THE REVIVAL OF *MIRANDA* AND THE FIFTH AMENDMENT

By: Jonathan Grossman

A. Introduction

Often the most powerful evidence for the prosecution is the defendant's own statements. A jury is likely to conclude there is no doubt as to guilt if the defendant has confessed. The decision of *Miranda v. Arizona* (1966) 384 U.S. 436 remains one of the most significant decisions from the United States Supreme Court protecting the rights of criminal defendants and in limiting the power of the police.

A backlash, starting in the early 1990's if not before, severely limited the reach of *Miranda* and other decisions concerning the admissibility of statements obtained from police questioning. Cases from the United States Supreme Court have even included situations where remaining silent was not an invocation of the right to silence (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 375-376, 381, 387-388) and stating "[m]aybe I should talk to a lawyer" was not deemed to be an unequivocal invocation of the right to counsel (*Davis v. United States* (1994) 512 U.S. 452, 455). Cases such as these can lead one to believe the right to silence is virtually dead as a practical matter.

Nonetheless, there have been a set of cases in recent years holding that the rights under *Miranda* have been violated or the statements are involuntary. What many of them have in common is strong advocacy in recalling from the *Miranda* decision itself certain interrogation techniques that have been considered to be potentially coercive, and then going through the transcript of the interrogation carefully to identify when the same coercive techniques have subtly but effectively caused the defendant to make certain statements. Thus, successful advocacy requires perseverance and a sound knowledge of *Miranda* and related cases.

B. In the Beginning . . .

The Fifth Amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . . " The Sixth Amendment states "the accused shall . . . have the Assistance of Counsel."

The Supreme Court issued opinions periodically since the 1930's in an attempt to curb police abuses. (See, e.g., *Brown v. Mississippi* (1936) 297 U.S. 278; *Chambers v. Florida* (1940) 309 U.S. 227; *Canty v. Alabama* (1940) 309 U.S. 629; *White v. Texas* (1940) 310 U.S. 530; *Vernon v. Alabama* (1941) 313 U.S. 547; *Ward v. Texas* (1942) 316 U.S. 547; *Ashcraft v.Tennessee* (1944) 322 U.S. 143; *Malinski v. New York* (1945) 324 U.S. 401;

Williams v. United States (1951) 341 U.S. 97; *Leyra v. Denno* (1954) 347 U.S. 556.) Physical abuse of suspects was reduced greatly, though not completely, but psychologically coerced confessions continued. The Court learned that deciding one case at a time did not significantly change things. The Court tried issuing a set of cases in the early 1960's. (*Blackburn v. Alabama* (1960) 361 U.S. 199, 206; *Rogers v. Richmond* (1961) 365 U.S. 534, 541; *Townsend v. Sain* (1963) 372 U.S. 293; *Lynumn v. Illinois* (1963) 372 U.S. 528; *Haynes v. Washington* (1963) 373 U.S. 503; *Fay v. Noia* (1963) 372 U.S. 391; *Malloy v. Hogan* (1964) 378 U.S. 1; *Escobedo v. Illinois* (1964) 378 U.S. 478.) Still, no significant change in police practices was made. Many officers continued "the old way of doing things . . . and litigating the voluntariness of any statement in nearly every instance." (See *Missouri v. Seibert* (2004) 542 U.S. 600, 609.)

C. The *Miranda* Decision Discussing Standard Interrogation Techniques

Finally, the Court decided *Miranda v. Arizona* (1966) 384 U.S. 436 with awareness of "the nature of the problem and because of [the] recurrent significance in numerous cases" of coerced confessions. (*Id.* at p. 491.) The Court first discussed the Reid technique, which synthesized previous police interrogation methods and became very popular by the middle 1960's. It is used in most interrogations today. "The methods described in Inbau & Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1956), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000." (*Id.* at p. 449, fn. 9.)

The Court noted that according to the Reid manual, the interrogation needs to be conducted in private. "The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy – being alone with the person under interrogation.' " (*Id.* at p. 449.) " 'In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.' " (*Id.* at p. 450.)

The interrogator should appear certain in the suspect's guilt. "[T]he manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance

to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already – that he is guilty. Explanations to the contrary are dismissed and discouraged." (*Id.* at p. 450, fns. omitted.)

"The texts thus stress that the major qualities an interrogator should possess are patience and perseverance. One writer describes the efficacy of these characteristics in this manner: 'In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days . . . . ' " (*Id.* at pp. 450-451.)

What has become the key to obtaining incriminating statements is to offer the suspect two scenarios. One scenario presents the suspect acting with obvious unmitigated malice. The second scenario presents the suspect acting in what seems to be socially mitigating, though just as incriminating in court. "The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt." (*Id.* at p. 451.) The suspect often leaps at the purportedly mitigating scenario.

If all else fails, resort to the classic good-cop, bad-cop tactic. When done subtly, the courts appear to be oblivious to it, and the suspects still fall for it. "When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the 'friendly-unfriendly' or the 'Mutt and Jeff' act[.]" (*Id.* at p. 452.)

"The interrogators sometimes are instructed to induce a confession out of trickery," such as falsely claiming the suspect has been identified by witnesses. (*Id.* at p. 453.) "Then the questioning resumes 'as though there were now no doubt about the guilt of the subject.' " (*Ibid.*)

The interrogator was instructed in the 1960's not to let the suspect invoke the right to silence or to an attorney. "The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. 'This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator.' After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk" could be seen as indicating the suspect has something to hide. (*Id.* at pp. 453-454, fn. omitted.) Today, the suspect is told this might be his only opportunity to tell his side of the story, or talking about it would make him feel better. Alternatively, the officer proceeds with the interrogation as if the invocation was not sufficiently clear.

In sum: "From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective may be attained.' When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights." (*Id.* at p. 455, fn. omitted.)

A manual stated: " 'The method should be used only when the guilt of the subject appears highly probable.' " (*Id.* at p. 451.) The Court noted such "[i]nterrogation procedures may even give rise to a false confession." (*Id.* at p. 455, fn. 24.) "The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Professor Sutherland's recent article, Crime and Confession, 79 Harv. L. Rev. 21, 37 (1965): 'Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient "witnesses," keep her secluded there for hours while they make insistent demands, weary her with contradictions of her assertions that she wants to leave her money to Elizabeth, and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?' " (*Id.* at p. 457, fn. 26.) (Imagine if the suspect used the

same technique to obtain money or sex. Would there be any problem in securing a conviction for robbery or rape by coercion?) Yet the Court fell short of condemning such interrogation techniques, It said, "[i]n these cases, we might not find the defendants' statements to have been involuntary in traditional terms." (*Id.* at p. 456.)

D. The *Miranda* Rule

The Court's solution was to create procedural protections for the suspect. "Our holding . . . briefly stated it is this: the 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. By custodial interrogation, we mean 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. 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, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (*Id.* at pp. 444-445.)

The Court explained its ruling. "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple . . . . " (*Id.* at p. 468.) "The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court." (*Id.* at p. 469.) Further, "we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . . " (*Id.* at p. 471.) And "it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." (*Id.* at p. 473.) "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent [or requests counsel], the interrogation must cease." (*Id.* at p. 473-474.)

The defendant must be in custody; a detention is insufficient. "[T]he police may, of course, seek out evidence in the field to be used at trial against him. 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." (*Id.* at p. 477.) "The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." (*Ibid.*)

"No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." (*Id.* at p. 476.) "If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication." (*Id.* at p. 477.)

The Court concluded: "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." (*Id.* at p. 478.) He must be warned prior to any 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. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." (*Id.* at p. 479.)

E. Applying *Miranda*

There are three elements to a *Miranda* claim: (1) The suspect must be in custody (2) while interrogated, and (3) either (a) there was not a proper *Miranda* warning, (b) a proper waiver of the right, or (c) questioning after invocation of the right.

1. Custody

A suspect is "in custody" if a reasonable person in a similar situation would not feel free to end the interrogation and leave. (*Miranda v. Arizona* (1966) 384 U.S. 436, 444; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442 [questioning at traffic stop not custodial]; *People v. Boyer* (1989) 48 Cal.3d 247, 272.)

The subjective intent of the officer is irrelevant. "It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed does not bear upon the question whether the individual is in custody for purposes of *Miranda.*" (*Stansbury v. California* (1994) 511 U.S. 318, 324; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 27.)

An arrest under *Miranda* is not necessarily the same as arrest under the Fourth Amendment:

> 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. (*United States v. Kim* (9th Cir. 2002) 292 F.3d 969, 976.) To resolve the detention issue, courts examine whether handcuffing the defendant met the Fourth Amendment reasonableness standard. As [*United States v.*] *Newton* [(2d Cir. 2004) 369 F.3d 659] explains, "where an officer has a reasonable basis to think that the person stopped poses a present physical threat to the officer or others, the Fourth Amendment permits the officer to take 'necessary measures … to neutralize the threat' without converting a reasonable stop into a *de facto* arrest. [Citations.]" (*Newton, supra*, 369 F.3d at p. 674, original italics.) Thus, courts look to the reasonableness of the officer's actions to determine whether handcuffing exceeded the scope of the detention and transformed it into a de facto arrest. [¶] In contrast, Fifth Amendment *Miranda* custody claims do not examine the reasonableness of the officer's conduct, but instead examine whether a reasonable person would conclude the restraints used by police were tantamount to a formal arrest. These two distinct analytical concepts may produce different outcomes. (See *Newton, supra*, 369 F.3d at p. 677 [officers' actions reasonable under Fourth Amendment but restraints imposed during detention placed defendant in custody for *Miranda* purposes].) As *Newton* explains, "*Miranda's* concern is not with the facts known to the law enforcement officers or the objective reasonableness of their actions in light of those facts. Miranda's focus is on the facts known to the seized suspect and whether a reasonable person would have understood that his situation was comparable to a formal arrest." (*Newton*, at p. 675.)

(*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1405–1406, ellipses in original.)

Consider whether (1) a formal arrest, (2) absent an arrest, the length of detention, (3) location of the interrogation, (4) length and form and nature of questioning, (5) number of officers present, (6) use of physical restraints and weapons, and (7) presence of *Miranda* warnings. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442; see also *Howes v. Fields* (2012)

565 U.S. 499, 508-509; *People v. Morris* (1991) 54 Cal.3d 127, 197 [also listing the factors]; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162 [same].) The youthfulness of a child is relevant in the analysis. (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, 277.)

2. Interrogation

An interrogation is "any words or actions on the part of officers (other than those normally attendant to arrest and custody) that the officer should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301; *Brewer v. Williams* (1977) 340 U.S. 391, 398 ["Christian burial" speech]; *People v. Sims* (1993) 5 Cal.4th 405, 442 [confronting defendant who was in jail about the evidence amounted to an interrogation because no other purpose]; *People v. Boyer* (1989) 48 Cal.3d 247, 274, disapproved on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 820, fn. 1 [telling defendant about the investigation was an interrogation]; *People v. Mobley* (1999) 72 Cal.App.4th 761, 792, disapproved on another point in *People v. Trujillo* (2006) 40 Cal.4th 165, 181 [(1) whether officer intended incriminating answers or (2) should have known was likely to do so]; see *People v. Brewer* (2000) 81 Cal.App.4th 442, 458-459 [asking for permission to search was not an interrogation].)

An interrogation can include a conversation with a police agent. (*Arizona v. Roberson* (1988) 486 U.S. 675, 680-681; *United States v. Henry* (1990) 447 U.S. 264, 274.) The test is whether: (1) the informant acted with police under agreement and with the expectation of gain, and (2) the informant deliberately elicited incriminating statements; facilitating someone acting on his own is not a police agent. (*People v. Frye* (1998) 18 Cal.4th 894, 993, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421; *In re Neely* (1993) 6 Cal.4th 901, 915 [acted as government agent in deliberately eliciting incriminating statements].)

The backlash: There are numerous decisions since 1990, especially from capital cases, finding there was no interrogation. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 735-736, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421 [no interrogation when officer sees defendant at jail and defendant said 'what's happening,' and officer asked if he's staying out of trouble, which prompted him to make admissions]; *People v. Haley* (2004) 34 Cal.4th 283, 302 [officer telling defendant in police car that he knows defendant did it because his fingerprints were found at the scene was not an interrogation]; *People v. Cunningham* (2001) 25 Cal.4th 926, 993 [officer may speak to defendant as long as not construed to be calling for incriminating statements]; *People v. Clark* (1993) 5 Cal.4th 950, 985, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421 [officer can talk to the suspect if not calculated to result in incriminating statements]; *People v. Franzen* (2012) 210 Cal.App.4th 1193, 1203 [saying "what guy?" when the defendant said drugs were possessed by some guy was not an interrogation]; *Mickey v. Ayers* (9th Cir. 2010)

606 F.3d 1223, 1235 ['small talk' about family was not an interrogation, though it was relevant to the crime]; *United States v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169 [telling defendant that police found 600 pounds of cocaine, defendant in a lot of trouble, and will receive longer prison sentence was not an interrogation]; *United States v. Shedelbower* (9th Cir. 1989) 885 F.2d 570, 572. 573 [falsely telling defendant that the victim identified defendant].)

There is no interrogation when the defendant starts the conversation or makes voluntary statements. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301; *People v. San Nicolas* (2004) 34 Cal.4th 614, 641-643 [showing defendant newspaper article discussing the crime was not an interrogation]; *People v. Ray* (1996) 13 Cal.4th 313, 334, 337 [no interrogation when prisoner wished to tell guard something].)

A police officer or agent listening while the defendant talks to someone else about the crime does not amount to an interrogation. (*Illinois v. Perkins* (1990) 496 U.S. 242; *Arizona v. Mauro* (1987) 481 U.S. 520, 527 [officers listened to defendant's conversation with his wife at the station after he invoked]; *Kuhlman v. Wilson* (1986) 477 U.S. 436, 459; *People v. Tate* (2010) 49 Cal.4th 635, 685 [recording people talking to defendant in custody was not an interrogation]; *People v. Hartsch* (2010) 49 Cal.4th 472, 490-492 [police taping codefendant in defendant's holding cell not a *Massiah* violation when codefendant was unaware of officers' plans]; *People v. Thornton* (2007) 41 Cal.4th 391, 433 [officers set up a meeting between defendant and a relative which was monitored]; *People v. Davis* (2005) 36 Cal.4th 510, 555 [taped conversation with another prisoner after defendant invoked]; *People v. Walker* (1988) 47 Cal.3d 605, 628-629 [defendant's statements to an undercover officer in a sting operation]; *People v. Jefferson* (2008) 158 Cal.App.4th 830, 840-842 [no interrogation when officers recorded the defendant speaking with codefendant]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1401-1402 [recording defendant's conversation with his father not an interrogation]; *People v. Terrell* (2006) 141 Cal.App.4th 1371, 1385 [no violation when police record defendant's call to his mother after he invoked]; *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 537-538 [conversation between minor and parent].)

