Los Angeles County District Attorney's Office
Jackie Lacey, District Attorney

Confession Admissibility

Fourth, Fifth, Sixth & Fourteenth Amendment Principles

ALLIANCE OF CALIFORNIA JUDGES

by

DEVALLIS RUTLEDGE
Special Counsel to the District Attorney
(213) 257-2937•drutledge@da.lacounty.gov

Whose Rules Govern Admissibility?

"This Constitution ... shall be the ***supreme law of the land****; and* ***the judges in every state shall be bound thereby****, anything in the Constitution or laws of any state to the contrary notwithstanding."* US Const. art. VI, § 2.

"[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. But, of course, ***a State may not impose such greater restrictions as a matter of federal constitutional law*** *when this Court specifically refrains from imposing them." Oregon v. Hass* (1975) 420 US 714, 719 (rejecting *Miranda* variation).

"The Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is ***foreclosed*** *by Oregon v. Hass." Arkansas v. Sullivan* (2001) 532 US 769, 772 (rejecting search-and-seizure variation).

"[A] ***state court can neither add to nor subtract from*** *the mandates of the US Constitution." South Carolina v. Butler* (1979) 441 US 369, 376 (rejecting *Miranda* variation).

"Except as provided by statute hereafter enacted by a two-thirds vote..., ***relevant evidence shall not be excluded*** *in* ***any*** *criminal proceeding...."* Cal. Const. art. I, § 28, cl. (f)(2).

The California Supreme Court has interpreted this "Truth-in-Evidence" provision to mean that **California courts cannot create exclusionary rules**, and that California courts may suppress evidence resulting from searches, seizures, interrogation or ID procedures, for example, ***"only if exclusion is required by the United States Constitution,"* as interpreted by the US Supreme Court.** *In re Lance W.* (1985) 37 Cal.3d 873, 890 (search-and-seizure issues); *People v. May* (1988) 44 Cal.3d 309, 319 (*Miranda* issues).

"Since the May decision, the courts have consistently held that state cases applying the exclusionary rule in circumstances where federal law would not compel exclusion are ***no longer valid****." People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 245.

Four Constitutional Tests of Admissibility

Miranda is one of **four** court-created exclusionary rules affecting confession admissibility. *Miranda compliance does not guarantee admissibility of a confession that may still be inadmissible under one or more of the other three.*

(1) A confession may be inadmissible under the **Fourth Amendment** exclusionary rule if it is the "fruit" of an **unreasonable search or seizure**, such as an arrest without PC. *Wong Sun v. US* (1963) 371 US 471, 485-488.

A confession inadmissible in the prosecution case-in-chief on Fourth Amendment grounds may be introduced to **impeach** the **defendant's** trial testimony, *US v. Havens* (1980) 446 US 620, 627, but may **not** be used to impeach his **defense witnesses.** *James v. Illinois* (1990) 493 US 307, 320.

(2) The *Miranda* exclusionary rule protects the **Fifth Amendment** trial privilege against **compelled** self-incrimination. *Miranda v. Arizona* (1966) 384 US 436, 439.

A statement that is inadmissible under *Miranda* in the prosecution case-in-chief is admissible for impeachment of the defendant's inconsistent trial testimony. *Harris v. New York* (1971) 401 US 222, 226 (no warning given before questioning); *Oregon v. Hass* (1975) 420 US 714, 722 (interrogation conducted after invocation of counsel).

Miranda exclusion is limited to the defendant's own statements. There is no "fruit of the poisonous tree" doctrine associated with *Miranda* non-compliance. *US v. Patane* (2004) 542 US 630, 642 (revealed physical evidence is admissible); *Michigan v. Tucker* (1974) 417 US 433, 447-52 (testimony of revealed witness is admissible); *People v. Brewer* (2000) 81 Cal.App.4th 442, 454 (revealed facts may be used to provide PC for a search warrant).

(3) A confession may be inadmissible under the **Sixth Amendment** exclusionary rule of *Massiah v. US* (1964) 377 US 201, 206, if it is deliberately elicited by government agents without a valid waiver on a case, after the defendant is indicted or arraigned (or made other first judicial appearance) and has retained or requested counsel as to that **specific offense**.

Statements so obtained are not admissible to prove guilt of the charged offense, though they are **admissible for impeachment**. *Michigan v. Harvey* (1990) 494 US 344, 351; *Kansas v. Ventris* (2009) 556 US 586, 594.

