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## You Have the Right to Be Confused! Understanding Miranda After 50 Years

Bryan Taylor  
*Canyon County Prosecuting Attorney*

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# YOU HAVE THE RIGHT TO BE CONFUSED! UNDERSTANDING MIRANDA AFTER 50 YEARS

Bryan Taylor, JD, PhD\*

## I. Introduction

2016 marks the fiftieth anniversary of *Miranda v. Arizona*.<sup>1</sup> Since its issuance, courts have rendered tens of thousands of decisions to interpret this amorphous opinion. Scholars have published numerous articles in legal academia, criminal justice journals, and law enforcement periodicals. Millions have heard the familiar *Miranda* warnings<sup>2</sup> whether it be from television or movies or being questioned by the police.

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\* Bryan Taylor is the elected Prosecuting Attorney for Canyon County Idaho, as well as an adjunct professor of law at Concordia University School of Law. The author would like to give special thanks to Margie Cleverdon, a third year law student at Concordia University School of Law, and Frank Zebari, a deputy prosecutor in Canyon County Idaho, for their contributions, suggestions, and thoughts.

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. “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.” *Id.* at 444. Police often quote the warnings as follows:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I have explained to you? Having these rights in mind do you wish to talk to us now?

*Wainright v. Greenfield*, 474 U.S. 284, 286 (1986). See *Berghuis v. Thompkins*, 560 U.S. 370, 375 (2010).

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Today, the *Miranda* warnings are nearly as deeply engrained in American culture as the Star-Spangled Banner is at a football game. The warnings have become second nature, even though they do not appear anywhere in the United States Constitution. But although these warnings are well known, their meaning and the timing of when police are required to provide them can be confusing. Ultimately with *Miranda* and its progeny “You have the right to be confused!”

Because so much has been written and discussed about *Miranda*, it is sometimes difficult to see the proverbial forest beyond the individual trees. This article examines where we are with *Miranda* after 50 years from a practice and application point of view.<sup>3</sup> Due to the complexities that legal opinions promulgated in their numerous interpretations, *Miranda’s* changing landscape creates a ripe opportunity for law enforcement, legal practitioners, as well as trial judges to have a working summation of a case that has significantly evolved and changed.

Part I of this article briefly explores the background and historical context that ultimately led to the *Miranda* decision. As the late Dr. Carl Sagan once said, “you have to know the past to understand the present.”<sup>4</sup> Understanding the circumstances and cases leading up to *Miranda* helps in the overall application of *Miranda* to cases of today. Part II addresses whether a statement should be allowed into evidence and provides a practical working approach to conduct a *Miranda* analysis. This innovative approach provides a step-by-step process in determining the admissibility of statements pursuant to *Miranda* and its progeny. This process provides clarity to the world of *Miranda* for practitioners in the criminal justice system. Finally, Part III of the article examines what happens when the *Miranda* rule is not followed. The ramifications are discussed and distinguished from the Fourth

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3. Each one of the sections discussed could easily be its own law review article. The purpose behind this article is to provide a basic foundational framework for law enforcement, prosecutors, defense attorneys, and judges in applying *Miranda* with fifty years of case law.

4. *Cosmos: A Personal Voyage: One Voice in the Cosmic Fugue* (PBS television broadcast Oct. 5, 1980), [http://www.dailymotion.com/video/x10bdyd\\_cosmos-carl-sagan-a-personal-voyage-episode-2\\_tech](http://www.dailymotion.com/video/x10bdyd_cosmos-carl-sagan-a-personal-voyage-episode-2_tech).

Amendment.

## II. PART I: Background and Historical Context of *Miranda*

By the time the facts of *Miranda* reached the Supreme Court in 1966, the nature and extent of the constitutional protections afforded by the Fifth and Sixth Amendment were slowly taking on a more contemporary shape. Reflecting the civil unrest of the period and the increasing pressure for greater social equality<sup>5</sup>, decisions of the United States Supreme Court were visibly forging dramatic transformations in the criminal justice system. Even though the Fourteenth Amendment was ratified in 1868 as a restriction on state power, the Court had consistently resisted interpreting the protections of the Bill of Rights as a restraint on the states in the exercise of their police power.<sup>6</sup> By 1915, the Court had ruled the protection of the Self-Incrimination Clause applied only to federal proceedings<sup>7</sup> and the Due Process Clause's only demand on the states with regards to criminal defendants was adequate notice of the charges and the opportunity to be heard.<sup>8</sup> Through numerous legal opinions written during the span of the 1930s to the 1960s, the Court gradually paved the way for a broader interpretation of the requirements of the Due

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5. GARY L. STUART, *MIRANDA: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT* 22 (Univ. of Ariz. Press 2004).

6. RICHARD C. CORTNER, *A SCOTTSBORO CASE IN MISSISSIPPI: THE SUPREME COURT AND BROWN V. MISSISSIPPI* vii (Paul L. Murphy ed., 1986).

7. *Twining v. New Jersey*, 211 U.S. 78, 114 (1908) (“[T]he exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution.”).

8. *Frank v. Mangum*, 237 U.S. 309 (1915). As per this court case:

[A] criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is ‘due process’ in the constitutional sense.

*Id.* at 326.

Process Clause.<sup>9</sup> However, a few specific cases effectively illustrate the background that ultimately cast the footings for the decision pronounced in *Miranda v. Arizona*. For almost three decades, the U.S. Supreme Court had struggled to answer fundamental questions regarding police questioning suspects and the rights of the accused. Although numerous opinions were promulgated, three opinions capture the general basis establishing the foundational framework for the Supreme Court's opinion in *Miranda v. Arizona*.

A. *Brown v. Mississippi* (1936)

The first case in the trek towards *Miranda* was the 1936 United States Supreme Court case of *Brown v. Mississippi*.<sup>10</sup> On Friday, March 30, 1934, a spring day in the Giles Community of Kemper County, Mississippi, the brutally bludgeoned and burnt body of Raymond Stewart was discovered in the cotton seed room of his home.<sup>11</sup> Stewart, a sixty-year-old white planter, succumbed to his wounds within thirty minutes of his discovery without ever having regained consciousness.<sup>12</sup> By the following Friday, April 6, an all-white

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9. See *Mooney v. Holohan*, 294 U.S. 103 (1935). The requirement of Due Process:

[C]annot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.

*Id.* at 112. See also *Powell v. Alabama*, 287 U.S. 45, 65 (1932) (“[F]ailure of the trial court to give [defendants] reasonable time and opportunity to secure counsel was a clear denial of due process.”); *Tumey v. Ohio*, 273 U.S. 510, 531 (1927) (“[A] system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice, either at common law or in this country, that it can be regarded as due process of law . . . .”); *Moore v. Dempsey*, 261 U.S. 86, 92 (1923) (“[I]t does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.”).

10. *Brown v. Mississippi*, 297 U.S. 278 (1936).

11. CORTNER, *supra* note 6, at 5, 15.

12. *Id.* at 15–16.

jury delivered verdicts of guilty against three of Stewart's black tenant farmers, Ed Brown, Henry Shields, and Yank Ellington.<sup>13</sup> The judge sentenced all three to hang on May 11, 1934.<sup>14</sup>

On the evening of the murder, a deputy sheriff and some other white men brought Ellington from his home to Stewart's,<sup>15</sup> where a mob tied Ellington to a tree and whipped him.<sup>16</sup> When Ellington denied his involvement in Stewart's murder, the men hung him by his neck from a tree limb.<sup>17</sup> They let him down, but hung him again when he still insisted he was not involved.<sup>18</sup> Letting him down again, he maintained his innocence, so the men tied him to the tree and whipped him.<sup>19</sup> When he still would not confess, the men told him to go home.<sup>20</sup> But the ordeal was far from over; two deputies arrested Ellington at his home the next day.<sup>21</sup> On the way to the jail, the deputies drove into nearby Alabama, stopped, and "severely whipped" Ellington until he agreed to confess.<sup>22</sup>

Meanwhile by Saturday afternoon, Brown and Shields were also arrested and taken to the jail.<sup>23</sup> On Sunday evening, they "were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it" by the deputy sheriff and two other men.<sup>24</sup> The defendants eventually changed their confessions "in all particulars of detail so as to conform to the demands of their torturers."<sup>25</sup>

The District Attorney, John Stennis, brought the three to trial six days after the murder.<sup>26</sup> His case against the suspects

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13. *Id.* at 31.

14. *Id.* at 10–11.

15. *Brown*, 297 U.S. at 281.

16. CORTNER, *supra* note 6, at 25.

17. *Brown*, 297 U.S. at 281.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Brown*, 297 U.S. at 281; CORTNER, *supra* note 6, at 25.

23. *Brown*, 297 U.S. at 282. *See* CORTNER, *supra* note 6, at 6.

24. *Brown*, 297 U.S. at 282.

25. *Id.*

26. Jonathan L. Entin, *Brown v. Mississippi*, 297 U.S. 278 (1936), in 1

was based entirely upon their confessions, all of which were obtained via torture.<sup>27</sup> After only half an hour, the jury returned guilty verdicts and the judge immediately imposed death sentences.<sup>28</sup> The defendants appealed the verdicts to the Mississippi Supreme Court which affirmed the judgments<sup>29</sup> and subsequently, to the United States Supreme Court.<sup>30</sup> In a significant expansion of the fair-trial rule,<sup>31</sup> a unanimous Court reversed the state conviction and ruled that a conviction based upon a coerced confession offended a fundamental principle of justice in violation of the Due Process Clause of the Fourteenth Amendment.<sup>32</sup> “Coercing the supposed state’s criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries.”<sup>33</sup> The *Brown* opinion made it very clear for law enforcement that they could not obtain evidence, especially confessions, through such physically brutal and coercive methods.

#### B. *Ashcraft v. Tennessee* (1944)

The second case in the path to *Miranda* was the 1944 opinion of *Ashcraft v. Tennessee*.<sup>34</sup> On the morning of June 5, 1941, Zelma Ashcraft got in her car and set out on a trip to

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ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 224-25 (David S. Tanenhaus ed., 2008).

27. *Brown*, 297 U.S. at 279. Called as a rebuttal witness at the trial, Deputy Sheriff Cliff Dial admitted that the defendants denied any involvement in Stewart’s murder, but that they changed their stories after he “kind of warmed them a little—not too much.” CORTNER, *supra* note 6, at 28. When asked if they had been whipped, Dial replied, “[n]ot too much for a negro.” *Id.*

28. ENTIN, *supra* note 26, at 224.

29. *Brown*, 297 U.S. at 280. The Mississippi Supreme Court heard the Defendant’s motion that the trial court erred that the confessions were admissible on the ground that all the evidence against them was obtained by coercion. The defendants also alleged that they had been denied the benefit of counsel or opportunity to confer with counsel in a reasonable manner. The court entertained the suggestion of error, and ultimately ruled against the defendants contention. Two judges dissented. *Id.*

30. CORTNER, *supra* note 6, at chs. 3-4.

31. *Mooney v. Holohan*, 294 U.S. 103 (1935).

32. CORTNER, *supra* note 6, at 131-32.

33. *Brown v. Mississippi*, 297 U.S. 278, 287 (1936).

34. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

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visit her mother in Kentucky from her home in Memphis, Tennessee.<sup>35</sup> Later that afternoon, her car was seen just outside of Memphis, and her murdered body was found just off the road in a slough.<sup>36</sup> The police questioned her husband E.E. Ashcraft later that day about the murder.<sup>37</sup> On Saturday June 14, 1941, the police arrested Ashcraft, brought him to the county jail, and placed him in an interrogation room.<sup>38</sup> They questioned Ashcraft for thirty-six hours straight until the morning of Monday, June 16.<sup>39</sup> During this entire time, Ashcraft was not allowed any rest and received only a five-minute break.<sup>40</sup> What actually transpired in the interrogation room was disputed the police claimed that at the end of the thirty-six hour interrogation Ashcraft confessed to the crime, while Ashcraft claimed he did not.<sup>41</sup> Regardless, the police relied on what they believed was a confession by Ashcraft: that he was overpowered by an individual named John Ware and that Ware was the one that actually committed the murder.<sup>42</sup> Once Ware was picked up, the police showed Ware the confession by Ashcraft.<sup>43</sup> Ware then gave his own statement that Ashcraft hired him to kill Ashcraft's wife.<sup>44</sup> Ashcraft argued that his confession was coerced because he was deprived sleep, food, and a break for such a long period of time.<sup>45</sup> The U.S. Supreme Court held that even if Ashcraft confessed, it was "not voluntary but compelled."<sup>46</sup> "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession."<sup>47</sup> The Court stated that an individual cannot be taken into custody by police officers and held for

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35. *Id.* at 144.

36. *Id.*

37. *Id.*

38. *Id.* at 149.

39. *Id.*

40. *Ashcraft*, 322 U.S. at 149.

41. *Id.* at 151.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 145.

46. *Ashcraft*, 322 U.S. at 143.

