Miranda Waivers

[W]e are steeped in the culture that knows a

verted into a "twelve-page rambling commentary" that was partly "misleading" and partly "unintelligible." 18

Reading from a *Miranda* card is especially important if the warning-waiver dialogue will not be recorded. This is because officers can usually prove that their warning was accurate by testifying that they recited it from a card, then reading to the court the warning from that card or a duplicate.¹⁹

MINORS: Because minors have the same *Miranda* rights as adults, officers are not required to provide them with any additional information.²⁰ For example, the courts have rejected arguments that minors must be told that they have a right to speak with a parent or probation officer before they are questioned, or that they have a right to have a parent present while they are questioned.²¹

"YOU CAN INVOKE WHENEVER YOU WANT": Officers will sometimes supplement the basic warning by telling suspects that, if they waive their rights, they can stop answering questions at any time. This is an accurate statement of the law and is not objectionable.²²

No additional information: Officers are not required to furnish suspects with any additional information, even if the suspect might have found it useful in deciding whether to waive or invoke.23 As the Supreme Court observed in Colorado v. Spring, "[A] valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that might affect his decision to confess." 24 For example, officers need not inform suspects of the topics they planned to discuss during the interview,25 the nature of the crime under investigation,26 the incriminating evidence that they had obtained so far.27 the possible punishment upon conviction,28 and (if not charged with the crime under investigation) that their attornev wants to talk to them.29

Incorrect Miranda warnings: If officers misrepresented the nature of the *Miranda* rights or the consequences of waiving them, a subsequent waiver may be deemed invalid on grounds that it was not knowing and intelligent. For example, in *People v. Russo* an officer's *Miranda* warning to Russo included the following: "If you didn't do this, you don't

^{18 (9}th Cir. 2011) 649 F.3d 986, 1107.

¹⁹ See, for example, *Oregon v. Elstad* (1985) 470 U.S. 298, 314-15 ["[The officer] testified that he read the *Miranda* warnings aloud from a printed card and recorded Elstad's responses."].

 $^{^{20}}$ See In re Bonnie H. (1997) 56 Cal. Ap. 4th v e x a m p l e ,

creates uncertainty and generates an additional issue for the trial court to resolve. Furthermore, as we will discuss later, an express statement of understanding may be necessary if the suspect's waiver was implied or if he was mentally impaired. Accordingly, it is best to ask the standard *Miranda*-card question: *Did you understand each of the rights I explained to you?* If he says yes, that should be adequate.⁴²

CIRCUMSTANTIAL EVIDENCE OF UNDERSTANDING: If the suspect said he understood his rights, but claimed in court that he didn't, the court may consider circumstantial evidence of understanding. The circumstances that are most frequently noted are the suspect's age, experience, education, background, and intelligence, prior arrests, and whether he had previously invoked his rights.⁴³

CLARIFYING THE RIGHTS: If the suspect said or

UNDER THE INFLUENCE OF DRUGS OR ALCOHOL

- š Although the suspect had ingested methamphetamine and cocaine, and had not slept "for days," his answers were "logical and rational." 48
- Š When it was tested two hours after the interview ended, his blood-alcohol content was between .14% and .22%. But he "made meaningful responses to questions asked" and "nothing indicated that [he] was anything but rational." 49
- Š His blood-alcohol content was approximately .21% and the arresting officer testified that his condition was such that he could not safely drive a car but "he otherwise knew what he was doing." 50
- š He was under the influence of PCP but his answers were "rational and appropriate to those questions." ⁵¹

MENTAL INSTABILITY

- š Although the suspect had been diagnosed as a paranoid schizophrenic, he "participated in his conversations with detectives, and indeed was keen enough to change his story when [a detective] revealed that the fire originated from inside the car." 52
- š He had been admitted to a hospital because he was suffering from acute psychosis and was under the influence of drugs. In addition, he was "sometimes irrational." Still, he "was responsive Tc7 been diagnosed gnosed as a

- š "[T] here is no evidence that Barrett was threatened, tricked, or cajoled into his waiver." 70
- š "No coercive tactics were employed in order to obtain defendant's waiver of his rights." 71
- š "[T]he record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements." 72
- š "There is no doubt that Spring's decision to waive his Fifth Amendment privilege was voluntary. He alleges no coercion of a confession by means of physical violence or other deliberate means calculated to break his will."