(4) An "involuntary" confession that was **coerced** by official pressures (such as mistreatment, threats, or promises of leniency) is inadmissible in state cases under the due process clause of the **Fourteenth Amendment**. *Brown v. Mississippi* (1936) 297 US 278.

An **involuntary** statement is **inadmissible *for any purpose***. It cannot be used for impeachment or rebuttal evidence. *Mincey v. Arizona* (1978) 437 US 385, 397. The derivative **"fruits"** of an involuntary statement are also **inadmissible**. *Harrison v. US* (1968) 392 US 219, 222.

Fifth Amendment Issues

(1) The Holding of *Miranda*

By 5-4 vote, the *Miranda* court **presumed** that custodial interrogation is "inherently compelling." Since the Fifth Amendment guarantees that no criminal defendant may be "compelled to be a witness against himself," a statement that is presumptively compelled is **inadmissible to prove guilt.** This presumption of compulsion may be rebutted by showing a warning and waiver, which would be effective to **neutralize** the inherent compulsion.

Ernesto Arturo Miranda

***Miranda's* actual holding:**

"Our holding...is this: the prosecution may not use statements...stemming from custodial interrogation unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

***Miranda v. Arizona* (1966) 384 US 436, 444**

Miranda compliance is a **prerequisite** to the **admissibility** of a statement obtained through **custodial police interrogation.**

● ***Custody*** **without police interrogation does not trigger *Miranda:*** *"It is clear therefore that the special procedural safeguards outlined in Miranda 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 US 291, 300.

● **Police *interrogation* without custody does not trigger *Miranda:*** *"Miranda, of course, did not reach investigative questioning of a person* ***not in custody*** *… and it assuredly did not indicate that such questioning ought to be deemed inherently coercive." Schneckloth v. Bustamonte* (1973) 412 US 218, 247.

● **Custodial interrogation without *apparent police involvement* does not trigger *Miranda:*** *"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." Illinois v. Perkins* (1990) 496 US 292, 299, 300. *"...Miranda protects the Fifth Amendment rights of a suspect faced with the coercive combination of custodial status and an interrogation* ***the suspect understands as official****." People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1173-74.

● **No anticipatory invocation.** Because *Miranda* protections are not triggered until the onset of custodial police interrogation, they may not be invoked by the suspect in advance (in custody, but not being questioned; or during police questioning, while not in custody). *"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 US 171, 182, fn. 3. *"Simply stated, the Miranda rights cannot be invoked except during the custodial interrogation against which they are being asserted." People v. Avila* (1999) 75 Cal.App.4th 416, 422.

(2) No Sixth Amendment Dimension

The *Miranda* "right" to counsel arises with custodial police interrogation, which typically occurs upon arrest, **before** adversary judicial proceedings have commenced. The **court-created** *Miranda* "right" to counsel is distinct from the **constitutional** right to counsel found in the Sixth Amendment. The Supreme Court has repeatedly stressed that its decision in *Miranda* relates solely to the **Fifth** Amendment privilege and has **nothing to do** with protecting the **Sixth** Amendment:

> *"The Miranda decision was based* ***exclusively on the Fifth Amendment*** *privilege against compulsory self-incrimination, upon the theory that custodial interrogation is inherently coercive." Kirby v. Illinois* (1973) 406 US 682, 688.

> *"The right to counsel mandated by Miranda was fashioned to secure the suspect's* ***Fifth Amendment privilege*** *in a setting thought inherently coercive.* ***The Sixth Amendment was not implicated****." US v. Mandujano* (1976) 425 US 564, 580, fn. 6.

*"The holding of Miranda rested **exclusively on the Fifth Amendment**."* *Moran v. Burbine* (1986) 475 US 412, 430.

*"[T]he right to counsel under the **Sixth** Amendment is inherently and definitively **different** from that created under the **Fifth** Amendment and **Miranda**. **They are not and cannot be interchangeable**." People v. Lispier* (1992) 4 Cal.App.4th 1317, 1325.

