Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Interview & Interrogation

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103 S.Ct. 3517
Supreme Court of the United States

CALIFORNIA, Petitioner,

v.

Jerry Lain BEHELER.

No. 82–1666.
|
July 6, 1983.

Synopsis

California defendant was convicted of aiding and abetting first-degree murder. The Court of Appeal reversed. Certiorari was granted. The Supreme Court held that *Miranda* warnings were not required where defendant, although a suspect, was not placed under arrest and voluntarily came to police station and was allowed to leave unhindered after brief interview.

Reversed and remanded.

Justice Stevens with whom Justice Brennan and Justice Marshall join, dissented and filed opinion.

Opinion

****3518** ***1121** PER CURIAM.

The question presented in this petition for certiorari is whether *Miranda* warnings are required if the suspect is not placed under arrest, voluntarily comes to the police station, and is allowed to leave unhindered by police after a brief interview. Because this question has already been settled ***1122** clearly by past decisions of this Court, we reverse a decision of the California Court of Appeal holding that *Miranda* warnings are required in these circumstances.

I

The respondent, Jerry Beheler, and several acquaintances, attempted to steal a quantity of hashish from Peggy Dean, who was selling the drug in the parking lot of a liquor store. Dean was killed by Beheler's companion and step-brother, Danny Wilbanks, when she refused to relinquish her hashish. Shortly thereafter, Beheler called the police, who arrived almost immediately. See Resp. to Pet. for Cert., at 3. He told the police that Wilbanks had killed the victim, and that other companions had hidden the gun in the Behelers' backyard. Beheler gave consent to search the yard and the gun was found. Later that evening, Beheler voluntarily agreed to accompany police to the station house, although the police specifically told Beheler that he was not under arrest.

At the station house, Beheler agreed to talk to police about the murder, although the police did not advise Beheler of the rights provided him under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The interview lasted less than 30 minutes. After being told that his statement would be evaluated by the district attorney, Beheler was permitted to return to his home. Five days later, Beheler was arrested in connection with the Dean murder. After he was fully advised of his *Miranda* rights, he waived those rights and gave a second, taped confession during which he admitted that his earlier interview with the police had been given voluntarily. The trial court found that it was not necessary for police to advise Beheler of his *Miranda* rights prior to the first interview, and Beheler's statements at both interviews were admitted into evidence.

****3519** The California Court of Appeal reversed Beheler's conviction for aiding and abetting first-degree murder, holding that the first interview with police constituted custodial interrogation, ***1123** which activated the need for *Miranda* warnings. The court focused on the fact that the interview took place in the station house, that before the station house interview the police had already identified Beheler as a suspect in the case because Beheler had discussed the murder with police earlier, and that the interview was designed to produce incriminating responses. Although the indicia of arrest were not present, the balancing of the other factors led the court to conclude that the State "has not met its burden of establishing that [Beheler] was not in custody" during the first interview. App. to Pet. for Cert., at 36.[1]

II

We held in *Miranda* that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S., at 444, 86 S.Ct., at 1612 (footnote omitted). It is beyond doubt that Beheler was neither taken into custody nor significantly deprived of his freedom of action. Indeed, Beheler's freedom was not restricted in any way whatsoever.

In *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), which involved a factual context remarkably similar to the present case, we held that the suspect was not "in custody" within the meaning of *Miranda.* The police initiated contact with Mathiason, who agreed to come to the patrol office. There, the police conducted an interview after informing Mathiason that they suspected him of committing a burglary, and that the truthfulness of any statement that he made would be ***1124** evaluated by the district attorney or a judge. The officer also falsely informed Mathiason that his fingerprints were found at the scene of the crime. Mathiason then admitted to his participation in the burglary. The officer advised Mathiason of his *Miranda* rights, and took a taped confession, but released him pending the district attorney's decision to bring formal charges. The interview lasted for 30 minutes.

In summarily reversing the Oregon Supreme Court decision that Mathiason was in custody for purposes of receiving *Miranda* protection, we stated, "Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.' " 429 U.S., at 495, 97 S.Ct., at 714. The police are required to give *Miranda* warnings only "where there has been such a restriction on a person's freedom as to render him 'in custody.' " *Ibid.* Our holding relied on the very practical recognition that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Ibid.*[2]

****3520** The court below believed incorrectly that *Mathiason* could be distinguished from the present case because Mathiason was not questioned by police until some 25 days after the burglary. In the present case, Beheler was interviewed shortly after the crime was committed, had been drinking earlier in ***1125** the day, and was emotionally distraught. See App. to Pet. for Cert., at 24–25. In addition, the court observed that the police had a great deal more information about Beheler before their interview than did the police in *Mathiason,* and that Mathiason was a parolee who knew that "it was incumbent upon him to cooperate with police." *Id.,* at 25. Finally, the court noted that our decision in *Mathiason* did not preclude a consideration of the "totality of circumstances" in determining whether a suspect is "in custody."

Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. *Mathiason, supra,* 429 U.S., at 495, 97 S.Ct., at 714. In the present case, the "totality of circumstances" on which the court focused primarily were that the interview took place in a station house, and that Beheler was a suspect because he had spoken to police earlier. But we have explicitly recognized that *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Ibid.* That the police knew more about Beheler before his interview than they did about Mathiason before his is irrelevant, see n. 2, *supra,* especially because it was Beheler himself who had initiated the earlier communication with police. Moreover, the length of time that elapsed between the commission of the crime and the police interview has no relevance to the inquiry.[3]

***1126** III

Accordingly, the motion of respondent for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted, the decision of the California Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

This case comes to us from an intermediate appellate court in California. It is a case that the Supreme Court of California deemed unworthy of review. It is a case in which the California Appellate Court wrote a 38-page opinion, most of which was devoted to an analysis of the question whether, under all of the relevant facts, the respondent was "in custody" under the test set forth in *People v. Blouin,* 80 Cal.App.3d 269, 283, 145 Cal.Rptr. 701 (1978).

****3521** In reviewing that question, the California court analyzed the facts of the case in light of the decisions in *People v. Herdan,* 42 Cal.App.3d 300, 116 Cal.Rptr. 641 (1974); *People v. Hill,* 70 Cal.2d 678, 76 Cal.Rptr. 225, 452 P.2d 329 (1969); *People v. Arnold,* 66 Cal.2d 438, 58 Cal.Rptr. 115, 426 P.2d 515 (1967); *People v. White,* 69 Cal.2d 751, 72 Cal.Rptr. 873, 446 P.2d 993 (1968); *People v. Sam,* 71 Cal.2d 194, 77 Cal.Rptr. 804, 454 P.2d 700 (1969); *In re James M.,* 72 Cal.App.3d 133, 139 Cal.Rptr. 902 (1977); *People v. McClary,* 20 Cal.3d 218, 142 Cal.Rptr. 163, 571 P.2d 620 (1977); *People v. Randall,* 1 Cal.3d 948, 83 Cal.Rptr. 658, 464 P.2d 114 (1970); and *People v. Howard* (July 16, 1982), 5 Crim. No. 5181. The court also considered and distinguished our opinions in *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), and *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). The court summarized its analysis in the following manner:

> ***1127** "As we have previously stated, the prosecution has the burden of establishing a [*sic*] voluntariness of the defendant's statement beyond a reasonable doubt. (*People v. Jimenez,* 21 Cal.3d 595 [147 Cal.Rptr. 172], 580 P.2d 672.) In the instant case, there appears to be no conflicting testimony on the *Miranda* issue. Where the facts are uncontradicted, the appellate court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (*People v. Murtishaw,* 29 Cal.3d 733, 753 [175 Cal.Rptr. 738], 631 P.2d 446.)
>
> "We conclude that respondent has not met its burden of establishing that appellant was not in custody during the February 21 interview. Furthermore, the incriminating statements from the February 21 interview should have been suppressed by the trial court. On the record before us, appellant essentially confessed to felony murder during the February 21 interrogation. A confession has been defined as 'amounting to a declaration of defendant's intentional participation in a criminal act.' (*People v. McClary*, 20 Cal.3d 218, 230 [142 Cal.Rptr. 163], 511 P.2d 620 (1977).) The improper introduction of a confession is reversible error per se. (*People v. Randall*, 1 Cal.3d 948, 958 [83 Cal.Rptr. 658], 464 P.2d 114 (1970).)" App. to Pet. for Cert. 36–37.

Today, without receiving briefs or arguments on the merits, this Court summarily reverses the decision of the intermediate appellate court of California. In doing so the Court notes that "the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' " and that the ultimate inquiry is whether the restraint on freedom of movement is "of the degree associated with a formal arrest." *Ante,* at 3520. I believe that other courts are far better equipped than this Court to make the kind of factual study that must precede such a determination. We are far too busy to review every claim of error by a prosecutor who ***1128** has been unsuccessful in presenting his case to a state appellate court. Moreover, those courts are far better equipped than we are to assess the police practices that are highly relevant to the determination whether particular circumstances amount to custodial interrogation. I therefore respectfully dissent from the Court's summary decision of the merits of this case.

All Citations

463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275

Footnotes

1 Beheler suggests that the decision below rested upon adequate and independent state grounds in that the court applied state "in custody" standards. See Resp. to Pet. for Cert., at 9, n. 5. It is clear from the face of the opinion, however, that the opinion below rested exclusively on the court's "decision on the *Miranda* issue." App. to Pet. for Cert., at 37. Although the court relied in part on *People v. Herdan,* 42 Cal.App.3d 300, 116 Cal.Rptr. 641 (1974), that decision applies *Miranda.*

2 Our holding in *Mathiason* reflected our earlier decision in *Beckwith v. United States,* 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976), in which we rejected the notion that the "in custody" requirement was satisfied merely because the police interviewed a person who was the "focus" of a criminal investigation. We made clear that "*Miranda* implicitly defined 'focus' ... as 'questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *Id.,* at 347, 96 S.Ct., at 1616 (quoting *Miranda, supra,* 384 U.S., at 444, 86 S.Ct., at 1612).

3 Beheler offers a number of arguments in opposition to the State's petition for certiorari. The thrust of these arguments is that even though he voluntarily engaged in the interview with police, his participation was "coerced" because he was unaware of the consequences of his participation. Beheler cites no authority to support his contention that his lack of

awareness transformed the situation into a custodial one. In addition, Beheler argues that it would be unjust to uphold his conviction because the triggerman was convicted only of voluntary manslaughter. We do not find Beheler's argument to be persuasive. See *Standefer v. United States,* 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980).

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259 A.2d 355
District of Columbia Court of Appeals.

Robert W. DUPONT, Appellant,

v.

UNITED STATES, Appellee.

No. 4799.
|
Argued April 28, 1969.
|
Decided Dec. 2, 1969.

Synopsis

Defendant was convicted in the District of Columbia Court of General Sessions, Alfred Burka, J., of possession of a submachine gun, and he appealed. The District of Columbia Court of Appeals, Gallagher, J., held that consent of girl in whose apartment defendant was staying to search of bed where defendant had secreted the gun was voluntarily and freely given and that girl had authority to give consent, but that in-custody statements given outside presence of counsel were inadmissible where defendant's attention had been directed to card containing statement of Miranda rights and defendant had ignored card, saying that he knew his rights.

Reversed and remanded for new trial.

Hood, C. J., dissented.

Attorneys and Law Firms

***355** John J. Hurley, Washington, D. C., appointed by this court, for appellant.

***356** Sandor Frankel, Asst. U. S. Atty., with whom David G. Bress, U. S. Atty., Frank Q. Nebeker and John F. Rudy, II, Asst. U. S. Attys., were on the brief, for appellee.

Before HOOD, Chief Judge, FICKLING and GALLAGHER, Associate Judges.

Opinion

GALLAGHER, Associate Judge:

Appellant was convicted under D.C.Code 1967, s 22-3214(a) for possession of a prohibited weapon, namely, a submachine gun. A sentence of 360 days was imposed, the execution of which was suspended. Appellant was released on personal recognizance and was confined by the military authorities as a deserter.

On the evening of January 31, 1967, at about 11:45 p. m., Officer Burton of the Metropolitan Police received information from an informant considered reliable that appellant was an army deserter, that he and some companions had gone to Virginia to purchase narcotics and planned to return to the Georgetown area, and that he was keeping a submachine gun in a bed in the Washington apartment of a female acquaintance. The officer was given a description of appellant and the girl with whom he was staying (said to be wearing an unusual purple cape), a description of the car, and the address of the apartment.

Armed with this information the officer enlisted the aid of Detective Sergeant Evanoff and others. The officers then went to Georgetown and arrested appellant at a parking lot adjacent to a cafeteria in the 1200 block of Wisconsin Avenue. After the arrest a large crowd gathered in the lot, which included persons recognized by Officer Burton as having frequented the girl's apartment. Detective Sergeant Evanoff recognized the girl in whose apartment the gun was said to be located from the description given him by Officer Burton, and approached her in the crowd.

There is some conflict between the testimony of Sergeant Evanoff and the girl as to what then transpired. Evanoff testified that he approached the girl and asked her if she knew appellant. When she replied that she knew him only as ‘Robbie’ and that he was staying at her apartment, he told her that appellant was an army deserter and that he was keeping a submachine gun in her apartment. The girl denied a gun was there and offered to let Sergeant Evanoff ‘see for yourself.’ The two were then driven to the girl's apartment in a police cruiser. Before entering the apartment, Sergeant Evanoff told the girl that he only wanted to search the area in which appellant slept, and said she replied, ‘(I)f there is a damn machine gun in here, I want it out.’ Sergeant Evanoff proceeded directly to the bed in which the girl said appellant slept and recovered a modified .45 caliber submachine gun wrapped in a blanket on the bed.

The girl, on the other hand, testified that Detective Sergeant Evanoff approached her, verified her name and then told her to come with him, without asking consent for a search at that

time. She said that she was refused permission to retrieve her coat from the cafeteria next door, but that a friend was sent to get it for her. Detective Sergeant Evanoff took her by the arm and led her to the squad car. She gave directions to her apartment, and was driven there by Evanoff and a uniformed officer. On the way, she said Evanoff told her that if the apartment were 'clean' everything would 'be all right', but that 'if anything were there' she would 'be in a lot of trouble.' She said that there was no conversation concerning the gun until after the entry into the apartment and that her permission for a search was never asked before that time. She did admit having opened the street door and the apartment door and having shown the Sergeant the bed in which appellant slept. She said she was surprised when the machine gun was found. No part of the apartment was searched other than the bed in which appellant had secreted the gun.

Appellant moved to suppress the gun before trial. A hearing was held on the motion ***357** at which Detective Sergeant Evanoff, the girl and one of her companions on the night of the arrest testified. The motion was denied in a written opinion which treated as a factual question the issue whether the girl had given consent for a limited search of her apartment. After considering the conflicting testimony, the motions judge found that valid consent had in fact been given.

Appellant renewed the motion at trial and requested another full hearing on the search and purported consent. He proffered as additional witnesses two other officers who had been present at the time of the arrest and who had not testified at the pretrial hearing, but made no proffer of the testimony he expected the officers to give. A conflict in the trial testimony of policemen Evanoff and Burton was also alleged. The trial judge, ruling he was bound by the pretrial holding of consent, held a hearing on the motion limited to two issues, (a) whether appellant had sufficient proprietary interest in the apartment to render ineffective any consent by the girl to a search of the bed, and (b) whether there was an emergency situation which would justify a search without a warrant. He found that the girl had sole dominion over the apartment and could consent to the search, and that there was an emergency sufficient to sustain a warrantless search. Accordingly, the gun was admitted into evidence.

Appellant contends the gun was improperly admitted since the trial court erred in denying him a hearing de novo on the issue whether the girl gave her valid consent to the search. He offers Rouse v. United States, 123 U.S.App.D.C. 348, 359 F.2d 1014 (1966), as authority for the proposition that a pretrial ruling on a motion to suppress is not binding on the trial judge where matters occurring at trial cast reasonable doubt on that ruling, and claims his proffers of additional police testimony and the conflict in testimony between officers Evanoff and Burton met the criteria therein for a de novo hearing. Rouse, however, is distinguishable on its facts. There two officers gave incredibly conflicting and confusing testimony about crucial factors involved in the court's inquiry. Here the sole inconsistency was that Evanoff stated the informant gave only the block address of the apartment in question, while Burton testified that the exact address was given.[1] Furthermore, appellant at no time proffered the substance of any 'new' evidence that would be offered by the additional officers he subpoenaed. Clearly there was no showing sufficient to warrant a de novo hearing.

Next, appellant argues that the pretrial ruling a valid consent was erroneous. Our review of the evidence adduced by the Government at the pretrial hearing leads us to conclude that it was sufficient to support the finding that a limited search of the apartment was conducted with the valid consent of the girl. The testimony of Detective Sergeant Evanoff 'taken at full value, (met) the required standard' for consent. Judd v. United States, 89 U.S.App.D.C. 64, 67, 190 F.2d 649, 652 (1951). We find no reason to overturn the finding that consent was voluntary and freely given. Compare Maxwell v. Stephens, 348 F.2d 325, 336-337 (8th Cir.), cert. denied, 382 U.S. 944, 86 S.Ct. 387, 15 L.Ed.2d 353 (1965).

Finally, the trial court properly ruled the girl could effectively consent to the search of the bed where appellant had secreted the gun. While appellant had standing to challenge the legality of this search as a person 'legitimately on (the) premises,' Jones v. United States, 362 U.S. 257, 267, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), he cannot prevail on this objection. The consent of his host was directed to a part of the apartment not reserved for his sole ***358** personal use,[2] unlike the bureau in Reeves v. Warden, Md. Penitentiary, 346 F.2d 915, 924-926 (4th Cir. 1965), or the closet in Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965). Moreover, since the search in question was confined to a room of joint use, the rule we follow is that: '(W)here there are multiple lawful residents of a premises, any one of such persons may give permission to enter and * * * if incriminating evidence is found, it may be used against all.' Wright v. United States, 389 F.2d 996, 998 (8th Cir. 1968).[3]

This conviction must be reversed, however, because of the admission into evidence of certain custodial statements of appellant which violated the Miranda rule.[4]

After his arrest, appellant was taken to the precinct by Officer Burton[5] where he attempted to direct appellant's attention to a large card on the wall which set forth the 'rights of an arrested person.'[6] The officer did not in any way orally communicate the warnings contained on the card. Appellant indicated no interest in the card and did not look at it. Thereafter, sometime between 2:00 and 2:30 a. m., Detective Sergeant Evanoff returned to the police station accompanied by the girl and carrying the submachine gun. He confronted appellant and immediately told him that he was under arrest for possession of a prohibited weapon. Evanoff then began to give appellant an oral warning of his rights, at the same time indicating the wall chart. Appellant cut him off somewhere in his first sentence beginning, 'anything you say', saying 'I know my rights, man' and that Sergeant Evanoff didn't have to go into that. Appellant did not look at the chart on the wall at this time, either.

After this exchange, appellant told the officer that the gun was entirely his, thus incriminating himself, and that the girl knew nothing about it. In response to questions by Detective Sergeant Evanoff about where the gun came from, appellant said he had found it in an abandoned car in Fairfax. Appellant then said he wanted to call his lawyer, claiming the right to make 'a phone call' after Evanoff replied, 'All right, very shortly.' As appellant was talking on the phone, Evanoff asked to whom he was talking and was handed a card with the name of an Air Force colonel on it, who appellant said was his lawyer. When appellant had completed the call, the questioning continued and appellant made further inculpatory statements.

The trial court denied appellant's motions to suppress the in-custody statements, finding that he either waived his Miranda rights or waived his right to be informed of them.

Under Miranda, prior to any questioning the accused must be warned (1) that he has the right to remain silent, (2) that anything said can be used against him in court, (3) that he has the right to consult with and to have counsel present at the interrogation, and (4) that if he cannot afford one a lawyer will be provided for him.[7]

While there is some evidence that the officers attempted to advise appellant of his rights and that appellant knew these rights, we need not reach the question of whether this evidence was sufficient to establish ***359** that the police actually met the requirements placed upon them by Miranda to inform him of his rights. Where, as here, an interrogation is conducted without the presence of counsel 'a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived * * *' the right to have retained or appointed counsel present when he was interrogated. Miranda, supra, 384 U.S. at 475, 86 S.Ct. 1602, at 1628. There was no showing sufficient to meet this requirement.

In Walker v. United States, D.C.App., 250 A.2d 553 (1969), the defendant was advised substantially of his Miranda rights, stated 'he knew all about them' and, upon interrogation, made an incriminating statement to the police shortly thereafter. This court held that since under Miranda there was a failure of the required proof that appellant had been offered counsel and had rejected the offer, the remark of the defendant and his subsequent statement to the police were insufficient to constitute a waiver of the right. 250 A.2d at 554-555. See also Brown v. Heyd, 277 F.Supp. 899, 903-905 (E.D.La.1967), aff'd per curiam, 406 F.2d 346 (5th Cir. 1969).[8]

It is clear from the record in this case that the Government has not carried the required 'heavy burden' of demonstrating that appellant 'knowingly and intelligently' waived his right to have counsel present when he was interrogated. Consequently, it was prejudicial error to deny appellant's motions to suppress the in-custody statements.

While we find it unnecessary to do so the dissenting opinion reaches the question of whether the evidence was sufficient to establish that appellant was informed of his Miranda rights. We might say in passing that, if we understand them correctly, we agree with most of the fundamental propositions stated in the dissent. That is to say, we agree that when an officer makes a 'good faith effort' to inform an arrested person of his Miranda rights and the person refuses to listen he has no standing to complain he was not informed of his rights; that the officer need not attempt to 'force' him to listen; and that when a person is informed of his rights and actually indicates no desire to avail himself of the rights, a waiver occurs.[9] Upon the basis of this court's prior decision in Walker v. United States, supra, however, we do differ with the dissent's conclusion that a waiver of his right to counsel was established here.

In view of the full Miranda hearing held by the trial court and because of our disposition of the case, we see no purpose in adopting the Government's alternative position that the case should be remanded for a finding as to whether appellant was warned of his rights.

Reversed and remanded for a new trial.

HOOD, Chief Judge (dissenting):

I dissent from that portion of the opinion dealing with appellant's Miranda rights. As the opinion points out, Officer Burton called appellant's attention to a large card on the wall setting forth a statement of his rights, as an arrested person, under Miranda. Appellant indicated no interest and would not even look at the card. Later when Detective Evanoff began to read to appellant his rights under Miranda, and at the same time attempted to direct appellant's attention to the card on the wall, appellant cut him off, saying he knew his rights and refused to look at the card. I think Miranda must be interpreted in a realistic and reasonable manner, and that the officers did all that reasonable men could do.

***360** What more could the officers have done? Should they have attempted to force appellant to read or to listen? Should the detective have continued to read when it was obvious that appellant was not listening?

It is my opinion that when officers make a good faith effort to inform an arrested person of his Miranda rights and that person refuses to pay any attention to the officers, such person has no standing to complain that he was not informed of his rights.

It is also my opinion that when an arrested person is informed of his rights and indicates no desire to take advantage of any of those rights, the trial court may find, as it did here, that such person knowingly and intelligently waived those rights. If there is substantial evidence in the record to support that finding it should stand, and I think that is the situation here. I believe my position is supported by the recent decision in United States v. McNeil, U.S.App.D.C. (decided October 31, 1969).

I would affirm the conviction.

All Citations

259 A.2d 355

Footnotes

1 This went to the warrantless search question, which has no relevancy if a valid consent was given by the girl for the search.

2 There was testimony to the effect that the beds and mattresses, in the apartment were used by the girl's friends on a 'first-come, first-serve' basis.

3 Since we have concluded that the search was lawful based on consent, we do not reach the question whether the circumstances constituted such an emergency as to justify a warrantless search.

4 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

5 The record indicates that appellant was then under arrest for a violation of the narcotics laws.

6 This wall chart is an enlargement of the standard PD 47 rights card which contains a statement of Miranda rights. The print is in 1/2 inch block lettering. Several of these charts were posted on the walls of the precinct.

7 Miranda v. Arizona, 384 U.S. at 468-473, 86 S.Ct. 1602.

8 In that case, the court stated:

> It will not do to suggest that (the defendant's) statement, 'I know all of that, (officer),' constitutes a waiver of the right to the warning that (the defendant) was not given. * * * (Miranda) clearly holds that the right to counsel may be waived only if the individual 'knowingly and intelligently' does so 'after such warnings have been given.' (citations omitted) 277 F.Supp. at 905.

9 It might eventuate that we would construe some factual situations differently.

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110 S.Ct. 2394
Supreme Court of the United States

ILLINOIS, Petitioner
v.
Lloyd PERKINS.

No. 88–1972.
|
Argued Feb. 20, 1990.
|
Decided June 4, 1990.

Synopsis

In a murder prosecution, the Circuit Court, St. Clair County, Richard A. Hudlin, IV, J., suppressed statements defendant made to undercover police officer and informant. The prosecution appealed. The Illinois Appellate Court, 176 Ill.App.3d 443, 126 Ill.Dec. 8, 531 N.E.2d 141,affirmed. On petition for certiorari, the United States Supreme Court, Justice Kennedy, held that an undercover law enforcement officer posing as a fellow inmate was not required to give *Miranda* warnings to an incarcerated suspect before asking questions that could elicit an incriminating response.

Reversed and remanded.

Justice Brennan filed an opinion concurring in the judgment.

Justice Marshall filed a dissenting opinion.

****2394 *292** *Syllabus*[*]

Police placed undercover agent Parisi in a jail cellblock with respondent Perkins, who was incarcerated on charges unrelated to the murder that Parisi was investigating. When Parisi asked him if he had ever killed anybody, ****2395** Perkins made statements implicating himself in the murder. He was then charged with the murder. The trial court granted respondent's motion to suppress his statements on the ground that Parisi had not given him the warnings required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, before their conversations. The Appellate Court of Illinois affirmed, holding that *Miranda* prohibits all undercover contacts with incarcerated suspects that are reasonably likely to elicit an incriminating response.

Held: An undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response. The *Miranda* doctrine must be enforced strictly, but only in situations where the concerns underlying that decision are present. Those concerns are not implicated here, since the essential ingredients of a "police-dominated atmosphere" and compulsion are lacking. It is *Miranda*'s premise that the danger of coercion results from the interaction of custody and official interrogation, whereby the suspect may feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess. That coercive atmosphere is not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate and whom he assumes is not an officer having official power over him. In such circumstances, *Miranda* does not forbid mere strategic deception by taking advantage of a suspect's misplaced trust. The only difference between this case and *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374—which upheld the placing of an undercover agent near a suspect in order to gather incriminating information—is that Perkins was incarcerated. Detention, however, whether or not for the crime in question, does not warrant a presumption that such use of an undercover agent renders involuntary the incarcerated suspect's resulting confession. *Mathis v. United States,* 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381—which held that an inmate's statements to a known agent were inadmissible because no *Miranda* warnings were given—is distinguishable. Where the suspect does not ***293** know that he is speaking to a government agent, there is no reason to assume the possibility of coercion. *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246, and similar cases—which held that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged—are inapplicable, since, here, no murder charges had been filed at the time of interrogation. Also unavailing is Perkins' argument that a bright-line rule for the application of *Miranda* is desirable, since law enforcement officers will have little difficulty applying the holding of this case. Pp. 2397–2399.

176 Ill.App.3d 443, 126 Ill.Dec. 8, 531 N.E.2d 141 (1988), reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J.,

filed an opinion concurring in the judgment, *post,* p. 2399. MARSHALL, J., filed a dissenting opinion, *post,* p. 2401.

Attorneys and Law Firms

Marcia L. Friedl, Assistant Attorney General of Illinois, argued the cause for petitioner. With her on the briefs were *Neil F. Hartigan,* Attorney General, *Robert J. Ruiz,* Solicitor General, and *Terrence M. Madsen* and *Jack Donatelli,* Assistant Attorneys General.

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Assistant Attorney General Dennis,* and *Deputy Solicitor General Bryson.*

Dan W. Evers, by appointment of the Court, 493 U.S. 930, argued the cause for respondent. With him on the brief was *Daniel M. Kirwan.**

* Briefs of *amici curiae* urging reversal were filed for Americans for Effective Law Enforcement, Inc., et al. by *Gregory U. Evans, Daniel B. Hales, George D. Webster, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt, Bernard J. Farber,* and *James P. Manak;* and for the Lincoln Legal Foundation et al. by *Joseph A. Morris, Donald D. Bernardi, Fred L. Foreman, Daniel M. Harrod,* and *Jack E. Yelverton.*

John A. Powell, William B. Rubenstein, and *Harvey Grossman* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Opinion

***294** Justice KENNEDY delivered the opinion of the Court.

An undercover government agent was placed in the cell of respondent Perkins, who was incarcerated on charges unrelated to the subject of the agent's investigation. Respondent made statements that implicated him in the crime that the agent sought to solve. ****2396** Respondent claims that the statements should be inadmissible because he had not been given *Miranda* warnings by the agent. We hold that the statements are admissible. *Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.

I

In November 1984, Richard Stephenson was murdered in a suburb of East St. Louis, Illinois. The murder remained unsolved until March 1986, when one Donald Charlton told police that he had learned about a homicide from a fellow inmate at the Graham Correctional Facility, where Charlton had been serving a sentence for burglary. The fellow inmate was Lloyd Perkins, who is the respondent here. Charlton told police that, while at Graham, he had befriended respondent, who told him in detail about a murder that respondent had committed in East St. Louis. On hearing Charlton's account, the police recognized details of the Stephenson murder that were not well known, and so they treated Charlton's story as a credible one.

By the time the police heard Charlton's account, respondent had been released from Graham, but police traced him to a jail in Montgomery County, Illinois, where he was being held pending trial on a charge of aggravated battery, unrelated to the Stephenson murder. The police wanted to investigate further respondent's connection to the Stephenson murder, but feared that the use of an eavesdropping device would prove impracticable and unsafe. They decided instead to place an undercover agent in the cellblock with respondent and Charlton. The plan was for Charlton and undercover ***295** agent John Parisi to pose as escapees from a work release program who had been arrested in the course of a burglary. Parisi and Charlton were instructed to engage respondent in casual conversation and report anything he said about the Stephenson murder.

Parisi, using the alias "Vito Bianco," and Charlton, both clothed in jail garb, were placed in the cellblock with respondent at the Montgomery County jail. The cellblock consisted of 12 separate cells that opened onto a common room. Respondent greeted Charlton who, after a brief conversation with respondent, introduced Parisi by his alias. Parisi told respondent that he "wasn't going to do any more time" and suggested that the three of them escape. Respondent replied that the Montgomery County jail was "rinky-dink" and that they could "break out." The trio met in respondent's cell later that evening, after the other inmates were asleep, to refine their plan. Respondent said that his girlfriend could smuggle in a pistol. Charlton said: "Hey, I'm not a murderer, I'm a burglar. That's your guys' profession." After telling Charlton that he would be responsible for any murder that occurred, Parisi asked respondent if he had ever "done" anybody. Respondent said that he had and proceeded to describe at length the events of the Stephenson murder. Parisi and respondent then engaged in some casual

conversation before respondent went to sleep. Parisi did not give respondent *Miranda* warnings before the conversations.

Respondent was charged with the Stephenson murder. Before trial, he moved to suppress the statements made to Parisi in the jail. The trial court granted the motion to suppress, and the State appealed. The Appellate Court of Illinois affirmed, 176 Ill.App.3d 443, 126 Ill.Dec. 8, 531 N.E.2d 141 (1988), holding that *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), prohibits all undercover contacts with incarcerated suspects that are reasonably likely to elicit an incriminating response.

We granted certiorari, 493 U.S. 808, 110 S.Ct. 49, 107 L.Ed.2d 18 (1989), to decide whether an undercover law enforcement officer must give ***296** *Miranda* warnings to an incarcerated suspect before asking him questions that may elicit an incriminating response. We now reverse.

****2397** II

In *Miranda v. Arizona, supra,* the Court held that the Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during "custodial interrogation" without a prior warning. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody...." *Id.* 384 U.S., at 444, 86 S.Ct., at 1612. The warning mandated by *Miranda* was meant to preserve the privilege during "incommunicado interrogation of individuals in a police-dominated atmosphere." *Id.,* at 445, 86 S.Ct., at 1612. That atmosphere is said to generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.,* at 467, 86 S.Ct., at 1624. "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer v. McCarty,* 468 U.S. 420, 437, 104 S.Ct. 3138, 3148, 82 L.Ed.2d 317 (1984).

Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda.* The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980); *Berkemer v. McCarty, supra,* 468 U.S., at 442, 104 S.Ct., at 3151. When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. *Miranda,* 384 U.S., at 449, 86 S.Ct., at 1614 ("[T]he 'principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation' "); *id.,* at 445, 86 S.Ct., at 1612. There is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear ***297** of reprisal for remaining silent or in the hope of more lenient treatment should he confess.

It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent. Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist. The state court here mistakenly assumed that because the suspect was in custody, no undercover questioning could take place. When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners. "[W]hen the agent carries neither badge nor gun and wears not 'police blue,' but the same prison gray" as the suspect, there is no "*interplay* between police interrogation and police custody." Kamisar, *Brewer v. Williams, Massiah* and *Miranda:* What is "Interrogation"? When Does it Matter?, 67 Geo.L.J. 1, 67, 63 (1978).

Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. As we recognized in *Miranda:* "[C]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S., at 478, 86 S.Ct., at 1629. 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. Cf. *Oregon v. Mathiason,* 429 U.S. 492, 495–496, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977) *(per curiam);* ****2398** *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) (where police fail to inform suspect of attorney's efforts to reach him,

***298** neither *Miranda* nor the Fifth Amendment requires suppression of prearraignment confession after voluntary waiver).

Miranda was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates. This case is illustrative. Respondent had no reason to feel that undercover agent Parisi had any legal authority to force him to answer questions or that Parisi could affect respondent's future treatment. Respondent viewed the cellmate-agent as an equal and showed no hint of being intimidated by the atmosphere of the jail. In recounting the details of the Stephenson murder, respondent was motivated solely by the desire to impress his fellow inmates. He spoke at his own peril.

The tactic employed here to elicit a voluntary confession from a suspect does not violate the Self–Incrimination Clause. We held in *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), that placing an undercover agent near a suspect in order to gather incriminating information was permissible under the Fifth Amendment. In *Hoffa,* while petitioner Hoffa was on trial, he met often with one Partin, who, unbeknownst to Hoffa, was cooperating with law enforcement officials. Partin reported to officials that Hoffa had divulged his attempts to bribe jury members. We approved using Hoffa's statements at his subsequent trial for jury tampering, on the rationale that "no claim ha[d] been or could [have been] made that [Hoffa's] incriminating statements were the product of any sort of coercion, legal or factual." *Id.,* at 304, 87 S.Ct., at 414. In addition, we found that the fact that Partin had fooled Hoffa into thinking that Partin was a sympathetic colleague did not affect the voluntariness of the statements. *Ibid.* Cf. *Oregon v. Mathiason, supra,* 429 U.S., at 495–496, 97 S.Ct., at 714 (officer's falsely telling suspect that suspect's fingerprints had been found at crime scene did not render interview "custodial" under *Miranda*); *Frazier v. Cupp,* 394 U.S. 731, 739, 89 S.Ct. 1420, 1424, 22 L.Ed.2d 684 (1969); *Procunier v. Atchley,* 400 U.S. 446, 453–454, 91 S.Ct. 485, 489, 27 L.Ed.2d 524 (1971). The only difference between this case and *Hoffa* is that the suspect here was incarcerated, but ***299** detention, whether or not for the crime in question, does not warrant a presumption that the use of an undercover agent to speak with an incarcerated suspect makes any confession thus obtained involuntary.

Our decision in *Mathis v. United States,* 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), is distinguishable. In *Mathis,* an inmate in a state prison was interviewed by an Internal Revenue Service agent about possible tax violations. No *Miranda* warning was given before questioning. The Court held that the suspect's incriminating statements were not admissible at his subsequent trial on tax fraud charges. The suspect in *Mathis* was aware that the agent was a Government official, investigating the possibility of noncompliance with the tax laws. The case before us now is different. Where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced. (The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official, but we do not have occasion to explore that issue here.)

This Court's Sixth Amendment decisions in *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), and *Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), also do not avail respondent. We held in those cases that the government may not use an undercover agent to circumvent the Sixth Amendment right to ****2399** counsel once a suspect has been charged with the crime. After charges have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel. *Moulton, supra,* at 176, 106 S.Ct., at 487. In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable.

Respondent can seek no help from his argument that a bright-line rule for the application of *Miranda* is desirable. Law enforcement officers will have little difficulty putting into practice our holding that undercover agents need not ***300** give *Miranda* warnings to incarcerated suspects. The use of undercover agents is a recognized law enforcement technique, often employed in the prison context to detect violence against correctional officials or inmates, as well as for the purposes served here. The interests protected by *Miranda* are not implicated in these cases, and the warnings are not required to safeguard the constitutional rights of inmates who make voluntary statements to undercover agents.

We hold that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response. The statements at issue in this case were voluntary, and there is no federal obstacle to their admissibility at trial. We now reverse and remand for proceedings not inconsistent with our opinion.

It is so ordered.

Justice BRENNAN, concurring in the judgment.

The Court holds that *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), does not require suppression of a statement made by an incarcerated suspect to an undercover agent. Although I do not subscribe to the majority's characterization of *Miranda* in its entirety, I do agree that when a suspect does not know that his questioner is a police agent, such questioning does not amount to "interrogation" in an "inherently coercive" environment so as to require application of *Miranda.* Since the only issue raised at this stage of the litigation is the applicability of *Miranda,*[*] I concur in the judgment of the Court.

***301** This is not to say that I believe the Constitution condones the method by which the police extracted the confession in this case. To the contrary, the deception and manipulation practiced on respondent raise a substantial claim that the confession was obtained in violation of the Due Process Clause. As we recently stated in *Miller v. Fenton,* 474 U.S. 104, 109–110, 106 S.Ct. 445, 448–449, 88 L.Ed.2d 405 (1985):

> "This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics ****2400** of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.... Although these decisions framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether the confession was 'involuntary,' *Blackburn v. Alabama,* 361 U.S. 199, 207 [80 S.Ct. 274, 280, 4 L.Ed.2d 242] (1960), the Court's analysis has consistently been animated by the view that 'ours is an accusatorial and not an inquisitorial system,' *Rogers v. Richmond,* 365 U.S. 534, 541 [81 S.Ct. 735, 739, 5 L.Ed.2d 760] (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness."

***302** That the right is derived from the Due Process Clause "is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Id.,* at 116, 106 S.Ct., at 452. See *Spano v. New York,* 360 U.S. 315, 320–321, 79 S.Ct. 1202, 1205–1206, 3 L.Ed.2d 1265 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves"); see also *Degraffenreid v. McKellar,* 494 U.S. 107, 1072–1074, 110 S.Ct. 1794, ——, 108 L.Ed.2d 794 (1990) (MARSHALL, J., joined by BRENNAN, J., dissenting from denial of certiorari).

The method used to elicit the confession in this case deserves close scrutiny. The police devised a ruse to lure respondent into incriminating himself when he was in jail on an unrelated charge. A police agent, posing as a fellow inmate and proposing a sham escape plot, tricked respondent into confessing that he had once committed a murder, as a way of proving that he would be willing to do so again should the need arise during the escape. The testimony of the undercover officer and a police informant at the suppression hearing reveal the deliberate manner in which the two elicited incriminating statements from respondent. See App. 43–53 and 66–73. We have recognized that "the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." *United States v. Henry,* 447 U.S. 264, 274, 100 S.Ct. 2183, 2188, 65 L.Ed.2d 115 (1980). As Justice MARSHALL points out, the pressures of custody make a suspect more likely to confide in others and to engage ***303** in "jailhouse bravado." See *post,* at 2402. The State is in a unique position to exploit this vulnerability because it has virtually complete control over the suspect's environment. Thus, the State can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses. Cf. *Mincey v. Arizona,* 437 U.S. 385, 399, 98 S.Ct. 2408, 2417, 57 L.Ed.2d 290 (1978); *Ashcraft v. Tennessee,* 322 U.S. 143, 153–155, 64 S.Ct. 921, 925–927, 88 L.Ed. 1192 (1944). The testimony in this case suggests the State did just that.

The deliberate use of deception and manipulation by the police appears to be incompatible "with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means," *Miller, supra,* 474 U.S., at 116, 106 S.Ct., at 452, and raises serious concerns that respondent's will was overborne. It is open to the lower court

on remand to determine whether, under the totality of the circumstances, respondent's **2401 confession was elicited in a manner that violated the Due Process Clause. That the confession was not elicited through means of physical torture, see *Brown v. Mississippi,* 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936) or overt psychological pressure, see *Payne v. Arkansas,* 356 U.S. 560, 566, 78 S.Ct. 844, 849, 2 L.Ed.2d 975 (1958), does not end the inquiry. "[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, [a court's] duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made." *Spano, supra,* 360 U.S., at 321, 79 S.Ct., at 1206.

Justice MARSHALL, dissenting.

This Court clearly and simply stated its holding in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966): "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.,* at 444, 86 S.Ct., at 1612. The conditions that require the police to apprise a defendant of his constitutional rights—custodial interrogation conducted by an agent of the police—were present in this *304 case. Because Lloyd Perkins received no *Miranda* warnings before he was subjected to custodial interrogation, his confession was not admissible.

The Court reaches the contrary conclusion by fashioning an exception to the *Miranda* rule that applies whenever "an undercover law enforcement officer posing as a fellow inmate ... ask[s] questions that may elicit an incriminating response" from an incarcerated suspect. *Ante,* at 2399. This exception is inconsistent with the rationale supporting *Miranda* and allows police officers intentionally to take advantage of suspects unaware of their constitutional rights. I therefore dissent.

The Court does not dispute that the police officer here conducted a custodial interrogation of a criminal suspect. Perkins was incarcerated in county jail during the questioning at issue here; under these circumstances, he was in custody as that term is defined in *Miranda.* 384 U.S., at 444, 86 S.Ct., at 1612; *Mathis v. United States,* 391 U.S. 1, 4–5, 88 S.Ct. 1503, 1504–1505, 20 L.Ed.2d 381 (1968) (holding that defendant incarcerated on charges different from the crime about which he is questioned was in custody for purposes of *Miranda*). The United States argues that Perkins was not in custody for purpose of *Miranda* because he was familiar with the custodial environment as a result of being in jail for two days and previously spending time in prison. Brief for United States as *Amicus Curiae* 11. Perkins' familiarity with confinement, however, does not transform his incarceration into some sort of noncustodial arrangement. *Cf. Orozco v. Texas,* 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969) (holding that suspect who had been arrested in his home and then questioned in his bedroom was in custody, notwithstanding his familiarity with the surroundings).

While Perkins was confined, an undercover police officer, with the help of a police informant, questioned him about a serious crime. Although the Court does not dispute that Perkins was interrogated, it downplays the nature of the 35–minute questioning by disingenuously referring to it as a *305 "conversatio [n]." *Ante,* at 2396, 2397. The officer's narration of the "conversation" at Perkins' suppression hearing however, reveals that it clearly was an interrogation.

"[Agent:] You ever do anyone?

"[Perkins:] Yeah, once in East St. Louis, in a rich white neighborhood.

"Informant: I didn't know they had any rich white neighborhoods in East St. Louis.

"Perkins: It wasn't in East St. Louis, it was by a race track in Fairview Heights....

**2402 "[Agent]: You did a guy in Fairview Heights?

"Perkins: Yeah in a rich white section where most of the houses look the same.

"[Informant]: If all the houses look the same, how did you know you had the right house?

"Perkins: Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner.

"[Agent]: How long ago did this happen?

"Perkins: Approximately about two years ago. I got paid $5,000 for that job.

"[Agent]: How did it go down?

"Perkins: I walked up [to] this guy['s] house with a sawed-off under my trench coat.

"[Agent]: What type gun[?]

"Perkins: A .12 gauge Remmington *[sic]* Automatic Model 1100 sawed-off." App. 49–50.

The police officer continued the inquiry, asking a series of questions designed to elicit specific information about the victim, the crime scene, the weapon, Perkins' motive, and his actions during and after the shooting. *Id.,* at 50–52. This interaction was not a "conversation"; Perkins, the officer, and the informant were not equal participants in a free-ranging discussion, with each man offering his views on different topics. Rather, it was an interrogation: Perkins was subjected to express questioning likely to evoke an incriminating response. ***306** *Rhode Island v. Innis,* 446 U.S. 291, 300–301, 100 S.Ct. 1682, 1689–1690, 64 L.Ed.2d 297 (1980).

Because Perkins was interrogated by police while he was in custody, *Miranda* required that the officer inform him of his rights. In rejecting that conclusion, the Court finds that "conversations" between undercover agents and suspects are devoid of the coercion inherent in station house interrogations conducted by law enforcement officials who openly represent the State. *Ante,* at 2397. *Miranda* was not, however, concerned solely with police *coercion.* It dealt with *any* police tactics that may operate to compel a suspect in custody to make incriminating statements without full awareness of his constitutional rights. See *Miranda, supra* 384 U.S., at 468, 86 S.Ct., at 1624 (referring to "inherent pressures of the interrogation atmosphere"); *Estelle v. Smith,* 451 U.S. 454, 467, 101 S.Ct. 1866, 1875, 68 L.Ed.2d 359 (1981) ("The purpose of [the *Miranda*] admonitions is to combat what the Court saw as 'inherently compelling pressures' at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it") (quoting *Miranda,* 384 U.S., at 467, 86 S.Ct., at 1624). Thus, when a law enforcement agent structures a custodial interrogation so that a suspect feels compelled to reveal incriminating information, he must inform the suspect of his constitutional rights and give him an opportunity to decide whether or not to talk.

The compulsion proscribed by *Miranda* includes deception by the police. See *Miranda, supra,* 384 U.S., at 453, 86 S.Ct., at 1616 (indicting police tactics "to induce a confession out of trickery," such as using fictitious witnesses or false accusations); *Berkemer v. McCarty,* 468 U.S. 420, 433, 104 S.Ct. 3138, 3146, 82 L.Ed.2d 317 (1984) ("The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce *or* trick captive suspects into confessing") (emphasis deleted and added). Cf. *Moran v. Burbine,* 475 U.S. 412, 421, 106 S.Ct. 1135, 1140, 89 L.Ed.2d 410 (1986) ("[T]he relinquishment of the right [protected by the *Miranda* warnings] must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, *or* deception") (emphasis ***307** added). Although the Court did not find trickery by itself sufficient to constitute compulsion in *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), the defendant in that case was not in custody. Perkins, however, was interrogated while incarcerated. As the Court has acknowledged in the Sixth Amendment context: ****2403** "[T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." *United States v. Henry,* 447 U.S. 264, 274, 100 S.Ct. 2183, 2188, 65 L.Ed.2d 115 (1980). See also *Massiah v. United States,* 377 U.S. 201, 206, 84 S.Ct. 1199, 1203, 12 L.Ed.2d 246 (1964) (holding, in the context of the Sixth Amendment, that defendant's constitutional privilege against self-incrimination was "more seriously imposed upon ... because he did not even know that he was under interrogation by a government agent") (citation and internal quotation marks omitted).

Custody works to the State's advantage in obtaining incriminating information. The psychological pressures inherent in confinement increase the suspect's anxiety, making him likely to seek relief by talking with others. Dix, Undercover Investigations and Police Rulemaking, 53 Texas L.Rev. 203, 230 (1975). See also Gibbs, The First Cut is the Deepest: Psychological Breakdown and Survival in the Detention Setting, in The Pains of Imprisonment 97, 107 (R. Johnson & H. Toch eds. 1982); Hagel–Seymour, Environmental Sanctuaries for Susceptible Prisoners, in The Pains of Imprisonment, *supra,* at 267, 279; Chicago Tribune, Apr. 15, 1990, p. D3 (prosecutors have found that prisoners often talk freely with fellow inmates). The inmate is thus more susceptible to efforts by undercover agents to elicit information from him. Similarly, where the suspect is incarcerated, the constant threat of physical danger peculiar to the prison environment may make him demonstrate his toughness to other inmates by recounting or inventing past violent acts. "Because the suspect's ability to select people with whom he can confide is completely within their control,

the police have a ***308** unique opportunity to exploit the suspect's vulnerability. In short, the police can insure that if the pressures of confinement lead the suspect to confide in anyone, it will be a police agent." (Footnote omitted.) White, Police Trickery in Inducing Confessions, 127 U.Pa.L.Rev. 581, 605 (1979). In this case, the police deceptively took advantage of Perkins' psychological vulnerability by including him in a sham escape plot, a situation in which he would feel compelled to demonstrate his willingness to shoot a prison guard by revealing his past involvement in a murder. See App. 49 (agent stressed that a killing might be necessary in the escape and then asked Perkins if he had ever murdered someone).

Thus, the pressures unique to custody allow the police to use deceptive interrogation tactics to compel a suspect to make an incriminating statement. The compulsion is not eliminated by the suspect's ignorance of his interrogator's true identity. The Court therefore need not inquire past the bare facts of custody and interrogation to determine whether *Miranda* warnings are required.

The Court's adoption of an exception to the *Miranda* doctrine is incompatible with the principle, consistently applied by this Court, that the doctrine should remain simple and clear. See, *e.g., Miranda, supra* 384 U.S., at 441–442, 86 S.Ct., at 1610–1611 (noting that one reason certiorari was granted was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow"); *McCarty, supra* 468 U.S., at 430, 104 S.Ct., at 3145 (noting that one of "the principal advantages of the *[Miranda]* doctrine ... is the clarity of that rule"); *Arizona v. Roberson,* 486 U.S. 675, 680, 108 S.Ct. 2093, 2097, 100 L.Ed.2d 704 (1988) (same). See also *New York v. Quarles,* 467 U.S. 649, 657–658, 104 S.Ct. 2626, 2632–2633, 81 L.Ed.2d 550 (1984) (recognizing need for clarity in *Miranda* doctrine and finding that narrow "public safety" exception would not significantly lessen clarity and would be easy for police to apply). We explained the benefits of a bright-line rule in *Fare v. Michael C.,* 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979): "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity ****2404** as to what they may do in conducting custodial ***309** interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Id.,* at 718, 99 S.Ct., at 2568.

The Court's holding today complicates a previously clear and straightforward doctrine. The Court opines that "[l]aw enforcement officers will have little difficulty putting into practice our holding that undercover agents need not give *Miranda* warnings to incarcerated suspects." *Ante,* at 2399. Perhaps this prediction is true with respect to fact patterns virtually identical to the one before the Court today. But the outer boundaries of the exception created by the Court are by no means clear. Would *Miranda* be violated, for instance, if an undercover police officer beat a confession out of a suspect, but the suspect thought the officer was another prisoner who wanted the information for his own purposes?

Even if *Miranda,* as interpreted by the Court, would not permit such obviously compelled confessions, the ramifications of today's opinion are still disturbing. The exception carved out of the *Miranda* doctrine today may well result in a proliferation of departmental policies to encourage police officers to conduct interrogations of confined suspects through undercover agents, thereby circumventing the need to administer *Miranda* warnings. Indeed, if *Miranda* now requires a police officer to issue warnings only in those situations in which the suspect might feel compelled "to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess," *ante,* at 2397, presumably it allows custodial interrogation by an undercover officer posing as a member of the clergy or a suspect's defense attorney. Although such abhorrent tricks would play on a suspect's need to confide in a trusted adviser, neither would cause the suspect to "think that the listeners have official power over him," *ante,* at 2397. The Court's adoption of the "undercover agent" exception to the *Miranda* rule thus is necessarily also the adoption of a substantial loophole in our jurisprudence protecting suspects' Fifth Amendment rights.

I dissent.

All Citations

496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243, 58 USLW 4737

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

* As the case comes to us, it involves only the question whether *Miranda* applies to the questioning of an incarcerated suspect by an undercover agent. Nothing in the Court's opinion suggests that, had respondent previously invoked his Fifth Amendment right to counsel or right to silence, his statements would be admissible. If respondent had invoked either right, the inquiry would focus on whether he subsequently waived the particular right. See *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Michigan v. Mosley,* 423 U.S. 96, 104, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). As the Court made clear in *Moran v. Burbine,* 475 U.S. 412, 421, 106 S.Ct. 1135, 1140, 89 L.Ed.2d 410 (1986), the waiver of *Miranda* rights "must [be] voluntary in the sense that it [must be] the product of a free and deliberate choice rather than *intimidation, coercion or deception.*" (Emphasis added.) Since respondent was in custody on an unrelated charge when he was questioned, he may be able to challenge the admission of these statements if he previously had invoked his *Miranda* rights with respect to that charge. See *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988); *Mosley, supra,* 423 U.S., at 104, 96 S.Ct., at 326. Similarly, if respondent had been formally charged on the unrelated charge and had invoked his Sixth Amendment right to counsel, he may have a Sixth Amendment challenge to the admissibility of these statements. See *Michigan v. Jackson,* 475 U.S. 625, 629–636, 106 S.Ct. 1404, 1407–1411, 89 L.Ed.2d 631 (1986). Cf. *Roberson, supra,* 486 U.S., at 683–685, 108 S.Ct., at 2099–2100.

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130 S.Ct. 1213
Supreme Court of the United States

MARYLAND, Petitioner,
v.
Michael Blaine SHATZER, Sr.,

No. 08–680.
|
Argued Oct. 5, 2009.
|
Decided Feb. 24, 2010.

Synopsis

Background: Defendant was convicted in the Maryland Circuit Court, Washington County, John H. McDowell and M. Kenneth Long, Jr., JJ., of child sexual abuse. Defendant noted a timely appeal to the Maryland Court of Special Appeals. The Maryland Court of Appeals granted certiorari on its own initiative, and reversed and remanded, 405 Md. 585, 954 A.2d 1118. Certiorari was granted.

Holdings: The Supreme Court, Scalia, J., held that:

the *Edwards* rule, under which a suspect who has invoked his right to the presence of counsel during custodial interrogation is not subject to further interrogation until either counsel has been made available or the suspect himself further initiates exchanges with the police, does not apply if a break in custody lasting 14 days has occurred, and

defendant's return to the general prison population, after he had invoked his right to the presence of counsel during custodial interrogation regarding allegations of criminal conduct separate from the conduct underlying the defendant's convictions, constituted a break in custody.

Maryland Court of Appeals reversed; remanded.

Justice Thomas joined as to Part III and filed an opinion concurring in part and concurring in the judgment.

Justice Stevens filed an opinion concurring in the judgment.

****1215** *Syllabus* [*]

***98** In 2003, a police detective tried to question respondent Shatzer, who was incarcerated at a Maryland prison pursuant to a prior conviction, about allegations that he had sexually abused his son. Shatzer ****1216** invoked his *Miranda* right to have counsel present during interrogation, so the detective terminated the interview. Shatzer was released back into the general prison population, and the investigation was closed. Another detective reopened the investigation in 2006 and attempted to interrogate Shatzer, who was still incarcerated. Shatzer waived his *Miranda* rights and made inculpatory statements. The trial court refused to suppress those statements, reasoning that *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, did not apply because Shatzer had experienced a break in *Miranda* custody prior to the 2006 interrogation. Shatzer was convicted of sexual child abuse. The Court of Appeals of Maryland reversed, holding that the mere passage of time does not end the *Edwards* protections, and that, assuming, *arguendo,* a break-in-custody exception to *Edwards* existed, Shatzer's release back into the general prison population did not constitute such a break.

Held: Because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his 2006 statements. Pp. 1219 – 1227.

(a) *Edwards* created a presumption that once a suspect invokes the *Miranda* right to the presence of counsel, any waiver of that right in response to a subsequent police attempt at custodial interrogation is involuntary. *Edwards* ' fundamental purpose is to "[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel," *Patterson v. Illinois,* 487 U.S. 285, 291, 108 S.Ct. 2389, 101 L.Ed.2d 261, by "prevent[ing] police from badgering [him] into waiving his previously asserted *Miranda* rights," *Michigan v. Harvey,* 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2d 293. It is easy to believe that a suspect's later waiver was coerced or badgered when he has been held in uninterrupted *Miranda* custody since his first refusal to waive. He remains cut off from his normal life and isolated in a "police-dominated atmosphere," *Miranda v. Arizona,* 384 U.S. 436, 456, 86 S.Ct. 1602, 16 L.Ed.2d 694, where his captors "appear to control [his] fate," *Illinois v. Perkins,* 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243. But where a suspect has been released from custody and returned ***99** to his normal life for some time before the later attempted

interrogation, there is little reason to think that his change of heart has been coerced. Because the *Edwards* presumption has been established by opinion of this Court, it is appropriate for this Court to specify the period of release from custody that will terminate its application. See *County of Riverside v. McLaughlin,* 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49. The Court concludes that the appropriate period is 14 days, which provides ample time for the suspect to get reacclimated to his normal life, consult with friends and counsel, and shake off any residual coercive effects of prior custody. Pp. 1219 – 1224.

(b) Shatzer's release back into the general prison population constitutes a break in *Miranda* custody. Lawful imprisonment imposed upon conviction does not create the coercive pressures produced by investigative custody that justify *Edwards*. When previously incarcerated suspects are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives before the attempted interrogation. Their continued detention is relatively disconnected from their prior unwillingness to cooperate in an investigation. The "inherently compelling pressures" of custodial interrogation ****1217** ended when Shatzer returned to his normal life. Pp. 1224 – 1225.

405 Md. 585, 954 A.2d 1118, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which THOMAS, J., joined as to Part III. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, pp. 1227 – 1228. STEVENS, J., filed an opinion concurring in the judgment, *post*, pp. 1228 – 1234.

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Opinion

Justice SCALIA delivered the opinion of the Court.

***100** We consider whether a break in custody ends the presumption of involuntariness established in *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

I

In August 2003, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown Police Department referred to the department allegations that respondent Michael Shatzer, Sr., had sexually abused his 3–year–old son. At that time, Shatzer was ***101** incarcerated at the Maryland Correctional Institution–Hagerstown, serving a sentence for an unrelated child-sexual-abuse offense. Detective Shane Blankenship was assigned to the investigation and interviewed Shatzer at the correctional institution on August 7, 2003. Before asking any questions, Blankenship reviewed Shatzer's *Miranda* rights with him, and obtained a written waiver of those rights. When Blankenship explained that he was there to question Shatzer about sexually abusing his son, Shatzer expressed confusion—he had thought Blankenship was an attorney there to discuss the prior crime for which he was incarcerated. Blankenship clarified the purpose of his visit, and Shatzer declined to speak without an attorney. Accordingly, Blankenship ended the interview, and Shatzer was released back into the general prison population. Shortly thereafter, Blankenship closed the investigation.

Two years and six months later, the same social worker referred more specific allegations to the department about the same incident involving Shatzer. Detective Paul Hoover, from the same division, was assigned to the investigation. He and the social worker interviewed the victim, ****1218** then eight years old, who described the incident in more detail. With this new information in hand, on March 2, 2006, they went to the Roxbury Correctional Institute, to which Shatzer had since

been transferred, and interviewed Shatzer in a maintenance room outfitted with a desk and three chairs. Hoover explained that he wanted to ask Shatzer about the alleged incident involving Shatzer's son. Shatzer was surprised because he thought that the investigation had been closed, but Hoover explained they had opened a new file. Hoover then read Shatzer his *Miranda* rights and obtained a written waiver on a standard department form.

Hoover interrogated Shatzer about the incident for approximately 30 minutes. Shatzer denied ordering his son to perform fellatio on him, but admitted to masturbating in ***102** front of his son from a distance of less than three feet. Before the interview ended, Shatzer agreed to Hoover's request that he submit to a polygraph examination. At no point during the interrogation did Shatzer request to speak with an attorney or refer to his prior refusal to answer questions without one.

Five days later, on March 7, 2006, Hoover and another detective met with Shatzer at the correctional facility to administer the polygraph examination. After reading Shatzer his *Miranda* rights and obtaining a written waiver, the other detective administered the test and concluded that Shatzer had failed. When the detectives then questioned Shatzer, he became upset, started to cry, and incriminated himself by saying, " 'I didn't force him. I didn't force him.' " 405 Md. 585, 590, 954 A.2d 1118, 1121 (2008). After making this inculpatory statement, Shatzer requested an attorney, and Hoover promptly ended the interrogation.

The State's Attorney for Washington County charged Shatzer with second-degree sexual offense, sexual child abuse, second-degree assault, and contributing to conditions rendering a child in need of assistance. Shatzer moved to suppress his March 2006 statements pursuant to *Edwards*. The trial court held a suppression hearing and later denied Shatzer's motion. The *Edwards* protections did not apply, it reasoned, because Shatzer had experienced a break in custody for *Miranda* purposes between the 2003 and 2006 interrogations. No. 21–K–06–37799 (Cir. Ct. Washington Cty., Md., Sept. 14, 2006), App. 55. Shatzer pleaded not guilty, waived his right to a jury trial, and proceeded to a bench trial based on an agreed statement of facts. In accordance with the agreement, the State described the interview with the victim and Shatzer's 2006 statements to the detectives. Based on the proffered testimony of the victim and the "admission of the defendant as to the act of masturbation," the trial court found Shatzer guilty of sexual child abuse of his ***103** son.[1] No. 21–K–06–37799 (Cir. Ct. Washington Cty., Md., Sept. 21, 2006), *id.,* at 70, 79.

Over the dissent of two judges, the Court of Appeals of Maryland reversed and remanded. The court held that "the passage of time *alone* is insufficient to [end] the protections afforded by *Edwards,*" and that, assuming, *arguendo,* a break-in-custody exception to *Edwards* existed, Shatzer's release back into the general prison population between interrogations did not constitute a break in custody. 405 Md., at 606–607, 954 A.2d, at 1131. We granted certiorari, 555 U.S. 1152, 129 S.Ct. 1043, 173 L.Ed.2d 468 (2009).

****1219** II

The Fifth Amendment, which applies to the States by virtue of the Fourteenth Amendment, *Malloy v. Hogan,* 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5. In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation. *Id.,* at 467, 86 S.Ct. 1602. The Court observed that "incommunicado interrogation" in an "unfamiliar," "police-dominated atmosphere," *id.,* at 456–457, 86 S.Ct. 1602, involves psychological pressures "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," *id.,* at 467, 86 S.Ct. 1602. Consequently, it reasoned, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.,* at 458, 86 S.Ct. 1602.

To counteract the coercive pressure, *Miranda* announced that police officers must warn a suspect prior to questioning ***104** that he has a right to remain silent, and a right to the presence of an attorney. *Id.,* at 444, 86 S.Ct. 1602. After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. *Id.,* at 473–474, 86 S.Ct. 1602. Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. *Id.,* at 474, 86 S.Ct. 1602. Critically, however, a suspect can waive these rights. *Id.,* at 475, 86 S.Ct. 1602. To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the "high standar[d] of proof

for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)." *Id.,* at 475, 86 S.Ct. 1602.

In *Edwards,* the Court determined that *Zerbst* 's traditional standard for waiver was not sufficient to protect a suspect's right to have counsel present at a subsequent interrogation if he had previously requested counsel; "additional safeguards" were necessary. 451 U.S., at 484, 101 S.Ct. 1880. The Court therefore superimposed a "second layer of prophylaxis," *McNeil v. Wisconsin,* 501 U.S. 171, 176, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). *Edwards* held:

> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.... [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S., at 484–485, 101 S.Ct. 1880.

The rationale of *Edwards* is that once a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling ***105** pressures' and not the purely voluntary choice of the suspect." *Arizona v. Roberson,* 486 U.S. 675, 681, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Under this rule, a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect's right to have counsel present, but it is not sufficient ****1220** at the time of subsequent attempts if the suspect initially requested the presence of counsel. The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion. That increased risk results not only from the police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to "increase as custody is prolonged," *Minnick v. Mississippi,* 498 U.S. 146, 153, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of "prolonged police custody," *Roberson,* 486 U.S., at 686, 108 S.Ct. 2093, by repeatedly attempting to question a suspect who previously requested counsel until the suspect is "badgered into submission," *id.,* at 690, 108 S.Ct. 2093 (KENNEDY, J., dissenting).

We have frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis. See, *e.g., Montejo v. Louisiana,* 556 U.S. 778, 787, 129 S.Ct. 2079, 2085–86, 173 L.Ed.2d 955 (2009); *Michigan v. Harvey,* 494 U.S. 344, 349, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990); *Solem v. Stumes,* 465 U.S. 638, 644, n. 4, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). Because *Edwards* is "our rule, not a constitutional command," "it is our obligation to justify its expansion." *Roberson, supra,* at 688, 108 S.Ct. 2093 (KENNEDY, J., dissenting). Lower courts have uniformly held that a break in custody ends the *Edwards* presumption, see, *e.g., People v. Storm,* 28 Cal.4th 1007, 1023–1024, and n. 6, 124 Cal.Rptr.2d 110, 52 P.3d 52, 61–62, and n. 6 (2002) (collecting state and federal cases), but we have previously addressed the issue only in dicta, see *McNeil, supra,* at 177, 111 S.Ct. 2204 (*Edwards* applies "assuming there has been no break in custody").

