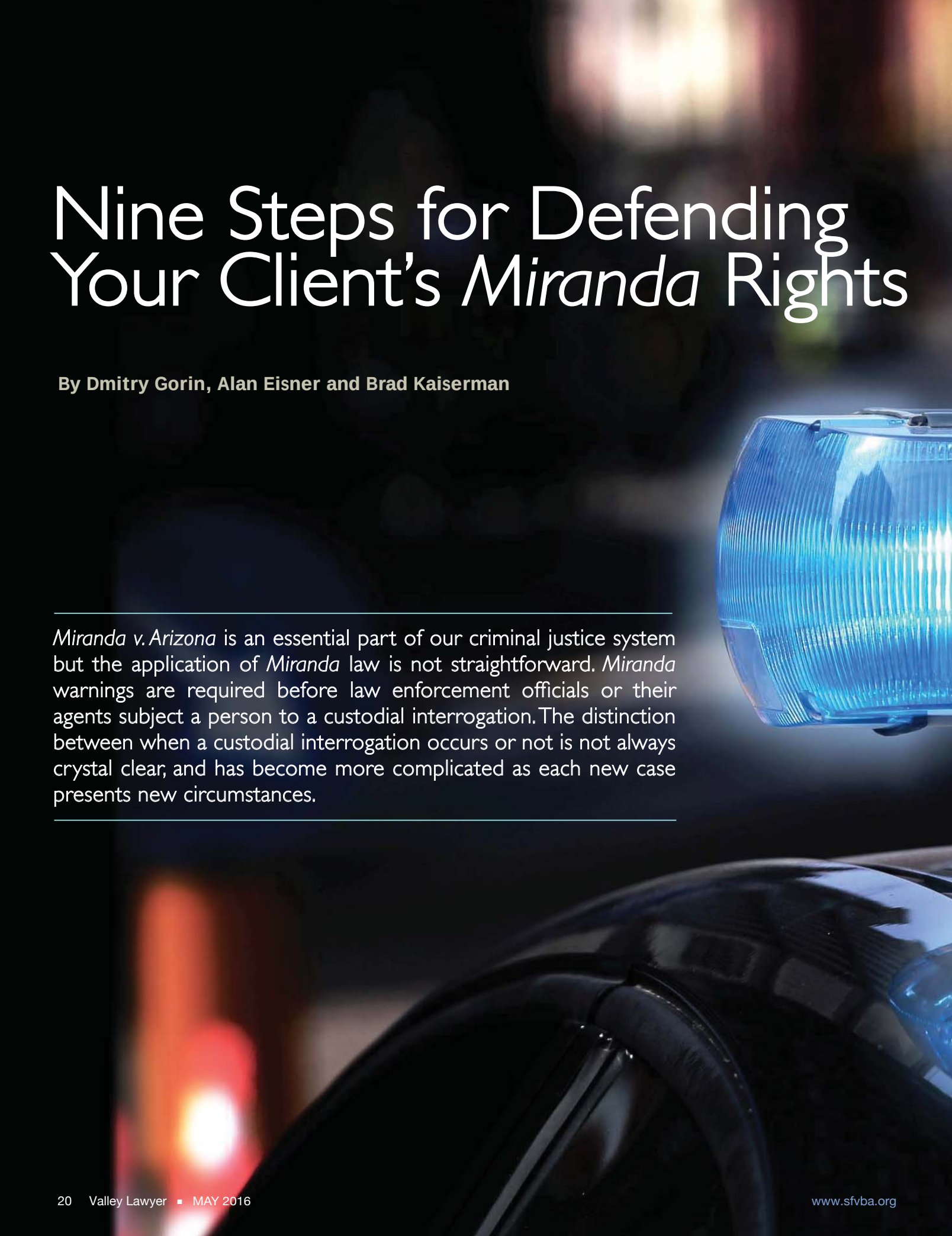
Nine Steps for Defending Your Client's *Miranda* Rights

By Dmitry Gorin, Alan Eisner and Brad Kaiserman



Miranda v. Arizona is an essential part of our criminal justice system but the application of *Miranda* law is not straightforward. *Miranda* warnings are required before law enforcement officials or their agents subject a person to a custodial interrogation. The distinction between when a custodial interrogation occurs or not is not always crystal clear, and has become more complicated as each new case presents new circumstances.