Notwithstanding these clear statements, judicial confusion persists, as illustrated by more recent, **erroneous statements** by appellate courts:

*"The United States Supreme Court articulated the **Miranda** admonitions in 1966 as a prophylactic measure to protect the Fifth **and Sixth Amendment** rights of those interrogated by agents of the government." People v. Castile* (2005) 129 Cal.App.4th 863, 867-68. **[Wrong!]**

*"The question is ... whether the defendant voluntarily, knowingly and intelligently waived his Fifth **and Sixth Amendment** rights as delineated in **Miranda**." People v. Riva* (2004) 112 Cal.App.4th 981, 989. **[Wrong!]**

*"Those Fifth **and Sixth Amendment** rights outlined in **Miranda** are inapposite in the context of removal proceedings." Vasquez-Trujillo v. Gonzales* (9th Cir. 2005) 151 Fed.Appx. 509, 510. **[Wrong!]**

Right to Counsel	**Basis**	**Triggered by…**
Miranda (court-created)	Fifth Amendment	Custodial Police Interrogation
Massiah (constitutional)	Sixth Amendment	Adversary Judicial Proceedings

(3) *Miranda* "Custody"

Custody is objectively determined, without regard to the suspect's or the officer's subjective state of mind; it is **"the functional equivalent of formal arrest."** *Berkemer v. McCarty* (1984) 468 US 420, 442.

"The ultimate inquiry is simply whether there is a **formal arrest or** restraint on freedom of movement **of the degree associated with a formal arrest.**" *California v. Beheler* (1983) 463 US 1121, 1125.

Even though not formally arrested, a person may still be in *Miranda* "custody" where **arrest-like restraints** are used. *Miranda* "custody" includes the following arrest-like restraints, which are the **functional equivalent** of arrest:

- Stationhouse detention. *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1166-67.
- Backseat Cage. *US v. Hensley* (9th Cir. 1993) 984 F2d 1040, 1042.
- Gunpoint Interrogation. *People v. Taylor* (1986) 178 Cal.App.3d 217, 229.
- Handcuffs. *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404-05, but see also *People v. Davidson* (2013) 221 Cal.App.4th 966, 972-73 (safety/control cuffing was not custodial).
- Show of Force. *Orozco v. Texas* (1969) 394 US 324, 327.
- Custodial Facility. *Mathis v. US* (1968) 391 US 1, 4 (state prison). *But,* prisoners **not subjected to increased restraints** are not necessarily in custody for all questioning. *US v. Turner* (9th Cir. 1994) 28 F3d 981, 983-84; *People v. Macklem* (2007) 149 Cal.App.4th 674, 691-96; *People v. Fradiue* (2000) 80 Cal.App.4th 15, 20-21. *"[S]ervice of a term of imprisonment, without more, is not enough to constitute Miranda custody. ...* ***Taking a prisoner aside for questioning ... does***

not necessarily convert a noncustodial situation to one in which Miranda applies.*" Howes v. Fields* (2012) 132 S.Ct. 1181, 1191.

(4) Non-custody

Interrogation that occurs with **no** restraints, or during an ordinary detention **not** in a police setting, or **after** arrest-like restraints are **removed**, is not subject to Miranda:

- Consensual Encounter. *People v. Bellomo* (1990) 10 Cal.App.4th 195, 200.
- Traffic Stop. *Pennsylvania v. Bruder* (1988) 488 US 9, 10-11.
- Ped Stop. *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1163.
- Front-yard detention. *People v. Salinas* (1982) 131 Cal.App.3d 925, 936.
- Residential Detention. *People v. Clair* (1992) 2 Cal.4th 629, 679.
- During Search Warrant. *US v. Davis* (9th Cir. 2008) 530 F.3d 1069, 1081-82.
- Customs waiting area. *People v. Forster* (1994) 29 Cal.App.4th 1746, 1754.
- Focus of Suspicion. *Stansbury v. California* (1994) 511 US 318, 324.
- PC to Arrest. *People v. Valdivia* (1986) 180 Cal.App.3d 657, 661.
- Plan to Arrest. *Berkemer v. McCarty* (1984) 468 US 420, 442.
- Meeting with PO. *Minnesota v. Murphy* (1984) 465 US 420, 430-33.
- Voluntary Stationhouse Interview. *Oregon v. Mathiason* (1977) 429 US 492, 495; *California v. Beheler* (1983) 463 US 1121, 1125; *People v. Ochoa* (1998) 19 Cal.4th 353, 402-03 (polygraph exam). ***"Beheler* admonition:" "You're not under arrest. You're free to leave here anytime you wish."**
- Removal of Restraints. *In re Joseph R.* (1998) 65 Cal.App.4th 954, 961

(uncuffing and releasing from the cage); *Michigan v. Summers* (1981) 452 US 692, n.15 (search warrant detention).

