Training Key® #410

Interrogations and Confessions after *Minnick*

Since 1966, law enforcement officers have adhered to the guidelines and restrictions of the landmark *Miranda* decision. However, several Supreme Court decisions handed down since 1988 have substantially altered the rules of *Miranda* concerning officer interrogation of individuals in custody and the admissibility of confessions thereby obtained.

Under the rule announced by the Supreme Court of the United States in *Miranda* v. *Arizona*,[1] before conducting a custodial interrogation of any person a police officer must inform that person of his "*Miranda* rights." These "*Miranda* warnings" must clearly inform the suspect that

- the suspect has the right to remain silent;
- anything that the suspect says may be used against him in a court of law;
- the suspect has the right to consult with an attorney and to have an attorney present during questioning; and
- if the suspect cannot afford an attorney, one will be appointed to represent him.[2]

The courts have held that the precise language of the warnings set forth in *Miranda* need not be followed, as long as the suspect has been informed of the substance of his rights and understands them.[3]

The *Miranda* warnings are required only when the suspect is subject to an "interrogation," and only when that interrogation is "custodial."[4]

Contact with a suspect is an interrogation if the suspect is subjected to "express questioning or its functional equivalent" in a situation in which the police know or should know that their actions are "reasonably likely to elicit an incriminating response from the subject."[5]

Various tests have been used by the courts to determine when an interrogation is "custodial." *Miranda* v. *Arizona*[6] held that an interrogation is custodial if the person has been "taken into custody or otherwise deprived of his freedom in any significant way."

Today, an interrogation will be considered custodial if a person being questioned in that situation would reasonably believe that he was not free to leave. This will be determined by the totality of the circumstances of the questioning, including such factors as the language used by the police before and during the interview, the duration of the detention, and the physical surroundings in which the questioning is conducted.[7]

If the police fail to administer the *Miranda* warnings, any statement made by that suspect will normally be inadmissible in a court of law. Statements taken in violation of the *Miranda* rights may also taint other evidence in the case under the "fruit of the poisonous tree" doctrine.[8] Note that the suspect has two separate and distinct rights: (1) the right to remain silent and (2) the right to counsel. If police fail to advise the suspect of both of these rights, or if either of the two rights is otherwise violated, the suspect's subsequent statements will be inadmissible.

Miranda and Voluntariness

Prior to *Miranda* v. *Arizona*, the test of the admissibility of confessions was voluntariness. The *Miranda* rule was formulated by the Supreme Court to further the application of this fundamental principle. Thus, the *Miranda* rule does not preclude the use of any confession that is voluntary. "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is admissible in evidence."[9]

The relationship between "voluntariness" and the *Miranda* rule may be summarized as follows:

First, a statement that is volunteered by any person is admissible even though the *Miranda* warnings have not been given.[10] If a person volunteers information in a non-custodial situation, this statement is not rendered inadmissible by the lack of *Miranda* warnings, even though it may be self-incriminating.[11]

Second, failure to give the *Miranda* warnings in a custodial situation will normally cause the courts to treat the statement

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as if it was given involuntarily. This is because it is presumed by the courts that there can be no valid waiver of the *Miranda* rights unless the suspect has first been advised of those rights.[12] (Unwarned statements that are not the product of coercion may still be admissible in certain instances, such as to impeach the suspect's testimony[13] or where the "public safety exception" applies.)[14]

Third, a statement may be involuntary even though the suspect has been advised of the *Miranda* rights. If the statement is the product of coercion by the police, the statement is inadmissible regardless of whether or not the *Miranda* warnings have been given.[15]

Statements Made Following an Initial Unwarned Statement

Contrary to popular belief, an initial failure to give the *Miranda* warnings does not necessarily render all further statements inadmissible. Even though a statement has been obtained from the suspect in a custodial interrogation without the *Miranda* warnings being given, thereby rendering that initial statement inadmissible, additional statements made after the giving of the warnings may still be admissible. This is so if, despite the lack of *Miranda* warnings, the original, unwarned statement was in fact made voluntarily.[16]