47. *Id.* at 155.



thirty-six hours during which they are kept incommunicado, without sleep or rest, being questioned by relays of officers, experienced investigators, and highly trained lawyers without respite. Such circumstances amount to a denial of due process of law and any statements made are not voluntary.<sup>48</sup> As a result of *Aschcraft*, all forms of coercive techniques are prohibited. *Ashcraft* distinguishes *Brown*—in *Brown*, the Court prohibits physical coercion; in *Aschcraft*, the Court prohibits forms of coercion that are necessarily “physical” such as deprivation of sleep.

C. *Escobedo v. Illinois* (1964)

The third case in the journey to *Miranda* was the 1964 case of *Escobedo v. Illinois*.<sup>49</sup> Up to this point in the timeline, police knew where the line was drawn as it relates to coercive interrogation techniques. However, they were not given any direction as to whether an individual could request an attorney to be present on their behalf during an interrogation. In *Escobedo*, the Court addressed the question of what happens when police fail to honor a suspect’s request to consult with his lawyer during the course of an interrogation.<sup>50</sup> The Court held that such a refusal violates the Sixth Amendment; police must allow a suspect to speak with an attorney when a suspect asks to do so.<sup>51</sup>

On the night of January 19, 1960, Danny Escobedo’s brother-in-law (Manuel Valtierra) was fatally shot.<sup>52</sup> Valtierra had escaped prosecution for stabbing his wife (Escobedo’s

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48. *Id.* at 153–54.

49. *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Escobedo* came down one year after the landmark case of *Gideon v. Wainwright*. In *Gideon*, the United States Supreme Court held that persons accused of felony offenses have a fundamental right to an attorney, even if they cannot afford one, per the Sixth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Escobedo* attempted to answer the question as to precisely when in the criminal justice process a defendant must be informed of this right to counsel. *Escobedo*, 378 U.S. at 478.

50. *Escobedo*, 378 U.S. at 479.

51. *Id.* at 492.

52. STUART, *supra* note 5, at 35.

sister) more than a dozen times the year prior.<sup>53</sup> Escobedo, his sister, and two friends were arrested the following morning and brought in to be questioned.<sup>54</sup> Escobedo did not say anything, was subsequently released, and retained a lawyer.<sup>55</sup> On January 30, 1960, Escobedo's friend, Benedict DiGerlando, was again in police custody.<sup>56</sup> DiGerlando told police that Escobedo was the one that had fired the fatal shots.<sup>57</sup> Police arrested Escobedo and a detective confronted Escobedo with DiGerlando's statement that Escobedo was the shooter.<sup>58</sup> Escobedo replied, "I am sorry but I would like to have advice from my lawyer."<sup>59</sup> The police refused, saying he could talk to his lawyer after they were done questioning him.<sup>60</sup> Escobedo thereafter made an incriminating remark.<sup>61</sup> While Escobedo was questioned, his attorney had arrived and asked to see his client, but the police refused to allow him access to Escobedo.<sup>62</sup> The Supreme Court held when a suspect is in custody and requests to speak to an attorney, the police must afford him that opportunity.<sup>63</sup> To deny such a request is a violation of the Sixth Amendment.<sup>64</sup>

#### D. *Miranda v. Arizona* (1966)

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53. *Id.*

54. *Escobedo*, 378 U.S. at 479.

55. *Id.*

56. STUART, *supra* note 5, at 35.

57. *Escobedo*, 378 U.S. at 479.

58. *Id.*

59. *Id.*

60. *Id.* at 481–82.

61. *Id.* at 482–83.

62. *Id.* at 481–82.

63. *Escobedo*, 378 U.S. at 490–92.

64. *Id.* at 491. An additional case prior to *Miranda* somewhat similar to *Escobedo* is *Massiah v. U.S.*, 377 U.S. 201 (1964). Winston Massiah was indicted for narcotics charges, retained a lawyer, pleaded not guilty, and was released on bail. While free on bail, a co-defendant (who was working with the police) had a conversation with Massiah in the absence of his counsel. Police listened in on the conversation and used the incriminating statements against him. The Supreme Court held that under the 6<sup>th</sup> Amendment guaranty of the defendant's right to assistance of counsel, the defendant's incriminating statements could not be used against him because the government had violated that right to counsel.

*Brown, Ashcraft, and Escobedo* were three seminal cases that capture the tone of the courts in relation to police interrogations and set the stage for the 1966 landmark opinion of *Miranda v. Arizona*.<sup>65</sup> Up to this point, the Supreme Court had employed a case-by-case voluntariness analysis where it would review the totality of the circumstances.<sup>66</sup> The Court was tired of this approach, and with *Miranda* they ended the prominence of due process voluntariness analysis. One of the goals of “the new *Miranda* rule was to displace the subjective, case-by-case due process voluntariness approach with an objective standard that applied equally to all cases.”<sup>67</sup> The Court’s position was that the “due process/totality of circumstances/voluntariness test” was “an inadequate barrier when custodial interrogation was at stake.”<sup>68</sup> Numerous factors influenced the Court’s determination to depart from the current voluntariness standard.

First, the doctrine required fact-specific, case-by-case review and thus placed enormous and ever-growing demands on the federal courts. Second,

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65. Although the *Miranda* opinion is a consortium of cases, because Ernesto Miranda’s case appears first in the caption, the case is referred to as *Miranda v. Arizona*. *Miranda v. Arizona*, 384 U.S. 436 (1966). The other three cases are *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*. *Id.*

66. *See, e.g.*, *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963); *Chambers v. Florida*, 309 U.S. 227, 238-40 (1940); *Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936).

67. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 628 (1996). *See* Martin R. Gardner, *The Emerging Good Faith Exception to the Miranda Rule -- A Critique*, 35 HASTINGS L.J. 429, 461 (1984); Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 781 (1988).

68. Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV., 965, 967 (2012). In *Dickerson v. U.S.*, 530 U.S. 428 (2000) the U.S. Department of Justice in its reply brief “recall[ed] that the *Miranda* Court arrived at its solution only after concluding that the ‘totality of circumstances’ voluntariness test, as the sole protection for the Fifth Amendment rights of a custodial suspect, had failed...It was inadequate because a ‘totality’ test, without more, provided insufficient guidance to the police, left inadequate means for this Court to unify and expound the law, and resulted in an uncertain legal rule that could not secure the vital constitutional rights at stake.” Reply Brief for the United States at 20, *Dickerson*, 530 U.S. 428 (No. 99-5525).

the Court had been unable to stimulate sufficient lower-court awareness of the voluntariness doctrine's underlying concerns. Despite a century of Supreme Court voluntariness jurisprudence, lower courts had failed to accept and implement creatively the Court's increasing sensitivity to the risks that police practices posed to values protected by the federal constitution.<sup>69</sup>

As a result, the rule promulgated by *Miranda* would change the landscape of custodial interrogations in American Criminal Justice.

The facts of *Miranda* are one of the most poetically ironic stories in criminal justice folklore. The year was 1963, the day March 2.<sup>70</sup> Ernesto Miranda, a poor, Mexican immigrant, lived in Phoenix, Arizona.<sup>71</sup> On this day, Miranda kidnapped an eighteen year-old woman from a movie theatre, blindfolded her, took her out into the Arizona desert, and raped her.<sup>72</sup> Following the rape, Miranda drove her back to town and dropped her off in the neighborhood where she lived.<sup>73</sup> While the rape took place, witnesses obtained a partial plate number of the truck.<sup>74</sup> Even though the victim reported the crime, the police did not have much to work from.<sup>75</sup> However, soon after, a witness spotted a truck matching the description along with

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69. George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 235 (1988). *see also* Stephen Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987).

70. STUART, *supra* note 5, at 4.

71. *Id.*

72. Michael S. Lief & H. Mitchell Caldwell, *You Have the Right to Remain Silent*, AM. HERITAGE MAGAZINE, Aug./Sept. 2006, [http://web.archive.org/web/20090206174116/http://americanheritage.com/articles/magazine/ah/2006/4/2006\\_4\\_48.shtml](http://web.archive.org/web/20090206174116/http://americanheritage.com/articles/magazine/ah/2006/4/2006_4_48.shtml).

73. *Id.* *See* STUART, *supra* note 5, at 4.

74. STUART, *supra* note 5, at 5 (disputing as to who obtained the partial plate number; the victim's cousin or the victim's brother-in-law).

75. *Id.* at 3–5. A young detective by the name of Carroll Cooley took on the case as the latest one in a series of similar incidents, which over the previous few months. *Id.* at 4. The first occurred on November 27, 1962, in which the suspect assaulted, robbed, and attempted to rape a young bank teller. *Id.* at 3. The second occurred on February 22, 1963, in which the suspect attempted to rape and rob an eighteen-year-old telephone dispatcher. *Id.*

the partial license plate.<sup>76</sup> Police followed up on the lead and identified the vehicle as belonging to Twila Hoffman.<sup>77</sup> Hoffman told detectives that the man living with her was Ernesto Miranda and he used the car.<sup>78</sup> Shortly after, Miranda agreed to accompany police to the station for questioning.<sup>79</sup> During the interrogation, Miranda did not have an attorney present.<sup>80</sup> The police officers questioning him did not inform him of his right against self-incrimination, nor of his right to counsel.<sup>81</sup> Miranda had not finished the ninth grade and had a history of mental instability.<sup>82</sup> After two hours, Miranda gave a full confession in writing.<sup>83</sup> The police then took Miranda to the victim where he further positively identified she was the girl he kidnapped and raped.<sup>84</sup>

Other than Miranda's confession, prosecutors had little evidence to present at trial. Relying on only the confession, a jury convicted Miranda. The trial judge imposed a sentence of twenty to thirty years in prison.<sup>85</sup> Miranda appealed, arguing he should have been advised of his right to an attorney and of his right to remain silent prior to police questioning.<sup>86</sup>

Miranda's appeal proceeded to the U.S. Supreme Court. In 1966, the Court set forth what would come to be known as *Miranda* warnings and mandated that law enforcement officers advise suspects of their constitutional rights (despite the Constitution itself does not requiring such action). The Supreme Court summarized as follows:

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory,

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76. *Id.* at 5.

77. STUART, *supra* note 5, at 5.

78. *Id.*

79. *Id.*

80. *Miranda v. Arizona*, 384 U.S. 436, 491 (1966).

81. *Id.*

82. STUART, *supra* note 5, at 7, 9.

83. *Id.*

84. *Id.*

85. *Id.* at 15–22.

86. *Id.* at 22.

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. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. 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.<sup>87</sup>

The Court rooted its rationale in the Fifth Amendment's privilege against self-incrimination, as opposed to the right to counsel.<sup>88</sup> The Court reasoned that when a suspect is being

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87. *Miranda*, 384 U.S. at 444–45 (footnote omitted).

88. Although the *Miranda* warnings are rooted in the Fifth Amendment, the Supreme Court has declared in a number of cases that the warnings established are a “series of recommended ‘procedural safeguards’ . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.” *Davis v. United States*, 512 U.S. 452, 457 (1994) (quoting *Michigan v. Tucker*, 417 U.S. 433, 443–44 (1974)); *See Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (holding that the warnings prescribed by *Miranda*

interrogated in a police-dominated atmosphere, they are likely to be prompted to make an incriminating confession.

Ultimately, the Supreme Court decided Miranda's confession was obtained improperly and, therefore, set Miranda's conviction aside.<sup>89</sup> The police failed to first inform Miranda of his right to an attorney and his right against self-incrimination. On remand, the State of Arizona retried Miranda, without using his confession. Rather, they used testimony from Miranda's estranged wife, whom Ernesto confided in about what had transpired and had confessed that he was guilty of the crime.<sup>90</sup>

However, the poetic tale of Ernesto Miranda does not end after his second trial. Miranda was paroled in 1972. After his release, Miranda earned a supplemental income autographing "Miranda Warning" cards for \$1.50 apiece.<sup>91</sup> Miranda decided to earn a little more money by playing in a poker game at a Phoenix bar. On January 31, 1976, Miranda was playing cards in a bar called La Amapola.<sup>92</sup> One of the other players caught Miranda cheating, confronted him, and ultimately stabbed and killed him.<sup>93</sup> Police arrived on scene and started to question potential suspects. The urban legend<sup>94</sup> told is that police questioned the suspected killer, yet failed to *Mirandize* him, and thus, the killer's statements could never be used to prosecute him.

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are not "required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose.").

89. *Miranda*, 384 at 492.

90. Larry A. Van Meter, *Miranda After Miranda*, in GREAT SUPREME COURT DECISIONS (Chelsea House Publishers, 2007) <http://www.fofweb.com/History/MainPrintPage.asp?iPin=GSCDMA07&DataType=AmericanHistory>.

91. Jack Kelly, *The Miranda Decision, 40 Years Later*, AM. HERITAGE (June 13, 2006, 8:40 AM), <http://web.archive.org/web/20080704141306/http://www.americanheritage.com/events/articles/web/20060613-ernesto-miranda-rights-supreme-court-fifth-amendment-arizona-constitution-scottsboro.shtml>.