- Release from Custody. *People v. Storm* (2002) 28 Cal.4th 1007, 1026.

A person who is neither in a police station nor physically confined is **not in custody simply because he is "not free to leave**," since this is the test of a **detention**—not formal arrest or its functional equivalent:

> *"Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of Miranda. ... Our cases make clear that the freedom-of-movement test identifies only a necessary and* ***not a sufficient condition for Miranda custody****."* *Howes v. Fields* (2012) 132 S.Ct. 1181, 1189-90.

> *"Thus, the temporary and relatively nonthreatening* ***detention*** *involved in a traffic stop or a Terry stop* ***does not constitute Miranda custody****."* *Maryland v. Shatzer* (2010) 130 S.Ct. 1213, 1224.

(5) "Interrogation," or Not

Miranda is not triggered by custody alone, but by *"the* ***interaction*** *of custody* ***and*** *official interrogation." Illinois v. Perkins* (1990) 496 US 292, 297.

Any **words** or **conduct, by law enforcement officers,** that could foreseeably elicit an **incriminating** response, is interrogation. An incriminating

statement that is **volunteered** by the suspect, without any prompting by police, is not subject to Miranda. *Rhode Island v. Innis* (1980) 446 US 291, 300.

Overheard conversations (cage, cell, etc.) are not the product of interrogation. *Arizona v. Mauro* (1987) 481 US 520, 530; *People v. Davis* (2005) 36 Cal.4th 510, 555.

Any actions taken by officers to **prompt** the suspect to talk could be interrogation under Miranda:

- Questions about the Case. *Pennsylvania v. Muniz* (1990) 496 US 582, 601.
- Provocative Statement. *In re Albert R.* (1980) 112 Cal.App.3d 783, 792 ("That was sure a cold thing you did."); *People v. Harris* (1988) 211 Cal.App.3d 640, 648 ("I thought you wanted to straighten it out.").
- Confrontation with Evidence. *People v. Davis* (2005) 36 Cal.4th 510, 555; *People v. Sims* (1993) 5 Cal.4th 405, 443-44.
- Reverse Lineup. *Arizona v. Mauro* (1987) 481 US 520, 526.
- Gang ID for cell assignment. *People v. Elizalde* (2015) 61 Cal.4th 523, 540.

Not all questioning or conversation will amount to interrogation, because some words and conduct are directed toward **other purposes** besides eliciting incriminating responses:

- Asking for ID. *People v. Farnam* (2002) 28 Cal.4th 107, 108.
- Booking Questions. *Rhode Island v. Innis* (1980) 446 US 291, 300.
- Medical Questions. *People v. Jones* (1979) 96 Cal.App.3d 820, 827.
- Lineup Directions. *People v. Johnson* (1992) 3 Cal.4th 1183, 1224.
- Stating Reasons for Arrest. *People v. Huggins* (2006) 38 Cal.4th 175, 198.
- Answering Suspect's Questions. *People v. Clark* (1993) 5 Cal.4th 950, 984.

- Mirandizing. *Guam v. Ichiyasu* (9th Cir. 1988) 838 F2d 353, 358.
- Clarifying Questions. *People v. Cunningham* (2001) 25 Cal.4th 926, 993.
- Casual Conversation. *People v. Gamache* (2010) 48 Cal.4th 347, 388.
- Witness Interview. *People v. Wader* (1993) 5 Cal.4th 610, 637.
- Requesting Consent. *People v. Brewer* (2000) 81 Cal.App.4th 442, 458.
- Conversation between officers. *RI v. Innis* (1980) 446 US 291, 302.
- Voice Exemplar. *US v. Dionisio* (1973) 410 US 1, 7.
- Handwriting Exemplar. *Gilbert v. California* (1967) 388 US 263, 266-67.
- Voice ID. *US v. Leone* (8th Cir. 1987) 823 F2d 246, 249-51.
- Crime Reenactment. *Avery v. Procunier* (5th Cir. 1985) 750 F2d 444, 448.
- FST. *Pennsylvania v. Muniz* (1990) 496 US 582, 601.
- Allowing a family visitor. *Arizona v. Mauro* (1987) 481 US 520, 530.

(6) Frequency of Warnings

"A Miranda warning is not required before each custodial interrogation; one warning, if adequately and reasonably contemporaneously given, is sufficient." People v. Braeseke (1977) 25 Cal.3d 691, 701-702.