"I WAS NOT GIVEN MY RIGHTS. . . . THE CASE should be dropped." This is a typical client statement to a criminal defense attorney, and the typical answer is that "*Miranda* rights are relevant only to whether a statement you made is admissible against you in court, not to whether your arrest was valid."

The case law arising from *Miranda v. Arizona*[1] is an important part of our criminal justice system, and this article examines its most highly litigated areas. The government's case can collapse if a defendant's statement is excluded. Alternatively, a defendant can talk himself or herself into a life sentence. The stakes are indeed very high during *Miranda* litigation.

Miranda warnings are required before law enforcement officials or their agents or court agents subject a person to a "custodial interrogation." Although law enforcement and courts understand this absolute constitutional right, criminal defense lawyers regularly must deal with potential *Miranda* violations.

When a prosecutor seeks to introduce a defendant's statement, a defense lawyer must be aware of *Miranda* case law to address its admissibility, and generally should ask nine questions:

1. Was a law enforcement official or agent or a court agent asking the questions?
2. Was the defendant "in custody" or "detained"?
3. Was there an "interrogation" or other questioning process?
4. Did the public safety exception apply?
5. Were the *Miranda* rights accurately stated in English or a foreign language?
6. Did the defendant waive his or her *Miranda* rights?
7. Did the defendant invoke the right to counsel?
8. Did the defendant invoke the right to remain silent?
9. Did questioning continue post-invocation?

1 Who asked the questions?

Miranda warnings are required only when a person is interrogated in custody by law enforcement officials or their agents or agents of a court.[2] The general test used "is whether he [the individual] is employed by an agency of government, federal, state or local, whose primary mission is to enforce the law."[3] Courts have held that law enforcement officials for purposes of *Miranda* can be Immigrations and Customs Enforcement agents[4] or Internal Revenue Service agents.[5]

A member of law enforcement working undercover, however, need not provide *Miranda* warnings.[6] This includes an agent undercover as a prison inmate.[7] Additionally, questions by a probation officer during a pre-plea interview that are not about the offense itself do not require *Miranda* warnings, even if the defendant is in custody.[8]

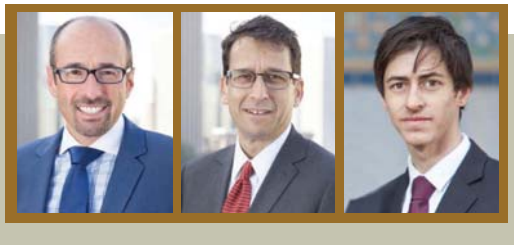
For purposes of *Miranda*, law enforcement officials do not include doctors asking questions about medical history,[9] social workers,[10] school officials,[11] plainclothes private store detectives,[12] private security guards,[13] or private investigators.[14] Thus, for example, where a suspect confesses to shoplifting to a department store's loss prevention officer, or where an employee suspected of embezzlement incriminates himself or herself to the employer's private investigator, *Miranda* warnings are not required.

Nonetheless, even if an individual is a private citizen instead of a member of law enforcement, he or she must provide *Miranda* warnings before engaging in a custodial interrogation, if he or she is acting as an agent of law enforcement or the courts. Examples of these "agents" include psychiatrists hired by the prosecution[15] or appointed by a court.[16]

2 Was there "custody" or "detention"?

Once it is established *Miranda* applies to the person asking the questions, the next question is whether the suspect was "in custody" as defined by *Miranda* case law.

