



Training Key® #683

Miranda Waivers

This *Training Key*® discusses the case law surrounding *Miranda* waivers.

Now that the *Miranda* rights have achieved the status of cultural icons, it seems appropriate to ask: Why must officers still advise suspects of these rights and obtain waivers of them before any interrogation? The question is especially apt in light of the U.S. Supreme Court's observation that anyone who knows he can refuse to answer an officer's questions (i.e., virtually everybody) "is in a curious posture to later complain that his answers were compelled."¹

Despite the possibility that *Miranda* has outlived its usefulness, the U.S. Supreme Court is not expected to scrap it anytime soon. Over the years, however, the Court has made *Miranda* compliance much less burdensome. As it pointed out in 2000, "If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement."² For example, as we will discuss in this *Training Key*®, the Court has ruled that waivers may be implied, that the language of *Miranda* warnings may vary, that waivers need only be reasonably contemporaneous with the subsequent interview, and that pre-waiver conversations with suspects are permissible within fairly broad limits.

This *Training Key*® will begin, however, by explaining the most basic requirement: that waivers must be knowing and intelligent.

Knowing and Intelligent

Because a waiver is defined as an "intentional relinquishment or abandonment of a known right,"³ the U.S. Supreme Court ruled that *Miranda* waivers must be both "knowing" and "intelligent."⁴ While this is a

fundamental rule, for various reasons it continues to be a frequent source of litigation.

"Knowing" waivers. A *Miranda* waiver is deemed "knowing" if the suspect is correctly informed of his rights and the consequences of waiving them.⁵ Although the courts are aware that most suspects know their *Miranda* rights, officers are required to enumerate them because prosecutors have the burden of proving such knowledge by means of direct evidence.⁶ Consequently, officers must inform suspects of the following:

- **Right to Remain Silent:** The suspect must be informed of his Fifth Amendment right to refuse to answer questions; e.g., *You have the right to remain silent.*
- **"Anything You Say...":** The suspect must be informed of the consequences of waiving his rights; e.g., *Anything you say may be used against you in court.*
- **Right to Counsel:** The *Miranda* right to counsel can be tricky because it has three components: (a) the right to consult with an attorney before questioning begins, (b) the right to have an attorney present while the questioning is under way, and (c) the right to have an attorney appointed if the suspect cannot afford one; e.g., *You have the right to talk to a lawyer and to have him present while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning.*⁷

... And Will Be Used Against You." Officers need not—and should not—tell suspects that anything they say "will" be used against them. That is because it is

plainly not true. After all, many of the things that suspects say to officers during custodial interrogation will not be used by prosecutors or would be irrelevant at trial. Consequently, it is sufficient to inform suspects that anything they say “may,” “might,” “can,” or “could” be used against them.⁸

Language May Vary. Officers are not required to recite the *Miranda* warnings exactly as they were enumerated in the *Miranda* decision or as they appear in a departmental *Miranda* card. Thus, the U.S. Supreme Court explained that, while the warnings required by *Miranda* “are invariable,” the Court “has not dictated the words in which the essential information must be conveyed.”⁹ Instead, officers are required only to “reasonably convey” the *Miranda* rights.¹⁰

Using a Miranda Card. Although the language may vary, it is usually best to read the warnings from a standard *Miranda* card to make sure that none of the essential information is inadvertently omitted, and to help prosecutors prove that the officers did not misstate the *Miranda* rights. As the Justice Department observed in its brief in *Florida v. Powell*, “[L]aw enforcement agencies have little reason to assume the litigation risk of experimenting with novel *Miranda* formulations.” Instead, it is “desirable police practice” and “in law enforcement’s own interest to state warnings with maximum clarity.”¹¹

Reading from a *Miranda* card is especially important if the warning-waiver dialogue will not be recorded. This is because officers can usually prove that their warning was accurate by testifying that they recited it from a card, then reading to the court the warning from that card or a duplicate.¹²

Minors. Because minors have the same *Miranda* rights as adults, officers are not required to provide them with any additional information.¹³ For example, the courts have rejected arguments that minors must be told that they have a right to speak with a parent or probation officer before they are questioned, or that they have a right to have a parent present while they are questioned.¹⁴

“You Can Invoke Whenever You Want.” Officers will sometimes supplement the basic warning by telling suspects that, if they waive their rights, they can stop answering questions at any time. This is an accurate statement of the law and is not objectionable.¹⁵

