INTERROGATION LAW INSTRUCTORS' OUTLINE

December 1996

THE COMMISSON
ON PEACE OFFICER STANDARDS AND TRAINING

STATE OF CALIFORNIA

0304

Commission on Peace Officer Standards and Training

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December 1, 1996

This outline was prepared at the direction of the Commission on Peace Officer Standards and Training (POST), who sponsored a seminar on interrogation law on October 18, 1996. Instructors, currently teaching interrogation law in POST's Robert Presley Institute of Criminal Investigation were invited to the seminar (see attached roster). The goal of the seminar was to review and update the instructor's outline of interrogation law based on U.S. Constitutional law and the most current case law relevant to the topic.

A majority of the outline was prepared by referencing two sources: 1) *Analyzing Confession Issues* authored by Orange County Deputy District Attorney Devallis Rutledge, and 2) the *California Peace Officers' Legal Sourcebook* edited by California Deputy Attorney General Joel Carey.

Please use this outline as a guide in teaching interrogation law in all POST certified courses which relate to interrogation of criminal suspects.

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INTERROGATION LAW
INSTRUCTORS' OUTLINE
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I. GENERAL ISSUES

A. **FEDERAL AND STATE COURT RESPONSIBILITIES.** As long as the minimum guarantees of the U.S. Constitution are met, state courts are free to interpret a state's constitution or statutes as providing greater protection to an accused. ***California v. Ramos*** (1983) 463 US 992, 1014. However, the Supremacy Clause of the U.S. Constitution (Article VI, Section 2) requires all courts to follow U.S. Supreme Court precedent where federal constitutional questions are at issue. The states are not free to deviate from Supreme Court rulings on such questions, in any direction. ***Oregon v. Hass*** (1975) 420 US 714, 719.

1. With the passage of Proposition 8 in 1982, California courts lost the power to impose greater restrictions upon the criminal justice system than are imposed by the U.S. Supreme Court. California Courts can no longer exclude evidence not made inadmissible by the federal exclusionary rules. ***In re Lance W.*** (1985) 37 C3d 873, 896; ***People v. May*** (1988) 44 C3d 309, 319.

2. No state appellate or Supreme Court decision, regardless of date, can properly be used by the defense or by the court to exclude confession evidence that is admissible under U.S. Supreme Court precedent.

B. **ADMISSIBILITY OF CONFESSION EVIDENCE**. The Miranda rules are not the only rules governing the admissibility of confession evidence. In fact, U.S. Supreme Court cases addressing constitutional admissibility of defendants' statements are governed by four separate tests, including Miranda. A statement may be inadmissible under any of these four exclusionary rules:

1. Fourth Amendment. If an arrest violates the Fourth Amendment, "verbal evidence" obtained by police based on that arrest is inadmissible whether or not Miranda rules were followed. ***Wong Sun* v. *US*** (1963) 371 US 471.

2. Fifth Amendment. A person is protected against self-incrimination under the Fifth Amendment. ***Miranda* v. *Arizona*** (1966) 384 US 436.

3. Sixth Amendment. If a suspect's admission or confession was obtained after a violation of the suspect's right to counsel (Sixth Amendment), it is inadmissible. ***Massiah* v. *US*** (1964) 377 US 201.

4. Fourteenth Amendment. Involuntary statements coerced from a defendant in violation of the due process clause of the Fourteenth Amendment may not be used to support a conviction in state court. ***Brown* v. *Mississippi*** (1936) 297 US 278.

C. The admissibility of confessions requires consideration of all four of these constitutional exclusionary rules, one at a time. Faulty analysis can result from careless use of language or indiscriminate mixing of separate concepts. For example, voluntariness of a Miranda waiver (a Fifth Amendment issue) is not the same thing as voluntariness of a confession (a Fourteenth Amendment issue); invoking the Miranda right to counsel (a Fifth Amendment issue) is not the same thing as asserting a person's right to counsel (a Sixth Amendment issue). Without a systematic approach, admissibility determinations can easily become confusing. The following summarized cases are grouped by issue, to aid systematic analysis.

II. FOURTH AMENDMENT ISSUES.

A. **FOLLOWING MIRANDA RULES AFTER FOURTH AMENDMENT VIOLATIONS.** Miranda waivers by a suspect whose statements result from unreasonable detention, arrest or other Fourth Amendment activity will not render the statements admissible.

Wong Sun* v. *US (1963) 371 US 471. Forcible detention of a suspect at the police station for interrogation, without probable cause to arrest, violates the Fourth Amendment, and a Miranda warning is not sufficient to purge the taint. ***Dunaway* v. *New York*** (1979) 442 US 200, 216; ***Taylor* v. *Alabama*** (1982) 457 US 687, 690; ***People* v. *Boyer*** (1989) 48 C3d 247, 267-269.

B. **USING STATEMENTS TO IMPEACH A DEFENDANT LYING UNDER OATH.** Evidence that is inadmissible as proof of guilt under the Fourth Amendment exclusionary rule may be admitted to impeach the defendant's trial testimony. ***Walder* v. *US*** (1954) 347 US 62, 65; ***US* v. *Havens*** (1980) 446 US 620, 627. However, such evidence, including a confession obtained by exploitation of defendant's unlawful arrest, cannot be admitted for impeachment of a third party who testifies on defendant's behalf. ***James* v. *Illinois*** (1990) 493 US 307, 320.