To determine this, courts ascertain if 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."[17] "[T]o determine how a suspect would have 'gauge[d]' his 'freedom of movement,' courts must examine 'all of the circumstances surrounding the interrogation.' "[18] Relevant factors include "the location of the questioning," "its duration," "statements made during the interview," "the presence or absence of physical restraints during the questioning," "and the release of the interviewee at the



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end of the questioning."[19] Although a common example of custody is an individual handcuffed and placed under arrest, formal arrest is not a requirement of custody for purposes of *Miranda*.

Age can also be a factor in assessing custody.[20] As the Supreme Court explained, in discussing a 13-year-old defendant, "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[21]

A "detention" does not qualify as "custody" as defined by *Miranda* case law. The most common example of detention is a driver pulled over for a traffic violation. Law enforcement need not provide *Miranda* warnings when initially questioning a driver prior to arrest under such circumstances.[22] Nor does law enforcement need to provide *Miranda* warnings when an individual is detained in public pursuant to *Terry v. Ohio*.[23] Law enforcement also has no obligation to provide *Miranda* warnings during negotiations with an individual who has a hostage.[24]

In *People v. Bejasa*,[25] the defendant was contacted by law enforcement after crashing his vehicle. The defendant acknowledged he was on parole and consented to a search, during which, two syringes were found. The defendant admitted shooting up methamphetamine. He was handcuffed and placed in the back of a police car. No *Miranda* warnings were provided. The defendant was then asked several questions regarding when and how much he had been drinking. The Court of Appeal held these circumstances qualified as custody for *Miranda* purposes as the "[d]efendant was confronted with two of the most unmistakable indicia of arrest: he was handcuffed and placed in the back of a police car."[26]

On the other hand, in *People v. Davidson*,[27] the defendant was detained and handcuffed for a motorcycle theft investigation. The officer then asked the defendant if the motorcycle he had been seen with was his. The Court of Appeal held that although the defendant was handcuffed, it was a short detention that did not amount to custody for *Miranda* purposes.

A person in prison is not in custody for *Miranda* purposes. Although incarceration limits the freedom of inmates, it "does not create the coercive pressures identified in *Miranda*" as prison has become their accustomed surroundings and part of their daily routine.[28]

In sum, determining whether a person is in custody under *Miranda* case law is a nuanced inquiry. For example, a court might hold a defendant being initially handcuffed is insufficient to constitute custody under *Miranda* if the incriminating statements were made after the suspect was later uncuffed. Unfortunately, nuanced custody disputes arise frequently because custody often forms the basis for motions to exclude incriminating statements.

❸ Was there an "interrogation" or other questioning process?

In addition to showing he or she was in "custody" as defined by *Miranda* case law, a defendant must show he or she was subject to an "interrogation" as defined by *Miranda* case law.

"Interrogation" for purposes of *Miranda* " 'refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.' "[29] Accordingly, "[i]ndirect comments (or coercive actions) by an officer that cause an accused to make inculpatory statements can also constitute interrogation."[30]

For example, *Miranda* warnings must be provided before a post-arrest sobriety test,[31] questioning for a routine tax investigation,[32] or questioning by an Immigration and Naturalization Service[33] (INS) agent during a criminal investigation.[34] A warning is not required, however, where an INS[35] agent questions a suspect in an investigation for an administrative deportation action.[36]

Likewise, routine booking questions, including asking a defendant about his or her gang moniker, do not require *Miranda* warnings.[37] Questions about gang affiliation, however, do require a *Miranda* warning, although unadmonished questions can be asked during booking for purposes of placing an inmate in jail or prison.[38]

It is the experience of most criminal defense attorneys that officers will ask routine questions after an arrest to "break the ice" with the suspect, with the intention of asking questions about the crime afterwards. The law does not require *Miranda* warnings for this "softening up" process.

❹ Did the public safety exception apply?

Under certain circumstances, implicating the interests of public safety, officers can ask a suspect certain questions without providing *Miranda* warnings.