No Additional Information. Officers are not required to furnish suspects with any additional information, even if the suspect might find it useful in deciding whether to waive or invoke.¹⁶ As the U.S. Supreme Court observed in *Colorado v. Spring*, “[A] valid waiver does not require that an individual be informed of all information ‘useful’ in making his decision or all information that might affect his decision to confess.”¹⁷ For example, officers need not inform suspects of the topics they planned to discuss during the interview,¹⁸ and (if not charged with the crime under investigation) that their attorney wants to talk to them.¹⁹

Incorrect Miranda Warnings. If officers misrepresented the nature of the *Miranda* rights or the consequences of waiving them, a subsequent waiver may be deemed invalid on grounds that it was not knowing and intelligent.

Utilizing Deception. Although officers must correctly explain the *Miranda* rights, a waiver will not be invalidated on grounds that they lied to him about other matters. As the U.S. Supreme Court observed, “Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*’s concerns.”²⁰

Recording Waivers. There is no requirement that officers record the waiver process. Still, it is usually a good idea because it provides judges with proof of exactly what was said by the officers and the suspect. Note that the waiver process, as well as the subsequent interview, may be recorded covertly.²¹

“Intelligent” Waivers. Suspects must not only know their rights in the abstract, they must have understood them. This is what the courts mean when they say that waivers must be “intelligent.”²²

Express Statement of Understanding. Technically, officers are not required to obtain an express statement from the suspect that he understood his rights. That is because the courts must consider the totality of circumstances in making this determination.²³ As a practical matter, however, it is dangerous to rely on circumstantial evidence because it creates uncertainty and generates an additional issue for the trial court to resolve. Furthermore, an express statement of understanding may be necessary if the suspect’s waiver was implied or if he was mentally impaired. Accordingly, it is best to ask the standard *Miranda*-card question: Did you understand each of the rights I explained to you? If he says yes, that should be adequate.²⁴

Circumstantial Evidence of Understanding. If the suspect said he understood his rights, but claimed in court that he didn’t, the court may consider circumstantial evidence of understanding. The circumstances that are most frequently noted are the suspect’s age, experience, education, background, intelligence, prior arrests, and whether he had previously invoked his rights.²⁵

Clarifying the Rights. If the suspect said or indicated that he did not understand his rights, officers must try to clarify them. Note that clarification concerning the right to counsel is frequently necessary because suspects may be confused as to whether a waiver of their right to have counsel present during the interview also constitutes a waiver of their right to be represented by counsel in court.²⁶ The answer, of course, is no.

Mentally Impaired Suspects. A suspect who tells officers that he understood his rights may later claim that he really didn’t because his mental capacity was impaired due to alcohol or drugs, physical injuries, a learning disability, or a mental disorder. In most cases, however, the courts rule that waivers of impaired sus-

pects are sufficiently “intelligent” if the answers to the officers’ questions are responsive and coherent.

Minors. The courts presume that minors are fully capable of understanding their *Miranda* rights.²⁷ But because the age, maturity, education, and intelligence of a minor may have a greater effect on understanding than they do on adults, these circumstances may be taken into account.²⁸ It is also relevant that the minor had previous experience with officers and the courts.

For example, in ruling that minors were sufficiently capable of understanding their rights, the Court noted: “He was a 16 year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be.”²⁹

Voluntary Waivers

In addition to being “knowing and intelligent,” *Miranda* waivers must be “voluntary.” This simply means that officers must not have obtained the waiver by means of threats, promises, or any other form of coercion.³⁰ Thus, in rejecting arguments that *Miranda* waivers were involuntary, the courts have noted the following:

- “[T]here is no evidence that Barrett was threatened, tricked, or cajoled into his waiver.”³¹
- “[T]he record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements.”³²
- “There is no doubt that Spring’s decision to waive his Fifth Amendment privilege was voluntary. He alleges no coercion of a confession by means of physical violence or other deliberate means calculated to break his will.”³³

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

Second, because the issue is whether the officers pressured the suspect into waiving, the suspect’s impaired mental state—whether caused by intoxication, low IQ, young age, or such—is relevant only if the officers exploited it to obtain a waiver.³⁴

Express and Implied Waivers

Until now, this *Training Key* has discussed what officers must do to obtain a valid waiver of rights. But there is also something the suspect must do: waive them. The courts recognize two types of *Miranda* waivers: (1) express waivers, and (2) waivers implied by conduct.