C. **EFFECT OF UNLAWFUL ENTRY TO ARREST UPON CONFESSIONS.** Where an arrest is lawfully supported by probable cause, the fact of unlawful entry to make the arrest (as without consent, warrant or exigency) does not render a station house confession inadmissible. ***New York* v. *Harris*** (1990) 495 US 14, 20-21; ***People* v. *Marquez*** (1992) 1 C4th 553, 569.

III. **FIFTH AMENDMENT ISSUES (MIRANDA WARNINGS AND WAIVER).** The Fifth Amendment includes the guarantee that no person "shall be compelled in any case to be a witness against himself." ***Miranda* v. *Arizona*** (1966) 384 US 436.

A. **GIVING THE MIRANDA WARNINGS.**

1. Law enforcement officers sometimes add gratuitous enlargements to the Miranda warnings that may reduce opportunities to obtain an admission or confession. The following example is what the courts have said is necessary. Police officers should ask the suspect if he understands after each part of the Miranda advisement is given. For example:

a. "You have the right to remain silent. Do you understand?" **Suspect answers.**

b. "Anything you say may be used against you in court. Do you understand?" **Suspect answers.** Warning a suspect that his statements may be used against him in court is sufficient; it is not necessary (or necessarily accurate) to assert that statements "can and will" be used as evidence. ***People v. Valdivia*** (1986) 180 CA3d 657, 664.

c. "You have the right to an attorney before questioning. Do you understand?" **Suspect answers.** A warning that the suspect has a right to an attorney before questioning is not inadequate for failing to add that the right also applies during questioning. ***People v. Valdivia*** (1986) 180 CA3d 657, 663. Likewise, advice as to the right to counsel "while you are being questioned" is not deficient for failing to indicate the existence of that right before questioning. ***People v. Kelly*** (1990) 51 C3d 931, 948-949.

d. "If you cannot afford an attorney, one will be appointed for you free of charge, before questioning, if you wish. Do you understand?" **Suspect answers.**

2. It is not necessary for police officers to get express waivers from suspects before questioning. However, if police officers want express waivers, they should then ask: "Do you want to talk about what happened?

3. Asking if the suspect wants an attorney is **not** necessary. ***Moran v. Burbine*** (1986) 475 US 412, 423.

4. Where a timely warning and waiver have occurred, there is no requirement that a suspect be re-advised of his rights each time interrogation is renewed within a reasonably contemporaneous period. ***Wyrick v. Fields*** (1982) 459 US 42, 48.

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5. Since the warnings serve to protect custodial suspects exposed to police interrogation "without the assistance of counsel," warnings are not be necessary where counsel accompanies the suspect. ***Roberts v. US*** (1980) 445 US 552, 560-561.

6. Miranda does not apply to questioning aimed at neutralizing an immediate threat to public or officer safety. ***New York v. Quarles*** (1984) 467 US 649, 657.

   a. Not required when an officer attempts to locate a discarded firearm in a public place. ***US v. DeSantis*** (CA 9 1989) 870 F2d 536; ***People v. Gilliard*** (1987) 189 CA3d 285, 291-292.

   b. Not required when officers ask questions in concern for their safety. Miranda was not required when an officer was fearful of attack and asked the suspect about dangerous weapons (***US v. Brady*** (CA 9 1984) 819 F2d 884; ***US v. De Santis*** (CA 9 1989) 870 F2d 536), or when asking a person if he had any hypodermic needles on this person before searching to avoid an hazardous substance exposure of the searching officer. ***People v. Cressy*** (1996) 47 CA4th 981.

   c. Not required when an officer asks questions attempting the rescue of kidnap victims.

7. Questioning by an undercover officer posing as a fellow prisoner, lacking the inherent compulsion of recognizable police interrogation, does not require warnings. ***Illinois v. Perkins*** (1990) 496 US 292, 300; ***People v. Wojtokowski*** (1985) 167 CA3d 1077, 1081.

8. If custodial interrogation mistakenly occurred before admonition and waiver, subsequent Miranda compliance permits a new interrogation. ***Oregon v. Elstad*** (1985) 470 US 298; ***US v. Polanco*** (CA9 1996) 93 F3d 555.

B. **WHAT IS CUSTODY.** Miranda warnings are necessary when a suspect is in **custody** and he is to be **interrogated.** To determine the applicability of the Miranda rule, it is necessary to identify the point at which custody occurs, and to consider whether the suspect's statements resulted from police interrogation.

1. A person may be "in custody" for Miranda purposes either where he has been informed that he is under arrest, or where he has been subjected to the kinds of restraints normally used on arrestees (handcuffs, guns, lock-ups, etc.): "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.

   a. A suspect was determined to be in custody where he was surrounded in his bedroom at 4:00 a.m. by four police officers. ***Orosco v. Texas*** (1969) 394 US 324.

   b. There was custody where a suspect was surrounded by four officers, several police cars, helicopter overhead, and was confronted at gunpoint. ***People v. Taylor*** (1986) 178 CA3d 217, 229.

   c. As a general rule, if the suspect is secured in the back seat of a patrol car or in handcuffs, he is deemed to be in custody. In the absence of a formal arrest or equivalent restraints, Miranda custody does not exist. ***US v. Martinez*** (CA10 1992) 983 F2d 968, 976-977.

