Gladys R.* (1970) 1 Cal.3rd 855, and P.C. § 26) is, in itself, a factor to consider when determining whether the minor was in custody at the time. (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 531.)

See “*When Combined with Other Admonishments*,” under “*Form of the Admonition*,” under “*The Admonition*” (Chapter 6), above.

Use of a Beheler Admonishment:

As with adults, when a minor is interrogated under objective circumstances where a reasonable person would not have felt like he was in custody, no *Miranda* admonishment is required. (*In re Kenneth S.* (2005) 133 Cal.App.4th 54, 63-66; minor told that he was not under arrest and that he was free to leave whenever he wanted, per *California v. Beheler* (1983) 453 U.S. 1121 [103 S.Ct. 3517; 77 L.Ed.2nd 1275].)

Defendant, a minor, was brought in by his foster mother, but told that he was not under arrest and that he was free to leave. No custody despite being taken to a secure area of a police station. (*In re Kenneth S.* (2005) 133 Cal.App.4th 54.)

A 12-year-old murder suspect being immediately informed that, “both of these doors are open, you are not under arrest, you’re not being detained, you’re here on your [own] free will,” and then being told that he could “get up” and “walk out anytime,” which it appeared that the minor heard and understood, “would have alerted a reasonable 12 year old that he was free to terminate the interview and leave.” (*In re I.F.* (2018) 20 Cal.App.5th 735, 769; the Court finding no custody.)

However, the minor’s interrogators’ failure to tell the minor that he was free to leave in a subsequent interview, at least until the interview was over, along with other factors, caused the Court to reach a different conclusion; i.e., that that interview was custodial and without a *Miranda* advisal and waiver, the minor’s responses were inadmissible. (*Id.*, at pp. 771-773.)

See “*The ‘Beheler Admonishment,’ or Taking the “Custody” out of an Interrogation,*” under “*The Custodial Interrogation,*” under “*Custody*” (Chapter 2), above.

Statutory Recording Requirements for Juveniles:

Pen. Code § 859.5(a); Recording Requirements of a Minor’s Interrogation: A custodial interrogation of a minor who is in a “*fixed place of detention*” and suspected of committing a *murder* must be electronically recorded in its entirety. The existence of such a recording creates a rebuttable presumption that the suspect gave the statement and that it was recorded accurately.

Note: As of January 1, 2017, this section also applies to adult murder suspects, at least as to the requirement that such an interrogation be audio-taped. See “*Recording Interrogations,*” under “*The Custodial Interrogation*” (Chapter 3), above.

Subd. (g)(2): An “*electronic recording*” is defined as a “*video recording*” that accurately records a custodial interrogation.

Subd. (g)(3): A “*fixed place of detention*” is defined as a fixed location under the control of a law enforcement agency where an individual is held in detention in connection with a criminal offense that has been, or may be, filed against that person, including a jail, police or sheriff’s station, holding cell, correctional or detention facility, juvenile hall, or a facility of the Division of Juvenile Facilities.

Subd. (b): Exceptions: The prosecution has the burden by “*clear and convincing evidence*” to show that an exception applies. Exceptions to the recording requirement are as follows:

- (1) Recording is not feasible because of exigent circumstances, an explanation of such circumstances being included in the police report; *or*
- (2) The suspect states that he or she will speak to law enforcement only if the interrogation is *not* recorded or that he or she will not speak further unless recording ceases; *or*
- (3) The interrogation took place in another jurisdiction and was conducted in compliance with the law of that jurisdiction, unless the interrogation was conducted with intent to avoid the requirements of this section; *or*
- (4) The interrogation occurs when no law enforcement officer reasonably believes the suspect may have committed murder. If during such an interrogation, facts and circumstances give a law enforcement officer reason to believe that murder has been committed, continued custodial interrogation must be electronically recorded; *or*

- (5) A law enforcement officer conducting the interrogation reasonably believes that recording would disclose the identity of an informant or jeopardize the safety of an officer, the suspect, or another individual. An explanation of such circumstances must be included in the police report; *or*
- (6) The recording device malfunctions despite reasonable maintenance of the equipment and timely repair or replacement was not feasible; *or*
- (7) The questions and answers are part of a routine processing or booking of the suspect or are spontaneous statements made during routine processing or booking.

Subd. (d): The minor's statement may be admitted into evidence even if not recorded if:

- (1) The statement is admissible under applicable rules of evidence; *and*
- (2) The prosecution proves by clear and convincing evidence that the statements were voluntary; *and*
- (3) If feasible, law enforcement makes a contemporaneous audio and/or visual recording of the reason for not making an electronic recording; *and*
- (4) The prosecution proves by clear and convincing evidence that one or more of the recording exceptions apply.

Subd. (e): If the court does *not* find that an electronic recording exception applies, *all* of the following remedies shall be granted as relief for noncompliance:

- (1) Failure to comply shall be considered by the court in adjudicating a motion to suppress the defendant's statement made during or after custodial interrogation; *and*
- (2) Failure to comply shall be admissible in support of claims that a defendant's statement was involuntary or is unreliable; *and*
- (3) The court shall give a jury instruction, to be developed by the Judicial Council, that advises the jury to view with caution the statements made during the custodial interrogation.

Subd. (f): The interrogating entity shall maintain the original or an exact copy of an electronic recording until a conviction is final and all direct and habeas corpus appeals are exhausted or prosecution for the offense is barred by law.

Welf. & Inst. Code § 626.8; Recording Interrogations of Minors:

Subd. (a): Makes the new electronic recording requirements in **P.C. § 859.5** (see above) applicable to juvenile *murder* suspects who may be adjudged wards of the juvenile court pursuant to **W&I § 602**.

Subd. (b): The interrogating entity must maintain an original or exact copy of an electronic recording made of a custodial interrogation until the minor is no longer subject to the jurisdiction of the juvenile court, unless the person is transferred to a court of criminal jurisdiction (adult court), in which case the entity must maintain the original or exact copy until a conviction is final and all direct and habeas corpus appeals are exhausted or the prosecution for the offense is barred by law.

Case Law:

See *Balbuena v. Sullivan* (9th Cir. 2020) 970 F.3rd 1176, 1189, where the Ninth Circuit noted that it helped in determining whether a 16-year-old defendant was coerced into confessing where the interview was videotaped and the Court was “not consigned to an evaluation of a cold record, or limited to reliance on the detectives’ testimony.” The Court ruled that under the circumstances, defendant, although his “status as ‘a juvenile (was) of critical importance,’” had not been coerced. (*Id.*, at p. 1186.)

Chapter 11: Public Employees Subject to Administrative Investigations

Coerced Statements from Public Employees:

Rule: During an administrative internal investigation, the choice of either forfeiting one's employment or incriminating oneself result in statements which are *coerced*. (*Garrity v. New Jersey* (1967) 385 U.S. 493 [17 L.Ed.2nd 562].)

Case Law:

Official compulsion, for purposes of the **Fifth Amendment**, is not limited to court process, and may include a public employer's threat to dismiss an employee for refusing to answer potentially incriminating questions. The **Fifth Amendment** "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." (*Garrity v. New Jersey*, *supra*, at pp. 496-498, 500; see also *Gardner v. Broderick* (1968) 392 U.S. 273 [20 L.Ed.2nd 1082]; *Sanitation Men v. Sanitation Commissioner* (1968) 392 U.S. 280 [20 L.Ed.2nd 1089].)

The fact that a police officer is the subject of a criminal investigation, and is questioned accordingly, does not automatically invoke the *Garrity* protections. "[T]he right against self-incrimination is not . . . violated until statements obtained by compulsion are used in criminal proceedings against the person from whom the statements were obtained." (*Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 727) "[A]nswers freely given [by government employees] are not immune from use in criminal proceedings" (*Evangelou v. District of Columbia* (D.D.C. 2012) 901 F.Supp.2nd 159, 166.) . . . In *Garrity*, the compulsion element was obvious: before being questioned, each officer was told that 'if he refused to answer he would be subject to removal from office.' (*Garrity*, *supra*, 385 U.S. at p. 494.) Accordingly, some federal courts have held that 'for [*Garrity*] to apply, the threat of a penalty for remaining silent must have been explicit' (*United States v. Corbin* (7th Cir. 1993) 998 F.2nd 1377, 1390.), and that absent an explicit threat of termination by the interrogators, there can be no compulsion and thus, no need to suppress. (See, e.g., *Dwan v. City of Boston* (1st Cir. 2003) 329 F.3rd 275, 279 ['[C]oercion is lacking so long as the employee was never threatened or forewarned of any sanction for refusing to testify, even though the employee suffers adverse action after-the-fact as a result of refusing to cooperate.']; accord, *United States v. Palmquist* (1st Cir. 2013) 712 F.3rd 640, 645; *United States v. Indorato* (1st Cir. 1980) 628 F.2nd 711, 716; *Singer v. Maine* (1st Cir. 1995) 49 F.3rd 837, 847.)" (*People v. Lazarus* (2015) 238 Cal.App.4th 734, 772.)

"Other courts have applied a less restrictive test, holding that a police officer claiming the protection of *Garrity* 'must have in fact

believed his . . . statements to be compelled on threat of loss of job and this belief must have been objectively reasonable.’ (*United States v. Friedrich* (D.C. Cir. 1988) 268 U.S. App.D.C. 386 [842 F.2nd 382, 395]; see, e.g., *United States v. Vangates* (11th Cir. 2002) 287 F.3rd 1315, 1321-1322 [‘In the absence of a direct threat, we determine whether the officer’s statements were compelled by examining her belief and, more importantly, the objective circumstances surrounding it.’]; accord, *McKinley v. City of Mansfield* (6th Cir. 2005) 404 F.3rd 418, 436; *United States v. Waldon* (11th Cir. 2004) 363 F.3d 1103, 1112; *United States v. Trevino* (5th Cir. 2007) 215 Fed.Appx. 319, 321; *United States v. Stein* (S.D.N.Y. 2006) 440 F.Supp.2nd 315, 328; *United States v. Camacho* (S.D.Fla. 1990) 739 F.Supp. 1504, 1515.)” (*Id.*, at pp. 772-773.)

In *People v. Lazarus*, *supra*, it was ruled that under either test, above, the defendant could not have reasonably believed that she was protected by *Garrity* from having her statements used against her in that she was not in custody and there was never any indication that she was the subject of an administrative, internal investigation. (*Id.*, at pp. 769-777.)

In a case where a prison lieutenant was indicted for beating a prison inmate to death, it was held that that statements in the duty and incident reports, written after the beating, were not compelled within the meaning of *Garrity*. While such reports are mandatory, the court concluded that where there is no direct threat, the mere possibility of future discipline is not enough to trigger the *Garrity* protections. Before a police officer’s testimony will be considered “coerced” under *Garrity*, the officer must show that he subjectively believed that he would lose his job if he refused to answer questions and that his belief was objectively reasonable. Here, the court held that defendant failed to present any evidence that he subjectively believed that he would be terminated if he refused to submit the reports. Instead, his motive to make the written statements more than likely was to deflect suspicion and avoid criminal prosecution rather than to retain his employment. Also, statements made to an Alabama state investigator, after being advised of his *Miranda* rights and waiving them, were admissible over a *Garrity* objection. Defendant failed to present any evidence that he subjectively believed that failing to answer the investigator’s questions would lead to termination. And lastly, statements made to prison investigators, after defendant was advised of his *Garrity* rights and waived them, were admissible at trial. (*United States v. Smith* (11th Cir. 2016) 821 F.3rd 1293.)

See *City of Hays v. Vogt* (10th Cir. 2017) 844 F.3rd 1235, 1239-1246, holding that the **Fifth Amendment** applies to pretrial hearings as well the

trial itself, holding that it was error to use defendant police officer's coerced statements against him at a probable cause hearing.

Applicable Statutes:

Gov't. Code § 3253(e)(1): A *firefighter* must receive a formal written offer of criminal *transactional immunity* before being required to answer an employer's incriminating questions.

Gov't. Code § 3303(f): A *police officer's* statements received under such circumstances are also *inadmissible in any subsequent civil action*.

Gov't. Code, § 3304: Forbidding "punitive action" against a police officer for lawfully exercising his rights under the **Public Safety Officers Procedural Bill of Rights Act (Gov't. Code, §§ 3303 et seq.)**, including his right to be informed of his constitutional rights where it is possible the investigation might lead to a criminal prosecution.

The **Public Safety Officers Procedural Bill of Rights (POBRA)** (Gov't. Code §§ 3300 et seq.) requires public agencies investigating misconduct by a public safety officer to complete their investigation and notify the officer of any proposed discipline within one year of discovering the misconduct. (Gov't. Code § 3304(d)(1).) If the possible misconduct "is also the subject of a criminal investigation or criminal prosecution," the one-year period is tolled while the "criminal investigation or criminal prosecution is pending." (Gov't. Code § 3304(d)(2)(A).) Here, the court held that a criminal investigation is no longer pending—and [the Gov't. Code § 3304(d)(2)(A)] tolling period ends—when a final determination is made not to prosecute all of the public safety officers implicated in the misconduct at issue. Applying this definition, the Court concluded that the tolling period did not end until the Los Angeles County District Attorney officially rejected prosecution of all three officers investigated in the case. (*Bacilio v. City of Los Angeles* (2018) 28 Cal.App.5th 717.)

Gov't. Code § 18676: When ordered to do so, a witness shall not be excused from testifying or from producing any documentary evidence in a civil service investigation or hearing upon the ground that the testimony or documentary evidence required of the witness may tend to incriminate or subject the witness to penalty or forfeiture, provided the witness has been granted *use and derivative use, or transactional immunity* by the appropriate law enforcement authority.

A deputy public defender could not be terminated for failing to provide incriminating answers to a county employer regarding the

P.D.'s purportedly deceptive statements to a judge, absent a formal grant of immunity. In rejecting the idea that the court should create a form of self-executing immunity that would attach to answers compelled from public employees by threat of discharge, the Court noted that the Legislature had already granted such immunity to witnesses in civil service matters under **Gov't. Code §§18676** (above) and **18677** (below). (*Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704.)

Gov't. Code § 18677: A person who claims and is granted immunity prior to testimony or the production of books or papers in a *civil service matter*, shall not be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction, matter, or thing concerning which he or she shall, under oath, have testified or produced documentary evidence in any such hearing or investigation, except for perjury committed in so testifying.

(See *Spielbauer v. County of Santa Clara*, *supra*.)

Gov't. Code § 83119: A person compelled, over a self-incrimination objection, to testify before the *Fair Political Practices Commission* has criminal *transactional immunity* with respect to those matters disclosed.

Corp. Code, § 25531(e): A person compelled, over a self-incrimination objection, to testify before the *Corporations Commissioner* in a *securities fraud investigation* has a criminal *transactional immunity* with respect to such matters.

P.C. § 1324: A prosecutor may request judicial immunity for a witness in a felony proceeding.

Examples:

Statements forced from a law enforcement officer in an *administrative investigation* under threat of disciplinary action should he or she refuse to cooperate, are *inadmissible* in any future criminal case against that officer. Per statute in California, an officer must be so advised. (*Lybarger v. City of Los Angeles* (1985) 40 Cal.3rd 822, citing **Gov't. Code § 3304(a)** and **3303(g)** (now **(h)**), which forbids “punitive action” against an officer for lawfully exercising his rights under the **Public Safety Officers Procedural Bill of Rights Act (Gov't. Code, §§ 3303 et seq.)**, including his right to be informed of his constitutional rights where it is possible the investigation might lead to a criminal prosecution.)

But see *Williams v. City of Los Angeles* (1988) 47 Cal.3rd 195, at pp. 201-206; Officer Williams being Lybarger's partner. In this case,

Williams was also not advised of his right against self-incrimination and that his statements would not be used against him in any subsequent criminal case. Unlike Officer Lybarger, however, Williams chose to answer questions. He was fired because of the answers he gave. Although his statutory right to an advisal of his rights was violated, the Court ruled that his dismissal was still warranted.

Officers are entitled to discovery of any recordings of interrogations and any related reports and complaints prior to a second round of interrogations during an internal affairs investigation. (*Santa Ana Police Officers Assn. v. City of Santa Ana* (2017) 13 Cal.App.5th 317, 326-328.)