Waiver of the *Miranda* Rights

The *Miranda* rights may be waived by the suspect. However, for the waiver to be effective it must be valid. Consequently, before questioning the suspect in a custodial situation, police must not only advise the suspect of his rights, but must also obtain a valid waiver of those rights. This is the essence of the *Miranda* rule.[17]

To be valid, the waiver must satisfy a two-pronged test: it must be voluntary, and it must be "knowing and intelligent."[18] This means that a court will find a waiver of the *Miranda* rights to be effective only when the totality of the circumstances indicates (1) that the waiver was freely and voluntarily made and (2) that this choice was made with knowledge of both the nature and extent of the right being waived and the consequences of the waiver decision.[19] Failure of the interrogating officers to advise the suspect of his *Miranda* rights creates an irrefutable presumption that there was no voluntary, knowing and intelligent waiver.[20] And, of course, any evidence that the suspect was "threatened, tricked or cajoled into a waiver will show that the defendant did not voluntarily waive his privilege."[21]

The waiver of the *Miranda* rights may be written or oral.[22] It need not be express or explicit, but may be inferred from the words or conduct of the suspect.[23] Silence alone is not normally sufficient,[24] but the defendant's silence, "coupled with an understanding of his rights and a course of conduct indicating waiver," may be enough to establish a waiver.[25] However, officers should not assume that the suspect's failure to assert the *Miranda* rights and apparent willingness to talk constitutes a waiver. In the absence of a clear and express waiver of rights, the court will examine the "totality of the circumstances" to determine whether the suspect knowingly and voluntarily decided to forego his rights.[26]

The prosecution has the burden of showing that there was a valid waiver,[27] and if the matter is in doubt, the courts will presume that no waiver occurred.[28] It is therefore essential that officers obtain a clear, unambiguous waiver from the suspect.

A waiver may be partial, in that the suspect may elect to make an oral statement even though he refuses to make a written one.[29]

It is not necessary that the suspect be aware of all possible subjects of questioning in order for the waiver to be effective.[30]

Even though the suspect has made a valid waiver of the *Miranda* rights, this waiver may be withdrawn at any time. An initial waiver of rights does not preclude the suspect from changing his mind and asserting the rights at some later stage of the questioning. A delayed assertion of the *Miranda* rights must be honored whenever it is made.[31]

Assertion of the *Miranda* Rights

As noted earlier, under *Miranda* v. *Arizona* the suspect has two rights: the right to remain silent and the right to counsel. A suspect may assert either or both of these rights at any time.

Many of the *Miranda*-related court decisions of the past few years have dealt with two critical issues. In some cases the courts have had to determine whether or not the suspect did in fact assert his *Miranda* rights. And in several other cases, the Supreme Court has dealt with the consequences of a suspect's decision to assert these rights.

In many instances, the suspect will clearly and expressly state that he wishes to remain silent or to have the advice of counsel. However, a troublesome question arises when the suspect's comments regarding silence and/or counsel are equivocal or ambiguous. The police (and, eventually, the courts) must determine whether such comments actually amounted to an assertion of the *Miranda* rights.

The *Miranda* case itself stated that when the suspect asserts his rights "in any manner," questioning must cease.[32] However, the lower federal and state courts have disagreed in their interpretation of this. Three different views have been recognized.[33] In some states, for example, the courts have held that where the suspect's words are ambiguous, officers must cease the questioning entirely.[34] Others take what is known as the "clarification approach," permitting police to continue the questioning for the sole purpose of determining whether or not the suspect has indeed asserted his *Miranda* rights.[35] Other jurisdictions, however, have held that ambiguous or equivocal references to the *Miranda* rights are not enough, and that police may continue to question a suspect until the *Miranda* rights are clearly asserted.[36]

The Supreme Court of the United States has not directly ruled on this issue. However, the Court has denied certiorari (to review) cases in which a state supreme court ruled that a request for counsel must be unambiguous and unequivocal before it constitutes an assertion of the *Miranda* rights.[37] In addition the Supreme Court has stated that after a request for counsel, all questioning must cease if "nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous."[38] The Court has also said that responses to further interrogation following a request for counsel may not be used to cast doubt on the clarity of the initial request.