Two other things should be noted. First, the rule that prohibits involuntary *Miranda* waivers is similar to the rule that prohibits involuntary confessions and admissions, as both require the suppression of statements that were obtained by means of police coercion. As the California Supreme Court observed, the voluntariness of a *Miranda* waiver and the voluntariness of a statement are based on "the same inquiry." The main difference is that a waiver is involuntary if officers obtained it by pressuring the suspect into waiving his rights; while a statement is involuntary if, after obtaining a waiver, officers coerced the suspect into making it.

Second, because the issue is whether the officers pressured the suspect into waiving, the suspect's impaired mental state—whether caused by intoxication, low IQ, young age, or such—is relevant only if the officers exploited it to obtain a waiver.⁷⁵

Express and Implied Waivers

Until now, we have been discussing what officers must do to obtain a valid waiver of rights. But there is also something the suspect must do: waive them. As we will now discuss, the courts recognize two types of *Miranda* waivers: (1) express waivers, and (2) waivers implied by conduct.

EXPRESS WAIVERS: An express waiver occurs if the suspect signs a waiver form or if he responds in the affirmative when, after being advised of his rights, he says he is willing to speak with the officers; e.g., "Having these rights in mind, do you want to talk to us?" "Yes." Note that while an affirmative response is technically only a waiver of the right to remain silent (since the suspect said only that he was willing to "talk" with officers), the courts have consistently ruled it also constitutes a waiver of the right to counsel if, thereafter, the suspect freely responded to the officers' questions."

Three other things should be noted about express waivers. First, they constitute "strong proof" of a valid waiver. For Second, an affirmative response will suffice even if the suspect did not appear to be delighted about waiving his rights. For example, in *People v. Avalos* the California Supreme Court rejected the argument that the defendant did not demonstrate a sufficient willingness to waive when, after being asked if he wanted to talk, he said, "Yeah, whatever; I don't know. I guess so. Whatever you want to talk about, you just tell me, I'll answer." 78

⁷⁰ Connecticut v. Barrett (1987) 479 U.S. 523, 527.

⁷¹ People v. Sauceda-Contreras (2012) __ Cal.4th __ [2012 WL 3263996].

⁷² Moran v. Burbine (1986) 475 U.S. 412, 421. ALSO SEE People v. Whitson (1998) 17 Cal.4th 229, 248-49; In re Brian W. (1981) 125 Cal.App.3d 590, 603.

⁷³ Colorado v. Spring (1987) 479 U.S. 564, 573-74.

⁷⁴ People v. Guerra (2006) 37 Cal.4th 1067, 1093. ALSO SEE Colorado v. Connelly (1986) 479 U.S. 157, 169-70 ["There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the Miranda s

Third, if the suspect expressly waived his rights, it is immaterial that he refused to sign a waiver form, 79 or that he refused to give a written statement.80

IMPLIED WAIVERS: In 1969 the California Supreme Court ruled that *Miranda* waivers may be implied under certain circumstances.⁸¹ Ten years later, the U.S. Supreme Court reached the same conclusion.⁸² And yet, because the language in both decisions was somewhat tentative,⁸³ there was some uncertainty as to what was required to obtain an implied waiver. Consequently, officers would often seek express waivers out of an abundance of caution.