Express Waivers. An express waiver occurs if the suspect signs a waiver form or responds in the affirmative when, after being advised of his rights, he says he is willing to speak with the officers; e.g., “Having these rights in mind, do you want to talk to us?” “Yes.” Note that while an affirmative response is technically only a waiver of the right to remain silent (since the suspect said only that he was willing to “talk” with officers), the courts have consistently ruled it also constitutes a waiver of the right to counsel if, thereafter, the suspect freely responds to the officers’ questions.³⁵

Three other things should be noted about express waivers. First, they constitute “strong proof” of a valid waiver.³⁶ Second, an affirmative response will suffice even if the suspect did not appear to be delighted about waiving his rights. Third, if the suspect expressly waived his rights, it is immaterial that he refused to sign a waiver form,³⁷ or that he refused to give a written statement.³⁸

Implied Waivers. In 2010, however, the U.S. Supreme Court ruled unequivocally in *Berghuis v. Thompkins* that a waiver will be implied if the suspect, having “a full understanding of his or her rights,” thereafter answered the officers’ questions. Thus, in ruling that Thompkins had impliedly waived his rights, the Court said, “If Thompkins wanted to remain silent, he could have said nothing in response to [the officer’s] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation.”³⁹ But because he did neither of these things, the Court ruled he had impliedly waived his rights.

Timely Waivers

The final requirement for obtaining a *Miranda* waiver is that the waiver must be timely or, in legal jargon, “reasonably contemporaneous” with the start or resumption of the interview.⁴⁰ This means that officers may be required to obtain a new waiver or at least remind the suspect of his rights if, under the circumstances, there is a reasonable likelihood that he forgot his rights or believes they somehow expired. As a practical matter, there are only two situations in which a new warning or reminder is apt to be required. The first occurs if officers obtain a waiver long before they began to question the suspect. This would happen, for example, if an officer obtains a waiver at the scene of the arrest, but the suspect is not questioned until after he had been driven to the police station. In such cases, the suspect may later claim in court that he had forgotten his rights in the interim. (This is one reason why officers should not *Mirandize* suspects or seek waivers unless they want to begin an interview immediately.) In any event, the most important factor in these cases is simply the number of minutes or hours between the time the suspect waived his rights and the time the interview began.⁴¹

The second situation is more common as it occurs when officers recessed or otherwise interrupted a lengthy interview at some point. This typically happens when officers needed to compare notes, consult with other officers or superiors, interview other sus-

pects or witnesses, conduct a lineup, or provide the suspect with a break.

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

- Change in Location: The site of the interview changes during the break.
- Change in Officers: The pre- and post-break interviews are conducted by different officers.
- Change in Topic: When the interview resumes after the break, the officers question the suspect about a different topic.⁴²

Suspect's State of Mind. The suspect's impaired mental state or young age are relevant as they might affect his ability to remember his rights as the interview progressed and as circumstances changed. Conversely, his mental alertness would tend to demonstrate an ability to retain this information.

Miranda Reminders. Even if there was some mental impairment or a change in circumstances, the courts usually reject timeliness arguments if the officers remind the suspect of his *Miranda* rights when the interview begins or resumes; e.g., Do you remember the rights I read to you earlier?

Pre-Waiver Communications

Before seeking a waiver, officers will almost always have some conversation with the suspect. Frequently, it will consist of small talk to help relieve the tension that is inherent in any custodial interrogation. This is, of course, permissible so long as it was relatively brief.

There are, however, two types of pre-waiver communications that may invalidate a subsequent waiver on grounds that they undermined the suspect's ability to freely decide whether to waive his *Miranda* rights. They are (1) communications that were part of a so-called "two-step" interrogation process, and (2) communications in which officers trivialized the *Miranda* protections. Finally, is the common—and usually legal—practice of seeking a waiver after informing the suspect of some or all the evidence that tends to prove he or she is guilty.