92. Van Meter, *supra* note 85.

93. *Miranda Stabbing Suspect Caught*, KINGMAN DAILY MINER, Feb. 2, 1976, at 2, <http://news.google.com/newspapers?id=cjIPAAAIBAJ&pg=6150,1736687>.

94. These facts are not substantiated, but are tales told amongst prosecutors and law enforcement professionals.

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For fifty years, the *Miranda* case has evolved in its understanding and its application. Those involved in the criminal justice system have struggled with proper implementation of Chief Justice Warren's majority opinion in *Miranda*. The remainder of this article provides a summation of the Supreme Court rulings interpreting and explaining *Miranda*. The article provides a functional approach for practitioners and law enforcement to navigate *Miranda* and its progeny 50 years later.<sup>95</sup>

### III. Part II: Two Prong Approach to *Miranda*

*Miranda v. Arizona* is the foundational opinion that sets base-line rules governing confessions both in the federal as well as state courts. The general rule prescribed by *Miranda* is that when a suspect is in custody being interrogated by police, he must be provided *Miranda* warnings for any subsequent confession to be admissible. After those warnings are given, it must then be determined whether the suspect voluntarily, knowingly, and intelligently agreed to speak with law enforcement. With over fifty years of precedent analyzing *Miranda*, a process slowly emerged from the numerous legal opinions. The following flow chart provides a six-step process to analyze whether a confession has been obtained in compliance with *Miranda* and its progeny. The chart further provides a pragmatic guide for practitioners, both in the legal and law enforcement communities.

There are two prongs to the *Miranda* analysis.<sup>96</sup> The first prong is whether the warnings need to be given. Step One is the most complex in determining whether three factors are

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95. Two years after the Supreme Court decided *Miranda*, Congress enacted 18 U.S.C. § 3501, which, in essence, made the admissibility of confessions dependent solely on whether they were made voluntarily. However, the Supreme Court, almost forty years later in *Dickerson v. United States*, stated that because *Miranda* was based upon interpretation of the Constitution, Congress could not impose different standards and rules making non-*Mirandized* confessions admissible. *Dickerson v. United States*, 530 U.S. 428 (2000).

96. Although not expressly established in any particular case, a confession will typically be allowed in a criminal prosecution upon a successful showing of these two prongs.



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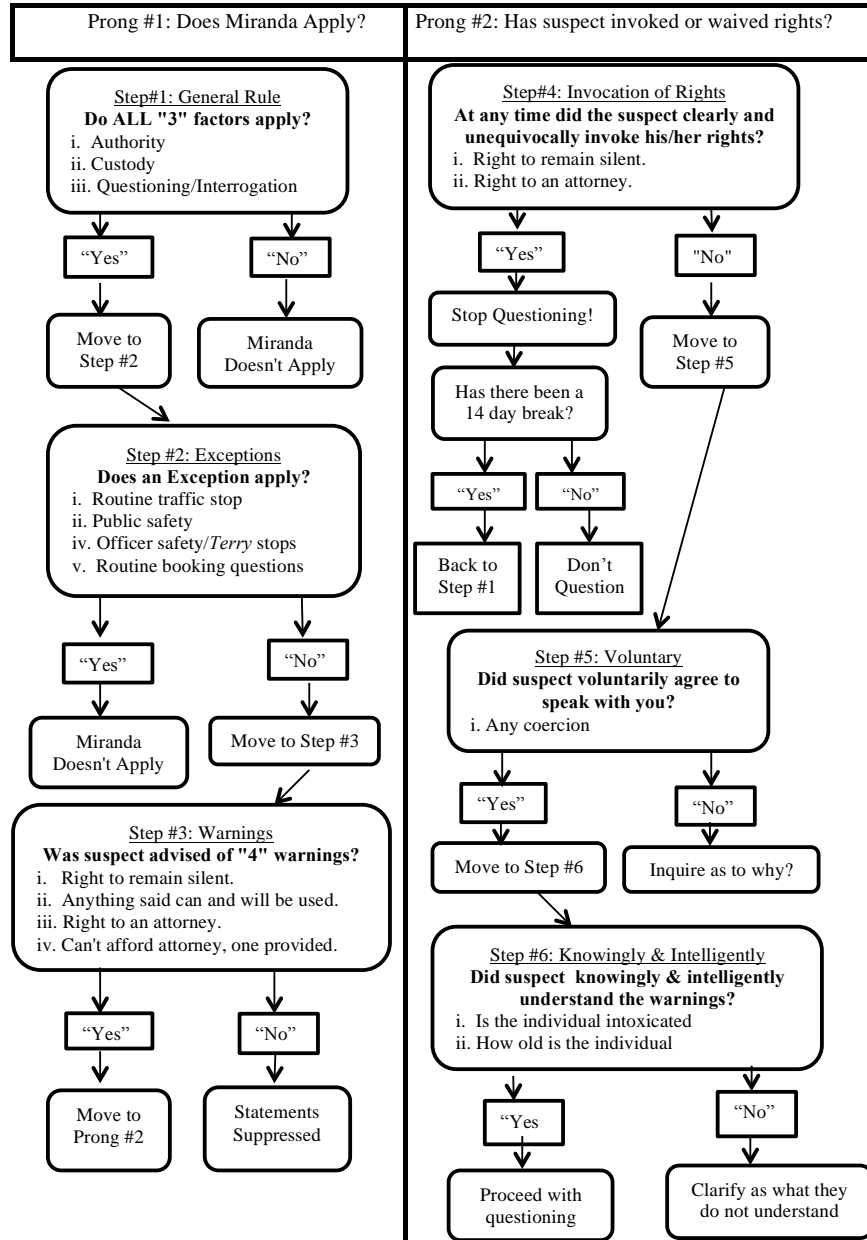
present for *Miranda* to apply. All three factors must be met before one can move on to Step Two. The second step identifies certain exceptions where even though the three factors exist in Step One, *Miranda* warnings are not required. Step Three requires a suspect be advised of the four warnings as prescribed.

The second prong is as follows: if the warnings are required to be given, has the suspect either effectively invoked his rights or has the suspect waived them. Step Four addresses whether at any time the suspect clearly and unequivocally invoked his rights. Steps Five and Six address whether a suspect's waiver was voluntarily, intelligently, and knowingly made. If the police follow all six steps properly, any statements made should be proper under the *Miranda* doctrine. Figure 1<sup>97</sup> is a flow chart of the proper application of *Miranda*.

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97. This flow chart was created in 2013 by Dr. Bryan Taylor to aid in the training of law enforcement officers. This particular version has been slightly modified for publication purposes. Further the chart has served as a tool for practitioners to apply *Miranda* as articulated by the Supreme Court over the past 50 years. The tool has been tested in state court with much success.

Figure 1: Miranda Flow Chart



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A. *First Prong: Does Miranda Apply?*

1. Step One: General Rule and Three Factors

Three basic requirements have to be met before the *Miranda* doctrine is applicable and the warnings required to be given. If one of these requirements is absent, then the rules set forth in *Miranda* do not apply. The three requirements are: (1) authority, (2) custody, and (3) interrogation. If all three requirements are met, then the law enforcement officer must advise the suspect of the four warnings as prescribed; that is unless there is an exception as discussed in Step Two.

a. *Authority*

The first requirement of *Miranda* is that police or other law enforcement officials are required to be the primary actors. If a private citizen, a corporate employer, or a non-law enforcement governmental entity questions a suspect about a crime, *Miranda* does not apply. For example, if a manager of a business brings an employee into an interview room, questions the employee about stealing from the company, and obtains a confession, the manager is not obligated to provide any warnings.

Typically, under *Miranda* and its progeny, the term “authority” has been limited to the police.<sup>98</sup> However, other categories of law enforcement officials can also fall under this category, such as prosecutors and probation officers. Despite this, case law addressing these groups is minimal compared to that dealing with police. *Miranda* does not apply to all government actors. The primary focus of *Miranda* is to protect the individual from those governmental actors that have the power to deprive an individual of constitutional liberties through unlawful coercion. When an individual comes into contact with law enforcement in their official capacity, a psychological factor is created. “[T]he ‘principal psychological factor contributing to a successful interrogation is *privacy*—

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98. Meg Penrose, *Miranda, Please Report to the Principal’s Office*, 33 FORDHAM URB. L.J. 775, 777 (2006).

being alone with the person under interrogation.”<sup>99</sup> The Supreme Court has recognized that even in the absence of physical coercion, a police officer’s dominance<sup>100</sup> in a setting of custodial interrogation creates grave risks. Such a setting hinders a suspect’s ability to refuse to answer questions.

Coercion is determined from the perspective of the suspect.<sup>101</sup> In *Illinois v. Perkins*, the court discussed what constitutes a coercive atmosphere.<sup>102</sup> In that case, a murder investigation led police to suspect Lloyd Perkins as the killer.<sup>103</sup> At the time of the investigation, Perkins was being incarcerated at a local jail for an unrelated offense.<sup>104</sup> Police placed an undercover agent (Parisi) in a jail cellblock with Perkins where Parisi then struck up a conversation with Perkins and asked if he had ever killed anyone.<sup>105</sup> Perkins made statements that implicated himself in the murder and those statements were used to aid in convicting Perkins.<sup>106</sup> The Supreme Court held that “the essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate.”<sup>107</sup> Thus, when a suspect does not perceive that he is speaking with law enforcement, the concerns of *Miranda* are alleviated.

The U.S. Supreme Court has never issued an opinion specifically addressing whether *Miranda*’s rules, regarding interrogation by a governmental actor, apply in a school

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99. *Arizona v. Miranda*, 384 U.S. 436, 449 (1966).

100. *Id.* at 451.

101. *Illinois v. Perkins*, 496 U.S. 292, 296 (1990); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

102. *Perkins*, 496 U.S. at 296. In *Perkins*, Richard Stephenson was murdered. *Id.* at 294. An investigation led police to suspect Lloyd Perkins as the killer. *Id.* at 294. Because Perkins was incarcerated at a local jail for an unrelated offense, the police placed an undercover agent (Parisi) in the same cellblock with Perkins. *Id.* at 294-95. Parisi made contact with Perkins and inquired if Perkins had ever killed anyone. *Id.* at 295. Perkins made statements that implicated him in the murder and those statements were later used against him. *Id.* at 295.

103. *Id.* at 294.

104. *Id.*

105. *Id.* at 294-95.

106. *Id.* at 295.

107. *Id.* at 296.

setting.<sup>108</sup> However, when a principal (or other school actor) requires a student to come to her office to question them about a potential crime, *Miranda* does not apply. As long as the principal is acting alone and is not being directed by the police, then she is not an “authority” for purposes of *Miranda*. In *New Jersey v. T.L.O.*,<sup>109</sup> the Supreme Court decided that school officials acting in furtherance of their educational responsibilities have greater latitude under the Fourth Amendment than law enforcement officers do to search students and their property.<sup>110</sup>

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108. Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 41 (2006).

109. *New Jersey v. T.L.O.*, 469 U.S. 325, 341–43 (1985).

110. *Id.* The Court “did not consider the level of suspicion necessary when school officials act ‘in conjunction with or at the behest of law enforcement agencies’ because the school administrator acted alone in searching [the defendant’s] belongings.” Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1080–81 (2003). See Holland, *supra* note 103, at 41 (proceeding to quote an Appellate Division of the New Jersey Superior Court that held that a student’s answer to a principal’s questions were admissible despite the absence of *Miranda* warnings). The Court held:

We have no doubt, however, that the T.L.O. standards concerning Fourth Amendment searches are equally applicable to defendant’s Fifth Amendment claim. A school official must have leeway to question students regarding activities that constitute either a violation of the law or a violation of school rules. This latitude is necessary to maintain discipline, to determine whether a student should be excluded from the school, and to decide whether further protection is needed for the student being questioned or for others. A principal acting completely independently of any law enforcement agency, such as the one in the case quoted above, cannot possibly convey the sort of compulsion equivalent to that associated with arrest. Thus, there is no need for *Miranda*’s protections. Accordingly, straightforward *Miranda* analysis would exempt such questioning from the rules applicable to custodial interrogation. The question of custody need not even be raised because the principal lacks the power that raises *Miranda* concerns. The T.L.O. opinion—which does not address interrogation or the Fifth Amendment privilege—simply does not make a meaningful contribution to this straightforward *Miranda* analysis. The error highlighted here, harmless in this context, becomes consequential when judges seek to extend T.L.O.’s “standards” to questioning

b. *Custody*

The second requirement for *Miranda* to apply is that a suspect must be in “custody.” Only when a suspect is taken into custody are the *Miranda* warnings triggered. Under *Miranda*, custody is viewed in light of the Fifth Amendment. Under a Fourth Amendment analysis there are three types of contacts between law enforcement and private citizens: (1) consensual encounter,<sup>111</sup> (2) stop/investigative detention (a seizure justified by reasonable suspicion),<sup>112</sup> and (3) actual arrest or “custody” (a seizure justified by probable cause).<sup>113</sup> The Fifth Amendment does not concern itself with the first two types of contacts. For example, if a police officer pulls over a vehicle for speeding, approaches the driver, and asks how fast he was driving, the individual would be “seized” (or “detained”) under a Fourth Amendment analysis.<sup>114</sup> However, the same individual would not be “in custody” for Fifth Amendment purposes. As a result, *Miranda* would not be triggered by this seizure.