***106** A judicially crafted rule is "justified only by reference to its prophylactic purpose," *Davis v. United States,* 512 U.S. 452, 458, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (internal quotation marks omitted), and applies only where its benefits outweigh its costs, *Montejo, supra,* at 793, 129 S.Ct., at 2089. We begin with the benefits. *Edwards* ' presumption of involuntariness has the incidental effect of "conserv[ing] judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Minnick, supra,* at 151, 111 S.Ct. 486. Its fundamental purpose, however, is to "[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel," *Patterson v. Illinois,* 487 U.S. 285, 291, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), by "prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Harvey, supra,* at 350, 110 S.Ct. 1176. Thus, the benefits of the rule are measured by the number of coerced confessions it suppresses that otherwise would have been admitted. See *Montejo, supra,* at 793, 129 S.Ct., at 2089.

It is easy to believe that a suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel in the paradigm *Edwards* case. That is a case in which the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated. After the initial interrogation, and up to and including the second one, he remains cut off from his normal life and companions, "thrust into" and isolated in an

"unfamiliar," "police-dominated atmosphere," *Miranda,* 384 U.S., at 456–457, 86 S.Ct. 1602, where his captors "appear to control [his] fate," **1221 *Illinois v. Perkins,* 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990). That was the situation confronted by the suspects in *Edwards, Roberson,* and *Minnick,* the three cases in which we have held the *Edwards* rule applicable. Edwards was arrested pursuant to a warrant and taken to a police station, where he was interrogated until he requested counsel. *Edwards,* 451 U.S., at 478–479, 101 S.Ct. 1880. The officer ended *107 the interrogation and took him to the county jail,[2] but at 9:15 the next morning, two of the officer's colleagues reinterrogated Edwards at the jail. *Id.,* at 479, 101 S.Ct. 1880. Roberson was arrested "at the scene of a just-completed burglary" and interrogated there until he requested a lawyer. *Roberson,* 486 U.S., at 678, 108 S.Ct. 2093. A different officer interrogated him three days later while he "was still in custody pursuant to the arrest." *Ibid.* Minnick was arrested by local police and taken to the San Diego jail, where two Federal Bureau of Investigation agents interrogated him the next morning until he requested counsel. *Minnick,* 498 U.S., at 148–149, 111 S.Ct. 486. Two days later a Mississippi deputy sheriff reinterrogated him at the jail. *Id.,* at 149, 111 S.Ct. 486. None of these suspects regained a sense of control or normalcy after they were initially taken into custody for the crime under investigation.

When, unlike what happened in these three cases, a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends.[3] And he knows from his earlier experience that he need only demand counsel to bring the interrogation *108 to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is farfetched to think that a police officer's asking the suspect whether he would like to waive his *Miranda* rights will any more "wear down the accused," *Smith v. Illinois,* 469 U.S. 91, 98, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) *(per curiam),* than did the first such request at the original attempted interrogation—which is of course not deemed coercive. His change of heart is less likely attributable to "badgering" than it is to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest. Uncritical extension of *Edwards* to this situation would not significantly increase the number of genuinely coerced confessions excluded. The "justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson,* 501 U.S. 722, 737, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

At the same time that extending the *Edwards* rule yields diminished benefits, extending the rule also increases its **1222 costs: the in-fact voluntary confessions it excludes from trial, and the voluntary confessions it deters law enforcement officers from even trying to obtain. Voluntary confessions are not merely "a proper element in law enforcement," *Miranda, supra,* at 478, 86 S.Ct. 1602, they are an "unmitigated good," *McNeil,* 501 U.S., at 181, 111 S.Ct. 2204, " 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law,' " *ibid.* (quoting *Moran v. Burbine,* 475 U.S. 412, 426, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)).

The only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects. Without that limitation—and barring some purely arbitrary time limit[4]—every *Edwards* prohibition of custodial interrogation *109 of a particular suspect would be eternal. The prohibition applies, of course, when the subsequent interrogation pertains to a different crime, *Roberson, supra,* when it is conducted by a different law enforcement authority, *Minnick,* 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489, and even when the suspect has met with an attorney after the first interrogation, *ibid.* And it not only prevents questioning *ex ante*; it would render invalid, *ex post,* confessions invited and obtained from suspects who (unbeknownst to the interrogators) have acquired *Edwards* immunity previously in connection with any offense in any jurisdiction.[5] In a country that harbors a large number of repeat offenders,[6] this consequence is disastrous.

We conclude that such an extension of *Edwards* is not justified; we have opened its " 'protective umbrella,' " *Solem,* 465 U.S., at 644, n. 4, 104 S.Ct. 1338, far enough. The protections offered by *Miranda,* which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects.

***110** If Shatzer's return to the general prison population qualified as a break in custody (a question we address in Part III, *infra*), there is no doubt that it lasted long enough (two years) to meet that durational requirement. But what about a break that has lasted only one year? Or only one week? It is impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to know, ****1223** with certainty and beforehand, when renewed interrogation is lawful. And while it is certainly unusual for this Court to set forth precise time limits governing police action, it is not unheard of. In *County of Riverside v. McLaughlin,* 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), we specified 48 hours as the time within which the police must comply with the requirement of *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), that a person arrested without a warrant be brought before a magistrate to establish probable cause for continued detention.

Like *McLaughlin,* this is a case in which the requisite police action (there, presentation to a magistrate; here, abstention from further interrogation) has not been prescribed by statute but has been established by opinion of this Court. We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption "will not reach the correct result most of the time." *Coleman, supra,* at 737, 111 S.Ct. 2546. It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.

The 14–day limitation meets Shatzer's concern that a break-in-custody rule lends itself to police abuse. He envisions that once a suspect invokes his *Miranda* right to counsel, the police will release the suspect briefly (to end the *Edwards* presumption) and then promptly bring him back into custody for reinterrogation. But once the suspect has been out of custody long enough (14 days) to eliminate its ***111** coercive effect, there will be nothing to gain by such gamesmanship—nothing, that is, except the entirely appropriate gain of being able to interrogate a suspect who has made a valid waiver of his *Miranda* rights.[7]

Shatzer argues that ending the *Edwards* protections at a break in custody will undermine *Edwards* ' purpose to conserve judicial resources. To be sure, we have said that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick,* 498 U.S., at 151, 111 S.Ct. 486. But clarity and certainty are not goals in themselves. They are valuable only when they reasonably further the achievement of some substantive end —here, the exclusion of compelled confessions. Confessions obtained after a 2–week break in custody and a waiver of *Miranda* rights are most unlikely to be compelled, and hence are unreasonably excluded. In any case, a break-in-custody exception will dim only marginally, if at all, the bright-line nature of *Edwards*. In every case involving *Edwards,* the courts must determine whether the suspect was in custody when he requested counsel and when he later made the statements he seeks to suppress. Now, in cases where there is an alleged break in custody, they simply have to repeat the inquiry for the time between the initial invocation and reinterrogation. In most cases that determination will be easy. And when it is determined that the defendant ****1224** pleading *Edwards* has been out of custody for two weeks before the contested interrogation, the court is spared the fact-intensive ***112** inquiry into whether he ever, anywhere, asserted his *Miranda* right to counsel.

III

The facts of this case present an additional issue. No one questions that Shatzer was in custody for *Miranda* purposes during the interviews with Detective Blankenship in 2003 and Detective Hoover in 2006. Likewise, no one questions that Shatzer triggered the *Edwards* protections when, according to Detective Blankenship's notes of the 2003 interview, he stated that " 'he would not talk about this case without having an attorney present,' " 405 Md., at 589, 954 A.2d, at 1120. After the 2003 interview, Shatzer was released back into the general prison population where he was serving an unrelated sentence. The issue is whether that constitutes a break in *Miranda* custody.

We have never decided whether incarceration constitutes custody for *Miranda* purposes, and have indeed explicitly declined to address the issue. See *Perkins,* 496 U.S., at 299, 110 S.Ct. 2394. See also *Bradley v. Ohio,* 497 U.S. 1011, 1013, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990) (Marshall, J., dissenting from denial of certiorari). Whether it does depends upon whether it exerts the coercive pressure that *Miranda* was designed to guard against—the "danger of coercion [that] results from the *interaction* of custody and official interrogation." *Perkins, supra,* at 297, 110 S.Ct. 2394 (emphasis added). To determine whether a suspect was in *Miranda* custody we have asked whether "there is a 'formal

arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *New York v. Quarles,* 467 U.S. 649, 655, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984); see also *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) *(per curiam)*. This test, no doubt, is satisfied by all forms of incarceration. Our cases make clear, however, that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. We have declined to accord it "talismanic power," because *Miranda* is to be enforced "only in those types of situations in which the concerns that powered the decision are implicated." ***113** *Berkemer v. McCarty,* 468 U.S. 420, 437, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Thus, the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop, see *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), does not constitute *Miranda* custody. *McCarty, supra,* at 439–440, 104 S.Ct. 3138. See also *Perkins, supra,* at 296, 110 S.Ct. 2394.

Here, we are addressing the interim period during which a suspect was not interrogated, but was subject to a baseline set of restraints imposed pursuant to a prior conviction. Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.

Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.

Their detention, moreover, is relatively disconnected from their prior unwillingness ****1225** to cooperate in an investigation. The former interrogator has no power to increase the duration of incarceration, which was determined at sentencing.[8] And even where the possibility of parole exists, the former interrogator has no apparent power to decrease the time ***114** served. This is in stark contrast to the circumstances faced by the defendants in*Edwards, Roberson,* and *Minnick,* whose continued detention as suspects rested with those controlling their interrogation, and who confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive.

Shatzer's experience illustrates the vast differences between *Miranda* custody and incarceration pursuant to conviction. At the time of the 2003 attempted interrogation, Shatzer was already serving a sentence for a prior conviction. After that, he returned to the general prison population in the Maryland Correctional Institution–Hagerstown and was later transferred, for unrelated reasons, down the street to the Roxbury Correctional Institute. Both are medium-security state correctional facilities. See Maryland Div. of Correction Inmate Handbook 7 (2007), online at http://dpscs.md.gov/rehabservs/ doc/ pdfs/2007_Inmate_Handbook.pdf (all Internet materials as visited Feb. 22, 2010, and available in Clerk of Court's case file). Inmates in these facilities generally can visit the library each week, *id.,* at 28; have regular exercise and recreation periods, *id.,* at 17; can participate in basic adult education and occupational training, *id.,* at 26, 7; are able to send and receive mail, *id.,* at 21–22, 16; and are allowed to receive visitors twice a week, see http://dpscs.md.gov/locations/mcih.shtml; http:// www. dpscs.state.md.us/locations/rci.shtml. His continued detention after the 2003 interrogation did not depend on what he said (or did not say) to Detective Blankenship, and he has not alleged that he was placed in a higher level of security or faced any continuing restraints as a result of the 2003 interrogation. The "inherently compelling pressures" of custodial interrogation ended when he returned to his normal life.

IV

A few words in response to Justice STEVENS' concurrence: It claims we ignore that "[w]hen police tell an indigent ***115** suspect that he has the right to an attorney" and then "reinterrogate" him without providing a lawyer, "the suspect is likely to feel that the police lied to him and that he really does not have any right to a lawyer." *Post,* at 1229 (opinion concurring in judgment) (hereinafter concurrence). See also *post,* at 1230, 1232, n. 11, 1234, n. 16. The fallacy here is that we are not talking about "reinterrogating" the suspect; we are talking about *asking his permission* to be interrogated. An officer has in no sense lied to a suspect when, after advising, as *Miranda* requires, "You have the right to remain silent, and if you choose to speak you have the right to the presence of an attorney," he promptly ends the attempted interrogation

because the suspect declines to speak without counsel present, and then, two weeks later, reapproaches the suspect and asks, "Are **1226 you now willing to speak without a lawyer present?"

The "concer[n] that motivated the *Edwards* line of cases," *post,* at 1229, n. 2, is that the suspect will be coerced into saying yes. That concern guides our decision today. Contrary to the concurrence's conclusion, *post,* at 1229 – 1230, 1231, there is no reason to believe a suspect will view confession as " 'the only way to end his interrogation' " when, before the interrogation begins, he is told that he can avoid it by simply requesting that he not be interrogated without counsel present —an option that worked before. If, as the concurrence argues will often be the case, *post,* at 1231, a break in custody does not change the suspect's mind, he need only say so.

The concurrence also accuses the Court of "ignor[ing] that when a suspect asks for counsel, until his request is answered, there are still the same 'inherently compelling' pressures of custodial interrogation on which the *Miranda* line of cases is based." *Post,* at 1230. We do not ignore these pressures; nor do we suggest that they disappear when custody is recommenced after a break, see *post,* at 1231. But if those pressures are merely "the same" as before, then *Miranda* provides sufficient protection—as it did before. The *116 *Edwards* presumption of involuntariness is justified only in circumstances where the coercive pressures have increased so much that suspects' waivers of *Miranda* rights are likely to be involuntary most of the time. Contrary to the concurrence's suggestion, *post,* at 1229 – 1230, it is only in those narrow circumstances—when custody is unbroken—that the Court has concluded a " 'fresh se[t] of *Miranda* warnings' " is not sufficient. See *Roberson,* 486 U.S., at 686, 108 S.Ct. 2093.

In the last analysis, it turns out that the concurrence accepts our principal points. It agrees that *Edwards* prophylaxis is not perpetual; it agrees that a break in custody reduces the inherently compelling pressure upon which *Edwards* was based; it agrees that Shatzer's release back into the general prison population constituted a break in custody; and it agrees that in this case the break was long enough to render *Edwards* inapplicable. *Post,* at 1234. We differ in two respects: Instead of terminating *Edwards* protection when the custodial pressures that were the basis for that protection dissipate, the concurrence would terminate it when the suspect would no longer "feel that he has 'been denied the counsel he has clearly requested,' " *post,* at 1234. This is entirely unrelated to the rationale of *Edwards*. If confidence in the police's promise to provide counsel were the touchstone, *Edwards* would not have applied in *Minnick,* where the suspect in continuing custody actually met with appointed counsel. The concurrence's rule is also entirely unrelated to the existence of a break in custody. While that may relieve the accumulated coercive pressures of custody that are the foundation for *Edwards,* it is hard to see how it bolsters the suspect's confidence that if he asks for counsel he will get one.

And secondly, the concurrence differs from us in declining to say *how long* after a break in custody the termination of *Edwards* protection occurs. Two and one-half years, it says, is clearly enough—but it gives law enforcement authorities no further guidance. The concurrence criticizes our use of *117 14 days as arbitrary and unexplained, *post,* at 1231, and n. 7. But in fact that rests upon the same basis as the concurrence's own approval of a 2 ½-year break in custody: how much time will justify "treating the second interrogation as no more coercive than the first," *post,* at 1234. Failure to say where the line falls short of 2 ½ years, and leaving that for future case-by-case determination, is certainly less helpful, but not at all less arbitrary.

**1227 * * *

Because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his March 2006 statements. Accordingly, we reverse the judgment of the Court of Appeals of Maryland, and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, concurring in part and concurring in the judgment.

I join Part III of the Court's opinion, which holds that release into the general prison population constitutes a break in custody. I do not join the Court's decision to extend the presumption of involuntariness established in *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), for 14 days after custody ends.

It is not apparent to me that the presumption of involuntariness the Court recognized in *Edwards* is justifiable even in the custodial setting to which *Edwards* applies it.

See, *e.g., Minnick v. Mississippi,* 498 U.S. 146, 160, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) (SCALIA, J., dissenting). Accordingly, I would not extend the *Edwards* rule "beyond the circumstances present in *Edwards* itself." 498 U.S., at 162, 111 S.Ct. 486. But even if one believes that the Court is obliged to apply *Edwards* to any case involving continuing custody, the Court's opinion today goes well beyond that. It extends the presumption of involuntariness ***118** *Edwards* applies in custodial settings to interrogations that occur after custody ends.

The Court concedes that this extension, like the *Edwards* presumption itself, is not constitutionally required. The Court nevertheless defends the extension as a judicially created prophylaxis against compelled confessions. Even if one accepts that such prophylaxis is both permissible generally and advisable for some period following a break in custody,[1] the Court's 14–day rule fails to satisfy the criteria our precedents establish for the judicial creation of such a safeguard.

Our precedents insist that judicially created prophylactic rules like those in *Edwards* and *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), maintain "the closest possible fit" between the rule and the Fifth Amendment interests they seek to protect. *United States v. Patane,* 542 U.S. 630, 640–641, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004) (plurality opinion); see generally *Montejo v. Louisiana,* 556 U.S. 778, 797, 129 S.Ct., at 2092; ****1228** *Chavez v. Martinez,* 538 U.S. 760, 772, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (plurality opinion). The Court's 14–day rule does not satisfy this test. The Court relates its 14–day rule ***119** to the Fifth Amendment simply by asserting that 14 days between release and recapture should provide "plenty of time for the suspect ... to shake off any residual coercive effects of his prior custody," *ante,* at 1223.

This *ipse dixit* does not explain why extending the *Edwards* presumption for 14 days following a break in custody—as opposed to 0, 10, or 100 days—provides the "closest possible fit" with the Self–Incrimination Clause, *Patane, supra,* at 640–641, 124 S.Ct. 2620; see *ante,* at 1223 (merely stating that "[i]t seems to us that" the appropriate "period is 14 days"). Nor does it explain how the benefits of a prophylactic 14–day rule (either on its own terms or compared with other possible rules) "outweigh its costs" (which would include the loss of law enforcement information as well as the exclusion of confessions that are in fact voluntary). *Ante,* at 1220 (citing *Montejo, supra,* at 793, 129 S.Ct. at 2089).

To be sure, the Court's rule has the benefit of providing a bright line. *Ante,* at 1223. But bright-line rules are not necessary to prevent Fifth Amendment violations, as the Court has made clear when refusing to adopt such rules in cases involving other *Miranda* rights. See, *e.g.*, *Michigan v. Mosley,* 423 U.S. 96, 103–104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). And an otherwise arbitrary rule is not justifiable merely because it gives clear instruction to law enforcement officers.[2]

As the Court concedes, "clarity and certainty are not goals in themselves. They are valuable only when they reasonably further the achievement of some substantive end—here, the exclusion of compelled confessions" that the Fifth Amendment prohibits. *Ante,* at 1223. The Court's arbitrary 14–day rule fails this test, even under the relatively permissive ***120** criteria set forth in our precedents. Accordingly, I do not join that portion of the Court's opinion.

Justice STEVENS, concurring in the judgment.
While I agree that the presumption from *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), is not "eternal," *ante,* at 1222, and does not mandate suppression of Shatzer's statement made after a 2 ½-year break in custody, I do not agree with the Court's newly announced rule: that *Edwards always* ceases to apply when there is a 14–day break in custody, *ante,* at 1223.

In conducting its "cost-benefit" analysis, the Court demeans *Edwards* as a " 'second layer' " of "judicially prescribed prophylaxis," *ante,* at 1219, 1220, 1223, n. 7; see also *ante,* at 1220 (describing *Edwards* as " 'our rule, not a constitutional command' " (quoting *Arizona v. Roberson,* 486 U.S. 675, 688, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) (KENNEDY, J., dissenting))). The source of the holdings in the long line of cases that includes both *Edwards* and *Miranda,* however, is the Fifth Amendment's protection against compelled self-incrimination applied to the "compulsion inherent in custodial" interrogation, *Miranda v. Arizona,* 384 U.S. 436, 458, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and the "significan[ce]" of "the assertion of the right to counsel," ****1229** *Edwards,* 451 U.S., at 485, 101 S.Ct. 1880.[1] The Court's analysis today is insufficiently sensitive to the concerns that motivated the *Edwards* line of cases.

***121** I

The most troubling aspect of the Court's time-based rule is that it disregards the compulsion caused by a second (or third, or fourth) interrogation of an indigent suspect who was told that if he requests a lawyer, one will be provided for him. When police tell an indigent suspect that he has the right to an attorney, that he is not required to speak without an attorney present, and that an attorney will be provided to him at no cost before questioning, the police have made a significant promise. If they cease questioning and then reinterrogate the suspect 14 days later without providing him with a lawyer, the suspect is likely to feel that the police lied to him and that he really does not have any right to a lawyer.[2]

When officers informed Shatzer of his rights during the first interrogation, they presumably informed him that if he requested an attorney, one would be appointed for him before he was asked any further questions. But if an indigent suspect requests a lawyer, "any further interrogation" (even 14 days later) "without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Roberson,* 486 U.S., at 686, 108 S.Ct. 2093. When police have not honored an earlier commitment to provide a detainee ***122** with a lawyer, the detainee likely will "understan [d] his (expressed) wishes to have been ignored" and "may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Davis v. United States,* 512 U.S. 452, 472–473, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (Souter, J., concurring in judgment). Cf. *Cooper v. Dupnik,* 963 F.2d 1220, 1225 (C.A.9 1992) (en banc) (describing an elaborate police task force plan to ignore a suspect's requests for counsel, on the theory that such would induce hopelessness and thereby elicit an admission). Simply giving a "fresh se[t] of *Miranda* warnings" will not " 'reassure' a suspect who has been denied ****1230** the counsel he has clearly requested that his rights have remained untrammeled." *Roberson,* 486 U.S., at 686, 108 S.Ct. 2093.

II

The Court never explains why its rule cannot depend on, in addition to a break in custody and passage of time, a concrete event or state of affairs, such as the police's having honored their commitment to provide counsel. Instead, the Court simply decides to create a time-based rule, and in so doing, disregards much of the analysis upon which *Edwards* and subsequent decisions were based. "[T]he assertion of the right to counsel" "[i]s a significant event."[3] *Edwards,* 451 U.S., at 485, 101 S.Ct. 1880. As the Court today acknowledges, the ***123** right to counsel, like the right to remain silent, is one that police may "coerc[e] or badge[r]," *ante,* at 1220, a suspect into abandoning.[4] However, as discussed above, the Court ignores the effects not of badgering but of reinterrogating a suspect who took the police at their word that he need not answer questions without an attorney present. See *Roberson,* 486 U.S., at 686, 108 S.Ct. 2093. The Court, moreover, ignores that when a suspect asks for counsel, until his request is answered, there are still the same "inherently compelling" pressures of custodial interrogation on which the *Miranda* line of cases is based, see 486 U.S., at 681, 108 S.Ct. 2093,[5] and that the concern about compulsion is especially serious for a detainee who has requested a lawyer, an act that signals his "inability to cope with the pressures of custodial interrogation," *id.,* at 686, 108 S.Ct. 2093.[6]

****1231** Instead of deferring to these well-settled understandings of the *Edwards* rule, the Court engages in its own speculation ***124** that a 14–day break in custody eliminates the compulsion that animated *Edwards.* But its opinion gives no strong basis for believing that this is the case.[7] A 14–day break in custody does not eliminate the rationale for the initial *Edwards* rule: The detainee has been told that he may remain silent and speak only through a lawyer and that if he cannot afford an attorney, one will be provided for him. He has asked for a lawyer. He does not have one. He is in custody. And police are still questioning him. A 14–day break in custody does not change the fact that custodial interrogation is inherently compelling. It is unlikely to change the fact that a detainee "considers himself unable to deal with the pressures of custodial interrogation without legal assistance." *Roberson,* 486 U.S., at 683, 108 S.Ct. 2093.[8] And in some instances, a 14–day break in custody may make matters worse[9] "[w]hen a ***125** suspect understands his (expressed) wishes to have been ignored" and thus "may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Davis,* 512 U.S., at 472–473, 114 S.Ct. 2350 (Souter, J., concurring in judgment).[10]

The Court ignores these understandings from the *Edwards* line of cases and instead speculates that if a suspect is reinterrogated and eventually talks, it must be that "further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation ****1232** is in his interest." *Ante,* at 1221. But it is not apparent why that is the case. The answer, we are told, is that once a suspect has been out of *Miranda* custody

for 14 days, "[h]e has likely been able to seek advice from an attorney, family members, and friends." *Ante,* at 1221. This speculation, however, is overconfident and only questionably relevant. As a factual matter, we do not know whether the defendant has been able to seek advice: First of all, suspects are told that if they cannot afford a lawyer, one will be provided for them. Yet under the majority's rule, an indigent suspect who took the police at their word when he asked for a lawyer will nonetheless be assumed to have "been able to seek advice from an attorney." Second, even suspects who ***126** are not indigent cannot necessarily access legal advice (or social advice as the Court presumes) within 14 days. Third, suspects may not realize that they *need* to seek advice from an attorney. Unless police warn suspects that the interrogation will resume in 14 days, why contact a lawyer? When a suspect is let go, he may assume that the police were satisfied. In any event, it is not apparent why interim advice matters.[11] In *Minnick v. Mississippi,* 498 U.S. 146, 153, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), we held that it is not sufficient that a detainee happened to speak at some point with a lawyer. See *ibid.* (noting that "consultation with an attorney" does not prevent "persistent attempts by officials to persuade [a suspect] to waive his rights" or shield against the "coercive pressures that accompany custody"). If the actual interim advice of an attorney is not sufficient, the hypothetical, interim advice of "an attorney, family members, and friends," *ante,* at 1221, is not enough.

The many problems with the Court's new rule are exacerbated in the very situation in this case: a suspect who is in prison. Even if, as the Court assumes, a trip to one's home significantly changes the *Edwards* calculus, a trip to one's prison cell is not the same. A prisoner's freedom is severely limited, and his entire life remains subject to government control. Such an environment is not conducive to "shak[ing] off any residual coercive effects of his prior custody." *Ante,* at 1223.[12] Nor can a prisoner easily "seek advice from an attorney, ***127** family members, and friends," *ante,* at 1221, especially not within 14 days; prisoners are frequently subject to restrictions on communications. Nor, in most cases, can he live comfortably knowing that he cannot be badgered by police; prison is not like a normal situation in which a suspect "is in control, and need only shut his door or walk away to avoid police badgering." *Montejo v. Louisiana,* 556 U.S. 778, 795, 129 S.Ct., at 2090. Indeed, for a person whose every move is controlled by the State, it is likely that "his sense of dependence on, and trust in, counsel ****1233** as the guardian of his interests in dealing with government officials intensified." *United States v. Green,* 592 A.2d 985, 989 (D.C.1991); cf. *Minnick,* 498 U.S., at 153, 111 S.Ct. 486 (explaining that coercive pressures "may increase as custody is prolonged").[13] The Court ignores these realities of prison, and instead rests its argument on the supposition that a prisoner's "detention ... is relatively disconnected from their prior unwillingness to cooperate in an investigation." *Ante,* at 1216. But that is not necessarily the case. Prisoners are uniquely vulnerable to the officials who control every aspect of their lives; prison guards may not look kindly upon a prisoner who refuses to cooperate with police. And cooperation frequently is relevant to ***128** whether the prisoner can obtain parole. See, *e.g.,* Code of Md. Regs., tit. 12, § 08.01.18(A)(3) (2008). Moreover, even if it is true as a factual matter that a prisoner's fate is not controlled by the police who come to interrogate him, how is the prisoner supposed to know that? As the Court itself admits, compulsion is likely when a suspect's "captors appear to control [his] fate," *ante,* at 1220 (internal quotation marks omitted). But when a guard informs a suspect that he must go speak with police, it will "appear" to the prisoner that the guard and police are not independent. "Questioning by captors, who *appear* to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will." *Illinois v. Perkins,* 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) (emphasis added).[14]

****1234** ***129** III

Because, at the very least, we do not know whether Shatzer could obtain a lawyer, and thus would have felt that police had lied about providing one, I cannot join the Court's opinion. I concur in today's judgment, however, on another ground: Even if Shatzer could not consult a lawyer and the police never provided him one, the 2 ½-year break in custody is a basis for treating the second interrogation as no more coercive than the first. Neither a break in custody nor the passage of time has an inherent, curative power. But certain things change over time. An indigent suspect who took police at their word that they would provide an attorney probably will feel that he has "been denied the counsel he has clearly requested," *Roberson,* 486 U.S., at 686, 108 S.Ct. 2093, when police begin to question him, without a lawyer, only 14 days later.[15] But, when a suspect has been left alone for a significant ***130** period of time, he is not as likely to draw such conclusions when the police interrogate him again.[16] It is concededly "impossible to determine with precision" where to draw such

a line. *Barker v. Wingo,* 407 U.S. 514, 521, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In the case before us, however, the suspect was returned to the general prison population for two years. I am convinced that this period of time is sufficient. I therefore concur in the judgment.

All Citations

559 U.S. 98, 130 S.Ct. 1213, 175 L.Ed.2d 1045, 78 USLW 4159, 10 Cal. Daily Op. Serv. 2218, 2010 Daily Journal D.A.R. 2731, 22 Fla. L. Weekly Fed. S 135

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The State filed a *nolle prosequi* to the second-degree sexual offense charge, and consented to dismissal of the misdemeanor charges as barred by the statute of limitations.

2 Jail is a "local government's detention center where persons awaiting trial or those convicted of misdemeanors are confined." Black's Law Dictionary 910 (9th ed. 2009). Prison, by contrast, is a "state or federal facility of confinement for convicted criminals, esp. felons." *Id.,* at 1314.

3 Justice STEVENS points out, *post,* at 1232 (opinion concurring in judgment), that in *Minnick,* actual pre-reinterrogation consultation with an attorney during *continued* custody did not suffice to avoid application of *Edwards*. That does not mean that the ability to consult freely with attorneys and others does not reduce the level of coercion at all, or that it is "only questionably relevant," *post,* at 1232, to whether termination of custody reduces the coercive pressure that is the basis for *Edwards'* super-prophylactic rule.

4 The State's alternative argument in the present case is that the substantial lapse in time between the 2003 and 2006 attempts at interrogation independently ended the *Edwards* presumption. Our disposition makes it unnecessary to address that argument.

5 This assumes that *Roberson*'s extension of *Edwards* to subsequent interrogation for a different crime and *Minnick*'s extension of *Edwards* to subsequent interrogation by a different law enforcement agency would apply even when the place of custody and the identity of the custodial agency are not the same (as they were in *Roberson* and *Minnick*) as those of the original interrogation. That assumption would seem reasonable if the *Edwards*-suspending effect of a termination of custody is rejected. Reinterrogation in different custody or by a different interrogating agency would seem, if anything, *less* likely than termination of custody to reduce coercive pressures. At the original site, and with respect to the original interrogating agency, the suspect has already experienced cessation of interrogation when he demands counsel—which he may have no reason to expect elsewhere.

6 According to a recent study, 67.5% of prisoners released from 15 States in 1994 were rearrested within three years. See Dept. of Justice, Bureau of Justice Statistics, Special Report, Recidivism of Prisoners Released in 1994 (NCJ 193427, 2002).

7 A defendant who experiences a 14–day break in custody after invoking the *Miranda* right to counsel is not left without protection. *Edwards* establishes a *presumption* that a suspect's waiver of *Miranda* rights is involuntary. See *Arizona v. Roberson,* 486 U.S. 675, 681, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Even without this "second layer of prophylaxis," *McNeil v. Wisconsin,* 501 U.S. 171, 176, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991), a defendant is still free to claim the prophylactic protection of *Miranda*—arguing that his waiver of *Miranda* rights was in fact involuntary under *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). See *Miranda,* 384 U.S., at 475, 86 S.Ct. 1602.

8 We distinguish the duration of incarceration from the duration of what might be termed interrogative custody. When a prisoner is removed from the general prison population and taken to a separate location for questioning, the duration of *that separation* is assuredly dependent upon his interrogators. For which reason once he has asserted a refusal to

speak without assistance of counsel *Edwards* prevents any efforts to get him to change his mind during that interrogative custody.