The "Two Step." In 2004, the U.S. Supreme Court ruled in *Missouri v. Seibert* that the pre-waiver tactic known as the "two step" was illegal.⁴³ What is a two step? It is a crafty device in which officers (step one) blatantly interrogate the suspect before obtaining a *Miranda* waiver. The officers know, of course, that any statement he makes will be suppressed, but they don't care because, if he confesses or makes a damaging admission, they would go to step two. Here, the officers seek a waiver and, if the suspect waives, they try to get him to repeat his previous statement.⁴⁴

In most cases, they succeed because the suspect thinks (erroneously) that his first statement could be

used against him and, therefore, he has nothing to lose by repeating it. As the Court in *Seibert* explained, the two step renders *Miranda* warnings ineffective "by waiting for a particularly opportune time to give them, after the suspect has already confessed."

Although the Court banned two-step interviews, the justices could not agree on a test for determining whether officers had, in fact, engaged in such conduct.

So the lower courts were forced to utilize a seldom-used procedure for resolving these issues.⁴⁵ And in implementing this procedure, at least two courts concluded that the appropriate test focuses on the officers' intent. Specifically, a two-step violation results if the officers deliberately utilized a two-phase interrogation for the purpose of undermining *Miranda*.⁴⁶

How can the courts determine the officers' intent? It is seldom difficult because they will usually have begun by conducting a systematic, exhaustive, and illegal pre-waiver interrogation of the suspect pertaining to the crime under investigation; and the interrogation will have produced a confession or highly incriminating statement which the suspect essentially repeated after he waived his rights.⁴⁷ Other circumstances that are indicative of a two-step interview include the officers' act of blatantly or subtly reminding the suspect during the post-waiver interrogation that he had already "let the cat out of the bag," the officers' use of interrogation tactics (e.g., good-cop/bad-cop) during the pre-waiver interrogation, and a short time lapse between the pre- and post-waiver statements.

Trivializing Miranda. Although there is not much law on this subject, a court might invalidate a waiver if officers obtained it after trivializing the *Miranda* rights or minimizing the importance of the suspect's decision to talk with them.

Putting Your Cards on the Table. Before seeking a waiver, officers may make a tactical decision to disclose to the suspect some or all of the evidence of his guilt they obtained to date. In many cases, the officers think that the suspect will be more likely to waive his rights if he realizes there is abundant evidence of his guilt, or if he thinks he could explain it away.

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

Acknowledgment

This *Training Key*® was adapted with permission from an article written by Mark Hutchins, Senior Deputy District Attorney for the Alameda County (CA) District Attorney's Office. The article was originally published in the 2013 edition of *Point of View*, a publication of the Alameda County District Attorney's Office.