2. A person taken into custody by one agency for one crime is entitled to Miranda protection when questioned by officers from another agency, or investigating another crime. ***Mathis v. US*** (1968) 391 US 1, 4.

3. Simply because police focus their suspicion on a person, this does not determine custody. ***Stansbury v. California*** (1994) 114 S.Ct. 1526, 1530.

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4. Voluntary appearance at the police station for questioning is not custodial if no restraints are present, even though the individual is suspected of the crime *__Oregon__* *__v.__* *__Mathiason__* (1977) 429 US 492, 495; *__California__* *__v.__* *__Beheler__* (1983) 463 US 1121, 1125.

5. The existence of probable cause for arrest does not convert a noncustodial situation into a custodial one. *__Berkemer__* *__v.__* *__McCarty__* (1984) 468 US 420, 435, n. 22; *__People__* *__v.__* *__Robertson__* (1982) 33 C3d 21, 38.

6. A temporary detention, such as a street stop, car stop, or in-place detention during search warrant service, where no arrest-like restraints are employed, is not Miranda custody, even though the suspect is not free to leave. *__Berkemer__* *__v.__* *__McCarty__* (1984) 468 US 420, 436-440; *__Pennsylvania__* *__v.__* *__Bruder__* (1988) 488 US 9, 10-11; *__People__* *__v.__* *__Breault__* (1990) 223 CA3d 125, 135.

7. A scheduled probation interview is noncustodial, despite the probationer's lack of choice in attending. *__Minnesota__* *__v.__* *__Murphy__* (1984) 465 US 420, 430.

8. Since the applicability of Miranda depends on the suspect's custodial status at the time of interrogation, the fact he was in custody previously is not controlling, as long as the restraints have since been removed, or the arrested person has been released prior to interrogation. *__People__* *__v.__* *__Mack__* (1980) 27 C3d 145, 154.

9. For Miranda purposes, the crucial consideration is the degree of coercive restraint which a reasonable person believes he is subject to at the time of questioning. Police officers may use sufficient force to effect an investigative stop, even drawing their weapons, and no Miranda warnings are required when questions are asked. Assuming the suspect is subject to no other restraints, officers' initial display of their re-holstered weapons does not require them to give Miranda warnings before asking

the suspect questions. ***People v. Taylor*** (1986) 178 CA3d 217, 230.

C. **WHAT IS INTERROGATION.** 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 US 291, 300.

1. The Miranda safeguards come into play whenever a person in custody is subjected to either express questioning, or to 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. ***Rhode Island v. Innis*** (1980) 446 US 291, 300.

2. A conversation between police officers which, though overheard by the suspect, is not objectively likely to elicit an incriminating response (although in fact it does), is not "interrogation." ***Rhode Island v. Innis, supra,*** 302-303.

3. Questioning a prisoner as a witness does not engage Miranda. ***People v. Wader*** (1993) 5 C4th 610, 637.

4. Permitting a prisoner to talk to his wife while officers stand by and overhear or record the conversation is not "interrogation." ***Arizona v. Mauro*** (1987) 481 US 520, 530.

   a. An officer stood by a prisoner and secretly recorded the prisoner's telephone call to an accomplice, who were both speaking a foreign language. The prisoner implicated himself in the crime, and his statement was admissible. ***People v. Siripongs*** (1988) 45 C3d 548, 563-564.

   b. It was admissible to record a suspect's jailhouse call to a victim after Miranda invocation. ***People v. Guilmette*** (1991) 1 CA4th 1534, 1540.

5. It is admissible to secretly record arrestees in the police car. ***People*** ***v.*** ***Crowson*** (1983) 33 C3d 623, 628-629. It is admissible to record suspects in the police car, even after invocation of the right to counsel. ***People*** ***v.*** ***Lucero*** (1987) 190 CA3d 1065, 1068.

6. Asking booking questions (such as name, address, height, weight, eye color, date of birth, and current age) does not constitute "interrogation", nor does police instruction to a suspect as to how to perform sobriety tests. ***Pennsylvania*** ***v.*** ***Muniz*** (1990) 496 US 582, 601; ***People*** ***v.*** ***Hall*** (1988) 199 CA3d 914, 921.

7. Both express questioning and its "functional equivalent" are included in the definition of "interrogation," and police words or conduct that prompt an incriminating response from the custodial suspect must come after Miranda warnings.

   a. A "reverse lineup," in which a coached witness "identifies" the suspect as the perpetrator of a fictitious crime, is a psychological ploy that amounts to interrogation. ***Arizona*** ***v.*** ***Mauro*** (1987) 481 US 520, 526.

   b. Bringing two suspects together was not necessarily interrogation, though they began to argue about their relative guilt. ***US*** ***v.*** ***Vasquez*** (CA1 1988) 857 F2d 857, 863.

   c. Confronting a suspect with an alleged accomplice who had allegedly confessed was interrogation. ***Nelson*** ***v.*** ***Fulcomer*** (CA3 1990) 911 F2d 928, 935.

8. Casual comments by custodial officials are not interrogation unless reasonably likely to elicit an incriminating response.