A public employee's **Fifth Amendment** right against self-incrimination protects him from the use of his statements compelled during an administrative interrogation, in a subsequent criminal case even though not warned accordingly, but does not preclude the use of those statements in imposing internal, administrative punishment. (*Szmaczarz v. State Personnel Board* (1978) 79 Cal.App.3rd 804, 917-918.)

Because the employee is being compelled to answer questions in an administrative interview, the **Fifth Amendment** precludes those statements from being used against him in any subsequent criminal prosecution. With such immunity, refusal to answer questions during such an interview, with use of the statements in a criminal case no longer being an issue, the employee may be administratively disciplined for refusing to answer them. (*Kelly v. State Personnel Board* (1979) 94 Cal.App.4th 905, 911.)

The same rule applies to any public employee (a public defender in this case). The employee is not entitled to a formal grant of immunity. It is sufficient that he is warned that refusal to answer questions will result in administrative discipline, up to and including termination, and that his responses, or any other evidence derived from his responses, cannot be used against him in any criminal case. (*Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704.)

Exceptions:

No Threatened Termination: Being told that one's employment cannot be terminated for refusing to answer questions will result in statements that are not coerced. (*United States v. Palmquist* (1st Cir. 2013) 712 F.3rd 640.)

A simple conversation between a police officer and her supervisor, intended only to be for purposes of training, even though it later led to an internal investigation and the officer's termination, is not a

situation protected by **Gov't. Code § 3303(f)**. (*Steinert v. City of Covina* (2006) 146 Cal.App.4th 458; i.e., qualified only as an “interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer,” per **Gov't Code § 3303(i)**.)

Promises of Immunity:

The United States Supreme Court has “held that the government can compel testimony from an unwilling witness who invokes the **Fifth Amendment** privilege against compulsory self-incrimination by conferring ‘*use and derivative use*’ immunity upon the witness. Such immunity bars use of the compelled testimony, or of evidence derived therefrom, in subsequent criminal proceedings.” (Italics added: *People v. Gwillim* (1990) 223 Cal.App.3rd 1254, 1266, 1270-1273; citing *Kastigar v. United States* (1972) 406 U.S. 441, 453 [32 L.Ed.2nd 212].)

However, this does not preclude a witness to the immunized from testifying in the same case as to other issues; e.g., as an expert on the use of force and arrest procedures. (*People v. Singleton* (2010) 182 Cal.App.4th 1, 11-18.)

There need not be a statute providing such immunity. “(T)he very act of the attorney general in telling the witness that he would be subject to removal if he refused to answer was held to have conferred such immunity.” (*Uniformed Sanitation Men’s Association v. Commissioner of Sanitation of New York* (2nd Cir. 1970) 426 F.2nd 619.)

Chapter 12: Appellate, Evidentiary, and Admissibility Issues

On Appeal:

When reviewing a **Miranda** ruling, an appellate court accepts the trial court's determination of disputed facts if supported by substantial evidence, but independently decides whether the challenged statements were obtained in violation of **Miranda**." (**People v. Molano** (2019) 7 Cal.5th 620, 633, citing **People v. Davis** (2009) 46 Cal.4th 539, 586; and **People v. Bradford** (1997) 15 Cal.4th 1229, 1311.)

Should a defendant fail to object to evidence as presented at trial, he generally waives any right to challenge that evidence on appeal. However, an appellate court may still consider the admissibility of that evidence if (1) there was error; (2) it was plain; (3) it affected the defendant's substantial rights; and (4) 'viewed in the context of the entire trial, the impropriety seriously affected the fairness, integrity, or public reputation of judicial proceedings. (**United States and Garcia-Morales** (9th Cir. 2019) 942 F.3rd 474, 475, quoting **United States v. Alcantara-Castillo** (9th Cir. 2015) 788 F.3rd 1186, 1191.)

The "Corpus Delicti" Rule:

Prerequisite of a "Prima Facie" Case: Before defendant's statements may be admitted into evidence, it has been held that a "*prima facie*" showing of each element of the charged criminal offense(s) must first be proved; i.e., the "*corpus delicti*." (**People v. Jennings** (1991) 53 Cal.3rd 334 [at trial]; **United States v. Norris** 9th Cir. 2005) 428 F.3rd 907, 914-915 [at trial]; **Hall v. Superior Court** (1953) 120 Cal.App.2nd 844 [at preliminary examination]; see also **United States v. Garcia-Villegas** (9th Cir. 2009) 575 F.3rd 949.)

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant." (**People v. Alvarez** (2002) 27 Cal.4th 1161, 1168-1169.)

"Some state courts follow the federal corroboration rule (see, e.g., **Armstrong v. State** (Alaska 1972) 502 P.2d 440, 447), but California does not. We instead apply the corpus delicti rule, which originally required independent proof of an actual crime before extrajudicial admissions could be admitted as evidence. (See **People v. Alvarez** (2002) 27 Cal.4th 1161, 1169–1170) The rule derives from California common law. (*Id.* at p. 1173.)" (**People v. Capers** (2019) 7 Cal.5th 989, 1002.)

A “*prima facie*” showing is made by producing evidence of a loss or injury, or that harm occurred, and that a criminal act was its cause. (*People v. Diaz* (1992) 3 Cal.4th 495, 529; *People v. Jennings*, *supra*, at p. 368; *People v. Crew* (2003) 31 Cal.4th 822, 837.)

The “*corpus delicti*” may be shown by circumstantial as well as direct evidence. (*People v. Andrews* (1963) 222 Cal.App.2nd 42, 244.)

“For corpus delicti purposes, *Jennings* makes clear, the evidence need only create a *reasonable inference*—‘by no means the only, or even the most compelling [inference]’—that the crime has occurred. [Citations]” (*People v. Riccio* (1996) 42 Cal.App.4th 995, 1000-1001; citing *People v. Jennings*, *supra*, at p. 367.)

“The People need make only a prima facie showing “‘permitting the reasonable inference that a crime was committed’” [Citations]” (*People v. Jones* (1998) 17 Cal.4th 279, 301-304; admitting defendant’s admissions concerning an oral copulation with no other evidence than that the victim had been subjected to other, multiple sex offenses.)

“Distilled to its essence, the corpus delicti *rule* requires that the prosecution establish the corpus delicti of a crime by evidence independent of the defendant’s extrajudicial inculpatory statements before he or she may be held to answer a criminal complaint following a preliminary examination, be convicted of an offense, or hear the statements repeated as evidence in court. [Citation.] The corpus delicti in turn consists of at least slight evidence that somebody committed a crime.” *In re I.M.* (2005) 125 Cal.App.4th 1195, 1202-1203; citing *People v. Ochoa* (1998) 19 Cal.4th 353, 450.)

“First, the government ‘must introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred. Second, it must introduce independent evidence tending to establish the trustworthiness of the admissions, unless the confession is, by virtue of special circumstances, inherently reliable.’ (Citation) The two prongs guard against distinct types of false confessions. Citation) The first ensures that a defendant is not convicted of a non-existent crime—that is, a crime that was not actually committed—and the second reduces the likelihood that a defendant is convicted based upon a false confession to an actual crime. (Citation) The government must satisfy both prongs for a case to survive a motion for a judgment of acquittal based on insufficient evidence.” (¶) “[T]he *corpus delicti* rule does not require the government to introduce evidence that would be independently sufficient to convict the defendant in the absence of the confession.’ (Citation). Nor does it require that the government ‘introduce independent, tangible

evidence supporting every element of the *corpus delicti*.’ (Citation). Instead, the government must introduce corroborating evidence ‘to support independently only the gravamen of the offense—the existence of the injury that forms the core of the offense and a link to a criminal actor.’” (*United States v. Niebla-Torres* (9th Cir. 2017) 847 F.3rd 1049, 1055; quoting *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2nd 583, 590-592, and *Valdez-Novoa* (9th Cir. 2015) 780 F.3rd 906, 923.)

The purpose of the rule is “to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened.” (*People v. Capers* (2019) 7 Cal.5th 989, 1169, citing *People v. Ochoa* (1998) 19 Cal. 4th 353, 405; *People v. Jones* (1998) 17 Cal. 4th 279, 301; *People v. Jennings* (1991) 53 Cal.3rd 334, 368.)

On appeal from defendant’s child molestation conviction, the Appellate Court reversed one of the convictions for a lack of a corpus delicti after distinguishing the existing case law. “Although . . . corpus delicti evidence can be quite slight, we think it a bridge too far to hold that corpus delicti evidence of sexual abuse identified by the victim as beginning around a particular time supports the inference that a sexual assault of a different kind occurred more than five months earlier [as admitted by defendant].” (*People v. Ruiz* (2020) 51 Cal.App.5th 369, 389-394.)

California Rule: The rule in California is that the prosecution cannot meet its burden of proving the corpus delicti of a crime by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. (*People v. Ochoa*, *supra*, citing *People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.)

The California Supreme Court has held that **Cal. Const. art. I, § 28(d) (Proposition 8)** abrogated the corpus delicti rule, requiring proof that a crime was committed independent of the defendant's extrajudicial statements, but only to the extent that such independent evidence must first be presented as a prerequisite to the admissibility of the defendant’s statements. **Section 28(d)** *did not*, however, abrogate that portion of the corpus delicti rule requiring that *defendant’s conviction* be supported by proof independent of his extrajudicial statements, and a jury must be so instructed. (*People v. Alvarez* (2002) 27 Cal.4th 1161.)

“In 1982, **Proposition 8** abrogated much of the corpus delicti requirement when it added the Right to Truth-in-Evidence provision to **article I** of the California Constitution. (**Cal. Const., art. I, § 28, subd. (d)**, added by initiative, Primary Elec. (Jun. 8, 1982), commonly known as **Prop. 8**.) As *Alvarez* observed, with certain exceptions, **Proposition 8** abolished ‘all state law restrictions on the *admissibility* of relevant evidence, necessarily including the prong of the corpus delicti rule that bars *introduction*

of an accused's out-of-court statements absent independent proof a crime was committed.' (*Alvarez, supra*, 27 Cal.4th at p. 1179; see *People v. Ray* (1996) 13 Cal.4th 313, 341) We cautioned that the pre-2008 version of 'section 28(d)' did not eliminate the independent-proof rule insofar as that rule prohibits *conviction* where the only evidence that the crime was committed is the defendant's own statements outside of court.' (*Alvarez, supra*, 27 Cal.4th at p. 1180.) We noted that the amount of independent evidence required is not great and may be circumstantial with only 'a slight or prima facie showing' that permits 'an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues.' (*Id.* at p. 1181.) *Alvarez* made it clear, however, that the pre-2008 version of 'section 28(d)' did not affect the rule to the extent it (1) requires an instruction to the jury that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements or (2) allows the defendant, on appeal, directly to attack the sufficiency of the prosecution's independent showing.' (*Alvarez, supra*, 27 Cal.4th at p. 1180.)" (*People v. Capers* (2019) 7 Cal.5th 989, 1002-1003.)

Based upon this, therefore, the California Supreme Court has determined "that insofar as the corpus delicti rule has directly barred or restricted the *admissibility in evidence* of otherwise relevant and admissible extrajudicial statements of the accused, on grounds that independent proof of the crime is lacking, the rule has been abrogated by **section 28(d)**. Under this constitutional provision, a corpus delicti objection to the *introduction* of defendant's statements is no longer valid as such." (*Id.*, at p. 1177.)

Despite the argument that this means that the corpus delicti rule need not be considered until a conviction is sought, it has been held that the rule applies at a preliminary examination with the case subject to being dismissed upon failing to do so. (*Jones v. Superior Court* (1979) 96 Cal.App.3rd 390, 393; *Rayyis v. Superior Court [People]* (2005) 133 Cal.App.4th 138; *People v. Herrera* (2005) 136 Cal.App.4th 1191.)

"In requiring independent evidence of the corpus delicti, California has not distinguished between actual confessions or admissions on the one hand, and preoffense statements of intent on the other. Thus, the rule in California has been that one cannot be convicted when there is no proof a crime occurred other than his or her own earlier utterances indicating a predisposition or purpose to commit it." (*People v. Capers* (2019) 7

Cal.5th 989, 1171-1172; citing; *People v. Beagle* (1972) 6 Cal.3rd 441, 445, fn.5.) *Beagle, supra*, 6 Cal. 3d 441, 455, fn. 5.)

“Such independent proof may consist of circumstantial evidence [citations], and need not establish the crime beyond a reasonable doubt [citations].’ (*People v. Jones* (1998) 17 Cal.4th 279, 301) ‘The amount of independent proof of a crime required for this purpose is . . . “slight.”’ (*Ibid.*) It need only permit a ““““reasonable inference that a crime was committed”””” (*ibid.*), ““even if a noncriminal explanation is also plausible”” (*People v.*) *Alvarez*, (2002) . . . (27 Cal.4th (1161) at p. 1171).” (*In re D.A.* (2018) 24 Cal.App.5th 768, 770-771; *People v. Capers* (2019) 7 Cal.5th 989, 1170, 1171.)

In a prosecution under **Pen. Code, §§ 187, 182**, for “*conspiracy to commit murder*,” defendant’s statements to a codefendant about killing the victim were *not* subject to the corpus delicti rule because the conversations captured on a police wiretap were part of the crime itself, specifically, the criminal agreement central to the charge of conspiracy. (*Munoz v. Superior Court (People)* (2020) 45 Cal.App.5th 774.)

Admissibility of Statements After Corpus Delicti Established: Once the prosecutor has established the corpus delicti, the defendant’s extrajudicial confession or admission can be introduced, assuming it is otherwise admissible. (*People v. Vuksanovich* (1982) 136 Cal.App.3rd 65, 73; *People v. Birch* (1961) 190 Cal.App.2nd 647.)

The corpus delicti rule also applies in capital cases as to uncharged acts admitted at the penalty phase. (*People v. Valencia* (2008) 43 Cal.4th 268, 296.)

Not Part of the Corpus Delicti:

The identity of the offender is *not* an element of the corpus delicti. (*People v. Cobb* (1955) 45 Cal.2nd 158, 161; *People v. McNorton* (2001) 91 Cal.App.4th Supp. 1.)

The corpus delicti rule does not apply to *the enhancement* contained in **subdivision (b)** of **H&S § 11379**, enhancing the sentence for a violation of transporting a controlled substance for sale under **H&S § 11379(a)**, where the drugs are transported from one county to a non-contiguous county. (*People v. Miranda* (2008) 161 Cal.App.4th 98.)

The corpus does not include the *identity of the perpetrator*, the *degree of the crime*, or the *enhancement of the penalty* for the offense. *People v. Alvarez* (2002) 27 Cal.4th 1161, 1169; *People v. Miranda, supra*, at p. 101.)

Other than penalty phase evidence, the rule *does not* apply to the *admissibility of other uncharged conduct*. (***People v. Davis*** (2008) 168 Cal.App.4th 617, 633-638.)

The corpus delicti rule has no application at all when the defendant's *extrajudicial statements constitute the crime itself*. (***People v. Carpenter*** (1997) 15 Cal.4th 312, 394.)

Where the defendant's extrajudicial statements at issue were his own false written entries on the California Department of Justice convicted sex offender registration forms, constituting a felony under **P.C. § 290(g)(2)**, there was no need of any corroborative evidence of his violation to sustain his conviction. (***People v. Chan*** (2004) 128 Cal.App.4th 408, 419-421.)

A defendant's false or misleading statements, as elements of the crime of being an accessory after the fact (per **P.C. § 32**), are not subject to the corpus delicti rule. (***In re I.M.*** (2005) 125 Cal.App.4th 1195, 1203.)

The *corpus delicti of a felony-based special circumstance* enumerated in **P.C. § 190.2(a)(17)** need not be proved independently of a defendant's extrajudicial statement. (**P.C. § 190.41**)

This statutory exception, applying to crimes committed after its effective date of June 5, 1990 (**Proposition 115**), overturns the contrary rule announced in ***People v. Mattson*** (1984) 37 Cal.3rd 85, 93-94.) (See ***People v. Ray*** (1996) 13 Cal.4th 313, fn. 13.)

Examples:

The Government satisfied the first prong of the corpus delicti test by introducing sufficient corroborating evidence that the core of defendant's crime actually occurred, including that defendant was arrested in an area controlled by drug-trafficking organizations, he was wearing camouflage, and he hid on a mountain for several days prior to his arrest. Also, there were cell phones and hand held radios on the mountain which were used by scouts to help others traverse the area carrying marijuana. (***United States v. Niebla-Torres*** (9th Cir. 2017) 847 F.3rd 1049.)