The Supreme Court in *Howes v. Fields*<sup>115</sup> provides guidance as to what “custody” means for the purposes of *Miranda*:

As used in our *Miranda* case law, “custody” is a term of art that specifies circumstances that are

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conducted by or in the presence of law enforcement officers, i.e., individuals with the power to arrest and whose actions carry a threat of compulsion no principal acting alone can ever convey.

Holland, *supra* note 103, at 59–60.

111. See *Florida v. Bostick*, 501 U.S. 429 (1991); *U.S. v. Drayton*, 536 U.S. 194 (2002); *I.N.S. v. Delgado*, 466 U.S. 210 (1984).

112. See *California v. Hodari D.*, 499 U.S. 621 (1991); *U.S. v. Mendenhall*, 466 U.S. 544 (1980); *Terry v. Ohio*, 392 U.S. 1, (1968); *Kaupp v. Texas*, 538 U.S. 626 (2003).

113. *Terry v. Ohio*, 392 U.S. 1 (1968); *Dunaway v. New York*, 442 U.S. 200 (1979); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

114. See *Berkemer v. McCarty*, 468 U.S. 420 (1984).

115. *Howes v. Fields*, 132 S. Ct. 1181 (2012).

thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of “the objective circumstances of the interrogation,” a “reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.” And in order to determine how a suspect would have “gauge[d]” his “freedom of movement,” courts must examine “all of the circumstances surrounding the interrogation.” Relevant factors include the location of the questioning.

Determining whether an individual’s freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. We have “decline[d] to accord talismanic power” to the freedom-of-movement inquiry, and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. “Our cases make clear . . . that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody.”<sup>116</sup>

Thus, the test of whether a suspect is in custody is analyzed using the objective reasonable suspect test.

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at

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116. *Id.* at 1189–90.

liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest."<sup>117</sup>

Ultimately, the determining factor of whether a suspect is in custody for the purposes of receiving *Miranda* protections is whether there is a formal arrest or "restraint on freedom of movement" to the degree associated with a formal arrest.<sup>118</sup>

All circumstances surrounding the situation should be examined, including how a reasonable person in the suspect's position would perceive his or her freedom to leave.<sup>119</sup> The subjective views of both the interrogating officers and those of the person being questioned are irrelevant.<sup>120</sup> The test involves no consideration of the "actual mindset" of the particular suspect being questioned by the police.<sup>121</sup> Five factors are often

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117. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (alteration in original) (internal quotation marks and footnote omitted). See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011); *Yarborough v. Alvarado*, 541 U.S. 652, 662–63 (2004); *Stansbury v. California*, 511 U.S. 318, 323 (1994); *Berkemer v. McCarty*, 468 U.S. 420, 442 n.35 (1984).

118. *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

119. *J.D.B.*, 131 S. Ct. at 2397 (citing *Stansbury*, 511 U.S. at 322,325).

120. *Stansbury*, 511 U.S. at 323.

121. See *Yarborough*, 541 U.S. at 667; see also *Beheler*, 463 U.S. at 1125 n.3. For example in *Illinois v. Perkins*, the government placed an undercover agent in the cell of Perkins. *Illinois v. Perkins*, 496 U.S. 292, 296 (1990). At the time, Perkins was incarcerated on charges unrelated to the subject of the government's investigation (a murder). *Id.* at 294. While the agent masqueraded as Perkins cellmate, Perkins made statements to the agent describing at length the details of the murder. *Id.* at 295. The Supreme Court ruled in this particular situation, a reasonable suspect would not believe they were in custody. *Id.* at 300. "*Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates." *Id.* at 298. Because Perkins was not in custody, one of the requirements was not met and, thus, *Miranda* was not applicable. *Id.* at 300. However, even though the use of undercover agents may not be violative of *Miranda*, such situations can create a violation of a defendant's Sixth Amendment right to counsel if the defendant has been already been charged. *Massiah v. United States*, 377 U.S. 201, 206 (1964).



considered to determine whether or not a suspect is free to leave: (1) whether the officers told the suspect he was under arrest or free to leave; (2) the location or physical surroundings of the interrogation;<sup>122</sup> (3) the length of the interrogation; (4)

122. The location of the interrogation plays an important role in determining custody for the purposes of *Miranda*. The objective reasonable suspect test, regarding whether a suspect believes they are free to leave, is also employed when examining the location of the interrogation. The majority of opinions discuss three primary locations: (1) police stations; (2) residential encounters; and (3) encounters on the street. *Oregon v. Elstad*, 470 U.S. 298, 300–01 (1985) (suspect's residence); *Berkemer*, 468 U.S. at 442–43 (street encounter); *Mathiason*, 429 U.S. at 493–94 (police station). Hospitals, schools, and places of employment are other common locations, however, there are no U.S. Supreme Court cases relating to these settings. See WAYNE LAFAYE ET AL., CRIMINAL PROCEDURE, 2 CRIM. PROC. § 6.6(e) (3d ed. Supp. 2014).

*Police station interrogations and arrests.* When a suspect is taken to a police station, he or she is likely “in custody” for *Miranda* purposes. See *Howes v. Fields*, 132 S. Ct. 1181, 1189–90 (2012). When a suspect has been advised that he or she is under arrest and is escorted to the police station, the suspect is clearly in custody. An objective reasonable person would not believe they were free to leave. From the moment the police place that individual under arrest, they are in custody for the purposes of *Miranda*. This means if a suspect is arrested and placed in handcuffs at the crime scene, they are in custody from that point forward. When a suspect is placed in the back of a patrol car to be taken down to the police station (even if not necessarily under arrest), more likely than not, such individual is in custody for the purposes of *Miranda*.

There is a distinction, however, when a suspect voluntarily comes to the police station on their own accord in response to a police request. In such situations, the suspect is typically not in custody for *Miranda* purposes. *Oregon v. Mathiason*, 429 U.S. 492, 495–96 (1977). In that case, Carl Mathiason was called to the police station to be questioned about a burglary. *Id.* at 493. Mathiason and an officer met in the hallway, shook hands, and went into an office. *Id.* The officer advised Mathiason that he was not under arrest and that the officer desired to talk with him about a burglary. *Id.* Mathiason sat there for a few minutes and ultimately confessed to the crime. *Id.* The officer never advised Mathiason of his *Miranda* rights prior to the confession. *Id.* at 494. The Supreme Court held that Mathiason was not in custody because he was not “deprived of his freedom of action in any significant way.” *Id.* at 495.

In *Howes*, the Supreme Court held that simply because someone is in prison or jail does not automatically mean they are “in custody” for the purposes of *Miranda*. *Howes*, 132 S. Ct. at 1188–89. There, Randall Fields (the suspect), was serving a sentence in a Michigan jail. *Id.* at 1185. A jailer escorted Fields to a conference room where two sheriff's deputies questioned him regarding allegations he engaged in sexual conduct with a twelve-year-old boy (prior to his incarceration). *Id.* In order for Fields to get to the conference room, he had to traverse down one floor and pass through a locked door. *Id.* at 1186. At the beginning of the interview, the deputies advised

whether the officers used coercive tactics such as a hostile manner of speech, the display of weapons, or physical restraint of the suspect's movement; and (5) whether the suspect voluntarily submitted to questioning.<sup>123</sup>

c. *Interrogation*

The third requirement for *Miranda* is that there be interrogation—defined as questioning of a suspect that is likely to illicit an incriminating response.<sup>124</sup> Stated differently,

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Fields he was free to leave and return to his cell. *Id.* Fields remained free of handcuffs throughout the duration of the interview, which lasted five to seven hours. *Id.* About half-way through, officers confronted Fields about the allegations of abuse. *Id.* Fields eventually confessed to engaging in sexual acts with the boy. *Id.* The Court indicated that “*Miranda* adopted a ‘set of prophylactic measures’ designed to ward off ‘the ‘inherently compelling pressures’ of custodial interrogation,” but *Miranda* did not hold that such pressures are always present when a prisoner is taken aside and questioned about events outside the prison walls.” *Id.* at 1188.

*Encounters at one's residence.* When an encounter takes place at a suspect's home, they are probably not in custody, unless they have been placed under arrest. *Beckwith v. United States*, 425 U.S. 341 (1976).

*Street Encounters.* Another common location where law enforcement and suspects interact is on the street. The general rule is that the police can engage in questioning of persons near the scene of a crime without giving *Miranda* warnings. During these encounters, there are times in which the police decide to detain a person, not for the specific known crime, but rather, because they are acting suspiciously. When an officer does this, typically the person is not in custody for the purposes of *Miranda*. See *Terry v. Ohio*, 392 U.S. 1 (1968).

123. *United States v. King*, 604 F.3d 125, 138 (3d Cir. 2010).

124. An incriminating response as defined by the Court is “any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial.” *Rhode Island v. Innis*, 446 U.S. 291, 301 n.5 (1980). As the Court observed in *Miranda*:

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. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely ‘exculpatory’. 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

*Miranda* applies only when a confession results from questioning or conduct intended to elicit an incriminating response. For example, if an officer arrests an individual for selling methamphetamine and, while driving the suspect to the police station, engages in a conversation about the Boise State Broncos, the suspect is not being interrogated. The U.S. Supreme Court clarified this standard in *Rhode Island v. Innis*:

[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.<sup>125</sup>

As with the custody requirement, the test is an objective inquiry that does not consider the officer’s intent or the individual suspect’s understanding. The questioning must be designed to elicit an incriminating response. This means that a volunteered statement would not be covered by *Miranda*. If a suspect spontaneously makes an incriminating statement without prompting, such statement is admissible per *Miranda*.<sup>126</sup> A voluntary statement may be used regardless of

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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. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.

*Id.* (citing *Miranda v. Arizona*, 384 U.S. 436, 476–77 (1966)).

125. *Innis*, 446 U.S. at 300.

126. *Colorado v. Connelly*, 479 U.S. 157 (1986). In *Connelly*, Francis

whether the suspect is in custody or not in custody.

Interrogation for the purposes of *Miranda* includes not just direct questioning but also indirect questioning. If an officer says specific words or performs some actions that an officer “should know are reasonably likely to elicit an incriminating response from the suspect,” then it would be deemed “interrogation.”<sup>127</sup> The test is whether an objectively reasonable person would believe that the actions (or words) indirectly conveyed are reasonably likely to elicit an incriminating response.

An interrogation must be conducted by police or an agent

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Connelly randomly approached a Denver police officer and stated that he had murdered someone and he wanted to talk about it. *Id.* at 160. The officer *Mirandized* him and Connelly subsequently told the officer that the “voice of God” told him to confess to the murder. *Id.* at 160-61. The Court held this was a voluntary and non-coerced answer and the statements came in. *Id.* at 167.

127. In *Innis*, the defendant Thomas Innis robbed a taxicab driver with a sawed-off shotgun. *Innis*, 446 U.S. at 293. The driver contacted officers and identified a picture of Innis. *Id.* When the police subsequently arrested Innis he did not have the shotgun on his person. *Id.* at 294. Officers read him his rights and Innis stated he wanted an attorney. *Id.* Three officers placed him in the back of their patrol car and began driving him to the police station. *Id.* While en route, two officers conversed among themselves about the missing shotgun. *Id.* One of the officers stated that there were “a lot of handicapped children running around in this area” because a school for such children was located nearby, and “God forbid one of them might find a weapon with shells and they might hurt themselves.” *Id.* at 294-95. Innis interrupted the conversation telling the officers that they should turn around and that he could show them where the gun was located. *Id.* at 295. The Supreme Court held:

Given the fact that the entire conversation appears to have consisted of no more than a few off hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent’s contention that, under the circumstances, the officers’ comments were particularly “evocative.” It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

*Id.* at 303.

of the police.<sup>128</sup> If police intentionally set up a compromising situation for the purpose of inducing a suspect to incriminate themselves, then it is likely that an “interrogation” will have taken place.<sup>129</sup> However, when police allow a situation to develop that is likely to prompt a suspect to provide an incriminating statement, typically *Miranda* does not apply.

In *Arizona v. Mauro*,<sup>130</sup> William Mauro was in police custody being investigated for the murder of his son. Mauro was provided *Miranda* warnings and conveyed to police that he did not want to answer any questions until a lawyer was present.<sup>131</sup> All questioning stopped, detectives left the room, and Mauro’s wife, who was being questioned in another room, asked if she could speak to her husband.<sup>132</sup> The Detectives agreed and allowed her to talk with Mauro in a room with an

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128. When questions are asked by people other than the police, *Miranda* does not apply, unless the questions are asked under the direction of police. For example, if a private investigator, or the victim of a crime, asks a suspect questions and the suspect provides incriminating statements, they can be used against that suspect, despite a lack of *Miranda* warnings.