A defendant talking to an informant is not an interrogation, so long as the court finds the informant was acting on his own and not as a police agent. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 284; *People v. Wilson* (2005) 36 Cal.4th 309, 348 ["A witness's reduced sentence without 'more specific proof of a deal' has little probative value of the witness's state of mind or the improper motive" in showing a *Massiah* violation]; *People v. Williams* (1997) 16 Cal.4th 153, 204 [subsequent favorable treatment alone is insufficient evidence of being a state agent]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1165 [same]; *People v. Memro* (1995) 11 Cal.4th 786, 828, disapproved on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 639 fn. 18 [jailhouse informant is not an agent of police

if there are no deals]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1249-1250 [a frequent informant placed in the defendant's jail and told to keep his ears open was not an agent and there was no interrogation]; *People v. Almeda* (2018) 19 Cal.App.5th 346, 359-360 [jailhouse informant continued to question codefendant even after debriefing authorities at least once]; *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1173, 1174 [cell mate who made promises of leniency was not a state agent]; *People v. Martin* (2002) 98 Cal.App.4th 408, 420 [officer giving witness a recorder to tape the defendant was not a police-initiated interrogation].)

An interrogation does not include routine booking questions. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 590-591; *People v. Clark* (1992) 2 Cal.4th 629, 679-680 [questions in order to identify the defendant].) But questions that are not aimed to identify the suspect but instead solicit incriminating information amounts to an interrogation. (*Munoz,* at p. 599 [asking what year was his sixth birthday was an interrogation]; *United States v. Henley* (1993) 984 F.2d 1040, 1042 [booking questions becomes an interrogation when the officer would know the questions would incriminate the defendant].)

In California, a booking officer is allowed to ask about gang membership but the answers are not admissible in the prosecution's case-in-chief unless the defendant has waived his *Miranda* rights. (*People v. Elizalde* (2015) 61 Cal.4th 523, 534-540; *People v. Roberts* (2017) 13 Cal.App.5th 565, 576 [applies to bookings before *Elizalde*]; but see *People v. Villa-Gomez* (2017) 9 Cal.App.5th 527, 538 [can admit gang admission to booking officer made before the crime was committed because the question would not be considered to lead to an incriminating response for this crime]; *People v. Leon* (2016) 243 Cal.App.4th 1003, 1016-1017 [codefendants' statements of gang membership to the booking officer are admissible].)

Small talk during booking does not amount to an interrogation. (*People v. Gamache* (2010) 48 Cal.4th 347, 387-388; *People v. Shamblin* (2015) 236 Cal.App.4th 1, 21-23 [officer asking why he thought he was caught]; *People v. Celeste* (1992) 9 Cal.App.4th 1370, 1374 [telling defendant why under arrest].)

Public safety exception: The police are permitted to question a suspect without giving a *Miranda* warning if it is necessary for public safety. (*New York v. Quarles* (1984) 467 U.S. 649, 657 [to find missing gun]; *People v. Mayfield* (1997) 14 Cal.4th 668, 733-734, disapproved on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2 [hostage negotiation]; *People v. Simpson* (1998) 65 Cal.App.4th 854, 858-863 [asking where weapons are during search]; *United States v. Martinez* (9th Cir. 2005) 406 F.3d 1160, 1165-1166 [need not give warning to ask about weapons while in the house after seeing one in plain view].)

The rescue doctrine also permits questioning without a *Miranda* warning. The court shall consider (1) urgency and no alternative and (2) possibility of saving life. (*People v. Davis* (2009) 46 Cal.4th 539, 593-594 [questioning defendant four days after he invoked to find "missing" Polly Klaas, who had been missing for two months]; *People v. Panah* (2005) 35 Cal.4th 395, 471 [questioning about missing victim's whereabouts permitted after found bloody knife because it was possible she was still alive]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 57-58 [questioning to determine location of missing person].)

The Fifth and Sixth Amendments do not prohibit a psychological evaluation by a prosecution expert for competency. (*People v. Jablonski* (2006) 37 Cal.4th 774, 803-804.)

Mandatory polygraph testing of a probationer is not viewed as a custodial interrogation. (*Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 320 [no right to counsel]; *United States v. Stoterau* (9th Cir. 2008) 524 F.3d 988, 1004; see *People v. Garcia* (2017) 2 Cal.5th 792, 806-808 [polygraph condition of probation].)

Group therapy at the jail is not an interrogation. (*Beaty v. Stewart* (9th Cir. 2002) 303 F.3d 795, 991.)

3. Advisement, Waiver, and Invocation

a. Advisement

i. Generally

Failure to properly give warning does not mean that the statement was coerced, but it is presumed the privilege against self-incrimination was not intelligently waived. (*People v. Storm* (2002) 28 Cal.4th 1007, 1029.)

No precise warning is required. (*Duckworth v. Egan* (1989) 492 U.S. 195, 202; *California v. Prysock* (1981) 453 U.S. 355, 359.) The inquiry is "whether the warnings reasonably conveyed to a suspect his rights as required by *Miranda*." (*Duckworth v. Eagan* (1989) 492 U.S. 195, 203, citation, alterations and internal quotation marks omitted.)

Giving the warning in English when the defendant only speaks Spanish is insufficient. (*United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 537-538; but see *United States v. Vallejo* (9th Cir. 2001) 237 F.3d 1008, 1014-1015 [defendant failed to prove he did not understand English].) An advisement in English was adequate when the defendant requested the advisement to be in English. (*People v. Salcido* (2008) 44 Cal.4th 93, 128-129.)

Some translations are good enough. "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.3d 1493, 1502; but see *United States v. Botello-Rosales* (9th Cir. 2013) 728 F.3d 865, 866-868 (per curiam) [saying in Spanish that defendant can have a 'free' lawyer, as in unoccupied, did not advise the defendant he could have one without cost]; *United States v. Perez-Lopez* (9th Cir. 2003) 348 F.3d 839, 848 [Spanish translator said could "solicit" the court for attorney suggests not automatic appointment].) "Whether there has been a valid waiver depends on the totality of the circumstances, including the background, experience, and conduct of defendant. [Citations.] The age of the defendant is one factor in applying the totality test. [Citation.] Similarly, any language difficulties encountered by the defendant are considered to determine if there has been a valid waiver. [Citations.] There is a presumption against waiver, and the burden of showing a valid waiver is on the prosecutor." (*United States v. Bernard S.* (9th Cir. 1986) 795 F.2d 749, 751-752.)

(1) The right to remain silent. Officers usually get this right.

(2) The suspect must be advised that statements can be used against him or her. (*People v. Bradford* (2008) 169 Cal.App.4th 843, 850-851; *People v. Hinds* (1984) 154 Cal.App.3d 222, 234, disapproved on other grounds in *People v. Crittenden* (1994) 9 Cal.4th 83, 229 ["[Anything] you say doesn't necessarily held [sic] against you, it can be held to help you, depending on what happened" was ineffective]

(3) Officers must advise of the right to attorney. (*People v. Russo* (1983) 148 Cal.App.3d 1172, 1177-1178 [" ' If you didn't do this, you don't need a lawyer, you know.' " was ineffective]; accord, *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1403; *Lujan v. Garcia* (9th Cir. 2013) 734 F.3d 917, 932 [error to say that if the defendant gets an attorney, the defendant probably would not be questioned anymore].) The advisement was sufficient though it did not expressly state the defendant had the right to counsel before questioning as well as during. (*People v. Wash* (1993) 6 Cal.4th 215, 236; *People v. Kelly* (1990) 51 Cal.3d 931, 948; *United States v. Loucious* (9th Cir. 2017) 847 F.3d 1146, 1149.) There was no error when officers said the defendant only had the right to talk to counsel before questioning. (*Florida v. Powell* (2010) 559 U.S. 50, 62.) Telling defendant an attorney would not be available for a while was found not to have discouraged a request for counsel. (*People v. Smith* (2007) 40 Cal.4th 483, 502-504.)

(4) Officers must inform the defendant an attorney will be appointed if the defendant was indigent. (*Duckworth v. Egan* (1989) 492 U.S. 195, 202-203 [not acceptable to say an attorney "may be appointed"]; *People v. Diaz* (1983) 140 Cal.App.3d 813, 821-824 [the

Spanish word "consequir" did not convey that the defendant was entitled to appointed counsel if indigent]; *United States v. San Juan-Cruz* (9th Cir. 2002) 314 F.3d 384, 388 [must advise of right to a free attorney]; but see *People v. Johnson* (2010) 183 Cal.App.4th 253, 292 [advisement changing "can" for "will" was adequate].)

Officers need not tell the defendant he could end the interrogation at any time. (*People v. Castille* (2005) 129 Cal.App.4th 863, 885-886; *United States v. Lares-Valedez* (9th Cir. 1991) 939 F.2d 688, 689.)

Officers need not tell a minor that he has a right to speak to parents. (*In re John S.* (1988) 199 Cal.App.3d 441, 445-446.)

ii. Softening the defendant

Softening up the defendant is the process of talking with the defendant before the interrogation to make him more willing to talk about the case. It often includes minimizing the importance of the mandatory *Miranda* warning. (See *Missouri v. Seibert* (2004) 542 U.S. 600, 611 (plur opn. of Souter, J.) ["[I]t would be absurd to believe that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable instance. 'The inquiry is simply whether the warnings reasonably "conve[y] to [a suspect] his rights as required by *Miranda*" ' " but mere recitation alone not enough if not reasonably convey to the defendant the rights]; *People v. Honeycutt* (1977) 20 Cal.3d 150, 160; *Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986, 1002-1007 (en banc) [analyze softening up as whether there was an effective advisement; a long modified advisement, minimizing its importance, was ineffectual].) "We agree with the proposition that evidence of police efforts to trivialize the rights accorded suspects by the *Miranda* decision – by 'playing down,' for example, or minimizing their legal significance – may under some circumstances suggest a species of prohibited trickery and weighs against a finding that the suspect's waiver was knowing, informed, and intelligent." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1237.)

The backlash. *People v. McCurdy* (2014) 59 Cal.4th 1063, 1086-1087 [the police can build a rapport with the defendant before issuing the warning]; *People v. Scott* (2011) 52 Cal.4th 452, 477-478 [discussing defendant's hobbies which led to incriminating statements].

iii. When a second advisement is required

If there has been a considerable break in interrogations, a second *Miranda* advisement might be necessary. In considering whether a second *Miranda* warning is required, the court considers the totality of the circumstances, including (1) the amount of time, (2) whether there was a change of location, (3) any official reminder of prior warnings, (4) defendant's sophistication or experience with law enforcement, (5) any indicia that the defendant

understood his rights. (*People v. Lewis* (2001) 26 Cal.4th 334, 386; *People v. Miller* (1996) 46 Cal.App.4th 412; *People v. Mickles* (1991) 54 Cal.3d 140, 170 [36 hour gap between interrogations did not require new advisement]; see *People v. Johnson* (1969) 70 Cal.2d 469, 477.) "The courts have generally rejected a per se rule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners." (*United States v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1312.)

b. Waiver

"*Miranda* holds that '[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.' [Citation.] The inquiry has *two distinct dimensions*. [Citations.] 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 the *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' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]" (*Moran v. Burbine* (1986) 475 U.S. 412, 421, emphasis added.) It "includes an evaluation of the juvenile's age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given to him, the nature of the Fifth Amendment rights, and the consequences of waiving those rights." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.) There is a difference between an involuntary waiver and a waiver that is not knowingly and intelligently made. Voluntariness depends on officer overreaching; knowing and intelligent waiver depends on the mental capacity of the defendant. (*Cox v. Del Papa* (9th Cir. 2008) 542 F.3d 669, 675.)

"The voluntariness of a waiver . . . has always depended on the absence of police overreaching." (*Colorado v. Connelly* (1986) 479 U.S. 157, 170.) "A waiver is voluntary if, under the totality of the circumstances, the confession was the product of free and deliberate choice rather than coercion or improper inducement." (*United States v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1074 (en banc).)

"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.3d 1070, 1074 (en banc), quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421.) Whether a defendant has made a knowing and intelligent waiver of these rights depends upon " 'the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused.' " (*Edwards v. Arizona* (1981) 451 U.S. 477, 482.)

The same rules for coercive statements apply for whether there was an invalid waiver of *Miranda* rights. "There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context." (*Colorado v. Connelly* (1986) 479 U.S. 157, 169-170; *People v. Cruz* (2008) 44 Cal.4th 636, 668.)

The backlash. Although the prosecution has the burden of showing a waiver, it may be implied by simply answering questions. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373; *People v. Cunningham* (2015) 61 Cal.4th 609, 642; *People v. Hawthorn* (2009) 46 Cal.4th 67, 87-88; *People v. Whitson* (1998) 17 Cal.4th 229, 250; *People v. Johnson* (1969) 70 Cal.2d 541, 558; *In re Joseph H.* (2015) 237 Cal.App.4th 517, 534, fn. 11; *id.* at p. 533-535 [10 year-old's waiver voluntary though had ADHD, other mental problems, borderline intelligence, and suggestibility problems, and he appeared confused during the interrogation]; *People v. Johnson* (2010) 183 Cal.App.4th 253, 294-295; *People v. Rios* (2009) 179 Cal.App.4th 491, 504-505; *People v. Riva* (2003) 112 Cal.App.4th 981, 989; *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1271 [implied from answering questions].)

Signing a waiver form is usually sufficient proof of a voluntary and knowing waiver. (*People v. Weaver* (2001) 26 Cal.4th 876, 924.) But refusal to sign waiver form does not necessarily indicate an invocation. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373 ["I will talk to you but I am not signing any form" with a shrug of shoulders was consent]; but see *United States v. Cheely* (9th Cir. 1994) 21 F.3d 914, 922 [refusal to sign waiver form and saying his attorney told him not to talk].)

Even if some of defendant's behavior is irrational or bizarre, courts have found there was a valid waiver. (See, e.g., *People v. Cunningham* (2015) 61 Cal.4th 609, 645; *People v. Panah* (2005) 35 Cal.4th 395, 472 [psychotic defendant's waiver was voluntary when there was evidence he was sometimes coherent and gave responsive answers]; *People v. Frye* (1998) 18 Cal.4th 894, 988, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421 [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. Memro* (1995) 11 Cal.4th 786, 834, disapproved on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 639 fn. 18 [mentally ill defendant sweeping the room for electronic bugs]; *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1172 [although low IQ, waiver was knowing and intelligent]; *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002 [15 year-old with an IQ of 47].) The supreme court "has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication or ingestion of drugs, where, as in this case, there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him. [Citation.]" (*People v. Clark* (1993) 5 Cal.4th 950, 988, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Breaux* (1991) 1 Cal.4th 281, 301 and cases

cited therein; *People v. Debouver* (2016) 1 Cal.App.5th 972, 978.)

c. Invocation

i. Generally

"A suspect may indicate a desire to invoke the privilege in many ways; no particular form of words or conduct is necessary." (*People v. Randall* (1970) 1 Cal.3d 948, 955.)

The backlash. An invocation, however, must be clear. (*Davis v. United States* (1994) 512 U.S. 452, 458; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125.) Merely staying virtually silent for the 2¾ hour interrogation was not an invocation. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 375-376, 381, 387-388; see also *Salinas v. Texas* (2013) 133 S.Ct. 2174, 2181-2183.) "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' [Citation.] But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. (*Davis v. United States* (1994) 512 U.S. 452, 459.) The Court "decline[d] 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." (*Id.* at pp. 461-462.)