The Appellate Court held that the prosecutor had presented sufficient evidence to establish the corpus delicti of misdemeanor battery independent of the defendant minor's statements to the responding police officer. Evidence that the victim was inside his bedroom, was upset, and had injuries on his face permitted a reasonable inference that defendant committed battery against the victim. That the victim may have been

crying and rubbing his eye did not negate that inference. (*In re D.A.* (2018) 24 Cal.App.5th 768, 770-771.)

The fact that the victim stopped calling her friends shortly after leaving town with the defendant, telling an acquaintance to call the police if she were not heard from within two weeks, and defendant selling the victim's truck, car, horse and clothes and spending her money, shortly after her disappearance, established a sufficient corpus of a murder. (*People v. Crew* (2003) 31 Cal.4th 822.)

Court's Duty to Instruct Jury: The court has a "*sua sponte*" duty to instruct the jury that the corpus must be proved independent of the defendant's statements. (*People v. Lara* (1994) 30 Cal.App.4th 658, 674-675.)

"Whenever an accused's extrajudicial statements form part of the prosecution's evidence, the cases have . . . required the trial court to *instruct sua sponte* that a finding of guilt cannot be predicated on the statements alone." (*People v. Capers* (2019) 7 Cal.5th 989, 1170; failure to instruct found *not* to be prejudicial; pp. 1181-1182.)

Evidentiary Uses of Defendant's Statements:

To Prove the Identity of the Defendant as the Perpetrator: The defendant's statements may be used to prove that the defendant was the perpetrator, once the corpus delicti of the offense has been shown, and, in fact, may be the only evidence establishing identity. (*People v. Manson* (1977) 71 Cal.App.3rd 1, 41-42.)

To Prove the Degree of the Charged Offense: The defendant's statements may be used to prove the degree of the charged crime once the elements of the basic offense have been proven. (*People v. Sanders* (1983) 145 Cal.App.3rd 218, 222.)

To Prove the Degree of a Homicide or Felony Murder: In any homicide case, it is only necessary to show prima facie evidence of a murder; i.e., death of the victim with some criminal agency as the cause, before the defendant's statements are admissible. Defendant's statements are then admissible to prove the *degree of the offense*, or to prove *an underlying felony* to substantiate the applicability of the *felony-murder rule*. (*People v. Cantrell* (1973) 8 Cal.3rd 672, 680; *People v. Martinez* (1994) 26 Cal.App.4th 1098, 1103-1104.)

To Prove Guilt by Inference: The use of three co-defendants' statements, all of which were implausible and inconsistent, is probative of the offenses with which they were charged (i.e., possession of cocaine with the intent to distribute). The fact that admission of such evidence of their statements is harmful to the defendants' case does not establish that such statements are "prejudicial." (*United States v. Rosario-Peralta* (1st Cir. 1999) 199 F.3rd 552, 558: "There is nothing improper about a jury drawing inferences about the guilt of three defendants who gave

inconsistent and incredible statements about how they acquired their vessel (full of cocaine) and where they were going.”)

To Prove the Elements of a Prior Strike Conviction:

A felony conviction for an offense which includes the infliction of great bodily injury is a “strike” for purposes of California’s “three strike” sentencing rules. (See **P.C. § 1192.7(c)(8)**) The proof of this element, however, is limited to the entire record of the conviction, and no further. (***People v. Guerrero*** (1988) 44 Cal.3rd 343, 355-256.)

Admissions in a post-plea probation report, not being a part of the record of the prior conviction, may not be used to prove the elements of a strike conviction. (***People v. Trujillo*** (2006) 40 Cal.4th 165, 179.)

Similarly, admissions made in court after the court’s acceptance of the guilty plea cannot be used to prove the great bodily injury element of a prior conviction. (***People v. Thoma*** (2007) 150 Cal.App.4th 1096.)

The Court’s Duty to Instruct: A trial court must instruct a jury to view an oral confession or admission with caution. (***People v. Hudson*** (1981) 126 Cal.App.3rd 733, 742-743.)

However, such a jury instruction should *not* be given when the admission (or confession) was tape recorded. (***People v. Franco*** (1994) 24 Cal.App.4th 1528, 1541.)

Admissibility in Evidence of a Defendant’s Statements:

Relevant Definitions:

Evid. Code § 140: “‘*Evidence*’ means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.”

Evid. Code § 225: “‘*Statement*’ means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.”

Evid. Code § 250: “‘*Writing*’ means handwriting, typewriting, printing photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures,

sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”

Tape or video recorded statements are admissible under the same rules as any other “writing.”

Statutory Presumptions:

Evid. Code § 1552: “A printed representation of computer information or a computer program is (rebuttably) presumed to be an accurate representation of the computer information or computer program it purports to represent.”

Evid. Code § 1553: “A printed representation of images stored on a video or digital medium is (rebuttably) presumed to be an accurate representation of the images it purports to represent.”

Hearsay Issues:

The Hearsay Rule:

Evid. Code § 1200(a): “‘*Hearsay evidence*’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.”

Evid. Code § 1200(b): “Except as provided by law, hearsay evidence is inadmissible.”

Relevant Exceptions:

Evid. Code § 1220: Party Admission Exception: A defendant’s extrajudicial hearsay statements (including writings) are admissible, at the option of the prosecution, as a “*Party Admission*.”

Section 1220, specifies that: “Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant (i.e., the person making the statement) in an action to which he is a party”

Note: There are only two “*parties*” to a criminal case; i.e., the “*People of the State of California*” and the “*Defendant*.” “*The People*” don’t make statements. Defendants do. Under the terms of **Evid. Code § 1220**, therefore, defendant’s extrajudicial statements are admissible as a hearsay exception *only* when offered by the prosecution (that represents the People) against the declarant defendant whether or not the statement is against the defendant’s penal interest. A

defendant may not offer his own hearsay statements into evidence over a hearsay objection by the prosecution.

Exception: Evid. Code § 356: When part of defendant's hearsay statement is offered by the prosecution, the defense may offer the rest of the statement where "necessary to make (the whole statement) understood." This is necessary to avoid a part of defendant's statement being unfairly taken out of context; misleading the jury. (See *People v. Williams* (1975) 13 Cal.3rd 559.)

"An admission is an extrajudicial recital of facts by the defendant that tends to establish guilt when considered with the remaining evidence in the case. [Citation]" (*People v. Brackett* (1991) 229 Cal.App.3rd 13, 19.)

Evid. Code § 1221: *Adoptive Admissions:* "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (See *People v. Castille* (2005) 129 Cal.App.4th 863.)

Evid. Code § 1222: *Authorized Admissions:* "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

Evid. Code § 1223: *Admissions of a Coconspirator:* "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in **subdivisions (a) and (b)** or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Evid. Code § 1291: *Former Testimony:* Defendant's testimony (including admissions to prior convictions) from trial #1, which

resulted in a mistrial when the jury hung, was properly admitted into evidence in trial #2 at the request of the prosecution after defendant declined to testify himself. (*People v. Malone* (2003) 112 Cal.App.4th 1241.)

Evid. Code § 771: *Past Recollection Refreshed*: In giving testimony, a police officer's memory (or that of any other witness) may also be refreshed by defendant's statements as recorded in police reports or other documents.

Evid. Code § 1230: *Declaration Against Penal Interest*: A "third party's" hearsay statements, offered by the prosecution when the statements incriminate the charged defendant along with the declarant, or offered by the defendant when the statements tend to exonerate the defendant, are submitted under the "*declaration against penal interest*" exception to the Hearsay Rule.

"*Declaration Against Interest*" defined: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal (i.e., "*penal*") liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (**Evid. Code § 1230**)

See also **Fed. Rules of Evid., § 804(b)(3)**.

Evid. Code § 1237: *Past Recollection Recorded*: A recorded statement may be read into the record where the witness is unable to remember the statement from his own knowledge and certain foundational requirements, attesting to the statements accuracy and authenticity, are met.

Admissibility of Defendant's Oral Declarations: Defendant's statements are normally (at least originally) in the form of an *oral declaration* heard by a police officer or some other witness who may then testify to what was heard. (**Evid. Code § 1220; Party Admission** exception to the Hearsay Rule [**Evid. Code § 1200**].)

Federal Extradition Proceedings:

Admissibility of Third Party Hearsay Statements Obtained by Torture:

In a federal extradition hearing, contrary to the federal district court's ruling, on the issue of whether there was sufficient probable cause to extradite the petitioner to Mexico on charges of kidnapping, evidence that a statement made by a third party was obtained by coercion (i.e., torture) may be treated as "explanatory" (as opposed to "contradictory") evidence that is admissible as it is possible to separate the inquiry concerning allegations of torture or coercion from the inquiry concerning a recantation of the statement in issue. (*Santos v. Thomas* (9th Cir. 2016) 830 F.3rd 987; the matter being remanded to the district court with instructions to grant the writ of habeas corpus where the issue of whether there was sufficient evidence to support a probable cause finding without the excluded statements was a close one and the extradition court was in the best position to review all of the evidence.)

Chapter 13: Suppression Issues and Procedures

Miranda Violations:

Summary: “***Miranda Violations***” involve either:

- *A defective warning* (i.e., “admonition”); *or*
- *No warning*; *or*
- *A proper warning where the subject’s negative response* (i.e., “invocation”) *is ignored* and questioning continues; *or*
- *The suspect’s attempts to invoke* mid-interrogation are ignored; *or*
- *Coercive interrogations methods* are used; *or*
- *A combination* of any of the above.

(See ***Oregon v. Hass*** (1974) 420 U.S. 714, 722 [43 L.Ed.2nd 570, 577-578]; ***People v. Harris*** (1989) 211 Cal.App.3rd 640, 651.)

Results: Such violations generate the following procedures and/or issues, discussed separately below:

- Procedural Issues
- Standing
- Suppression Issues:
 - Suppressed Statements.
 - Knowing and Intelligent Waiver as a Prerequisite to Admissibility.
 - ***Miranda*** Violations: Statements Inadmissible in the People’s Case-in-Chief.
 - Fruit of the Poisonous Tree Doctrine.
 - Statements in Violation of ***Miranda*** as Probable Cause in a Search Warrant Affidavit.
 - Statements in Violation of ***Miranda*** as Probable Cause to Arrest.
 - Statements in Violation of ***Miranda*** used to Establish Consent to Search.
 - Statements in Violation of ***Miranda*** used to Violate Parole or Probation.
 - Statements Obtained as the Product of an Illegal Detention or Arrest.
 - Statements Obtained as the Product of an Illegal Search.
 - Exceptions to the Non-Admissibility of Statements or Evidence Seized as a Product of a **Fourth Amendment** (Detention, Arrest, or Search) Violation
 - Products of a Breach of a Statutory Privilege.
 - Other Suppression Issues.

- Statements Taken During a Delay in Arraignment
- Statements Obtained from a Foreign National; **P.C. § 834c(a)(1)**
- Polygraph Tests and Results
- Sixth Amendment Right to Counsel

Procedural Issues:

Federal Standards to be Used: “Under California law, issues relating to the suppression of statements made during a custodial interrogation must be reviewed under federal constitutional standards.” (*People v. Sims* (1993) 5 Cal.4th 405, 440; see also *People v. Markham* (1989) 49 Cal.3rd 63, 65; *People v. May* (1988) 44 Cal.3rd 309, 315; *People v. Nelson* (2012) 53 Cal.4th 367, 374; and *People v. Cunningham* (2001) 25 Cal.4th 926, 993; *People v. Cooper* (2019) 37 Cal.App.5th 642; *People v. Flores* (2020) 9 Cal.5th 371, 416.)

Proposition 8: Since passage in California of the initiative **Proposition 8** in June, 1982, **Fifth Amendment** issues, including the rules of *Miranda*, have been guided by federal principles rather than the stricter California rules which previously had been based on California’s constitutional principles under the doctrine of “*Independent State Grounds*.”

Substantive Rules: Statements taken in violation of *Miranda* can be used for impeachment purposes, abrogating California’s former rule to the contrary. (*People v. May* (1988) 44 Cal.3rd 309.)

Procedural Rules: California now follows the federal rule that a waiver of the *Miranda* protections needs to be proven by a *preponderance of the evidence*, abrogating the former California rule requiring *proof beyond a reasonable doubt*. (*People v. Markham* (1989) 49 Cal.3rd 63.)

See “*Federal Principles vs. ‘Independent State Grounds’*,” under “*The Fifth Amendment and Miranda*” (Chapter 1), above.

California Rules: In Limine Motions Heard by the Trial Court:

In California, *Miranda* issues are tested by way of a non-statutory, “*in limine*” motion (i.e., an “**Evidence Code § 402** hearing”), normally heard by the trial court just prior to commencement of jury selection or the taking of testimony, out of the presence of the jury, if any party so requests. (See **Evid. Code § 402(b)**)

“In reviewing the trial court's denial of a suppression motion on *Miranda-Edwards* <https://advance.lexis.com/document/?pdmfid=1000516&crd=1243d589-5558-4b22-bd92-ad86ead0872e&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5WKR-2Y41-F27X-60JC-00000-00&pddocid=urn%3AcontentItem%3A5WKR-2Y41-F27X-60JC-00000-00&pdcontentcomponentid=4860&pdshepid=urn%3AcontentItem%3A5WJW-SXX1-J9X6-H0N7-00000-00&pdteaserkey=sr0&pditab=allpods&ecomp=1f4Lk&earg=sr0&prid=5d3031b3-97be-4d94-b49d-378a8d37cbcd> (v. *Arizona* (1981) 451 U.S. 477) grounds, “it is well established that we accept the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.” (*People v. Gamache* (2010) 48 Cal.4th 347, 385; see also *Cunningham*, at p. 992.)” (*People v. Cooper* (2019) 37 Cal.App.5th 642.)

A pretrial ruling on the motion, if not heard by the trial court itself, is not binding on the trial court in that the court must remain free to alter its ruling upon receiving full information at trial. (*Saidi-Tabatabai v. Superior Court* (1967) 253 Cal.App.2nd 257, 266; *People v. Beasley* (1967) 250 Cal.App.2nd 71, 76-77; *People v. Boyer* (1989) 48 Cal.3rd 247, 270, fn. 13.)

At a new trial after either a reversal on appeal or following a mistrial declaration, a second trial judge is empowered to reconsider prior evidentiary rulings, including on issues of the applicability of the rules of *Miranda*, and change them if it deems it necessary. (*People v. Riva* (2003) 112, Cal.App.4th 981, 991-992.)

“This authority, however, is not unlimited. It must be exercised in conformity with the defendant’s right to due process of law or, as one court put it, “with due consideration” (fn.) which means the defendant must be given notice and an opportunity to be heard and the revised ruling cannot be arbitrary or made without reason. (fn.)” (*Id.*, at p. 992; noting, however, that in reversing the rulings of a prior judge, there should be “a highly persuasive reason for doing so.”)

Statutory “Motion to Suppress Evidence” for Fourth Amendment Issues Only: California’s statutory motion to suppress evidence, pursuant to **Penal Code § 1538.5**, is limited to evidence obtained by illegal searches and seizures pursuant to the **Fourth Amendment**, and does *not* extend to *Miranda* claims. (*People v. Campa* (1984) 36 Cal.3rd 870, 885.)

Federal Court Rules:

18 U.S.C. § 3501: In federal court, a trial judge is required to conduct a *hearing out of the jury's presence* to determine the voluntariness and admissibility of a confession or self-incriminating statement made during a detention or arrest.

However, an evidentiary hearing on a motion to suppress the defendant's statements need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist. (*United States v. Howell* (9th Cir. 2000) 231 F.3rd 615, 620.)

"A hearing will not be held on a defendant's pre-trial motion to suppress merely because defendant wants one. Rather, the defendant must demonstrate that a 'significant disputed factual issue' exists such that a hearing is required." (*United States v. Harris* (7th Cir. 1990) 914 F.2nd 927, 933; *United States v. Howell, supra*, at p. 921.)