129. In *Missouri v. Seibert*, the Supreme Court invalidated the “question-first” interrogation technique by law enforcement. *Missouri v. Seibert*, 542 U.S. 600 (2004). Patrice Seibert’s twelve-year-old son, Jonathan, had cerebral palsy. *Id.* at 604. When he died in his sleep, Seibert was fearful that charges would be brought against her for neglect. *Id.* at 604. Seibert, with the assistance of her two teenage sons, devised a plan to incinerate the body of Jonathan by burning their mobile home. *Id.* at 604. They asked Donald Rector, a mentally ill teenager who was living with the family, to remain at the home with Jonathan, without telling Donald that Jonathan was dead. *Id.* at 604. Seibert’s son and a friend set the home afire, ultimately killing Donald. *Id.* at 604. When police ultimately arrested Seibert, they brought her into an interrogation room. *Id.* at 604. Officer Hanrahan refrained from giving *Miranda* warnings and questioned Seibert for thirty to forty minutes. *Id.* at 605. Seibert ultimately confessed to the crime. *Id.* at 605. After she confessed, Officer Hanrahan turned on a tape recorder, provided Seibert *Miranda* warnings, and obtained a signed waiver of her rights. *Id.* at 605. Seibert thereafter provided a full confession on tape. *Id.* at 605. In short, law enforcement intentionally started the interrogation without first reading *Miranda* warnings, and thereafter, obtained a confession. *Id.* at 605-06. Then, knowing the story, officers went back, read the warnings, and had the suspect repeat the same story. *Id.* at 606. The Court held that this “question-first” tactic effectively threatens to thwart *Miranda*’s purpose of reducing the risk that a coerced confession would be admitted, and thus, is not permitted. *Id.* at 617.

130. *Arizona v. Mauro*, 481 U.S. 520 (1987).

131. *Id.* at 522.

132. *Id.*

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officer present and the conversation being tape-recorded.<sup>133</sup> In conversing with his wife, Mauro made incriminating statements.<sup>134</sup> The Supreme Court held this did not constitute interrogation because Mauro's wife was not acting at the direction of the police.<sup>135</sup> The police did not utilize any coercive design to extract a confession in this particular circumstance.

## 2. Step Two: Exceptions

If one of the three factors (authority, custody, and interrogation) is not met, then the rules promulgated in *Miranda* do not apply and the only potential issue surrounding the confession is whether it was voluntarily given. If all three factors do exist, the next step in the analysis is whether one of the "exceptions" apply in which the *Miranda* warnings do not need to be given. Case law suggests four exceptions: (1) routine traffic stops, (2) public safety, (3) officer safety/routine *Terry* stops, and (4) routine booking questions and questions of identification.

### a. Routine Traffic Stops

The roadside questioning of a motorist who has been detained as a result of a routine traffic stop does not constitute "custodial interrogation" for the purposes of *Miranda*.<sup>136</sup> Although an ordinary traffic stop curtails the "freedom of action" of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. A traffic stop is usually brief and the motorist expects that, while he may be given a citation, in the end he will most likely be allowed to continue on his way. Moreover, the typical traffic stop is conducted in public, and the atmosphere surrounding it is substantially less "police

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133. *Id.*

134. *Id.* at 522-23.

135. *Id.* at 529-30.

136. *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984).

dominated” than that surrounding the types of interrogation at issue in *Miranda* and subsequent cases in which *Miranda* has been applied.<sup>137</sup>

In *Berkemer v. McCarty*,<sup>138</sup> after observing McCarty’s car weaving in and out of a highway lane, an officer of the Ohio State Highway Patrol forced him to stop and asked him to get out of the car.<sup>139</sup> Upon noticing that McCarty was having difficulty standing, the officer concluded that McCarty would be charged with a traffic offense and would not be allowed to leave the scene.<sup>140</sup> However, the officer never told McCarty that he would be taken into custody.<sup>141</sup> When McCarty failed a field sobriety test, the officer asked if he had been using intoxicants and McCarty replied he consumed two beers and smoked marijuana a short time before.<sup>142</sup> The officer then formally arrested McCarty and drove him to a county jail where a blood test failed to detect any alcohol in McCarty’s blood.<sup>143</sup> The U.S. Supreme Court held that McCarty was not necessarily in custody from the moment he was required to exit his vehicle.<sup>144</sup> This was because a reasonable person in McCarty’s position would have still felt they were free to leave.<sup>145</sup>

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137. *Id.* at 438-39.

138. *Id.* at 420.

139. *Id.* at 423.

140. *Id.*

141. *Id.*

142. *Berkemer*, 468 U.S. at 423.

143. *Id.*

144. *Id.* at 442.

145. *Id.* at 437-38. The Court states:

Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced “to speak where he would not otherwise do so freely.” First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist’s expectations, when he sees an officer’s lights flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration; that he may then be given a citation, but that in the end, he most likely will be allowed to continue on his way. In this respect, questioning incident to an ordinary traffic stop is quite

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Under *Brendlin v. California*,<sup>146</sup> the driver and all passengers in a vehicle are seized for purposes of the Fourth Amendment, but are not necessarily “in custody” for the purposes of the Fifth Amendment.

Traffic stops utilize the same objective reasonable suspect test. If an objective reasonable motorist was in the suspect’s position, would she believe that she was free to leave. Usually, a driver reasonably believes that she will be free to leave after a ticket has been issued to her. This belief changes after the officer notifies the motorist that she is under arrest.

b. *Public Safety Exception*

An officer is not required to give *Miranda* warnings when the questioning is “reasonably prompted by a concern for the

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different from a stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek.

Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of the officer and motorist. This exposure to public view both reduces the ability of an unscrupulous officer to use illegitimate means to elicit self-incriminating statements and diminishes the motorist’s fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two officers further mutes any sense of vulnerability. In short, the atmosphere surrounding an ordinary traffic stop is substantially less “police dominated” than that surrounding the kinds of interrogation at issue in *Miranda* itself.

See *Berkemer*, 468 U.S. at 437–39 (citations omitted).

146. *Brendlin v. California*, 551 U.S. 249 (2007).



public safety.”<sup>147</sup> In *New York v. Quarles*, two officers were patrolling when a young woman approached their car telling them that she had just been “raped by a black male, approximately six feet tall, who was wearing a black jacket with the name ‘Big Ben’ printed in yellows on the back.”<sup>148</sup> She said that he had just entered a supermarket and was carrying a gun.<sup>149</sup> The officers drove to the supermarket and entered the store.<sup>150</sup> They approached Benjamin Quarles at gun point.<sup>151</sup> Quarles was apprehended, placed under arrest, put into handcuffs, and frisked.<sup>152</sup> Officers discovered Quarles wore a shoulder holster but did not locate a gun.<sup>153</sup> One of the officers asked Quarles where the gun was. Quarles nodded his head and said, “the gun is over there.”<sup>154</sup> After the officer retrieved the gun, the officer *Mirandized* Quarles, who then asked to speak with an attorney.<sup>155</sup>

On appeal, Quarles sought to suppress his communication regarding the location of the gun and the fruits therefrom.<sup>156</sup> The Supreme Court indicated although all three factors were present, in the interest of public safety, *Miranda* warnings were not necessary.<sup>157</sup> The *Quarles* opinion created the “public safety exception” for *Miranda*. The rationale is that when law enforcement is attempting to obtain information for public safety, rather than seeking to obtain an incriminating statement, there is no need for warnings, because “a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”<sup>158</sup> As explained by the Court:

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147. *New York v. Quarles*, 467 U.S. 649, 656 (1984).

148. *Id.* at 651.

149. *Id.* at 651-52.

150. *Id.* at 652.

151. *Id.*

152. *Id.*

153. *Quarles*, 467 U.S., at 652.

154. *Id.* at 652.

155. *Id.*

156. *Id.* at 653.

157. *Id.* at 657-68.

158. *Id.* at 657. The existence of a threat to public safety is determined by an objective inquiry. *Id.* at 656. It does not matter what the officer’s subjective belief or intent was at the time. *Id.* The test is what a reasonable officer would have perceived in light of the circumstances. *Id.*

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We hold that on these facts there is a “public safety” exception to the requirement that Miranda warnings be given before a suspect’s answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved.<sup>159</sup>

c. *Officer Safety/Terry Stops*

In *Terry v. Ohio*,<sup>160</sup> the Supreme Court outlined that during a stop or investigatory detention, an officer may conduct a limited frisk of a suspect for weapons when the officer has reasonable, articulable suspicion that the suspect has been engaged in, or is about to be engaged in, criminal activity and there is a reasonable belief that the suspect is armed and presently dangerous.<sup>161</sup> In the *Terry* opinion that came two years after *Miranda*, there is no discussion indicating warnings are required in situations where *Terry* would apply. Thus, such situations are not viewed as “custodial” for purposes of *Miranda*.

d. *Routine Booking Questions & Questions of Identification*

Routine questions asked for the purpose of identification only do not require *Miranda* warnings. Although identification is typically an element of a crime and can be incriminating, questions about a defendant’s name, address, height, weight, eye color, and other identifying questions do not require the

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159. *New York v. Quarles*, 467 U.S. at 655–56. See Marc Reiner, *The public safety exception to Miranda: Analyzing Subjective Motivation*, 93 MICH. L. REV. 2377 (1995); Elizabeth Williams, *What Circumstances Fall Within Public Safety Exception to General Requirement, Pursuant to or as Aid in Enforcement of Federal Constitution’s Fifth Amendment Privilege Against Self-Incrimination, to Give Miranda Warnings Before Custodial Interrogation –post-Quarles Cases*, 142 A.L.R. FED. 229 (1997).

160. *Terry v. Ohio*, 392 U.S. 1 (1968).

161. See *Adams v. Williams*, 407 U.S. 143, 146 (1972).

warnings. Questions seeking identifying information are typical in any police encounter. It is common for police to ask questions inquiring into an individual's name or address when they are first stopped as well as when they are arrested and booked.<sup>162</sup> Police are required to have a record of the suspect's identity before a number of actions can even take place, such as an arrest and booking. This biographical data thus falls into an exception that the Supreme Court has created—often referred to as “routine booking information.”<sup>163</sup>

The Supreme Court held in *Pennsylvania v. Muniz*<sup>164</sup> that answers to questions eliciting a suspect's name, address, height, weight, eye color, date of birth, and current age are routine booking questions and do not require *Miranda* warnings. In *Muniz*, a patrol officer observed Inocencio Muniz and a passenger parked in a car on the shoulder of a highway.<sup>165</sup> When the officer inquired whether Muniz needed assistance, the officer smelled alcohol on his breath.<sup>166</sup> The officer told Muniz to keep the vehicle parked until his condition improved.<sup>167</sup> As the officer walked back to his vehicle, Muniz drove off.<sup>168</sup> The officer pursued him down the highway and pulled him over.<sup>169</sup> After conducting a DUI investigation, the officer arrested Muniz and took him to jail.<sup>170</sup> While at the jail, a booking officer asked Muniz his name, address, height, weight, eye color, date of birth, and current age.<sup>171</sup> Muniz responded to each of these questions, stumbling over his address and age.<sup>172</sup> The officer then asked Muniz, “Do you

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162. Meghan S. Skelton & James G. Connell III, *The Routine Booking Question Exception to Miranda*, 34 U. BALT. L. REV. 55, 55 (2004).

163. *Pennsylvania v. Muniz*, 496 U.S. 582, 584 (1990). It should be noted that *Muniz* was a plurality opinion. *Id.* So although a majority of the Supreme Court has not signed off on this exception, this exception has become a staple to Fifth Amendment jurisprudence. *Id.*

164. *Id.* at 584.

165. *Id.* at 585

166. *Muniz*, 496 U.S. at 585.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 585-86.

172. *Muniz*, 496 U.S. at 586.

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know what the date was of your sixth birthday?”<sup>173</sup> After Muniz offered an inaudible reply, the officer repeated, “When you turned six years old, do you remember what the date was?”<sup>174</sup> Muniz responded, “No, I don’t.”<sup>175</sup>

A plurality of the Court decided routine booking questions are an exception to *Miranda* as such questions are designed to secure the “biographical data necessary to complete booking or pretrial services.”<sup>176</sup>

### 3. Step Three: The Warnings

If all three factors (authority, custody, and interrogation) apply, and there is no exception identified, then the suspect must be advised of the four warnings prescribed in *Miranda*. The four warnings that are required once *Miranda* applies are as follows:

1. He has the right to *remain silent*;
2. Anything he says can be *used against him* in a court of law;
3. He has the right to the *presence* of an *attorney*;  
and
4. If he cannot *afford* an attorney, one will be *appointed for him* prior to any questioning if he desires.

If the police do not provide these four warnings during a custodial interrogation, then any statement obtained is inadmissible in a prosecution’s case-in-chief, even if the statement was voluntary. However, the general rule is that voluntary statements taken in violation of *Miranda* can be introduced to impeach the testimony of the defendant if he testifies at trial.

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173. *Id.*

174. *Id.*

175. *Id.* at 586.