The consequences of an assertion of the *Miranda* rights depend upon whether the suspect asserts the right to remain silent, the right to counsel or both.

Assertion of the Right to Remain Silent. *Miranda* v. *Arizona*[39] states that if the suspect "indicates in any manner that he does not wish to be interrogated, the police may not question him."[40] Taken literally, this would seem to preclude any further questioning at all. However, in *Michigan* v. *Mosley*,[41] a robbery suspect who had asserted his *Miranda* right to remain silent was questioned two hours later by another officer in connection with an unrelated murder. During this second interview, which was conducted after the *Miranda* warnings had again been given, Mosley confessed to the murder. The Supreme Court upheld the admissibility of this statement, saying that *Miranda* did not create a "per se proscription of indefinite duration upon any further questioning."[42] This decision was widely interpreted to mean that the *Miranda* rule, while requiring the termination of the interrogation being conducted at the time of the assertion of the right to remain silent, permits further questioning at a later time.[43]

Assertion of the Right to Counsel. Although an assertion of the right to remain silent may permit the later resumption of questioning an assertion of the right to counsel stands on a different footing. In *Miranda*, the Supreme Court stated that if the defendant invokes the right to counsel, the defendant "must have an opportunity to confer with an attorney and to have the attorney present during any subsequent questioning."[44] However, it was generally assumed that the assertion of the right to counsel had the same effect as the assertion of the right to remain silent — that the assertion required the cessation of questioning for the moment, but did not preclude an attempt by the police to question the suspect further at a later time, whether or not counsel had been provided. Many courts took the position that even though the defendant had previously invoked the right to counsel, this was waived if the suspect subsequently voluntarily agreed to talk with police.[45]

Two landmark Supreme Court cases have now clarified *Miranda*'s view of the consequences of an assertion of the right to counsel. These cases are *Edwards* v. *Arizona*[46] and *Minnick* v. *Mississippi*.[47]

All officers should be thoroughly familiar with the holding in these two cases.

Edwards v. *Arizona*

In *Edwards* v. *Arizona*,[48] the Supreme Court announced that once a suspect asserts the right to counsel, that suspect "is not subject to further interrogation by the authorities until counsel has been made available to him." This precludes officers from even attempting further questioning prior to the provision of counsel for the suspect, unless the resumption of contact between the officers and the suspect was initiated by the suspect.[49] The fact that the suspect is again advised of the *Miranda* rights prior to the additional questioning does not alter this.[50] This view was reiterated by the Supreme Court in subsequent cases.[51]

Edwards and the later cases left one important issue unresolved, however. Because of the statement in *Edwards* that an accused who invokes his right to counsel is not subject to further interrogation "until counsel has been made available to him,"[52] the *Edwards* decision was construed to mean that there could be no further questioning until an attorney had been consulted.[53] It was assumed by police and by many courts that once the suspect had discussed the matter with an attorney, police could resume the questioning, even though the attorney was not then present.[54] This view persisted despite statements by the Supreme Court in *Miranda*, *Edwards* and other cases that made reference to the necessity of the presence of counsel at any police-renewed interrogation.[55]

Minnick v. *Mississippi*

Any ambiguity in *Edwards* and these subsequent decisions was resolved in December 1990 by the Supreme Court's decision in *Minnick* v. *Mississippi*.[56] In *Minnick*, the Supreme Court rejected the view, discussed above, that *Edwards* required only that the suspect have consulted with counsel prior to the initiation by police of further questioning. The Court said in *Minnick*:

> *Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.*[57]

Assertion After Edwards and Minnick

As a result of these two holdings, *Edwards* and *Minnick*, the effect of an assertion of the right to counsel may currently be stated as follows:

1. When a suspect asserts the *Miranda* right to counsel, police must terminate the questioning immediately.
2. Regardless of whether or not the suspect has consulted with an attorney in the interim, the questioning may not be resumed at any later time unless
   a. the suspect's attorney is present at the questioning; or
   b. the suspect initiates the new contact with the police.