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a. "That car's not yours," was not interrogation. ***In re Curt W.*** (1982) 131 CA3d 169.

b. "You're a terrible person...that was a cold thing you did," was interrogation. ***In re Albert R.*** (1980) 112 CA3d 783.

c. A jailer's question to a prisoner, "What did you get yourself into?" was not interrogation. ***People v. Claxton*** (1982) 129 CA3d 638.

d. Suspects were informed they were under arrest for possession of cocaine for sale. One suspect responded that the drugs were for personal use. The officer's comment was not interrogation. ***People v. Celestine*** (1992) 9 CA4th 1370.

e. A jailer's inquiry, "Who are you accused of killing?" was interrogation. ***People v. Morris*** (1987) 192 CA3d 380.

f. A prisoner volunteered a murder confession to a jailer, whose initial comments were not interrogation. ***People v. Ray*** (1996) 13 C4th 313.

9. There is no interrogation involved, and therefore no Miranda applicability, when officials compel the suspect to perform an act or provide an exemplar having no "testimonial" component. There is no "interrogation," no need for Miranda warnings or waiver, and no Fifth Amendment privilege for the suspect to refuse cooperation, in investigative or evidentiary acts that make the suspect the source of non-testimonial evidence, such as:

a. Obtaining blood samples. ***Schmerber v. California*** (1966) 384 US 757, 765.

b. Obtaining hand writing exemplars. ***Gilbert v. California*** (1967) 388 US 263, 266-267.

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c. Standing in a line-up. ***US v. Wade*** (1967) 388 US 218, 221-222.

d. Trying on clothing. ***Holt v. US*** (1910) 218 US 245, 252-253.

e. Completing a voice exemplar. ***US v. Dionisio*** (1973) 410 US 1, 7.

f. Completing a blood-alcohol test/refusal. ***South Dakota v. Neville*** (1983) 459 US 553, 563.

g. Being forced to re-enact a robbery. ***Avery v. Procunier*** (CA5 1985) 750 F2d 444, 448.

h. Standing and giving his name in court. ***US v. Silvestri*** (CA1 1986) 790 F2d 186, 189.

i. Compelling a defendant to shave his beard and mustache for an in-court identification. ***US v. Valenzuela*** (CA9 1983) 722 F2d 1431, 1433.

j. Compelling a defendant to utter phrases used by the perpetrator, ***US v. Leone*** (CA8 1987) 823 F2d 246, 249-251.

10. Police questioning of the suspect to clarify his understanding of his rights and the meaning of any ambiguous responses does not constitute interrogation. ***People v. Wash*** (1993) 6 C4th 215, 239. "Case law draws a sensible distinction between clarification and interrogation. On the one hand, it permits clarifying questions with regard to the individual's comprehension of his constitutional rights or the waiver of them; on the other hand it prohibits substantive questions which portend to develop the facts under investigation...." ***People v. Turnage*** (1975) 45 CA3d 201, 211.

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11. After the Miranda warnings and waiver, the interrogator need not cease questioning the suspect nor stop to clarify the suspect's **ambiguous** reference to counsel. ***US v. Davis*** (1994) 129 Led2d 362. However, an ambiguous reference to counsel **during** the actual Miranda admonition should be clarified.

12. Statements volunteered by the suspect, not in response to police interrogation, are not affected by Miranda. Volunteered statements of any kind are not barred by the Fifth Amendment even though they are made outside of Miranda. ***Miranda v. Arizona*** (1966) 384 US 436, 478. Volunteered statements include:

    a. Spontaneous utterances upon approach of an officer or during arrest. ***People v. Celestine*** (1992) 9 CA4th 1370.

    b. Statements during the booking process when no interrogation is occurring. ***Pennsylvania v. Muniz*** (1990) 496 US 582, 601. Or while in custody ***People v. Ray*** (1996) 13 C4th 313 .

    c. Statements volunteered during forensic testing or transportation. ***People v. Grant*** (1988) 45 C3d 829.

    d. Comments made by a suspect after asking for a lawyer: "I just want to say, off the record, or it can be on the record, I didn't mean to kill that dude." ***People v. Owens*** (1980) 106 CA3d 23.

D. **WHAT CONSTITUTES A WAIVER OF MIRANDA.** Miranda requires not only that warnings precede custodial interrogation, but also that persuasive evidence demonstrate the defendant's voluntary, knowing and intelligent waiver of his rights before questioning. ***Miranda v. Arizona*** (1966) 384 US 436, 475.

1. A "knowing and intelligent" waiver requires that the suspect have the mental capacity to comprehend and knowingly

relinquish his rights. ***Fare* *v.* *Michael* *C.*** (1979) 442 US 707, 725. Factors relevant to the assessment of capacity include the suspect's age, intelligence, education, experience with the justice system, and physical and mental condition.

a. Waiver was valid despite pain from a recent bullet wound. ***People* *v.* *Barker*** (1986) 182 CA3d 921, 934

b. Valid waiver by 16-year-old who had used alcohol, marijuana, PCP and LSD. ***People* *v.* *Ventura*** (1985) 174 CA3d 784, 791.

c. Valid waiver by diagnosed psychotic paranoid schizophrenic. ***People* *v.* *Villareal*** (1985) 167 CA3d 450, 457.

d. Valid waiver by experienced 15-year-old. ***In* *re* *Frank* *C.*** (1982) 138 CA3d 708, 712.