In *New York v Quarles*,[39] the Supreme Court held no *Miranda* warning was required when an officer asked a suspect, who had just been arrested, where in a supermarket he had discarded his gun. The Supreme Court held the police:

> were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might

make use of it, a customer or employee might later come upon it.[40]

5 Were the *Miranda* rights accurately read?

Most persons are familiar with the reading of *Miranda* warnings because of its popular use in television and movies. The required *Miranda* warnings are: "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 an attorney. If you cannot afford an attorney, one will be provided for you."

The officer or agent must then ask the suspect if he or she understands these rights and if he or she still wishes to speak to the officer or agent. Only after receiving affirmative answers to both questions can the officer or agent proceed to interrogate the suspect.

If the suspect does not speak English, the rights must be read to him or her in his or her language. In such instances, it is important for defense attorneys to confirm the *Miranda* warnings were accurately translated. For example, in *People v. Diaz*,[41] the Court of Appeal held *Miranda* warnings, which were "a verbatim reading of the Spanish *Miranda* card," were defective. The deficiency was the translation stated, "[i]f you cannot get a lawyer, one can be named before they ask you questions." By using "get" instead of "afford," law enforcement failed to convey to defendant that the defendant's "indigent status . . . entitled him to appointed counsel."

6 Did the defendant waive his or her rights?

A suspect's waiver of *Miranda* rights must be voluntary, knowing and intelligent.[42] As the Ninth Circuit has noted, "[t]he government's burden to make such a showing 'is great,' and the court will 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' "[43]

A suspect's waiver and subsequent statement are considered voluntary only if they were "the product of a rational intellect and a free will."[44] A suspect's statement is considered involuntary if it was "coerced by physical intimidation or psychological pressure."[45] A waiver of *Miranda* rights based on promises of leniency by law enforcement is not considered voluntary.[46] Yet law enforcement's urging a suspect "to 'cut a deal' before his accomplice" cooperated did not render his statement involuntary.[47]

To consider a waiver knowing and intelligent, a suspect must be "aware of the nature of the right being abandoned and the consequences of the decision to abandon it."[48] If a suspect indicates he or she is willing to continue answering questions, he or she will be held to have waived his or her *Miranda* rights.[49]

❼ Did the defendant invoke the right to counsel?

An invocation of *Miranda* rights must be unequivocal. If a suspect's invocation is ambiguous, law enforcement can proceed with questioning.[50] For example, courts have held the following statements ambiguous:

- "Maybe I should talk to a lawyer[.]"[51]
- "I think I probably should change my mind about the lawyer now. . . . I think I need some advice here[.]"[52]
- "I think it'd probably be a good idea for me to get an attorney[.]" [53]

Likewise, in *People v. Suff*,[54] the suspect during interrogation stated, "I need to know, am I being charged with this, because if I'm being charged with this I think I need a lawyer[.]" The detective answered, "Well at this point, no you're not being charged with this," and the questioning continued. The California Supreme Court held the defendant's statement was an insufficient invocation.

Along the same lines, in *People v. Williams*,[55] the suspect initially started answering questions, but then, mid-interview, stated, "I want to see my attorney cause you're all bullshitting now." The California Supreme Court held this statement was ambiguous and not an invocation of *Miranda* rights.

And in *People v. Sauceda-Contreras*,[56] the suspect stated, "If you can bring me a lawyer . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me." The California Supreme Court held this was an insufficient invocation of *Miranda* rights.

❽ Did the defendant invoke the right to remain silent?