Retroactivity: Under **28 U.S.C. § 2254(d)(1)**, "clearly established federal law" includes only those Supreme Court's decisions that had been issued before the relevant adjudication of the merits of a defendant's claim, regardless of when the prisoner's conviction became final. Defendant's direct appeal thus established the relevant adjudication of the merits of his case. The fact that the Supreme Court later established a different rule on the issue on which defendant had previously appealed and lost, therefore, did not provide defendant with grounds for a habeas corpus relief. (*Greene v. Fisher* (2011) 565 U.S. 34 [132 S.Ct. 38; 181 L.Ed.2nd 336], citing *Gray v. Maryland* (1998) 523 U.S. 185 [140 L.Ed.2nd 294]; see also *Thompson v. Runnels* (9th Cir. 2013) 705 F.3rd 1089, 1095-1097.)

Procedure on Appeal:

"In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda* . . . , the scope of our review is well established. 'We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained.' [Citation.] 'Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we 'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence.' [Citation.]" (Some internal quotation marks omitted; (*People v. Delgado* (2018) 27 Cal.App.5th 1092, 1104; citing *People v. Camino* (2010) 188 Cal.App.4th 1359, 1370-1371.)

Standing:

Rules: As with any other challenge to admissibility of evidence, the defendant will first have to prove that he has “*standing*,” i.e., that it was his (or her) rights that were violated. (*In re Jessie L.* (1982) 131 Cal.App.3rd 202; *People v. Enriquez* (1982) 132 Cal.App.3rd 784.)

Another Person’s Miranda Violation: A defendant lacks standing to complain of the violation of a third party’s **Fifth Amendment** privilege against self-incrimination. (*People v. Jenkins* (2000) 22 Cal.4th 900, 965; *People v. Clark* (2016) 63 Cal.4th 522, 580-581.)

“[D]efendant can prevail on his suppression claim only if he can show that the trial testimony given by [the third party] was involuntary at the time it was given.” (Citation.) “The purpose of exclusion of evidence pursuant to a due process claim such as defendants’ is adequately served by focusing on the evidence to be presented at trial, and asking whether *that evidence* is made unreliable by ongoing coercion, rather than *assuming* that pressures that may have been brought to bear at an earlier point ordinarily will taint the witness’s testimony.” (Citation.) “Thus, it is not enough for a defendant who seeks to exclude trial testimony of a third party to allege that coercion was applied against the third party, producing an involuntary statement before trial. In order to state a claim of violation of his *own* due process rights, a defendant must also allege that the pretrial coercion was such that it would actually affect the reliability of the evidence to be presented at trial.” (Citation.) (*Id.*, p. 580; quoting *People v. Badgett* (1995) 10 Cal.4th 330, 347-348.)

Defendant may not challenge the taking of an uncoerced, non-**Mirandized** statement from a codefendant. (*People v. Felix* (1977) 72 Cal.App.3rd 879.)

See also *People v. Williams* (2010) 49 Cal.4th 405, 452.

Products of Another’s Miranda Violation: Any evidence developed against the defendant that is *the product of the violation of another person’s Miranda rights* is admissible against the defendant. (*People v. Varnum* (1967) 66 Cal.2nd 808, 812; *People v. Douglas* (1990) 50 Cal.3rd 468, 501; *People v. Badgett* (1995) 10 Cal.4th 330, 343-344; *People v. Jenkins* (2000) 22 Cal.4th 900, 966-968.)

A Third Person’s Involuntary, Coerced Statements: The admissibility of an involuntary, coerced, statement, obtained from a third person, may be

challenged by the defendant when the defendant can show that its admission into evidence (by being unreliable) would violate his (the defendant's) right to a fair trial; a **Fourteenth Amendment** "due process" issue. (*People v. Badgett*, *supra*. See also *People v. Leon* (2016) 243 Cal.App.4th 1003, 1016-1017.)

A defendant *does* have standing to assert that his own due process right to a fair trial was violated as a consequence of the asserted violation of a third party's **Fifth Amendment** self-incrimination rights. (*People v. Jenkins*, *supra*, at p. 966.)

E.g.; If the admission of improperly obtained statements of a third party threaten to result in a "fundamentally unfair trial," defendant's "due process" rights are being violated. (*Id.*, citing *People v. Douglas*, *supra*, at p. 499.)

Admissibility of the third party statement itself, given after a threat of incarceration, may be challenged by the defendant as involuntary and unreliable. (*People v. Jones* (1980) 105 Cal.App.3rd 572.)

It is the defendant's burden to prove that the statement is involuntary. (*People v. Badgett*, *supra*.)

Products of Another's Coerced Statements:

Evidence (such as a physical article like a murder weapon, or the identities of witnesses) that is the fruit of a "coerced" statement, if not itself unreliable, *are* admissible absent proof of some connection between the coercion and the evidence sought to be excluded which makes the evidence itself unreliable. (*People v. Lee* (2002) 95 Cal.App.4th 772, 788.)

Use of a witness' recorded statement identifying defendant as the killer in a murder case, however, obtained from the witness under threat of being prosecuted for murder himself, was error. Defendant had standing to challenge the admissibility of the third party witness' statement due to the coercive manner it had been obtained, and its inherent lack of reliability. (*Id.*, at pp. 781-788.)

Corporations: Unlike private individuals, corporations have no privilege against self-incrimination. (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 883, citing *Wilson v. United States* (1911) 221 U.S. 361, 382 [55 L.Ed. 771, 780].)

Suppression Issues:

Suppressed Statements:

Statements Subject to Suppression include (***Miranda v. Arizona***, *supra*, at pp. 476-477 [16 L.Ed.2nd at p. 725].):

Complete confessions; i.e., admission of all the elements of a particular offense without claiming any defenses.

Admissions; i.e., a partial confession.

Inculpatory statements; i.e., statements which tend to incriminate.

Exculpatory statements; i.e., statements which tend to exonerate.

Knowing and Intelligent Waiver as a Prerequisite to Admissibility:

Before a statement will be admitted into evidence, there must be a *knowing and intelligent waiver* of ***Miranda*** rights reflected in the record. (***Miranda v. Arizona***, *supra*, at pp. 444, 479 [16 L.Ed.2nd at pp. 706, 726].)

“The ‘(f)ailure to administer ***Miranda*** warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the **Fifth Amendment** must nevertheless be excluded from evidence under ***Miranda***.’ (***Oregon v. Elstad*** (1985) 470 U.S. 298, 307 [84 L.Ed.2nd 222; 105 S.Ct. 1285].)” (***People v. Bradford*** (1997) 14 Cal.4th 1005, 1033.)

See “*Waiver of Rights*” (Chapter 8), above.

Miranda Violations: Statements Inadmissible in the People’s Case-in-Chief:

Rule: The defendant’s statements taken in violation of ***Miranda*** are not admissible in the People’s “*case-in-chief*” to establish the defendant’s guilt. (***People v. Boyer*** (1989) 48 Cal.3rd 247, 271.)

See “*The Post-Miranda Rule*,” under “***The Fifth Amendment and Miranda***” (Chapter 1), above.

Exception: Statements Offered for Purposes of Impeachment:

The use of a defendant’s “*non-coerced*” statements for purposes of impeaching his untruthful testimony is lawful. (***Harris v. New York*** (1971) 401 U.S. 222 [28 L.Ed.2nd 1].)

See “*Impeachment*,” under “*Lawful Exceptions to the **Miranda** Rule*” (Chapter 5), above.

Exception #1 to Impeachment Exception: Involuntary or Coerced Statements:

Statements obtained from a defendant under circumstances that are determined to be “*involuntary*” or “*coerced*,” are inadmissible for any purpose. (*People v. Cahill* (1993) 5 Cal.4th 478, 510-511; *Brown v. Mississippi* (1936) 297 U.S. 278, 285-286 [89 L.Ed. 682, 686-687]; *Schneekloth v. Bustamonte* (1973) 412 U.S. 218, 225 [36 L.Ed.2nd 854, 861]; *Pope v. Zenon* (9th Cir. 1996) 69 F.3rd 1018, 1020.)

See “*Coercion*,” under “*Impeachment*,” under “*Lawful Exceptions to the **Miranda** Rule*” (Chapter 5), above.

Exception #2 to Impeachment Exception: Defendant’s Illegally Obtained Statements Offered to Impeach a Defense Witness:

Statements obtained from a defendant in violation of **Miranda** are *not* admissible for purposes of impeaching a defense witness who testifies contrary to the defendant’s illegally obtained statements. (*James v. Illinois* (1990) 493 U.S. 307 [107 L.Ed.2nd 676].)

In *James*, the Supreme Court held that the threat of a perjury prosecution is more likely to deter lying by defense witnesses. Also, to allow such impeachment would “*chill*” some defendants from presenting their best evidence. (*Ibid.*)

But the use of defendant’s suppressed statements, obtained in violation of his invocation to the right to counsel, to impeach mental health expert witnesses during the sanity phase of defendant’s murder trial was upheld, the Court finding the use of the suppressed statements “promotes the same truth-seeking function of a criminal trial as the impeachment exception of a defendant who testifies.” (*People v. Edwards* (2017) 11 Cal.App.5th 759, 766-772.)

Though there is little, if any, concern that expert witnesses would commit perjury (fn. omitted), the admission of this evidence prevents the defendant from turning the exclusionary rule into a ““a shield against contradiction of his untruths.”” (*Id.*, quoting *Harris v. New York*, *supra*, at p. 224.)

“Nor would the admission of the suppressed statements have a chilling effect on a defendant's ability to present a defense. Defendants could avoid impeachment of the testimony of expert witnesses by not providing these witnesses with statements that contradict the suppressed statements. Defendants could reasonably expect that expert witnesses, given their professional qualifications, would not testify in a manner that intentionally or inadvertently invited impeachment. Expert witnesses also generally provide reports prior to trial, thereby allowing adequate preparation by defendants. Moreover, the number of expert witnesses at a criminal trial is usually fewer than other third party witnesses. Thus, in contrast to *James*, the expansion of the impeachment exception to the cross-examination of expert witnesses during the sanity phase would further the truth-seeking process with minimal loss of probative witness testimony.” (*Id.*, at pp. 768-769.)

See “*Impeachment*,” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

Exception #3 to Impeachment Exception: Defendant’s Illegally Induced Testimony:

A defendant’s in-court incriminatory testimony trial #1 was induced by the need to counter three confessions made by the defendant which were introduced by the prosecution at trial #1, and which, on appeal, were determined to have been illegally obtained. Such prior testimony by defendant is not admissible against him in trial #2 because his testimony in trial #1 was tainted by the same illegality that rendered the confessions inadmissible. (*Harrison v. United States* (1968) 392 U.S. 219 [20 L.Ed.2nd 1047].)

Defendant’s inculpatory confession made in testimony during trial, testified to in order to counter the prosecution’s evidence of defendant’s pretrial confession to law enforcement that should have been suppressed because obtained in violation of *Miranda*, requires reversal of defendant’s conviction in that the in-court testimony was “*fruit of the poisonous tree*.” (*Lujan v. Garcia* (9th Cir. 2013) 734 F.3rd 917, 930-936.)

See “*Exception; Unlawfully Induced Testimony*,” under “*Fruit of the Poisonous Tree*,” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

Fruit of the Poisonous Tree Doctrine:

*Rule: The products of a non-coerced **Miranda** violation (other than the statements themselves) are not subject to suppression. (**United States v. Patane** (2004) 542 U.S. 630 [159 L.Ed.2nd 667].)*

*Note, however, that the fruit of the poisonous tree doctrine does apply when it is the admissibility of the defendant's statements, as the product of a **Fourth Amendment** search or seizure violation, that is the issue. A suspect's incriminating statements may be inadmissible if they were obtained through the "exploitation of illegality;" i.e., as the direct product of an illegal search or seizure. (See **United States v. Ramirez** (9th Cir. 2020) 976 F.3rd 946, 959-962; see also **United States v. Johnson** (9th Cir. 1980) 626 F.2nd 753.)*

*See "Fruit of the Poisonous Tree," under "Lawful Exceptions to the **Miranda Rule**" (Chapter 5), above.*

Statements in Violation of Miranda as Probable Cause in a Search Warrant Affidavit:

*Statements taken in violation of **Miranda**, at least when otherwise voluntary, may be used as probable cause in a search warrant affidavit. (**United States v. Patterson** (9th Cir. 1987) 812 F.2nd 1188, 1193.)*

*See "Fruit of the Poisonous Tree," under "Lawful Exceptions to the **Miranda Rule**" (Chapter 5), above.*

Statements in Violation of Miranda as Probable Cause to Arrest:

*Statements taken in violation of **Miranda**, at least when otherwise voluntary, may be used as probable cause to arrest. (**United States v. Morales** (2nd Cir. 1986) 788 F.2nd 883, 886.)*

*See "Fruit of the Poisonous Tree," under "Lawful Exceptions to the **Miranda Rule**" (Chapter 5), above.*

Statements in Violation of Miranda used to Establish Consent to Search:

*"**Miranda** [is] not violated when an officer ask[s] for and obtain[s] consent to search after the defendant had exercised his privilege against self-incrimination." (**People v. Johnson** (2022) 12 Cal.5th 544, 568, fn. 1, quoting **People v. James** (1977) 19 Cal.3rd 99, 115.)*

Statements obtained in violation of **Miranda** due to a failure to admonish can be used to establish consent to a search. (*United States v. Lemon* (9th Cir. 1977) 550 F.2nd 467, 473.)

A suspect's consent to search her residence, obtained after invocation of her right to remain silent, held *not* to be a product of the officer's illegal continued questioning of the suspect, and was valid. (*United States v. Calvetti* (6th Cir. 2016) 836 F.3rd 654.)

See “*Fruit of the Poisonous Tree*,” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

Statements in Violation of Miranda Used to Violate Parole or Probation:

Statements taken in violation of **Miranda** are also admissible at a *parole revocation hearing*, unless such statements were involuntary or coerced. (*In re Martinez* (1970) 1 Cal.3rd 641; *In re Tucker* (1971) 5 Cal.3rd 171.)

In a probation revocation hearing, the probationer's admissions, elicited by police officers absent **Miranda** warnings, are admissible. (*People v. Racklin* (2011) 195 Cal.App.4th 872, 878-881.)

See “*Fruit of the Poisonous Tree*,” under “*Lawful Exceptions to the Miranda Rule*” (Chapter 5), above.

Statements Obtained as the Product of an Illegal Detention, Arrest, or Search:

Rule: Statements taken as the direct product of an illegal arrest or detention, “even when (the statements are given) knowing(ly), voluntar(ily), and intelligent(ly),” but not the result of an independent act of free will, are subject to suppression. (*People v. Boyer* (1989) 48 Cal.3rd 247, 267; *Brown v. Illinois* (1975) 422 U.S. 590, 603 [45 L.Ed.2nd 416, 427]; *Dunaway v New York* (1979) 442 U.S. 200, 216-217 [60 L.Ed.2nd 824, 838-839]; *Florida v. Royer* (1983) 460 U.S. 491, 501 [75 L.Ed.2nd 229, 239]; *Taylor v. Alabama* (1982) 457 U.S. 687 [73 L.Ed.2nd 314]; *United States v. Ramirez* (9th Cir. 2020) 976 F.3rd 946. 959-961.)

The practice of taking witnesses /or potential defendants, involuntarily, and without probable cause to arrest, to a police station for interview (despite its popularity in television police shows), is not lawful. (*Kaupp v. Texas* (2003) 538 U.S. 626, 629-633 [155 L.Ed.2nd 814, 820].)

“(T)he **Fourth Amendment** guards, among other things, against the police tactic of ‘investigative detention.’ (E.g.,

Hayes v. Florida (1985) 470 U.S. 811, 815-816 [84 L.Ed.2nd 705, 710, 105 S.Ct. 1643].)” (**People v. Boyer**, *supra*.)

An unconsented detention at the police station amounts to an arrest, and if done without probable cause, is illegal. (See **In re Dung T.** (1984) 160 Cal.App.3rd 697, 713.)

Otherwise voluntary statements, obtained from defendant immediately following his illegal, warrantless arrest upon being ordered out of his home, are subject to suppression as a direct product of that arrest. (**United States v. Nora** (9th Cir. 2014) 765 F.3rd 1049, 1052-1057.)

“Probable cause is shown ‘when the facts known to the arresting officer would persuade someone of “reasonable caution” that the person to be arrested has committed a crime.’ (**People v. Celis** (2004) 33 Cal.4th 667, 673 . . .)” (**People v. Zaragoza** (2016) 1 Cal.5th 21, 57-58; finding defendant’s pre-interrogation arrest to be lawful under the circumstances.)