"[A]n invocation of the *Miranda* right to counsel must occur at the time of the custodial interrogation." (*People v. Avila* (1999) 75 Cal.App.4th 416, 422 [an invocation by counsel before any interrogation was ineffective]; accord, *People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1449-1450 [invoking when being arrested ineffective when later questioned at the police station]; *People v. Nguyen* (2005) 132 Cal.App.4th 350, 354-358 [defendant calling attorney when arrested was not an invocation because there was no interrogation yet]; *People v. Calderon* (1997) 54 Cal.App.4th 766, 770-771 [defense investigator informing police that defendant requested counsel was ineffective because no interrogation had begun yet].)

Selective refusal to answer some questions in not an effective invocation. (*People v. Watkins* (1970) 6 Cal.App.3d 119, 124.)

Unwillingness to be recorded is not an invocation. (*People v. Samayoa* (1996) 15 Cal.4th 795, 829-830; *People v. Johnson* (1993) 6 Cal.4th 1, 25-26.) Defendant saying the statement is "off the record" was not an invocation. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041.)

Requesting someone other than an attorney is not an invocation of any rights. (*Fare v. Michael C.* (1979) 442 U.S. 707, 728 [request probation officer]; *People v. Nelson* (2012) 53 Cal.4th 367, 380-383 [minor requesting parents]; *People v. Lessie* (2010) 47 Cal.4th 1152, 1164-1168 [no right to have parents present]; *People v. Hector* (2000) 83 Cal.App.4th 228, 234-237.)

ii. Resuming the interrogation

If the defendant invokes the right to silence or to an attorney, all questioning shall cease. However, the police can continue to interrogate the defendant once he or she re-initiates the interrogation. In assessing whether the defendant did so, the court considers the words spoken and the conduct engaged in that could fairly represent a desire to discuss the matter about the interrogation. (*People v. Waidla* (2000) 22 Cal.4th 690.) The defendant asking unrelated questions after an invocation was not a waiver. (*People v. Sims* (1996) 5 Cal.4th 405; *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1417-1420 [did not re-initiate simply by asking how long her boyfriends would be detained]; see *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045.)

The backlash. *People v. McCurdy* (2014) 59 Cal.4th 1063, 1085-1090 [defendant restarted conversation 20 seconds after invoked]; *People v. Duff* (2014) 58 Cal.4th 527, 555; *People v. Thomas* (2012) 54 Cal.4th 908, 925-928 [defendant reinitiating an interrogation on one crime permitting questioning on another crime]; *People v. Gamache* (2010) 48 Cal.4th 347, 385-387 [defendant re-initiated interrogation when he summoned officers and discussed his wife's lack of involvement].

The officer saying the defendant would not receive an attorney until arraignment, 48 hours later, did not provoke the defendant to talk after an invocation. (*People v. Enraca* (2012) 53 Cal.4th 735, 753-755.)

If defendant exercised the right to silence, the police can re-initiate interrogation if sufficient time has passed. (*People v. Riva* (2003) 112 Cal.App.4th 981, 993-994 [one hour later without new advisement]; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 580; *People v. DeLeon* (1994) 22 Cal.App.4th 1265 [*Mirandized* 5 days later].)

If defendant exercised the right to counsel, the police can re-initiate interrogation if there was a break in custody. (*Maryland v. Shatzer* (2010) 559 U.S. 98, 109-110 [released back to general prison population; defendant was re-*Mirandized*]; *Bobby v. Dixon* (2011) 565 U.S. 26, 27-28 (per curiam) [invoking silence when not in custody did not apply when in custody five days later].)

When the first confession is coerced, it is presumed the second confession is also under the psychological or practical disadvantages of having "let the cat out of the bag by confessing." (*People v. Sims* (1993) 5 Cal.4th 405, 444; accord *People v. McWhorter* (2009) 47 Cal.4th 318, 358-361 [retraction to a second set of officers eight days later].) But a subsequent confession is admissible when there is sufficient attenuation. (*People v. Sims* (1993) 5 Cal.4th 405, 444-445.)

iii. The two-step interrogation

Sometimes the police would interrogate the defendant without giving a *Miranda* warning and then give the warning and ask the same questions. Even if the confession was inadmissible in the prosecution's case-in-chief, it could be admitted to impeach the defendant or used to discourage him or her from testifying. (*Harris v. New York* (1971) 401 U.S. 222, 223-226.) To most defendants, there seemed to be no point in not answering the questions since he already gave the same information. (See *United States v. Bayer* (1947) 331 U.S. 532, 540-541 ['the cat was out of the bag'].) This technique was in vogue for a while. (See, e.g., *People v. Neal* (2003) 31 Cal.4th 61, 78, 82 [confession after defendant initiated interrogation the next day was involuntary when officers ignored nine requests for counsel and to silence and otherwise coerced defendant]; *People v. Storm* (2002) 28 Cal.4th 1007, 1028-1029 [must admit second statement if untainted and voluntary, even though "let the cat out of the bag" as long as there is a sufficient break in the events in order not to undermine the inference that was caused by a Fourth or Fifth Amendment violation]; *People v. Peevy* (1998) 17 Cal.4th 1184, 1194 [deliberate violations of Sixth Amendment right for impeachment purposes can be admitted]; *Cooper v. Dupnik* (9th Cir. 1992) 963 F.2d 1220, 1243 (en banc) [plan to question after invocation in order to impeach].)

In *Oregon v. Elstadt* (1985) 470 U.S. 298, the Court ruled the second interrogation was admissible so long as the statements were not coerced. (*Id.* at p. 310-311, 314, 318.) "It is an unwarranted extension of *Miranda* to hold that a simple failure to administer, 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. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn *in these* circumstances solely on whether it is knowingly and voluntarily made." (*Id.* at p. 309.) "Thus, under *Elstad*, if the prewarning statement was voluntary (or if involuntary, the change in time and circumstances dissipated the taint), then the postwarning confession is admissible unless it was involuntarily made despite the *Miranda* warning. (*United States v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1153.)

The Supreme Court revisited the issue in 2004, where the police admitted it was a deliberate practice to interrogate the defendant without giving the *Miranda* warning and then

do the interrogation all over again with a *Miranda* warning. A majority of the Court said that deliberately violating *Miranda* made the second interrogation inadmissible. (*Missouri v. Seibert* (2004) 542 U.S. 600, 611-614 (plur. opn. of Souter, J.); see *People v. Camino* (2010) 188 Cal.App.4th 1359, 1376 [affirming denial of the motion when there was substantial evidence the officer did not deliberately employ the method]; see *United States v. Barnes* (9th Cir. 2013) 713 F.3d 1200, 1205-1207 [failure to give warning was deliberate when cop said did not *Mirandize* because thought defendant would then believe in custody; mid-interrogation warning was ineffective when already had a full confession];

But the Court splintered on other aspects of the case, and this has resulted in long opinions by lower courts in an effort to understand the *Seibert* case. As the Ninth Circuit recently described:

"According to the plurality, the threshold inquiry is 'whether it would be reasonable to find that in these circumstances the warnings could function effectively as *Miranda* requires.' *Seibert*, 542 U.S. at 611-612." (*United States v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1155.) "To avoid undermining *Miranda's* 'clarity,' Justice Kennedy would also evaluate the effectiveness of a midstream warning using an *objective* inquiry, but only in cases where the police *deliberately* employed the two-step strategy to undermine *Miranda*[.]" (*Id.* at p. 1156, citing *Seibert, supra,* at p. 622; accord, *Reyes v. Lewis* (9th Cir. 2016) 833 F.3d 1001, 1029; *United States v. Navarez-Gomez* (9th Cir. 2007) 489 F.3d 970, 974 [they are issues of fact].) The Ninth Circuit said, "we hold that a trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream *Miranda* warning – in light of the objective facts and circumstances – did not effectively apprise the suspect of his rights. Although the plurality would consider all two-step interrogations eligible for a *Seibert* inquiry, Justice Kennedy's opinion narrowed the *Seibert* exception to those cases involving deliberate use of the two-step process to weaken *Miranda's* protections." (*Id.* at p. 1157; also *People v. Rios* (2009) 179 Cal.App.4th 491, 503-504; *Navarez-Gomez,* at pp. 973-974.) In order to determine if the practice was deliberate, consider: objective evidence of the timing, setting, and completeness of prewarning interrogations, the continuity of police personnel and the overlapping content of the pre and post warning statements, as well as evidence of the officer's subjective intent. (*Id.* at pp. 1158-1159; also *Navarez-Gomez,* at p. 974.) In order to determine the effectiveness of the warning, consider: (1) the completeness and detail of prewarning interrogation, (2) the overlapping content of the two interrogations; (3) the timing and circumstances of the interrogation; (4) the continuity of police personnel; (5) the extent to which the interrogator's questions treated the second round of interrogation as a continuation of the first; and (6) whether any curative measures were taken. (*Id.* at pp. 1160-1161; see *People v. Camino* (2010) 188 Cal.App.4th 1359, 1376; *Rios, supra,* at pp. 503-504.)

The Supreme Court revisited the issue briefly in 2011. In a per curiam opinion, it stated " 'there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second [warned] statement was also voluntarily made.' " (*Bobby v. Dixon* (2011) 565 U.S. 26, 28, quoting *Elstadt, supra,* 470 U.S. at p. 318 with fn. omitted, brackets in original.) "In this case, no two-step interrogation technique of the type that concerned the Court in *Seibert* undermined the *Miranda* warnings Dixon received." (*Id.* at pp. 29-30 (per curiam).) "Moreover, in *Seibert* the Court was concerned that the *Miranda* warnings did not "effectively advise the suspect that he had a real choice about giving an admissible statement" because the unwarned and warned interrogations blended into one 'continuum.' " (*Id.* at pp. 29-30.)

4. Right to Counsel

a. Under *Miranda*

Under *Miranda*, the defendant has a right to counsel during questioning but only if the defendant requests one. (*Miranda v. Arizona* (1966) 384 U.S. 436; *McNeil v. Wisconsin* (1991) 501 U.S. 171.) There is no Fifth Amendment right to counsel; it is a prophylactic rule in order to protect the Fifth Amendment privilege against self-incrimination. (*McNeil,* at pp. 176-177; *People v. Avila* (1999) 75 Cal.App.4th 416, 421.)

When the defendant asks for an attorney, questioning must stop unless the defendant re-initiates contact. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.) The police cannot ask about other charges for which no right to counsel has yet attached. (*Ibid.*; accord, *Minnick v. Mississippi* (1991) 498 U.S. 146, 150-156 [unless defendant resumes discussion; the attorney must be present, not just available for consultation]; *Arizona v. Robertson* (1988) 486 U.S. 675, 683; *In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602.)

In considering whether the defendant re-initiated the interrogation, one shall consider the words spoken and conduct engaged and whether the defendant fairly presented a desire to discuss the matter. (*People v. Waidla* (2000) 22 Cal.4th 690, 731; see, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 268-269.)

The officers can resume questioning when they re-arrest the defendant. (*People v. Storm* (2002) 28 Cal.4th 1007, 1024-1027; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 154; *Dunkins v. Thigpen* (11th Cir. 1988) 854 F.2d 394, 397.) However, the officers cannot release the defendant and then re-arrest him as a pretext to get around the invocation of the right to counsel. (*In re Bonnie H.* (1997) 56 Cal.App.4th 563, 584.)

b. Sixth Amendment

The Sixth Amendment right to counsel guarantees the right to counsel at all "critical stages" of the criminal proceeding. (*United States v. Wade* (1967) 388 U.S. 218, 227-228.) An interrogation by the state is a critical stage. (*Messiah v. United States* (1967) 377 U.S. 201, 204-205.) But the Sixth Amendment right commences only when judicial proceedings have begun. (*Brewer v. Williams* (1977) 430 U.S. 391, 398.)

It violates the Sixth Amendment for the police to arrange for an informant, acting as a police agent, to question the defendant about the crime after counsel has been appointed. (*Maine v. Moulton* (1985) 501 U.S. 171, 176; *United States v. Henry* (1980) 447 U.S. 264, 269-275; *Messiah v. United States* (1967) 377 U.S. 201, 204-205.)

The backlash: The Sixth Amendment is offense specific, and it does not violate the Sixth Amendment to question the defendant about uncharged incidents. (*Maine v. Moulton* (1985) 501 U.S. 176-177; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 284 [and rule 2-100 of Rules of Professional Responsibility, not to talk to represented client, does not apply]; *People v. DePriest* (2007) 42 Cal.4th 1, 33-34 [appointment of counsel in Missouri did not preclude questioning him about charges in California]; *People v. Thornton* (2007) 41 Cal.4th 391, 433-434 [discussion concerning allegation which were not the charges defendant was booked on]; *In re Robert E.* (2000) 77 Cal.App.4th 557, 561 [can question defendant after trial on potential perjury from his testimony]; *Anderson v. Alameida* (9th Cir. 2005) 397 F.3d 1175, 1180 [attorney appointed for extradition does not prevent questioning defendant about the underlying charges].) However, the officers cannot ask about lesser included offenses of the charged incident. (*Texas v. Cobb* (2001) 532 U.S. 162, 173; see *People v. Slayton* (2001) 26 Cal.4th 1076, 1082 [auto theft by illegal driving is the same as auto theft by unlawful taking but not the same as burglary]; *People v. Martin* (2002) 98 Cal.App.4th 408, 423-425 [under *Cobb*, can ask about witness intimidation after attorney appointed for murder though committed murder as the witness intimidation and can use the statement on the murder charge].)

It is permissible to have an informant act on his own, even if the police record the conversation. (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1249.)

The rule used to be that when an attorney is appointed, even without an invocation from the defendant, officers can ask about other crimes but not about the charged crimes. (See *Michigan v. Jackson* (1986) 475 U.S. 625. 629-630.) The Supreme Court re-interpreted *Jackson* and held that even after the defendant has an attorney appointed by the court, the officers can question the defendant without the attorney unless he invokes the right to counsel. (*Montejo v. Louisiana* (2009) 556 U.S. 778, 787-791; see also *Patterson v. Illinois*

(1988) 487 U.S. 285, 290-291.)

Officers need not let an available attorney to see defendant who did not invoke. (*Moran v. Burbane* (1986) 475 U.S. 412; *People v. Ledesma* (1988) 204 Cal.App.3d 682.)