176. *Id.* at 601. Although the court held that name, address, height, weight, eye color, date of birth, and age were admissible, the question about Muniz’s sixth birthday was not covered by the “routine booking” exception. *Id.*

Recently, in *Florida v. Powell*,<sup>177</sup> the U.S. Supreme Court held that the form of the warnings was not as important as the content conveyed. Thus, when giving the *Miranda* warnings, it is not necessary to read them in the order as delineated in the *Miranda* opinion, nor to recite them verbatim.<sup>178</sup> All that is required is for an officer to “clearly inform” the suspect of them prior to custodial interrogation. Law enforcement is permitted to use different words than those prescribed in *Miranda* as long as they communicate the same essential message.<sup>179</sup> If the warnings are “sufficiently comprehensive and comprehensible

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177. *Florida v. Powell*, 559 U.S. 50 (2010). On August 10, 2004, law enforcement officers in Tampa, Florida, seeking to apprehend respondent Kevin Powell in connection with a robbery investigation, entered an apartment rented by Powell’s girlfriend. *Id.* at 53. After spotting Powell coming from a bedroom, the officers searched the room and discovered a loaded nine-millimeter handgun under the bed. *Id.* The officers arrested Powell and transported him to the Tampa Police headquarters. *Id.* Once there, and before asking Powell any questions, the officers read Powell the standard Tampa Police Department Consent and Release Form 310. *Id.* The form states:

You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. *You have the right to talk to a lawyer before answering any of our questions.* If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. *You have the right to use any of these rights at any time you want during this interview.*

*Id.* at 54 (emphasis added). Acknowledging that he had been informed of his rights, that he “understood them,” and that he was “willing to talk” to the officers, Powell signed the form. *Id.* He then admitted that he owned the handgun found in the apartment. *Id.* Powell knew he was prohibited from possessing a gun because he had previously been convicted of a felony, but said he had nevertheless purchased and carried the firearm for his protection. *Id.* The Supreme Court held that the *Miranda* warnings provided adequately informed Powell of his right to consult with a lawyer and to have the lawyer with him during the interrogation, even though they were not verbatim recitations of language from *Miranda*. *Id.* at 60. When administering *Miranda* warnings, the language must reasonably convey the content of *Miranda* to a suspect. *Id.* Although the warnings were not the clearest iteration, they were both comprehensive and comprehensible when viewed in a commonsense reading. *Id.* at 63.

178. *Id.* at 60. See *Duckworth v. Eagan*, 492 U.S. 195 (1989); *California v. Prysock*, 453 U.S. 355, 359 (1981).

179. *Powell*, 559 U.S. at 64.

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when given a commonsense reading,” they satisfy *Miranda*.<sup>180</sup>

B. *Second Prong: Waiver and Invocation of Miranda Rights*

The second prong of the *Miranda* analysis is whether or not the suspect waived his constitutional rights or invoked them. After the warnings have been given during a custodial interrogation by the police, the suspect may invoke or waive his rights to an attorney and to remain silent. Generally, a suspect may exercise his right to have a lawyer present or to remain silent at any time during the questioning. This means a suspect could start talking to police and then decide halfway through the questioning to invoke. It also means the opposite—they may invoke right at the start, but then notify the police that they want to speak. Step Four examines what constitutes invocation and what constitutes a valid waiver.

1. Step Four: Invocation of Rights or Waiver of Rights

When a suspect invokes his right to remain silent or to speak with an attorney, the police must immediately cease the interrogation. However, the invocation must be clearly and explicitly made. Simply remaining silent is not sufficient to invoke the right to remain silent.<sup>181</sup> This also means that a suspect must be extremely clear when they request an attorney. There is a significant difference between “I want an attorney” versus “Officer, do you think I should speak with an attorney?” Finally, when a suspect waives the right to remain silent or to have an attorney present, the waiver must be knowingly and intelligently made.

Step Four explores the difference between an individual invoking their constitutional rights or waiving them under *Miranda*. The choice a suspect makes determines the direction the law enforcement officer must follow.

a. *Invocation*

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180. *Id.* at 63.

181. *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

The protection that *Miranda* provides to a suspect is that when the suspect asserts either of his rights, the prosecution may not introduce any facts or evidence that the defendant remained silent while undergoing police questioning post-arrest. When a suspect invokes his *Miranda* rights the police must immediately cease the interrogation.<sup>182</sup> The rationale of this rule, often referred to as the *Edwards* rule,

[I]s that once a suspect indicates that “he is not capable of undergoing [custodial] questioning without advice of counsel,” “any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.” . . . The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of “prolonged police custody,” by repeatedly attempting to question a suspect who previously requested counsel until the suspect is “badgered into submission.”<sup>183</sup>

This invocation must be clearly explicit. The rule prescribed by the Court is that a suspect’s request must be unambiguous and unequivocal.<sup>184</sup> In *Davis v. United States*,<sup>185</sup>

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182. *Michigan v. Mosley*, 423 U.S. 96, 103–04 (1975) (officers must cease questioning once a suspect invokes his right to remain silent). See *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (an accused “having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police”). The Court in *Berghuis* confirmed the rule articulated in *Davis*—that there needs to be a clear invocation of ones rights—applies to both the right to remain silent and the right to an attorney. *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

183. *Maryland v. Shatzer*, 559 U.S. 98, 104–05 (2010) (citations omitted) (citing *Arizona v. Roberson*, 486 U.S. 675, 681 (1988)).

184. See *Davis v. United States*, 512 U.S. 452, 459 (1994). The court states:

A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has

the Supreme Court outlined that if a suspect does not clearly assert his right to have counsel present during custodial interrogation, then the ambiguous request does not invoke the protections of *Miranda*. Robert Davis was a navy serviceman.<sup>186</sup> After a fight at a pool hall on a naval base, Davis was brought in for questioning.<sup>187</sup> Investigators advised Davis of his *Miranda* rights and Davis agreed to waive them, both orally and in writing.<sup>188</sup> As the investigation proceeded, Davis stated, “Maybe I should talk to a lawyer?”<sup>189</sup> The investigators reminded Davis of his rights and then proceeded with an additional hour of questioning.<sup>190</sup> Davis provided incriminating statements. The Court indicated that if a suspect does not make an unambiguous request, the questioning does not have to stop.<sup>191</sup> Further, the police do not have to ask clarifying questions to determine if the suspect really does want a lawyer. “A statement either is such an assertion of the right to counsel or it is not.”<sup>192</sup> Although a suspect need not speak with a law enforcement official, “he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”<sup>193</sup> If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.”<sup>194</sup>

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indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

*Id.* at 460–61.

185. *Davis v. United States*, 512 U.S. 452, 459 (1994).

186. *Id.* at 454.

187. *Id.*

188. *Id.* at 455.

189. *Id.*

190. *Davis v. United States*, 512 U.S. 452, 455 (1994).

191. *Edwards v. Arizona*, 451 U.S. 477 (1981).

192. *Smith v. Illinois*, 469 U.S. 91, 97-98 (1984) (citing Justice Simon’s dissent in *People v. Smith*, 466 N.E.2d 236, 241 (1984)).

193. *Davis*, 512 U.S. at 459.

194. *Id.* See *Moran v. Burbine*, 475 U.S. 412, 433 n. 4 (1986).



Likewise, just because a suspect remains silent does not mean they are invoking their right to remain silent.<sup>195</sup> This also means that a suspect must be extremely clear both when they request an attorney and when they desire to remain silent. As iterated above, there is a significant distinction between “I want an attorney” versus “Maybe I should talk to a lawyer?”

In *Maryland v. Shatzer*,<sup>196</sup> the Supreme Court created a “break-in-custody” exception upon a proper invocation of one’s rights. In *Shatzer*, police received information from a social worker that Michael Shatzer, Sr. had sexually abused his three-year-old son.<sup>197</sup> At the time law enforcement learned this information, Shatzer was incarcerated at the Maryland Correctional Institution, serving a sentence on an unrelated child-sexual-abuse offense.<sup>198</sup> Detective Blankenship went to the correctional institution to question Shatzer.<sup>199</sup> Before questioning began, Detective Blankenship advised Shatzer of his *Miranda* rights.<sup>200</sup> Shatzer invoked his right to an attorney immediately.<sup>201</sup> Detective Blankenship left and thereafter

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195. *Salinas v. Texas*, 133 S.Ct. 2174, 2181 (2013). *See also* *Berghuis v. Thompkins*, 560 U.S. 370 (2010). In *Berghuis*, officers were investigating a murder. *Id.* at 374. An officer advised Van Chester Thompkins of his rights using a form. *Id.* 374-75. The form included the four warnings required by *Miranda* and an additional warning not required by *Miranda*: “You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.” *Id.* at 375. Thompkins read the fifth warning, but declined to sign the form. *Id.* During the interrogation, Thompkins never stated that he wanted to remain silent, did not want to talk with the officers, or wanted a lawyer. *Id.* About two hours and forty-five minutes into the interrogation, during which Thompkins was mostly silent, an officer asked him if he “prays to God to forgive him for shooting that boy down?” *Id.* at 376. In response to this question, Thompkins said “yes” and looked away. *Id.* The interview ended shortly thereafter. *Id.* Since Thompkins never said he wanted to remain silent, the statements were held admissible. *Id.* at 388-89. Salinas takes the Thompkins case one step further, saying that the prosecution’s use of Salinas’s noncustodial silence did not violate the Fifth Amendment, and that there is no exception to invocation requirement for a witness to who declines to give an answer to police. *Salinas*, 133 S.Ct. at 2181.

196. *Maryland v. Shatzer*, 559 U.S. 98 (2010).

197. *Id.* at 100.

198. *Id.* at 101.

199. *Id.*

200. *Id.*

201. *Id.*

closed the investigation.<sup>202</sup> Two years and six months later, the same social worker referred more specific allegations to police.<sup>203</sup> Detective Hoover was assigned the case.<sup>204</sup> Detective Hoover went back to the correctional facility and again advised Shatzer of his *Miranda* rights.<sup>205</sup> This time, Shatzer signed a written waiver and proceeded to confess to the sexual abuse of his son.<sup>206</sup> The State used the confession to convict Shatzer.<sup>207</sup> On appeal, Shatzer argued that since he had invoked his rights two-and-a-half years earlier, that Detective Hoover should not have been allowed to question him.<sup>208</sup>

The Supreme Court concluded that the *Edwards* rule should not be extended indefinitely.<sup>209</sup> When a break in custody is of “sufficient duration to dissipate its coercive effects,” police may reinitiate questioning.<sup>210</sup> The Court felt that “law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful.”<sup>211</sup> Ultimately, the Court determined that fourteen days was the appropriate amount of time that had to lapse to have a proper break in custody.<sup>212</sup> “That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”<sup>213</sup>

#### b. *Waivers*

The Fifth Amendment protects an individual’s right against self-incrimination and an individual’s right to counsel in custodial interrogation.<sup>214</sup> Because these are the rights of

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202. *Shatzer*, 559 U.S. at 101.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 101-02.

207. *Id.* at 102.

208. *Shatzer*, 559 U.S. at 103.

209. *Id.* at 109.

210. *Id.*

211. *Id.* at 110.

212. *Id.*

213. *Id.*

214. U.S. CONST. amend. IV.

the individual, such individual can waive them. Waiver can be either expressed or implied.

Express waivers are the cleanest method. Customarily, an express waiver is in written form that provides the rules and warnings prescribed by *Miranda* and its progeny. This allows for the suspect to review the warning and then sign the waiver acknowledging he understands them and is thereby waiving the right to an attorney as well as the right to remain silent. As long as there is no coercion on the part of law enforcement, the express waiver leaves little room for dispute. Even if a suspect refuses to sign a written waiver, this does not necessarily negate a waiver of *Miranda* rights through a subsequent course of conduct.<sup>215</sup> For example, if a suspect provides law enforcement with an oral statement, while refusing to sign a written transcript of that statement, it does not necessarily mean that the suspect failed to waive his rights.<sup>216</sup>

In practice, however, most waivers are implied. Implied waivers leave room for more argument on both sides. It should be noted that police are not required to obtain an express waiver before commencing an interrogation.<sup>217</sup> An implied waiver occurs when a suspect does not expressly state that he is waiving his rights, but rather, his words or conduct indicate an abandonment of those rights.<sup>218</sup> Prosecutors carry the burden of demonstrating that a suspect was aware of his rights and knowingly and voluntarily waived them.

Further, just as only the suspect can waive his or her rights, the invocation must also be executed by the suspect

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215. *North Carolina v. Butler*, 441 U.S. 369 (1979). In *Butler*, the Supreme Court stated that an “express” waiver is not required per *Miranda*. *Id.* at 375-76. The only question is whether the individual waived the exercise of one of his rights. *Id.* at 374.

216. *Connecticut v. Barrett*, 479 U.S. 523 (1987). In *Barrett*, the suspect was in custody on suspicion of sexual assault and was advised of his *Miranda* rights three times. *Id.* at 525. On each occasion, after signing and dating an acknowledgement that he had been given his rights, he advised police he would not make a written statement but would talk about the crime. *Id.* After the second and third time the rights were advised, he indicated that he would not make a written statement outside the presence of an attorney, and then proceeded to orally admit his involvement in the sexual assault. *Id.*

217. *Berghuis v. Thompkins*, 560 U.S. 370, 387-88 (2010).