1 At a minimum the latter proposition is questionable. I concede that some police officers might badger a suspect during a subsequent interrogation after a break in custody, or might use catch-and-release tactics to suggest they will not take no for an answer. But if a suspect reenters custody after being questioned and released, he need only invoke his right to counsel to ensure *Edwards*' protection for the duration of the subsequent detention. And, if law enforcement officers repeatedly release and recapture a suspect to wear down his will—such that his participation in a subsequent interrogation is no longer truly voluntary—the "high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)," will protect against the admission of the suspect's statements in court. *Miranda v. Arizona,* 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The *Zerbst* inquiry takes into account the totality of the circumstances surrounding the waiver—including any improper pressures by police. See *id.,* at 464, 58 S.Ct. 1019; cf. *ante,* at 1223, n. 7 (stating that "[e]ven without *[Edwards']* second layer of prophylaxis, a defendant is still free to claim the prophylactic protection of *Miranda*—arguing that his waiver of *Miranda* rights was in fact involuntary under *Johnson v. Zerbst*" (internal quotation marks and citation omitted)).

2 Though the Court asserts that its 14–day rule will tell "law enforcement officers ... with certainty and beforehand, when renewed interrogation is lawful," *ante,* at 1222 – 1223, that is not so clear. Determining whether a suspect was previously in custody, and when the suspect was released, may be difficult without questioning the suspect, especially if state and federal authorities are conducting simultaneous investigations.

1 See *Dickerson v. United States,* 530 U.S. 428, 438, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (holding that "the protections announced in *Miranda* " are "constitutionally required"); *Shea v. Louisiana,* 470 U.S. 51, 52, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985) ("In *Edwards* ..., this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present—after he requested an attorney"); *Oregon v. Bradshaw,* 462 U.S. 1039, 1043, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) (plurality opinion) ("[The] subsequent incriminating statements made without [an] attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution"); *Miranda,* 384 U.S., at 458, 86 S.Ct. 1602 (examining the "history and precedent underlying the Self–Incrimination Clause to determine its applicability in this situation").

2 The Court states that this argument rests on a "fallacy" because "we are not talking about 'reinterrogating' the suspect; we are talking about asking his permission to be interrogated." *Ante,* at 1225 (emphasis deleted). Because, however, a suspect always has the right to remain silent, this is a distinction without a difference: Any time that the police interrogate or reinterrogate, and read a suspect his *Miranda* rights, the suspect may decline to speak. And if this is a "fallacy," it is the same "fallacy" upon which this Court has relied in the *Edwards* line of cases that held that police may not continue to interrogate a suspect who has requested a lawyer: Police may not continue to ask such a suspect whether they may interrogate him until that suspect has a lawyer present. The Court's apparent belief that this is a "fallacy" only underscores my concern that its analysis is insufficiently sensitive to the concerns that motivated the *Edwards* line of cases.

3 Indeed, a lawyer has a "unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Fare v. Michael C.,* 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). Counsel can curb an officer's overbearing conduct, advise a suspect of his rights, and ensure that there is an accurate record of any interrogation. "Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." *Arizona v. Roberson,* 486 U.S. 675, 682, n. 4, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) (internal quotation marks omitted). Thus, "once the accused has requested counsel," courts must be especially wary of "coercive form[s] of custodial interrogation." *Bradshaw,* 462 U.S., at 1051, 103 S.Ct. 2830 (Powell, J., concurring in judgment).

4 See *Michigan v. Harvey,* 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990) (subsequent confession suggests the police "badger [ed] a defendant into waiving his previously asserted *Miranda* rights").

5 See *Minnick v. Mississippi,* 498 U.S. 146, 155, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) ("[N]either admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not

the inducing cause"); cf. *Smith v. Illinois,* 469 U.S. 91, 98, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) *(per curiam)* ("[T]he authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance").

6 See *Roberson,* 486 U.S., at 681, 108 S.Ct. 2093 ("[I]f a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' "); *Michigan v. Mosley,* 423 U.S. 96, 110, n. 2, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) (White, J., concurring in result) ("[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism").

7 Today's decision, moreover, offers no reason for its 14–day time period. To be sure, it may be difficult to marshal conclusive evidence when setting an arbitrary time period. But in light of the basis for *Edwards,* we should tread carefully. Instead, the only reason for choosing a 14–day time period, the Court tells us, is that "[i]t seems to us that period is 14 days." *Ante,* at 1223. That time period is "plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." *Ibid.* But the Court gives no reason for that speculation, which may well prove inaccurate in many circumstances.

8 In *Roberson,* for example, we observed that once a suspect has asserted his right to an attorney, courts must presume he does "not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist....." 486 U.S., at 681, 108 S.Ct. 2093. We held in *Roberson* that just because different police come to speak about a different investigation, that presumption does not change: "[T]here is no reason to assume that a suspect's state of mind is in any way investigation-specific." *Ibid*. Nor is there any reason to believe that it is arrest specific.

9 The compulsion is heightened by the fact that "[t]he uncertainty of fate that being released from custody and then reapprehended entails is, in some circumstances, more coercive than continual custody." Strauss, Reinterrogation, 22 Hastings Const. L.Q. 359, 390 (1995).

10 Not only is this a likely effect of reinterrogation, but police may use this effect to their advantage. Indeed, the Court's rule creates a strange incentive to delay formal proceedings, in order to gain additional information by way of interrogation after the time limit lapses. The justification for Fifth Amendment rules "must be consistent with ... practical realities," *Roberson,* 486 U.S., at 688, 108 S.Ct. 2093 (KENNEDY, J., dissenting), and the reality is that police may operate within the confines of the Fifth Amendment in order to extract as many confessions as possible, see Leo & White, Adapting to *Miranda:* Modern Interrogators' Strategies for Dealing With the Obstacles Posed by *Miranda*, 84 Minn. L.Rev. 397 (1999). With a time limit as short as 14 days, police who hope that they can eventually extract a confession may feel comfortable releasing a suspect for a short period of time. The resulting delay will only increase the compelling pressures on the suspect.

11 It is important to distinguish this from the point that I make above about indigent suspects. If the police promise to provide a lawyer and never do so, it sends a message to the suspect that the police have lied and that the rights read to him are hollow. But the mere fact that a suspect consulted a lawyer does not itself reduce the compulsion when police reinterrogate him.

12 Cf. *Orozco v. Texas,* 394 U.S. 324, 326, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969) (holding that a suspect was in custody while being held in own home, despite his comfort and familiarity with the surroundings); *Mathis v. United States,* 391 U.S. 1, 5, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968) (holding that a person serving a prison sentence for one crime was in custody when he was interrogated in prison about another, unrelated crime); *Miranda v. Arizona,* 384 U.S. 436, 478, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ("[W]hen an individual is ... deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized").

13 Prison also presents a troubling set of incentives for police. First, because investigators know that their suspect is also a prisoner, there is no need formally to place him under arrest. Thus, police generally can interview prisoners even without probable cause to hold them. This means that police can interrogate suspects with little or no evidence of guilt, and police can do so time after time, without fear of being sued for wrongful arrest. Second, because police know that their suspect

is otherwise detained, there is no need necessarily to resolve the case quickly. Police can comfortably bide their time, interrogating and reinterrogating their suspect until he slips up. Third, because police need not hold their suspect, they do not need to arraign him or otherwise initiate formal legal proceedings that would trigger various protections.

14 The Court attempts to distinguish detention in prison from the "paradigm *Edwards* case," *ante,* at 1220, but it is not clear why that is so. The difference cannot be simply that convicted prisoners' "detention ... is relatively disconnected from their prior unwillingness to cooperate in an investigation," *ante,* at 1216, because in many instances of pretrial custody, the custody will continue regardless of whether a detainee answers questions. Take *Roberson* for example. Roberson was arrested and being held for one crime when, days later, a different officer interrogated him about a different crime. 486 U.S., at 681, 108 S.Ct. 2093. Regardless of whether he cooperated with the second investigation, he was still being held for the first crime. Yet under the Court's analysis, had Roberson been held long enough that he had become "accustomed" to the detention facility, *ante,* at 1224, there would have been a break in custody between each interrogation. Thus, despite the fact that coercive pressures "may increase as custody is prolonged," *Minnick,* 498 U.S., at 153, 111 S.Ct. 486, the real problem in *Roberson* may have been that the police did not leave him sitting in jail for long enough.

This problem of pretrial custody also highlights a tension with the Court's decision last Term in *Montejo v. Louisiana,* 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009). In *Montejo,* the Court overturned *Michigan v. Jackson,* 475 U.S. 625, 636, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), which had protected an accused's Sixth Amendment right to counsel by "forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding." 556 U.S., at 780 – 781, 129 S.Ct., at 2082. In so doing, the Court emphasized that because the *Edwards* "regime suffices to protect the integrity of 'a suspect's voluntary choice not to speak outside his lawyer's presence,' before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment." 556 U.S., at 795, 129 S.Ct., at 2090 (quoting *Texas v. Cobb,* 532 U.S. 162, 175, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) (KENNEDY, J., concurring); citation omitted). But typically, after arraignment, defendants are released on bail or placed in detention facilities, both of which, according to the majority's logic, sometimes constitute breaks in custody. How then, under the Court's decision today, will *Edwards* serve the role that the Court placed on it in *Montejo?*

15 The Court responds that "[i]f confidence in the police's promise to provide counsel were the touchstone, *Edwards* would not have applied in *Minnick,* where the suspect in continuing custody actually met with appointed counsel." *Ante,* at 1226. But my view is not that "confidence in the police's promise to provide counsel" is "the touchstone." *Ibid*. Rather, my view is that although an appropriate break in custody will mitigate many of the reasons that custodial reinterrogation of a suspect who requested counsel is inherently compelling, it will not mitigate the effect of an indigent detainee believing that he has "been denied the counsel he has clearly requested," *Roberson,* 486 U.S., at 686, 108 S.Ct. 2093. If police tell an indigent suspect that he is not required to speak without an attorney, and that they will provide him with an attorney, and that suspect asserts his right to an attorney, but police nonetheless do not provide an attorney and reinterrogate him (even if there was a break in custody between the interrogations), the indigent suspect is likely to feel that the police lied to him or are ignoring his rights. This view is not in tension with *Minnick*. *Minnick* holds only that consultation with an attorney between interrogations is not *sufficient* to end the *Edwards* presumption and therefore that when there has been no break in custody, "counsel's *presence* at interrogation," 498 U.S., at 152, 111 S.Ct. 486, is necessary to address the compulsion with which the *Edwards* line of cases is concerned.

16 I do not doubt that some of the compulsion caused by reinterrogating an indigent suspect without providing a lawyer may survive even a break in custody and a very long passage of time. The relevant point here is more limited: A long break in time, far longer than 14 days, diminishes, rather than eliminates, that compulsion.

96 S.Ct. 321
Supreme Court of the United States

State of MICHIGAN, Petitioner,

v.

Richard Bert MOSLEY.

No. 74-653.
|
Argued Oct. 6, 1975.
|
Decided Dec. 9, 1975.

Synopsis

Defendant was convicted in the Recorder's Court of Detroit, Wayne County, of first-degree murder, and he appealed. The Court of Appeals, 51 Mich.App. 105, 214 N.W.2d 564, reversed and remanded. The State's petition for writ of certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that under the Miranda Rule the admissibility of statements obtained after the person in custody has exercised his right to remain silent depends on whether his "right to cut off questioning" was scrupulously honored, that Miranda does not require that once a person has indicated a desire to remain silent any subsequent questioning may be undertaken only in presence of counsel and that where defendant, who had been arrested on robbery charge, was given required Miranda warnings, when defendant stated that he did not want to discuss the robberies the detective immediately ceased interrogation and it was only after more than two-hour hiatus and following readmonition of Miranda rights that another detective questioned defendant solely about an unrelated murder, admission of inculpatory statement made during the second interrogation did not violate the Miranda principles.

Judgment of Michigan Court of Appeals vacated and case remanded.

Mr. Justice White filed an opinion concurring in the result.

Mr. Justice Brennan filed a dissenting opinion in which Mr. Justice Marshall joined.

On remand, conviction reversed, 72 Mich.App. 289, 249 N.W.2d 393.

On appeal following remand, judgment of Court of Appeals affirmed, 254 N.W.2d 29.

****323** *Syllabus* [*]

***96** Respondent, who had been arrested in connection with certain robberies and advised, in accordance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, that he was not obliged to answer any questions and that he could remain silent if he wished, and having made oral and written acknowledgment of the Miranda warnings, declined to discuss the robberies, whereupon the detective ceased the interrogation. More than two hours later, after giving Miranda warnings, another detective questioned respondent solely about an unrelated murder. Respondent made an inculpatory statement, which was later used in his trial for murder which resulted in his conviction. The appellate court reversed on the ground that Miranda mandated a cessation of all interrogation after respondent had declined to answer the first detective's questions. Held: The admission in evidence of respondent's incriminating statement did not violate Miranda principles. Respondent's right to cut off questioning was scrupulously honored, the police having immediately ceased the robbery interrogation after respondent's refusal to answer and having commenced questioning about the murder only after a significant time lapse and after a fresh set of warnings had been given respondent. Westover v. United States, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, distinguished. Pp. 324-328.

51 Mich.App. 105, 214 N.W.2d 564, vacated and remanded.

Attorneys and Law Firms

Thomas Khalil, Detroit, Mich., for petitioner.

Carl Ziemba, Detroit, Mich., for respondent.

Opinion

***97** Mr. Justice STEWART delivered the opinion of the Court.

The respondent, Richard Bert Mosley, was arrested in Detroit, Mich., in the early afternoon of April 8, 1971, in connection with robberies that had recently occurred at the Blue Goose Bar and the White Tower Restaurant on that city's lower east side. The arresting officer, Detective James Cowie of the

Armed Robbery Section of the Detroit Police Department, was acting on a tip implicating Mosley and three other men in the robberies.[1] After effecting the arrest, Detective Cowie brought Mosley to the Robbery, Breaking and Entering Bureau of the Police Department, located on the fourth floor of the departmental headquarters building. The officer advised Mosley of his rights under this Court's decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and had him read and sign the department's constitutional rights notification certificate. After filling out the necessary arrest papers, Cowie began questioning Mosley about the robbery of the White Tower Restaurant. When Mosley said he did not want to answer any questions about the robberies, Cowie promptly ceased the interrogation. The completion of the arrest papers and the questioning of Mosley together took approximately 20 minutes. At no time during the questioning did Mosley indicate a desire to consult with a lawyer, and there is no claim that the procedures followed to this point did not fully comply with the strictures of the Miranda opinion. Mosley was then taken to a ninth-floor cell block.

Shortly after 6 p. m., Detective Hill of the Detroit ***98** Police Department Homicide Bureau brought Mosley from the cell block to the fifth-floor office of the Homicide Bureau for questioning about the fatal shooting of a man named Leroy Williams. ****324** Williams had been killed on January 9, 1971, during a holdup attempt outside the 101 Ranch Bar in Detroit. Mosley had not been arrested on this charge or interrogated about it by Detective Cowie.[2] Before questioning Mosley about this homicide, Detective Hill carefully advised him of his "Miranda rights." Mosley read the notification form both silently and aloud, and Detective Hill then read and explained the warnings to him and had him sign the form. Mosley at first denied any involvement in the Williams murder, but after the officer told him that Anthony Smith had confessed to participating in the slaying and had named him as the "shooter," Mosley made a statement implicating himself in the homicide.[3] The interrogation by Detective Hill lasted approximately 15 minutes, and at no time during its course did Mosley ask to consult with a lawyer or indicate that he did not want to discuss the homicide. In short, there is no claim that the procedures followed during Detective Hill's interrogation of Mosley, standing alone, did not fully comply with the strictures of the Miranda opinion.[4]

Mosley was subsequently charged in a one-count information with first-degree murder. Before the trial he moved to suppress his incriminating statement on a number of grounds, among them the claim that under the doctrine of the Miranda case it was constitutionally ***99** impermissible for Detective Hill to question him about the Williams murder after he had told Detective Cowie that he did not want to answer any questions about the robberies.[5] The trial court denied the motion to suppress after an evidentiary hearing, and the incriminating statement was subsequently introduced in evidence against Mosley at his trial. The jury convicted Mosley of first-degree murder, and the court imposed a mandatory sentence of life imprisonment.

On appeal to the Michigan Court of Appeals, Mosley renewed his previous objections to the use of his incriminating statement in evidence. The appellate court reversed the judgment of conviction, holding that Detective Hill's interrogation of Mosley had been a per se violation of the Miranda doctrine. Accordingly, without reaching Mosley's other contentions, the Court remanded the case for a new trial with instructions that Mosley's statement be suppressed as evidence. 51 Mich.App. 105, 214 N.W.2d 564. After further appeal was denied by the Michigan Supreme Court, 392 Mich. 764, the State filed a petition for certiorari here. We granted the writ because of the important constitutional question presented. 419 U.S. 1119, 95 S.Ct. 801, 42 L.Ed.2d 819.

In the Miranda case this Court promulgated a set of safeguards to protect the there-delineated constitutional rights of persons subjected to custodial police interrogation. In sum, the Court held in that case that unless law enforcement officers give certain specified warnings beforequestioning ***100** a person in custody,[6] and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in ****325** evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary. See Michigan v. Tucker, 417 U.S. 433, 443, 94 S.Ct. 2357, 2363, 41 L.Ed.2d 182.

Neither party in the present case challenges the continuing validity of the Miranda decision, or of any of the so-called guidelines it established to protect what the Court there said was a person's constitutional privilege against compulsory self-incrimination. The issue in this case, rather, is whether the conduct of the Detroit police that led to Mosley's incriminating statement did in fact violate the Miranda "guidelines," so as to render the statement inadmissible in evidence against Mosley at his trial. Resolution of the question turns almost entirely on the interpretation of a single passage in the Miranda opinion, upon which the Michigan appellate court relied in finding a per se violation of Miranda:

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody ***101** interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 U.S., at 473-474, 86 S.Ct., at 1627.[7]

This passage states that "the interrogation must cease" when the person in custody indicates that "he wishes to remain silent." It does not state under what circumstances, if any, a resumption of questioning is permissible.[8] The passage could be literally read to mean that ***102** a person who has invoked his "right to silence" can never again be subjected to custodial interrogation by any police officer at any time or place on any subject. Another possible construction of the passage would characterize "any statement taken after the person invokes his privilege" as "the product of compulsion" and would therefore mandate its exclusion from evidence, even if it were volunteered by the person in custody without any further interrogation whatever. Or the passage could be interpreted to require only the immediate cessation of questioning, ****326** and to permit a resumption of interrogation after a momentary respite.

It is evident that any of these possible literal interpretations would lead to absurd and unintended results. To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, neither this passage nor any other passage in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any ***103** police officer on any subject, once the person in custody has indicated a desire to remain silent.[9]

A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ." 384 U.S., at 479, 86 S.Ct., at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Id., at 474, 86 S.Ct., at 1627. Through the exercise of his option to terminate questioning he can control the time at ***104** which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."[10]

A review of the circumstances leading to Mosley's confession reveals that his ****327** "right to cut off questioning" was fully respected in this case. Before his initial interrogation, Mosley was carefully advised that he was under no obligation to answer any questions and could remain silent if he wished. He orally acknowledged that he understood the Miranda warnings and then signed a printed notification-of-rights form. When Mosley stated that he did not want to discuss the robberies, Detective Cowie immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position. After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. He was given full and complete Miranda warnings at the outset of the second interrogation. He was thus reminded again that he could remain silent and could consult with a lawyer, ***105** and was carefully given a full and fair opportunity to exercise these options. The subsequent questioning did not undercut Mosley's previous decision not to answer Detective Cowie's inquiries. Detective Hill did not resume the interrogation about the White Tower Restaurant robbery or inquire about the Blue Goose Bar robbery, but instead focused exclusively on the Leroy Williams homicide, a crime different in nature and in time and place of occurrence from the robberies for which Mosley had been arrested and interrogated by Detective Cowie. Although it is not clear from the record how much Detective Hill knew about the earlier interrogation, his questioning of Mosley about an unrelated homicide was quite consistent with a reasonable interpretation

of Mosley's earlier refusal to answer any questions about the robberies.[11]

This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to ***106** wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

The Michigan Court of Appeals viewed this case as factually similar to Westover v. United States, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, a companion case to Miranda. But the controlling facts of the two cases are strikingly different.

In Westover, the petitioner was arrested by the Kansas City police at 9:45 p. m. and taken to the police station. Without giving any advisory warnings of any kind to Westover, the police questioned him that night and throughout the next morning about various local robberies. At noon, three FBI agents took over, gave advisory warnings to Westover, and proceeded to question him about two California bank robberies. After two hours of questioning, the petitioner confessed to the California crimes. The Court held that the confession obtained by the FBI was inadmissible because the interrogation leading to the petitioner's statement followed on the heels of prolonged questioning that was commenced and continued ****328** by the Kansas City police without preliminary warnings to Westover of any kind. The Court found that "the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation" and that the belated warnings given by the federal officers were "not sufficient to protect" Westover because from his point of view "the warnings came at the end of the interrogation process." Id., at 496-497, 86 S.Ct., at 1639.

Here, by contrast, the police gave full "Miranda warnings" to Mosley at the very outset of each interrogation, subjected him to only a brief period of initial questioning, ***107** and suspended questioning entirely for a significant period before beginning the interrogation that led to his incriminating statement. The cardinal fact of Westover—the failure of the police officers to give any warnings whatever to the person in their custody before embarking on an intense and prolonged interrogation of him—was simply not present in this case. The Michigan Court of Appeals was mistaken, therefore, in believing that Detective Hill's questioning of Mosley was "not permitted" by the Westover decision. 51 Mich.App., at 108, 214 N.W.2d, at 566.

For these reasons, we conclude that the admission in evidence of Mosley's incriminating statement did not violate the principles of Miranda v. Arizona. Accordingly, the judgment of the Michigan Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Judgment vacated and case remanded.

Mr. Justice WHITE, concurring.

I concur in the result and in much of the majority's reasoning. However, it appears to me that in an effort to make only a limited holding in this case, the majority has implied that some custodial confessions will be suppressed even though they follow an informed and voluntary waiver of the defendant's rights. The majority seems to say that a statement obtained within some unspecified time after an assertion by an individual of his "right to silence" is always inadmissible, even if it was the result of an informed and voluntary decision following, for example, a disclosure to such an individual of a piece of information bearing on his waiver decision which the police had failed to give him prior to his assertion of the privilege but which they gave him immediately thereafter. Indeed, ante, at p. 325, the majority characterizes ***108** as "absurd" any contrary rule. I disagree. I do not think the majority's conclusion is compelled by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and I suspect that in the final analysis the majority will adopt voluntariness as the standard by which to judge the waiver of the right to silence by a properly informed defendant. I think the Court should say so now.

Miranda holds that custody creates an inherent compulsion on an individual to incriminate himself in response to questions, and that statements obtained under such circumstances are therefore obtained in violation of the Fifth Amendment privilege against compelled testimonial self-incrimination unless the privilege is "knowingly and intelligently waived." Id., at 471, 475, 86 S.Ct., at 1626, 1628. It also holds that an individual will not be deemed to have made a knowing and intelligent waiver of his "right to silence" unless the authorities have first informed him, inter alia, of that right "the threshold requirement for an intelligent decision as to

its exercise." Id., at 468, 86 S.Ct., at 1624. I am no more convinced that Miranda was required by the United States Constitution than I was when it was decided. However, there is at least some support in the law both before and after Miranda for the proposition that some rights will never be deemed waived unless the defendant is first expressly advised of their existence. E. g., Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 238 (1969); Fed.Rules Crim.Proc. 11, 32(a)(2). There is little support in the law or in common sense for the **329 proposition that an informed waiver of a right may be ineffective even where voluntarily made. Indeed, the law is exactly to the contrary, e. g., Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Parker v. North Carolina, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). Unless an individual is *109 incompetent, we have in the past rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). To do so would be to "imprison a man in his privileges,"[1] Adams v. United States ex rel. McCann, 317 U.S. 269, 280, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942), and to disregard " 'that respect for the individual which is the lifeblood of the law,' " Faretta v. California, supra, 422 U.S., at 834, 95 S.Ct., at 2541. I am very reluctant to conclude that Miranda stands for such a proposition.

The language of Miranda no more compels such a result than does its basic rationale. As the majority points out, the statement in Miranda, 384 U.S., at 474, 86 S.Ct., at 1627, requiring interrogation to cease after an assertion of the "right to silence" tells us nothing because it does not indicate how soon this interrogation may resume. The Court showed in the very next paragraph, moreover, that when it wanted to create a per se rule against further interrogation after assertion of a right, it knew how to do so. The Court there said "(i)f the individual states that he *110 wants an attorney, the interrogation must cease until an attorney is present." Ibid.[2] However, when the individual indicates that he will decide unaided by counsel whether or not to assert his "right to silence" the situation is different. In such a situation, the Court in Miranda simply said: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Id., at 475, 86 S.Ct., at 1628. Apparently, although placing a heavy burden on the government, Miranda intended waiver of the "right to silence" to be tested by the normal standards. In any event, insofar as the Miranda decision might be read to require interrogation to cease for some magical and unspecified period of time following an assertion of the "right to silence," and to reject voluntariness as the standard by which to judge informed waivers of that right, it should be disapproved as inconsistent with otherwise uniformly applied legal principles.

In justifying the implication that questioning must inevitably cease for some unspecified **330 period of time following an exercise of the "right to silence," the majority *111 says only that such a requirement would be necessary to avoid "undermining" "the will of the person being questioned." Yet, surely a waiver of the "right to silence" obtained by "undermining the will" of the person being questioned would be considered an involuntary waiver. Thus, in order to achieve the majority's only stated purpose, it is sufficient to exclude all confessions which are the result of involuntary waivers. To exclude any others is to deprive the factfinding process of highly probative information for no reason at all. The "repeated rounds" of questioning following an assertion of the privilege, which the majority is worried about, would, of course, count heavily against the State in any determination of voluntariness particularly if no reason (such as new facts communicated to the accused or a new incident being inquired about) appeared for repeated questioning. There is no reason, however, to rob the accused of the choice to answer questions voluntarily for some unspecified period of time following his own previous contrary decision. The Court should now so state.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

The Court focuses on the correct passage from Miranda v. Arizona, 384 U.S. 436, 473-474, 86 S.Ct. 1602, 1627, 16 L.Ed.2d 694 (1966) (footnote omitted):

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to *112 cut off questioning, the setting of in-custody interrogation operates on the individual

to overcome free choice in producing a statement after the privilege has been once invoked."

But the process of eroding Miranda rights, begun with Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), continues with today's holding that police may renew the questioning of a suspect who has once exercised his right to remain silent, provided the suspect's right to cut off questioning has been "scrupulously honored." Today's distortion of Miranda's constitutional principals can be viewed only as yet another stop in the erosion and, I suppose, ultimate overruling of Miranda's enforcement of the privilege against self-incrimination.

The Miranda guidelines were necessitated by the inherently coercive nature of in-custody questioning. As in Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), "we sought a protective device to dispel the compelling atmosphere of the interrogation." 384 U.S., at 465, 86 S.Ct., at 1623. We "concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Id., at 467, 86 S.Ct., at 1624.[1] To assure safeguards that promised to dispel the "inherently compelling pressures" of in-custody interrogation, a prophylactic rule was fashioned to supplement the traditional determination of voluntariness on the facts of each case. Miranda held that any confession obtained when not preceded by the required warnings ***113** or an adequate substitute safeguard was per se inadmissible in evidence. ****331** Id., at 468-469, 479, 86 S.Ct., at 1624-1625, 1630. Satisfaction of this prophylactic rule, therefore, was necessary, though not sufficient, for the admission of a confession. Certiorari was expressly granted in Miranda "to give concrete constitutional guidelines for law enforcement agencies and courts to follow," id., at 441-442, 86 S.Ct., at 1611, that is, clear, objective standards that might be applied to avoid the vagaries of the traditional voluntariness test.

The task that confronts the Court in this case is to satisfy the Miranda approach by establishing "concrete constitutional guidelines" governing the resumption of questioning a suspect who, while in custody, has once clearly and unequivocally "indicate(d) . . . that he wishes to remain silent . . .." As the Court today continues to recognize, under Miranda, the cost of assuring voluntariness by procedural tests, independent of any actual inquiry into voluntariness, is that some voluntary statements will be excluded. Ante, at p. ——. Thus the consideration in the task confronting the Court is not whether voluntary statements will be excluded, but whether the procedures approved will be sufficient to assure with reasonable certainty that a confession is not obtained under the influence of the compulsion inherent in interrogation and detention. The procedures approved by the Court today fail to provide that assurance.

We observed in Miranda : "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion ***114** of a voluntary relinquishment of the privilege." 384 U.S., at 476, 86 S.Ct., at 1629. And, as that portion of Miranda which the majority finds controlling observed, "the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." Id., at 474, 86 S.Ct., at 1628. Thus, as to statements which are the product of renewed questioning, Miranda established a virtually irrebuttable presumption of compulsion, see id., at 474 n. 44, 86 S.Ct., at 1627, and that presumption stands strongest where, as in this case, a suspect, having initially determined to remain silent, is subsequently brought to confess his crime. Only by adequate procedural safeguards could the presumption be rebutted.

In formulating its procedural safeguard, the Court skirts the problem of compulsion and thereby fails to join issue with the dictates of Miranda. The language which the Court finds controlling in this case teaches that renewed questioning itself is part of the process which invariably operates to overcome the will of a suspect. That teaching is embodied in the form of a proscription on any further questioning once the suspect has exercised his right to remain silent. Today's decision uncritically abandons that teaching. The Court assumes, contrary to the controlling language, that "scrupulously honoring" an initial exercise of the right to remain silent preserves the efficaciousness of initial and future warnings despite the fact that the suspect has once been subjected to interrogation and then has been detained for a lengthy period of time.

Observing that the suspect can control the circumstances of interrogation "(t)hrough the exercise of his option to terminate questioning," the Court concludes "that the

admissibility of statements obtained after the person in custody has decided to remain silent depends . . . ***115** on whether his 'right to cut off questioning' was 'scrupulously honored.' " Ante, at 326. But scrupulously honoring exercises of the right to cut off questioning is only meaningful insofar as the suspect's will to exercise that right remains wholly unfettered. The Court's formulation thus assumes the very matter at issue here: whether renewed ****332** questioning following a lengthy period of detention acts to overbear the suspect's will, irrespective of giving the Miranda warnings a second time (and scrupulously honoring them), thereby rendering inconsequential any failure to exercise the right to remain silent. For the Court it is enough conclusorily to assert that "(t)he subsequent questioning did not undercut Mosley's previous decision not to answer Detective Cowie's inquiries." Ante, at 327. Under Miranda, however, Mosley's failure to exercise the right upon renewed questioning is presumptively the consequence of an overbearing in which detention and that subsequent questioning played central roles.

I agree that Miranda is not to be read, on the one hand, to impose an absolute ban on resumption of questioning "at any time or place on any subject," ante, at 325, or on the other hand, "to permit a resumption of interrogation after a momentary respite," ibid. But this surely cannot justify adoption of a vague and ineffective procedural standard that falls somewhere between those absurd extremes, for Miranda in flat and unambiguous terms requires that questioning "cease" when a suspect exercises the right to remain silent. Miranda's terms, however, are not so uncompromising as to preclude the fashioning of guidelines to govern this case. Those guidelines must, of course, necessarily be sensitive to the reality that "(a)s a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, ***116** where there are often impartial observers to guard against intimidation or trickery." 384 U.S., at 461, 86 S.Ct., at 1621 (footnote omitted).

The fashioning of guidelines for this case is an easy task. Adequate procedures are readily available. Michigan law requires that the suspect be arraigned before a judicial officer "without unnecessary delay,"[2] certainly not a burdensome requirement. Alternatively, a requirement that resumption of questioning should await appointment and arrival of counsel for the suspect would be an acceptable and readily satisfied precondition to resumption.[3] Miranda expressly held that "(t)he presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege (against self-incrimination)." Id., at 466, 86 S.Ct., at 1623. The Court expediently bypasses this alternative in its search for circumstances where renewed questioning would be permissible.[4]

Indeed, language in Miranda suggests that the ***117** presence of counsel is the only appropriate alternative. In categorical language we held in Miranda : "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id., at 473-474, 86 S.Ct., at 1627. We then immediately observed: "If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence ****333** of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements." Id., at 474 n. 44, 86 S.Ct., at 1627 (emphasis added).