How much time may elapse before a new warning and waiver would be needed? Cases have considered that a valid waiver obtained within 40 hours would be sufficiently contemporaneous to permit renewed interrogation without a new warning and waiver. *People v. Thompson* (1992) 7 Cal.4th 1966, 1972-73 (9-hour interval); *Guam v. De La Peña* (9th Cir. 1995) 72 F.3d 767, 769-70 (15 hours); *US v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1129 (16 hours); *People v. Mickle* (1991) 54 Cal.3d 140, 171 (36 hours); *People v. Williams* (2010) 49 Cal.4th 405, 434-35 (40 hours).

Even if later questioning **that same day** relates to a **different crime**, no new warning is required. *Colorado v. Spring* (1987) 479 US 564, 576-77 (questioning changed from firearms violation to murder without new warning).

Even if later questioning **that same day** is conducted by a **different officer,** no new warning is required. *People v. Lewis* (2001) 26 Cal.4th 334, 386-87.

Even if later questioning **that same day** is at a **different location**, by officers from a **different jurisdiction**, no new warning is necessary. *US v. Baron* (9th Cir. 1996) 94 F.3d 1312, 1320 (change from state to federal officers).

Cf., People v. Quirk (1982) 129 Cal.App.3d 618, 632 (warning and waiver 3 days earlier are not "reasonably contemporaneous").

No warning has to be given before limited **rescue** or **public safe**ty or **officer safety** questioning. *New York v. Quarles* (1984) 467 US 649, 657 ("Where's the gun?"); *People v. Davis* (2009) 46 Cal.4th 539, 593-96 (OK to question about kidnap victim's whereabouts, despite invocation).

(7) Contents of the Warning

The warning need not be in any particular words and need not follow any particular order. *Florida v. Powell* (2010) 120 S.Ct. 1195; *California v. Prysock* (1981) 453 US 355, 359 (no *"talismanic incantation"* of precise words necessary); *Duckworth v. Eagan* (1989) 492 US 195, 202-03 (*"Reviewing courts need not examine Miranda warnings as if construing a will or defining the terms of an*

easement."). **Four elements** must be covered (right to silence, consequences of waiver, right to counsel, and no-cost counsel). *Dickerson v. US* (2000) 530 US 428, 435.

• There is **no need** to tell the suspect that he can stop answering questions at anytime. *People v. Castille* (2005) 129 Cal.App.4th 863, 885.

• There is **no need** to tell a juvenile that he has a right to talk to his parents. *In re John S.* (1988) 199 Cal.App.3d 441, 445-46.

• There is **no need** to tell a suspect his answers "can and will" be used against him; that they **may** be used against him in court is sufficient warning. *People v. Valdivia* (1986) 180 Cal.App.3d 657, 664.

• There is **no need** to tell a suspect the right to counsel applies **both** "before and during questioning." *Florida v. Powell* (2010) 120 S.Ct. 1195; *People v. Wash* (1993) 6 Cal.4th 215, 236 ("before" was sufficient without "during"); *People v. Kelly* (1990) 51 Cal.3d 931, 948 ("during" was sufficient without "before").

• There is **no need** to inform the suspect of the crimes under investigation. *Colorado v. Spring* (1987) 479 US 564, 576.

• There is **no need** to tell the suspect the potential penalties he is facing. *People v. Jackson* (1996) 13 Cal.4th 1164, 1207, fn. 4.

Before a waiver can be obtained, there must be evidence of the suspect's **understanding of the rights.** *Berghuis v. Thompkins* (2010) 560 US 370, 384; *Tague v. Louisiana* (1980) 444 US 469, 471. Rather than reading all four parts and then asking if the suspect understands, it is sufficient if the officer seeks an acknowledgment **after each part**, so that only that one portion need be repeated or explained if the suspect indicates s/he does not understand:

(8) *Miranda* Waiver

A *Miranda* waiver must be **knowing, voluntary** and **intelligent.** This means that the suspect must understand his rights and cannot be tricked, threatened or cajoled into waiving. *People v. Honeycutt* (1977) 20 Cal.3d 150, 161. Voluntariness of the waiver must be shown by a **preponderance of the evidence**. *Colorado v. Connelly* (1986) 479 US 157, 169.

Although the suspect must have the **rational capacity** to waive, *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577, this does not mean that diminished mental faculties or temporary impairment precludes a valid waiver where the facts show that the suspect was **lucid** and **responsive** during non-coercive questioning:

• *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1171 (IQ of 64 and severe cognitive disability).