218. *Id.*

personally. That is, someone else cannot assert either the right to an attorney or the right to remain silent on behalf of a suspect. The Supreme Court addressed this issue in *Moran v. Burbine*.<sup>219</sup> In *Burbine*, a woman was murdered in a factory parking lot in Providence, Rhode Island.<sup>220</sup> After several months of investigation, detectives brought in Brian Burbine for breaking and entering charges, which then led to the murder investigation.<sup>221</sup> While detectives were questioning Burbine at the police station, Burbine's sister contacted the Public Defender's Office to obtain legal assistance for her brother.<sup>222</sup> An attorney then contacted the police station and spoke with detectives.<sup>223</sup> She identified herself and informed the detectives that Burbine had an attorney and that they should stop questioning until that attorney could be present.<sup>224</sup> The police did not inform Burbine of the attorney's telephone call.<sup>225</sup> The Supreme Court held this failure to inform did not deprive Burbine of information essential to his ability to knowingly waive his Fifth Amendment right to remain silent and to the presence of counsel.<sup>226</sup> "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."<sup>227</sup> Once it is demonstrated that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. The level of the police's culpability—whether intentional or inadvertent—in failing to inform respondent of the telephone call has no bearing on the validity of the waivers.<sup>228</sup>

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219. *Moran v. Burbine*, 475 U.S. 412 (1986).

220. *Id.* at 416.

221. *Id.*

222. *Id.*

223. *Id.* at 417.

224. *Id.*

225. *Moran*, 475 U.S. at 417.

226. *Id.* at 428.

227. *Id.* at 422.

228. *Id.* at 413.

## 2. Step Five: Voluntary

Even before *Miranda*, a suspect's confession was admissible only if it was given voluntarily.<sup>229</sup> Regardless of whether the *Miranda* warnings are given, a confession must be obtained without police coercion.

Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.<sup>230</sup>

The test for determining the "voluntariness" of a confession centers on whether or not there is police coercion. Courts have held that coercion by non-governmental personnel does not count as involuntary.<sup>231</sup> When a confession is obtained by police coercion, making it involuntary, it must be excluded from the prosecution's case-in-chief, as well as prohibited from use as impeachment evidence of a defendant's testimony. Involuntary confessions are quite different than confessions

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229. In *Hopt v. Utah* the U.S. Supreme Court set forth the requirement that a defendant's out-of-court admissions must be voluntarily made in order to be used at trial. *Hopt v. Utah*, 110 U.S. 574, 584-87 (1884).

230. *Arizona v. Mauro*, 481 U.S. 520, 529 (1987) (quoting *Miranda v. Arizona*, 384 U.S. 436, 478 (1966)).

231. For example: Victim says to a suspect, "Because you shot me, I will take revenge on you by shooting your sister unless you turn yourself into the police and confess." Suspect then goes to the police and confesses. This confession would likely be treated as "voluntary" and admitted against the suspect at a criminal trial, even though, in a sense, it was the product of coercion by Victim. As long as there is no *police coercion*, statements made will typically be deemed "voluntary." *Cf. Arizona v. Fulminante*, 499 U.S. 279 (1991).

obtained in violation of *Miranda* that may be admitted to impeach a defendant's testimony on the stand.

A waiver of *Miranda* must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."<sup>232</sup> The focus of the inquiry in determining if a waiver is voluntary is whether there was "official coercion."<sup>233</sup> The Supreme Court emphasized this point in *Colorado v. Connelly*.<sup>234</sup> In that case, the defendant, Francis Connelly, suffered from "chronic paranoid schizophrenia."<sup>235</sup> Connelly approached an on-duty officer, and without any prompting, began to reveal details about a murder he committed.<sup>236</sup> The officer informed Connelly of his *Miranda* rights, and Connelly indicated he understood them but still wanted to tell the officer about the murder.<sup>237</sup> Again, the officer warned Connelly that he did not have an obligation to tell the officer anything.<sup>238</sup> Despite the warnings, Connelly informed the officer "his conscience had been bothering him" and he wished to talk about the murder.<sup>239</sup>

In addressing the issue of *Miranda* waiver, the Court held:

*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that. Respondent's perception of coercion flowing from the "voice of God," however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak.<sup>240</sup>

Accordingly, a mental illness will not, in and of itself,

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232. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

233. *Oregon v. Elstad*, 470 U.S. 298, 305 (1985). The Fifth Amendment is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion." *Id.*

234. *Colorado v. Connelly*, 479 U.S. 157 (1986).

235. *Id.* at 174 (Brennan, J., dissenting).

236. *Id.* at 160.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Connelly*, 479 U.S. at 170-71.

necessarily preclude a determination that a suspect voluntarily waived *Miranda* rights as long as the police do not coerce the suspect into waiving his rights, the suspect's mental illness will not impair the validity of a waiver.<sup>241</sup>

Likewise, in *Colorado v. Spring*,<sup>242</sup> the Court held that where a suspect did not know he could be interrogated about a separate crime aside from what the suspect was arrested for,<sup>243</sup> there was "no doubt" the Fifth Amendment waiver was voluntary.<sup>244</sup> The Court stated that the suspect's "allegation that the police failed to supply him with certain information does not relate to any of the traditional indicia of coercion: 'the duration and conditions of detention . . . , the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control.'"<sup>245</sup> Thus, the inquiry is whether coercive police conduct overcame the suspect's will and "critically impaired" the suspect's "capacity for self-determination."<sup>246</sup>

Law enforcement must be careful when interrogating a suspect in more than one session. If the suspect invokes his right to remain silent in the first session, police cannot wait a couple of hours and then re-commence interrogation. Where the second interrogation is about a different crime and the police give new *Miranda* warnings prior to the second interrogation, a waiver given by the suspect is likely valid despite his insistence on remaining silent at the first interrogation. However, after a person in custody has expressed his desire to deal with the police only through counsel, he is not subject to further interrogation by authorities until counsel has been made available unless the accused "initiates further communication, exchanges, or conversations with the police."<sup>247</sup> In such situations, law enforcement cannot talk to the suspect about ANYTHING, including old, present,

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241. *Id.*

242. *Colorado v. Spring*, 479 U.S. 564 (1987).

243. *Id.* at 567–68.

244. *Id.* at 573.

245. *Id.* at 574 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)) (alteration in original).

246. *Spring*, 479 U.S. at 574.

247. *Arizona v. Robertson*, 486 U.S. 675, 677 (1988).

or new crimes. Law enforcement can reinitiate an interrogation after fourteen days, but must make sure *Miranda* warnings are given again.<sup>248</sup>

### 3. Step Six: Knowingly & Intelligently

*Miranda* requires that any decision to waive the right against self-incrimination be made knowingly and intelligently.<sup>249</sup> The requirement of a knowing and intelligent waiver of rights means that the suspect must have cognitive faculties for understanding the meaning and effect of statements he may give. In determining whether there has been an intelligent waiver, various factors, which were often considered in pre-*Miranda* confession cases under the “totality of circumstances” test,<sup>250</sup> are extremely relevant. The Supreme Court has never definitively set forth a set of factors in a single case that make up the totality of the circumstances. However, certain factors have been identified in various cases. The factors relevant to determining whether a statement was knowingly and intelligently made include the suspect’s age, experience, education, background, intelligence, presence or absence of prior contact with the police, and whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.<sup>251</sup>

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248. *Maryland v. Shatzer*, 559 U.S. 98 (2010). In 2003, the police interviewed Shatzer—then serving a sentence for an unrelated offense—regarding allegations that he sexually abused his three-year-old son. *Id.* at 100. Shatzer invoked his right to counsel, ending the interrogation. *Id.* at 101. The investigation was subsequently closed. *Id.* In 2006, while Shatzer remained incarcerated, a new investigation began. *Id.* Shatzer waived his *Miranda* rights and denied allegations that he forced his son to perform fellatio on him. *Id.* However, Shatzer admitted to masturbating in front of his son. *Id.* at 101-02. Several days later, Shatzer was again *Mirandized* and then failed a polygraph. *Id.* at 102. Immediately after questioning, Shatzer began to cry and stated, “I didn’t force him. I didn’t force him.” *Id.*

249. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

250. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

251. *See J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011). *See also Colorado v. Spring*, 479 U.S. 564 (1987); *Moran v. Burbine*, 475 U.S. 412 (1986); *North Carolina v. Butler*, 441 U.S. 369 (1979); *Fare v. Michael C.*, 442 U.S. 707 (1979); *Brewer v. Williams*, 430 U.S. 387 (1977); *Miranda v. Arizona*, 384 U.S. 436 (1966).



In *Moran v. Burbine*,<sup>252</sup> the Supreme Court set forth a two-part test that aggregates both “knowing” and “intelligent.”<sup>253</sup> In assessing a waiver of *Miranda*, the test first assesses whether such waiver was voluntary; the second part assesses whether the waiver was knowing and intelligent. In determining if a waiver is knowing and intelligent, the pertinent inquiry is whether the defendant understood the right to remain silent and anything said could be used as evidence.<sup>254</sup> A waiver is deemed knowing and intelligent if 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.”<sup>255</sup>

However, “events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.”<sup>256</sup> This is because the U.S. “Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege.”<sup>257</sup> The decision in *Burbine* is illustrative of what factors are considered when determining if a waiver is knowing and intelligent. There, law enforcement received a tip that the defendant Brian Burbine was involved in a burglary that resulted in a murder.<sup>258</sup> Officers read Burbine his *Miranda* rights and he refused to execute a written waiver.<sup>259</sup> Officers received statements from other suspects further implicating Burbine and questioning continued.<sup>260</sup> A few hours into the questioning, Burbine’s sister phoned the office of the public defender in an attempt to obtain legal assistance for her brother.<sup>261</sup> Eventually, an assistant public defender called and informed officers she intended to act as

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252. *Burbine*, 475 U.S. at 421.

253. See *Berghuis v. Thompkins*, 560 U.S. 370, 382-83 (2010) (discussing that a waiver inquiry involves two aspects).

254. *Spring*, 479 U.S. at 574.

255. *Burbine*, 475 U.S. at 421.

256. *Id.* at 422.

257. *Spring*, 479 U.S. at 574.

258. *Burbine*, 475 U.S. at 416.

259. *Id.*

260. *Id.*

261. *Id.*

counsel if police sought to question the defendant.<sup>262</sup> The officer informed the public defender they were done questioning Burbine for the night.<sup>263</sup>

Shortly thereafter, officers began a series of interviews with Burbine.<sup>264</sup> The officers informed Burbine of his *Miranda* rights each time and Burbine signed a waiver form.<sup>265</sup> The officers never informed Burbine of the public defender's attempts to get in contact with him and Burbine eventually provided incriminating statements.<sup>266</sup> The case made its way to the U.S. Supreme Court.<sup>267</sup> While recognizing that the fact an attorney was calling to speak with Burbine would be helpful to him in deciding whether to waive *Miranda* rights, the Court stated the Constitution does not require "that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."<sup>268</sup> The Court continued, "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law."<sup>269</sup> Accordingly, the requirement of knowing and intelligent involves a rudimentary showing of understanding. Where there is no allegation that a defendant "failed to understand the basic privilege guaranteed by the Fifth Amendment" or that the defendant "misunderstood the consequences of speaking freely to law enforcement," a waiver is made knowingly and intelligently in the context of *Miranda*.<sup>270</sup>

#### IV. Part III: Ramifications for violating *Miranda*

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262. *Id.* at 417.

263. *Id.*

264. *Burbine*, 475 U.S. at 417.

265. *Id.*

266. *Id.* at 418.

267. *Id.* at 418–20.

268. *Id.* at 422.

269. *Id.* at 422–23.

270. *Colorado v. Spring*, 479 U.S. 564, 575 (1987).

When a confession is obtained in violation of *Miranda*, it may not be used or introduced as part of the prosecution's case-in-chief. If one of the steps is missed or violated, the confession cannot be used as evidence of the suspect's guilt. However, the prosecution may be able to use the statements to impeach a defendant's testimony at trial if the statements' "trustworthiness . . . satisfies legal standards."<sup>271</sup> As long as the statement is not obtained as a result of coercion or was involuntary for any reason, the statement will be deemed "trustworthy" for impeachment purposes.<sup>272</sup>

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271. *Harris v. New York*, 401 U.S. 222, 224 (1971). Vivien Harris was charged for selling heroin to an undercover officer. *Id.* at 222. At trial, the State's chief witness, the undercover officer, testified to the details of the two sales. *Id.* at 223. A second officer verified collateral details of the sales and a third officer offered testimony about the chemical analysis of heroin. *Id.* Harris took the stand in his own defense. *Id.* He admitted knowing the undercover police officer but denied the sale on January 4, 1966. *Id.* Harris also testified that the substance provided to the officer on January 6, 1966 was baking powder and a part of a scheme to defraud the purchaser. *Id.* On cross-examination, the prosecution asked Harris whether he made specified statements to the police immediately following his arrest on January 7, 1966. *Id.* These statements partially contradicted Harris's direct testimony at trial. *Id.* In response, Harris testified he could not remember virtually any of the questions or answers recited by the prosecutor. *Id.* The prosecution read the statement, obtained in violation of *Miranda*, in which Harris admitted to the sale. *Id.* The prosecution sought the prior statements to be considered by the jury regarding Harris's credibility. *Id.* In addressing the propriety of the prosecution's use of the prior statement, the Supreme Court held, "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226. See *Oregon v. Hass*, 420 U.S. 714 (1975).