In 2010, however, the U.S. Supreme Court ruled unequivocally in *Berghuis v. Thompkins* that a waiver will be implied if the suspect, having "a full understanding of his or her rights," thereafter answered the officers' questions. Thus, in ruling that Thompkins had impliedly waived his rights, the Court said, "If Thompkins wanted to remain silent, he could have said nothing in response to [the officer's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation." But because did neither of these things, the Court ruled he had impliedly waived his rights.

Consequently, a waiver of both the right to remain silent and the right to counsel will be found if the following circumstances existed:

- (1) CORRECTLY ADVISED: Officers correctly informed the suspect of his rights.
- (2) UNDERSTOOD: The suspect said he understood his rights.
- (3) NO COERCION: Officers exerted no pressure on the suspect to waive his rights.⁸⁵

Thus, in ruling that the defendant in the post-Thompkins case of People v. Nelson had impliedly waived his rights, the California Supreme Court observed, "Although [the defendant] did not expressly waive his Miranda rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights." 86

It should be noted that in *People v. Johnson* the California Supreme Court indicated that a waiver might be implied only if the suspect freely and unreservedly answered the officers' questions.⁸⁷ But the Court in *Thompkins* seemed to reject this idea, as it ruled that Thompkins had impliedly waived his rights even though he was "largely silent during the interrogation which lasted about three hours." ⁸⁸

Timely Waivers

The final requirement for obtaining a *Miranda* waiver is that the waiver must be timely or, in legal jargon, "reasonably contemporaneous" with the start or resumption of the interview. ⁸⁹ This means that officers may be required to obtain a new waiver or at least remind the suspect of his rights if, under the circumstances, there was a reasonable likelihood that he had forgotten his rights or believed they had somehow expired. On the other hand, the California Supreme Court observed that "where a subsequent interrogation is reasonably contemporaneous with a prior knowing and intelligent waiver, a readvisement of *Miranda* rights is unnecessary." ⁹⁰

As a practical matter, there are only two situations in which a new warning or reminder is apt to be required. The first occurs if officers obtained a waiver long before they began to question the suspect. This would happen, for example, if an officer obtained a waiver at the scene of the arrest, but the suspect was not questioned until after he had been driven to the police station. If such cases, the suspect may later claim in court that he had forgotten his rights in the interim. (This is one reason why officers should not *Mirandize* suspects or seek waivers unless they want to begin an interview immediately.) In any event, the most important factor in these cases is simply the number of minutes or hours between the time the suspect waived his rights and the time the interview began.91

The second situation is more common as it occurs when officers recessed or otherwise interrupted a lengthy interview at some point. This typically happens when officers needed to compare notes, consult with other officers or superiors, interview other suspects or witnesses, conduct a lineup, or provide the suspect with a break. Although the Court of Appeal has said that a new *Miranda* warning "need not precede every twist and turn in the investigatory phase of the criminal proceedings," 92 and although these arguments are frequently contrived, officers need to know what circumstances are relevant so they can determine whether a new waiver may be necessary.

CHANGES IN LOCATION, OFFICERS, TOPIC: In addition to the time lapse between the waiver and the resumption of the interview, the courts will consider whether there was a change in circumstances that would have caused the suspect to reasonably believe that his *Miranda* rights did not apply to the new situation. What changed circumstances are important? The following, singly or in combination, are frequently cited:

- š CHANGE IN LOCATION: The site of the interview had changed during the break.
- š CHANGE IN OFFICERS: The pre- and post-break interviews were conducted by different officers.
- š CHANGE IN TOPIC: When the interview resumed after the break, the officers questioned the suspect about a different topic.⁹³

⁸⁹ See Wyrick v. Fields (1982) 459 U.S. 42; People v. Smith (2007) 40 Cal.4th 483, 504 ["This court repeatedly has held that a Miranda readvisement is not necessary before a custodial interrogation is resumed, so long as a proper warning has been given, and the subsequent interrogation is reasonably contemporaneous with the prior knowing and intelligent waiver."]; People v. Lewis (2001) 26 Cal.4th 334, 386. ALSO SEE Berghuis v. Thompkins (2010) __U.S. __[130 S.Ct. 2250, 2263] [officers are "not required to rewarn suspects from time to time"].