Significance of the *Edwards* and Minnick Cases

The impact on police of the holdings in *Edwards* and *Minnick* will be far-reaching. Justice Scalia, dissenting in *Minnick*, noted that "One should not underestimate the extent to which the Court's expansion of *Edwards* constricts law enforcement."[58] Indeed, justice Scalia in his dissent pointed out that as the result of these cases, police are now forbidden "to urge a prisoner who has initially declined to confess to change his mind — or indeed, even to ask whether he has changed his mind."

Further, it appears that this prohibition is perpetual. Minnick was reapproached three days after requesting counsel, but, as justice Scalia observed, "the result would presumably be the same if it had been three months, or three years or even three decades" later.[59]

Finally, and perhaps most significantly of all for law enforcement, it appears that these rules apply even if the subsequent questioning concerns other crimes, even if the subsequent questioning is conducted by other officers and even if the other officers are not aware of the suspect's previous assertion of the right to counsel.[60]

It is possible that future cases will clarify or mitigate the effects of the *Edwards* and *Minnick* decisions. In the meantime, it is vital that all police officers understand these cases and take the necessary steps to ensure that incriminating statements are not rendered inadmissible by a failure to comply with these newly announced aspects of the *Miranda* rule.

Summary and Recommendations

In view of the legal developments discussed above, it is highly recommended that all police departments consider and, if possible, implement the following steps:

1. All officers should know when the *Miranda* rights are and are not applicable. In particular, officers should be thoroughly familiar with the principle that the *Miranda* rights attach in any custodial interrogation, regardless of the location of the questioning or the degree of suspicion attaching to the person being questioned.
2. *Miranda* rights should always be read to suspects from a standardized form or card approved by departmental legal counsel. Variations from this language should be avoided. While an oral warning, if correctly given, may be sufficient, every oral warning opens the door for defendants to claim that the warning was not properly given or was not given at all.[61]
3. Waivers of the *Miranda* rights should be obtained in writing. An oral waiver may later be denied by a suspect. Therefore, if the subject refuses to sign a waiver form but agrees orally to talk with officers, all possible steps should be taken to ensure that it may be conclusively proven in court that the waiver did in fact occur.[62]
4. If a suspect asserts the right to remain silent, questioning should be terminated immediately. The interrogation should not be resumed for at least several hours. Otherwise, the courts may find that the assertion of the right to remain silent has not been "scrupulously honored" by police.[63]
5. Whenever for any reason questioning has been suspended and then later resumed, the *Miranda* warnings should be repeated and a new waiver obtained. Although this is not absolutely required by the courts in all cases, it precludes any contention by the defendant that statements taken during the later interview were unwarned.
6. If a suspect asserts the right to counsel, the following steps should be taken:
   a. Questioning should be terminated immediately and should not be resumed until counsel is present or the suspect himself initiates further contact.
   b. Provision should be made to notify any other interested officers or agencies that the right to counsel has been asserted by the suspect, so that such officers or agencies will not initiate new questioning unaware of the previous assertion of the right.
   c. If the suspect does initiate further contact, the suspect should again be advised of the *Miranda* rights, and a waiver obtained. In addition, care should be taken to document the fact that the new contact was initiated by the suspect, and not by the police. If possible, the waiver form should include a statement to this effect.
7. Careful attention should be paid to any future developments in his area of the law. There will be more cases at all levels of the judicial system interpreting or applying *Miranda*, *Edwards* and *Minnick*. Departments should be alert for, and carefully scrutinize, not only subsequent cases of the Supreme Court of the United States, but also the decisions of the federal circuit and district in which the department's jurisdiction lies, and the decisions of the appellate courts of that state.[64]

Endnotes

[1] 384 U.S. 436 (1966).

[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[3] *California* v. *Prysock*, 453 U.& 355 (1981) (no "talismanic incantation" required by *Miranda*). However, it is strongly recommended that officers follow the "official" wording of the *Miranda* warnings, preferably by always reading the rights to suspects from a departmentally approved standardized form or card. See summary "Recommendations," section of this *Training Key®*.

[4] As noted above, the degree of police suspicion of the person being questioned is not the test of *Miranda*'s applicability. Contrary to suggestions in some of the earlier cases, today the fact that the investigation has or has not "focused" on the person being questioned is not considered determinative. See *California* v. *Beheler*, 463 U.S. 1121 (1983); *Beckwith* v. *United States*, 425 U.S. 341 (1976).