F. Coerced Confessions

Involuntary or coerced admissions are inadmissible at trial (*Lego v. Twomey* (1972) 404 U.S. 477, 478), because their admission is a violation of a defendant's right to due process under the Fourteenth Amendment (*Jackson v. Denno* (1964) 378 U.S. 368, 385-386). A confession is involuntary if it is not "the product of a rational intellect and a free will." (*Townsend v. Sain* (1963) 372 U.S. 293, 307; see also *Blackburn v. Alabama* (1960) 361 U.S. 199, 208.) A "necessary predicate" to finding a confession involuntary is that it was produced through "coercive police activity." (*Colorado v. Connelly* (1986) 479 U.S. 157, 167.) Coercive police activity can be the result of either "physical intimidation or psychological pressure." (*Townsend*, at p. 307, overruled on other grounds in *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1; see also *Blackburn*, 361 at p. 206 ["[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition."].) Whether a confession is involuntary must be analyzed within the "totality of the circumstances." (*Withrow v. Williams* (1993) 507 U.S. 680, 693.) The factors to be considered include the degree of police coercion; the length, location and continuity of the interrogation; and the defendant's maturity, education, physical condition, mental health, and age. (See *id*. at 693-694; *Yarborough v. Alvarado* (2004) 541 U.S. 652, 668.)

A statement can be involuntary even after a *Miranda* warning. (See *Dickerson v. United States* (2000) 530 U.S. 428, 444.)

The test is whether the government obtained the statement by physical or psychological coercion or improper inducements such that the defendant's will was overborne or if there were any sort of threat or violence or any direct or indirect promise, however slight, or exertion of improper influence. (*Mincey v. Arizona* (1978) 437 U.S. 385, 388-389 [look at physical environment and means of questioning]; see *People v. Neal* (2003) 31 Cal.4th 63, 79 [otherwise just a *Miranda* violation].) A statement is not "involuntary" without coercion from law enforcement. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 [mentally ill defendant confessed due to voices commanding him to do so]; *People v. Jackson* (2016) 1 Cal.5th 269, 340 [" '[t]he Fifth Amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion." ' "]; *People v. Weaver* (2001) 26 Cal.4th 876, 921 ["a statement is voluntary unless there is 'coercive police activity.' "]; *Mickey v. Ayers* (9th Cir. 2010) 606 F.3d 1223, 1234 [being in a Japanese prison was not a factor caused by law enforcement].) The issue

is whether defendant's will was overborne by coercive police conduct. (*Connelly,* at p. 163; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 208.) A statement is involuntary if it is "not the product of a rational intellect and a free will." (*Mincey,* at p. 698, internal quotation marks omitted.)

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.]" (*People v. Maury* (2003) 30 Cal.4th 342, 404-405; accord, *People v. Tully* (2012) 54 Cal.App.4th 952, 985-986; *People v. Perez* (2016) 243 Cal.App.4th 863, 871.)

One must look at the totality of the circumstances. (*Withrow v. Williams* (1993) 507 U.S. 680, 693; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *Rogers v. Richmond* (1961) 365 U.S. 534, 544 [whether confession true is irrelevant]; *People v. Thompson* (1990) 50 Cal.3d 134, 166; *People v. Michaels* (2002) 28 Cal.4th 486, 512 ["on the totality of the facts, including background, experience, and conduct of the accused."]; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 208.)

In determining whether the defendant's will was overborne under the totality of the circumstances causing involuntary statements, the court shall consider: (1) the length of interrogation, location of interrogation, the continuity of interrogation, (2) the defendant's maturity, defendant's education, defendant's physical condition, and defendant's mental health (and (3) whether there were any inducements). (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58 [constant questioning after invocation not compelled statement without psychological or physical coercion].)

1. Nature of the interrogation

Attitude and tone of the officers. (See *Oregon v. Elstad* (1985) 470 U.S. 298, 312, fn. 3 [intense interrogation of minor with threats]; *Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 416 [terse and insistent]; but see *People v. Johnson* (2010) 183 Cal.App.4th 253, 295 [sarcasm and saying defendant's statements were ridiculous did not cause the following incriminating statements].)

Length of questioning. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *Mincey v. Arizona* (1978) 437 U.S. 385, 401 [four hour questioning in hospital room]; *Clewis v. Texas* (1967) 386 U.S. 707 [nine days and other factors]; *Spano v. New York* (1959) 360 U.S.315, 322 [eight hour interrogation continued after repeated requests to speak with an attorney and repeated refusal to answer questions]; but see *People v. Salcido* (2008) 44 Cal.4th 93, 129 [interrogation after long flight from Mexico]; *People v. Rundle* (2008) 43 Cal.4th 76, 122-123 [extensive interviews not coercive when no single interview was unduly

long]; *People v. Hill* (1992) 3 Cal.4th 959, 981, disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 [12 hours but significant bathroom and food breaks].)

Failure to give a *Miranda* warning can be a factor, though not determinative. (*Greenwald v. Wisconsin* (1968) 390 U.S. 519, 521 (per curiam) [considering "the lack or inadequacy of warnings as to the constitutional rights" in voluntariness analysis; *Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986, 1002-1007 (en banc) [juvenile who lacked familiarity with criminal justice system, defective *Miranda* advisement, overnight interrogation].) Failing to cease questioning after invocation can indicate coerciveness. (*Michigan v. Harvey* (1990) 494 U.S. 344, 350; *Cooper v. Dupnik* (9th Cir. 1992) 963 F.2d 1220, 1243 (en banc) [plan to question after invocation in order to impeach]; see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [listing "the lack of any advice to the accused of his constitutional rights" as a possible factor in the voluntariness analysis].) "However, just as a failure to give *Miranda* warnings does not in and of itself constitute coercion [citation], neither does continued interrogation after a defendant has invoked his right to counsel . . . inherently constitute coercion." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1039; accord, *People v. DePriest* (2007) 42 Cal.4th 1, 34-36 [though officer told defendant the statements could not be used in the "case-in-chief"]; *People v. Jablonski* (2006) 37 Cal.4th 774, 814, 815-816 [no coercion though repeated invocations]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58 [must show will was overborne]; *People v. Villasenor* (2015) 242 Cal.App.4th 42, 71-72 [no coercion though repeated invocations].)

An assertion on the record that the statement is voluntary is less likely to be seen as coerced. (*Hayes v. Washington* (1963) 373 U.S. 503, 512-513 [unless coercion clear from the record]; *People v. Belmontes* (1988) 45 Cal.3d 744. 772-774; *People v. Simpson* (1991) 2 Cal.App.4th 228; but see *People v. Denney* (1984) 152 Cal.App.3d 530, 546.)

Incommunicado. (*Darwin v. Connecticut* (1968) 391 U.S. 346 [48 hours despite request for attorney]; *Reck v. Pate* (1961) 367 U.S. 433, 439-440, fn. 3.) Justice Douglas once explained: "I was impressed with the need [to interpret a "criminal prosecution" to include police interrogations] on experiences in my various Russian journeys. In that nation detention incommunicado is the common practice, and the period of permissible detention now extends for nine months. Where there is custodial interrogation, it is clear that the critical stage of the trial takes place long before the courtroom formalities commence. That is apparent to one who attends criminal trials in Russia. Those that I viewed never put in issue the question of guilt; guilt was an issue resolved in the inner precincts of a prison under questioning by the police. The courtroom trial concerned only the issue of punishment." (*Coleman v. Alabama* (1970) 399 U.S. 1, 15-16 (conc. opn. of Douglas, J.).)

A statement obtained after a delay in arraignment does not make a statement involuntary unless there are also acts of coercion. (*People v. Guerra* (2006) 37 Cal.4th 1067,

1098 ["The delay in arraignment was not itself coercive."]; *People v. Turner* (1994) 8 Cal.4th 137, 167, disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) But a delay in presentment is unreasonable "where the delay is based solely on police efforts to investigate additional crimes in which the suspect might have participated." (*United States v. Davis* (8th Cir. 1999) 174 F.3d 941, 951; *Willis v. Chicago* (7th Cir. 1993) 999 F.2d 284, 289; accord *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1175-1176 [detained for 16 hours after DUI arrest without arraignment in order to question the defendant].) Thus, such a statement could be excluded as the fruit of an unreasonable detention. (*Jenkins,* at p. 1176.)

Promises to keep the conversation confidential can be a factor. (*People v. Quartermain* (1997) 16 Cal.4th 600, 618-622 [as part of the plea bargain]; see *Henry v. Kernan* (9th Cir. 1999) 197 F.3d 1021, 1027-1028 [promise not to use statement against defendant produced confused and incoherent admissions]; *United States v. Escamilla* (9th Cir. 1992) 975 F.2d 568 [exclusion of failed polygraph after plea agreement]; but see *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 59-60 [estoppel cannot be used to exclude statements from custodial interrogation after the cops said the statements would not be used against him]; *People v. Gurule* (2002) 28 Cal.4th 557, 604 [promise to keep conversation "just between us" was not a promise of confidentiality]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1133 [admissible for impeachment]; *People v. Samayoa* (1997) 15 Cal.4th 795, 829-830; *People v. Johnson* (1993) 6 Cal.4th 1, 26, 30-32 [defendant never said that off the record statement could not be used against him].)

Interrogation at school can be coercive. (*In re Elias V.* (2015) 237 Cal.App.4th 568, 582.)

Placing the defendant in handcuffs and putting him or her in the back of police car while discussing the crime was not coercive. (*People v. Holloway* (2004) 33 Cal.4th 96, 118-121; *United States v. Orso* (9th Cir. 2001) 266 F.3d 1030, 1039-1040 (en banc), overruled on other grounds as stated in *United States v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1161 and *United States v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1138 (dis. opn. of Berzon, J.).)

Telling the defendant of the charges or that he would be arrested was not coercive. (*People v. Hayes* (1985) 169 Cal.App.3d 898, 905-908.)

Police polygrapher's parental and empathetic questioning did not make questioning involuntary. (*Ortiz v. Uribe* (9th Cir. 2011) 671 F.3d 863, 869-870.)

Talking to the codefendant first is not coercive. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 98.)

If the defendant was subjected to a coercive interrogation and then re-interrogated, the taint from the first interrogation is a factor in determining whether the second interrogation is coercive. (*Missouri v. Seibert* (2004) 542 U.S. 600, 615-617 (plur. opn.); *id.* at pp. 621-622 (conc. opn. of Kennedy, J.); *Leyra v. Denno* (1954) 347 U.S. 556, 561; *People v. Neal* (2003) 31 Cal.4th 63, 80-82.) The California Supreme Court has recognized that "where—as a result of improper police conduct—an accused confesses, and subsequently makes another confession, it may be presumed the subsequent confession is the product of the first because of the psychological or practical disadvantages of having let the cat out of the bag by confessing." (*McWhorter, supra,* 47 Cal.4th at p. 359, internal quotation marks omitted.) The court has instructed that: " 'The degree of attenuation that suffices to dissipate the taint 'requires at least an intervening independent act by the defendant or a third party' to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality. [Citations.]" (*Id.* at p. 360.)

2. Physical or mental state of the defendant

The police interrogation exploiting the fact the defendant has been physically injured can be coercive. (*Mincey v. Arizona* (1976) 439 U.S. 385, 396-402 [in hospital and heavily medicated]; but see *People v. Perdomo* (2007) 147 Cal.App.4th 605, 616-619 [questioning defendant in hospital, recovering from surgery from injuries suffered four days before and under the influence of narcotics and sleeping medication, did not create coerced statements because defendant appeared alert and oriented and no longer on a respirator]; *United States v. Martin* (9th Cir. 1985) 781 F.2d 671, 673-674 [defendant on painkillers for back injury not a result of police conduct, so the confession was voluntary].)

Juvenile's age. (*Withorow v. Williams* (1993) 507 U.S. 680, 693; *Oregon v. Elstad* (1985) 470 U.S. 298, 312, fn. 3; *Fare v. Michael C.* (1979) 442 U.S. 707, 725; *In re Gault* (1967) 387 U.S. 1, 45; *Gallegos v. Colorado* (1962) 370 U.S. 549, 554; *Haley v. Ohio* (1948) 332 U.S. 596, 599-603; *People v. Neal* (2003) 31 Cal.4th 63, 84 [18 year old without experience, other factors]; *In re T.F.* (2017) 16 Cal.App.5th 202, 214-215 [15 year-old learning disabled, lack of sophistication, minimal experience with law enforcement, emotional, hour and a half interrogation in two small rooms, police convey the notion of a rock-solid belief in guilt and the repeated denials would fail]; *In re Elias V.* (2015) 237 Cal.App.4th 568, 578 [13 year-old and the Reid technique]; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 212-213]; *Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986, 1008-1009 (en banc) [sleep-deprived juvenile who lacked familiarity with criminal justice system, ineffective *Miranda* advisement, overnight interrogation]; *Crowe v. County of San Diego* (9th Cir. 2010) 593 F.3d 841, 866-867 [according to expert, interrogation of teenager amounted to emotional child abuse and rendered false confession involuntary]; but see *People v. Boyette* (2002) 29 Cal.4th 381, 412 [lack of evidence of coercion despite youth, lack of education, level of literacy, unfamiliarity with legal system]; *People v. Lewis* (2001) 26 Cal.4th 324, 384 [14 year old paranoid schizophrenic]; *People v. Thomas* (2012) 211

Cal.App.4th 987, 1010-1012 [holding 17 year-old beyond the six hours under Welf. & Inst. Code, § 207.1, subd. (d)(1)(B) and telling him 'we know you did it' not coercive]; *id.* at p. 1013 [15 year-old retarded minor].)

Intelligence and education. (*Fare v. Michael C.* (1979) 442 U.S. 707, 725; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 212-213 [unsophisticated 16 year old]; *In re T.F.* (2017) 16 Cal.App.5th 202, 214-215 [15 year-old learning disabled, lack of sophistication, minimal experience with law enforcement, emotional, hour and a half interrogation in two small rooms, police convey the notion of a rock-solid belief in guilt and that repeated denials would fail]; *United States v. Preston* (9th Cir. 2014) 751 F.3d 1008, 1016-1017, 1020-1027 (en banc) [though low IQ alone is not enough, police exploiting it made the confession involuntary]; *Rodriguez v. McDonald* (9th Cir. 2017) 872 F.3d 908, 924 [ADHD, IQ 70-75];see *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272 [discussing why youthfulness relevant in determining whether a minor is in custody for purposes of *Miranda*]; but see *People v. Richardson* (2008) 43 Cal.4th 959, 992-993 [falsely told retarded defendant his semen was found on the victim]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1398-1403 [voluntary though low intelligence, developmental disability, lack of experience with officers, in small windowless interrogation room]; *People v. Boyette* (2002) 29 Cal.4th 381, 412 [lack of evidence of coercion despite youth, lack of education, level of literacy, unfamiliarity with legal system];*In re Brian W.* (1981) 125 Cal.App.3d 590, 603 [low IQ]; *In re Norman H.* (1976) 64 Cal.App.3d 997, 1001 [15 year old boy with the IQ of 47 had the intelligence of a 7 or 8 year old, but statements were voluntary].)

Religious beliefs. (*Brewer v. Williams* (1977) 430 U.S. 391, 395 and *Williams v. Brewer* (S.D. Iowa 1974) 375 F.Supp. 170, 184-185[Christian burial speech]; *People v. Adams* (1983) 143 Cal.App.3d 970, 987, disapproved on other grounds in *People v. Hill* (2015) 3 Cal.4th 959, 995, fn. 3; but see *People v. Carrington* (2009) 47 Cal.4th 145, 176; *People v. Kelly* (1990) 51 Cal.3d 931, 953.)