• *People v. Watson* (1977) 75 Cal.App.3d 384, 397 (schizophrenic with chronic organic brain damage and IQ of 65, had recently used alcohol and LSD).

• *People v. Kelly* (1990) 51 Cal.3d 931, 951 (low IQ, brain atrophy, ADD and impulsivity).

• *People v. Clark* (1993) 5 Cal.4th 950, 988 (alcohol intoxication plus use of Valium, methamphetamine and marijuana).

• *People v. Whitson* (1998) 17 Cal.4th 229, 248 (hospitalized, injured, mentally retarded, on painkillers).

• *People v. Breaux* (1991) 1 Cal.4th 281, 299 (pain from police gunshot wounds and on morphine).

• *People v. Anderson* (1990) 52 Cal.3d 453, 469 (no sleep for 30 hours before interrogation).

Miranda waivers are of 2 kinds: **express** and **implied**.

To seek an **express** waiver, the suspect must be **asked** whether or not s/he agrees to talk, and then s/he gives an express response (such as "Yes" or "No.").

A *Miranda* waiver is **implied** when the suspect is fully warned, acknowledges his or her understanding of the rights, and then answers a question, instead of asserting the rights.

• *North Carolina v. Butler* (1979) 441 US 369, 373: *"In at least some cases, waiver can be clearly inferred from the actions and words of the person interrogated."*

• *Berghuis v. Thompkins* (2010) 130 S.Ct. 2250: *"Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement **establishes** an implied waiver of the right to remain silent. ... Thus, after giving a Miranda warning, police may interrogate a suspect **who has neither invoked nor waived** his or her Miranda rights."*

• *People v. Riva* (2003) 112 Cal.App.4th 981, 988-89—implied waiver where suspect made statements and answered questions after warning and acknowledgment of understanding.

• *People v. Whitson* (1998) 17 Cal.4th 229, 247-48—upholding conviction on 2 murder counts where suspect was advised, stated his understanding, and then proceeded to answer the officer's questions.

• *People v. Sully* (1991) 53 Cal.3d 1195, 1233—upholding 6 counts of murder and death penalty on implied *Miranda* waiver.

A waiver can be **conditional**. *Connecticut v. Barrett* (1987) 479 US 523, 529

("Nothing in writing until my attorney comes").

The suspect must clearly, unambiguously assert his or her rights before officers need stop questioning. *Berghuis v. Thompkins* (2010) 560 US 370, 381; *Davis v. US* (1994) 512 US 452, 461-62. There is **no requirement to repeat or clarify rights** whenever the suspect makes an ambiguous statement about "maybe" asserting the rights, **following** either an express or an implied **waiver**.

(9) Warning Juveniles

In *Fare v. Michael C.* (1979) 442 US 707, 717, Fn. 4, the Supreme Court said, *"[T]his Court has not yet held that Miranda applies with full force to exclude evidence obtained in violation of its proscriptions from consideration in juvenile proceedings, which for certain purposes have been distinguished from formal criminal prosecutions."* It still has not done so, but has proceeded as if *Miranda* does apply.

However, the court has refused to create a second set of *Miranda* rules for juveniles. A minor's request to speak to a probation officer is **not** an automatic invocation. *Fare*. Where a minor's age was known or apparent to police at the time of interrogation, a court should factor minority age into its "custody" analysis. *JDB v. North Carolina* (2011) 131 S.Ct. 2394, 2406; and maybe into its "invocation" analysis. *In re Art T.* (2015) 234 Cal.App.4th 335, 351-56.

What about California Welfare and Institutions Code section 625(c)? That section says the following:

*"In any case **where** a minor is taken into temporary custody, ... 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."

W&I 625(c) **does not** create any evidentiary exclusion of statements.

For purposes of this statute, "temporary custody" means the **same thing as "arrest."** *In re Thierry S.* (1977) 19 Cal.3d 727, 734, fn. 6; *In re Ian C.* (2001) 87 Cal.App.4th 856, 860; *In re Charles C.* (1999) 76 Cal.App.4th 420, 425, fn. 3: *"To take into temporary custody is the functional equivalent of an arrest."* This section does not apply during consensual encounters or non-custodial detentions of minors.

Unlike *Miranda*, this statutory advisory does **not** require asking the minor if s/he **understands** the rights, and does **not** require seeking a **waiver.**

This section does **not** specify exactly **when** this advisement is to be given, and **no case has ever held** that such advice need be given immediately upon the minor being taken into custody. If the minor is given a regular *Miranda* warning before custodial interrogation, this will incidentally satisfy 625(c), as well.