This was the only circumstance in which we at all suggested that questioning could be resumed, and even then, further questioning was not permissible in all such circumstances, for compulsion was still the presumption not easily dissipated.[5]

***118** These procedures would be wholly consistent with the Court's rejection of a "per se proscription of indefinite duration," ante, at 326, a rejection to which I fully subscribe. Today's decision, however, virtually empties Miranda of principle, for plainly the decision encourages police asked to cease interrogation to continue the suspect's detention until the police station's coercive atmosphere does its work and the suspect responds to resumed questioning.[6] Today's rejection of that reality of life contrasts sharply with the Court's acceptance only two years ago that "(i)n Miranda the Court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation." Schneckloth v. Bustamonte, 412 U.S. 218, 247, 93 S.Ct. 2041, 2058, 36 L.Ed.2d 854 (1973). I can only conclude that today's decision signals rejection of Miranda's basic premise.

My concern with the Court's opinion does not end with its treatment of Miranda, but extends to its treatment of the facts in this case. The Court's effort to have the Williams homicide appear as "an unrelated holdup murder," ante at 326, is patently unsuccessful. The anonymous tip received

by Detective Cowie, conceded by the Court to be the sole basis for Mosley's arrest, ante, at 323 n. 1, embraced both the robberies covered in Cowie's interrogation ***119** and the robbery-murder of Williams, ante, at 323, 324 n. 2, about which Detective Hill questioned Mosley. Thus, when Mosley was apprehended, Cowie suspected him of being involved in the Williams robbery in addition to the robberies about which he tried to examine Mosley. On another matter, the Court treats the second interrogation as being "at another location," ante, at 326. Yet the fact is that it was merely a different floor of the same building, ante, at 323, 324.[7]

****334** I also find troubling the Court's finding that Mosley never indicated that he did not want to discuss the robbery-murder, see ante, at 326-327. I cannot read Cowie's testimony as the Court does. Cowie testified that Mosley ***120** declined to answer " '(a)nything about the robberies,' " ante, at 327 n. 11. That can be read only against the background of the anonymous tip that implicated Mosley in the Williams incident. Read in that light, it may reasonably be inferred that Cowie understood "(a)nything" to include the Williams episode, since the anonymous tip embraced that episode. More than this, the Court's reading of Cowie's testimony is not even faithful to the standard it articulates here today. "Anything about the robberies" may more than reasonably be interpreted as comprehending the Williams murder which occurred during a robbery. To interpret Mosley's alleged statement to the contrary, therefore, hardly honors "scrupulously" the suspect's rights.

In light of today's erosion of Miranda standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution. See Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975);[8] Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 626, 30 L.Ed.2d 618 (1972); Cooper v. California, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967). A decision particularly bearing upon the question of the adoption of Miranda as state law is Commonwealth v. Ware, 446 Pa. 52, 284 A.2d 700 (1971). There the Pennsylvania Supreme Court adopted an aspect of Miranda as state law. This Court on March 20, ***121** 1972, granted the Commonwealth's petition for certiorari to review that decision. 405 U.S. 987, 92 S.Ct. 1254, 31 L.Ed.2d 453. A month later, however, the error of the grant having been made apparent, the Court vacated the order of March 20, "it appearing that the judgment below rests upon an adequate state ground." 406 U.S. 910, 92 S.Ct. 1606, 31 L.Ed.2d 821 (1972). Understandably, state courts and legislatures are, as matters of state law, increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court. See, e. g., State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971) (rejecting Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971)); People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975), cert. denied, 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 111 (rejecting ****335** United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971)); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (rejecting Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)); Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854, cert. denied, 417 U.S. 969, 94 S.Ct. 3172, 41 L.Ed.2d 1139 (1974) (adopting "same transaction or occurrence" view of Double Jeopardy Clause). I note that Michigan's Constitution has its own counterpart to the privilege against self-incrimination. Mich.Const., Art. 1, s 17; see State v. Johnson, supra.

All Citations

423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The officer testified that information supplied by an anonymous caller was the sole basis for his arrest of Mosley.

2 The original tip to Detective Cowie had, however, implicated Mosley in the Williams murder.

3 During cross-examination by Mosley's counsel at the evidentiary hearing, Detective Hill conceded that Smith in fact had not confessed but had "denied a physical participation in the robbery."

4 But see n. 5, infra.

5 In addition to the claim that Detective Hill's questioning violated Miranda, Mosley contended that the statement was the product of an illegal arrest, that the statement was inadmissible because he had not been taken before a judicial officer without unnecessary delay, and that it had been obtained through trickery and promises of leniency. He argued that these circumstances, either independently or in combination, required the suppression of his incriminating statement.

6 The warnings must inform the person in custody "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S., at 444, 86 S.Ct., at 1612.

7 The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since Mosley made no such request at any time. Those procedures are detailed in the Miranda opinion as follows:

"If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

"This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." Id., at 474, 86 S.Ct., at 1628.

8 The Court did state in a footnote:

"If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements." Id., at 474 n. 44, 86 S.Ct., at 1627.

This footnote in the Miranda opinion is not relevant to the present case, since Mosley did not have an attorney present at the time he declined to answer Detective Cowie's questions, and the officer did not continue to question Mosley but instead ceased the interrogation in compliance with Miranda's dictates.

9 It is instructive to note that the vast majority of federal and state courts presented with the issue have concluded that the Miranda opinion does not create a per se proscription of any further interrogation once the person being questioned has indicated a desire to remain silent. See Hill v. Whealon, 490 F.2d 629, 630, 635 (C.A.6 1974); United States v. Collins, 462 F.2d 792, 802 (C.A.2 1972) (en banc); Jennings v. United States, 391 F.2d 512, 515-516 (C.A.5 1968); United States v. Choice, 392 F.Supp. 460, 466-467 (E.D.Pa.1975); McIntyre v. New York, 329 F.Supp. 9, 13-14 (E.D.N.Y.1971); People v. Naranjo, 181 Colo. 273, 277-278, 509 P.2d 1235, 1237 (1973); People v. Pittman, 55 Ill.2d 39, 54-56, 302 N.E.2d 7, 16-17 (1973); State v. McClelland, Iowa, 164 N.W.2d 189, 192-196 (Iowa 1969); State v. Law, 214 Kan. 643, 647-649, 522 P.2d 320, 324-325 (1974); Conway v. State, 7 Md.App. 400, 405-411, 256 A.2d 178, 181-184 (1969); State v. O'Neill, 299 Minn. 60, 70-71, 216 N.W.2d 822, 829 (1974); State v. Godfrey, 182 Neb. 451, 454-457, 155 N.W.2d 438, 440-442 (1968); People v. Gary, 31 N.Y.2d 68, 69-70, 334 N.Y.S.2d 883, 884-885, 286 N.E.2d 263, 264 (1972); State v. Bishop, 272 N.C. 283, 296-297, 158 S.E.2d 511, 520 (1968); Commonwealth v. Grandison, 449 Pa. 231, 233-234, 296 A.2d 730, 731 (1972); State v. Robinson, 87 S.D. 375, 378, 209 N.W.2d 374, 375-377 (1973); Hill v. State, 429 S.W.2d 481, 486-487 (Tex.Cr.App.1968); State v. Estrada, 63 Wis.2d 476, 486-488, 217 N.W.2d 359, 365-366 (1974). See also People v. Fioritto, 68 Cal.2d 714, 717-720, 68 Cal.Rptr. 817, 818-820, 441 P.2d 625, 626-628 (1968) (permitting the suspect but not the police to initiate further questioning).

Citation of the above cases does not imply a view of the merits of any particular decision.

10 The dissenting opinion asserts that Miranda established a requirement that once a person has indicated a desire to remain silent, questioning may be resumed only when counsel is present. Post, at 332-333. But clearly the Court in Miranda imposed no such requirement, for it distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that "the interrogation must cease until an attorney is present" only "(i)f the individual states that he wants an attorney." 384 U.S., at 474, 86 S.Ct., at 1628.

11 Detective Cowie gave the only testimony at the suppression hearing concerning the scope of Mosley's earlier refusal to answer his questions:

"A. I think at that time he declined to answer whether he had been involved.

"Q. He declined to answer?

"A. Yes. Anything about the robberies."

At the suppression hearing, Mosley did not in any way dispute Cowie's testimony. Not until trial, after the judge had denied the motion to suppress the incriminating statement, did Mosley offer a somewhat different version of his earlier refusal to answer Detective Cowie's questions. The briefs submitted by Mosley's counsel to the Michigan Court of Appeals and to this Court accepted Detective Cowie's account of the interrogation as correct, and the Michigan Court of Appeals decided the case on that factual premise. At oral argument before this Court, both counsel discussed the case solely in terms of Cowie's description of the events.

1 The majority's rule may cause an accused injury. Although a recently arrested individual may have indicated an initial desire not to answer questions, he would nonetheless want to know immediately if it were true that his ability to explain a particular incriminating fact or to supply an alibi for a particular time period would result in his immediate release. Similarly, he might wish to know if it were true that (1) the case against him was unusually strong and that (2) his immediate cooperation with the authorities in the apprehension and conviction of others or in the recovery of property would redound to his benefit in the form of a reduced charge. Certainly the individual's lawyer, if he had one, would be interested in such information, even if communication of such information followed closely on an assertion of the "right to silence." Where the individual has not requested counsel and has chosen instead to make his own decisions regarding his conversations with the authorities, he should not be deprived even temporarily of any information relevant to the decision.

2 The question of the proper procedure following expression by an individual of his desire to consult counsel is not presented in this case. It is sufficient to note that the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.

1 The Court said further:

"Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U.S., at 458, 86 S.Ct., at 1619.

2 Mich.Comp.Laws ss 764.13, 764.26 (1970); Mich.Stat.Ann. ss 28.871(1), 28.885 (1972). Detective Cowie's testimony indicated that a judge was available across the street from the police station in which Mosley was held from 2:15 p. m. until 4 p. m. or 4:30 p. m. App. 13. The actual interrogation of Mosley, however, covered only 15 or 20 minutes of this time. Id., at 14. The failure to comply with a simple state-law requirement in these circumstances is totally at odds with the holding that the police "scrupulously honored" Mosley's rights.

3 In addition, a break in custody for a substantial period of time would permit indeed it would require law enforcement officers to give Miranda warnings a second time.

4 I do not mean to imply that counsel may be forced on a suspect who does not request an attorney. I suggest only that either arraignment or counsel must be provided before resumption of questioning to eliminate the coercive atmosphere

of in-custody interrogation. The Court itself apparently proscribes resuming questioning until counsel is present if an accused has exercised the right to have an attorney present at questioning. Ante, at 325 n. 7.

5 The Court asserts that this language is not relevant to the present case, for "Mosley did not have an attorney present at the time he declined to answer Detective Cowie's questions." Ante, at 325 n. 8. The language, however, does not compel a reading that it is applicable only if counsel is present when the suspect initially exercises his right to remain silent. Even if it did, this would only indicate that Miranda placed even stiffer limits on the circumstances when questioning may be resumed than I suggest here. Moreover, since the concern in Miranda was with assuring the absence of compulsion upon renewed questioning, it makes little difference whether counsel is initially present. Thus, even if the language does not specifically address the situation where counsel is not initially present, it certainly contemplates that situation.

The Court also asserts that Miranda "directed that 'the interrogation must cease until an attorney is present' only '(i)f the individual states that he wants an attorney.' " Ante, at 326 n. 10 (quoting 384 U.S., at 474, 86 S.Ct., at 1627). This is patently inaccurate. The language from the quoted portion of Miranda actually reads: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."

6 I do not suggest that the Court's opinion is to be read as permitting unreasonably lengthy detention without arraignment so long as any exercise of rights by a suspect is "scrupulously honored." The question of whether there is some constitutional limitation on the length of time police may detain a suspect without arraignment, cf. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), is an open one and is not now before the Court.

7 See Westover v. United States, 384 U.S. 436, 494, 86 S.Ct. 1602, 1638, 16 L.Ed.2d 694 (1966), where Westover confessed after being turned over to the FBI following questioning by local police. We said:

"Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. . . .

"We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station in the same compelling surroundings. Thus, in obtaining a confession from Westover the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege." Id., at 496-497, 86 S.Ct., at 1639.

It is no answer to say that the questioning was resumed by a second police officer. Surely Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971), requires that the case be decided as if it involved two interrogation sessions by a single law enforcement officer.

8 Although my Brother Marshall correctly argued in Hass, 420 U.S., at 728, 95 S.Ct., at 1223 (dissenting), that we should have remanded for the state court to clarify whether it was relying on state or federal law, such a disposition is not required here. In Hass the state court cited both federal and state authority; in this case Mosley's counsel has conceded that the self-incrimination argument in the state court was based solely on the Fifth Amendment to the Federal Constitution. Tr. of Oral Arg. 44.

111 S.Ct. 486
Supreme Court of the United States

Robert S. MINNICK, Petitioner
v.
MISSISSIPPI.

No. 89–6332.
|
Argued Oct. 3, 1990.
|
Decided Dec. 3, 1990.

Synopsis
Defendant was convicted in the Circuit Court, Lowndes County, Mississippi, Lester F. Williamson, J., of two counts of capital murder, and he appealed. The Supreme Court of Mississippi, 551 So.2d 77,affirmed, and certiorari was granted. The Supreme Court, Justice Kennedy, held that where accused had requested and been provided counsel, reinitiation of interrogation in interview which accused was compelled to attend without counsel was impermissible.

Reversed and remanded.

Justice Scalia filed dissenting opinion in which Chief Justice Rehnquist joined.

Justice Souter did not participate.

****487** *Syllabus*[*]

Petitioner Minnick was arrested on a Mississippi warrant for capital murder. An interrogation by federal law enforcement officials ended when he requested a lawyer, and he subsequently communicated with appointed counsel two or three times. Interrogation was reinitiated by a county deputy sheriff after Minnick was told that he could not refuse to talk to him, and Minnick confessed. The motion to suppress the confession was denied, and he was convicted and sentenced to death. The State Supreme Court rejected his argument that the confession was taken in violation of, *inter alia,* his Fifth Amendment right to counsel, reasoning that the rule of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378—that once an accused requests counsel, officials may not reinitiate questioning "until counsel has been made available" to him—did not apply, since counsel had been made available.

Held: 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. In context, the requirement that counsel be "made available" to the accused refers not to the opportunity to consult with an attorney outside the interrogation room, but to the right to have the attorney present during custodial interrogation. This rule is appropriate and necessary, since a single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights and from the coercive pressures that accompany custody and may increase as it is prolonged. The proposed exception is inconsistent with *Edwards'* purpose to protect a suspect's right to have counsel present at custodial interrogation and with *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, where the theory that the opportunity to consult with one's attorney would substantially counteract the compulsion created by custodial interrogation was specifically rejected. It also would undermine the advantages flowing from *Edwards'* clear and unequivocal character. Since, under respondent's formulation of the rule, *Edwards'* protection could be reinstated by a subsequent request for counsel, it could pass in and out of existence multiple times, a vagary that would spread confusion through the justice system and lead to a loss of respect for the underlying constitutional principle. And such an exception would leave uncertain the sort of consultation required to displace *Edwards.* In addition, allowing a suspect whose counsel is ***147** prompt to lose *Edwards'* protection while one whose counsel is dilatory would not distort the proper conception of an attorney's duty to his client and set a course at odds with what ought to be effective representation. Since Minnick's interrogation was initiated by the police in a formal interview which he was compelled to attend, after Minnick had previously made a specific request for counsel, it was impermissible. Pp. 489–492.

551 So.2d 77 (Miss.1988), reversed and remanded.

****488** KENNEDY, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, *post,* p. 492. SOUTER, J., took no part in the consideration or decision of the case.

Attorneys and Law Firms

Floyd Abrams argued the cause for petitioner. With him on the briefs were *Anthony Paduano* and *Clive A. Stafford Smith.*

Marvin L. White, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *Mike Moore,* Attorney General.*

**David W. DeBruin* and *Donald B. Verrilli, Jr.,* filed a brief for the Mississippi State Bar as *amicus curiae* urging reversal.

Solicitor General Starr, Assistant Attorney General Dennis, Deputy Solicitor General Bryson, and *Nina Goodman* filed a brief for the United States as *amicus curiae* urging affirmance.

Opinion

Justice KENNEDY delivered the opinion of the Court.

To protect the privilege against self-incrimination guaranteed by the Fifth Amendment, we have held that the police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel. *Miranda v. Arizona,* 384 U.S. 436, 474, 86 S.Ct. 1602, 1627, 16 L.Ed.2d 694 (1966). We reinforced the protections of *Miranda* in *Edwards v. Arizona,* 451 U.S. 477, 484–485, 101 S.Ct. 1880, 1884–1885, 68 L.Ed.2d 378 (1981), which held that once the accused requests counsel, officials may not reinitiate questioning "until counsel has been made available" to him. The issue in the case before us is whether *Edwards'* protection ceases once the suspect has consulted with an attorney.

***148** Petitioner Robert Minnick and fellow prisoner James Dyess escaped from a county jail in Mississippi and, a day later, broke into a mobile home in search of weapons. In the course of the burglary they were interrupted by the arrival of the trailer's owner, Ellis Thomas, accompanied by Lamar Lafferty and Lafferty's infant son. Dyess and Minnick used the stolen weapons to kill Thomas and the senior Lafferty. Minnick's story is that Dyess murdered one victim and forced Minnick to shoot the other. Before the escapees could get away, two young women arrived at the mobile home. They were held at gunpoint, then bound hand and foot. Dyess and Minnick fled in Thomas' truck, abandoning the vehicle in New Orleans. The fugitives continued to Mexico, where they fought, and Minnick then proceeded alone to California. Minnick was arrested in Lemon Grove, California, on a Mississippi warrant, some four months after the murders.

The confession at issue here resulted from the last interrogation of Minnick while he was held in the San Diego jail, but we first recount the events which preceded it. Minnick was arrested on Friday, August 22, 1986. Petitioner testified that he was mistreated by local police during and after the arrest. The day following the arrest, Saturday, two Federal Bureau of Investigation (FBI) agents came to the jail to interview him. Petitioner testified that he refused to go to the interview, but was told he would "have to go down or else." App. 45. The FBI report indicates that the agents read petitioner his *Miranda* warnings, and that he acknowledged he understood his rights. He refused to sign a rights waiver form, however, and said he would not answer "very many" questions. Minnick told the agents about the jailbreak and the flight, and described how Dyess threatened and beat him. Early in the interview, he sobbed "[i]t was my life or theirs," but otherwise he hesitated to tell what happened at the trailer. The agents reminded him he did not have to answer questions without a lawyer present. According to the report, "Minnick stated 'Come back Monday when I have a lawyer,' ***149** and stated that he would make a more complete statement then with his lawyer present." App. 16. The FBI interview ended.

After the FBI interview, an appointed attorney met with petitioner. Petitioner spoke with the lawyer on two or three occasions, though it is not clear from the record whether all of these conferences were in person.

On Monday, August 25, Deputy Sheriff J.C. Denham of Clarke County, Mississippi, came to the San Diego jail to question Minnick. Minnick testified that his jailers again told him he would "have to talk" to Denham ****489** and that he "could not refuse." *Id.,* at 45. Denham advised petitioner of his rights, and petitioner again declined to sign a rights waiver form. Petitioner told Denham about the escape and then proceeded to describe the events at the mobile home. According to petitioner, Dyess jumped out of the mobile home and shot the first of the two victims, once in the back with a shotgun and once in the head with a pistol. Dyess then handed the pistol to petitioner and ordered him to shoot the other victim, holding the shotgun on petitioner until he did so. Petitioner also said that when the two girls arrived, he talked Dyess out of raping or otherwise hurting them.

Minnick was tried for murder in Mississippi. He moved to suppress all statements given to the FBI or other police officers, including Denham. The trial court denied the motion with respect to petitioner's statements to Denham, but

suppressed his other statements. Petitioner was convicted on two counts of capital murder and sentenced to death.

On appeal, petitioner argued that the confession to Denham was taken in violation of his rights to counsel under the Fifth and Sixth Amendments. The Mississippi Supreme Court rejected the claims. With respect to the Fifth Amendment aspect of the case, the court found "the *Edwards* bright-line rule as to initiation" inapplicable. 551 So.2d 77, 83 (1988). Relying on language in *Edwards* indicating that the bar on interrogating the accused after a request for counsel ***150** applies " 'until counsel has been made available to him,' " *ibid.,* quoting *Edwards v. Arizona, supra,* 451 U.S., at 484–485, 101 S.Ct., at 1885, the court concluded that "[s]ince counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied." 551 So.2d, at 83. The court also rejected the Sixth Amendment claim, finding that petitioner waived his Sixth Amendment right to counsel when he spoke with Denham. *Id.,* at 83–85. We granted certiorari, 495 U.S. 903, 110 S.Ct. 1921, 109 L.Ed.2d 285 (1990), and, without reaching any Sixth Amendment implications in the case, we decide that the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel.

In *Miranda v. Arizona, supra,* 384 U.S., at 474, 86 S.Ct., at 1627, we indicated that once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present"; at that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Edwards* gave force to these admonitions, finding it "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 451 U.S., at 485, 101 S.Ct., at 1885. We held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.,* at 484, 101 S.Ct., at 1884–1885. Further, an accused who requests an attorney, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.,* at 484–485, 101 S.Ct., at 1885.

Edwards is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey,* 494 U.S. 344, 350, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990). ***151** See also *Smith v. Illinois,* 469 U.S. 91, 98, 105 S.Ct. 490, 494, 83 L.Ed.2d 488 (1984). The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections ****490** of *Miranda* in practical and straightforward terms.

The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application. We have confirmed that the *Edwards* rule provides " 'clear and unequivocal' guidelines to the law enforcement profession." *Arizona v. Roberson,* 486 U.S. 675, 682, 108 S.Ct. 2093, 2098, 100 L.Ed.2d 704 (1988). Cf. *Moran v. Burbine,* 475 U.S. 412, 425–426, 106 S.Ct. 1135, 1142–1144, 89 L.Ed.2d 410 (1986). Even before *Edwards,* we noted that *Miranda*'s "relatively rigid requirement that interrogation must cease upon the accused's request for an attorney ... has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare v. Michael C.,* 442 U.S. 707, 718, 99 S.Ct. 2560, 2568, 61 L.Ed.2d 197 (1979). This pre-*Edwards* explanation applies as well to *Edwards* and its progeny. *Arizona v. Roberson, supra,* 486 U.S., at 681–682, 108 S.Ct., at 2098.

The Mississippi Supreme Court relied on our statement in *Edwards* that an accused who invokes his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him...." 451 U.S., at 484–485, 101 S.Ct., at 1885. We do not interpret this language to mean, as the Mississippi court thought, that the protection of *Edwards* terminates once counsel has consulted with the suspect. In ***152** context, the requirement that counsel be "made available" to the accused refers to more than an opportunity to consult with an attorney outside the interrogation room.

In *Edwards,* we focused on *Miranda*'s instruction that when the accused invokes his right to counsel, "the interrogation must cease until an attorney is *present,*" 384 U.S., at 474, 86 S.Ct., at 1628 (emphasis added), agreeing with Edwards' contention that he had not waived his right "to have counsel *present* during custodial interrogation." 451 U.S., at 482, 101 S.Ct., at 1883 (emphasis added). In the sentence preceding the language quoted by the Mississippi Supreme Court, we referred to the "right to have counsel *present* during custodial interrogation," and in the sentence following, we again quoted the phrase " 'interrogation must cease until an attorney is *present* ' " from *Miranda.* 451 U.S., at 484–485, 101 S.Ct., at 1885 (emphasis added). The full sentence relied on by the Mississippi Supreme Court, moreover, says: "We further hold that an accused, such as Edwards, *having expressed his desire to deal with the police only through counsel,* is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Ibid.* (emphasis added).

Our emphasis on counsel's *presence* at interrogation is not unique to *Edwards.* It derives from *Miranda,* where we said that in the cases before us "[t]he presence of counsel ... would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." 384 U.S., at 466, 86 S.Ct., at 1623. See *Fare v. Michael C., supra,* 442 U.S., at 719, 99 S.Ct., at 2568. Our cases following *Edwards* have interpreted the decision to mean that the authorities may not initiate questioning of the accused in counsel's absence. Writing for a plurality of the Court, for instance, then-Justice REHNQUIST described the holding of ****491 *153** *Edwards* to be "that subsequent incriminating statements made *without* [*Edwards'*] *attorney present* violated the rights secured to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution." *Oregon v. Bradshaw,* 462 U.S. 1039, 1043, 103 S.Ct. 2830, 2833, 77 L.Ed.2d 405 (1983) (emphasis added). See also *Arizona v. Roberson, supra,* 486 U.S., at 680, 108 S.Ct., at 2097 ("The rule of the *Edwards* case came as a corollary to *Miranda*'s admonition that '[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present' "); *Shea v. Louisiana,* 470 U.S. 51, 52, 105 S.Ct. 1065, 1066, 84 L.Ed.2d 38 (1985) ("In *Edwards v. Arizona, ...* this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present—after he requested an attorney"). These descriptions of *Edwards'* holding are consistent with our statement that "[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny." *Patterson v. Illinois,* 487 U.S. 285, 291, 108 S.Ct. 2389, 2394, 101 L.Ed.2d 261 (1988). In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. 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.

We consider our ruling to be an appropriate and necessary application of the *Edwards* rule. A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is prolonged. The case before us well illustrates the pressures, and abuses, that may be concomitants of custody. Petitioner testified that though he resisted, he was required to submit to both the FBI and the ***154** Denham interviews. In the latter instance, the compulsion to submit to interrogation followed petitioner's unequivocal request during the FBI interview that questioning cease until counsel was present. The case illustrates also that consultation is not always effective in instructing the suspect of his rights. One plausible interpretation of the record is that petitioner thought he could keep his admissions out of evidence by refusing to sign a formal waiver of rights. If the authorities had complied with Minnick's request to have counsel present during interrogation, the attorney could have corrected Minnick's misunderstanding, or indeed counseled him that he need not make a statement at all. We decline to remove protection from police-initiated questioning based on isolated consultations with counsel who is absent when the interrogation resumes.

The exception to *Edwards* here proposed is inconsistent with *Edwards'* purpose to protect the suspect's right to have counsel present at custodial interrogation. It is inconsistent as well with *Miranda,* where we specifically rejected respondent's theory that the opportunity to consult with one's attorney would substantially counteract the compulsion created by custodial interrogation. We noted in *Miranda* that "[e]ven preliminary advice given to the accused by his own attorney

can be swiftly overcome by the secret interrogation process. Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." 384 U.S., at 470, 86 S.Ct., at 1625 (citation omitted).

The exception proposed, furthermore, would undermine the advantages flowing ****492** from *Edwards'* "clear and unequivocal" character. Respondent concedes that even after consultation with counsel, a second request for counsel should reinstate the *Edwards* protection. We are invited by this formulation to adopt a regime in which *Edwards'* protection could pass in and out of existence multiple times prior to arraignment, ***155** at which point the same protection might reattach by virtue of our Sixth Amendment jurisprudence, see *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). Vagaries of this sort spread confusion through the justice system and lead to a consequent loss of respect for the underlying constitutional principle.

In addition, adopting the rule proposed would leave far from certain the sort of consultation required to displace *Edwards.* Consultation is not a precise concept, for it may encompass variations from a telephone call to say that the attorney is en route, to a hurried interchange between the attorney and client in a detention facility corridor, to a lengthy in-person conference in which the attorney gives full and adequate advice respecting all matters that might be covered in further interrogations. And even with the necessary scope of consultation settled, the officials in charge of the case would have to confirm the occurrence and, possibly, the extent of consultation to determine whether further interrogation is permissible. The necessary inquiries could interfere with the attorney-client privilege.

Added to these difficulties in definition and application of the proposed rule is our concern over its consequence that the suspect whose counsel is prompt would lose the protection of *Edwards,* while the one whose counsel is dilatory would not. There is more than irony to this result. There is a strong possibility that it would distort the proper conception of the attorney's duty to the client and set us on a course at odds with what ought to be effective representation.

Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system. It does not detract from this principle, however, to insist that neither admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause. The *Edwards* rule sets forth a specific standard to fulfill these purposes, and we have declined ***156** to confine it in other instances. See *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). It would detract from the efficacy of the rule to remove its protections based on consultation with counsel.

Edwards does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities; but that is not the case before us. There can be no doubt that the interrogation in question was initiated by the police; it was a formal interview which petitioner was compelled to attend. Since petitioner made a specific request for counsel before the interview, the police-initiated interrogation was impermissible. Petitioner's statement to Denham was not admissible at trial.

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SOUTER took no part in the consideration or decision of this case.

Justice SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

The Court today establishes an irrebuttable presumption that a criminal suspect, after invoking his *Miranda* right to counsel, can *never* validly waive that right during any police-initiated encounter, even after the suspect has been provided multiple *Miranda* warnings and has actually consulted his attorney. This holding builds on foundations already established in ****493** *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), but "the rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion." *Arizona v. Roberson,* 486 U.S. 675, 688, 108 S.Ct. 2093, 2101–2102, 100 L.Ed.2d 704 (1988) (KENNEDY, J., dissenting). Because I see no justification for applying the *Edwards* irrebuttable presumption when a criminal suspect has actually consulted with his attorney, I respectfully dissent.

***157** I

Some recapitulation of pertinent facts is in order, given the Court's contention that "[t]he case before us well illustrates the pressures, and abuses, that may be concomitants of custody." *Ante,* at 491. It is undisputed that the FBI agents who first interviewed Minnick on Saturday, August 23, 1986, advised him of his *Miranda* rights before any questioning began. Although he refused to sign a waiver form, he agreed to talk to the agents, and described his escape from prison in Mississippi and the ensuing events. When he came to what happened at the trailer, however, Minnick hesitated. The FBI agents then reminded him that he did not have to answer questions without a lawyer present. Minnick indicated that he would finish his account on Monday, when he had a lawyer, and the FBI agents terminated the interview forthwith.

Minnick was then provided with an attorney, with whom he consulted several times over the weekend. As Minnick testified at a subsequent suppression hearing:

> "I talked to [my attorney] two different times and—it might have been three different times.... He told me that first day that he was my lawyer and that he was appointed to me and to not to talk to nobody and not tell nobody nothing and to not sign no waivers and not sign no extradition papers or sign anything and that he was going to get a court order to have any of the police—I advised him of the FBI talking to me and he advised me not to tell anybody anything that he was going to get a court order drawn up to restrict anybody talking to me outside of the San Diego Police Department." App. 46–47.

On Monday morning, Minnick was interviewed by Deputy Sheriff J.C. Denham, who had come to San Diego from Mississippi. Before the interview, Denham reminded Minnick of his *Miranda* rights. Minnick again refused to sign a ***158** waiver form, but he did talk with Denham and did not ask for his attorney. As Minnick recalled at the hearing, he and Denham

> "went through several different conversations about—first, about how everybody was back in the county jail and what everybody was doing, had he heard from Mama and had he went and talked to Mama and had he seen my brother, Tracy, and several different other questions pertaining to such things as that. And, we went off into how the escape went down at the county jail...." App. 50.

Minnick then proceeded to describe his participation in the double murder at the trailer.

Minnick was later extradited and tried for murder in Mississippi. Before trial, he moved to suppress the statements he had given the FBI agents and Denham in the San Diego jail. The trial court granted the motion with respect to the statements made to the FBI agents, but ordered a hearing on the admissibility of the statements made to Denham. After receiving testimony from both Minnick and Denham, the court concluded that Minnick's confession had been "freely and voluntarily given from the evidence beyond a reasonable doubt," *id.,* at 25, and allowed Denham to describe Minnick's confession to the jury.

The Court today reverses the trial court's conclusion. It holds that, because Minnick had asked for counsel during the interview with the FBI agents, he could not—as a matter of law—validly waive the right to have counsel present during the conversation ****494** initiated by Denham. That Minnick's original request to see an attorney had been honored, that Minnick had consulted with his attorney on several occasions, and that the attorney had specifically warned Minnick not to speak to the authorities, are irrelevant. That Minnick was familiar with the criminal justice system in general or *Miranda* warnings in particular (he had previously been convicted of robbery in Mississippi and assault with a deadly ***159** weapon in California) is also beside the point. The confession must be suppressed, not because it was "compelled," nor even because it was obtained from an individual who could realistically be assumed to be unaware of his rights, but simply because this Court sees fit to prescribe as a "systemic assuranc[e]," *ante,* at 492, that a person in custody who has once asked for counsel cannot thereafter be approached by the police unless counsel is present. Of course the Constitution's proscription of compelled testimony does not remotely authorize this incursion upon state practices; and even our recent precedents are not a valid excuse.