Mental illness. (*Blackburn v. Alabama* (1960) 361 U.S. 199; but see *Colorado v. Connelly* (1986) 479 U.S. 157, 165 [mentally ill defendant confessed due to voices commanding him to do so]; *People v. Dykes* (2009) 46 Cal.4th 731, 753 [defendant felt psychologically vulnerable]; *People v. Rundle* (2008) 43 Cal.4th 76, 117-120 [threat to withhold psychological care was not the *cause* of the admission]; *People v. Smith* (2007) 40 Cal.4th 483, 502 [confession from defendant with history of psychological problems, sexual abuse, and brain damage and had been committed to institution not coerced because officer did not cause the mental problems]; *People v. Maury* (2003) 30 Cal.4th 342, 411 [statement voluntary though police had defendant talk to a police psychologist]; *People v. Lewis* (2001) 26 Cal.4th 334, 384 [14 year old paranoid schizophrenic]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1041 ["the Fifth Amendment is not 'concerned with moral and psychological pressures to confess emanating from sources other than official coercion' "].)

Drug or alcohol use can be a factor (*Greenwald v. Wisconsin* (1968) 390 U.S. 519; *Reck v. Pate* (1961) 367 U.S. 433, 441-442 [mentally disturbed, isolated without food and pain medication]) but insufficient by itself (*People v. Michaels* (2002) 28 Cal.4th 486, 511 [meth]; *People v. Weaver* (2001) 26 Cal.4th 876, 892 [medication]; *People v. Frye* (1998) 18 Cal.4th 894, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421 [*People v. Hernandez* (1988) 204 Cal.App.3d 639 [heroin withdrawal]; *People v. Loftis* (1984) 157 Cal.App.3d 229 [PCP]; *People v. Cartwright* (1979) 98 Cal.App.3d 369, 382-384 [.06 percent BAC]).

Prior experience with police. (*People v. Neal* (2003) 31 Cal.4th 63, 84 [18 year old without experience, other factors]; *In re T.F.* (2017) 16 Cal.App.5th 202, 214-215 [15 year-old learning disabled, lack of sophistication, minimal experience with law enforcement, emotional, hour and a half interrogation in two small rooms, police convey the notion of a rock-solid belief in guilt and that repeated denials would fail]; *People v. Vasila* (1995) 38 Cal.App.4th 876; *In re Shawn D.* (1993) 20 Cal.App.4th 200; *People v. Denny* (1984) 152 Cal.App.3d 530; *Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986, 1008-1015 (en banc) [juvenile who lacked familiarity with criminal justice system, ineffective *Miranda* advisement, overnight interrogation]; but see *People v. Leonard* (2007) 40 Cal.4th 1370, 1398-1403 [voluntary though low intelligence, developmental disability, lack of experience with officers, in small windowless interrogation room]; *People v. Boyette* (2002) 29 Cal.4th 381, 412 [lack of evidence of coercion despite youth, lack of education, level of literacy, unfamiliarity with legal system].)

3. Inducements

Physical violence or threat of violence. (*Arizona v. Fulminante* (1991) 499 U.S. 279 [credible threat of violence]; *Beecher v. Alabama* (1967) 389 U.S. 35, 36 [gun to defendant's head]; *Jackson v. Denno* (1964) 378 U.S. 368 [truth serum]; *Brown v. Mississippi* (1936) 297 U.S. 278, 286 [beat suspect with leather belts and mocked a lynching]; *People v. Berve* (1958) 51 Cal.2d 286, 292-293 [threats inducing jailhouse confession inadmissible]; *People v. McElheny* (1982) 137 Cal.App.3d 396, 402-403 [defendant beaten]; but see *People v. Williams* (2013) 56 Cal.4th 165, 185 [a threat in course of a jailhouse confession did not make the evidence inadmissible]; *In re Walker* (1974) 10 Cal.3d 764, 777 [force necessary for arrest not produce involuntary confession].)

Food or sleep deprivation. (*Greenwald v. Wisconsin* (1968) 390 U.S. 519 [cell with plank for bed woken early, no food, pain medication]; *Davis v. North Carolina* (1966) 384 U.S. 737,, 746 [two sandwiches a day for 16 days]; *Reck v. Pate* (1961) 367 U.S. 433, 441-442 [mentally disturbed, isolated without food and pain medication]; *Blackburn v. Alabama* (1960) 361 U.S. 199, 206 [8-9 hour interrogation in small room against mentally weak defendant]; *People v. Neal* (2003) 31 Cal.4th 63, 84; but see *People v. Storm* (2002) 28 Cal.4th 1007, 1035 [little sleep before arrest not the result of police conduct].)

Lies or tricks *if the subterfuge is likely to produce false statements* (*People v. Guerra* (2006) 37 Cal.4th 1067, 1096-1097; *People v. Felix* (1977) 72 Cal.App.3d 879, 886; *People v. Hogan* (1982) 31 Cal.3d 815, 840-841; *In re Elias V.* (2015) 237 Cal.App.4th 568, 584 [false evidence increases risk of false confessions]; see *Campos v. Stone* (N.D. Cal. 2016) 201 F. Supp.3d 1083, 1094-1099 [exhorting a defendant to tell the truth and fake DNA and fingerprint evidence scientifically proves he is lying was more likely to be coercive]).

The backlash. "[D]eception which produces a confession does not preclude admissibility of the confession unless the deception is of such a nature to produce an untrue statement" (*People v. Watkins* (1970) 6 Cal.App.3d 119, 125 [falsely claimed fingerprints were matched]; accord, *Illinois v. Perkins* (1990) 496 U.S. 272, 297 ["*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust."]). Subterfuge alone is seldom sufficient. (*People v. Thompson* (1990) 50 Cal.3d 134, 167 [officers repeatedly lied about evidence linking the defendant]; see, e.g., *Frazier v. Cupp* (1969) 394 U.S. 731, 737-739 [falsely said accomplice was captured and confessed]; *People v. Williams* (2010) 49 Cal.4th 405, 442-443 [telling defendant he would suffer the death penalty if he did not cooperate, used deception, expressed confidence in guilt and questioning only to confirm details, minimize defendant's responsibility, good cop/bad cop tactic]; *People v. Richardson* (2008) 43 Cal.4th 959, 992-993 [falsely telling retarded defendant his semen was found on the victim]; *People v. Smith* (2007) 40 Cal.4th 483, 506 [telling mentally ill defendant he tested positive for gunshot residue in the "Neutron Proton Negligence Intelligence Test"]; *People v. Farnam* (2002) 28 Cal.4th 107, 182 [falsely claimed matched his fingerprints]; *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280 and cases cited therein [officer told suspected molester he was looking into placement for children]; *People v. Parrison* (1992) 137 Cal.App.3d 529, 537 [police falsely told suspect a gun residue test produced a positive result].) It is acceptable to request a polygraph and confront the defendant with the (false) results. (*Wyrick v. Fields* (1982) 459 U.S. 42, 47; but see *In re Elias V.* (2015) 237 Cal.App.4th 568, 584 [describing how "the lie detector ploy" is deceptive].)

Threat of increased punishment. (*Haynes v. Washington* (1963) 373 U.S. 503, 513-514; *Blackburn v. Alabama* (1960) 361 U.S. 199, 206; *People v. Neal* (2003) 31 Cal.4th 63, 84-85; *People v. McClary* (1977) 20 Cal.3d 218, 229, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510 [threat to take legal action because defendant allegedly was lying]; *People v. Brommel* (1961) 56 Cal.2d 629, 632-634, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510 [threat to take legal action because defendant allegedly was lying]; *People v. Denney* (1984) 152 Cal.App.3d 530 [threatened the death penalty when defendant invoked]; *Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 417.) Once upon a time the Supreme Court said " 'a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.… A confession can never be received in evidence where

the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.' " (*Bram v. United States* (1897) 168 U.S. 532, 542-543.)

The backlash. "Although the Court noted in *Bram* that a confession cannot be obtained by 'any direct or implied promises, however slight, nor by the exertion of any improper influence,' it is clear that this passage from *Bram,* which under current precedent does not state the standard for determining the voluntariness of a confession. . . ." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 285; see also *People v. Winbush* (2017) 2 Cal.5th 402, 452-454 [mentioning the death penalty to a young and uneducated defendant not coercive]; *People v. Williams* (2010) 49 Cal.4th 405, 441-445 [telling defendant was a capital case when was, used deception, expressed confidence in guilt and questioning only to confirm details, minimize defendant's responsibility, good cop/bad cop tactic]; *People v. McWhorter* (2009) 47 Cal.4th 318, 347-348 [telling defendant that he is dragging his family into the case by using them as his false alibis was not a threat]; *People v. Holloway* (2004) 33 Cal.4th 96, 115-116 [telling defendant it could be a capital case was acceptable].)

Promise of leniency. (*People v. McWhorter* (2009) 47 Cal.4th 318, 358 [promising to free family members would coerce a confession]; *People v. Boyde* (1988) 46 Cal.3d 212, 238 [the officer's intention to fulfill the promise is irrelevant]; *People v. Jimenez* (1978) 21 Cal.3d 595, 611 ["It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied."]; *Rodriguez v. McDonald* (9th Cir. 2017) 872 F.3d 908, 924 [would be charged with murder unless he spoke with officers].) "The distinction that is to be drawn between permissible police conduct on the one hand and conduct deemed to have induced an involuntary statement on the other 'does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth as represented by the police.' [Citation.] Thus, '[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, '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. …' [Citations.]" (*Jimenez, supra*, at pp. 611–612.)

The backlash. *Bobby v. Dixon* (2011) 565 U.S. 26, 28 (per curiam) [urging the defendant to "cut a deal" before the codefendant confesses]; *People v. Jones* (2017) 7 Cal.App.5th 787, 1812-1815 [telling 16 year-old could do time in juvenile hall and should clear his name, falsely allege there evidence linking his father which could lead to "serious time" did not coerce the incriminating statements]; *People v. McCurdy* (2014) 59 Cal.4th

1063, 1088 ["we're here to help you" and "our motivation is not to give you grief or punishment" not coercive]; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1249, 1251 [saying it was in his best interest to cooperate was not coercive]; *People v. Linton* (2013) 56 Cal.4th 1146, 1176-1179 [promised would not get in trouble for admitting sexual interest in the murdered child]; *People v. Scott* (2011) 52 Cal.4th 452, 478-481 [incriminating statements was not caused by the alleged inducements]; *People v. Carrington* (2009) 47 Cal.4th 145, 170-171 [officer telling defendant the killing could have been an accident or self-defense would not coerce a confession, and did not when the defendant did not make admissions until an hour later]; *id.* at pp. 171-176 [telling defendant it would not make a difference to confess to a second murder]; *People v. Davis* (2009) 46 Cal.4th 539, 600-601 [telling murder defendant to confess to the sex crimes because it would not make a difference]; *People v. Jones* (1998) 17 Cal.4th 279, 297 [promise to tell DA defendant was truthful]; *People v. Ray* (1996) 13 Cal.4th 313, 340 [telling defendant it could be a capital case]; *People v. Clark* (1993) 5 Cal.4th 950, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421 [officer said defendant would get 7 years in a capital case was an innocent underestimation]; *People v. Jiminez* (1978) 21 Cal.3d 595, 611 [telling defendant would advise the jury he was cooperative was acceptable]; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1212 ["we are here to listen and help you out" was not a promise of leniency]; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1203-1204 [saying cooperation would be beneficial but it was up to the district attorney]; *People v. Higareda* (1994) 24 Cal.App.4th 1399 [promise to talk to DA not coercive]; *People v. Simpson* (1992) 2 Cal.App.4th 228 [that codefendant was more responsible]; *In re Anthony J.* (1980) 107 Cal.App.3d 962, 971 ["we'll tell the DA you cooperate" was not a promise]; *Ortiz v. Uribe* (9th Cir. 2011) 671 F.3d 863, 871 [telling defendant wished to clear him]; *United States v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 959-963 [feds arranged with Indian tribe to arrest defendant, hold him for several days without hearing, and interrogate him by telling him things would go better if cooperative, then charged him with capital murder]; *Leon-Guerrero* (9th Cir. 1988) 847 F.2d 1363, 1366 [would report defendant as cooperative].) It is acceptable to tell the defendant of the natural consequences flowing from the confession. (*People v. Jones* (1998) 17 Cal.4th 279, 297 ['truth will set you free,' truthful statements that cooperation could be useful in plea negotiations and exhortation to tell the truth]; *People v. Williams* (1997) 16 Cal.4th 635, 660-661; *People v. Vasila* (1995) 35 Cal.App.4th 805, 874; *People v. Seaton* (1983) 146 Cal.App.3d 67, 74 [commenting on the realities of the situation].

Threats concerning friends or family. (*Lynumn v. Illinois* (1963) 372 U.S. 528 [would end welfare and put children in foster homes]; *In re Cook* (2003) 30 Cal.4th 974, 999 [defense investigator coerced retractions]; *People v. Haydel* (1978) 12 Cal.3d 190 [threat to arrest wife and children]; *People v. Trout* (1960) 64 Cal.2d 576 [used girlfriend to implore defendant]; *In re Shawn D.* (1993) 20 Cal.App.4th 200 [threat to arrest pregnant girlfriend]; *People v. Howard* (1988) 44 Cal.3d 375, 395-396 [defendant confessed after his son and girlfriend were interrogated and officers said they were not interested in them if he

confessed]; but see *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1401-1401-1405 [officer telling defendant to talk because pregnant girlfriend would otherwise be liable did not coerce the statements]; *People v. Jackson* (1971) 19 Cal.App.3d 95, 99-101 [confession to free girlfriend not coerced when there was probable cause to arrest her].)

Threat to prolong the interrogation. (*Davis v. North Carolina* (1966) 384 U.S. 737, 744-746 [isolated defendant until confessed]; *People v. Vasila* (1995) 38 Cal.App.4th 865 [will be released if talk; otherwise will be in custody for 12 to 24 hours without ability to call in order to post bail]; *People v. Azure* (1986) 178 Cal.App.3d 591 ["we're not leaving until you remember"]; *Rodriguez v. McDonald* (9th Cir. 2017) 872 F.3d 908, 924-925 [continued questioning after an invocation].)

G. The Revival

➤ *Dickerson v. United States* (2000) 530 U.S. 429

The Supreme Court declined to overturn or limit *Miranda*, with Justices Scalia and Thomas dissenting. The source of the controversy was the description during the backlash that *Miranda* warnings were "prophylactic" (*New York v. Quarles* (1984) 457 U.S. 649, 653) and "not themselves rights protected by the Constitution" (*Michigan v. Tucher* (1974) 417 U.S. 433, 444). The Court made clear that *Miranda* is based on the United States Constitution and is binding on the states. (*Dickerson*, at pp. 441-442.)