Most custodial interrogation advisements and procedures are **the same** for juveniles and adults.

(10) Invocation

A suspect can invoke by asserting the right to **silence** or by requesting

counsel. "I ain't got nothin' to say," is an invocation of silence. *People v. Carey* (1986) 183 Cal.App.3d 99, 103. Asking for an attorney to be appointed is an invocation of counsel. *Alvarez v. Gomez* (9th Cir. 1999) 185 F.3d 995, 997. However, remaining mostly silent during 2 hours and 45 minutes of questioning and then answering questions was **not** an invocation, but an implied waiver, in *Berghuis v. Thompkins* (2010) 560 US 370, 382.

Not every mention of the word "lawyer" by a suspect is an invocation. *People v. Sapp* (2003) 31 Cal.4th 240, 268; *People v. Michaels* (2002) 28 Cal.4th 486, 508. *"It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." McNeil v. Wisconsin* (1991) 501 US 171, 178.

The *Miranda* "right" to counsel *"is one that must be affirmatively invoked." Davis v. US* (1994) 512 US 452, 461 (suspect's ambiguous statement after waiver that "maybe I should talk to a lawyer" did not require officers to stop questioning or to ask clarifying questions); *People v. Johnson* (1993) 6 Cal.4th 1, 27 (mother can get me a "high-priced lawyer from New York" was not an invocation); but see *In re Art. T.* (2015) 234 Cal.App.4th 335, 351-56 (“Could I have an attorney? ‘Cause that’s not me,” said by unsophisticated 13-year-old held to be an invocation).

(11) Reinitiation of Questioning

If the suspect previously waived and talked, interrogation can be reinitiated within a reasonably contemporaneous time without new warning or any reminder of rights, even by a different officer, or about a different crime, or at a different location, or by a different jurisdiction.

If the suspect previously invoked only the right to **silence,** s/he can be re-approached for a waiver on a **different case,** *Michigan v. Mosely* (1975) 423 US 96, 104-05 (two hours after suspect declined to answer questions about a robbery, he agreed to waive and discuss a murder), and sometimes on the **same case**. *People v. Warner* (1988) 203 Cal.App.3d 1122, 1129-31; *US v. Hsu* (9th Cir. 1988) 852 F.2d 407, 410-11; *People v. Lisper* (1992) 4 Cal.App.4th 1317; and *People v. DeLeon* (1994) 22 Cal.App.4th 1265 (invocation "scrupulously honored" by first officer; second officer, unaware of invocation, warns and gets waiver).

If s/he invokes the "right" to **counsel,** s/he may **not** be approached for police-initiated questioning **about any case,** without counsel present, during continuous custody, for an admissible statement. *Edwards v. Arizona* (1981) 451 US 477, 484-85; *Arizona v. Roberson* (1988) 486 US 675, 684-88; *Minnick v. Mississippi* (1990) 498 US 146, 153.

If there has been a **break in custody of at least 14 days** (including a sentenced prisoner's return to the general population) following an invocation of counsel, a new warning and waiver will allow an admissible statement. *Maryland v. Shatzer* (2010) 559 US 98, 110.

If a release from custody following invocation of counsel is **shorter than 14 days**, waiver for a subsequent custodial interrogation is **invalid**. *People v. Bridgeford* (2015) 241 Cal.App.4th 887, 890.

Law enforcement officers and agencies are charged with knowledge of the suspect's prior invocation. *"Custodial interrogation must be conducted pursuant to established procedures that must enable an officer who proposes to initiate an*

interrogation to determine whether the suspect has previously requested counsel." Arizona v. Roberson (1988) 486 US 675, 687 (ruling that detective's failure to learn about invocation of counsel from arresting officer's report did not excuse failure to honor the invocation).

The **suspect** can **always** reinitiate discussions, waive his or her rights, and answer questions. *Oregon v. Bradshaw* (1983) 462 US 1039, 1045-46 ("What's going to happen to me now?"). The officer must **take a waiver of the right previously asserted** before resuming interrogation. *Bradshaw*.

(12) The Nature of *Miranda*

Because of the constitutional **separation of powers**, the judicial branch has no supervisory authority over the executive branch (which includes law enforcement officers and prosecutors), as the US Supreme Court recognizes:

> *"We have **no general oversight authority** with respect to state police investigations. We may disapprove an investigatory practice only if it violates the Constitution." Weatherford v. Bursey* (1977) 429 US 545, 557.