See **People v. Flores** (2019) 38 Cal.App.5th 617, 633-636; defendant’s confession suppressed as the product of an unlawful detention *and* an unlawful search of defendant’s bedroom with the recovery of drugs.

Effect of Intervening Factors:

Attenuation of the Taint: The exception to this rule is when, after considering the following factors, the statements are sufficiently “attenuated” from the “primary taint” (**Wong Sun v. United States** (1963) 371 U.S. 471, 486 [9 L.Ed.2nd 441, 454].) that the statements cannot be said to be the direct product of the illegal police conduct.

These factors are:

- The temporal proximity of the illegal act and the resulting statements;
- The presence of intervening circumstances; *and*
- The purpose and flagrancy of the official misconduct.

(**Brown v. Illinois**, *supra*, at pp. 600-605 [45 L.Ed.2nd at pp. 425-428]; **Kaupp v. Texas**, *supra*; **United States v. Ramirez** (9th Cir. 2020) 976 F.3rd 946, 960.)

Insufficient Attenuation:

The trial court's refusal to grant defendant's suppression motion was reversed by the Ninth Circuit Court of Appeal in a 2-to-1 decision where FBI agents' use of deceit to seize and search defendant and his vehicle violated the **Fourth Amendment**. The FBI agents, with a warrant to search defendant's home, posed as police officers and played on defendant's trust and reliance on their story that his home had been burglarized to trick him into coming home, bringing his car and his person within the ambit of the warrant when it was not otherwise within its ambit. The FBI agents' use of a ruse to seize and search the defendant was held to have violated the **Fourth Amendment**. Balancing the Government's justification for its actions against the intrusion into the defendant's **Fourth Amendment** interests, the Ninth Circuit concluded that the Government's conduct was clearly unreasonable. The Court rejected the Government's arguments that the agents never seized the defendant, holding that the seizures of the defendant's person and the electronic devices in his car were the direct result of the FBI agents' unreasonable ruse. The Court further held (at pp. 959-962) that the Government failed to carry its burden to show that the defendant's incriminating statements, made after an agent revealed the true purpose of the investigation and asked to speak with him, were not obtained through exploitation of an illegality rather than by means sufficiently distinguishable to be purged of the primary taint. (*United States v. Ramirez* (9th Cir. 2020) 976 F.3rd 946.)

Causal Chain of Events: The causal chain was broken where defendant confessed after being held in jail for a day, defendant asked to see the arresting officer, and they conversed about defendant's personal problems for two hours before he confessed. (*People v. Trudell* (1985) 173 Cal.App.3rd 1221, 1232.)

The Public Safety Exception: The "public safety exception" does not, by itself, attenuate the taint of a prior illegal arrest. (*United States v. Patzer* (9th Cir. 2002) 277 F.3rd 1080; consent to search, and some accompanying incriminating statements as to the presence of certain illegal weapons in a car, as the product of an illegal arrest, with no intervening *Miranda* advisal or waiver.)

See “*Public Safety Exception*,” under “*Lawful Exceptions to the **Miranda Rule***” (Chapter 5), above.

*Effect of an Intervening **Miranda** Admonishment:* The fact that following an illegal arrest the defendant is properly **Mirandized** does *not* in itself make a confession admissible. (*Lanier v. South Carolina* (1985) 474 U.S. 25 [88 L.Ed.2nd 23]; *Brown v. Illinois* (1975) 422 U.S. 590 [45 L.Ed.2nd 416].)

The **Miranda** warnings are an important factor. But they are not the only factor to be considered. They cannot assure in every case that the **Fourth Amendment** violation has not been exploited. (*Brown v. Illinois, supra*, at pp. 603-605 [45 L.Ed.2nd at pp. 427-428].)

In addition to a **Miranda** warning, a court should consider ““(t)he temporal proximity of the arrest and the confession, the presence of intervening circumstances [Citation] (and) particularly, the purpose and flagrancy of the official misconduct[.]’ . . . (422 U.S. at p. 603, . . .” *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 441; see also *People v. Boyer* (1989) 48 Cal.3rd 247, 268-269.)

In *People v. Gonzalez, supra*, defendant confessed to two robberies, one confession, which was suppressed, occurring within hours after his illegal (no probable cause) arrest. The second confession, which was not suppressed, was for a robbery occurring 12 days earlier, made to officers from a different agency who were unaware of the circumstances of the arrest.

Miranda warnings, and allowing a visit with a girlfriend, were not enough to dissipate the taint of an illegal arrest. (*Taylor v. Alabama* (1982) 427 U.S. 687 [73 L.Ed.2nd 314].)

Where it is shown that defendant’s illegal detention was “investigatory,” both in design and execution, and the subsequent search of his bedroom was knowingly illegal, a subsequent **Miranda** advisal and waiver fails to dissipate the taint, and should have been suppressed. (*People v. Flores* (2019) 38 Cal.App.5th 617, 634-636; citing *Brown v. Illinois, supra*.)

Statements Obtained as the Product of an Illegal Search:

Rule: Statements taken as the direct product of an illegal search are subject to suppression. (***People v. Johnson*** (1969) 70 Cal.2nd 541, 548-550; defendant's confession held to be inadmissible as a direct product of the unlawful seizure of the stolen property.)

Defendant's incriminatory statements obtained some 36 hours after an illegal search of his residence, and recognizing that what was found during the search would be used in defendant's subsequent interrogation, were held to be inadmissible as a direct product of the illegal search. (***United States v. Shetler*** (9th Cir. 2011) 665 F.3rd 1150, 1156-1160.)

It was also noted that because the government bore the burden of proving that the defendant's confession was not "fruit of the poisonous tree," the government was required to produce evidence demonstrating that the defendant's answers were not induced or influenced by the illegal search. (***Id.***, at pp. 1157-1161.)

A statement induced by confrontation with illegally seized evidence may be suppressed. (***People v. Stoner*** (1967) 65 Cal.2nd 595, 599.)

Where it is shown that defendant's illegal detention was "investigatory," both in design and execution, and the subsequent search of his bedroom was knowingly illegal, a subsequent ***Miranda*** advisal and waiver fails to dissipate the taint, and should have been suppressed. (***People v. Flores*** (2019) 38 Cal.App.5th 617, 634-636; citing ***Brown v. Illinois***, *supra*.)

Exceptions to the Non-Admissibility of Statements or Evidence Seized as a Product of a Fourth Amendment (Detention, Arrest, or Search) Violation:

As Impeachment Evidence:

Evidence seized illegally in violation of the **Fourth Amendment** is admissible to *impeach* a testifying defendant who chooses to lie. (***United States v. Havens*** (1980) 446 U.S. 620, 626-628 [64 L.Ed.2nd 559, 565-566].)

Where the Taint is Purged:

The "taint" of the illegal act, in some circumstances, may be purged (See ***Brown v. Illinois*** (1975) 422 U.S. 590, 604-605 [45 L.Ed.2nd 416, 427].)

The **Fourth Amendment** taint may be attenuated, taking into consideration the passage of time, any intervening circumstances, the nature of the police misconduct, and the voluntariness of a resulting confession or admission. (*Rawlings v. Kentucky* (1980) 448 U.S. 98 [65 L.Ed.2nd 633].)

“The issue is whether ‘intervening events break the causal connection between the illegal [detention] and the [incriminating statement] so that the [statement] is “sufficiently an act of free will to purge the primary taint.”’ [Citations]’ (*Taylor v. Alabama* (1982) 457 U.S. 687, 690 [73 L.Ed.2nd 314, 319, 102 S.Ct. 2664], . . . The important considerations are ‘[t]he temporal proximity of the [illegal seizure] and the [statement], the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct. (Citations)’” (*People v. Boyer* (1989) 48 Cal.3rd 247, 268-269.)

Whether or not the taint has been purged is dependent upon all the surrounding circumstances (*People v. DeVaughn* (1977) 18 Cal.3rd 889, 898-899.), including (but not limited to):

- A subsequent *Miranda* admonishment;
- The amount of time between the illegal arrest and the subsequent statements;
- The “purpose and flagrancy of the official misconduct;” *and*
- Any other intervening factors.

Where Law Enforcement’s Illegal Act is Not Exploited:

A warrantless arrest in the home, in violation of *Payton v New York* (1980) 445 U.S. 573 [63 L.Ed.2nd 639] (See also *People v. Ramey* (1976) 16 Cal.3rd 263.), does *not* invalidate a later statement made to police which was not “an exploitation of the illegal entry.” (*New York v. Harris* (1990) 495 U.S. 14, 17-21 [109 L.Ed.2nd 13]; *People v. Watkins* (1994) 26 Cal.App.4th 19, 29-31.)

New York v. Harris, *supra*, at p. 21: “We hold that, where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State’s use of a statement

made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton (v. New York)*.”

Following *Harris*, not questioning defendant until after he has been removed from the illegally entered home, rendered the defendant’s confession lawful. (*People v. Watkins*, *supra*; defendant not questioned until taken to the police station.)

See also *People v. Marquez* (1992) 1 Cal.4th 553, 569; The *Harris* rule applies to an arrest made with probable cause but in violation of the California Constitution and *People v. Ramey*, *supra*.

And see *People v. Trudell* (1985) 173 Cal.App.3rd 1221, a pre-*Harris* case, talking about the relationship between an allegedly invalid arrest under *Ramey* and a subsequent confession: “The admissibility of a confession depends upon the totality of the circumstances existing at the time the confession was obtained. [Citation.] The invalidity of an antecedent arrest becomes a factor in that totality of circumstances to be weighed along with the other circumstances in determining whether the confession was a product of free will and an intelligent waiver of the defendant’s **Fifth Amendment** rights.” (Citing *In re Reginald B.* (1977) 71 Cal.App.3rd 398, 403.)

A Knock and Notice Violation, per **P.C. § 844** (or **§ 1531**), does not negate an officer’s otherwise valid probable cause to arrest a subject found inside. Statements taken from the suspect, therefore, as a product of that arrest, are not subject to suppression. (*People v. Watkins* (1994) 26 Cal.App.4th 19, 32-33.)

Note also: A “knock and notice” violation is not necessarily a constitutional violation which would necessitate the suppression of the products of the unlawful entry. (*Wilson v. Arkansas* (1995) 514 U.S. 927 [131 L.Ed.2nd 976]; *Hudson v. Michigan* (2006) 547 U.S. 586 [165 L.Ed.2nd 56].)

Note: “*Knock and Notice*” (or, federally, “*Knock and Announce*”), refers to the statutory and constitutional requirement that upon seeking entry into a residence, law enforcement officers are first required to knock, identify themselves as law enforcement, state their purpose, and to demand that the occupants allow them to enter, the purpose being to avoid violent confrontations by allowing the

occupants to peaceably let officers make entry. (*People v. Schad* (1971) 21 Cal.App.3rd 201, 207; *People v. Murphy* (2005) 37 Cal.4th 490, 495; *People v. Peterson* (1973) 9 Cal.3rd 717, 723; *Duke v. Superior Court* (1969) 1 Cal.3rd 314, 321.)

Products of a Breach of a Statutory Privilege:

General Rule: Statements obtained as the product of a *breach of a statutory privilege* will *not* be suppressed.

Statements obtained as the product of defendant's lawyer's possible breach of the "*lawyer-client privilege*" (See **E.C. § 954**) does not implicate the "*Fruit of the Poisonous Tree*" Doctrine." (*Nickel v. Hannigan* (10th Cir. 1996) 97 F.3rd 403.)

The marital communication privilege, per **Evid. Code § 980**, is outweighed by the importance of a police internal investigation investigating possible police misconduct, and therefore does not apply when the spouse officer is questioned concerning otherwise privileged communications. (*Riverside County Sheriff's Department v. Zigman [Reynolds]* (2008) 169 Cal.App.4th 763.)

Exception: However, statements made by a defendant in compliance with mandatory disclosure provisions pursuant to the **National Firearms Act**, revealing the possession of weapons which are illegal under state law, and specifically privileged by federal statute (**26 U.S.C. § 5848**) prohibiting such information from being used "directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence," may *not* be used as part of a state officer's probable cause for a search warrant. (*People v. Sun* (2007) 148 Cal.App.4th 374, 380-388.)

Other Suppression Issues:

Statements Made to Third Persons and/or at Prior Hearings, Used for Impeachment: In many situations, defendant's extra-judicial statements to other persons or at prior court hearings which, during trial, would not be admissible in the People's case-in-chief, are admissible if necessary to impeach a defendant's contrary direct testimony. *Examples:*

Statements Made to Psychotherapists:

Absent a waiver of the **Fifth Amendment** privilege, a defendant's responses to questions by experts evaluating his mental competency ordinarily are *not* admissible as evidence

against the defendant in the guilt phase of the trial (*Estelle v. Smith* (1981) 451 U.S. 454, 466-469 [68 L.Ed.2nd 359, 371-373; see also *People v. Weaver* (2001) 26 Cal.4th 876, 959-961.), nor at the penalty phase of a death-penalty case. (*Petrocelli v. Baker* (9th Cir. 2017) 869 F.3rd 710, 725-728.)

Un-*Mirandized* statements, however, made to the prosecution's psychiatrist are admissible when used solely for purposes of impeachment whether obtained in violation of the defendant's **Fifth Amendment**, or **Sixth Amendment**, protections. (*Id.*, at p. 724.)

But statements obtained under these circumstances may be used against the defendant *for impeachment purposes* should he testify and lie. (*People v. Pokovich* (2004) 120 Cal.App.4th 436; psychotherapists appointed to determine defendant's competence to stand trial.)

Statements to a psychologist retained to testify on the issue of the defendant's fitness for juvenile court treatment were held to be admissible as impeachment evidence. (*People v. Humiston* (1993) 20 Cal.App.4th 460, 472-477.)

People v. Stanfill (1968) 184 Cal.App.3rd 577, 581: Statements made to a court appointed psychiatrist for the purpose of determining the defendant's mental competency to stand trial, pursuant to **P.C. § 1368**, were admissible for impeachment purposes. (*People v. Stanfill* (1968) 184 Cal.App.3rd 577, 581.)

But see *People v. Harris* (1987) 192 Cal.App.3rd 943, 948-950, disagreeing with *Stanfill*.

Ordering juvenile defendants to submit to psychiatric examinations in preparation for a federal "transfer hearing" for adult prosecution, per **18 U.S.C. § 5032**, does not implicate the defendants' **Fifth Amendment** self-incrimination rights because the resulting statements cannot be used in the Government's case-in-chief. (*United States v. Mitchell H.* (9th Cir. 1999) 182 F.3rd 1034.)

Defendant's statements made to a prosecution expert, on the issue of defendant's alleged mental retardation in a capital case per **P.C. § 1376**, is *inadmissible* in the guilt phase under the terms of the statute (**subd. (b)(2)**), but is *admissible* in the trial or hearing to determine retardation, or when necessary to

rebut defense evidence on the issue of defendant's mental condition. Neither the defendant's **Fifth Amendment** right against self-incrimination nor his **Sixth Amendment** right to an attorney is violated by such a procedure. (*Centeno v. Superior Court [Los Angeles]* (2004) 117 Cal.App.4th 30, 43-44.)

Statements Made to a Probation Officer:

Statements made to a *probation officer* by a minor in preparation for a *Juvenile Court Fitness Hearing* under **W&I § 707(c)** are admissible for *impeachment* purposes. (*People v. Macias* (1997) 16 Cal.4th 739, 754-757.)

The same rule applies to the minor's testimony *at the fitness hearing*. (*Id.*, at p. 744, fn. 2; see also *Sheila O. v. Superior Court* (1981) 125 Cal.App.3rd 812, 817.)

Testimony of a *probationer/defendant at a probation revocation hearing* is inadmissible at his later trial except for purposes of impeachment or rebuttal. (*People v. Coleman* (1975) 13 Cal.3rd 867, 889; see also *People v. Weaver* (1985) 39 Cal.3rd 654.)

Other Hearings:

Defendant's testimony at a **P.C. § 1538.5** *evidence suppression hearing*, holding that if a defendant testifies at a suppression hearing in superior court, his testimony may *not* be used against him by the prosecution in its case-in-chief. However, if a defendant's testimony at the suppression hearing is inconsistent with his testimony at trial, then prosecution may use his prior testimony for purposes of impeaching his credibility. (*People v. Drews* (1989) 208 Cal.App.3rd 1317, 1325-1326.)