A suspect's answering "no" after being asked if he or she would like to give up his or her *Miranda* rights is unambiguous and questioning must stop.[57] A suspect's repeated requests to be taken home or picked up by his parents, as a whole, is an unequivocal invocation of *Miranda* rights.[58] A minor asking if he can have an attorney has also been held an unequivocal invocation.[59] Remaining silent, however, does not invoke one's *Miranda* rights.[60]

Context can be important in determining if a statement invokes *Miranda* rights. In *People v. Peracchi*, the defendant's statement, "I don't want to discuss it right now[,]" was held sufficient to invoke his rights.[61] In *People v. Martinez*, however, the defendant's statement, "I don't want to talk anymore right now" was held insufficient to invoke his rights.[62] The *Martinez* Court distinguished Martinez from Peracchi on the basis that Peracchi "invoked his right to silence at the outset of the interrogation," but Martinez made his statement *after* waiving his rights and answering a series of questions.[63]

Once a suspect has waived his or her *Miranda* rights, he or she need not be advised again of his or her rights during a second interrogation as long as the second interrogation is "reasonably contemporaneous" with the first.[64]

9 Did questioning continue post-invocation?

When an individual invokes his or her *Miranda* rights, questioning must stop immediately. If a suspect invokes his or her right to counsel, all questioning must stop until an attorney is present.[65] Law enforcement must wait at least 14 days before attempting to interrogate again without counsel.[66] If questioning continues, any statements made by the defendant are inadmissible at trial.

Statements obtained in violation of *Miranda*, however, are admissible at a probation violation hearing "in the absence of egregious conduct by law enforcement[,]"under the truth-in-evidence provision of the California Constitution.[67]

Additionally, after *Miranda* warnings are given, if a suspect answers questions, but is then silent in response to specific questions, that silence can be admitted as an adoptive admission.[68]

But when law enforcement intentionally does not provide *Miranda* warnings in order to obtain a confession, and then subsequently provides *Miranda* warnings and has the suspect repeat the confession, that confession is inadmissible.[69]

The application of *Miranda* law is not straightforward but has become more complicated as each new case presents new circumstances. The distinction between when a custodial interrogation occurs or not is not always crystal clear. Likewise, the line between a sufficient and insufficient invocation of *Miranda* rights can be very thin. Regardless, when facing a prosecutor who is seeking to admit a defendant's statements, defense counsel should see if they can be excluded by running through the nine questions discussed in this article to see if a *Miranda* violation has occurred.