In *Miranda*, the court established "*a set of procedural safeguards, now commonly known as the Miranda rules. The Court recognized that these procedural safeguards were **not themselves rights protected by the Constitution**." Michigan v. Tucker* (1974) 417 US 433, 443-44.

> *"As is now well established, the Miranda warnings are not themselves rights protected by the Constitution. ... Their objective is **not to mold police***

conduct *for its own sake.* ***Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials****.... Moran v. Burbine* (1986) 475 US 412, 424-425.

"The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental ***trial right****. Although conduct by law enforcement officials prior to trial may ultimately impair that right,* ***a constitutional violation occurs only at trial****." US v. Verdugo-Urquidez* (1990) 494 US 259, 264.

"Just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the Miranda rule. ***The Miranda rule is not a code of police conduct,*** *and* ***police do not violate the Constitution*** *(or even the Miranda rule, for that matter) by mere failures to warn.*

"It follows that ***police do not violate a suspect's constitutional rights*** *(or the Miranda rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by Miranda.*

"It is ***not for this Court to impose*** *its preferred police practices on either federal law enforcement officials or their state counterparts." US v. Patane* (2004) 542 US 630, 637-42.

"Violations of judicially crafted prophylactic rules ***do not violate the constitutional rights*** *of any person." Chavez v. Martinez* (2003) 538 US 760, 767-73 (no civil lability based on police non-compliance with *Miranda*).

The **collection** of inadmissible evidence is improper **only** where officers violate the Constitution or some statute in **acquiring** the evidence (such as in an

unreasonable search), but **not** when an evidentiary rule or exclusionary rule makes the evidence inadmissible in court in order **to *prevent*** a constitutional violation from occurring **at trial** (such as with hearsay, or statements lacking *Miranda* foundation, or statements that deny confrontation).

The failure of police, attorneys and judges to notice this distinction sometimes results in the mistaken assumption that there is something wrong about police **asking questions** whenever the answers cannot be used in a prosecution case-in-chief because of *Miranda*. *See, e.g., People v. Nguyen* (2015) 61 Cal.4th 1015, 1077, and cases cited. Although the holding of *Miranda* may require the trial judge to exclude as evidence of guilt a statement obtained by custodial interrogation without warnings or waivers, ***"The mere asking of questions is not illegal."*** *In re Deborah C.* (1981) 30 Cal.3d 125, 132. *"It has long been recognized that* ***the Constitution does not forbid the asking of criminative questions."*** *Minnesota v. Murphy* (1984) 465 US 420, 428.

The US Supreme Court has never ruled that police questioning "outside Miranda" is unethical, improper, illegal or unconstitutional.

When presented with the argument that officers have incentives to question without *Miranda* compliance for uses other than to obtain admissible evidence of guilt, the Supreme Court has repeatedly acknowledged and accepted this result:

> *"One might concede that when proper Miranda warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have* ***little to lose and something to gain****.... In any event, the balance was struck in Harris, and we are not*

disposed to change it now." Oregon v. Hass (1975) 420 US 714, 722.

"Hass was decided fifteen years ago, and no new evidence has come to our attention which should lead us to think otherwise now." Michigan v. Harvey (1990) 494 US 344, 352.

In fact, the court's rulings that questioning "outside *Miranda"* **does not** violate either the Constitution or the *Miranda* rule are the premises for its more recent conclusions that there is no "fruit of the poisonous tree" exclusion of physical evidence discovered "outside *Miranda*" (*US v. Patane, supra*), and that there can be no civil liability based on non-coercive interrogation that lacks *Miranda* compliance (*Chavez v. Martinez*, *supra*).

What of the statement in *US v. Dickerson* (2000) 530 US 428, 444, that *"Miranda announced a* ***constitutional*** *rule"?* The rule that *Miranda* announced was **not** that police could not conduct custodial interrogations without warnings and waivers, but that courts could not admit the resulting statements as proof of guilt in a prosecution case-in-chief: *"The decision's* ***core ruling*** *[was] that unwarned statements may not be* ***used as evidence*** *in the prosecution case in chief." Ibid.* This **admissibility** ruling was the "constitutional ruling" that *Miranda* announced.

"Far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *US v. Washington* (1977) 431 US 181, 187.