➤ *J.D.B. v. North Carolina* (2011) 564 U.S. 261

Although the determination of whether one is in custody under *Miranda* is an objective test – whether a reasonable person would be feel free to go – the child's age is a factor in determining whether the defendant is in custody. (*Id.* at p. 277.) "A child's age is far 'more than a chronological fact.' [Citations.] It is a fact that 'generates commonsense conclusions about behavior and perception.' [Citation.] Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge. [¶] Time and again, this Court has drawn these commonsense conclusions for itself. We have 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, [citation]; and so on. [Citation.] Addressing the specific context of police interrogation, we have observed that events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.' [Citations.] Describing no one child in particular, these observations restate what 'any parent knows'—indeed, what any person knows—about children generally. [Citation.]" (*Id.* at p. 272.)

While this case concerns a minor, similar arguments can be made about young adults, one can also draw from cases holding that life sentences for juvenile offenders is cruel and unusual punishment. The cases discuss how the part of the brain responsible for executive functioning is not fully developed until around the age of 25, causing the youth to not fully appreciate the seriousness or consequences of his or her actions. (See *Miller v. Alabama* (2012) 567 U.S. 460, 471-473, citing *Graham v. Florida* (2010) 560 U.S. 48, 68-71 and *Roper v. Simmons* (2005) 543 U.S. 551, 569-570; *People v. Caballero* (2012) 55 Cal.4th 262, 268-269.)

➤ *People v. Neal* (2003) 31 Cal.4th 63

During an interrogation, the defendant invoked his right to remain silent. The officer ignored the invocation and continued the interrogation so that the remainder of the interview could be used to impeach the defendant should he testify. (See *People v. Peevy* (1998) 17 Cal.4th 1184, 1193-1194.) The officer not only ignored the youth's nine invocations of the right to silence but also badgered him, saying this was his only opportunity to clear himself and otherwise "the system is going to stick it to you." (*Neal,* at p. 68.) He still made no admission. Until he reached out and contacted the officers the following days. (*Ibid.*) The court held the subsequent admissions were involuntary. (*Id.* at pp. 68-69, 81-85.)

➤ *People v. Elizalde* (2015) 61 Cal.4th 523

This case concerned asking defendants when they are being booked about gang ties, which is used in court for proving gang allegations. The California Supreme Court had once held in *People v. Rucker* (1980) 26 Cal.3d 368 that officers can ask booking questions, but they could not be admitted in court unless there had been a *Miranda* warning. This rule was abrogated by Proposition 8. However, the rule was effectively reinstated in this situation. The court held that booking officers asking about gang ties amounted to an interrogation under *Rhode Island v. Innis* (1980) 446 U.S. 291. Though booking officers can ask the questions, the answers were inadmissible in the prosecution's case-in-chief unless there had been a *Miranda* warning. (*Elizalde*, at pp. 534-540.) Julie Dunger points out there can be an argument that the statement is involuntary and should be excluded even for impeachment purposes because the defendant faces being housed with those who would attack him if he does not answer in a manner acceptable to the officers. (See *Washington v. DeLoen* (Wash. 2016) 185 Wn.2d 478, 487-488 [374 P.3d 95, 99].)

➤ *In re Elias V.* (2015) 237 Cal.App.4th 568

This is a good case for describing coercive police interrogation techniques in general, and how easily juveniles specifically are coerced. The court held the 13 year-old minor's confession was coerced. (*Id.* at pp. 582-586.) He was accused of lewd conduct on another minor. He was interrogated by a detective in a school room for 20 to 30 minutes. (*Id.* at p.

574.) The court pointed out "an 'interrogation' is significantly different from an 'interview.' An interrogation is an accusatory process involving active persuasion. An interview is a non-accusatory investigative tool designed to gather information and normally precedes an interrogation." (*Id.* at p. 574, fn. 4.)

> The danger of false confessions is real. Studies conducted after *Miranda* was decided estimate that between 42 and 55 percent of suspects confess in response to a custodial interrogation. (Kassin & Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psych Sci. in the Public Interest 33, 44.)[fn.] Estimates of false confessions as the leading cause of error in wrongful convictions range from 14 to 25 percent, and as will be discussed . . . , a disproportionate number of false confession cases involve juveniles. Recent research has shown that more than one-third (35 percent) of proven false confessions were obtained from suspects under the age of 18. (Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* (2004) 82 N.C.L.Rev. 891, 902, 944-945, fn. 5 (*False Confessions*).) Since *Miranda*, the Supreme Court has continued to express concern about false confessions. In *Corley v. United States* (2009) 556 U.S. 303, 320–321, the court observed again that " '[c]ustodial police interrogation, by its very nature, isolates and pressures the individual,' [citation], and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed … ." (*Ibid*.) Even more recently, the court indicated that its long-standing concern about false confessions may be most acute in cases involving the police interrogation of juveniles, particularly adolescents. (*J. D. B. v. North Carolina* (2011) 564 U.S. 261, ___ [131 S.Ct. 2394, 2401].) An extensive body of literature demonstrates that juveniles are "more suggestible than adults, may easily be influenced by questioning from authority figures, and may provide inaccurate reports when questioned in a leading, repeated, and suggestive fashion" (Meyer & Reppucci, Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility (2007) 25 Behav. Sci. & L. 757, 763; see Ceci & Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis (1993) vol. 113, No. 3 Psychol. Bull. 403–409; Note, Questioning the Reliability of Children's Testimony: An Examination of the Problematic Elements (1995) 19 Law & Psychol. Rev. 203–215; Owen-Kostelnick et al., Testimony and Interrogation of Minors: Assumptions About Maturity and Morality (2006) vol. 61, No. 4 Am. Psychologist 286–304), and that "juveniles aged fifteen and younger have deficits in their legal understanding, knowledge, and decision-making capabilities." (Redlich, The Susceptibility of Juveniles to False Confessions and False Guilty Pleas (2010) 62 Rutgers L.Rev. 943, 952 (Susceptibility of Juveniles); see Viljoen et al., Legal Decisions of Preadolescent and Adolescent Defendants: Predictors

> of Confessions, Pleas, Communication with Attorneys, and Appeals (2005) 29(3) Law & Hum. Behav. 253; Note, No Match for the Police: An Analysis of Miranda's Problematic Application to Juvenile Defendants (2011) 38 Hastings Const. L.Q. 1053, 1066–1069 (No Match).)

(*Id.* at pp. 577-578; see also id. at p. 587.)

The court also made clear California police officers are trained to conduct interrogations using methods described in *Miranda*, including the Reid technique. (*Id.* at p. 579, fn. 7.) It explained what the Reid technique is 50 years after *Miranda*:

> Behavioral scientists who study interrogation techniques and their effects have concisely described the Reid Technique as follows: "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 & Human Behav. 3, 7 (*Police-Induced Confessions*).)[fn. 8] According to these authors, the purpose of interrogation is "not to discern the truth, determine if the suspect committed the crime, or evaluate his or her denials. Rather, police are trained to interrogate only those suspects whose culpability they 'establish' on the basis of their initial investigation." (*Police-Induced Confessions*, at p. 6.)

(*Id.* at pp. 579-580.)

> "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." (*Mourning Miranda, supra,* 96 Cal. L.Rev. at pp. 1532-1533, fns. omitted.)

(*Id.* at p. 580, fn. 8.) The court recited passages in *Miranda* about the interrogation technique. (*Id.* at p. 581-582.) "[T]he most recent edition of the Reid manual on interrogations notes that . . . '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.' [Citation.]" (*Id.* at p. 588.) "The developing consensus about the dangers of interrogation has resulted from the growing number of studies showing that the risk interrogation will produce a false confession is significantly greater for juveniles than for adults; indeed, juveniles usually account for one-third of proven false confession cases." (*Ibid.*)

The court pointed out that the authors of the Reid manual state it should not be used for interrogating minors because it could lead to involuntary confessions. (*Id.* at p. 578.) It described offering two scenarios, one less morally objectionable, but both incriminating as a factor that leans toward making a statement involuntary. (*Id.* at pp. 584-586.)

The court also observed "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 (Police Interrogation of Juveniles).) [¶] False evidence, . . . was used in many cases in this country in which defendants subsequently exonerated by DNA evidence were wrongfully convicted based upon confessions." (*Id.* at p. 584; see also id. at pp. 593-594.)

The officer's "threat to subject Elias against his will to a lie detector test that would definitively reveal the falsity of his denials—referred to in the literature as 'the lie detector

ploy'—is among the most common interrogation techniques that result in false confessions. (See, e.g., Lykken, A Tremor in the Blood: Uses and Abuses of the Lie Detector (1981); Decision to Confess Falsely, supra, 74 Denv.U. L.Rev. at pp. 1036–1041.)" (*Id.* at p. 584.) The court then discussed the minor offered no details that the officers did not suggest in the interrogation, and this indicates the confession was probably fabricated. (*Id.* at pp. 592-593.)

➤ *In re T.F.* (2017) 16 Cal.App.5th 202

The 15 year-old minor allegedly committed lewd acts on another minor. The juvenile court suppressed his pre-*Miranda* statements made at school to two detectives in an hour-long interrogation but admitted the post-*Miranda* statements at the police station. (*Id.* at pp. 205-206.) The court of appeal rendered two conclusions.

First, the court decided the minor did not knowingly and intelligently waive his *Miranda* rights due to his young age, learning disability, lack of experience in the criminal justice system, and the manner the detectives advised him of his rights. (*Id.* at p. 212.) The detective began the second interrogation by stating "I'm going to read this before we talk," read the *Miranda* rights, and then immediately asked about an unrelated warrant. (*Id.* at pp. 211-212.) The minor's reaction was to be confused, and the detective then returned to asking about the allegations. (*Id.* at p. 212.) "Although an express waiver is not required where a suspect's actions make clear that a waiver is intended [citation], here, T.F.'s actions did not clearly show that he was fully aware of 'the nature of the right being abandoned and the consequences of the decision to abandon it.' " (*Ibid.*)

Second, the court decided the minor's statements were coerced, noting the detectives used the same techniques described in *Elias V.* (2015) 237 Cal.App.4th 568. (*Id.* at p. 215.) "[T]he aggressive nature and persistence of Hewitt's questioning was designed to create a sense of hopelessness." (*Id.* at p. 216.) The "accusatory interrogation was dominating, unyielding, and intimidating. These overbearing tactics, combined with T.F.'s youth, which rendered him most susceptible to influence, [citation], and outside pressures" contributed to the coercive nature of the interrogation. (*Id.* at p. 218, internal quotation marks omitted.) "Contrary to the juvenile court's view that Hewitt did not 'threaten[], trick[], or cajole[]' T.F. into giving a statement, his pervasive use of maximization and minimization techniques, combined with his unrelenting exhortations to be honest and tell him what happened are precisely the things that could overwhelm an adolescent such as T.F. and induce him to incriminate himself." (*Id.* at p. 219.)

➤ *People v. Bejasa* (2012) 205 Cal.App.4th 26

Appellant was in an automobile collision that seriously injured his passenger. He admitted being on parole. Officers searched him and found syringes. He admitted using methamphetamine. He was handcuffed, placed in the back of the police car, and told that

he was being detained for a possible parole violation. He was later taken out of the police car, unhandcuffed, and asked questions about the accident and his drug use. He was directed to conduct field sobriety tests. (*Id.* at pp. 30-31.) The court held he was in custody during questioning in violation of *Miranda*. (*Id.* at p. 37.) Distinguishing *Berkemer v. McCarty* (1984) 468 U.S. 420 (a roadside detention is not custodial under *Miranda*), the court said: "This was not a typical traffic stop. Defendant was handcuffed and placed in the back of a police car before [the interrogating officer] arrived. A reasonable person in that situation would feel completely at the mercy of the police." (*Id.* at p. 38.) The court also said that while placing him in the back of the police car might not transform a detention to an arrest under the Fourth Amendment, it was part of what made the encounter custodial under *Miranda*. (*Ibid.*)

➤ *People v. Saldana* (2018) 19 Cal.App.5th 432

A 58 year-old immigrant with a sixth grade education and no criminal record was accused of lewd conduct with three girls. The defendant agreed to go to the police department, was told he was not under arrest, and confessed after being interrogated. Since he was told he was not under arrest, they let him leave but arrested him after he was about a block from the police station. (*Id.* at pp. 436-437) Because he was purportedly not under arrest, he was not told his *Miranda* rights.

Citing *Elias V., supr*a, 237 Cal.App.4th 568, the court noted that "[f]or about 40 minutes, the detective utilized classic interrogation techniques designed to convey two things. The first is the interrogator's rock-solid belief the suspect is guilty and 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." ' [Citation.] The second is to provide the suspect with moral justification and face-saving excuses for having committed the crime, a tactic that ' "communicates by implication that leniency in punishment is forthcoming upon confession." ' [Citation]." (*Id.* at p. 437.) The court tracked the progress of the interrogation from minimizing the importance of the interrogation (we "just want the truth" and "Sometimes we make mistakes"), to accusatory questioning, to "offered a 'false choice'—alternative explanations for improperly touching the girls—something that seems to be morally less offensive," to more accusatory questioning with false evidence, back to offering an apparently less culpable scenario, leading to the confession. (*Id.* at pp. 443-448.)

The court conceded "[i]t is appropriate for police to use these interrogation techniques." (*Id.* at p. 438.) It instead reversed because the defendant was not *Mirandized*, holding that using full-blown interrogation techniques at a police station amounted to custody under *Miranda*, even if he were not arrested under the Fourth Amendment. "[W]hen police create an atmosphere equivalent to that of formal arrest by questioning a suspect who

is isolated behind closed doors in a police station interrogation room, by repeatedly confronting him with the evidence against him, repeatedly dismissing his denials, and telling him at the outset he is free to leave—when all the objective circumstances later are to the contrary—*Miranda* is triggered." (*Id.* at p. 438.)

➤ *In re I,F*, (2018) 20 Cal.App.5th 735

The 12 year-old minor was accused of murdering his eight year-old sister. The minor told the 911 operator an Hispanic man broke into the house and stabbed his sister. The sister was transported to the hospital, but she died before arriving. A deputy sheriff interviewed the minor in a vestibule that led from the ambulance bay to the hospital with only the minor's father present. The minor explained what happened, ending with the officer asking the minor if he had harmed his sister, which he denied. Later that day, the father took the minor to the district attorneys office for an hour-long interview with the officer. Two days later, the father took the minor to the district attorneys office for another interview with two officers. The father instructed the minor to answer the questions. About 42 minutes into the interview, the officers confronted the minor with alleged DNA evidence tying him to the crime and perceived inconsistencies. There was a fourth interview at the district attorneys office a couple of weeks later. This one included an FBI agent, lasted more than two hours, and included the father telling the minor it looks bad for him and he should answer the questions, which led to the minor's confession.

Appellate counsel argued the officers employed the Reid interrogation technique from the beginning and claimed the interviews were custodial in nature and without a *Miranda* warning. The court of appeal disagreed that the first two interviews were accusatory but agreed the latter two were. It spent a considerable amount of time discussing the father's role in the process. He was the one who kept taking the minor to the interviews and instructing him to answer the questions. The court noted that while parents can be helpful for their children, some provide bad advice because of naivete or a sense of civil duty. In this case, there was a real problem with the father having a conflict of interest, as his daughter had been murdered and he had a strong motive to learn why. While the father voluntarily took the minor to the interviews, the court could perceive how the minor would not feel he had a choice or the freedom to leave on his own accord. Nonetheless, the court refused to hold that a parent with a conflict of interest created a coercive environment by itself. Instead, it was one factor to consider. The court did conclude the father acted as a police agent in the fourth interview. It decided the last two interrogations were custodial in nature and should have been excluded because there was no *Miranda* warning.