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[1] 384 U.S. 436 (1966).
[2] *In re Deborah C.*, 30 Cal.3d 125 (1981).
[3] *People v. Wright*, 249 Cal.App.2d 692, 694-95 (1967) (footnote omitted).
[4] *See, e.g., United States v. Maier*, 646 F.3d 1148 (9th Cir. 2011).
[5] *Mathis v. United States*, 391 U.S. 1 (1968).
[6] *People v. Walker*, 47 Cal.3d 605 (1988).
[7] *Illinois v. Perkins*, 496 U.S. 292 (1990).
[8] *United States v. Gonzalez-Mares*, 752 F.2d 1485 (9th Cir. 1985).
[9] *People v. Salinas*, 131 Cal.App.3d 925 (1982).
[10] *People v. Battaglia*, 156 Cal.App.3d 1058 (1984).
[11] *In re Corey L.*, 203 Cal.App.3d 1020 (1988).
[12] *In re Deborah C.*, 30 Cal.3d 125 (1981).
[13] *United States v. Birnstihl*, 441 F.2d 368 (1971).
[14] *People v. Mangiefico*, 25 Cal.App.3d 1041 (1972).
[15] *People v. Polk*, 63 Cal.2d 443 (1965).
[16] *In re Spencer*, 63 Cal.2d 400 (1965).
[17] *Howes v. Fields*, ____ U.S. ___, ___, 132 S.Ct. 1181, 1189 (2012).
[18] Id. (quoting *Stansbury v. California*, 511 U.S. 318, 322, 325 (1994) (internal quotation marks omitted)).
[19] *Id.*
[20] *J.B.D. v. North Carolina*, 564 U.S. 261, ___, 131 S.Ct. 2394, 2402-2403 (2011).
[21] *Id.* at ___, 131 S.Ct. at 2403.
[22] *Berkemer v. McCarty*, 468 U.S. 420 (1984).
[23] *Terry v. Ohio*, 392 U.S. 1 (1968); *McCarty*, 468 U.S. 420.
[24] *People v. Mayfield*, 14 Cal.4th 668 (1997).
[25] 205 Cal.App.4th 26 (2012).
[26] *Id.* at 38.
[27] 221 Cal.App.4th 966 (2013).
[28] *Maryland v. Shatzer*, 559 U.S. 98, 113 (2010); *see Howes v. Fields* ____ U.S. ___, ___, 132 S.Ct. 1181 (2012).
[29] *People v. Mickey*, 54 Cal.3d 612, 648 (1991) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (footnote omitted)).
[30] *United States v. Foster*, 227 F.3d 1096, 1103 (9th Cir. 2000).
[31] *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).
[32] *Mathis v. United States*, 391 U.S. 1 (1968).
[33] When the Department of Homeland Security was created in 2003, most of the functions of Immigration and Naturalization Service were transferred to Citizenship and Immigration Services (C.I.S.), Immigration and Customs Enforcement (I.C.E.), or Customs and Border Protection (C.B.P.).
[34] *United States v. Mata-Abundiz*, 717 F.2d 1277 (9th Cir. 1983).
[35] *See supra* note 33.
[36] *United States v. Salgado*, 292 F.3d 1169 (9th Cir. 2002).
[37] *United States v. Washington*, 462 F.3d 1124, 1132-1133 (9th Cir. 2006).
[38] *People v. Elizalde*, 61 Cal.4th 523 (2015).
[39] 467 U.S. 649 (1984).
[40] *Id.* at 657.
[41] 140 Cal.App.3d 813, 822-823 (1983).
[42] *United States v. Garibay*, 143 F.3d 534, 536 (1998).
[43] *Id.* at 537 (quoting *United States v. Heldt*, 745 F.2d 1275, 1277 (9th Cir. 1984)).
[44] *Mincey v. Arizona*, 437 U.S. 385, 398 (1978).
[45] *Mickey v. Ayers*, 606 F.3d 1223, 1233 (2010).
[46] *People v. Gonzalez,* 210 Cal.App.4th 875 (2012); *see People v. Boyde* (1988) 46 Cal.3d 212.
[47] *Bobby v. Dixon*, ___ U.S. ___, ___, 132 S.Ct. 26, 29-30 (2011).
[48] *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005) (quoting *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir.1998)) (internal quotation marks omitted).
[49] *People v. Sauceda-Contreras*, 55 Cal.4th 203, 218-219 (2012).
[50] *Davis v. United States*, 512 U.S. 452, 459 (1994).
[51] *Id.* at 462.
[52] *People v. Shamblin*, 236 Cal.App.4th 1, 20 (2015).
[53] *People v. Bacon*, 50 Cal.4th 1082, 1104 (2010).
[54] 58 Cal.4th 1013, 1067 (2014).
[55] *People v. Williams*, 49 Cal.4th 405, 431 (2010).
[56] 55 Cal.4th 203, 206 (2012).
[57] *Garcia v. Long,* 808 F.3d 771 (9th Cir. 2015).
[58] *People v. Villasenor*, 242 Cal.App.4th 42 (2015); but see *People v. Lessie*, 47 Cal.4th 1152 (2010) (holding a minor's request to speak with his father an insufficient invocation).
[59] *In re Art T.*, 234 Cal.App.4th 335 (2015).
[60] *Berghuis v. Thompkins*, 560 U.S. 370 (2010).
[61] *People v. Peracchi*, 86 Cal.App.4th 353, 360-61 (2001).
[62] *People v. Martinez*, 47 Cal.4th 911, 951 (2010); see also id. at 946 n.8 (discussing similar version of defendant's statement).
[63] *Id.*
[64] *People v. Mickle*, 54 Cal.3d 140, 170 (1991); *see People v. Smith*, 40 Cal.4th 483, 504 (2007).
[65] *Davis v. United States*, 512 U.S. 452, 458 (1994).
[66] *Maryland v. Shatzer*, 559 U.S. 98 (2010); *see People v. Bridgeford* (2015) 241 Cal. App.4th 887.
[67] *People v. Racklin*, 195 Cal.App.4th 872, 881 (2011) (discussing subdivision (f)(2) of section 28 of article 1 of the California Constitution).
[68] *People v. Bowman*, 202 Cal.App.4th 353 (2011).
[69] *Missouri v. Seibert*, 542 U.S. 600 (2004).