272. *Mincey v. Arizona*, 437 U.S. 385 (1978). In *Mincey*, undercover police officer Barry Headricks arranged to purchase a quantity of heroin from Rufus Mincey. *Id.* at 387. The officer left to obtain money, and when he arrived back, he brought nine other officers in plain clothes. *Id.* The undercover officer knocked on the door and it was opened by John Hodgman, one of three acquaintances of Mincey, who were in the living room of the apartment. *Id.* Officer Headricks slipped inside and moved quickly into the bedroom. *Id.* Hodgman attempted to slam the door in order to keep the other officers from entering, but was pushed back against the wall. *Id.* As police entered the apartment, a rapid volley of shots was heard from the bedroom. *Id.* Officer Headricks emerged and collapsed on the floor after being shot and subsequently died. *Id.* When other officers entered the bedroom, they found Mincey lying on the floor, wounded and semiconscious. *Id.* Homicide detectives arrived on the scene to take charge of the investigation and proceeded to conduct an exhaustive four-day warrantless search of the apartment. *Id.* at 389. This included the opening of dresser drawers, the ripping up of carpets, and the seizure of 200 to 300 objects. *Id.*

Next, *Miranda* is generally not subject to the typical Fourth Amendment “fruit of the poisonous tree”<sup>273</sup> analysis. Evidence obtained as a result of a statement in violation of *Miranda* is usually not suppressed.<sup>274</sup> The Supreme Court in *Michigan v. Tucker*<sup>275</sup> held that the fruit of the poisonous tree doctrine does not apply in the traditional fashion to *Miranda* violations.<sup>276</sup> The police “did not abridge respondent’s

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In the evening of the same day as the raid, one of the detectives went to the hospital where petitioner was confined in the intensive-care unit. *Id.* at 396. After giving Mincey his *Miranda* warnings, the detective proceeded to interrogate him while he was lying in bed barely conscious, encumbered by tubes, needles, and a breathing apparatus, and despite the fact that Mincey repeatedly asked that the interrogation stop until he could get a lawyer. *Id.* The Supreme Court held that where statements are not “the product of rational intellect and free will” they cannot be used in a criminal trial, even for impeachment purposes. *Id.* at 398. Mincey “was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious and his will was simply overborne.” *Id.* at 401–02. Accordingly, Mincey’s statements were not the product of his free and rationale choice. *Id.*

273. *Wong Sun v. United States*, 371 U.S. 471 (1963). *Wong Sun* establishes the “fruit of the poisonous tree” doctrine. *Id.* The fruits of police conduct that actually infringed a defendant’s Fourth Amendment rights must be suppressed. *Id.* at 485. In *Wong Sun* the police discovered evidence through statements made by the accused after he had been placed under arrest. *Id.* at 490. The Court, found that the arrest had occurred without probable cause and held that the derivative evidence could not be introduced against the accused at trial. *Id.* at 491.

274. *Michigan v. Tucker*, 417 U.S. 433 (1974).

275. On the morning of April 19, 1966, a forty-three-year-old woman in Pontiac, Michigan was found in her home by a friend and coworker, Luther White, in serious condition. *Id.* at 435. At the time she was found, the woman was tied, gagged, partially disrobed, and had been both raped and severely beaten. *Id.* She was unable to tell White anything about her assault at that time and still remains unable to recollect what happened. *Id.* While contacting police, White observed a dog in the house. *Id.* The victim did not own a dog so this was strange to White. *Id.* at 435-36. Upon their arrival, the police were able to track the dog back to Thomas Tucker. *Id.* at 436. The police brought Tucker to the station and questioned him about the rape. *Id.* They advised him of his rights, except failed to state he would be furnished counsel free of charge if he could not pay for such services. *Id.* (discussing such a violation of *Miranda*). Tucker provided information about a witness, Robert Henderson, who he had been with. *Id.* Police took that information and followed up by speaking with Henderson. *Id.* Henderson provided police information that Tucker told him regarding scratches on Tucker’s face and about a sexual encounter Tucker had with a woman that lived on the next block over. *Id.* at 436-37. The prosecution used this statement at trial. *Id.* at 437.

276. *Id.* at 445. The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits.

constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege.”<sup>277</sup> *Miranda* deals only with the Fifth Amendment, so it is only applies to statements. The Fifth Amendment is not concerned with nontestimonial evidence.<sup>278</sup> “Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.”<sup>279</sup>

The Court in *Oregon v. Elstad*<sup>280</sup> eloquently explained that a *Miranda* violation is not a true Constitutional violation, and thus, the normal suppression rules do not apply.<sup>281</sup> That case involved a home that was burglarized.<sup>282</sup> Items missing from the home included art objects and furnishings valued at around \$150,000.<sup>283</sup> A witness contacted the police and implicated Michael Elstad, who was an eighteen-year-old neighbor and friend of the victim home’s teenage son.<sup>284</sup> Police obtained a warrant for Elstad’s arrest and went to speak with him at his residence.<sup>285</sup> An officer first sat down with Elstad in his living room and asked him about the burglary.<sup>286</sup> After Elstad

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Dunaway v. New York, 442 U.S. 200, 216–217 (1979); *Brown v. Illinois*, 422 U.S. 590, 600–602 (1975). “The exclusionary rule. . .when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth.” *Brown*, 422 U.S. at 601. Where a Fourth Amendment violation “taints” the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted in evidence. *Taylor v. Alabama*, 457 U.S. 687, 690 (1982). “Beyond this, the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation.” *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

277. *Id.* at 445–46.

278. *See* *Schmerber v. California*, 384 U.S. 757, 764 (1966).

279. *United States v. Washington*, 431 U.S. 181, 187 (1977).

280. *Oregon v. Elstad*, 470 U.S. 298 (1985).

281. *Id.* at 318.

282. *Id.* at 300.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Elstad*, 470 U.S. at 300-01.

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confessed to the crime, the officers arrested him, placed him in the back of the patrol car, and took him to the police station.<sup>287</sup> At the station, the officers advised Elstad for the first time of his *Miranda* rights.<sup>288</sup> Elstad gave a second confession and provided a full statement.<sup>289</sup> The Supreme Court held that second confession was admissible and went through an analysis as to why the unwarned first confession did not taint the second confession.<sup>290</sup>

The arguments advanced in favor of suppression of respondent's written confession rely heavily on metaphor. One metaphor, familiar from the Fourth Amendment context, would require that respondent's confession, regardless of its integrity, voluntariness, and probative value, be suppressed as the "tainted fruit of the poisonous tree" of the *Miranda* violation. A second metaphor questions whether a confession can be truly voluntary once the "cat is out of the bag." Taken out of context, each of these metaphors can be misleading. They should not be used to obscure fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment. The Oregon court assumed and respondent here contends that a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as "fruit of the poisonous tree." We believe this view misconstrues the nature of the protections afforded by *Miranda* warnings and therefore misreads the consequences of police failure to

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287. *Id.* at 301.

288. *Id.*

289. *Id.*

290. *Id.* at 318.

supply them.<sup>291</sup>

. . . The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.<sup>292</sup>

In accord with *Elstad*, most courts have held that *Miranda* violations will not require the exclusion of derivative evidence, even when that evidence is physical. The Court, thirty years later, held that the two-stage interrogation technique violates *Miranda*, saying that the second confessions are inadmissible and violate the spirit of the rule.<sup>293</sup> Although this technique violates *Miranda* it does little to deviate away from the same Fourth and Fifth Amendment analysis regarding derivative evidence. In *United States v. Patane*,<sup>294</sup> the Supreme Court addressed the specific issue of "whether a failure to give a suspect the warnings prescribed by *Miranda v. Arizona* requires suppression of the physical fruits of the suspect's unwarned but voluntary statements."<sup>295</sup> The Court continued, "Because the *Miranda* rule protects against violations of the Self-Incrimination Clause, which, in turn, is not implicated by

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291. *Id.* at 303–04.

292. *Elstad*, 470 U.S. at 306–07. See *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

293. *Missouri v. Seibert*, 542 U.S. 600 (2004).

294. *United States v. Patane*, 542 U.S. 630 (2004).

295. *Id.* at 633–34.

the introduction at trial of physical evidence resulting from voluntary statements, we answer the question presented in the negative.”<sup>296</sup>

In that case, Samuel Patane was arrested for harassing his ex-girlfriend.<sup>297</sup> He was released on bond, subject to a restraining order that prohibited him from contacting the victim.<sup>298</sup> Patane violated the order by telephoning the victim.<sup>299</sup> At the time, officers had been investigating Patane on another matter relating to illegally possessing a firearm (a Glock pistol).<sup>300</sup> A county probation officer informed police of the violation of the order.<sup>301</sup> Officers went to Patane’s residence and placed him under arrest.<sup>302</sup> One detective tried to advise Patane of his rights but only made it to, “You have the Right to Remain Silent.”<sup>303</sup> At this point, Patane interrupted and said he knew his rights and none of the officers completed the warning.<sup>304</sup> One of the detectives then asked Patane about the firearm.<sup>305</sup> Patane was initially reluctant to discuss the matter and stated, “I am not sure I should tell you anything about the Glock because I don’t want you to take it away from me.”<sup>306</sup> After the detective persisted, Patane told him that the pistol was in his bedroom and also gave the detective permission to retrieve the pistol.<sup>307</sup> The detective found the pistol and seized it.<sup>308</sup> The Court held:

The *Miranda* rule “does not require that the statements [taken without complying with the rule] and their fruits be discarded as inherently tainted.” Such a blanket suppression rule could

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296. *Id.* at 634.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Patane*, 542 U.S. at 634.

301. *Id.* at 634-35.

302. *Id.* at 635.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Patane*, 542 U.S. at 635.

307. *Id.*

308. *Id.*



not be justified by reference to the “Fifth Amendment goal of assuring trustworthy evidence” or by any deterrence rationale, and would therefore fail our close-fit requirement. Furthermore, the Self-Incrimination Clause contains its own exclusionary rule. It provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” Unlike the Fourth Amendment’s bar on unreasonable searches, the Self-Incrimination Clause is self-executing. We have repeatedly explained “that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial.” This explicit textual protection supports a strong presumption against expanding the *Miranda* rule any further.<sup>309</sup>

Therefore, the “fruit of the poisonous tree” doctrine does not apply or extend to *Miranda*. Dissimilar to searches in violation of the Fourth Amendment, the Fifth Amendment contains a built-in safeguard that does not need to be expanded.

## V. Conclusion

After fifty years, *Miranda v. Arizona* has become second nature in the criminal justice system. Since its primary rule was fictitiously created out of the Fifth Amendment, it has caused much confusion among law enforcement officials, legal practitioners, and trial judges as to its application in the admissibility of confessions. For five decades, courts have struggled to provide an adequate framework for practitioners to do their job. *Miranda*’s evolution and modern day application has needed a template for the day-to-day administration of justice. This six-step analysis provides a practical model for those in the justice system to apply the

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309. *Id.* at 639–40 (citations omitted).

principles that *Miranda* was established on.

The two-prong test presented captures the Supreme Court's continued discussion and interpretation of *Miranda*. The first prong centers on whether *Miranda* applies. Step One sets forth the primary rule of establishing the three factors that must exist: existence of an authority figure (for example, police) engaged in custodial interrogation. If these three factors are present, then Step Two discusses the four exceptions that have been carved out of *Miranda*: (i) routine traffic stops, (ii) public safety, (iii) officer safety, and (iv) routine booking questions. If no exception applies, Step Three explains how to advise the suspect of the four warnings prescribed by *Miranda*.

The second prong centers on whether the suspect has invoked or waived *Miranda* rights. Step Four explained that a suspect must clearly and unequivocally invoke their rights, otherwise, their statements can be used against them. Step Five clarifies that police cannot exert unlawful coercion over the suspect and the statements made must be voluntary. Finally, Step Six ensures that the suspect knowingly and intelligently waive these rights.

If both prongs are followed and all six steps adhered to, statements made by a suspect should be admissible as evidence in a subsequent case. If the steps are not complied with, then statements can, and often times likely will, be excluded. When *Miranda* is violated, the Fifth Amendment excludes subsequent statements. However, such a violation does not necessarily lead to the exclusion of physical evidence (although possible).

*Miranda* continues to evolve. Practitioners in the criminal justice system continue to see what new interpretations, new exceptions, new analyses, and new rulings come out each year. The living creature embodied in *Miranda* is simultaneously both exciting and frustrating. Ultimately with *Miranda*, if a practitioner follows the six-step analysis outlined above, there no longer will be confusion.