➤ *People v. Perez* (2016) 243 Cal.App.4th 863

Defendant was charged with murder. (*Id.* at p. 867.) "During his interview with Detective Flagg and Sergeant Banasiak, Perez denied any knowledge of the murder for

approximately 25 minutes, until Sergeant Banasiak told him that if he were to 'tell the truth and be honest,' then '*we are not gonna charge you with anything*.' (Italics added.) Sergeant Banasiak then told Perez that he was either a 'suspect that we are gonna prosecute,' or a 'witness.' The sergeant emphasized that he was giving Perez his 'word,' and that Perez could have his 'life' if he were to cooperate. Immediately after Banasiak made these statements, Perez responded that he 'd[id] have some information,' and proceeded to confess his involvement in the crimes. In light of these facts, there can be no doubt that Sergeant Banasiak made an express promise of leniency that was a motivating cause of Perez's confession. Accordingly, the confession must be suppressed." (*Id.* at p. 876.)

➤ *In re Shawn D.* (1993) 20 Cal.App.4th 200

An older Sixth District case finding the statements of the 16 year-old minor to be coerced. He was found to have committed a burglary and committed to CYA. In a recorded three-hour interrogation, the minor initially denied wrongdoing. The officer threatened to prosecute his girlfriend; they said they knew the minor was guilty and was lying, offered to state in the police report he was cooperative and to talk with the DA, and implied he could face a more serious disposition unless he explained his actions (*Id.* at pp. 212-215.) The court held the statements were involuntary.

➤ *Collazzo v. Estelle* (9th Cir. 1991) 940 F.2d 411 (en banc)

The defendant was interrogated by the San Jose Police Department and convicted of murder. The Court of Appeal affirmed. The Ninth Circuit granted relief on habeas corpus. The issue was that when the defendant said during the interrogation, "Oh, you know, ah, can I, you know, talk to a lawyer?" the officer replied: "It's up to you. This is your last chance to talk with us though. [¶] . . . [¶] Then it might be worse for you." (*Id.* at p. 414.) The officers, however, stopped the interrogation. The defendant requested to talk with the officers a few hours later and confessed after another *Miranda* warning. (*Ibid.*) The court of appeals concluded the officer's statements "were coercive. His words were calculated to pressure Collazo into changing his mind about remaining silent, and into talking without counsel to his interrogators." (*Id.* at pp. 416-418.) The court concluded that Collazzo's subsequent "request" to speak to the officers was caused by the coercion. (*Id.* at pp. 420-423.)

➤ *Crowe v. County of San Diego* (9th Cir. 2010) 593 F.3d 841

Three teenagers, 14 to 15 years old, were interrogated and convicted of murdering Crowe's 12 year-old sister. After serving time in prison, DNA tests showed the girl was murdered by a neighborhood transient, whom the family had suspected from the beginning. One expert witness described the interrogation as " 'the most extreme form of emotional child abuse that I have ever observed in my nearly forty years of observing and working with

children and adolescents.' " (*Id.* at p. 866.) The court stated the boys "were isolated and subjected to hours and hours of interrogation during which they were cajoled, threatened, lied to, and relentlessly pressured by teams of police officers. 'Psychological torture' is not an inapt description. (*Id.* at p. 867.) The details of the interrogation were described. (*Id.* at pp. 854-860.)

➤ *Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986 (en banc)

A 17 year-old was charged with murdering nine people, including monks in a Buddhist temple. (*Id.* at p. 990.) In advising Doody of his *Miranda* rights, the officers implied the warning was just a formality, repeatedly re-assured him they did not necessarily suspect he did anything wrong, and modified the right to attorney advisement to apply if he had been involved in a crime, which made it sound that invoking the right to counsel would amount to admitting guilt. There was thus no voluntary waiver of the rights under *Miranda*. (*Id.* at pp. 1002-1003.)

Further, the court held the confession was involuntary. "We can readily discern from the audiotapes an extraordinarily lengthy interrogation of a sleep-deprived and unresponsive juvenile under relentless questioning for nearly thirteen hours by a tag team of detectives, without the presence of an attorney, and without the protections of proper *Miranda* warnings. The intensive and lengthy questioning was compounded by Doody's lack of prior involvement in the criminal justice system, his lack of familiarity with the concept of *Miranda* warnings, and the staging of his questioning in a straight-back chair, without even a table to lean on. (*Id.* at p. 1009.) It found the state court's decision to the contrary was unreasonable because, among other things, the state court considered each factor individually instead of looking at the totality of the circumstances. (*Id.* at p. 1015.)

➤ *United States v. Preston* (9th Cir. 2014) 751 F.3d 1008 (en banc)

An 18 year-old youth with the IQ of 65 was charged with molestation. The court noted someone with such an intellectual impairment was more likely to be distressed for not knowing the answers or understanding the questions, more easily confused, and more eager to please, and thus more suggestible and easier to manipulate. (*Id.* at pp. 1021-1022.) He was interrogated in his home. The court said whether one was in custody was just one factor in determining voluntariness of the statement. (*Id.* at p. 1023.)

The court then described how the officers' interrogation followed the Reid technique, such as providing two different scenarios, both equally incriminating, but one apparently less blameworthy. (*Id.* at p. 1024.) "The manual, however, suggests that the inculpatory alternatives technique recommended may be unduly coercive when used for suspects of seriously impaired mental ability: it trains agents in the alternative questioning method with the understanding that 'no innocent suspect, *with normal intelligence and mental capacity*,

would acknowledge committing a crime merely because the investigation contrasted a less desirable circumstance to a more desirable one and encouraged the suspect to accept it.' Reid manual, *supra*, at 303 (emphasis added)." (*Ibid.*)

"A second questioning technique the officers used with Preston was repeated pressure to change answers inconsistent with guilt and adopt answers evidencing guilt instead. Repeatedly rejecting Preston's denials or equivocations, [Officers] Kraus and Secatero asked him the same questions over and over until he finally assented and adopted the details that the officers posited. Such acquiescence and willingness to 'shift' answers in response to interrogative pressure is common for the intellectually disabled, who, when presented with leading or suggestive questions, 'frequently seek to conform to the perceived desires of the interrogator.' [Citation.]" (*Id.* at p. 1024.)

"Identifying a third technique that the officers used, . . . there were a number of times during the officers' interrogation of Preston that the desired response was embedded in the question." (*Id.* at p. 1024, internal quotation marks omitted.)

The officers also suggested leniency for confessing and said the letter of apology would not be sent to the prosecutor, which the court found to be coercive in itself. (*Id.* at p. 1026.) The Reid manual "also cautions that when questioning people of low intelligence, investigators should avoid offering promises of leniency or using deceptive interrogation techniques due to the vulnerability of this group." (*Ibid.*)

➤ *Sessoms v. Grounds* (9th Cir. 2015) 776 F.3d 615 (en banc)

A naive and relatively uneducated 19 year-old turned himself in, following his father's advice. His father also told him to ask for a lawyer before talking to the police. (*Id.* at p. 617.) At the beginning of the interrogation, he was being *Mirandized*. When the officer said he had a right to an attorney, he said " 'Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer.' " (*Id.* at pp. 617-618.) "Instead of immediately ceasing the interrogation, the detectives carried on, convinced Sessoms that his accomplices had already told them what had happened, and impressed upon Sessoms that the only way to tell his side of the story was to speak to the officers then and there, without an attorney. Only after talking with him, softening him up, and warning him about the various 'risks' of speaking with counsel did the detectives read Sessoms his rights . . . . " (*Id.* at p. 618.) He confessed, was convicted of murder, and sentenced to LWOP. The California Court of Appeal decided he did not make an unequivocal invocation of the right to counsel. (*Ibid.*) The Ninth Circuit held the state court's decision was unreasonable, stating tersely "[t]he only reasonable interpretation of 'give me a lawyer' is that Sessoms was asking for a lawyer. What more was Sessoms required to say?" (*Id.* at p. 627.)

In a dissent, Judge Kozinski thought the state court decision was reasonable, but he was not troubled with the outcome of the case. "If the State of California can't convict and sentence [defendant] without sharp police tactics, it doesn't deserve to keep him behind bars for the rest of his life. I have seen far too many cases where police extract inculpatory statements from suspects they believe to be guilty, then stop looking for evidence, confident that the courts will uphold the interrogation, no matter how tainted. [Citations.] This can lead to wrongful convictions, as innocent interrogation subjects confess with surprising frequency. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3, 3–5 (2009); Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 88–89 (2008). When courts bend over backwards to salvage evidence extracted by questionable methods, they encourage police to take such shortcuts rather than doing the arduous legwork required to obtain hard evidence." (*Id.* at pp. 631-632 (dis. opn. of Kozinski, J.).)

➤ *Rodriguez v. McDonald* (9th Cir. 2017) 872 F.3d 908

14 year-old with an IQ of 70 or 75 was found guilty in adult court in California of first degree murder. In the interrogation, he invoked the right to counsel, but the officer said the defendant could be imprisoned for life or up his 25th birthday, depending if he could straighten things out now. (*Id.* at pp. 923-924.) The court held "[t]his is precisely the type of threat that we have held makes a subsequent reinitiation of interrogation involuntary." (*Id.* at p. 924, citing *Collazo, supra*.)

➤ *Campos v. Stone* (N.D. Cal. 2016) 201 F. Supp.3d 1083

The defendant was convicted of molesting a child at his wife's daycare center. He was convicted after confessing. The Sixth District Court of Appeal decided his statements were voluntary. The United States District Court determined the state court's decision was unreasonable. (*Id.* at p. 1087.)

The defendant was an immigrant from Latin America, spoke little English, had little education, and had no criminal record. "The investigators, in their attempt to get Campos to confess, performed fake fingerprint and DNA tests on him. They insisted repeatedly and forcefully, but falsely, that the fake tests demonstrated to a certainty that Campos had touched the child's genitals. When Campos continued trying to deny ever touching the child's genitals or molesting her in any way, the investigators repeatedly interrupted him and insisted that this could not possibly be the truth in light of the fingerprint and DNA evidence. They yelled 'no, no, no!', insisted their evidence 'doesn't lie,' and said things like: 'Okay, so you're lying to us. You have to tell us the truth.' They emphasized that if Campos continued to deny the 'truth' of the fingerprint and DNA evidence, the District Attorney would not like it. Accordingly, the investigators repeatedly and forcefully exhorted Campos to at least allow for the possibility that his hand might have touched the victim's genitals

accidentally. They refused to accept any statement from Campos that did not allow for this possibility. [¶] Perhaps a more sophisticated person would have continued to insist he never touched the victim's genitals, either accidentally or on purpose. But Campos had a third grade education from Mexico. He had no prior experience with the criminal justice system, and clearly had difficulty understanding the evidentiary concepts the officers introduced to him. It's no wonder, in light of the officers' exhortations, that Campos eventually felt compelled to allow for the possibility of an accidental touching. Many people in the same position would react this way — particularly people as unsophisticated as Campos — whether they were guilty or innocent. [¶] . . . [¶] At trial, during closing argument, the prosecutor made effective use of Campos' statements, insisting that no innocent person would ever have allowed for the possibility of even an accidental touching. And the jury convicted Campos of some counts, likely in reliance on Campos' statements and on the prosecutor's assertions about those statements." (*Id.* at p. 1087.)

"It also bears noting that the officers used interrogation methods apparently influenced by the 'Reid technique.' [Citation.] The Reid technique 'is designed to get suspects to incriminate themselves by increasing the anxiety associated with denial and minimizing the perceived consequences of confession.' Saul M. Kassin, On the Psychology of Confessions: Does Innocence Put Innocents at Risk?, 60:3 Am. Psychologist 215, 219 (April 2005). The scientific community is coming to realize that the Reid technique has a strong tendency to elicit false confessions as well as true ones. See, e.g., Melissa B. Russano et al., Investigating True and False Confessions within a Novel Experimental Paradigm, 16:6 Psychological Science 481 (2005); see also Saul M. Kassin et al., Police-Induced Confessions: Risk Factors and Recommendations, 34:3 Law & Hum. Behavior 3 (2010); Welsh S. White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 HARV. C.R.-C.L. L. REV. 105, 119 (1997)." (*Id.* at p. 1098, fn. 4.)

The district court explained why the state court's decision was unreasonable. "[A]lthough the majority intoned the correct 'totality of the circumstances' standard for assessing the voluntariness of Campos' statement, as the dissenting justice observed, it appears the majority disassociated Campos' personal characteristics from the circumstances of the interrogation. [Citation.] The majority first turned to Campos' characteristics, deciding that Campos wasn't particularly unsophisticated. [Citation.] And then it turned to an analysis of the circumstances of the interrogation, seemingly conducting that analysis in a vacuum, without regard to Campos' characteristics." (*Id.* at pp. 1093-1094.)

"A second and related problem lies in the majority's conclusion that the manner in which the officers conducted the interrogation was not unduly coercive. . . . [H]e attempted to reconcile, in response to the officers' demands that he do so, the allegedly irrefutable 'scientific' evidence that he touched K.M.'s genitals with his insistence that he did not molest her. . . . [F]ar less coercion is needed before a suspect will start feeling compelled to make a statement of this type. And a person of limited sophistication, such as Campos, is

particularly susceptible to this type of coercion. It's one thing for officers to tell a suspect, 'your buddy says you did it.' Even someone like Campos would conclude he has multiple options for how to respond to that question, such as 'he's lying,' or 'you're lying.' It's quite another thing to insist to someone like Campos, after conducting fake fingerprint and DNA tests, that science has irrefutably proven something he is denying. In that scenario, it's no surprise that someone like Campos would, in response to the officers' insistence that he must at least allow for the possibility of an accident, conclude he has no choice but to do so." (*Id.* at pp. 1094-1095.)

Further, "[i]n determining that the police officers had not made improper promises of leniency, the majority noted that 'mere exhortations by interrogators to tell the truth are permissible,' and then concluded that the officers' refusal to accept Campos' denials, and their insistence that he provide a statement consistent with the fake DNA and fingerprint evidence, 'are more properly characterized as urging defendant to tell the truth.' [Citation.] Although it's technically true that the officers made no direct promise of leniency, the majority's determination that the officers were merely 'urging defendant to tell the truth' was an objectively unreasonable characterization of what the officers did in the interrogation. The officers did not merely urge Campos to tell the truth. They insisted, loudly and repeatedly, and in rapid-fire fashion, that he must give a statement consistent with their fake DNA and fingerprint evidence, which they insisted was 'the truth.' " (*Id.* at p. 1096.)