Endnotes

- ¹ *United States v. Washington* (1977) 431 U.S. 181, 188.
- ² *Dickerson v. United States* (2000) 530 U.S. 428, 443. ALSO SEE *Berghuis v. Thompkins* (2010) 560 U.S. ___ [130 S. Ct. 2250, 2262 [Miranda “does not impose a formalistic waiver procedure”].
- ³ *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1048; *People v. \$241,600* (1998) 67 Cal.App.4th 1100, 1109.
- ⁴ See *Colorado v. Spring* (1987) 479 U.S. 564, 572.
- ⁵ *Moran v. Burbine* (1986) 475 U.S. 412, 421.
- ⁶ See *Miranda v. Arizona* (1966) 384 U.S. 436, 471-72 [“No amount of circumstantial evidence that a person may have been aware of his rights will suffice.”].
- ⁷ See *Miranda v. Arizona* (1966) 384 U.S. 436, 467-72; *Florida v. Powell* (2010) 559 U.S. ___ [130 S. Ct. 1195, 1203]; *Moran v. Burbine* (1986) 475 U.S. 412, 421.
- ⁸ See *Florida v. Powell* (2010) 559 U.S. ___ [130 S. Ct. 1195, 1203 [“can be used”]; *Dickerson v. United States* (2000) 530 U.S. 428, 435 [“can be used”]; *Colorado v. Spring* (1987) 479 U.S. 564, 577 [“may be used”]; *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 [“could be used”];
- ⁹ *Florida v. Powell* (2010) 559 U.S. ___ [130 S. Ct. 1195, 1204].
- ¹⁰ *Duckworth v. Egan* (1989) 492 U.S. 195, 203.
- ¹¹ (2010) 559 U.S. ___ [130 S. Ct. 1195, 1206].
- ¹² See, for example, *Oregon v. Elstad* (1985) 470 U.S. 298, 314-15 [“[The officer] testified that he read the *Miranda* warnings aloud from a printed card and recorded Elstad’s responses.”].
- ¹³ See *U.S. v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1074 [“The test for reviewing a juvenile’s waiver of rights is identical to that of an adult’s and is based on the totality of the circumstances.”].
- ¹⁴ See *Fare v. Michael C.* (1979) 442 U.S. 707 [no right to talk with probation officer].
- ¹⁵ See *Berghuis v. Thompkins* (2010) 560 US ___ [130 S. Ct. 2250, 2256] [“[Y]ou 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.”]; *Florida v. Powell* (2010) 559 US ___ [130 S. Ct. 1195, 1198] [“officers told the suspect that he had “the right to use any of his rights at any time he wanted during the interview”].
- ¹⁶ See *Moran v. Burbine* (1986) 475 U.S. 412, 422 [“[W]e have never read the Constitution to 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.”]; *Collins v. Gaetz* (7th Cir. 2010) 612 F.3d 574, 589 [“we do not require that a criminal defendant understand every consequence of waiving his rights or make the decision that is in his best interest”].
- ¹⁷ (1987) 479 U.S. 564, 576.
- ¹⁸ See *Colorado v. Spring* (1987) 479 U.S. 564, 577.
- ¹⁹ See *Moran v. Burbine* (1986) 475 U.S. 412, 422.
- ²⁰ *Illinois v. Perkins* (1990) 496 U.S. 292, 297.
- ²¹ See *Lopez v. United States* (1963) 373 U.S. 427, 439 [“Stripped to its essentials, petitioner’s argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent’s memory, or to challenge the agent’s credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.”].
- ²² See *Brady v. United States* (1970) 397 U.S. 749, 748 [“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”].
- ²³ See *Moran v. Burbine* (1986) 475 U.S. 412, 421; *Fare v. Michael C.* (1979) 442 U.S. 707, 724-25.
- ²⁴ See *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 [“Yeh”]; *U.S. v. Labrada-Bustamante* (9th Cir. 2005) 428 F.3d 1252, 1259 [court rejects the argument that suspect who told officers he understood his rights did not really understand them because he was unfamiliar with the criminal justice system].
- ²⁵ See *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 [“A recent high school graduate, Elstad was fully capable of understanding this careful administering of *Miranda* warnings.”].
- ²⁶ See *Duckworth v. Egan* (1989) 492 U.S. 195, 204 [“We think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask when he will obtain counsel.”].
- ²⁷ See *Fare v. Michael C.* (1979) 442 U.S. 707, 725 [“We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.”].
- ²⁸ See *J. D. B. v. North Carolina* (2011) 564 U.S. ___ [131 S. Ct. 2394].
- ²⁹ *Fare v. Michael C.* (1979) 442 U.S. 707, 726.
- ³⁰ See *Berghuis v. Thompkins* (2010) 560 U.S. ___ [130 S. Ct. 2250,

2260] [a waiver “must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception”]; *Colorado v. Connelly* (1986) 479 U.S. 157, 169 [“Of course, a waiver must at a minimum be ‘voluntary’ to be effective against an accused.”]. NOTE: While some older cases held that a waiver might be involuntary if it was a result of the “slightest pressure,” this standard was abrogated by the U.S. Supreme Court in *Arizona v. Fulminante* (1991) 499 U.S. 279, 285-86.

³¹ *Connecticut v. Barrett* (1987) 479 U.S. 523, 527.

³² *Moran v. Burbine* (1986) 475 U.S. 412, 421.

³³ *Colorado v. Spring* (1987) 479 U.S. 564, 573-74.

³⁴ See *Colorado v. Connelly* (1986) 479 U.S. 157, 169-70 [“The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on ‘free choice’ in any broader sense of the word.”]; *Fare v. Michael C.* (1979) 442 U.S. 707, 725; *Collins v. Gaetz* (7th Cir. 2010) 612 F.3d 574, 584 [“The Supreme Court has said that when the police are aware of a suspect’s mental defect but persist in questioning him, such dogged persistence can contribute to a finding that the waiver was involuntary.” Citations omitted.].

³⁵ See *North Carolina v. Butler* (1979) 441 U.S. 369, 372-73 [Court rejects argument that a suspect who agreed to speak with officers must also expressly waive his right to counsel].