Test No. 91

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Undercover agents of law enforcement are not required to provide *Miranda* warnings during a custodial interrogation.
❑ True ❑ False

2. A court-appointed psychiatrist is required to provide *Miranda* warnings during a custodial interrogation.
❑ True ❑ False

3. The duration of the interrogation is not an established factor to be used in determining whether a person was in custody for purposes of *Miranda*.
❑ True ❑ False

4. Law enforcement should provide *Miranda* warnings when a suspect is detained for a vehicle code violation while driving.
❑ True ❑ False

5. Questions by an INS agent regarding an administrative deportation action do not require *Miranda* warnings if the person is in custody for purposes of Miranda.
❑ True ❑ False

6. Urging a suspect to cut a deal would not render a waiver of the *Miranda* warnings involuntary.
❑ True ❑ False

7. "Maybe I should talk to a lawyer" has been held to be a sufficient invocation of the *Miranda* rights.
❑ True ❑ False

8. Silence has been held to be a sufficient invocation of the *Miranda* rights.
❑ True ❑ False

9. Once a suspect has invoked his or her right to counsel, law enforcement must wait 14 days before attempting to interrogate a suspect again without counsel.
❑ True ❑ False

10. A suspect who waived his rights during a first interrogation does not need to be advised again of his *Miranda* rights during a second interrogation if the suspect signed his waiver.
❑ True ❑ False

11. Interrogation for *Miranda* purposes does not include the silent treatment.
❑ True ❑ False

12. Public Safety exception is an established exception to the *Miranda* warnings.
❑ True ❑ False

13. The following rendition of the *Miranda* warnings has been held as insufficient: If you cannot get a lawyer, one can be named before they ask you questions.
❑ True ❑ False

14. Statements obtained in violation of *Miranda* can still be used if the suspect is charged with a capital offense as long as a lie detector test was used.
❑ True ❑ False

15. Whether or not the questioning was recorded is not an established factor to be used in determining whether a person was in custody for purposes of *Miranda*.
❑ True ❑ False

16. It has been held that a confession following a *Miranda* warning is not admissible when law enforcement provides the warnings but then intentionally shows the suspect surveillance video of the incident before the confession.
❑ True ❑ False

17. Whether the suspect was in custody is not one of the central factors to be assessed to determine whether there is a *Miranda* issue.
❑ True ❑ False

18. Veterans are not considered part of law enforcement for *Miranda* purposes.
❑ True ❑ False

19. Asking a recently arrested suspect how he or she knows the victim illustrates an exception to the *Miranda* rule.
❑ True ❑ False

20. A waiver of the *Miranda* rights must be voluntary, knowing and intelligent.
❑ True ❑ False

MCLE Answer Sheet No. 91

INSTRUCTIONS:
1. **Accurately complete this form.**
2. **Study the MCLE article in this issue.**
3. **Answer the test questions by marking the appropriate boxes below.**
4. **Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:**

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METHOD OF PAYMENT:
❒ **Check or money order payable to "SFVBA"**
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Authorized Signature

5. **Make a copy of this completed form for your records.**
6. **Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.**

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ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**	❑ **False**
13.	❑ **True**	❑ **False**
14.	❑ **True**	❑ **False**
15.	❑ **True**	❑ **False**
16.	❑ **True**	❑ **False**
17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**