[5] *Rhode Island* v. *Innis*, 446 U.S. 291 (1980). An "interrogation" may occur even though the suspect is not being directly questioned. Comments made in the presence of the suspect may constitute an "interrogation" if the comments are "reasonably likely to elicit an incriminating response."

[6] 384 U.S. 436 (1966).

[7] Location is not determinative. Questioning has been held custodial even though conducted in the suspect's home (*Orozco* v. *Texas*, 394 U.S. 324 (1969)), and noncustodial even though conducted in a police station (*Oregon* v. *Mathiason*, 429 U.S. 492 (1977)).

[8] This doctrine was announced in *Wong Sun* v. *United States*, 371 U.S. 471 (1963), a pre-*Miranda* case that has been applied to *Miranda* violations. See *Brown* v. *Illinois*, 422 U.S. 590 (1975).

[9] *Miranda* v. *Arizona*, 394 U.S. 436, 478 (1966).

[10] "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda* v. *Arizona*, 384 U.S. 436, 478 (1966).

[11] Although the volunteered statement is admissible despite the lack of *Miranda* warnings, it is recommended that the warnings be given before the person is questioned further about the matter so that subsequent statements, e.g., those giving further details of the crime, will be admissible even if the initial statement results in the situation becoming a "custodial interrogation."

[12] See "Waiver of the *Miranda* Rights" Section of this *Training Key®*.

[13] See *Harris* v. *New York*, 401 U.S. 222 (1971).

[14] See *New York* v. *Quarles*, 104 S.Ct. 2626 (1984).

[15] However, only governmental coercion renders a confession involuntary. For example, it has been held by the Supreme Court that the fact that the suspect was "told" by "voices" to confess does not, by itself, render a confession involuntary. *Colorado* v. *Connelly*, 107 S.Ct. 515 (1986). Note: The mental condition of the suspect may, however, affect the validity of a waiver of the *Miranda* rights. See "Waiver of the *Miranda* Rights" Section of this *Training Key®*.

[16] *Oregon* v. *Elstad*, 105 S.Ct. 1285, 1293 (1985). Defendants frequently argue that once they have "let the cat out of the bag" by making an unwarned statement, this effectively prevents the defendant from later credibly asserting his innocence. This, it is contended, amounts to psychological coercion that renders all later statements involuntary, even though made after the administration of the *Miranda* warnings. This argument may or may not be accepted by the courts depending upon circumstances of the individual case. See *Brown* v. *Illinois*, 422 U.S. 590 (1975).

[17] *Miranda* v. *Arizona*, 384 U.S. 436, 476 (1966).

[18] *Miranda* v. *Arizona*, 384 U.S. 436, (1966). See also *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *North Carolina* v. *Butler*, 461 U.S. 369 (1979).

[19] See *Moran* v. *Burbine*, 106 S.Ct. 1135 (1986). The provision that the waiver be "intelligent" does not require that it be wise. As long as the waiver was voluntary, and was made with knowledge of both the nature and extent of the right being waived and the consequences of the waiver decision, this is sufficient, and courts will not inquire into the wisdom of the suspect's choice. See *Colorado* v. *Spring*, 107 S.Ct. 851 (1987).

[20] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[21] *Miranda* v. *Arizona*, 384 U.S. 436, 475-76 (1966).

[22] See *North Carolina* v. *Butler*, 441 U.S. 369 (1970) (suspect told officers "I will talk with you but I am not signing any form").

[23] See *North Carolina* v. *Butler* 441 U.S. 369 (1979).

[24] See *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[25] See *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979).

[26] See *Fare* v. *Michael C.*, 442 U.S. 707 (1979). See also *North Carolina* v. *Butler*, 441 U.S. 369 (1979).

[27] "A heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege…" *Miranda* v. *Arizona*, 384 U.S. 436, 445 (1966).

[28] See, e.g., *North Carolina* v. *Butler*, 441 U.S. 369 (1970). This "presumption of no waiver" approach may be traced to *Brewer* v. *Williams*, 430 U.S. 367 (1977). This case involved the Sixth Amendment right to counsel, rather than the Fifth Amendment right incorporated into the *Miranda* warnings, but courts have treated *Miranda* cases in similar fashion.