e. Valid waiver by schizophrenic with chronic organic brain damage and IQ of 65, who had recently ingested alcohol and LSD. ***People* *v.* *Watson*** (1977) 75 CA3d 384, 397.

f. Valid waiver by 15-year-old with IQ of 47. ***In* *re* *Norman* *H.*** (1976) 64 CA3d 997, 1003.

g. Valid waiver despite suspect's grief at killing his wife by OD, while drunk and under the influence of heroin. ***People* *v.* *Gurley*** (1972) 23 CA3d 536, 552.

h. Valid waiver by suspect in broken English, while in ICU suffering from serious knife wounds. ***Campaneria* *v.* *Reid*** (CA2 1989) 891 F2d 1014, 1020.

i. Invalid waiver by retarded 15-year-old illiterate. ***Cooper* *v.* *Griffin*** (CA5 1972) 455 F2d 1142, 1146.

2. 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 US 412, 421; ***People v. Kelly*** (1990) 51 C3d 931, 950. "[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***, at 476. Examples that invalidate a waiver are:

   a. Before waiver, officers told the suspect he could get the death penalty, and that they would "assume the worst" unless he told them otherwise. ***People v. Hinds*** (1984) 154 CA3d 222, 234.

   b. A 16-year-old arrestee was confronted with gruesome photos of the murder scene and fabricated evidence, and told "this is going to hang you," before waiver was obtained. ***Woods v. Clusen*** (CA7 1986) 794 F2d 293, 297.

   c. Police beat a handcuffed suspect and shoved his face into murder victim before admonishing. ***People v. McElhenny*** (1982) 137 CA3d 396, 400.

   d. Officers told the suspect he didn't need a lawyer if he didn't do the murder. ***People v. Russo*** (1983) 148 CA3d 1172, 1177.

   e. Waiver followed 30 minutes of "clever softening up" through ingratiating conversation and disparagement of the victim. ***People v. Honeycutt*** (1977) 20 C3d 150, 161, and ***People v. Munoz*** (1978) 83 CA3d 993, 997.

3. Telling a suspect that his statement is not necessary because of the physical evidence against him may or may not make the waiver valid. A waiver was **valid** where police briefly informed the suspect of incriminating evidence before the admonition.

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People v. Gray (1982) 135 CA3d 859, 864. Conversely, In attempting to get a waiver, police hinted they suspected defendant of other crimes and untruthfully told him his statement was unnecessary because his fingerprints connected him to the crime. ***People v. Superior Court (Keithly)*** (1975) 13 C3d 406, 409.

4. The Supreme Court held that the mere silence by law enforcement officials as to the subject matter of an interrogation was **not** "trickery" sufficient to invalidate a suspect's waiver of Miranda rights.

   a. The 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. ***Colorado v. Spring*** (1987) 479 US 564, 576.

   b. A voluntary waiver was found despite police failure to tell a weapons offender that they also suspected him of an unsolved murder. ***Colorado v. Spring,*** (1987) 479 US 564, 576.

5. An express statement of waiver is not necessarily required. A suspect's acknowledgement of understanding of his rights "and a course of conduct indicating waiver" can support a finding of implied waiver sufficient to satisfy Miranda. ***North Carolina v. Butler*** (1979) 441 US 369, 373.

6. A waiver need not be absolute. As long as officers honor any limitations imposed by the suspect, resulting statements are not inadmissible under Miranda. For example:

   a. A suspect agreed to discuss the case verbally, but refused to give a written statement before consulting counsel. ***Connecticut v. Barrett*** (1987) 479 US 523, 529.

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b. An oral waiver was valid, although suspect refused to sign a waiver form or be tape recorded. ***People* v. *Maier*** (1991) 226 CA3d 1670, 1677.

c. Valid selective waiver where suspect said he would answer some questions if he thought it appropriate. ***US* v. *Eaton*** (CA1 1989) 890 F2d 511, 513.

d. Valid selective waiver for oral statements, although suspect refused written or taped statements without counsel. ***Bruni* v. *Lewis*** (CA9 1988) 847 F2d 561, 563.

e. Valid selective waiver where officer focused on other areas whenever suspect said, "I don't want to talk about that." ***People* v. *Clark*** (1992) 3 C4th 41, 122.

f. Valid waiver where the suspect said, "Yeah, can I talk to you later?" and questioning was delayed 30 minutes. ***People v. Bolden*** (1996) 44 CA4th 707.

7. The suspect's waiver is not rendered invalid merely because an attorney instructs police not to talk to the suspect, nor because police withhold this information from the suspect. ***Moran* v. *Burbine*** (1986) 475 US 412, 423.

E. **INVOKING MIRANDA RIGHTS.** A suspect has two different rights he can assert under Miranda: his right to remain silent, and his right to have counsel present at interrogation. ***Miranda*,** at 474.

1. The right to remain silent may be invoked by any words or conduct which reflect an unwillingness to discuss the case. ***Scaffidi*** (1992) 11 CA4th 145, 152-153. Whether a suspect's conduct or words constitute an invocation is a question of fact to be determined in light of all the circumstances. ***People* v. *Hayes*** (1985) 38 C3d 780, 784.

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2. After a valid waiver has been obtained, the right to <u>counsel</u> can only be invoked by a clear and express request for an attorney. ***US v. Davis*** (1994) 129 LEd2d 362.