Confidential conversations illegally obtained by *eavesdropping in violation of Penal Code § 632*: The criminal proscription of **P.C. § 632**, making inadmissible any evidence obtained by eavesdropping on a confidential communication, applies to any participant to the illegal eavesdropping. However, the evidentiary sanction of **section 632(d)**, making inadmissible the results of an eavesdropping done in violation of this section, does not operate to exclude the independent present recollection of a recording

participant because that evidence is not “obtained as a result” of the illegality. Further, use of evidence obtained in violation of **P.C. § 632** merely to refresh the recollection of the monitoring participant does not render the refreshed testimony inadmissible. However, if the recording party has inadequate recollection of the confidential communication, testimony in the form of “past recollection recorded” cannot avoid the statutory sanction. (*Frio v. Superior Court* (1988) 203 Cal.App.3rd 1480, 1497.)

“‘[T]he remedy for breach of an unauthorized cooperation agreement usually is a sanction short of dismissal.’ (*People v. C.S.A.* (2010) 181 Cal.App.4th 773, 780, citing, inter alia, *State of North Carolina v. Sturgill* (1996) 121 N.C.App. 629 [469 S.E.2d 557, 568] [concluding that the exclusion of evidence, rather than the dismissal of the charges, was the proper remedy for defendant's reliance on unauthorized cooperation agreement and stating, “(W)e are not required, as a result of the ‘constable’s blunder,’ to place defendant in a better position than he enjoyed prior to making the agreement with the police.” (*People v. Perez* (2016) 243 Cal.App.4th 863, 881, fn. 12.)

A father’s admissions of abuse made during a *juvenile dependency hearing* were held to be admissible for impeachment purposes in a later proceeding. (*In re Jessica B.* (1989) 207 Cal.App.3rd 504, 521.)

Defendant’s statements made at a *motion for new trial* on grounds of ineffectiveness of trial counsel may be used in a subsequent hearing for impeachment. (*People v. Dennis* (1986) 177 Cal.App.3rd 863, 876.)

Statements taken during a *civil bankruptcy proceeding deposition* should not be suppressed in a later criminal proceeding. (*United States v. Fraza* (1st Cir. 1997) 106 F.3rd 1050.)

It is error for the trial court to advise defendant that he will be waiving his **Fifth Amendment** right to remain silent if he discusses the circumstances of the charged offense in a post-conviction, pre-sentencing “*Marsden* hearing.” Statements made in a *Marsden* hearing are subject to use immunity in that the statements may not be used in further related proceedings except for the purpose of impeachment and

rebuttal in such proceedings. (*People v. Knight* (2015) 239 Cal.App.4th 1, 5-9.)

Note: A so-called “**Marsden** hearing” is one in which a defendant asks a court for substitution of counsel, arguing that because of some conflict or a dissatisfaction with the way present counsel is handling his case, the defendant is being deprived of his **Sixth Amendment** right to effective assistance of counsel. (See *People v. Marsden* (1970) 2 Cal.3rd 118.)

During Plea Negotiations:

Statements made *during plea negotiations* are generally *inadmissible* (**P.C. § 1192.4**) except if necessary as rebuttal evidence or in cross-examination in response to defendant’s contrary testimony on direct examination concerning the same factual issues. (*People v. Crow* (1994) 28 Cal.App.4th 440, 448-453; *United States v. Mezzanatto* (1995) 513 U.S. 196 [130 L.Ed.2nd 697].)

See similar **Federal Rules of Evidence, Rule 410(4)** and **Federal Rules of Criminal Procedure, Rule 11(e)(6)(D)**.

These rules, however, only apply to statements made to government attorneys, and not those made to law enforcement agents. (*United States v. Lewis* (7th Cir. 1997) 117 F.3rd 980, 983-984.)

Meeting with an Assistant United States Attorney prior to filing a case for the purpose of explaining her actions and why she thought what she was doing was not illegal, where the AUSA tells her she is in fact in violation of the law, and offers to let her plead guilty to limited counts, constitutes “*plea bargaining*” which should have been excluded from her subsequent trial. (*United States v. Thongsangoune* (1999) 186 F.3rd 928, 934-936; but held to be harmless error given the strength of the other evidence.)

“**Evidence Code section 1153** provides that ‘[e]vidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including

proceedings before agencies, commissions, boards, and tribunals.’ **Penal Code section 1192.4** provides that ‘[i]f the defendant’s plea of guilty pursuant to **Section 1192.1** [plea of guilty specifying degree of crime] or **1192.2** [plea before committing magistrate] is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. The plea so withdrawn may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.’ In the enactment of these sections the Legislature extended the earlier rule from civil cases to prohibit evidence of offers to compromise. (*People v. Wilson* (1963) 60 Cal.2nd 139, 156 . . . ; see **Code Civ. Proc.**, former § **2078**.) At least one case has extended the exclusionary rule to admissions made in the course of plea negotiations. (*People v. Tanner* (1975) 45 Cal.App.3rd 345, 349–351)” (*People v. Amezcua & Flores* (2019) 6 Cal.5th 886, 913-914; assuming, without deciding, that this rule applies to plea negotiations, but holding that the defendant’s incriminating statements in this case were not made during plea negotiations.)

These rules are also subject to waiver for purposes of impeachment, so long as the waiver is knowing, voluntary, and intelligently made. (*United States v. Rebbe* (9th Cir. 2002) 314 F.3rd 402.)

Statements Admissible at Other Hearings: Defendant’s non-**Mirandized** statements may be admissible, and/or the usual **Fifth Amendment** self-incrimination protections may not be available, at hearings other than criminal trials. For instance:

Civil Proceedings: The privilege against self-incrimination does not, as a general rule, extend to proceedings that are essentially civil in nature.

The **Fifth Amendment** self-incrimination privilege is not applicable to *matters that will subject a witness to liability in a civil proceeding only*. (*Metalworking Machinery, Inc. v. Superior Court* (1977) 69 Cal.App.3rd 791, 794.)

The privilege does not apply in civil commitment hearings of mentally retarded persons, per **W&I § 6502**. (*Cramer v. Tyars* (1979) 23 Cal.3rd 131, 137-138.)

The privilege of a criminal defendant *not* to testify does not extend to civil commitments. (*Allen v. Illinois* (1986) 478 U.S. 364, 374-375 [92 L.Ed.2nd 296]; Proceedings under the **Illinois Sexually Dangerous Persons Act**.)

California's rule is the same, under the "**Sexually Violent Predator**" ("**SVP**") statutes (i.e., **W&I §§ 6600 et seq.**). (*People v. Leonard* (2000) 78 Cal.App.4th 776, 792-793; see also *People v. Field* (2016) 1 Cal.App.5th 174, 192-197; case remanded to the trial court for hearings upon the Fourth District Court of Appeal's finding that defendant's objection to being called as a witness "may have merit."

A person who has been convicted in a criminal court of drug possession, and then certified to a trial court for a civil determination of whether he or she is addicted or in imminent danger of becoming addicted to drugs per **W&I § 3050**, which could result in the person being committed to narcotics rehabilitation program, may be required to testify at such a hearing. (*People v. Whelchel* (1967) 255 Cal.App.2nd 455, 460-461.)

Where Sanity is at Issue:

Statements made to a psychiatrist pursuant to **P.C. §§ 1026, 1027**, on the issue of defendant's sanity, may be used against the defendant should he place his sanity in issue. (*People v. Williams* (1988) 44 Cal.3rd 883, 961-962.)

"[W]hen a defendant initiates a psychiatric examination by court-appointed experts, admission of the defendant's statements in a subsequent proceeding in which he has placed his mental state in issue violates neither his **Fifth Amendment** right against self-incrimination nor his **Sixth Amendment** right to counsel. Even if the defendant or his counsel is not aware at the time of the examination of all of the possible uses to which his statements might be put, he is on notice that they are admissible in rebuttal in such proceedings." (*Ibid.*)

Note that this is a looser standard than that for competency hearings, per **P.C. § 1368**, where such statements to a psychotherapist may be used only for impeachment purposes after the defendant testifies falsely. (See above.) This is because in a competency proceeding, defendant has no control over the choice for such a hearing. Where the issue is sanity, having experts appointed to determine these issues is a tactical decision on the defendant's part. (*Centeno v. Superior Court [Los Angeles]* (2004) 117 Cal.App.4th 30, 43.)

Deportation Hearings, per **8 U.S.C. §§ 1302, 1306, & 1325**:

Miranda warnings are not necessary before questioning a defendant in the context of a deportation hearing. Such questioning is not an interrogation, within the meaning of *Miranda*. Therefore, the defendant's responses and the documentary products of those responses are admissible as evidence in a later criminal prosecution. (*United States v. Solano-Godines* (9th Cir. 1997) 120 F.3rd 957, 960-961.)

In fact, an immigration judge may draw an adverse inference from a defendant's silence should he refuse to testify at his deportation hearing. (*Id.*, at p. 962.)

Statements obtained without a *Miranda* admonishment or waiver are admissible at a deportation hearing. (*INS v. Lopez-Mendoza* (1984) 468 U.S. 1032, 1039 [82 L.Ed.2nd 778, 786].)

A *Miranda* admonishment unnecessary. (*United States v. Montoya-Robles* (Utah 1996) 935 F.Supp. 1196, and cases cited therein.)

However, a defendant's statements are *inadmissible* if, under the circumstances, they were involuntary and in violation of fundamental due process. (*Navia-Duran v. Immigration & Naturalization Service* (1st Cir. 1977) 568 F.2nd 803, 810-811.)

The same statement elicited by an INS investigator in violation of *Miranda*, although admissible in a deportation hearing, is *inadmissible* in any criminal proceeding where alienage is an element of the crime and the interrogation is

reasonably likely to elicit an incriminating response. (*United States v. Mata-Abundiz* (9th Cir. 1983) 717 F.2nd 1277, 1278-1279.)

Answers to routine booking questions by a local law enforcement officer after an arrest on state charges, which included defendant's place of birth and country of citizenship, were admissible at defendant's later federal criminal prosecution for being in the country illegally after a prior deportation despite the lack of a *Miranda* admonishment and waiver. (*United States v. Salgado* (9th Cir. 2002) 292 F.3rd 1169, 1174-1175.)

Answers to routine questions asked by an Immigration Enforcement officer asked to determine whether defendant was subject to a civil administrative action for deportation, were admissible at defendant's later federal criminal prosecution for being in the country illegally after a prior deportation despite the lack of a *Miranda* admonishment and waiver. (*Id.*, at pp. 1172-1174.)

The rule of *United States v. Mata-Abundiz*, *supra*, did not apply in that the interrogator in *Mata-Abundiz*, who did criminal investigations, had reason to suspect that defendant was in violation of a federal criminal statute when he questioned the defendant. (*Ibid.*)

Parole Revocation Hearings:

Statements taken in violation of *Miranda* are admissible at a *parole revocation hearing*, unless such statements were involuntary or coerced. (*In re Martinez* (1970) 1 Cal.3rd 641; *In re Tucker* (1971) 5 Cal.3rd 171.)

Probation Revocation Hearings:

In a probation revocation hearing, the probationer's admissions, elicited by police officers absent *Miranda* warnings, are admissible. (*People v. Racklin* (2011) 195 Cal.App.4th 872, 878-881.)

Mental Competence Jury Trial, per P.C. § 1368:

In defendant's *jury trial to determine his present mental competence*, per **P.C. § 1368**, where it was defense counsel himself who provided the mental health expert with evidence of an illegally obtained confession, the Court held that if the defendant puts his mental capacity in issue, he cannot later complain if his attorney hands over an illegally obtained confession to an expert witness who considers that confession in forming an opinion of the defendant's mental condition. (*People v. Samuel* (1981) 29 Cal.3rd 489, 495.)

Mentally Retarded Determinations, per W&I § 6500.1:

Miranda principles are not applicable to proceedings under **W&I § 6500.1**; *Re: mentally retarded persons* who are a danger to themselves or others, although a hearing concerning "voluntariness" should first be held. (*Cramer v. Shay* (1979) 94 Cal.App.3rd 242.)

State Bar Proceedings:

The exclusionary rules, including those involving a possible **Miranda** violation, are not generally part of the administrative due process requirements in State Bar disciplinary proceedings. The Court, however, declined to discount the possibility that circumstances could not be presented under which the constitutional demands of due process did not require the suppression of illegally obtained evidence in a proceeding conducted by such governmental agency or administrative arm of this court. "The application of such rules must be worked out on a case-by-case basis in this and other license revocation proceedings." (*Emslie v. State Bar* (1974) 11 Cal.3rd 210, 224-230.)

Mentally Disordered Offender Hearings:

A defendant in a "mentally disordered offender" (i.e., "MDO") trial, per **P.C. § 2972**, does not have the right *not* to be called as a witness by the prosecution. (*People v. Merfeld* (1997) 57 Cal.App.4th 1440; *People v. Clark* (2000) 82 Cal.App.4th 1072; *People v. Lopez* (2006) 137 Cal.App.4th 1099.)

The Lanterman-Petris-Short Act, per W&I §§ 5000-5550:

A person may be required to testify at an involuntary post-certification treatment hearing as a dangerous person, pursuant to the **Lanterman-Petris-Short Act**, (**W&I §§ 5000-5550**), although he cannot be required to answer specific incriminating questions. (*Conservatorship of Bones* (1987) 189 Cal.App.3rd 1010, 1015-1016.)

Writ of Habeas Corpus Hearings:

A post-conviction writ of habeas corpus, challenging the competency of counsel, is not itself a criminal case and cannot result in added punishment for the petitioner. It is an independent action the defendant in the earlier criminal case institutes to challenge the results of that case. Therefore, the **Fifth Amendment** does not prevent the respondent (i.e., prosecution) from calling the defendant to the stand to testify, although he does retain the right to assert the privilege against self-incrimination as to individual questions, as does any witness in any proceeding. (*In re Scott* (2003) 29 Cal.4th 783, 815-816.)

Foreign Criminal Proceedings:

Statements sought from a person that might tend to incriminate him or her in a criminal proceeding in a foreign country are *not* shielded by the **Fifth Amendment**. (*United States v. Gecas* (11th Cir. 1997) 120 F.3rd 1419; *United States v. (Under Seal)* (4th Cir. 1986) 807 F.2nd 374; *United States v. Gilboe* (2nd Cir. 1983) 699 F.2nd 71.)

The **Fifth Amendment** does not protect one whose statements might subject the person to prosecution by a foreign government. (*United States v. Balsys* (1998) 524 U.S. 666 [141 L.Ed.2d 575]; subject resisting a U.S. administrative subpoena arguing that answering questions about wartime activities between 1940 and 1944 might subject him to prosecution by a foreign government as a war criminal.

Interrogations by Foreign Officials:

The results of an interrogation of a suspect in a foreign country by foreign officials will not be suppressed in a United States court despite the lack of a **Miranda** admonishment unless the methods used were so violative of “fundamental due process as to undermine

the truth of the evidence acquired.” (*People v. Helfend* (1969) 1 Cal.App.3rd 873, 890.)

See also *United States v. Martindale* (4th Cir. 1986) 790 F.2nd 1129, 1133-1134: Questioning by Scotland Yard on a British case did not require a *Miranda* admonishment for his responses to be used in a later U.S. prosecution, absent proof of duress.

And see *United States v. Mundt* (10th Cir. 1974) 508 F.2nd 904, 906-907: Peruvian authorities who questioned the defendant without American participation, did not have to admonish the defendant despite the fact that the American agents were involved in the events leading up to the defendant's arrest.

However, if U.S. officials are involved in the interrogation, or a foreign officer acted on behalf of the U.S. officials, the laws of the U.S. jurisdiction in which the case is tried govern admissibility of the evidence. (*People v. Neustice* (1972) 24 Cal.App.3rd 178, 187.)

Also, statements obtained by compulsion by a foreign government (e.g., obtained under threat of imprisonment) are inadmissible in a later prosecution in the United States, in that as “*compelled*” statements, their use in a U.S. prosecution violates the **Fifth Amendment**. (*United States v. Conti* (2nd Cir. 2017) 864 F.3rd 63.)