➤ *State v. Fernandez-Torres* (Kan.Ct.App. 2014) 50 Kan.App.2d 1069

A Spanish speaking defendant was suspected of molesting a child. The interrogation was hampered by a language barrier, which the court found significant in finding the confession was involuntary. There are some observations made by the court that can be useful. The court described revisited the discussion in *Miranda* of the Reid technique and noticed the same technique was used here and is still used around the country. (*Id.* at pp. 1086-1092, citing *Preston, supra,* 751 F.3d 1008 and others.)

The court explained why the technique of suggesting an apparently less morally objectionable explanation can be coercive. "The susceptibility to psychologically manipulative interrogation techniques may be more pronounced in individuals unfamiliar with the criminal justice process. Although innocent, an individual may attribute the purported evidence against him or her to a horrible and likely uncorrectable mistake rather than to the interrogator's deception. And the interrogator's categorical dismissal of each protest of innocence can cement that fear. The individual then considers the minimalized admission of guilt the interrogator has offered to be the best way out of an exceptionally bad predicament. See Kassin, 34 Law & Hum. Behav. at 14, 16-19; Gohara, A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques, 33 Fordham Urb. L.J. 791, 817-19 (2006); Ofshe & Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U.L. Rev. 979, 985-86

(1997)." (*Id.* at p. 1087.)

" 'If a suspect is told that he appears on a surveillance tape, or that his fingerprints or DNA have been found, even an innocent person would perceive that he or she is in grave danger of wrongful prosecution and erroneous conviction.' [Citation.] And 'such "minimization" of the crime by an interrogator implies leniency if the suspect will adopt that minimized version of the crime, and that leniency can thereby be implicitly offered even if it is not expressly stated as a quid pro quo for the confession.' " (*Id.* at p. 1088, quoting *Commonwealth v/ DiGiambattista* (Mass. 2004) 442 Mass. 423, 434-436.)

➤ New Legislation

Penal Code section 859.5 now generally requires that custodial interrogations of suspects accused of murder be recorded. It is not clear if mere failure to comply with the recording requirement can lead to exclusion of evidence under the Truth in Evidence provision. The statute, however, provides other enforcement mechanisms. The failure to record a custodial interrogation in such cases can be considered by the judge or jury as evidence that the statements were involuntary or unreliable, for example.

Welfare and Institutions Code section 625.6 requires providing a juvenile 15 years old or younger with the opportunity to consult an attorney before a custodial interrogation. This provision is still in the process of being implemented on the ground.

The new legislation reflects the public's concern that coercive custodial interrogations can lead to wrongful convictions. In the uncodified portion of the bill amending Penal Code section 859.5, the Legislature observed: "Three injustices result from false confessions. First, a false confession can result in an innocent person being incarcerated. Second, when an innocent person is incarcerated, the criminal investigations end and the real perpetrator remains free to commit similar or potentially worse crimes. Third, victims' families are subjected to double the trauma: the loss of, or injury occurring to, a loved one and the guilt over the conviction of an innocent person." (Stats. 2016, ch. 791, § 1, subd (a)(2).)

H. The Right Against Self-Incrimination

"Under cases of the United States Supreme Court, there are four requirements that together trigger this privilege: the information must be (i) 'incriminating'; (ii) 'personal to the defendant'; (iii) obtained by 'compulsion'; and (iv) 'testimonial or communicative in nature.' " (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 366.)

The Fifth Amendment privilege encompasses "two separate and distinct testimonial privileges . . . In a *criminal* matter a defendant has an absolute right not to be called as a witness and not to testify. [Citations.] Further, in any proceeding, *civil or criminal*, a witness

has the right to decline to answer questions which may tend to incriminate him in criminal activity [citation]." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137.)

1. Incriminating

"The privilege afforded not only extends to answers that would, in itself support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime . . . but this protection would be confined to instances where the witness has a reasonable cause to apprehend danger from a direct answer. . . . To sustain the privilege, it need only be evidence from the implication 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* (1951) 341 U.S. 479, 486-487.)

One can invoke the Fifth Amendment even if one claims to be innocent. (*Ohio v. Reiner* (2001) 532 U.S. 17, 21.)

A person cannot invoke the Fifth Amendment for fear of being prosecuted for perjury. (*United States v. Vanages* (9th Cir. 1998) 151 F.3d 1185, 1192; *United States v. Whittington* (9th Cir. 1986) 783 F.2d 1210.) But fear of perjury is a legitimate reason for invocation if the witness had testified before and is concerned the testimony would not be consistent. (*People v. Cudjo* (1993) 6 Cal.4th 585, 617; *People v. Maxwell* (1979) 94 Cal.App.3d 562, 570-571; *United States v. Morgan-Roth* (6th Cir. 1983) 718 F.2d 161.)

The Fifth Amendment ceases to apply after the statute of limitations expires or the time for appealing ends. (*Brown v. Walker* (1896) 161 U.S. 591, 597-598; *Ex Parte Cohen* (1894) 104 Cal. 524, 528; *People v. Fonseca* (1995) 36 Cal.App.4th 631, 637; *People v. Lopez* (1980) 110 Cal.App.3d 1010, 1021.)

2. Personal to the defendant

The Fifth Amendment right against self-incrimination is usually not self-executing. "[T]he [Fifth] Amendment speaks of compulsion. . . . If [an individual] desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." (*Minnesota v. Murphy* (1984) 465 U.S. 420, 427.)

The Fifth Amendment right against self-incrimination is personal. Counsel cannot invoke it or the *Miranda* rights for the defendant. (See *Moran v. Burbine* (1986) 475 U.S. 412; *United States v. Nobles* (1975) 422 U.S. 225, 233; *People v. Beltran* (1999) 75 Cal.App.4th 425, 430; *People v. Avila* (1999) 75 Cal.App.4th 416, 419.)

One cannot assume a witness would invoke. (*People v. Ford* (1988) 45 Cal.3d 431, 441.) "A determination that the witness may exercise the privilege must be made, therefore, after the witness has asserted the privilege. '[Before] a claim of privilege can be sustained, the witness should be put under oath and the party calling him be permitted to begin his interrogation. Then the witness may invoke his privilege with regard to the specific question and the court is in a position to make the decision as to whether the answer might tend to incriminate the witness.' [Citation.]" (*Ibid.*)

3. Compulsion

The requirement to speak to the probation officer or a treatment program about certain things does not in itself violate the Fifth Amendment. (*People v. Garcia* (2017) 2 Cal.5th 792, 806-808 [polygraph condition of probation]; see *Minnesota v. Murphy* (1984) 465 U.S. 420, 427-428.)

4. Testimony

The Fifth Amendment applies only to testimony, not compelled conduct. And "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate to a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." (*Doe v. United States* (1988) 487 U.S. 201, 210.)

Material in documents are not privileged. (*Fisher v. United States* (1976) 425 U.S. 391; *United States v. Doe* (1984) 465 U.S. 605, 610; *Couch v. United States* (1973) 409 U.S. 322, 328; but see *United States v. Hubbell* (2000) 530 U.S. 27, 36 [subpoena request was so vague that production of any document that might be incriminating was itself incriminating].)

Compelled exemplars are not testimonial. (*Baltimore City Dept. of Social Services v. Bouknight* (1990) 493 U.S. 549 [juvenile court can compel parent to show minor for welfare check]; *Doe v. United States* (1988) 487 U.S. 201, 210-211 [forced blood samples, handwritings, voice, line-up, and the wearing of certain clothing is not testimonial]; *South Dakota v. Neville* (1983) 459 U.S. 553 [DUI test refusal]; *United States v. Mara* (1973) 410 U.S. 19, 21 [voice]; *United States v. Wade* (1967) 388 U.S. 218 [voice sample]; *Gilbert v. California* (1967) 388 U.S. 263 [handwriting]; *Schmerber v. California* (1966) 384 U.S. 757 [fluids]; *Holt v. United States* (1910) 218 U.S. 245, 252-253 [forced to wear suspect's clothes]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1221-1223 [line-up]; *People v. Williams* (1969) 71 Cal.2d 614 [fingerprints]; *People v. Ellis* (1966) 65 Cal.2d 529, 533-537 [voice identification]; *People v. Lopez* (1963) 60 Cal.2d 223 [voice line-up]; *People v. Tai* (1995) 37 Cal.App.4th 990 [handwriting]; *People v. Thomas* (1986) 180 Cal.App.3d 49 [hair, saliva, blood]; *People v. Monson* (1976) 61 Cal.3d 102, 149 [refusal to give handwriting sample admissible for consciousness of guilt]; *Quintana v. Municipal Court* (1987) 192 Cal.App.3d

361, 365-366 [refusal to do blood alcohol test]; *People v. Smith* (1956) 142 Cal.App.2d 287 [photograph]; *United States v. Zimmerman* (9th Cir. 2007) 514 F.3d 851, 855 [DNA test]; *United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023, 1030 (en banc) [slurred speech showed nervousness; demeanor during inadmissible polygraph, fingerprints, handwriting, vocal characteristics, stance, stride, gesture, blood]; *State v. Tiner* (2006) 340 Or. 551, 561-562 [135 P.3d 305, 311-312 [compelled display of tattoos]; *Com. v. Monahan* (1988) 378 Pa.Super. 623, 632 [549 A.2d 231, 235 [gunshot residue test]; but see *United States v. Olvera* (9th Cir. 1994) 30 F.3d 1195 [forced to say the words of the robber when not for identification violated right to silence].)

Because producing hidden drugs would not be testimonial, it does not violate the Fifth Amendment to punish a defendant for "bringing" hidden drugs to jail. (*People v. Low* (2010) 49 Cal.4th 372, 389-393; *People v. Gastello* (2010) 49 Cal.4th 395, 402-403.)

Required disclosure and registration are not testimonial. (*Baltimore City Dept. of Social Services v. Bouknight* (1990) 493 U.S. 549 [juvenile court can compel parent to show minor for welfare check]; *South Dakota v. Neville* (1983) 459 U.S. 553 [DUI test refusal]; *California v. Byers* (1971) 402 U.S. 424 [must report an auto accident]; *People v. Kurtzenbach* (2012) 204 Cal.App.4th 1264, 1282-1287 [insurance fraud when did not disclose committed an arson]; *United States v. Sullivan* (1927) 274 U.S. 259 [income tax forms]; *People v. Wilmshurst* (2007) 146 Cal.App.4th 621, 628-629 [required gun transfer records under Pen. Code, §§ 12220, subd. (a), 12280, sub. (b)].)

But required disclosure of illegal activity violates the Fifth Amendment. (*Marchetti v. United States* (1968) 390 U.S. 39, 48 [required reporting of 'wagering']; *Leary v. United States* (1969) 395 U.S. 6, 16-18 [required registration for taxation purposes the transfer of marijuana]; *Haynes v. United States* (1968) 390 U.S. 85, 100 [required disclosure when possessing an unregistered gun]; *Grosso v. United States* (1968) 390 U.S. 62, 64-69 [income tax on illegal activity]; *Albertson v. Subversive Activities Control Board* (1965) 382 U.S. 70, 79 [required Communist Party registration]; *In re Jorge G.* (2004) 117 Cal.App.4th 931, 949-950 [requiring defendant to identify and give whereabouts of gang members as a condition of gang registration]; *Gonzales v. Superior Court* (1980) 117 Cal.App.3d 57, 67-68 [interrogatories sent to alleged fathers for family support could not be used in criminal cases] but see *United States v. Knox* (1969) 396 U.S. 77 [although cannot prosecute the assertion of the Fifth Amendment, can still prosecute false statements].)

I. Judicial Procedure

Under California's Truth-in-Evidence provision, evidence is excluded only if required by the United States Constitution. (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125; *People v. Peevy* (1998) 17 Cal.4th 1184, 1188; *People v. May* (1988) 44 Cal.3d 309, 316, 318-319.)

The only remedy for a Fifth Amendment violation or violation of *Miranda* is exclusion of the statement. (*United States v. Patane* (2004) 542 U.S. 630, 641; *Chavez v. Martinez* (2004) 538 U.S. 760, 767 [no civil rights violation when questioned in the hospital so long as the statements were not admitted in court].)

"The United States Supreme Court recently held that the failure to give a defendant *Miranda* warnings does not require suppression of physical evidence obtained as a result of the defendant's unwarned but voluntary statements. (*United States v. Patane* (2004) 542 U.S. [630, 640].) Rather, potential violations of the self-incrimination clause 'occur, if at all, only upon the admission of the unwarned *statements* into evidence at trial.' (*Id.* at p. [641], italics added.)" (*People v. Davis* (2005) 36 Cal.4th 510, 552; accord *People v. Davis* (2009) 46 Cal.4th 539, 598-599.)

Statement in violation of *Miranda* can be used for impeachment as long as the statements are voluntary. (*Harris v. New York* (1971) 401 U.S. 222, 223-226; *Michigan v. Harvey* (1990) 494 U.S. 344; *People v. Weaver* (2001) 26 Cal.4th 876, 918 [statement without advisement].)

The *Miranda* exclusionary rule does not apply to probation violation hearings. (*People v. Racklin* (2011) 195 Cal.App.4th 872, 878-881.)

A statement obtained in violation of the Sixth Amendment is admissible to impeach the defendant. (*Kansas v. Ventris* (2009) 556 U.S. 586, 591-592.)

Preserving the claim. A *Miranda* claim is distinct from a claim that a statement was involuntary. They must be analyzed separately. An objection on one ground does not preserve an objection on the other. (*People v. Tully* (2012) 54 Cal.4th 952, 1004 [violation of right to counsel did not preserve that statement was involuntary]; *People v. Scott* (2011) 52 Cal.4th 452, 482 [claim of involuntary statement and softening up before advisement did not preserve claim defendant invoked right to silence]; *People v. Martinez* (2010) 47 Cal.4th 911, 951 [" 'Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.' [Citation.]"]; *People v. Cruz* (2008) 44 Cal.4th 636, 669 [objection that there is not a *Miranda* waiver did not preserve involuntariness of the statement].)

Harmless error. Admission of an involuntary statement or a statement obtained in violation of *Miranda* is subject to harmless error analysis. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312; *People v. Cahill* (1993) 5 Cal.4th 478, 482, 511.) Since it is a federal constitutional right, the *Chapman* test applies. (*Cahill,* at p. 510.) Nonetheless, "an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors – in particular cases it may be devastating to a defendant . . . . " (*Fulminante,* at p. 312.)

As the California Supreme Court has stated:

> In *People v. Cahill, supra,* we expressed a "recognition that confessions, 'as a class,' '[a]lmost invariably' will provide persuasive evidence of a defendant's guilt [citation], ... that such confessions often operate 'as a kind of evidentiary bombshell which shatters the defense' [citation], . . . [and therefore] that the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial . . . . " (*Id.*, at p. 503.) We acknowledged, however, that the erroneous admission of any given confession "might be found harmless, for example, (1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime . . . . " (*Id.*, at p. 505.) But we emphasized that although the erroneous admission of a confession might be harmless in a particular case, it nevertheless is "likely to be prejudicial in many cases." (*Id.*, at p. 503.)

(*People v. Neal* (2003) 31 Cal.4th 63, 86.) "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. Cahill* (1993) 5 Cal.4th 478, 497.)" (*People v. Saldana* (2018) 19 Cal.App.5th 432, 436.)