II

In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), this Court declared that a criminal suspect has a right to have counsel present during custodial interrogation, as a prophylactic assurance that the "inherently compelling pressures," *id.,* at 467, 86 S.Ct., at 1624, of such interrogation will not violate the Fifth Amendment. But *Miranda* did not hold that these "inherently compelling

pressures" precluded a suspect from waiving his right to have counsel present. On the contrary, the opinion recognized that a State could establish that the suspect "knowingly and intelligently waived ... his right to retained or appointed counsel." *Id.,* at 475, 86 S.Ct., at 1628. For this purpose, the Court expressly adopted the "high standar[d] of proof for the waiver of constitutional rights," *ibid.,* set forth in *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

The *Zerbst* waiver standard, and the means of applying it, are familiar: Waiver is "an intentional relinquishment or abandonment of a known right or privilege," *id.,* at 464, 58 S.Ct., at 1023, and whether such a relinquishment or abandonment has occurred depends "in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused," *ibid.* We have applied the *Zerbst* approach in many contexts where a State bears the burden of showing a waiver of constitutional criminal ***160** procedural rights. See, *e.g., Faretta v. California,* 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975) (right to the assistance of counsel at trial); *Brookhart v. Janis,* 384 U.S. 1, 4, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314 (1966) (right to confront adverse witnesses); *Adams v. United States ex rel. McCann,* 317 U.S. 269, 275–280, 63 S.Ct. 236, 240–242, 87 L.Ed. 268 (1942) (right to trial by jury).

Notwithstanding our acknowledgment that *Miranda* rights are "not themselves rights protected by the Constitution but ... instead measures to insure that the right against compulsory self-incrimination [is] protected," *Michigan v. Tucker,* 417 U.S. 433, 444, 94 S.Ct. 2357, 2364, 41 L.Ed.2d 182 (1974), we have adhered to the principle that nothing less than the *Zerbst* standard for the waiver of constitutional rights applies to the waiver of *Miranda* rights. Until *Edwards,* however, we refrained from imposing on the States a *higher* standard for the waiver of *Miranda* rights. For example, in *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), we rejected a proposed irrebuttable presumption that a criminal suspect, after invoking the *Miranda* right to remain silent, could not validly waive the right during any subsequent questioning by the police. In *North Carolina v. Butler,* 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979), we rejected a proposed rule that waivers of *Miranda* ****495** rights must be deemed involuntary absent an explicit assertion of waiver by the suspect. And in *Fare v. Michael C.,* 442 U.S. 707, 723–727, 99 S.Ct. 2560, 2570–2573, 61 L.Ed.2d 197 (1979), we declined to hold that waivers of *Miranda* rights by juveniles are *per se* involuntary.

Edwards, however, broke with this approach, holding that a defendant's waiver of his *Miranda* right to counsel, made in the course of a police-initiated encounter after he had requested counsel but before counsel had been provided, was *per se* involuntary. The case stands as a solitary exception to our waiver jurisprudence. It does, to be sure, have the desirable consequences described in today's opinion. In the narrow context in which it applies, it provides 100% assurance against confessions that are "the result of coercive pressures," *ante,* at 489; it " 'prevent[s] police from badgering a ***161** defendant,' " *ante,* at 489 (quoting *Michigan v. Harvey,* 494 U.S. 344, 350, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990)); it "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness," *ante,* at 489; and it provides " ' "clear and unequivocal" guidelines to the law enforcement profession,' " *ibid.* (quoting *Arizona v. Roberson,* 486 U.S., at 682, 108 S.Ct., at 2098). But so would a rule that simply excludes all confessions by all persons in police custody. The value of any prophylactic rule (assuming the authority to adopt a prophylactic rule) must be assessed not only on the basis of what is gained, but also on the basis of what is lost. In all other contexts we have thought the above-described consequences of abandoning *Zerbst* outweighed by " 'the need for police questioning as a tool for effective enforcement of criminal laws,' " *Moran v. Burbine,* 475 U.S. 412, 426, 106 S.Ct. 1135, 1143, 89 L.Ed.2d 410 (1986). "Admissions of guilt," we have said, "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Ibid.* (citation omitted).

III

In this case, of course, we have not been called upon to reconsider *Edwards,* but simply to determine whether its irrebuttable presumption should continue after a suspect has actually consulted with his attorney. Whatever justifications might support *Edwards* are even less convincing in this context.

Most of the Court's discussion of *Edwards*—which stresses repeatedly, in various formulations, the case's emphasis upon the "right 'to have counsel *present* during custodial interrogation,' " *ante,* at 490, quoting 451 U.S., at 482, 101 S.Ct., at 1883 (emphasis added by the Court)—is beside the point. The existence and the importance of the *Miranda*-created right "to have counsel *present*" are unquestioned

here. What *is* questioned is why a State should not be given the opportunity to prove (under *Zerbst*) that the right was *voluntarily waived* by a suspect who, after having been read his *Miranda* rights twice and ***162** having consulted with counsel at least twice, chose to speak to a police officer (and to admit his involvement in two murders) without counsel present.

Edwards did not assert the principle that no waiver of the *Miranda* right "to have counsel *present*" is possible. It simply adopted the presumption that no waiver is *voluntary* in certain circumstances, and the issue before us today is how broadly those circumstances are to be defined. They should not, in my view, extend beyond the circumstances present in *Edwards* itself—where the suspect in custody asked to consult an attorney and was interrogated before that attorney had ever been provided. In those circumstances, the *Edwards* rule rests upon an assumption similar to that of *Miranda* itself: that when a suspect in police custody is first questioned he is likely to be ignorant of his rights and to feel isolated in a hostile environment. This likelihood is thought to justify special protection against unknowing or coerced waiver of rights. After a suspect has seen his request for an ****496** attorney honored, however, and has actually spoken with that attorney, the probabilities change. The suspect then knows that he has an advocate on his side, and that the police will permit him to consult that advocate. He almost certainly also has a heightened awareness (above what the *Miranda* warning itself will provide) of his right to remain silent—since at the earliest opportunity "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." *Watts v. Indiana,* 338 U.S. 49, 59, 69 S.Ct. 1347, 1358, 93 L.Ed. 1801 (1949) (opinion of Jackson, J.).

Under these circumstances, an irrebuttable presumption that any police-prompted confession is the result of ignorance of rights, or of coercion, has no genuine basis in fact. After the first consultation, therefore, the *Edwards* exclusionary rule should cease to apply. Does this mean, as the Court implies, that the police will thereafter have license to "badger" the suspect? Only if all one means by "badger" is asking, without such insistence or frequency as would constitute coercion, ***163** whether he would like to reconsider his decision not to confess. Nothing in the Constitution (the only basis for our intervention here) prohibits such inquiry, which may often produce the desirable result of a voluntary confession. If and when post consultation police inquiry becomes so protracted or threatening as to constitute coercion, the *Zerbst* standard will afford the needed protection.

One should not underestimate the extent to which the Court's expansion of *Edwards* constricts law enforcement. Today's ruling, that the invocation of a right to counsel permanently prevents a police-initiated waiver, makes it largely impossible for the police 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. Many persons in custody will invoke the *Miranda* right to counsel during the first interrogation, so that the permanent prohibition will attach at once. Those who do not do so will almost certainly request or obtain counsel at arraignment. We have held that a general request for counsel, after the Sixth Amendment right has attached, also triggers the *Edwards* prohibition of police-solicited confessions, see *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), and I presume that the perpetuality of prohibition announced in today's opinion applies in that context as well. "Perpetuality" is not too strong a term, since, although the Court rejects one logical moment at which the *Edwards* presumption might end, it suggests no alternative. In this case Minnick was reapproached by the police three days after he requested counsel, but the result would presumably be the same if it had been three months, or three years, or even three decades. This perpetual irrebuttable presumption will apply, I might add, not merely to interrogations involving the original crime, but to those involving other subjects as well. See *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).

Besides repeating the uncontroverted proposition that the suspect has a "right to have counsel *present,*" the Court stresses the clarity and simplicity that are achieved by today's ***164** holding. Clear and simple rules are desirable, but only in pursuance of authority that we possess. We are authorized by the Fifth Amendment to exclude confessions that are "compelled," which we have interpreted to include confessions that the police obtain from a suspect in custody without a knowing and voluntary waiver of his right to remain silent. Undoubtedly some bright-line rules can be adopted to implement that principle, marking out the situations in which knowledge or voluntariness cannot possibly be established—for example, a rule excluding confessions obtained after five hours of continuous interrogation. But a rule excluding all confessions that follow upon even the slightest police inquiry cannot conceivably be justified on this basis. It does not rest upon a reasonable prediction that all such confessions, or even

most such ****497** confessions, will be unaccompanied by a knowing and voluntary waiver.

It can be argued that the same is true of the category of confessions excluded by the *Edwards* rule itself. I think that is so, but, as I have discussed above, the presumption of involuntariness is at least more plausible for that category. There is, in any event, a clear and rational line between that category and the present one, and I see nothing to be said for expanding upon a past mistake. Drawing a distinction between police-initiated inquiry before consultation with counsel and police-initiated inquiry after consultation with counsel is assuredly more reasonable than other distinctions *Edwards* has already led us into—such as the distinction between police-initiated inquiry after assertion of the *Miranda* right to remain silent, and police-initiated inquiry after assertion of the *Miranda* right to counsel, see Kamisar, The *Edwards* and *Bradshaw* Cases: The Court Giveth and the Court Taketh Away, in 5 The Supreme Court: Trends and Developments 153, 157 (J. Choper, Y. Kamisar, & L. Tribe eds. 1984) ("[E]ither *Mosley* was wrongly decided or *Edwards* was"); or the distinction between what is needed to prove waiver of the ***165** *Miranda* right to have counsel present and what is needed to prove waiver of rights found in the Constitution.

The rest of the Court's arguments can be answered briefly. The suggestion that it will either be impossible or ethically impermissible to determine whether a "consultation" between the suspect and his attorney has occurred is alarmist. Since, as I have described above, the main purpose of the consultation requirement is to eliminate the suspect's feeling of isolation and to assure him the presence of legal assistance, any discussion between him and an attorney whom he asks to contact, or who is provided to him, in connection with his arrest, will suffice. The precise content of the discussion is irrelevant.

As for the "irony" that "the suspect whose counsel is prompt would lose the protection of *Edwards,* while the one whose counsel is dilatory would not," *ante,* at 492: There seems to me no irony in applying a special protection only when it is needed. The *Edwards* rule is premised on an (already tenuous) assumption about the suspect's psychological state, and when the event of consultation renders that assumption invalid the rule should no longer apply. One searching for ironies in the state of our law should consider, first, the irony created by *Edwards* itself: The suspect in custody who says categorically "I do not wish to discuss this matter" can be asked to change his mind; but if he should say, more tentatively, "I do not think I should discuss this matter without my attorney present" he can no longer be approached. To that there is added, by today's decision, the irony that it will be far harder for the State to establish a knowing and voluntary waiver of Fifth Amendment rights by a prisoner who has already consulted with counsel than by a newly arrested suspect.

Finally, the Court's concern that "*Edwards*' protection could pass in and out of existence multiple times," *ante,* at 492, does not apply to the resolution of the matter I have proposed. ***166** *Edwards* would cease to apply, permanently, once consultation with counsel has occurred.

* * *

Today's extension of the *Edwards* prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement. This newest tower, according to the Court, is needed to avoid "inconsisten[cy] with [the] purpose" of *Edwards'* prophylactic rule, *ante,* at 491, which was needed to protect *Miranda*'s prophylactic right to have counsel present, which was needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution.

It seems obvious to me that, even in *Edwards* itself but surely in today's decision, we have gone far beyond any genuine concern ****498** about suspects who do not *know* their right to remain silent, or who have been *coerced* to abandon it. Both holdings are explicable, in my view, only as an effort to protect suspects against what is regarded as their own folly. The sharp-witted criminal would know better than to confess; why should the dull-witted suffer for his lack of mental endowment? Providing him an attorney at every stage where he might be induced or persuaded (though not coerced) to incriminate himself will even the odds. Apart from the fact that this protective enterprise is beyond our authority under the Fifth Amendment or any other provision of the Constitution, it is unwise. The procedural protections of the Constitution protect the guilty as well as the innocent, but it is not their objective to set the guilty free. That some clever criminals may employ those protections to their advantage is poor reason to allow criminals who have not done so to escape justice.

Thus, even if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it;

a rule that foolish mistakes do not count would leave most offenders ***167** not only unconvicted but undetected. More fundamentally, however, it is wrong, and subtly corrosive of our criminal justice system, to regard an honest confession as a "mistake." While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, "admissio[n] of guilt ..., if not coerced, [is] inherently desirable," *United States v. Washington,* 431 U.S. 181, 187, 97 S.Ct. 1814, 1818, 52 L.Ed.2d 238 (1977), because it advances the goals of both "justice *and* rehabilitation," *Michigan v. Tucker,* 417 U.S., at 448, n. 23, 94 S.Ct., at 2366, n. 23 (emphasis added). A confession is rightly regarded by the Sentencing Guidelines as warranting a reduction of sentence, because it "demonstrates a recognition and affirmative acceptance of personal responsibility for ... criminal conduct," U.S. Sentencing Commission, Guidelines Manual § 3E1.1 (1988), which is the beginning of reform. We should, then, rejoice at an honest confession, rather than pity the "poor fool" who has made it; and we should regret the attempted retraction of that good act, rather than seek to facilitate and encourage it. To design our laws on premises contrary to these is to abandon belief in either personal responsibility or the moral claim of just government to obedience. Cf. Caplan, Questioning *Miranda,* 38 Vand.L.Rev. 1417, 1471–1473 (1985). Today's decision is misguided, it seems to me, in so readily exchanging, for marginal, super-*Zerbst* protection against genuinely compelled testimony, investigators' ability to urge, or even ask, a person in custody to do what is right.

All Citations

498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489, 59 USLW 4037

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

53 Cal.4th 735
Supreme Court of California

The PEOPLE, Plaintiff and Respondent,

v.

Sonny ENRACA, Defendant and Appellant.

No. S080947
|
Feb. 6, 2012.
|
Rehearing Denied March 14, 2012.
|
Certiorari Denied Oct. 1, 2012.
|
See 133 S.Ct. 225.

Synopsis

Background: Defendant was convicted in the Superior Court, Riverside County, No. CR60333, W. Charles Morgan, J., of assault with a deadly weapon and two counts of first degree murder with special circumstance of multiple murder, and was sentenced to death. Appeal was automatic.

Holdings: The Supreme Court, Corrigan, J., held that:

police officer did not improperly resume interrogation after defendant invoked his right to counsel;

evidence of heat of passion was insufficient for jury instruction;

evidence that provocation negated deliberation or premeditation was insufficient for jury instruction;

argument that jury should vote for death penalty out of concern for feelings of victims' families was harmless error; and

prosecutor did not improperly urge jury to consider defendant's lack of remorse as aggravating circumstance.

Affirmed.

Attorneys and Law Firms

*****123** Paul J. Spiegelman, under appointment by the Supreme Court, for Defendant and Appellant.

John T. Philipsborn, San Francisco, for the Republic of the Philippines as Amicus Curiae on behalf of Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Holly D. Wilkens and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

Opinion

*****124** CORRIGAN, J.

***740** ****549** In May 1999, defendant Sonny Enraca was convicted of the first degree murders[1] of Ignacio Hernandez and Dedrick Gobert, with a multiple-murder special-circumstance finding.[2] Defendant was also convicted of assault with a deadly weapon[3] on Jenny Hyon, with a great bodily injury finding.[4] Firearm use[5] and criminal street gang[6] findings were made as to all three counts. Defendant was sentenced to death.[7]

This appeal is automatic. We affirm the judgment.

***741 I. FACTUAL BACKGROUND**

A. Guilt Phase

1. Prosecution Evidence

The victims were shot during a gang fight in November 1994. Associates of both defendant and the victims testified for the prosecution. Defendant's companions identified him as the shooter, but the victims' companions were unable to do so. Defendant admitted to both his friends and the police that he shot the victims.

a. Testimony of the Victims' Companions

Late one evening Maile Gilleres and Jenny Hyon accompanied Ignacio Hernandez and Dedrick Gobert to the site of illegal street races. During one race Hernandez's car was cut off by an "Asian"[8] driver. Both men got out of their cars and fought. At least 10 other Asians surrounded Hernandez, but when the police arrived, everyone drove away.

Gobert, Hernandez, Hyon, and Gilleres drove to a nearby pizza parlor. When they got out of their cars, the same group of Asians approached them and the two groups cursed at one another. One of the Asians, whom Gilleres described as a Filipino,[9] pointed a gun at Hyon. He put the weapon away when a slightly older Asian man said something to him. Gilleres told the older man that she would get her group to leave if he and his friends did the same. He nodded in agreement and the two groups parted.

Gobert got into his car and drove up and down the street for several minutes. A different group of 15 to 35 Asians, dressed in red, started chanting, "Blood, blood, blood." Gilleres assumed they were claiming to be members of the Bloods gang. Gobert parked and approached the group. Making hand signs indicating he was a member of the Crips gang, Gobert said to them, "What's up, cuz?"

*****125** A gang expert testified that it would be an insult for a member of a Crips gang to ****550** address members of a Bloods gang as "cuz" because the term is used to refer to Crips. He further testified they would have lost credibility in the gang culture if they had failed to avenge such an insult. Therefore, an attack ***742** on Gobert carried out under these circumstances would be undertaken for the benefit of defendant's Akraho Boyz Crazzys (ABC) gang.

The Asians immediately charged Gobert, threw him to the ground, and beat him. As Hernandez and Gilleres tried to shield him, gunshots rang out. Gilleres saw an Asian man shooting down at Hernandez. Hyon was struck by a bullet. As a result of a neck wound, she was paralyzed from the chest down.

Gilleres did not identify defendant in a pretrial photo lineup. She testified at trial that he was not the person she saw shoot Hernandez. Instead, the shooter appeared to be the person who had pointed a gun at Hyon in the preceding incident. Hyon was unable to identify her assailant. She testified it was possible the shooter was the person who had earlier pointed a gun at her.

b. Testimony of Defendant's Companions

Among the prosecution witnesses were four of defendant's friends: Lester Maliwat, Roger Boring, Eric Garcia, and John Frick. Along with defendant, they were members of the ABC gang, an affiliate of the Bloods. Before driving to the street races that night, they had met at Boring's home, where defendant was living. According to Boring, defendant was "drinking pretty heavily" and "doing speed."[10] Garcia testified that defendant used speed frequently and offered him some that night. According to Maliwat, defendant had a revolver with him.

After the races, the ABC gang members congregated in the parking lot of the pizza parlor. Gobert drove up, approached them, and made hand signs indicating he was a member of the Crips gang. He said, "Fuck you, slobs."[11] According to one witness, he shouted, "I'm not afraid to die." The ABC's, including defendant, just laughed at Gobert because he appeared to be intoxicated and was outnumbered 10 or 20 to one. Then Gobert stuck his hand into his waistband. Thinking he was reaching for a gun, Boring, Maliwat, and the other ABC's rushed him, knocked him down, and kicked him. According to Detective Schultz, Lester Maliwat told him defendant was involved in the fight. A passerby also told Schultz that "the shooter" was involved in the fight and had "gotten off the ground right prior to the shooting."

***743** Boring testified that he saw defendant shoot Gobert. When Hernandez tried to shield Gobert with his body, defendant pulled him up and shot him, also. When Jenny Hyon kicked defendant in the back, he turned around and shot her.[12]

Maliwat testified that he ran away when he heard someone yell, "He has a gun." From his car Maliwat saw defendant shoot a man lying on the ground. He could not see whether the victim was Gobert or Hernandez. Maliwat also saw a girl lying on *****126** the ground. As Maliwat began to drive away, defendant jumped in the car. Maliwat asked him why he shot the girl. Defendant said, "Fuck them. They deserved it."[13]

Eric Garcia saw the fight and heard the shots. Another participant told Garcia that defendant was the shooter. Garcia confronted defendant, demanding to know why he did it.

Defendant initially refused to answer, but finally replied, "Maybe they deserved it." Defendant gave Garcia a revolver but reclaimed it a few days later. Defendant then gave the gun to another ABC member, Mike Betts. Defendant later called Garcia from jail and said he had confessed. He said that ****551** he would be a man about it and did not want the other ABC's involved.

c. Defendant's Confession

Following his arrest defendant waived his *Miranda* rights.[14] The interrogation ended when defendant subsequently asked for a lawyer. However, during the booking process, defendant waived his rights again and confessed to the booking officer, Detective Spidle. Defendant now contends his second waiver was not knowing and intelligent. The facts relevant to this claim will be set forth below. (*Post,* pt. II.A.)

Defendant told Spidle the following. After the races, Gobert[15] drove up and skidded to a halt in front of the ABC's. After apparently taking something out of his car, Gobert walked up to them. He was "claiming some crip gang" and "talking all sorts of shit." Because they vastly outnumbered Gobert, the ABC's "just started giggling." Gilleres told Gobert, "[K]ick back, that's not ***744** them." However, Gobert challenged the gang and lifted up his shirt as if he had a gun. After an ABC gang member shouted, "[H]e's reaching, he's reaching," someone punched Gobert, and they fell to the ground. When the other ABC's rushed Gobert, his companions Ignacio Hernandez, Jenny Hyon, and Maile Gilleres came to his defense. Defendant told Spidle that he tried to "break it up."

Hernandez shielded Gobert's body with his own. Defendant grabbed Hernandez by the hair, pulled his head back, and asked him where he was from. When Hernandez hit his hand, defendant shot him with a .38–caliber revolver. Hernandez moved and defendant shot him again. Defendant claimed that before Hernandez hit him he had planned to shoot in the air to break up the fight. Defendant also claimed he was afraid Hernandez was about to shoot him with the gun that, defendant believed, Gobert was carrying. He admitted, however, that he never saw a gun.

After Gobert cursed at him, defendant also shot Gobert. Defendant claimed he was also afraid Gobert was about to grab a gun, although again he had not seen one.

Jenny Hyon pushed defendant, saying, "[F]uck you asshole, what are you doing." She was about to hit him. Defendant pointed his gun at her and started walking backwards. When Hyon charged him, defendant shot her. He intended to fire in *****127** the air, "like right by her or ... over her head."

Defendant jumped into Lester Maliwat's car. As Maliwat drove back to his house, defendant threw the gun out the window.

d. Forensic Evidence

When sheriff's deputies arrived at the scene Hernandez and Gobert were dead. Autopsies revealed they were shot from behind and died from their wounds. Hernandez was shot twice. One bullet entered his back and passed through his heart and lungs. The other entered the back of his head, went through his brain, and lodged underneath the skin of his forehead. Abrasions on Hernandez's forehead suggested he was shot as he lay facedown on a hard surface that blocked the bullet's exit. Gobert was shot once, in the back of the head. According to eyewitness Alfred Ward, defendant shot Jenny Hyon "from behind" as well. The bullets recovered from Hernandez and Gobert were .38 caliber.

2. Defense Evidence

The defense called several eyewitnesses. Daryl Arquero, John Frick, and Cedrick Lopez were or had been members of the ABC gang. According to ***745** Arquero, Gobert claimed to be a Crip and said, "Fuck you, slobs." Frick and Lopez heard Gobert say he was not afraid to die. According to Arquero, Gobert lifted his shirt and displayed a shiny object stuck in his pants. Frick and Lopez saw Gobert make a reaching movement, either lifting up his shirt or reaching inside his ****552** waistband. Arquero exclaimed, "Oh, shit. I think he's got a gun." The ABC's rushed Gobert. Arquero estimated that Gobert was shot two minutes later.[16] All three testified they did not see who the shooter was.

The defense argued that eyewitness descriptions of the shooter's clothing did not match what defendant wore that night. Prosecution witness Lester Maliwat testified that defendant wore dark pants and a light blue shirt. Defense witnesses Marcus Freeman and Alfred Ward testified that the shooter wore a white hooded sweatshirt. However, Freeman said that the shooter put the sweatshirt on immediately

before the shootings. Detective Larry Dejarnett, a prosecution rebuttal witness, testified that Ward told him the shooter wore a black hood and later said he was not sure what color the hood was.[17]

Defendant told Detective Spidle that at the time of the shootings he was "coming down" from two "lines" of "speed" he had taken earlier in the evening. It made him "kind of scared, nervous." Asked how much alcohol he had consumed, defendant told Spidle, "maybe six,"[18] but that he was only "buzzed" because "it takes a lot for me to get drunk."

According to Eric Garcia, defendant showed him some speed that night and asked Garcia whether he wanted to use it with him. Garcia declined. He believed ***128 that defendant took some speed, but he was not certain.

Roger Boring testified that defendant "was drinking" that night, but that he did not know whether defendant had "a lot" to drink.

Dr. James Rosenberg, a psychiatrist who also specialized in psychopharmacology, testified for the defense. He had not tested or interviewed defendant. According to Dr. Rosenberg, methamphetamine use can cause very severe disturbances in thinking similar to those associated with paranoid psychosis *746 or manic-depressive illness. "[P]robably the most characteristic would be ... an irrational fear that someone is trying to hurt you." A minor threat may be perceived as a very severe and life-threatening situation. Methamphetamine use is believed to produce these symptoms by releasing "adrenalin-type chemicals." The half-life of methamphetamine is typically 11 hours. However, the effects of methamphetamine intoxication may last much longer, depending on the individual. In Rosenberg's opinion, a hypothetical description based on the facts of this case was consistent with methamphetamine intoxication. While the interactive effect of methamphetamine and alcohol was not well developed in the medical literature, alcohol intoxication would be another factor affecting judgment and impulse control.

B. Penalty Phase

1. Prosecution Evidence

Jenny Hyon testified the bullet that struck her completely severed her spinal cord. As a consequence, she had difficulty breathing, could not tend to her bodily functions, and was confined to a wheelchair. She had no feeling below her chest, except for nearly constant pain in one arm that made sleeping difficult. She worried about who would care for her when her mother and younger sister could no longer do so. "What kills me the most" were the sacrifices her mother had made for her.

Carmen Vera was Ignacio Hernandez's mother. Hernandez was 19 when he was murdered. He was a good boy, and a good student. He was not a gang member, nor did he use drugs. After he died, Vera received notice that he had been accepted to college in a mechanical engineering program. Hernandez's murder deeply grieved Vera and her younger son, Emanuel. Ms. Vera **553 went to a psychiatrist for three years. For two and a half years, unable to bring herself to tell Emanuel of his brother's death, Vera told Emanuel that Hernandez was in New York with her family.

Carolyn Gobert was Dedrick Gobert's mother. He was 19 or 20 when he was murdered. An aspiring actor, Dedrick was in three movies, television shows, and a commercial. Ms. Gobert's whole life was changed by the murder. She was under psychiatric care, her attendance at work suffered, and she withdrew from her friends. Her younger son's performance in school also suffered greatly.

2. Defense Evidence

The defense called witnesses who knew defendant during different periods of his life: (1) Defendant's extended family from the Philippines who cared *747 for him until he was eight; (2) relatives who met defendant when he was 14 and moved to California with his mother and stepfather; and (3) the surrogate families defendant joined when he left home.[19] Defendant's half sister ***129 Lilibeth, who first met him when he was eight, also testified.

Defendant's mother Shirley grew up in the Philippines. When Shirley was 16 she gave birth to Lilibeth, but abandoned her to the care of her sister Pina. A year later, Shirley returned, pregnant with defendant. She consigned him to Pina's care also. Two years later, Shirley returned for Lilibeth, but not defendant.

In addition to defendant, Pina's family included her husband Raymond, their four children, and Raymond's parents "Mamang" and "Tatai." All of them traveled from the Philippines to testify on defendant's behalf. The extended

family provided a caring and affectionate home. Although they were not related to him by blood, Mamang and Tatai treated defendant as if he were their eldest grandson.

When defendant was eight, Shirley returned and took him to Guam, where her husband Robert Harris was in the United States military. Defendant was heartbroken at leaving the only family he had ever known.

According to Lilibeth, Shirley and Robert did not treat defendant like their other children. Shirley said that defendant was the product of rape.[20] Shirley humiliated defendant by telling others of his bedwetting. She also held him up to ridicule for his tendency to twitch and have convulsions.

Robert was physically and emotionally abusive to Shirley and the children. Lilibeth feared Robert might kill her. He broke several of Shirley's bones, and struck defendant with a belt. The police were often summoned. Shirley and the children once sought refuge in a domestic violence shelter. The children were aware that Shirley and Robert had extramarital affairs.

When defendant was in the seventh grade the family moved from Japan to California. In addition to Lilibeth, Robert's mother, sister, and brother described defendant's family life at that time. Robert remained physically abusive. Defendant cried often, missed his grandmother, and wanted to return to the Philippines. Shirley again abandoned her children, leaving for New York. Lilibeth visited Shirley there, but defendant was not welcome.

While still in his middle teens, defendant left home, finding shelter with the families of ABC gang members. Their mothers became surrogate parents ***748** to him. Two of them testified. They loved defendant as a son and he responded in kind, calling them "Mom" or "Mother." He was respectful and helpful. He cooked, did yard work, and cared for the younger children. Defendant assisted at a residential care facility for Alzheimer's patients managed by one of the women.

Dr. Jean F. Nidorf testified as a cultural mental health expert. She based her opinions on interviews with defendant, members of his family, and his friends; police reports; investigative materials prepared by the public defender's office; a videotape and transcript ****554** of defendant's confession to Detective Spidle; and other materials.

In Nidorf's opinion, the ABC gang was a surrogate family, replacing the one defendant lost when he was taken from the Philippines. He lived with the families of gang members, ingratiating himself with their mothers. While defendant reported to Nidorf he felt welcomed, he moved frequently to avoid burdening their hospitality.

Within the gang defendant aspired to a role as peacemaker, moral conscience, and *****130** wise leader. He needed to feel important. He told Nidorf the gang members "needed me." She concluded he was grandiose about his role.

Defendant related that he had been using speed almost every day. In Nidorf's experience, many Asian and Southeast Asian young people are drawn to speed to overcome anxiety about feeling small and weak.

Nidorf thought defendant appeared to express remorse in his videotaped statement to Detective Spidle. "[H]e felt badly about what he had done. He didn't want people to do that anymore. He didn't want people to gangbang. He wanted them to go to church, and I saw that as remorse." Based on her interviews with defendant, she concluded he "sincerely felt that what he did was wrong and that he regretted it."

II. DISCUSSION

A. The Admissibility of Defendant's Confession

As we explain in greater detail below, defendant was advised of his *Miranda* rights, waived them, and agreed to talk to Detectives Schultz and Horton. He denied responsibility for these crimes, then requested counsel. Interrogation stopped. Defendant later initiated a conversation with the booking officer, Detective Spidle, and confessed to him.

Defendant contends his confession should have been suppressed on the following grounds: (A) Schultz continued to interrogate him after he requested counsel. (B) Schultz should have told him that he could consult with ***749** appointed counsel immediately, rather than telling him that counsel would be appointed when he was arraigned. (C) Schultz and Spidle failed to advise him of his rights under the Vienna Convention on Consular Relations (Apr. 24, 1963, 21 U.S.T. 77) and the bilateral consular convention between the United States and the Philippines. Defendant's claims lack merit.

The evidence considered at the suppression hearing consisted of the testimony of Schultz and Spidle and the transcripts of their interviews with defendant.

1. Background

Defendant was arrested several weeks after the shootings. He had been in custody for two hours when questioning began. The officers knew that defendant was born in the Philippines, lived in the United States, and had a "green card." Schultz gave defendant the standard *Miranda* admonitions.[21] Defendant said that he understood his rights and wished to speak to them. Defendant said he read and understood English well. He initialed the boxes on the waiver form indicating that he understood his rights and that, with those rights in mind, wished to speak to the officers. Defendant also signed the form. Schultz did not notify the Philippine consulate of defendant's arrest, nor did he advise defendant of his right to such notification.

The interview lasted 15 to 20 minutes and ended in a confrontation. Schultz told defendant that several eyewitnesses had identified him as the shooter, and that his "only chance in life" was to tell the officers his side of the story. Defendant persisted in proclaiming his innocence and challenged Schultz to produce the witnesses.

*****131** "[Schultz]: I've already talked to them[,] wise guy.

"[Defendant]: Shit.

****555** "[Schultz]: And I'[ve] about had it up to here with you cuz you're full of shit and that's it.

"[Defendant]: Okay, can I get an attorney then, huh?

"[Schultz]: You can get anything you want[,] turn around, you're going to jail for double homicides.