[29] See *Connecticut* v. *Barrett* 107 S.Ct. 828 (1987).

[30] *Colorado* v. *Spring*, 107 S.Ct. 851 (1987).

[31] This is true regardless of whether the initial waiver was oral or written, and regardless of the point in the proceedings at which the waiver is withdrawn and the rights asserted. See "Assertion of the *Miranda* Rights" Section of this *Training Key®*.

[32] *Miranda* v. *Arizona*, 384 U.S. 436, 444-45 (1966).

[33] See *Smith* v. *Illinois*, 105 S.Ct. 490, 494 (1984), which describes the various views and cites state and federal cases in support of each view.

[34] See, e.g., *Ochoa* v. *State*, 573 S.W.2d 796 (Tex. Crim. App. 1978).

[35] See, e.g., *Crawford* v. *State*, 589 A.2d 571 (Del. 1990).

[36] See, e.g., *Eaton* v. *Commonwealth*, 397 S.E.2d 385 (Va. 1990). In this case the Supreme Court of Virginia ruled that the suspect's words, "You did say I could have an attorney if I wanted one" were so equivocal that it was insufficient to invoke the *Miranda* right to counsel, and that police were not obligated to cease the questioning at that point.

[37] E.g., *Poyner* v. *Commonwealth*, 229 Va. 401, cert. denied 474 U.S. 888 (1985); *Bunch* v. *Commonwealth*, 225 Va. 423, cert. denied 464 U.S. 977 (1983).

[38] *Smith* v. *Illinois*, 105 S.Ct. 490, 494 (1984).

[39] 384 U.S. 436 (1966).

[40] 384 U.S. at 444-45.

[41] 423 U.S. 96 (1975).

[42] 423 U.S. at 102.

[43] The case indicates that resumption of questioning too soon after the assertion of the right to remain silent would violate *Miranda*. Furthermore, whenever the questioning is resumed the suspect is always free to reassert the *Miranda* rights, thereby again forcing termination of the questioning.

[44] 184 U.S. at 474.

[45] See, e.g., *State* v. *Edwards*, 122 Ariz. 206, 594 P.2d 72 (1979), the decision of the Supreme Court of Arizona that was appealed to the Supreme Court of the United States as *Edwards* v. *Arizona*.

[46] 101 S.Ct. 1880 (1981).

[47] No. 89-6332, 48 CrL 2051, decided December 3, 1990.

[48] 101 S.Ct. 1880 (1981).

[49] In *Edwards*, the defendant requested counsel, but had not had any opportunity to consult with a lawyer prior to the further attempt to question him.

[50] *Edwards* v. *Arizona*, 451 U.S. at 484.

[51] See, e.g., *Arizona* v. *Roberson*, 486 U.S. 675 (1988). These subsequent cases also indicated that the *Edwards* prohibition against further questioning applies only if the request for counsel is unambiguous. See, e.g., *Smith* v. *Illinois*, 105 S.Ct. 490 (1984), in which the Court stated that "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." 105 S.Ct. at 494.

[52] 451 U.S. at 484-85.

[53] The opinion in *Edwards* made repeated reference to *Miranda*'s assertion that the suspect has the right to have counsel present during interrogation. See 451 U.S. 481, 484-5. However, this was not generally understood to be an absolute requirement of either *Miranda* or *Edwards*, as long as the suspect had, following the assertion of the right to counsel, consulted with counsel.

[54] See, e.g., the decision of the Supreme Court of Mississippi in *Minnick* v, *Mississippi*. The Mississippi court assumed that once Minnick had consulted with, and received advice from, his attorney, the police could resume their questioning. See 551 So.2d 77 (Miss. Sup. Ct. 1988).

[55] See, e.g., *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983); *Shea* v. *Louisiana*, 470 U.S. 51 (1985); and *Arizona* v. *Roberson*, 486 U.S. 675 (1988). The *Miranda* case itself stated that when the right to counsel has been invoked, the interrogation "must cease until an attorney is present." 384 U.S. at 474.