⁹⁰ People v. San Nicolas (2004) 34 Cal.4th 614, 640.

⁹¹ **NOTE**: There is no set time limit after which a reminder or new waiver will be required. See *U.S. v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1312 ["The courts have generally rejected a per serule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners."].

⁹² People v. Schenk (1972) 24 Cal.App.3d 233, 236

⁹³ See *Wyrick v. Fields* (1982) 459 U.S. 42, 47-48. Also see *People v. Martinez* (2010) 47 Cal.4th 911, 944-50 [overnight, same location, different officers, different topics, reminder given]; *People v. Riva* (2003) 112 Cal.App.4th 981, 994 ["Both interrogations were conducted by the same officer."]; *People v. Rich* (1988) 45 Cal.3d 1036, 1077 [new waiver not required merely because the defendant was notified he had failed a polygraph test]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 640 ["*Miranda* does not require a second advisement when a new interviewer steps into the room."]; *People v. Schenk* (1972) 24 Cal.App.3d 233, 236 ["[A] repeated and continued *Miranda* warning need not precede every twist and turn in the investigatory phase of the criminal proceedings."]; *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1129 ["[T] here were no intervening events which might have given Rodriguez-Preciado the impression that his rights had changed in a material way."]; *Guam v. Dela Pena* (9th Cir. 1995) 72 F.3d 767, 769 [an arrest does not automatically constitute a sufficient changed circumstance to require a new waiver].

Suspect's state of MIND: The suspect's impaired mental state or young age are relevant as they might affect his ability to remember his rights as the interview progressed and as circumstances changed. Conversely, his mental alertness would tend to demonstrate an ability to retain this information. Thus, in ruling that a waiver was reasonably contemporaneous with an interview that resumed over 30 hours later, the court in *People v. Mickle* observed that "[n] othing in the record indicates that defendant was mentally impaired or otherwise incapable of remembering the prior advisement." ⁹⁴

MIRANDA REMINDERS: Even if there was some mental impairment or a change in circumstances, the courts usually reject timeliness arguments if the officers reminded the suspect of his *Miranda* rights when the interview began or resumed; e.g., *Do you remember the rights I read to you earlier?* If he says yes, that will usually suffice. For example, in

decision (i.e., a majority of the justices did not endorse it 117). In addition, *Honeycutt* was based on the premise that softening-up renders a waiver "involuntary." But nine years later the United States Supreme Court rejected the idea that involuntariness can result from anything other than *coercive* police conduct. 118 And because it is hardly "coercive" for officers to pretend to be sympathetic to the suspect's plight, there is reason to believe that *Honeycutt* is a dead letter.

Putting your cards on the table

Before seeking a waiver, officers may make a tactical decision to disclose to the suspect some or all of the evidence of his guilt they had obtained to date. In many cases, the officers think that the suspect will be more likely to waive his rights if he realized there was abundant evidence of his guilt, or if he thought he could explain it away.

It is, of course, possible that the suspect will respond to such a disclosure by making an incriminating statement. But the courts have consistently ruled that it does not constitute pre-waiver "interrogation," nor is it otherwise impermissible if the officers did so in a brief, factual, and dispassionate manner.

For example, in *People v. Gray*¹¹⁹ the officers sought a waiver from a murder suspect after telling him about "considerable evidence pointing to his involvement in the death." In rejecting an argument that such a tactic had somehow invalidated his subsequent waiver, the court noted that the officer's recitation of the facts was "accurate, dispassionate and not remotely threatening."

In addition, having such information may be helpful to the suspect in determining whether or not to waive his rights. Thus, the Ninth Circuit ruled that "Miranda does not preclude officers, after a defendant has invoked his Miranda rights, from informing the defendant of evidence against him or of other circumstances which might contribute to an