³⁶ *North Carolina v. Butler* (1979) 441 U.S. 369, 373 [“An express written or oral statement of waiver ... is usually strong proof of the validity of that waiver but is not inevitably either necessary nor sufficient to establish waiver.”].

³⁷ See *Berghuis v. Thompkins* (2010) 560 U.S. ___ [130 S. Ct. 2250, 2256] [“Thompkins declined to sign the form.”].

³⁸ See *Connecticut v. Barrett* (1987) 479 U.S. 523, 530, fn.4 [“[T]here may be several strategic reasons why a defendant willing to speak to the police would still refuse to write out his answers to questions”].

³⁹ (2010) 560 U.S. ___ [130 S. Ct. 2250, 2263].

⁴⁰ See *Wyrick v. Fields* (1982) 459 U.S. 42. ALSO SEE *Berghuis v. Thompkins* (2010) 560 U.S. ___ [130 S. Ct. 2250, 2263] [officers are “not required to rewarn suspects from time to time”].

⁴¹ NOTE: There is no set time limit after which a reminder or new waiver will be required. See *U.S. v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1312 [“The courts have generally rejected a per se rule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners.”].

⁴² See *Wyrick v. Fields* (1982) 459 U.S. 42, 47-48. rial way.”].

⁴³ (2004) 542 U.S. 600.

⁴⁴ See *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 973 [“A two-step interrogation involves eliciting an unwarned confession, administering the *Miranda* warnings and obtaining a waiver of *Miranda* rights, and then eliciting a repeated confession.”].

⁴⁵ NOTE: Because none of the views in *Seibert* garnered the votes of five Justices, the holding of the Court “may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. U.S.* (1977) 430 U.S. 188, 193. Because Justice Kennedy concurred in the judgment of the plurality on the narrowest grounds (he rejected the plurality’s position that a “fruits” analysis should be applied to unintentional violations), his opinion represents the holding of the Court. And because Justice Kennedy would apply the “fruits” analysis only if the two-step procedure was employed deliberately, a statement will not be suppressed if it was employed inadvertently. BUT ALSO SEE *U.S. v. Heron* (7th Cir. 2009) 564 F.3d 879, 885 [court questions whether *Seibert* established an intent-based test].

⁴⁶ See *U.S. v. Reyes-Bosque* (9th Cir. 2010) 596 F.3d 1017, 1031 [“If the use of the two-step method is not deliberate, the post-warning statements are admissible if they were voluntarily made.”].

⁴⁷ See *Missouri v. Seibert* (2004) 542 U.S. 600, 616 [the questioning was “systematic, exhaustive, and managed with psychological skill,” adding that when the police were finished “there was little, if anything, of incriminating potential left unsaid.”]; *Bobby v. Dixon* (2011) 565 U.S. ___ [132 S. Ct. 26, 31 [in discussing *Seibert*, the court noted that a “detective exhaustively questioned *Seibert*”] *U.S. v. Aguilar* (8th Cir. 2004) 384 F.3d 520, 525 [“[T]he method and timing of the two interrogations establish intentional, calculated conduct by the police”; the unwarned interrogation “lasted approximately ninety minutes”].

questions

The following questions are based on material in this *Training Key*®. Select the one best answer for each question.

1. Which of the following is true concerning *Miranda* waivers?
 - (a) *They must be both knowing and intelligent.*
 - (b) *They should not be obtained through the use of threats, promises, or coercion - they must be voluntary.*
 - (c) *They must be timely. New waivers may be necessary if the suspect is reasonably likely to forget his rights or believes they expired.*
 - (d) *All of the above.*
2. Which of the following is false?
 - (a) *Officers should not tell suspects that anything they say will be used against them.*
 - (b) *Miranda warnings do not have to use the exact language found in the court decision. Rather, officers are only required to “reasonably convey” the rights.*
 - (c) *Since most suspects are aware of their rights and the contents of Miranda warnings, there is no need for officers to state them.*
 - (d) *If officers misrepresent the nature of Miranda rights or the consequences of waiving them, any subsequent waiver may be deemed invalid.*
3. If a suspect states that he does not understand his rights, officers must try to clarify them.
 - (a) *True.*
 - (b) *False.*

answers

1. (d) All of the above.
2. (c) Although the courts are aware that most suspects know their *Miranda* rights, officers are required to enumerate them because prosecutors have the burden of proving such knowledge by direct evidence.
3. (a) True. This is especially true concerning the right to counsel.