***750** "[Defendant]: Yeah, yeah, yeah.

"[Schultz]: I don't need your yeah, yeah, do you understand me[,] from now on you are to shut your mouth[,] I don't want to hear another word out of you [,] do you understand that?

"[Defendant]: Yes sir.

"[Schultz]: Thank you.

"[Defendant]: Can I ask a question?

"[Schultz]: Only if it's polite.

"[Defendant]: When am I going to see my lawyer[?]

"[Schultz]: I don't know[.] I don't pay for your lawyer, you do.

"[Defendant]: I thought I was going to get appointed one.

"[Schultz]: You can, when you go to court and get arraigned, one will be appointed to represent you. [T]hat's when you can see your lawyer. Now I suggest[ ] for the next 48 hours, that you deeply consider that[.] Is that all clear[?]"

Schultz broke off the interview and turned defendant over to Spidle for booking. Spidle had worked on the case, but had not been part of the interrogation. Schultz told Spidle that defendant had "invoked," which Spidle understood to mean that he had asked for counsel. In addition to photographing and fingerprinting defendant, Spidle permitted him to call his girlfriend.

Throughout the booking interview defendant interrupted Spidle to ask questions or make comments. Defendant asked when he would get a lawyer. Spidle explained that if defendant was eligible, counsel would be appointed for him when he was arraigned, which would occur in 48 to 72 hours. Defendant asked whether a reward had been offered. Spidle replied he was not aware of one. Defendant said, "You know, it's not how it went down." Spidle admonished him, "Once you ask for a lawyer, we're not going to question you any further about how it went down." Defendant asked, "What if I say what happened?" Spidle repeated that he was not allowed to question defendant because he had invoked his right to counsel. However, if defendant wished to make a statement, he would record it and provide it to the prosecutor's office. Defendant said that was what he wanted to do.

***751** Spidle got a tape recorder, turned it on, and said, "[O]kay, what time is it?" Defendant immediately interrupted him to say, "Okay, what I'm going to tell you is that it didn't involve anybody else and I did this." Spidle in turn interrupted defendant to establish for the record that he had been booking defendant, that he had not asked defendant any questions about the shootings, and that defendant had volunteered that he wished to talk about what had happened. Defendant confirmed these statements were accurate. He stated that he

had been advised of his rights and did not need to have them repeated.

"[Spidle]: Okay, and so knowing what your rights are, you want to tell me what happened. [G]o right ahead, lay it out.

"[Defendant]: I want to tell this because I just want to make it clear [that no one else was involved]. I mean I did it and *****132** that's the whole thing, my friends are my friends still no matter what.

"[Spidle]: Okay.

"[Defendant]: ... I just got to face it, I'm caught[,] you know."

The transcript of defendant's confession, which we summarized in the statement of facts (pt. I.A.1.c.), is 35 pages long. At its conclusion the following colloquy occurred.

"[Spidle]: ... I just want to go over this with [you] again. You're telling me this because you wanted to tell me this?

"[Defendant]: Yes.

"[Spidle]: Okay, not because I forced you, or asked you any questions?

"[Defendant]: No, no, no.

****556** "[Spidle]: Okay.

"[Defendant]: I figure you guys already know [so] I might as well let you know the real story."

Spidle asked, "Why did you pick me?" Defendant said that he had chosen to confess to Spidle because the other detectives were "assholes." Spidle had treated him with respect, so he respected Spidle.

Spidle pursued the point. "[S]omewhere down the road someone is going to want to make a big deal that I made you talk or something.

***752** "[Defendant]: No, no.

"[Spidle]: Okay.

"[Defendant]: Even if a lawyer would say that[,] you know[,] you made him talk, I would tell the lawyer that he is wrong."

2. General Principles

The principles of law applicable to defendant's *Miranda* claim are well established.

Questioning remains an important part of any criminal investigation. Police officers may legitimately endeavor to secure a suspect's participation in the interrogation process so long as constitutional safeguards are honored. (See *Miranda, supra,* 384 U.S. at p. 478, 86 S.Ct. 1602.)

Once an in-custody suspect invokes his right to either silence or counsel, interrogation must cease. (*Miranda, supra,* 384 U.S. at pp. 473–474, 86 S.Ct. 1602.) If the right to counsel is invoked, the suspect cannot be interrogated further, unless counsel is provided (*ibid.*) or the suspect reinitiates contact with the police. (*Minnick v. Mississippi* (1990) 498 U.S. 146, 156, 111 S.Ct. 486, 112 L.Ed.2d 489; *Solem v. Stumes* (1984) 465 U.S. 638, 646, 104 S.Ct. 1338, 79 L.Ed.2d 579; *Edwards v. Arizona* (1981) 451 U.S. 477, 485–486, 101 S.Ct. 1880, 68 L.Ed.2d 378; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1122, 23 Cal.Rptr.3d 295, 104 P.3d 98.) Interrogation includes both express questioning and "words or actions ... the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297, fns. omitted.)

"After a suspect has invoked the right to counsel, police officers may nonetheless resume their interrogation if 'the suspect "(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." ' (*Connecticut v. Barrett* (1987) 479 U.S. 523, 527 [107 S.Ct. 828, 93 L.Ed.2d 920]; see also *Smith v. Illinois* (1984) 469 U.S. 91, 95 [105 S.Ct. 490, 83 L.Ed.2d 488]; *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 [103 S.Ct. 2830, 77 L.Ed.2d 405].) The waiver must be ' "knowing and intelligent ... under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." ' *****133** (*Bradshaw, supra,* at p. 1046 [103 S.Ct. 2830], quoting *Edwards* [*v. Arizona* (1981)] 451 U.S. [477,] 486, fn. 9 [101 S.Ct. 1880, 68 L.Ed.2d 378].)" (*People v. Davis* (2009) 46 Cal.4th 539, 596, 94 Cal.Rptr.3d 322, 208 P.3d 78; accord, *People v. Gamache* (2010) 48 Cal.4th 347, 385, 106 Cal.Rptr.3d 771, 227 P.3d 342 (*Gamache*).) The prosecution has the burden of proof on these points. (*Gamache,* at pp. 384–385, 106 Cal.Rptr.3d 771, 227 P.3d 342.)

***753** " 'In reviewing constitutional claims of this nature, it is well established that we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' (*People v. Cunningham* (2001) 25 Cal.4th 926, 992 [108 Cal.Rptr.2d 291, 25 P.3d 519].)" (*People v. Thomas* (2011) 51 Cal.4th 449, 476, 121 Cal.Rptr.3d 521, 247 P.3d 886.)

In denying the motion to suppress, the trial court made the following findings. Defendant was properly advised of his *Miranda* rights, signed a form waiving them, and demonstrated his understanding by later invoking his right to counsel. At that point the interrogation ended. While Spidle was engaged in a legitimate booking process defendant initiated the conversation leading to his confession. Spidle admonished defendant ****557** that Spidle could not question him because defendant had invoked his right to counsel. Nevertheless, defendant wanted to confess and waived his rights. The court concluded that, under the totality of the circumstances, "this is clearly a waiver freely and voluntarily and intelligently made."

(A)

Substantial evidence supports the trial court's findings, including the finding that when Schultz concluded that defendant had invoked his right to counsel, Schultz stopped interrogating defendant. Instead, he told defendant, "from now on you are to shut your mouth[,] I don't want to hear another word out of you[,] do you understand that?" Saying he understood, defendant asked Schultz when he would see his attorney and whether one would be appointed for him. Schultz responded, "You can, when you go to court and get arraigned, one will be appointed to represent you. [T]hat's when you can see your lawyer. Now I suggest[ ] for the next 48 hours, that you deeply consider that[.] Is that all clear[?]" Schultz then turned defendant over to Spidle for booking, informing Spidle that defendant had invoked his right to counsel.

In arguing that Schultz continued to interrogate him after he invoked his right to counsel, defendant relies on a single sentence uttered by Schultz: "Now I suggest[ ] for the next 48 hours, that you deeply consider that[.]" Defendant makes the argument that Schultz admitted on recross-examination that this statement was "calculated to get [defendant] to 'speak with law enforcement without a lawyer being present.' "

Defendant blatantly misstates the record. Schultz did not testify his statement was intended to convince defendant to speak to one of the detectives in ***754** the absence of counsel. Schultz testified that he was encouraging defendant to use the next 48 hours to reflect on his crimes and to reconsider his attitude.[22]

*****134** Moreover, Schultz's intent is not determinative. "In deciding whether police conduct was 'reasonably likely' to elicit an incriminating response from the suspect, we consider primarily the perceptions of the suspect rather than the intent of the police. (*Arizona v. Mauro* [(1987) 481 U.S. 520,] 527 [107 S.Ct. 1931, 95 L.Ed.2d 458]; *Rhode Island v. Innis, supra,* [446 U.S.] at p. 301 [100 S.Ct. 1682].)" (*People v. Davis* (2005) 36 Cal.4th 510, 554, 31 Cal.Rptr.3d 96, 115 P.3d 417.) To determine defendant's likely perception, the statement at issue must be considered in context. Defendant is highly unlikely to have understood Schultz's statement as encouragement to continue or renew the interview. In virtually the same breath Schultz told him in no uncertain terms: "[F]rom now on you are to shut your mouth[,] I don't want to hear another word out of you[,] do you understand that?" Defendant responded, "Yes sir." Moreover, when defendant did seek to initiate a conversation with Spidle about what happened, Spidle admonished him: "Once you ask for a ****558** lawyer, we're not going to question you any further about how it went down." Defendant persisted and asked, "What if I say what happened?" Spidle repeated that questioning was not permitted because of defendant's invocation. Only after defendant confirmed that he wanted to make a statement was the recording made.

Finally, defendant told Spidle why he initiated the conversation. It was not because of Schultz's remark. He manifestly held Schultz in low regard. Defendant spoke to Spidle because "I figure you guys already know [so] I ***755** might as well let you know the real story." He chose to confess to Spidle, rather than Schultz, because Spidle had treated him with respect. He insisted, "Even if a lawyer would say that ... you made him talk, I would tell the lawyer that he is wrong."

In *People v. Sapp* (2003) 31 Cal.4th 240, 2 Cal.Rptr.3d 554, 73 P.3d 433 (*Sapp*), the officer made a similar parting remark after the defendant invoked his right to counsel. The officer "gave defendant his card and told him to 'think about it overnight,' adding that before the homicide investigators

could again talk to defendant with or without an attorney being present, defendant would have to 'get in contact' with them." (*Id.* at p. 264, 2 Cal.Rptr.3d 554, 73 P.3d 433.) We held that Sapp's confession was voluntary. "[W]hen defendant unequivocally told Detective Tye he wanted an attorney, Tye stopped his questioning *****135** and properly advised defendant that none of the homicide investigators could question him unless defendant initiated contact with them. [Citation.] Some 24 hours later, defendant summoned a jail guard and asked for the homicide investigators to come back so he could admit to three murders. [Citation.] Thereafter, he gave investigators a detailed account of the murders and led them to the crime scenes. Defendant was over 30, obviously intelligent and well-acquainted with the criminal justice system. The totality of circumstances show his decision to summon the investigators was not the result of coercion. On these facts, voluntariness is established beyond a reasonable doubt." (*Id.* at p. 268, 2 Cal.Rptr.3d 554, 73 P.3d 433.)

In seeking to distinguish *Sapp,* defendant again distorts the record here. Defendant asserts that Detective Schultz "physically threatened" him. To the contrary, when defendant was placed in the interview room, Schultz removed his handcuffs, thus removing a source of discomfort and limitation on movement. Schultz warned defendant that he would be physically restrained if he tried to escape. The admonition was colorful,[23] but not improper. Defendant asserts that Schultz "verbally abused and cursed at" him. Schultz did say, "I'[ve] about had it up to here with you cuz you're full of shit and that's it." However, Schultz was simply responding to defendant in his own mode of expression. Immediately before Schultz's remark, Schultz told defendant that five eyewitnesses had identified defendant as the shooter. Defendant had responded, "Shit." Defendant complains that Schultz called him a liar. Schultz did do so. However, defendant was indeed lying to Schultz, as he admitted to Spidle. Further, officers may legitimately accuse a suspect of lying. (*In re Joe R.* (1980) 27 Cal.3d 496, 515, 165 Cal.Rptr. 837, 612 P.2d 927.) The totality of the circumstances support the trial court's findings that Schultz properly ended the interrogation and that defendant initiated the ***756** conversation with Spidle, waived his *Miranda* rights, and made his statements freely, voluntarily, and intelligently.

(B)

There is no merit to defendant's claim that Schultz should have told him that he could consult with appointed counsel immediately. Defendant was correctly informed that he could acquire his own counsel or, if he was eligible, counsel would be appointed when he was arraigned. "That is in fact when his right to counsel attached. (*United States v. Gouveia* (1984) 467 U.S. 180, 185, 187 [104 S.Ct. 2292, 81 L.Ed.2d 146]; see ****559** *Duckworth v. Eagan* (1989) 492 U.S. 195, 203–204 [109 S.Ct. 2875, 106 L.Ed.2d 166].)" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1045, 60 Cal.Rptr.2d 225, 929 P.2d 544; accord, *People v. Smith* (2007) 40 Cal.4th 483, 503, 54 Cal.Rptr.3d 245, 150 P.3d 1224.) "*Miranda* does not require that attorneys be producible on call, or that police 'keep a suspect abreast of his various options for legal representation.' (*People v. Bradford, supra,* 14 Cal.4th at p. 1046 [60 Cal.Rptr.2d 225, 929 P.2d 544].)" (*Smith, supra,* 40 Cal.4th at p. 503, 54 Cal.Rptr.3d 245, 150 P.3d 1224.)

(C)

Finally, we turn to defendant's claims under the Vienna Convention on Consular Relations and the bilateral consular convention *****136** between the United States and the Philippines. Article 36, paragraph 1(b) of the Vienna Convention, which the United States has ratified, provides that law enforcement officials " 'shall ... inform' arrested foreign nationals of their right to have their consulate notified of their arrest, and if a national so requests, inform the consular post that the national is under arrest." (*People v. Mendoza* (2007) 42 Cal.4th 686, 709, 68 Cal.Rptr.3d 274, 171 P.3d 2.) Article VII, paragraph 2 of the United States consular convention with the Philippines provides that whenever their nationals are arrested, consular officers are to be notified immediately and permitted to visit them without delay.

Sanchez–Llamas v. Oregon (2006) 548 U.S. 331, 126 S.Ct. 2669, 165 L.Ed.2d 557 (*Sanchez–Llamas*) was decided after defendant gave his confession. There, the United States Supreme Court made it clear that an officer's failure to notify a suspect of his or her consular rights does not, in itself, render a confession inadmissible. "The violation of the right to consular notification ... is at best remotely connected to the gathering of evidence. Article 36 has nothing whatsoever to do with searches or interrogations. Indeed, Article 36 does not guarantee defendants *any* assistance at all. The provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention—not to have their consulate intervene, or ***757** to have law

enforcement authorities cease their investigation pending any such notice or intervention. In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.

"Moreover, the reasons we often require suppression for Fourth and Fifth Amendment violations are entirely absent from the consular notification context. We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable. *Watkins v. Sowders,* 449 U.S. 341, 347 [101 S.Ct. 654, 66 L.Ed.2d 549] (1981). We exclude the fruits of unreasonable searches on the theory that without a strong deterrent, the constraints of the Fourth Amendment might be too easily disregarded by law enforcement. *Elkins v. United States,* 364 U.S. 206, 217 [80 S.Ct. 1437, 4 L.Ed.2d 1669] (1960). The situation here is quite different. The failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions. And unlike the search-and-seizure context—where the need to obtain valuable evidence may tempt authorities to transgress Fourth Amendment limitations—police win little, if any, practical advantage from violating Article 36. Suppression would be a vastly disproportionate remedy for an Article 36 violation." (*Sanchez–Llamas, supra,* 548 U.S. at p. 349, 126 S.Ct. 2669.)

The *Sanchez–Llamas* court added that a violation of the right of consular notification is not without remedy in appropriate cases. "[S]uppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police." (*Sanchez–Llamas, supra,* 548 U.S. at p. 350, 126 S.Ct. 2669.) Defendant did so here. The trial court found a "clear violation" of article 36.[24] However, it further found that no causal relationship or linkage had been shown between the violation and defendant's confession.

Defendant claims that this finding was a conclusion of law, not a finding of fact. ****560** He asserts the finding only anticipated *****137** *Sanchez–Llamas*'s legal holding that a consular violation does not, in itself, render a confession inadmissible. The passage referenced by defendant does anticipate that holding. The trial court observed: "You've equated it to *Miranda,* almost. In *Miranda* ... [t]here's linkage, something that flows from that directly, and I don't see that there is any case authority or any logical proposition that a violation of the Vienna Convention means that you can't introduce a statement." However, defendant fails to mention the preceding and succeeding paragraphs. There the trial court explicitly made a factual finding that, under the totality of the circumstances, defendant's confession was not linked to the consular convention violation. "[I]t hasn't been shown to me that this violation [has] a linkage ***758** with any statements given." "How has this harmed this individual in getting a fair trial? ... I don't think it links up.... I am looking to see if he is harmed in the totality. He was afforded, so far as I can see, all his constitutional rights." The record clearly supports this finding.

As the *Sanchez–Llamas* court noted, article 36 "secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention—not to have ... law enforcement authorities cease their investigation pending any such notice or intervention." (*Sanchez–Llamas, supra,* 548 U.S. at p. 349, 126 S.Ct. 2669.) Defendant made his confession while he was being booked, within a few hours of his arrest and several weeks after the murders. Even if we assume, as the trial court did, that the Philippine consulate would have provided a lawyer for defendant and that the consular officers and counsel would have advised defendant to remain silent, there was no showing that this would have occurred before defendant was booked.

For the same reasons, defendant's claim under the United States bilateral consular convention with the Philippines also fails.

B. Refusal to Instruct on Heat of Passion

Defendant contends the trial court erred by refusing his request to instruct the jury on voluntary manslaughter due to heat of passion. The claim fails because the requested instructions were not supported by substantial evidence.

"In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)" (*People v. Martinez* (2010) 47 Cal.4th 911, 953, 105 Cal.Rptr.3d 131, 224 P.3d 877; accord, *People v. Booker* (2011) 51 Cal.4th 141, 179, 119 Cal.Rptr.3d 722, 245 P.3d 366 (*Booker*).)

" 'To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.' (*People v. Blair* [(2005)]

36 Cal.4th [686,] 745 [31 Cal.Rptr.3d 485, 115 P.3d 1145], citing *People v. Breverman, supra,* 19 Cal.4th at p. 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)" (*People v. Burney* (2009) 47 Cal.4th 203, 250, 97 Cal.Rptr.3d 348, 212 P.3d 639.)

"Murder is the unlawful killing of a human being with malice aforethought. (See § 187, subd. (a).) A murder, however, may be reduced to ***759** voluntary manslaughter if the victim engaged in provocative conduct that would cause an ordinary person with an average disposition to act rashly or without due deliberation and reflection." *****138** (*Booker, supra,* 51 Cal.4th at p. 183, fn. 23, 119 Cal.Rptr.3d 722, 245 P.3d 366.)

Heat of passion has both objective and subjective components. Objectively, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (E.g., *People v. Moye* (2009) 47 Cal.4th 537, 549–550, 98 Cal.Rptr.3d 113, 213 P.3d 652 (*Moye*).) The standard is not the reaction of a "reasonable gang member." (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087, 56 Cal.Rptr.2d 142, 921 P.2d 1.)

****561** Subjectively, "the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation. ([*People v.*] *Wickersham* [(1982)] 32 Cal.3d [307,] 327 [185 Cal.Rptr. 436, 650 P.2d 311].) 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." [Citations.]' (*People v. Barton* [(1995)] 12 Cal.4th [186,] 201 [47 Cal.Rptr.2d 569, 906 P.2d 531].)" (*Moye, supra,* 47 Cal.4th at p. 550, 98 Cal.Rptr.3d 113, 213 P.3d 652.)

The trial court instructed the jury on perfect and imperfect defense of self or another. However, it declined to instruct on heat of passion because it found no evidence that defendant acted under the influence of such passion. The court observed: "I don't see any ... heat of passion here at all or sudden quarrel." Defendant's "passions weren't aroused. It was either self-defense or he killed somebody." "They were laughing at this guy until they had a belief they were going to get shot at."

We agree there was no substantial evidence that defendant acted under the heat of passion. Indeed, all the evidence is to the contrary. Defendant claims that he shot the victims in the heat of passion provoked by Gobert's "belligerent behavior" and conduct insulting to the ABC gang. However, we have rejected arguments that insults or gang-related challenges would induce sufficient provocation in an *ordinary* person to merit an instruction on voluntary manslaughter. (*People v. Avila* (2009) 46 Cal.4th 680, 706–707, 94 Cal.Rptr.3d 699, 208 P.3d 634; see also *People v. Manriquez* (2005) 37 Cal.4th 547, 586, 36 Cal.Rptr.3d 340, 123 P.3d 614.) Moreover, defendant told Detective Spidle that until Gobert appeared to reach for a gun, he and the other ABC's just laughed at him. "[W]e just started giggling." The other ABC's confirmed this. Lester Maliwat testified that the ABC's were not provoked by Gobert's jibes, but rather considered him laughable because he ***760** was so badly outnumbered. "Q. Okay. When the black guy said to you, 'Fuck you slobs,' what was your reaction? [¶] A. I just started laughing. [¶] Q. Why did you laugh? [¶] A. Because he was the only guy there." Roger Boring's testimony was consistent with Maliwat's. "Q. Okay. Did other people in your group besides yourself laugh at this guy because you didn't take him seriously? ... [¶] ... [¶] A. I noticed a couple that didn't take him seriously at the time."

Defendant acknowledges that the ABC's did not consider Gobert a "serious threat" at first. However, he claims that his assessment changed, prompting him to respond in the heat of passion, when Gobert appeared to reach for a gun. This claim, too, is belied by the record. Defendant told Detective Spidle that he remained *****139** calm and tried to exert a calming influence on the other ABC's even after Gobert apparently reached for a gun and was attacked by the others. Defendant claimed that he tried "to break it up." "I go [,] 'just leave him the fuck alone[,] dude.' " Defendant also told Spidle that he drew his pistol with the intention of stopping the fight. "I was about to shoot in the air so that, everyone would just run. You know so that the whole fight would just break up." "I was just trying to break it up, you know I mean if I wanted to shoot them, if I wanted to intentionally kill these[ ] guys, I would of done it ... when they first came up here."

Defendant claims that Hernandez and Gobert each appeared to be reaching for a gun while they lay on the ground. However, the autopsy evidence strongly suggests that they were killed while lying facedown, execution style, and not while engaged in a defensive effort. Moreover, defendant's version of the events is of no help to him. Under his scenario, Hernandez responded to being pulled up by the hair by an armed assailant, and Gobert acted in resistance to Hernandez being killed. Predictable and reasonable conduct by a victim resisting felonious assault is not sufficient provocation to

merit an instruction on voluntary manslaughter. (*People v. Blacksher* (2011) 52 Cal.4th 769, 833, 130 Cal.Rptr.3d 191, 259 P.3d 370; *People v. Jackson* (1980) 28 Cal.3d 264, 306, 168 Cal.Rptr. 603, 618 P.2d 149.)

****562** Finally, defendant claims that the trial court erred in refusing his request to read CALJIC No. 8.73, which instructs that provocation insufficient to reduce homicide to manslaughter may nevertheless be considered on the question of whether the defendant killed with deliberation or premeditation. CALJIC No. 8.73 is a pinpoint instruction that must be given, upon request, only if supported by substantial evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 214, 30 Cal.Rptr.3d 464, 114 P.3d 717.) Substantial evidence was lacking here. Again, the forensic evidence strongly suggested that defendant deliberately executed his victims.

***761 C. Instructions on Perfect and Imperfect Self-defense**

Defendant claims there was no factual basis for instructing the jury that the doctrines of perfect and imperfect self-defense cannot be invoked by a defendant whose own wrongful conduct created the circumstances in which the adversary's attack was legally justified. The claim fails.

"The concepts of perfect and imperfect self-defense are not entirely separate, but are intertwined. We have explained that 'the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances.' (*In re Christian S.* [(1994)] 7 Cal.4th [768,] 773, fn. 1 [30 Cal.Rptr.2d 33, 872 P.2d 574].) As applied to this case, this means that if defendant had first assaulted Cruz, then unreasonably believed Cruz was assaulting him, a claim of imperfect self-defense would be unavailable because a claim of perfect self-defense would have been unavailable had the belief been reasonable. To make the observation in *In re Christian S.* more general, not every unreasonable belief will support a claim of imperfect self-defense but only one that, if reasonable, would support a claim of perfect self-defense." *****140** (*People v. Valencia* (2008) 43 Cal.4th 268, 288–289, 74 Cal.Rptr.3d 605, 180 P.3d 351; see *Booker, supra,* 51 Cal.4th at p. 182, 119 Cal.Rptr.3d 722, 245 P.3d 366; *People v. Randle* (2005) 35 Cal.4th 987, 1001, 28 Cal.Rptr.3d 725, 111 P.3d 987.)

In response to requests by both the prosecution and the defense, the trial court instructed the jury on the law as we have just explained it. It gave CALJIC No. 5.55: "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." Pursuant to CALJIC No. 5.17, the jury was also instructed that the principle of imperfect self-defense "is not available, and malice aforethought is not negated, if the defendant[,] by his unlawful or wrongful conduct[,] created the circumstances which legally justified his adversary's use of force."

The Attorney General contends that defendant may not complain of these instructions because he requested them. The doctrine of invited error bars a defendant from challenging an instruction when the defendant has made a conscious and deliberate tactical choice to request it. (*People v. Moore* (2011) 51 Cal.4th 386, 410, 121 Cal.Rptr.3d 280, 247 P.3d 515; *People v. Harris* (2008) 43 Cal.4th 1269, 1293, 78 Cal.Rptr.3d 295, 185 P.3d 727; *People v. Catlin* (2001) 26 Cal.4th 81, 150, 109 Cal.Rptr.2d 31, 26 P.3d 357.) Here, ***762** whether or not defendant made such a choice, the instructions were clearly supported by the record. When Gobert appeared to reach for a gun, the ABC gang attacked him, threw him to the ground, and beat him. Hernandez tried to shield Gobert with his body. Holding his gun in one hand, defendant grabbed Hernandez by the hair, pulled his head back, and asked him where he was from. Hernandez hit his hand, and defendant shot him. Hernandez moved and defendant shot him again. Defendant claimed he fired because he was afraid Hernandez was about to shoot him. This is scant evidence for this claim, but, even if it were true, defendant had attacked Hernandez as he tried to shield Gobert. Defendant could claim neither perfect nor imperfect self-defense ****563** in the shooting of Gobert. Once defendant shot Hernandez, Gobert would have reasonably believed he would be shot next.

D. Defendant's Waiver of His Right to Testify

Defendant contends the trial court prejudicially erred because it did not advise him of his right to testify or obtain an on-the-record waiver of that right. The claim fails.

A trial court has no duty to give such advice or seek an explicit waiver, unless a conflict with counsel comes to its attention. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332–

1333, 65 Cal.Rptr.2d 145, 939 P.2d 259; *People v. Alcala* (1992) 4 Cal.4th 742, 805–806, 15 Cal.Rptr.2d 432, 842 P.2d 1192 (*Alcala*); *In re Horton* (1991) 54 Cal.3d 82, 95, 284 Cal.Rptr. 305, 813 P.2d 1335.)

Defendant does not assert that a conflict occurred here. Instead, he asks us to create a new rule of procedure. He argues that requiring an advisement and explicit waiver, even in the absence of a conflict, "would not only protect [a] defendant's fundamental constitutional right to testify, but also ease the burden on the judicial system" by obviating the need for posttrial evidentiary hearings on the question of waiver. To the contrary, we reaffirm our previous decisions, in which "we have rejected similar proposals. (See *People v. Hendricks* (1987) 43 Cal.3d 584, 592–594 [238 Cal.Rptr. 66, 737 P.2d 1350]; *****141** *People v. Murphy* (1972) 8 Cal.3d 349, 366–367 [105 Cal.Rptr. 138, 503 P.2d 594]; see also *People v. Cox* (1991) 53 Cal.3d 618, 671 [280 Cal.Rptr. 692, 809 P.2d 351] [' "[A] trial judge may safely assume that a defendant, who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy; otherwise, the judge would have to conduct a law seminar prior to every criminal trial." ' (Quoting *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 545 [85 Cal.Rptr. 346])].) When the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite ***763** expressing to counsel his desire to testify, he was deprived of that opportunity.' (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1231–1232 [280 Cal.Rptr. 578]; *People v. Guillen* (1974) 37 Cal.App.3d 976, 984–985 [113 Cal.Rptr. 43].)" (*Alcala, supra,* 4 Cal.4th at pp. 805–806, 15 Cal.Rptr.2d 432, 842 P.2d 1192.)

E. Victim Impact Evidence

Defendant contends that because the trial court failed to give a limiting instruction, sua sponte, regarding the use of victim impact evidence, he was denied his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments to the federal Constitution. This is the instruction he now proposes: "1. That evidence about the victims' personal characteristics was introduced to give a brief glimpse of [the] victim's life and to inform the jury of the uniqueness of the lives of these victims. [¶] 2. No human life is worth more than another. [¶] 3. The bedrock of a penalty determination is an evaluation of the moral culpability of the defendant [.] [¶] 4. The culpability of the defendant for facts about which he was unaware at the time of the crime is less than for things he knew at the time of the crime." We reject his argument.

Unless it invites a purely irrational response from the jury, the effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a). The federal Constitution bars victim impact evidence only if it is so unduly prejudicial as to render the trial fundamentally unfair. (*People v. Nelson* (2011) 51 Cal.4th 198, 219, 120 Cal.Rptr.3d 406, 246 P.3d 301 (*Nelson*); *People v. Bramit* (2009) 46 Cal.4th 1221, 1240, 96 Cal.Rptr.3d 574, 210 P.3d 1171 (*Bramit*); *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056–1057, 47 Cal.Rptr.3d 467, 140 P.3d 775 (*Lewis & Oliver*).)

Pursuant to CALJIC No. 8.85, the penalty jury was instructed to consider, among other factors, the circumstances of defendant's crimes.[25] (See also ****564** CALCRIM No. 763.) We have repeatedly held that this instruction adequately informs the jury how to consider victim impact evidence. (*Bramit, supra,* 46 Cal.4th at p. 1245, 96 Cal.Rptr.3d 574, 210 P.3d 1171; *People v. Zamudio* (2008) 43 Cal.4th 327, 369, 75 Cal.Rptr.3d 289, 181 P.3d 105 (*Zamudio*); *People v. Brown* (2003) 31 Cal.4th 518, 573, 3 Cal.Rptr.3d 145, 73 P.3d 1137.) We have also repeatedly held there is no sua sponte duty to give instructions that were substantially similar to the one defendant proposes. (*People v. Carrington* (2009) 47 Cal.4th 145, 198, 97 Cal.Rptr.3d 117, 211 P.3d 617; *Bramit,* at pp. 1244–1245, 96 Cal.Rptr.3d 574, 210 P.3d 1171; *Zamudio,* at pp. 369–370, 75 Cal.Rptr.3d 289, 181 P.3d 105.) We have explained *****142** that such instructions are misleading ***764** insofar as they suggest that the jury may not be moved by sympathy for the victims and their survivors. (*People v. Tate* (2010) 49 Cal.4th 635, 708, 112 Cal.Rptr.3d 156, 234 P.3d 428; *Zamudio,* at p. 369, 75 Cal.Rptr.3d 289, 181 P.3d 105; *People v. Pollock* (2004) 32 Cal.4th 1153, 1195, 13 Cal.Rptr.3d 34, 89 P.3d 353.) Finally, there is no basis in the law for defendant's proposed instruction that "[t]he culpability of the defendant for facts about which he was unaware at the time of the crime is less than for things he knew at the time of the crime." (See *Nelson, supra,* 51 Cal.4th at p. 219, fn. 17, 120 Cal.Rptr.3d 406, 246 P.3d 301; *Bramit,* at p. 1240, 96 Cal.Rptr.3d 574, 210 P.3d 1171; *Lewis & Oliver, supra,* 39 Cal.4th at p. 1057, 47 Cal.Rptr.3d 467, 140 P.3d 775.)