Right Against Self-Incrimination at Sanity Commitment Extension Hearings, Sexually Violent Predator Hearings, or Mentally Disordered Offender Hearings:

Sanity Commitment Extension Hearings: Pursuant to **P.C. § 1026.5(a)**, A person found not guilty of a felony by reason of insanity may be committed to a state hospital for a period no longer than the maximum prison sentence for his or her offense or offenses. That commitment, however, may be extended if, because of mental disorder, the person “represents a substantial danger” to others. (**Sub. (b)(1)**) **Subd. (b)(7)** specifically provides that at such a hearing; “[t]he person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings.” Such rights guaranteed by the Constitution in criminal cases includes the right to refuse to take the witness stand. The California Supreme Court, therefore, has held that by virtue of **P.C. § 1026.5(b)(7)**, a person facing extended commitment has the right to refuse to testify, a right constitutionally guaranteed criminal defendants. (*Hudec v. Superior Court* (2015) 60 Cal.4th 815, 819-832.)

Sexually Violent Predator Hearings: A defendant who is subject to the **Sexually Violent Predator Act (SVPA; W&I §§ 6600 et seq.)** may be similarly situated with and NGI defendant, and therefore be accorded under an Equal Protection argument the privilege not to have to testify, at least in this case. The case, however, was remanded to the trial court for a determination whether, as argued by the people, that the defendant's testimony in an SVP case is more important to have because there is more available information on the mental state of a person found not guilty by reason of insanity. (*People v. Curlee* (2015) 237 Cal.App.4th 709, 716-722.)

And see *People v. Landau* (2016) 246 Cal.App.4th 850, 862-865m which held, per *People v. Curlee, supra*, that defendant was denied equal protection of the law when the court allowed the prosecution to call him as a witness at his **SVPA** extension trial, despite the lack of any specific statute protecting his right against self-incrimination, finding that defendant was entitled to the same **Fifth Amendment** protections as an NGI defendant receives under **P.C. § 1026.5(b)(7)**.

The Court also found it error to admit into evidence “a massive amount of inadmissible hearsay” from an expert forensic psychiatrist, showing defendant to be an incurable pedophile who had declined to submit to treatment. (*Id.*, at pp. 865-878.)

See also *People v. Field* (July 6, 2016) 1 Cal.App.5th 174; case remanded to the trial court for hearings upon the Fourth District Court of Appeal's finding that defendant's objection to being called as a witness “may have merit.”

See also *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1230 (commitment extension for a defendant found not guilty by reason of insanity, per **P.C. § 1026.5**), and *People v. Luis C.* (2004) 116 Cal.App.4th 1397 (commitment extension for a person under the control of the California Youth Authority, per **W&I §§ 1800 to 1803**), where it was held that the applicable statutes (**P.C. § 1026.5(b)(7)** & **W&I § 1801.5**, respectively) provide that the person so-committed is entitled to the rights guaranteed under the Federal and State Constitutions for criminal proceedings, and thus were not required to testify in their respective extension proceedings.

Haynie disagrees with *People v. Superior Court [Williams]* (1991) 233 Cal.App.3rd 477, which held to the contrary. (See also *People v. Powell* (2004) 114 Cal.App.4th 1153, 1157-1158, citing *Williams* with approval.)

Mentally Disordered Offender Hearings:

Appealing from a judgment extending his commitment as a mentally disordered offender (“MDO;” **P.C. §§ 2960 et seq.**), defendant argued that he should not have been compelled to testify in his proceeding, getting the same protections as sexually violent predators (SVP) and those pleading not guilty by reason of insanity (NGI). The Court of Appeal agreed, holding that “MDO’s, SVP’s and NGI’s are all similarly situated with respect to the testimonial privilege provided for in **P.C. § 1026.5(b)(7).**” (*People v. Dunley* (2016) 247 Cal.App.4th 1438.

In a case in which defendant argued that a trial court violated his equal protection rights when it compelled him to testify over his objection at a trial to determine whether his mentally disordered offender (MDO) commitment should be extended, the Court concluded that the question of equal protection was a legal issue of continuing public importance that was likely to reoccur in MDO proceeding. However, because defendant had been recommitted as an MDO in a proceeding subsequent to his appeal without being required to testify, this issue of equal protection was held to be moot as to him, in that a reversal could have no practical effect or provide him with effective relief. The Court held, however, that MDO’s are similarly situated to persons found not guilty by reason of insanity and sexually violent predators with respect to the testimonial privilege and for purposes of equal protection. (*People v. Alsafar* (2017) 8 Cal.App.5th 880, 885-888.)

Military Investigations and Hearings:

The applicability of the **Fifth Amendment** right against self-incrimination, and its attendant right to counsel during a custodial interrogation to military personnel in a military investigation has never been specifically decided by the United States Supreme Court. This is because the President has decreed that statements obtained in violation of the **Fifth Amendment** self-incrimination clause are

generally not admissible at trials by court-martial (**Mil. Rules of Evid. § 304(a), (c)(3)**), and the Court of Military Appeals has held that cases construing the **Fifth Amendment** right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial. (See *United States v. McLaren* (1993) 38 M.J. 112, 115; *United States v. Applewhite* (1987) 23 M.J. 196, 198; and see *Davis v. United States* (1994) 512 U.S. 452, 457, fn. 1C [129 L.Ed.2nd 362].)

The President of the United States, exercising his authority to prescribe procedures for military criminal proceedings (**Art. 36(a), UCMJ, 10 U.S.C. § 836(a)**), has decreed that statements obtained in violation of the self-incrimination clause of the **Fifth Amendment** are generally inadmissible at trials by court-martial. (*Davis v. United States, supra*, and **Mil. Rules of Evid., § 304(a), (c)(3)**.)

Statements Taken During a Delay in Arraignment:

California Rule (P.C. §§ 821, 825):

Statements taken during a delay in arraignment, if not involuntary, are admissible *so long as* there is no prejudice to the defendant caused by the delay. (*People v. Turner* (1994) 8 Cal.4th 37, 172-177; *People v. Morris* (1991) 53 Cal.3rd 152, 200.)

In order to justify a suppression of a defendant's statements, the defendant must show that the delay in arraignment produced his admissions or that there was an essential connection between the illegal detention and admissions of guilt. (*People v. Richardson* (2008) 43 Cal.4th 959, 990-991.)

However, statements taken from a detained criminal suspect held for over 16 hours without probable cause to arrest, are subject to suppression as the product of an unlawfully prolonged detention. (*People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1170-1171.)

Where an alleged delay in arraignment is not the cause of defendant eventually inculcating himself, but rather him being confronted with other incriminating evidence connecting him to the crime, there is no prejudice. (*People v. Williams* (2010) 49 Cal.4th 405, 446.)

Defendant must also prove that the statements were a product of an illegal delay in arraignment. (*People v. Sapp* (2003) 31 Cal.4th 240, 269-270; confessions obtained prior to a violation of the 48-hour arraignment rule, where defendant not arraigned until up to 5 days after arrest.)

Federal Rule (18 U.S.C. § 3501(c)): A custodial confession made by a person within *six hours* following arrest is *not inadmissible* solely because of a delay in arraignment.

The *McNabb-Mallory* Rule: A confession obtained from a detained arrestee who was not brought before a judicial officer “*without unnecessary delay*” is inadmissible in a federal court. (*McNabb v. United States* (1943) 318 U.S. 332, 343-344 [87 L.Ed. 819]; *Mallory v. United States* (1957) 354 U.S. 449 [1 L.Ed.2nd 1479].)

Note: These federal “speedy arraignment” rules, and their effect upon the admissibility of any statements obtained from an in-custody defendant, do not apply to, nor seek to modify, California’s less restrictive rules in that they are based upon statutes, as opposed to the United States Constitution.

Fed. R. Crim. Proc. 5(a), enacted shortly after *McNabb* was decided, requires that an arrested person shall be taken before the nearest available federal magistrate judge “without unnecessary delay.” “*Without unnecessary delay*” is not defined.

The “*without unnecessary delay*” requirement serves at least three vital interests:

- It “protect(s) the citizen from a deprivation of liberty as a result of an unlawful arrest by requiring that the Government establish probable cause;”
- “(E)ffectuate(s) and implement(s) the citizen’s constitutional rights by insuring that a person arrested is informed by a judicial officer” of those rights; *and*
- “(M)inimize(s) the temptation and opportunity to obtain confessions as a result of coercion, threats, or unlawful inducements.”

(*United States v. Superville* (Virgin Islands, 1999) 40 F.Supp.2nd 672, 679; see also *Corley v. United States* (2009) 556 U.S. 303, 321-322 [173 L.Ed.2nd 443].)

18 U.S.C. § 595: “It shall be the duty of the marshal . . . who may arrest a person . . . to take the defendant before the nearest . . . judicial officer . . . for a hearing.”

It is not relevant that the defendant's confession was voluntary. A failure to bring the defendant to a magistrate without unnecessary delay requires the suppression of a confession obtained during the period of delay. (*Upshaw v. United States* (1948) 335 U.S. 410 [93 L.Ed. 100].)

18 U.S.C. § 3501(c); Safe Harbor Act: Enacted in 1968, **18 U.S.C. § 3501(c)** provides a six hour “safe harbor” after the arrest and before arraignment during which a confession will not be excluded solely because of delay. (*United States v. Van Poyck* (9th Cir. 1996) 77 F.3rd 285, 288.)

Note: **18 U.S.C. § 3501** was passed into law some eleven years after *Mallory* in order to modify the Supreme Court's exclusionary rules governing the admissibility of confessions in federal prosecutions.

“Where the right to prompt presentment has been violated, two sources—**18 U.S.C. § 3501(c)** and what we have termed the *McNabb-Mallory* rule—govern the admissibility of any resulting confessions.” (*United States v. Gowadia* (9th Cir. 2014) 760 F.3rd 989, 992; citing *Corley v. United States* (2009) 556 U.S. 303, 332 [173 L.Ed.2nd 443].)

However, **section 3501** was not intended to sweep the *McNabb-Mallory* exclusionary rule away in its entirety, but rather only to provide immunization to voluntary confessions given within six hours of a suspect's arrest, modifying, but not supplanting, *McNabb-Mallory*. (*Corley v. United States* (2009) 556 U.S. 303, 321-322 [173 L.Ed.2nd 443]; defendant not brought before a magistrate until some 29½ hours after his arrest; confession suppressed.)

18 U.S.C. § 3501(e): A “confession” is defined as “any confession of guilt or any self incriminating statement made or given orally or in writing.”

Because the six-hour rule is not constitutionally mandated, California does not follow the *McNabb-Mallory* Rule: (*People v. Thomas* (2012) 211 Cal.App.4th 987, 1010; Juvenile defendant detained beyond the statutory 6-hour limit of **Wel. & Insti. Code § 207.1** before being questioned; no prejudice.)

Exceptions: The *McNabb-Mallory* Rule is subject to exceptions:

The *McNabb* Rule was not intended to invoke any constitutional principles, but rather, through the Court's supervisory powers, to establish and maintain “civilized standards of procedure and

evidence” in federal courts. (*Corley v. United States* (2009) 556 U.S. 303, 321-322 [173 L.Ed.2nd 443].)

The **18 U.S.C. § 3501(c)** safe harbor did not apply where the defendant’s incriminating statements, made on a Sunday, were made more than six hours after his 9:30 a.m. Friday morning arrest and before his Tuesday morning initial appearance before a magistrate. The four-day delay in presenting defendant to the magistrate was unreasonable and unnecessary in violation of **Fed. R. Crim. Proc. 5(a)** and under the *McNabb-Mallory* rule where the government did not contend that the delay was reasonable for humanitarian reasons, the reason defendant was not transported to the magistrate was not due to the unavailability of any necessary personnel or available judge, and there was nothing in the record to support the claim that the agents needed more evidence than what they had at 10:00 a.m. on Friday. (*United States v. Pimental* (9th Cir. 2014) 755 F.3rd 1095, 1100-1104.)

The *McNabb-Mallory* Rule is a statutorily authorized rule that is not affected by **Fed. Rules of Evid., Rule 402**, which restricts the suppression of evidence to certain types of evidence. (*Tome v. United States* (1995) 513 U.S. 150 [130 L.Ed.2nd 574]; *Corley v. United States* (2009) 556 U.S. 303, 321-322 [173 L.Ed.2nd 443].)

This six hour “safe harbor” period may be extended beyond six hours if the delay is reasonable and is due to the means of transportation and the distance to the nearest magistrate. (*United States v. Van Poyck* (9th Cir. 1996) 77 F.3rd 285, 288-289.)

Defendant’s confession, obtained by a federal officer some eight hours after his arrest, was admissible in that the interrogating federal officer needed time to get to where defendant was being held and was interrupted by other law enforcement business. (*United States v. Padilla-Mendoza* (9th Cir. 1998) 157 F.3rd 730, 732.)

A 28-hour delay in arraignment did not make defendant’s inculpatory statements inadmissible absent a showing of physical or psychological coercion by law enforcement, or that the delay somehow rendered his confession involuntary. (*United States v. Rosario-Diaz* (1st Cir. 2000) 202 F.3rd 54, 70.)

A twenty-four hour pre-arraignment delay was reasonable and necessary because the defendant needed to receive medical treatment. (*United States v. Matus-Leva* (9th Cir. 2002) 311 F.3rd 1214, 1217.)

A thirty-one hour delay pre-arraignment delay was necessary because the defendant spoke only Spanish and the first available Spanish-speaking FI agent did not arrive until approximately 27 hours after defendant's arrest. (*United States v. Gomez* (9th Cir. 2002) 301 F.3rd 1138, 1141-1143.)

An arrestee who receives his “*probable cause determination*,” within 48 hours of his arrest, pursuant to *Riverside v. McLaughlin* (1991) 500 U.S. 44 [114 L.Ed.2nd 49], bears the burden of proving that federal agents delayed his arraignment for purposes of interrogating him. (*United States v. Ramirez-Lopez* (9th Cir. 2003) 315 F.3rd 1143, 1151.)

Administrative delays due to the unavailability of government personnel and judges necessary to completing the arraignment process are reasonable and necessary. (*United States v. Garcia-Hernandez* (9th Cir. 2009) 569 F.3rd 1100, 1106; a 19-hour delay did not violate the prompt presentment requirement of **Rule 5(a)**.)

18 U.S.C. § 3501(c) and *McNabb-Mallory* do not expand the right to presentment established by **Fed. R. Crim. Pro. 5(a)**, but instead provide only that the remedial framework for violations of that right is suppression. Defendant could not invoke *McNabb-Mallory* in this case because he was *not*, during the period in question (during which a series of non-custodial interviews took place), either formally arrested or in “other detention” within the meaning of **§ 3501**. The interviews occurring during this time period did not amount to a detention. (*United States v. Gowadia* (9th Cir. 2014) 760 F.3rd 989, 992-996.)

Other Case Law Applying the Rule:

Where defendant was first questioned within six hours of being taken into custody, but was not brought before a judicial officer until some 14 days later, his confession was admissible. However, in a second interrogation eight days after being taken into custody, but before being taken before the judge, the statements obtained in this second interview were suppressed. (*United States v. Superville* (Virgin Islands, 1999) 40 F.Supp.2nd 672, 679-687.)

Statements made by defendant to federal investigators three days after his arrest are not inadmissible under **Section 3501(c)**, even though questioned over six hours after his arrest, when defendant is held in state custody. (*United States v. Alvarez-Sanchez* (1994) 511 U.S. 350 [128 L.Ed.2nd 319].)

A thirty-hour delay in arraignment, caused by malfunctioning recording equipment, thus necessitating a second interrogation by law enforcement, is not a justifiable excuse for delaying the defendant's arraignment, requiring the suppression of his statements obtained during the delay. (*United States v. Liera* (9th Cir. 2009) 585 F.3rd 1237.)

A delay in arraignment of 27 hours, finally accomplished at 2:00 pm on the day after his arrest by Immigration and Customs Enforcement agents (ICE), required the suppression of defendant's statements obtained eight hours after his arrest. While it was apparently an ICE policy that paperwork was to be filed with the court by 10:30 a.m. on the morning of a suspect's appearance, this policy alone did not establish that a delay beyond 6 hours was reasonable considering the availability of transportation and distance to the magistrate. Further investigation on whether defendant could be charged was not necessary in that he was arrested for a crime which occurred in an agent's presence (possession of marijuana). Thus, there was no need to wait for a search warrant to determine if he could be charged. (*United States v. Valenzuela-Espinoza* (9th Cir. 2012) 697 F.3rd 742, 748-753.)