3. Cases where suspects invoked their rights include:

   a. A suspect's response, "I'd like to do that," when advised of his right to have an attorney, is a clear invocation of Miranda after which incriminating answers to questions will be inadmissible to prove guilt at trial. Subsequent statements he makes cannot be used to cast retrospective doubt on whether he intended to assert his rights. ***Smith v. Illinois*** (1984) 469 US 91, 98.

   b. Request to talk "off the record." ***People v. Braeseke*** (1979) 25 C3d 691, 702.

   c. Request that tape be turned off, that other officers leave the room, and that room not be bugged. ***People v. Nicholas*** (1980) 112 CA3d 249, 268.

4. Cases finding no invocation in the context of the conversation include:

   a. "Do I gotta still tell you after I admit it?" ***People v. Hayes*** (1985) 38 C3d 780, 785.

   b. "That's all I want to tell you." ***In re Joe R.*** (1980) 27 C3d 496, 516.

   c. "Maybe I shouldn't say anything without a lawyer." ***People v. Bestelmeyer*** (1985) 166 CA3d 520, 528.

   d. "I need a lawyer, but you can go ahead and question me." ***People v. Maynarich*** (1978) 83 CA3d 476, 481).

5. Only an assertion of the right to remain silent or a request for an **attorney** is an invocation. A juvenile's request for his probation officer is not an invocation of either right. ***Fare v. Michael C.*** (1979) 442 US 707, 723-724.

6. A suspect who has invoked retains the option to change his mind and initiate discussions with the police, who are then free to interrogate if the suspect waives the right he had previously asserted. ***People v. McClary*** (1977) 20 C3d 218, 226.

   a. Where a suspect requested an attorney but later asked police, "Well, what is going to happen to me now?", the court ruled that the suspect's question "evinced a willingness and a desire for a generalized discussion about the investigation." ***Oregon v. Bradshaw*** (1983) 462 US 1039, 1045-1046.

   b. After invocation, the suspect initiated discussions by requesting a polygraph exam. ***Wyrick v. Fields*** (1982) 459 US 42.

7. When a suspect who has been advised of his rights in connection with an arrest for Case A invokes his right to remain silent and police honor this invocation by asking no questions about that case, Miranda does not prohibit officers from returning at a later time (two hours has been held sufficient) and requesting a waiver to discuss Case B. Voluntary statements obtained after such a waiver are admissible at the trial of Case B. ***Michigan v. Mosley*** (1975) 423 US 96, 104-105; ***People v. Warner*** (1988) 203 CA3d 1122, 1124.

8. By contrast, once a suspect in custody invokes his right to counsel under Miranda, police can scrupulously honor this request only by providing counsel whenever the suspect is subjected to custodial interrogation, as to any case. Unless counsel is present, police may not re-initiate discussions with the suspect on any case, as long as the suspect remains in custody.

Edwards v. Arizona (1981) 451 US 477, 485-487; *Arizona v. Roberson* (1988) 486 US 675, 683-685; *Minnick v. Mississippi* (1990) 498 US 146, 112 L.Ed.2d 489, 499.

F. **JUVENILE CASES.** Juveniles present a particular problem in the areas of implied consent and invoking their rights.

1. There is no obligation under federal or California law for a law enforcement officer to advise a minor that he has a right to contact his parents (or other adult), to have them present during questioning. ***Aven S.*** (1991) 1 CA4th 69, 76. This is true even though the parent is present at the station or location of the interrogation. ***John S.*** (1988) 199 CA3d 441.

2. It is perfectly possible for a minor to validly waive his Miranda rights without his parents or other adult being present. ***John S.*** (1988) 199 CA3d 441.

3. When a juvenile request to talk to an adult, such as his parents, spouse, probation officer, or friend, after being advised of his Miranda rights, it does not mean, automatically, that he is invoking his Miranda rights. Such a request may, or may not, amount to an invocation of rights, depending on the circumstances, which will be evaluated on a case-by-case basis. ***Fare v. Michael C.*** (1979) 442 US 707; ***Ahmad A. v. Superior Court*** (1989) 215 CA3d 528; ***Aven S.*** (1991) 1 CA4th 69, 76; ***People v. Soto*** (1984) 157 CA3d 694, 709. Therefore, when you are confronted with a juvenile's request to talk to an adult, clarify the situation, before any interrogation, by trying to determine the reason behind the minor's request.

   a. If the reason for the request relates directly to the interrogation, the request probably constitutes an invocation of rights. ***Aven S.*** (1991) 1 CA4th 69, 76.

b. If the minor wants to speak to his parent(s) or other adult for some reason which is not directly related to the questioning, such as to notify them of his whereabouts, to have them bring him a toothbrush, or just to have them present for moral support, the request probably does not amount to an invocation. ***Maestas*** (1987) 194 CA3d 1499.

4. When a minor asks, as a condition of giving a statement, that his parents be notified or that he speaks to them, then it is the peace officers' choice to meet the request or stop the questioning.

5. If a minor asks to speak with his parents or other adult at the station, other than an attorney, you may secretly tape-record the conversation, as long as you haven't lulled him into a false sense of privacy. ***Ahmad A. v. Superior Court*** (1989) 215 CA3d 528.