[56] No. 89-633Z 48 CrL 2051, decided December 3, 1990.

[57] *Minnick* v. *Mississippi*, 58 CrL 2053, 2054.

[58] *Minnick* v. *Mississippi*, 58 CrL 2053, 2057 (dissenting opinion of Scalia, J.).

[59] *Minnick* v. *Mississippi*, 58 CrL 2053, 2055 (dissenting opinion of Scalia, J.).

[60] The prohibition applies "not merely to interrogations involving the original crime but to those involving other subjects as well." *Minnick* v. *Mississippi*, 58 CrL 2055, 2057 (dissenting opinion of Scalia, J.). See *Arizona* v. *Roberson*, 486 U.S. 675 (1988). See also *Arizona* v. *Edwards*, 101 S.Ct. 1880 (1981).

[61] As most police officers are well aware, if it is purely a matter of a defendant's word against the word of a police officer as to what was said, a court or jury will not necessarily accept the officer's testimony over that of the defendant.

[62] If the suspect refuses to sign a waiver form but agrees to talk with the officers, some written record of the oral waiver should be made. If possible, a permanent departmental log should be kept for all interrogations which will verify that the rights were given and waived. Even where a written waiver form is used, the separate log is desirable; if no written waiver is obtained, the log becomes vital. Another alternative would be to set forth in the written report of the investigation the fact of the oral waiver, including, if possible, the exact words used by the suspect in making the waiver.

[63] As noted above, in the past the assertion of the right to remain silent has not precluded police-initiated resumption of questioning at a later time. The *Edwards* and *Minnick* cases dealt only with the assertion of the right to counsel. Whether the rules set forth in those cases will ultimately be applied to assertions of the right to silence remains uncertain at this time.

[64] State courts may impose restrictions upon the police that are more severe than those announced by the Supreme Court of the United States. Such decisions may be the result of restrictive state statutes, but are more often based upon interpretations of the language of the state constitution.

Acknowledgement

Training Key® was prepared by Charles Friend, attorney-at-law, Williamsburg, VA, and Professor of Law (Ret.), George Mason University.

questions

The following questions are based on material in this *Training Key®*. Select the best answers.

1. Miranda *warnings* are required only when:

(a) the investigation has focused on the suspect.
(b) the suspect has been arraigned.
(c) a custodial interrogation is being conducted.
(d) the suspect is being questioned at the police station.

2. If a suspect agrees to waive the *Miranda* rights and talk to police, the waiver

(a) is valid only if it is in writing.
(b) is binding and the suspect must then answer any and all questions asked by the officers.
(c) is effective even if coercion is later used.
(d) may be withdrawn at any time.

3. Once a suspect asserts the *Miranda* right to counsel, the police

(a) must suspend all questioning for at least two hours.
(b) may not question the suspect again unless counsel is present or the suspect initiates further contact.
(c) may not question the suspect again until the suspect has had an opportunity to confer with counsel
(d) may continue to question the suspect about other offenses.

answers

1. (c) *Miranda* warnings are required only when the suspect is being subjected to a custodial interrogation. An interrogation is "custodial" if a reasonable person in those circumstances would not feel free to leave. The term "interrogation" includes not only direct questioning, but also any comments made by police officers that they know or should know may elicit an incriminating response from the suspect.
2. (d) A suspect who has agreed to waive the *Miranda* rights may withdraw the waiver at any time. This is true whether the waiver is oral or in writing, and despite the lack of any coercion by the police.
3. (b) Under *Edwards* v. *Arizona* and *Minnick* v. *Illinois*, when a suspect unambiguously asserts the *Miranda* right to counsel, questioning must cease immediately, and may not be resumed until (1) the suspect's legal counsel is present or (2) the suspect himself initiates further communication with the police.

have you read...?

"Waiver of Rights in Custodial Interrogations," S/A Jeffrey Higginbotham, J.D., *FBI Law Enforcement Bulletin*, November 1987.

"Cellmate Informants-A Constitutional Guide to Their Use," S/A Kimberly Crawford, J.D., *FBI Law Enforcement Bulletin*, December 1990.