A confession obtained during an alleged "delay in arraignment" (i.e., seven days after his arrest) is still admissible where defendant was subject to a parole hold. (*Benson v. Chappell* (9th Cir. 2020) 958 F.3rd 801, 819, .)

Statements Obtained from a Foreign National; The Vienna Convention & P.C. § 834c(a)(1):

Vienna Convention on Consular Relations: P.C. § 834c(a)(1) is a statutory enactment of the 1963 **Vienna Convention on Consular Relations, Article 36**; a Treaty signed by the United States and 169 other countries.

Note: If the subject is a foreign "diplomat," entitled by "diplomatic immunity" from arrest and prosecution, then the "**Vienna Convention on Diplomatic Relations**" (22 U.S.C. § 245) is the controlling document. (See <https://www.state.gov/documents/organization/150546.pdf>, and https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_August2016.pdf.)

Advisal of Rights Made to Arrestee/Detainee: Upon the arrest and booking or detention for more than two (2) hours of a known or suspected foreign national, the arrestee/detainee shall be advised "*without delay*" that he or she has a right to communicate with an official from the consulate of his or her native country. If

the arrestee/detainee chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified. (*People v. Enraca* (2012) 53 Cal.4th 735, 756-758; *People v. Mendoza* (2007) 42 Cal.4th 686, 709.)

This is a statutory enactment of the 1963 **Vienna Convention on Consular Relations, Article 36**; a treaty signed by the United States and 169 other countries.

Although there is some disagreement, it is generally accepted that a foreign national has the “*standing*” necessary to invoke the provisions of the **Vienna Convention** in so far as they require notice to an arrestee/detainee of his right to contact his consulate. (*People v. Mendoza* (2016) 62 Cal.4th 856, 917; and see *United States v. Superville* (Vir. Islands, 1999) 40 F.Supp.2nd 672, 676-678.)

However, a claim concerning the asserted prejudicial effect of a violation of **article 36** of the **Vienna Convention** that is based on material outside the record on appeal appropriately should be raised in a petition for writ of habeas corpus. (*People v. Mendoza, supra.*)

The United States Supreme Court, until recently (see below), declined to decide whether a foreign national who had not been advised of his rights under the **Vienna Convention** had an enforceable right in U.S. courts. (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 343 [165 L.Ed.2nd 557]; assuming for the sake of argument that they did, while specifically declining to decide the issue. Four dissenting opinions would have held that the defendants had a right to raise these issues. (At pp. 369-378.)

An arresting officer’s department is responsible for making the requested notification. (**subd. (a)(2)**)

The **Vienna Convention** also provides that any communication addressed to the consular post by the person arrested, in prison, custody or detention *shall* be forwarded by the authorities “*without delay.*” (**Art. 36(1)(b)**)

The law enforcement official in charge of a custodial facility where a foreign national is housed shall ensure that the arrestee is allowed to communicate with, correspond with, and be visited by, a consular officer of his or her country. (**subd. (a)(3)**)

Local law enforcement agencies are to incorporate these requirements into their respective policies and procedures. (**subd. (c)**)

Standing:

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Automatic Notice to Foreign Country: Fifty-six (56) countries are listed in **subdivision (d)** which *must* be notified of the arrest or detention (pursuant to **subd. (a)(1)**; i.e., more than 2 hours) of one of their foreign nationals “without regard to an arrested or detained foreign national’s request to the contrary.”

Sanctions for Violations: It has been generally accepted that a violation of the provisions of the **Vienna Convention** and, presumably, this statute, *will not* result in the suppression of any evidence. (*United States v. Lombera-Camorlinga* (9th Cir. 2000) 206 F.3rd 882; *People v. Corona* (2001) 89 Cal.App.4th 1426; *United States v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3rd 1118, 1130; *People v. Sanchez* (2019) 7 Cal.5th 14, 51.)

Not informing a Japanese national of his right to contact the Japanese consulate upon his arrest is not a violation of the **Japan Convention, Article 16(1)**. Even if **Article 16(1)** could be interpreted as requiring such notification, a violation would *not* result in the suppression of the defendant’s later statements nor any physical evidence recovered as the result of a consensual search. (*United States v. Amano* (9th Cir. 2000) 229 F.3rd 801, 804.)

Japan, although a signatory to the **Vienna Convention**, is *not* one of the 56 countries listed in **P.C. 834c** that must be notified upon the arrest or detention of one of their citizens.

The United States Supreme Court, until recently, has rejected appeals on this issue on *procedural* grounds, declining to decide this issue on its merits. (See *Breard v. Greene* (1998) 523 U.S. 371 [140 L.Ed.2nd 529].)

However, a number of justices have expressed dissatisfaction with avoiding the issue, in general, and not sanctioning states for

violating the **Convention**, in particular. (See also *Torres v. Mullin* (2003) 540 U.S. 1035 [157 L.Ed.2nd 454].)

The “*International Court of Justice*” (ICJ), in a lawsuit brought against the United States by Mexico and decided on March 31, 2004, found that at the time of this decision there were 54 death row inmates (27 of which were in California) who were *not* provided with a notification of their consular rights, in violation of the **Vienna Convention**. The Court concluded that the offending state and local jurisdictions violating these requirements were “*obligated*” to review and reconsider these cases. (See *Mexico v. United States of America [Avena]* (2004) 2004 I.C.J. No. 128.)

The United States Supreme Court, in *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 351-356 [165 L.Ed.2nd 557], while finding that the rulings of the ICJ deserved “*respectful consideration*,” held that they were not binding upon U.S. courts and declined to follow their guidance on this issue.

In May, 2005, the United States Supreme Court dismissed as improvidently granted a writ of certiorari in a Texas case challenging state law enforcement officers’ failure to provide a capital defendant, and Mexican national, with a **Vienna Convention** notification. (*Medellin v. Dretke* (2005) 544 U.S. 660 [161 L.Ed.2nd 982].)

The Court in *Medellin v. Dretke* did not dismiss the writ out of a lack of interest, however, but rather because the defendant initiated new proceedings in the Texas’ courts, based upon the ICJ’s latest pronouncement (*Mexico v. United States of America [Avena]*, *supra.*) and an executive order issued by President Bush for American courts to review violations of the **Vienna Convention** (see *International Herald Tribune* (3/4/05), that might well resolve the issues.

Even so, four U.S. Supreme Court justices dissented, noting that “(n)oncompliance with our treaty obligations is especially worrisome in capital cases,” and that the defendant in this case had raised some “debatable” issues that “suggest the very real possibility of his victory in state court.” (*Medellin v. Dretke*, *supra.*)

The United States Supreme Court finally ruled on the issues of (1) the proper remedy for an **Article 36** violation and (2) whether failing to raise the issue at the trial court level precluded the raising of the issue post-conviction, in *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331 [165 L.Ed.2nd 557] (joined with *Bustillo v. Johnson* (#05-51), a case from the Virginia Supreme Court). In these two cases, the Court held that a

violation of the **Vienna Convention** does *not* warrant the suppression of evidence, including a defendant's statements. The Court also held (in the *Bustillo v. Johnson* portion of the decision) that failing to raise the issue in the state courts will preclude, procedurally, the defendant from litigating the issue by way of a federal writ of habeas corpus.

Not decided was whether the **Vienna Convention** grants individuals enforceable rights in a state court, or whether the provisions of the **Convention** are something to be enforced via political channels between countries, the Court assuming, for the sake of argument, that such rights were enforceable without deciding the issue. (*Sanchez-Llamas v. Oregon*, *supra*, a p. 343.) Four dissenting opinions would have specifically held that the defendants had a right to raise these issues. (*Id.*, at pp. 369-378.)

But note: An extradited defendant has standing to seek enforcement of an extradition treaty's restrictions on the potential punishment to which he may be subjected. (*Benitez v. Garcia* (9th Cir. 2007) 476 F.3rd 676; extradited from Venezuela under the understanding that he would not be subjected to the death penalty or a life sentence.)

The **Vienna Convention** does *not* provide a foreign national any rights that are enforceable in a **42 U.S.C. § 1983** civil rights suit against law enforcement for violating the person's rights provided for under the **Convention**. (*Cornejo v. County of San Diego* (9th Cir. 2007) 504 F.3rd 853.)

Then, in November, 2006, the Texas appellate court refused to comply with the president's command to provide defendants whose Vienna Convention rights were violated with a hearing on the issue, deciding that it would not allow Jose Ernesto Medellin to file a second habeas petition seeking relief. (*Medellin v. Texas*, 06-984.)

The United States Supreme Court upheld Texas on this issue, finding that the terms of the **Vienna Convention** are not "self-executing," did not have the force of domestic law, and were not binding on U.S. Courts. The Court also held that the President had no authority to dictate the procedures to be used in state court and therefore could not legally order state courts to give prisoners hearings on this issue. (*Medellin v. Texas* (2008) 552 U.S. 491 [170 L.Ed.2nd 190].)

See also *In re Martinez* (2009) 46 Cal.4th 945, where the California Supreme Court concluded that petitioner was precluded from renewing his **Vienna Convention** claim because he had previously raised the issue and the court had denied relief on its merits. Therefore, his petition was successive, and he failed to demonstrate any change of circumstance or the

applicability of any exception to the procedural bar of successiveness to warrant reconsideration of his claim.

The California Supreme Court has held that even assuming a defendant is not advised of his consular rights in violation of the **Vienna Convention**, relief will not be granted absent a showing of prejudice. (*People v. Mendoza* (2007) 42 Cal.4th 686, 709-711.)

The Ninth Circuit Court of Appeal is in agreement. (*Ayala v. Davis* (9th Cir. 2016) 813 F.3rd 880, 881.)

Failing to advise an arrested Filipino murder suspect of his right to have his consulate notified of his arrest does not, by itself, render a confession inadmissible. (*People v. Enraca* (2012) 53 Cal.4th 735, 756-758.)

Using the same reasoning, defendant's claim under the United States bilateral consular convention with the Philippines also failed. (*Id.*, at p. 758.)

The California Supreme Court did hold, however, that such a notification violation is relevant to a defendant's broader challenge to the voluntariness of his statements to the police; i.e., it is a factor to consider. (*Id.*, at p. 756; see also *People v. Suarez* (2020) 10 Cal.5th 116, 164.)

Defendant, a Mexican national, was convicted of murder and sentenced to death by a Texas court. The International Court of Justice (ICJ) held that the United States had violated the **Vienna Convention** by failing to notify him of his right to consular assistance. The Mexican national and the United States sought to stay the execution so that Congress could consider whether to enact legislation implementing the ICJ decision. The Supreme Court determined that a stay of execution was not warranted because (1) neither the ICJ decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law, (2) the Due Process Clause did not prohibit Texas from carrying out a lawful judgment and executing him in light of un-enacted legislation that might someday authorize a collateral attack on that judgment, (3) it had been seven years since the ICJ ruling and three years since the Supreme Court's previous decision, making a stay based on the bare introduction of a bill in a single house of Congress even less justified, and (4) the United States studiously refused to argue that he was prejudiced by the **Vienna Convention** violation. (*Garcia v. Texas* (2011) 564 U.S. 940 [180 L.Ed.2nd 872].)

A foreign national claiming relief pursuant to the provisions of the **Vienna Convention** is not entitled to relief via a direct appeal. He must proceed

by way of a habeas corpus petition even though he will be required to establish prejudice under such a petition where the standard in a direct appeal is considerably less. (*People v. Maciel* (2013) 57 Cal.4th 482, 504-506; *People v. Mendoza* (2016) 62 Cal.4th 856, 917.)

A “defendant can raise an **Article 36** claim as part of a broader challenge to the voluntariness of his statements to police,” but alone is not grounds for the suppression of his statements. (*People v. Sanchez* (2019) 7 Cal.5th 14, 51.)

Suppression was not required by the failure of officers to alert defendant to his right to have the Mexican consulate notified of his detention, as required by the **Vienna Convention** and **Pen. Code, § 834c** because failure to notify does not, in itself, render a statement inadmissible. (*People v. Leon* (2020) 8 Cal.5th 831, 845-847.)

While noting that the U.S. Supreme Court in *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 343 [165 L.Ed.2nd 557], has held that violating the notification requirements of the **Vienna Convention** does not require the suppression of a defendant’s confession, the California Supreme Court in *People v. Suarez* (2020) 10 Cal.5th 116, held that defendant failed to establish a relationship between his lack of consular notice and his confessions. Defendant, who wasn’t told of his right to consult with someone from the Mexican consulate until his arraignment, had not shown that had he been advised of his consular rights earlier, he would have requested that the consulate be notified in that even after he was advised of his rights, he did not request such notification to the consulate. (*Id.*, at pp. 157-158.)

Polygraph Tests and Results:

Rule: Polygraph results are inadmissible at trial, or any pretrial or post-conviction hearings, including juvenile hearings, unless its admission is stipulated to by both the prosecution and the defense. (**Evid. Code § 351.1**; *People v. Kegler* (1987) 197 Cal.App.3rd 72, 84; *In re Aontae D.* (1994) 25 Cal.App.4th 167, 173-174; *People v. Clark* (2016) 63 Cal.4th 522, 631; *In re I.F.* (2018) 20 Cal.App.5th 735, 783, fn. 18.)

Any reference to taking, offer to take, or failure to take, a polygraph examination is similarly inadmissible, under the terms of the statutory prohibition. (See **Subd. (a)** of **Evid. Code § 351.1**)

Threatening to subject a suspect to a polygraph does not necessarily convert an interview into an in-custody situation requiring a **Miranda** admonishment and waiver. (*United States v. Norris* (9th Cir. 2005) 428 F.3rd 907, 912-913.)

However, threatening the use of a polygraph, or confronting a suspect with his failed polygraph examination, has been recognized as an interrogative tool that, in some cases, particularly with minors, might contribute to inducing a false, unreliable confession. (See *In re Elias V.* (2015) 237 Cal.App.4th 568, 584.)

Pursuant to **Subd. (b) of Evid. Code § 351.1**, otherwise admissible statements a suspect made during a polygraph exam may be admissible, so long as done in a manner that eliminates any indicia of the existence of the polygraph examination itself. (*People v. Flores* (2020) 9 Cal.5th 371, 406.)

Sixth Amendment Right to Counsel:

The Sixth Amendment provides in pertinent part: “*In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.* (sic)”

The **Sixth Amendment** right to counsel is a *whole* separate issue from one’s right to counsel as implied under the **Fifth Amendment**, as discussed above. (See *People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 216, fn. 3.) The two issues should be analyzed separately, recognizing that the rules for applying each are totally different.

Fifth Amendment vs. Sixth Amendment Right to Counsel: The easiest way to keep the two issues separate is to remember that:

The **Fifth Amendment** right to counsel is primarily involves that time period between arrest (or otherwise taken into “*custody*,” as that term is defined under *Miranda*) and when the defendant makes his first court appearance; i.e., when he or she is generally first arraigned and requests the appointment of an attorney. (See *Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2nd 246].)

Note: Although one’s “*Miranda*” rights are applicable as well after arraignment (*Massiah v. United States, supra.*), the issue normally comes up prior to arraignment in that law enforcement seldom has the opportunity, or makes the effort, to question criminal suspects after he or she has been appointed an attorney. (See *Montejo v. Louisiana* (2009) 556 U.S. 778 [173 L.Ed.2nd 955], allowing for such contact.)

The **Sixth Amendment** right to counsel applies exclusively to that time period between the filing of a “*formal charge, preliminary hearing, indictment, information, or arraignment*” (e.g., filing of the criminal

complaint; *People v. Viray* (2005) 134 Cal.App.4th 1186.), continuing for as long as that case against him exists (i.e., through the completion of post-conviction appeal), (*Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2nd 246].), at least as to all “critical stages” of a prosecution that occur during this time period. (*United States v. Wade* (1967) 388 U.S. 218, 226 [18 L.Ed.2nd 1149, 1157].)

See “*The Fifth Amendment Self-Incrimination vs. Fifth Amendment Right to Counsel*” under “*Invocation of Rights*” (Chapter 7), above.