G. STATEMENTS OBTAINED OUTSIDE OF MIRANDA.

1. If Miranda warnings should have been given but were not, a suspect's statements in response to a law enforcement officer's questions are inadmissible to establish guilt of suspect. ***Miranda v. Arizona*** (1966) 384 US 436.

2. Voluntary statements obtained in non-compliance with Miranda's guidelines ("outside" Miranda) statements can nevertheless be used:

   a. To impeach a defendant who lies on the stand at his trial. ***Harris v. New York*** (1971) 401 US 222, 226; ***People v. May*** (1988) 44 CA3d 309.

   b. As a basis for obtaining physical evidence. ***Michigan v. Tucker*** (1974) 417 US 433, 444. ***People v. Whitfield*** (1996) 46 CA4th 947.

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c. For other investigative purposes, such as locating contraband, locating the crime scene, identifying co-suspects, locating witnesses, clearing cases in order to re-prioritize investigative time, and putting to rest community fears.

3. Non-coercive police questioning that departs from Miranda does not violate a suspect's civil rights or his Fifth Amendment Rights. *Bennett v. Passic* (CA10 1976) 545 F2d 1260, 1263; *Turner v. Lynch* (1982) 534 F.Supp. 686; *Cooper v. Dupnik* (CA9 1992) 963 F2d 1220, 1244.

4. Although a police violation of Miranda renders the suspect's statement inadmissible as proof of guilt, "Non-coercive questioning is not itself unlawful...." *People v. Varnum* (1967) 66 C2d 808, 812. "The mere asking of questions is not illegal." *In re Deborah C.* (1981) 30 C3d 125, 132. While the courts can decide that police compliance with Miranda is prerequisite to confession admissibility, the courts have no authority to declare that non-compliance is "unlawful," nor to direct the manner in which police investigate crimes.

IV. SIXTH AMENDMENT ISSUES. A separate, constitutional right to an attorney exists under the Sixth Amendment, to assist the accused in coping with "the intricacies of substantive and procedural law" likely to be encountered in a criminal prosecution. *US v. Gouveia* (1984) 467 US 180, 189.

A. **ADVERSARY JUDICIAL PROCESS.** This right is not related to the presumed pressures of custodial interrogation, and so does not depend on the defendant's custodial status or his awareness that he is being interrogated by a government agent. Instead, it depends on whether the case has reached a "critical stage" in the adversary judicial process at which the guiding hand of counsel is indispensable. *Powell v. Alabama* (1932) 287 US 45, 69. "The right to counsel exists to protect the accused during trial-type

confrontations with the prosecutor." ***US v. Gouveia*** (1984) 467 US 180, 189.

B. **ASSISTANCE OF COUNSEL.** To promote the Sixth Amendment guarantee that "the accused shall enjoy the right to have the assistance of counsel for his defense," the Supreme Court adopted an exclusionary rule to bar the trial evidence use of an accused's own incriminating words deliberately elicited by the government through interference with the right. ***Massiah v. US*** (1964) 377 US 201.

C. **WHEN DOES RIGHT TO COUNSEL START.**

1. Since the purpose of the right is to aid the accused in dealing with the prosecutor in the courtroom, his right attaches "only at or after the time that adversary judicial proceedings have been initiated against him." ***Kirby v. Illinois*** (1972) 406 US 682, 688. This right is "offense specific," and does not prohibit questioning on cases that have not reached the state of "adversary judicial proceedings." ***McNeil v. Wisconsin*** (1991) 115 Led2d 158.

2. The commencement of "adversary judicial proceedings" sufficient to trigger the Sixth Amendment right to counsel was found in the following circumstances:

    a. Defendant had been indicted and arraigned before interrogation. ***Massiah v. US*** (1964) 377 US 201.

    b. Indicted, with counsel appointed, apparently at arraignment. ***US v. Wade*** (1967) 388 US 218.

    c. After a preliminary hearing. ***Coleman v. Alabama*** (1970) 399 US 1.

    d. After arraignment. ***Brewer v. Williams*** (1977) 430 US 387.

3. That the initial court appearance, whether an arraignment, preliminary hearing, or other proceeding, causes the right to counsel to attach is clear from the preceding cases. However, those cases involving the initiation of a prosecution by complaint suggest that "adversary judicial proceedings" commence with the first court appearance on that complaint, which would generally be arraignment.

4. Within the federal jurisdiction, the prevailing view is that neither the filing of a complaint, nor the issuance of an arrest warrant on a complaint, nor the defendant's arrest on such warrant triggers the Sixth Amendment right to counsel. ***US v. Duvall*** (CA2 1976) 537 F2d 15, 22; ***US v. Smith*** (CA2 1985) 778 F2d 925, 932; ***US v. Langley*** (CA11 1988) 848 F2d 152, 153.

5. The U.S. Supreme Court identified arraignment as the point at which the right to counsel will normally attach: "The arraignment signals the initiation of adversary judicial proceedings and thus the attachment of the Sixth Amendment." ***Michigan v. Jackson*** (1986) 475 US 625, 638.

6. In the absence of the "formal charging proceeding" that triggers the right to counsel (***Burbine***, p. 428), the fact that a suspect has an attorney does not mean that the Sixth Amendment has attached, or that police may not communicate directly with the suspect, without notice to his attorney. Even where an attorney called police and told them not to interrogate her client, the court found no constitutional violation when police promptly resumed interrogating the arrestee, whose right to counsel had not attached (and the court cautioned that states are not free to define the circumstances under which the federal right attaches). ***Moran v. Burbine*** (1986) 475 US 412, 430, n.3.

V. FOURTEENTH AMENDMENT ISSUES (VOLUNTARINESS OF CONFESSIONS)

A. **COERCED STATEMENTS.** A statement is "involuntary" if it is coerced from the suspect by physical force or threats, or if it is elicited by express or implied promises of leniency or by overbearing psychological pressure, such that the statement does not reasonably appear to be "the product of a rational intellect and a free will." *Blackburn v. Alabama* (1960) 361 US 199, 208. Examples of coercion include:

1. Use of physical force, for instance, whipping and beating the suspect until he confessed. *Brown v. Mississippi* (1936) 297 US 278.

2. Hours of persistent interrogation, combined with fatigue and sympathy falsely aroused by a friend's feigned troubles. *Spano v. New York* (1959) 360 US 315; *People v. Alfieri* (1979) 95 CA3d 533, 546.

3. Threat to have suspect's wife and children taken into custody if he did not confess. *Rogers v. Richmond* (1961) 365 US 534.

4. Threat to place in juvenile hall, coupled with promise to cite and release if minor was "cooperative." *In re J. Clyde K.* (1987) 192 CA3d 710.

5. Appeals to the suspect's religion ("confess or burn in hell"). *People v. Adams* (1983) 143 CA3d 970, 990; *People v. Montano* (1991) 226 CA3d 914, 935; *People v. Esqueda* (1993) 17 CA4th 1450.

6. Assurances by interrogator that the perpetrator was not so much a criminal deserving of punishment but as one with a mental problem who needed psychiatric help which was offered. *Fenton v. Miller* (1985) 474 US 104, 107-110, & n.2.

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7. Promises to get psychiatric "help" for a troubled suspect in exchange for confession. ***People v. Hogan*** (1982) 31 C3d 815.

8. A six-hour interrogation of a serial rapist by multiple interrogators, including several coercive threats. ***Cooper v. Dupnik*** (1992) 963 CA 2d 1220.

B. **ADVISING SUSPECT TO TELL THE TRUTH.** Telling the suspect to tell the truth, or pointing out the consequences "flowing naturally from a truthful course of conduct," would not make a confession involuntary. ***People v. Howard*** (1988) 44 C3d 375, 398.

C. **USE OF DECEPTION OR SUBTERFUGE.** Police use of strategic deception or subterfuge is not necessarily impermissible. A statement will still be voluntary and admissible, as long as the deception or falsehood was not sufficient to overbear the suspect's will, but rather merely prompts him to react from a consciousness of guilt. ***Frazier v. Cupp*** (1969) 394 US 731 (police falsely informed the suspect his confederate had been captured and had confessed). Police may use such tactics because subterfuge per se is not the same as coercive conduct. The court will not exclude a defendant's voluntary statement which was the product of police deception or communication of false information. A resulting admission is admissible, provided the subterfuge is not likely to produce an untrue statement. ***People v. Parrison*** (1982) 137 CA3d 529, 537. The following police conduct was found not to be coercive:

1. Officers falsely told the suspect he had been positively identified by the witness. ***People v. Pendarvis*** (1961) 189 CA2d 180.

2. The suspect was falsely told his fingerprints had been found on the getaway car. ***People v. Watkins*** (1970) 6 CA3d 119.

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3. Officer told the wounded suspect he was in "pretty bad shape" and might not make it to the hospital. *In re Walker* (1974) 10 C3d 764.

4. When one suspect initially denied involvement, police played a tape recording of the confederate's confession obtained outside Miranda. *People v. Felix* (1977) 72 CA3d 879.

5. Investigators falsely told the suspect his car had been linked to the murder scene by tire tracks and soil samples, and that fibers and other physical evidence linked the victim to the suspect's car and bedroom. *People v. Thompson* (1990) 50 C3d 134.

D. **GRANTING IMMUNITY.** A statement compelled by officially granting immunity is involuntary. *People v. Bey* (1994) 21 CA4th 1623. However, a statement made by defendant as a result of a plea bargain is not per se involuntary and may be admitted in evidence if defendant withdraws his plea.

E. **CHALLENGING THE VOLUNTARINESS OF CONFESSIONS.** When a defendant challenges his confession as involuntary, the court must hear evidence and make a finding. The prosecution must prove voluntariness by a preponderance of the evidence. *People v. Markham* (1989) 49 C3d 63, 71.

F. **USE OF INVOLUNTARY CONFESSIONS.** An involuntary confession is not admissible for any purpose.

1. Unlike evidence resulting from 4th, 5th or 6th Amendment errors, involuntary confession evidence cannot be admitted for impeachment or rebuttal, and may be excluded by any party against whom it is offered. *Mincey v. Arizona* (1978) 437 US 385, 397; *In re J. Clyde K.* (1987) 192 CA3d 710, 716.

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2. Where an involuntary confession discloses other evidence, such evidence may be admitted only if the prosecution is able to prove an independent source of the evidence. ***Murphy v. Waterfront Commission*** (1964) 378 US 52, n. 18.

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