F. Asserted Improper Prosecutorial Argument

Defendant contends the prosecutor committed prejudicial misconduct during his penalty phase argument by implying that the victims' families wanted defendant to be sentenced to death. The claim fails.

The views of a victim's family as to the appropriate punishment are beyond the scope of constitutionally permissible victim impact testimony. (*Payne v. Tennessee* (1991) 501 U.S. 808, 830, fn. 2, 111 S.Ct. 2597, 115 L.Ed.2d 720; *People v. Cowan* (2010) 50 Cal.4th 401, 484, 113 Cal.Rptr.3d 850, 236 P.3d 1074 (*Cowan*); *People v. Pollock, supra,* 32 Cal.4th at p. 1180, 13 Cal.Rptr.3d 34, 89 P.3d 353; see *People v. Smith* (2003) 30 Cal.4th 581, 622, 134 Cal.Rptr.2d 1, 68 P.3d 302.) It follows that a prosecutor may not attribute such views to a victim's family expressly or by implication. Defendant complains that three remarks made by the prosecutor crossed this line.

1. Urging the jury to return a death penalty, the prosecutor said, "If the decision is not the appropriate one in this case, it would bring further injury to the shattered lives of three families." Defense counsel did not object to this remark.

2. Later, speaking of the victims' families, the prosecutor said: "These people look to you for justice. They have waited patiently for 4 1/2 years." Defense counsel objected, "that's improper argument." The court impliedly sustained the objection, giving this admonition: "I want to clarify something, ladies and gentlemen. Public feeling or sentiment should not enter into your determination. It's based solely on those mitigating and aggravating factors in rendering your verdict in the penalty phase." Defense counsel thanked the court, and sought no further intervention.

3. Finally, the prosecutor essentially repeated the first complained-of remark. Acknowledging that the jury had the power to return a verdict of life imprisonment without possibility of parole, the prosecutor argued that to do so would be inappropriate and an "insult" to the victims. "Theirs, not our ***765** lives, we would be adding insult to. It's further insult that we'd be adding to theirs and their families'." This time defense counsel did object and the objection was sustained. In response to defense counsel's request for an admonition, the court instructed the jury: "Once again, ladies and gentlemen, public sentiment and public feeling should not come into any decision you make in the penalty phase." The prosecutor said that he had not intended to invoke "public outrage." "My comments are limited specifically to these facts, this defendant, and these victims." Defense counsel objected to the prosecutor's ****565** implication. "Again, Your Honor, I'm going to object. What it implies." The following colloquy ensued. *****143** "The Court: Victim impact is a consideration for this jury. [¶] [Defense counsel]: But not their desire. [¶] The Court: Victim impact is a consideration for this jury. [¶] [The prosecutor]: Thank you, Your Honor. [¶] [Defense counsel]: That's overruled? [¶] The Court: Yes, ma'am."

Defendant failed to object to the first remark of which he now complains. Therefore, the point is forfeited because any prejudice it may have caused could have been cured by an appropriate admonition. (*People v. Jablonski* (2006) 37 Cal.4th 774, 835, 38 Cal.Rptr.3d 98, 126 P.3d 938; *People v. Arias* (1996) 13 Cal.4th 92, 159, 51 Cal.Rptr.2d 770, 913 P.2d 980.) The court did admonish the jury as to the second remark, and defense counsel sought no additional relief.

Counsel objected in the third instance and sought a curative instruction. The court did inform the jury that *public* sentiment could not affect its verdict. While a correct statement of the law, the instruction did not address the point of which defendant complained, and further instruction would have been appropriate in light of the defense request. The defense position was that the jury was being asked to vote for execution out of concern for the feelings of the victims' families. The defense is correct that such an argument is improper.

The court and prosecution apparently failed to understand the appropriate scope of victim impact testimony. In considering penalty a jury may properly take into account the impact of the *defendant's conduct.* The concept cannot be stretched to include the potential effect the *jury's decision* may have.

However, any error in this regard was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) The victims' family members themselves did not express any views on the appropriate punishment, and the prosecutor did not expressly attribute any such views to them. Defendant had no criminal history and a compelling background of family dysfunction. However, the evidence reflects that defendant shot and killed Hernandez and Gobert execution-style as they lay ***766** facedown on the ground. He then shot Hyon, paralyzing her for life. As he fled, he made several statements reflecting his lack of remorse. This evidence supports a conclusion, beyond a reasonable doubt, that the jury's verdict was based on his conduct rather than the prosecution's complained-of remarks.

G. Lack of Remorse

Defendant contends the prosecutor improperly urged the jury to consider defendant's lack of remorse as an aggravating circumstance. The claim fails.

"Conduct or statements demonstrating a lack of remorse made at the scene of the crime or while fleeing from it may be considered in aggravation as a circumstance of the murder under section 190.3, factor (a). (*People v. Bonilla* (2007) 41 Cal.4th 313, 356 [60 Cal.Rptr.3d 209, 160 P.3d 84]; *People v. Pollock* [, *supra,*] 32 Cal.4th [at p.] 1184 [13 Cal.Rptr.3d 34, 89 P.3d 353].) 'On the other hand, *postcrime* evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating.' (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232 [275 Cal.Rptr. 729, 800 P.2d 1159].)" (*People v. Collins* (2010) 49 Cal.4th 175, 227, 110 Cal.Rptr.3d 384, 232 P.3d 32.) When evidence of postcrime remorselessness has been presented, however, the prosecutor may stress that remorse is not available as a mitigating factor. (*People v. Davis, supra,* 46 Cal.4th at p. 620, 94 Cal.Rptr.3d 322, 208 P.3d 78; *****144** *People v. Pollock, supra,* 32 Cal.4th at p. 1185, 13 Cal.Rptr.3d 34, 89 P.3d 353; *People v. Mendoza* (2000) 24 Cal.4th 130, 187, 99 Cal.Rptr.2d 485, 6 P.3d 150.)

Here, defendant showed lack of remorse while fleeing the scene. As they drove away Lester Maliwat asked defendant why he had shot Jenny Hyon. Defendant said, "Fuck them. They deserved it." This statement could properly be considered as a circumstance in aggravation under section 190.3, factor (a).

****566** The main thrust of the prosecutor's argument, however, was that the defense attempt to establish remorse as a mitigating factor was belied by the evidence. Defense expert Dr. Jean Nidorf testified that defendant appeared to express remorse in his videotaped statement to Detective Spidle. "[H]e felt badly about what he had done. He didn't want people to do that anymore. He didn't want people to gangbang. He wanted them to go to church, and I saw that as remorse." She further testified that she believed, based on her interviews with defendant, that he "sincerely felt that what he did was wrong and that he regretted it."

The prosecutor began his penalty phase argument by saying that he was forced to anticipate possible defense arguments because, unlike at the guilt phase, he would not have an opportunity for rebuttal. In particular, the ***767** prosecutor correctly anticipated that the defense would argue defendant was remorseful. The prosecutor argued that, to the contrary, defendant had shown lack of remorse. The prosecutor introduced the subject of remorse by characterizing it as the "third reason why death is the only appropriate verdict in this case." He reviewed the evidence showing lack of remorse at the scene of the crime or immediately afterward. Later, observing that "[the defense] put remorse in issue, not us," the prosecutor sought to discredit the testimony of Dr. Nidorf, and he called attention to defendant's postcrime statement to Eric Garcia that maybe his victims "deserved it." In recapping the latter evidence, the prosecutor said: "You see, there's no remorse. And lack of remorse is the third thing."

There is a subtle but important distinction between the manifestations of a defendant's remorselessness that may be considered as an aggravating factor and those that may be considered only to rebut remorse as a mitigating factor. The court and the parties should be careful not to blur it. The prosecutor here was not as clear in this regard as he might have been. However, he was not guilty of misconduct for he did not begin discussing any postcrime evidence of remorselessness until after he noted that defendant "put remorse in issue." Moreover, "remorse is universally deemed a factor relevant to penalty. The jury, applying its common sense and life experience, is likely to consider that issue in the exercise of its broad constitutional sentencing discretion no matter what it is told. [Citations.]" (*People v. Keenan* (1988) 46 Cal.3d 478, 510, 250 Cal.Rptr. 550, 758 P.2d 1081; accord, *People v. Combs* (2004) 34 Cal.4th 821, 866, 22 Cal.Rptr.3d 61, 101 P.3d 1007; *People v. Bemore* (2000) 22 Cal.4th 809, 854–855, 94 Cal.Rptr.2d 840, 996 P.2d 1152.)

H. Refusal to Instruct on Lingering Doubt

Defendant contends the trial court's refusal to instruct during the penalty phase on lingering doubt violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. We have consistently rejected state and federal law claims that a trial court must specifically instruct on lingering doubt because the concept is sufficiently *****145** covered in CALJIC No. 8.85. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1176, 95 Cal.Rptr.3d 652, 209 P.3d 977; *Zamudio, supra,* 43 Cal.4th at p. 370, 75 Cal.Rptr.3d 289, 181 P.3d 105; *People v. DePriest* (2007) 42 Cal.4th 1, 59–60, 63 Cal.Rptr.3d 896, 163 P.3d 896.)[26]

Defendant seeks to distinguish this case on the grounds that (1) an alternate juror was seated during the penalty phase, and

(2) the court gave CALJIC No. 17.51.1, which provides in pertinent part that "the alternate juror must ***768** accept as having been proved beyond a reasonable doubt, those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial." We recently rejected this argument in *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 128 Cal.Rptr.3d 417, 256 P.3d 543 (*Gonzales & Soliz*), in which the defendant claimed that "a lingering doubt instruction is crucial in a penalty *retrial* because a jury that has not decided guilt decides penalty." ****567** (*Id.* at p. 325, 128 Cal.Rptr.3d 417, 256 P.3d 543.) We explained: "Had the penalty retrial jury been convinced by defendants' arguments in mitigation based on the circumstances of the capital crimes, it could have used section 190.3, factors (a) and (k), as expressed in CALJIC No. 8.85, to return a verdict of life imprisonment without parole instead of death. It needed no lingering doubt instruction to do so. (*People v. Zamudio*[*, supra,*] 43 Cal.4th 327, 370 [75 Cal.Rptr.3d 289, 181 P.3d 105] ... [CALJIC No. 8.85 sufficiently covers concept of lingering doubt].)" (*Gonzales & Soliz, supra,* at p. 326, 128 Cal.Rptr.3d 417, 256 P.3d 543.)

Finally, defendant contends that our decision in *People v. Gay* (2008) 42 Cal.4th 1195, 73 Cal.Rptr.3d 442, 178 P.3d 422 (*Gay*) compels a conclusion that a lingering doubt instruction is required when an alternate is seated during the penalty phase. In the context of a penalty retrial, we rejected this argument in *Gonzales & Soliz,* as well. "Unlike the trial court in this case, the court in *Gay* had instructed the penalty retrial jury on lingering doubt, but had limited the evidence the defense could offer and had informed the jury the defendant's responsibility for the shooting had been conclusively proven by the guilt phase verdicts and no evidence to the contrary would be presented. ([*Gay,*] at p. 1224 [73 Cal.Rptr.3d 442, 178 P.3d 422].) We reversed the judgment because '[t]he combination of the evidentiary and instructional errors present[ed] an intolerable risk that the jury did not consider all or a substantial portion of the penalty phase defense, which was lingering doubt.' ([*Gay,*] at p. 1226 [73 Cal.Rptr.3d 442, 178 P.3d 422].) *Gay* is essentially the converse of the present case: In *Gay,* the trial court instructed the jury on lingering doubt, but precluded the defendant from presenting that defense; in the present case, the trial court allowed defendants to present and argue their lingering doubt defenses, but refused to specifically instruct on lingering doubt. As we stated in *Gay,* our holding there was not based on any state or federal constitutional right to a lingering doubt instruction; rather, it was based on California's death penalty statute, which authorizes the admission of evidence of innocence at a penalty retrial. ([*Gay,*] at p. 1220 [73 Cal.Rptr.3d 442, 178 P.3d 422].) *Gay* is consistent with our prior holdings that a lingering doubt instruction is not required.... We therefore reject defendants' claim that the trial court erred in not instructing on lingering doubt." *****146** (*Gonzales & Soliz, supra,* 52 Cal.4th at p. 326, 128 Cal.Rptr.3d 417, 256 P.3d 543.)

I. Challenges to the Death Penalty Law and Instructions

Defendant raises a series of challenges to California's death penalty law and the standard CALJIC sentencing instructions. We have rejected each of these challenges in the past and do so here.

***769** California homicide law and the special circumstances listed in section 190.2 adequately narrow the class of murderers eligible for the death penalty. (*People v. Gamache, supra,* 48 Cal.4th at p. 406, 106 Cal.Rptr.3d 771, 227 P.3d 342; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1058, 63 Cal.Rptr.3d 82, 162 P.3d 596 (*Barnwell*).) Specifically, the felony-murder special circumstance (§ 190.2, subd. (a)(17)) is not overbroad and adequately narrows the pool of those eligible for death. (*Gamache, supra,* 48 Cal.4th at p. 406, 106 Cal.Rptr.3d 771, 227 P.3d 342; *People v. Kraft* (2000) 23 Cal.4th 978, 1078, 99 Cal.Rptr.2d 1, 5 P.3d 68.)

Section 190.3, factor (a), which permits the jury to consider the circumstances of the crime in deciding whether to impose the death penalty, does not license the arbitrary and capricious imposition of the death penalty. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975–976, 114 S.Ct. 2630, 129 L.Ed.2d 750; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308, 106 Cal.Rptr.3d 459, 226 P.3d 949 (*D'Arcy*); *People v. Cruz* (2008) 44 Cal.4th 636, 680, 80 Cal.Rptr.3d 126, 187 P.3d 970 (*Cruz*).)

Nothing in the federal Constitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation; agree unanimously that a particular aggravating circumstance exists; find all aggravating factors proved beyond a reasonable doubt or by a ****568** preponderance of the evidence; find that aggravation outweighs mitigation beyond a reasonable doubt; or conclude beyond a reasonable doubt that death is the appropriate penalty. (*People v. Burney, supra,* 47 Cal.4th at pp. 267–268, 97 Cal.Rptr.3d 348, 212 P.3d 639; *People v. Williams* (2008) 43 Cal.4th 584, 648–649, 75 Cal.Rptr.3d 691, 181 P.3d 1035.) This conclusion is not altered by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, *Ring v.*

Arizona (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, and *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. (*D'Arcy, supra,* 48 Cal.4th at p. 308, 106 Cal.Rptr.3d 459, 226 P.3d 949; *People v. Carrington, supra,* 47 Cal.4th at p. 200, 97 Cal.Rptr.3d 117, 211 P.3d 617; *People v. Mendoza, supra,* 42 Cal.4th at p. 707, 68 Cal.Rptr.3d 274, 171 P.3d 2.)

Review for intercase proportionality is not constitutionally compelled. (*Pulley v. Harris* (1984) 465 U.S. 37, 41–42, 50–51, 104 S.Ct. 871, 79 L.Ed.2d 29; *Bramit, supra,* 46 Cal.4th at p. 1250, 96 Cal.Rptr.3d 574, 210 P.3d 1171; *People v. Butler* (2009) 46 Cal.4th 847, 885, 95 Cal.Rptr.3d 376, 209 P.3d 596 (*Butler*).)

The use in the sentencing factors of the phrases "*extreme* mental or emotional disturbance" (§ 190.3, factor (d), italics added) and "*extreme* duress or ... *substantial* domination of another" (*id.,* factor (g), italics added) does not inhibit the consideration of mitigating evidence or make the factors impermissibly vague. (*Bramit, supra,* 46 Cal.4th at p. 1249, 96 Cal.Rptr.3d 574, 210 P.3d 1171; *People v. Bunyard* (2009) 45 Cal.4th 836, 861, 89 Cal.Rptr.3d 264, 200 P.3d 879; *People v. Lewis* (2008) 43 Cal.4th 415, 532, 75 Cal.Rptr.3d 588, 181 P.3d 947.)

*****147** ***770** The trial court need not label the statutory sentencing factors as either aggravating or mitigating, nor instruct the jury that the absence of mitigating factors does not constitute aggravation. (*D'Arcy, supra,* 48 Cal.4th at p. 308, 106 Cal.Rptr.3d 459, 226 P.3d 949; *People v. Watson* (2008) 43 Cal.4th 652, 704, 76 Cal.Rptr.3d 208, 182 P.3d 543; *People v. Cunningham, supra,* 25 Cal.4th at p. 1041, 108 Cal.Rptr.2d 291, 25 P.3d 519.)

"Because capital defendants are not similarly situated to noncapital defendants, California's death penalty law does not deny capital defendants equal protection by providing certain procedural protections to noncapital defendants but not to capital defendants." (*People v. Jennings* (2010) 50 Cal.4th 616, 690, 114 Cal.Rptr.3d 133, 237 P.3d 474; see *Cruz, supra,* 44 Cal.4th at p. 681, 80 Cal.Rptr.3d 126, 187 P.3d 970; *People v. Johnson* (1992) 3 Cal.4th 1183, 1242–1243, 14 Cal.Rptr.2d 702, 842 P.2d 1.)

The death penalty as applied in this state is not rendered unconstitutional through operation of international law and treaties. (*People v. Mills* (2010) 48 Cal.4th 158, 215, 106 Cal.Rptr.3d 153, 226 P.3d 276; *Butler, supra,* 46 Cal.4th at p. 885, 95 Cal.Rptr.3d 376, 209 P.3d 596; *Barnwell, supra,* 41 Cal.4th at p. 1059, 63 Cal.Rptr.3d 82, 162 P.3d 596.)

III. DISPOSITION

The judgment is affirmed.

WE CONCUR: CANTIL–SAKAUYE, C.J., and KENNARD, BAXTER, WERDEGAR, CHIN, LIU, JJ.

All Citations

53 Cal.4th 735, 269 P.3d 543, 137 Cal.Rptr.3d 117, 12 Cal. Daily Op. Serv. 1473, 2012 Daily Journal D.A.R. 1515

Footnotes

1 Penal Code section 187. All further statutory references are to the Penal Code unless otherwise indicated.

2 Section 190.2, subdivision (a)(3).

3 Section 245, subdivision (a)(2).

4 Section 12022.7, subdivision (a).

5 Section 12022.5, subdivision (a).

6 Section 186.22, subdivision (b)(1).

7 The court also sentenced defendant to a determinate term of 12 years: three years for the assault with a deadly weapon conviction, with a consecutive three-year great bodily injury enhancement, plus consecutive terms of four years and

two years for the firearm use and gang enhancements, respectively. The determinate term was ordered stayed pending execution of the death sentence.

8 This is the term the witnesses used to refer to persons of Asian–Pacific–Islander heritage.

9 Gilleres testified that she was of mixed “Hawaiian, Japanese, Mexican, [and] Filipino” heritage herself, and that she could generally distinguish members of various Asian–Pacific–Islander groups based on their physical appearance.

10 Defense expert Dr. James Rosenberg later clarified that “doing speed” is a slang phrase for taking methamphetamine.

11 Maliwat testified that “slobs” was an insulting term Crips used for Bloods.

12 On cross-examination, Boring admitted he falsely told a defense investigator that he had not seen who fired the shots. He also admitted that he told the prosecutor's office what he thought it wanted to hear.

13 Maliwat had pleaded guilty to being an accessory after the fact. He had served his sentence and completed probation when he testified. He admitted lying repeatedly to law enforcement officers about this matter.

14 *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (*Miranda*).

15 Defendant did not refer to the victims by name. He called Gobert, for example, “the black guy.” However, the references are clear because he said they were the “people that I shot.”

16 Herman Flores estimated the time lapse at “a minute or so.”

17 Defendant does not challenge the sufficiency of the evidence to support his conviction. Nevertheless, he calls attention to defense testimony suggesting that there was a second shooter at the scene. Twenty-two-caliber bullet casings were found nearby. However, the bullets recovered from the victims were .38 caliber. Defendant told the police he was carrying a .38 revolver that evening, and he confessed to the police and his friends that he used it to kill the victims. His friends testified that they saw him shoot the victims. That someone may have fired a .22 in the area, at some undetermined time, did not bolster defendant's case.

18 Defendant did not specify the type of alcohol or the size of the six units.

19 Because many of the witnesses shared last names we will refer to them by their first names or the informal names used by family members.

20 Pina testified that Shirley's rape story was untrue.

21 “[Schultz:] I read to him, ‘You have the right to remain silent. Anything you say can and will be used against you in a court of law. [¶] You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.”

22 In the exchange in question, defense counsel asked Schultz, “The 48 hours you made reference to in your last statement when you told Mr. Enraca [to] ‘deeply consider that,’ that's the period of time when Mr. Enraca would be able to speak to you or law enforcement without a lawyer being present. Is that fair to say?” Schultz responded, “If that was his choice, yes, sir.”

On redirect, Schultz clarified his intent. He drew an analogy to “talking to your kids when they do something wrong. ‘I suggest you think about it.’ ” He said he was encouraging defendant to use the 48 hours before arraignment to consider his crimes and his “wise guy” attitude. “[Prosecutor:] Did that comment have anything to do with his attitude? [¶] [Schultz:] I would say so, yes. [¶] [Prosecutor:] And what was that? [¶] [Schultz:] Only that he'd become quite disenchanted, quite upset. And I suggested that he think about his actions. And, you know, I used the term ‘the next 48 hours' because, you know, that's the time before arraignment, approximately 48 hours. [¶] [Prosecutor:] Did your term ‘wise guy’ have anything to do with ... what you considered to be his attitude? [¶] [Schultz:] Yes. [¶] [Prosecutor:] Was that what you

were talking about when you suggested he think about it? [¶] [Defense counsel:] Objection. Leading. [¶] [The court:] Overruled. [¶] [Schultz:] Yes."

On recross-examination, defense counsel asked Schultz, "You didn't tell [defendant] that he needs to contact you within this 48–hour period if he wants to speak to you without benefit of a lawyer?" Schultz responded, "No." Defense counsel then asked, "Did you tell Detective Spidle that you had perhaps suggested to the defendant he should possibly talk to you in the next 48 hours?" Schultz responded, "No."

23 "[Schultz:] I'm going to take those handcuffs off you. I guarantee you if you try and leave this room.... [¶] [Defendant:] I'm not going to try and leave this room. [¶] [Schultz:] You're gonna think WWF's Santa Claus, okay? [¶] [Defendant:] Okay."

24 We are not called upon to consider the correctness of that ruling.

25 The trial court also gave the other instructions that are pertinent to victim impact evidence: CALJIC No. 8.84.1 and CALJIC No. 8.88.

26 As noted, CALJIC No. 8.85 was given here. (*Ante,* 137 Cal.Rptr.3d at p. 143, 269 P.3d at p. 565.)

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32 Cal.App.5th 802
Court of Appeal, Second District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,

v.

Eduardo OROZCO, Defendant and Appellant.

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Synopsis

Background: Defendant was convicted in the Superior Court, Los Angeles County, No. VA130104, John A. Torribio, J., of second-degree murder and assault on a child causing death. Defendant appealed.

Holdings: The Court of Appeal, Hoffstadt, J., held that:

defendant's invocation of his *Miranda* right to counsel during police interview did not require suppression of defendant's subsequent unrepresented statements during meeting with defendant's girlfriend, which was arranged by police officers;

confession to girlfriend was not suppressible fruit of prior *Miranda* violation; and

officers' deliberate circumvention of *Miranda* protections by disregarding defendant's requests for counsel and orchestrating a monitored conversation between defendant and his girlfriend did not violate due process.

Affirmed.

****340** APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed. (Los Angeles County Super. Ct. No. VA130104)

Attorneys and Law Firms

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez, Supervising Deputy Attorney General, and Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

HOFFSTADT, J.

***806** While watching his six-month-old daughter by himself one evening, a man struck her so hard that he killed her. He confessed to doing so while meeting privately with the child's mother in a police interview room, and the trial court admitted the confession at trial. That meeting, however, was orchestrated by police and occurred just hours after defendant had been questioned by police, had proffered an innocent explanation for the infant's death, and had thereafter repeatedly asked for a lawyer. This appeal presents three questions bearing on the admissibility of confessions in ****341** criminal cases: (1) Does a suspect's invocation of his right to counsel under *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (*Miranda*) preclude the admission of a confession a suspect subsequently makes to a person he is unaware is functioning as an agent of law enforcement, (2) Does continued questioning of a suspect after invocation of the *Miranda* right to counsel automatically taint any subsequent confession, and (3) Does the above described law enforcement conduct otherwise violate due process? We conclude that the answer to all three questions is "no," and affirm the trial court's ruling admitting his confession.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Underlying crime*

Mia was a little over six months old at the time of her death. Mia died from blunt trauma. She had 29 bruises, seven rib fractures, a punctured right lung, bruised lungs, and a lacerated liver. Most of these injuries had been inflicted in the hours prior to Mia's death, as a pediatrician's appointment earlier the same day revealed only a few bruises and no internal bleeding.

Just hours before her death, however, Mia was playing with toys and "look[ing] fine." That was how her mother Nathaly Martinez (Martinez) last ***807** saw Mia, when she left the infant in the sole custody of her boyfriend and Mia's father, Edward Orozco (defendant).

A few hours later, defendant called Martinez to report that Mia was not breathing. Martinez rushed back home, but Mia's body was cold to the touch and attempts at CPR by defendant, Martinez, and Martinez's relative did not resuscitate her. Administering CPR did not inflict any of Mia's injuries.

Someone called 911, and emergency medical personnel responded. A paramedic had to carry Mia out of the home while defendant, Martinez and other family members quarreled among themselves.

Attempts to revive Mia failed.

B. *Subsequent interviews*

1. *Law enforcement interrogates defendant (the first interview)*

A little before dawn the day after Mia's death, defendant voluntarily accompanied police to the police station. He met with three officers in an interview room, and they told him he was "not in custody" and was "free to leave." One of the officers nevertheless read defendant his *Miranda* rights, and defendant indicated that he understood them.

Defendant then proffered his account of what happened. He said he gave Mia some baby Motrin when she was crying; that he put her in her crib; and that when he came back upstairs a few hours later to check on her, her face was up against the side of the crib and she was no longer breathing. Defendant had no explanation for how Mia got so bruised up.

The interviewing officers expressed some skepticism, pointing out that defendant was "the last one with her" and pressing for an explanation of the numerous bruises on her body. However, defendant stuck to his account of what happened and said he "would never hurt [his] daughter."

An officer then asked if defendant would be "willing to sit down and repeat the story on a polygraph machine." Defendant responded by asking, "Can I have an attorney?" The officer responded, "Sure you can have an attorney," but that officer and ****342** another officer then proceeded to ask defendant at least four times, "Why would you need an attorney"? In the midst of these further questions, defendant requested an attorney four more times, all the while maintaining that his account was truthful and that he had no explanation for Mia's injuries.

***808** At that point, one of the officers placed defendant under arrest for Mia's murder. Another officer told defendant, "[Y]ou ask[ ] for your attorney ... but we're asking for your honesty." The officer then told defendant, "[i]f you're willing to talk to us right now" "[w]ithout your attorney present" "and [to] explain what happened[,] I'm not going to take you to jail." Defendant repeated his request for an attorney and the officer said, "All right. Go to jail. Done."

At that point, the interview ended. Defendant had not made any incriminating statements.

2. *The conversation between defendant and Martinez*

a. *Preconversation*

Several hours after the first interview, the police allowed defendant and Martinez to meet in an interview room at the police station. It is not clear who suggested the meeting. Before placing Martinez in the interview room, one of the police officers told her that maybe "you can get the full explanation out of [defendant]." The officer reminded her, "You are the mother of Mia and that you ha[ve] a right to know, that you ha[ve] to know, and that you ha[ve] to know everything." The officer did not give Martinez specific questions to ask or describe the particular information to get from defendant, but Martinez felt like she had to report back to the police.

b. First portion of conversation

The officer escorted Martinez into the interview room and immediately left, leaving Martinez alone with defendant. Their conversation was recorded.

Martinez asked defendant what happened while he was watching Mia. Defendant gave Martinez the same explanation he had previously given the police. Defendant said he was

"scared," but Martinez assured him that "[she] knew" he "didn't do anything."

c. Interruption regarding autopsy and subsequent discussion

One of the officers then entered the interview room. He said he had received a call from the coroner's office. The autopsy, he reported, showed that Mia had "died at the hands of [an]other," that Mia "didn't suffocate," and ***809** that her bruises were caused by "a beating." The officer then told defendant, "[Y]ou were the last one with your daughter and there's [no] doubt [about] it. She suffered major injuries. This may be the last time you guys get to talk to each other in person, okay?" He stated that "right now both of you are looking at going to jail for child neglect; causing the death of that baby." He then asked, "Did either of you have anything you want to say to me?" Martinez said, "No"; defendant was silent.

The officer left the interview room.

Martinez again asked defendant, "What happened?" Defendant said he "want[ed] [the police] to leave [her] alone" and that he did not want "them to take" Martinez. Martinez again reassured him, "We're ... going to get through this."

d. Officer momentarily pulls Martinez out of the room

The same officer who announced the autopsy results reentered the room and ****343** asked Martinez to step outside. He asked if she would take a polygraph test, and informed her that defendant had refused to do so. The officer then escorted Martinez back to the interview room. The officer later admitted that his purpose in doing this was to "stimulate conversation" between Martinez and defendant.

e. Resumption of conversation and confession

Once they were alone again, Martinez asked defendant, "[W]hy don't [you] want to take [the] polygraph?" Martinez reminded defendant that she was "Mia's mother," that she "need[ed] to know what happened to her," and that, "If you love me, you need to tell me the truth."

Defendant at first replied that he "didn't do it," but moments later said he "did it." While sobbing, he went on to confess that he "hit her" "once" and that he "fucking killed Mia," their "little baby."

A few minutes later, the officer returned, said "Time's up," and escorted Martinez from the interview room.

***810** II. Procedural Background

A. *Charges*

The People charged defendant with (1) murder (Pen. Code, § 187, subd. (a)),[1] and (2) assault on a child causing death (§ 273ab, subd. (a)).[2]

B. *Cross motions to suppress and admit*

Defendant filed a written motion to exclude his confession as obtained in violation of *Miranda*. The People filed a cross-motion to admit the confession.

The trial court ruled that the confession was admissible. The court found that Martinez was an agent of the police at the time she spoke with defendant in the interview room, but ruled that "the case law"—specifically, *Illinois v. Perkins* (1990) 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (*Perkins*), *People v. Guilmette* (1991) 1 Cal.App.4th 1534, 2 Cal.Rptr.2d 750 (*Guilmette*) and *People v. Plyler* (1993) 18 Cal.App.4th 535, 22 Cal.Rptr.2d 772 (*Plyler*)—foreclosed defendant's argument that his prior invocation of his *Miranda* right to counsel mandated suppression because defendant had been unaware of Martinez's role as a police agent and thought he was talking to his girlfriend. The court also rejected defendant's argument that the officer's intervention to announce the autopsy results changed the analysis because the officer "just came in and then he left again."

C. *Verdicts, sentencing and appeal*

The matter proceeded to a jury trial. The jury convicted defendant of second degree murder and assault on a child causing death.

The trial court sentenced defendant to prison for 25 years to life on the assault count. The court imposed, but stayed under section 654, a sentence of 15 years to life on the murder count. The court also imposed $60 in court operations assessments, $80 in criminal conviction assessments, and the minimum $300 restitution fine, and imposed but suspended a $300 parole revocation fine.

Defendant filed a timely notice of appeal.

***811 DISCUSSION**

Defendant argues that the trial court erred in not suppressing his confession ****344** to Martinez under (1) *Miranda* and (2) due process.[**] We independently review the trial court's legal determinations on these issues but review its underlying factual findings for substantial evidence. (*People v. Williams* (2010) 49 Cal.4th 405, 425, 111 Cal.Rptr.3d 589, 233 P.3d 1000 [*Miranda* determination]; *People v. Carrington* (2009) 47 Cal.4th 145, 169, 97 Cal.Rptr.3d 117, 211 P.3d 617 [due process determination]; *People v. Tate* (2010) 49 Cal.4th 635, 686, 112 Cal.Rptr.3d 156, 234 P.3d 428 [factual findings].)

I. *Miranda*

Miranda established the now-familiar rule that prosecutors may not admit a suspect's statements in their case-in-chief against the suspect-defendant unless (1) the defendant was advised that (a) "he has a right to remain silent," (b) anything he says "may be used as evidence against him," (c) "he has a right to the presence of an attorney," and (d) the defendant will be provided an attorney if he cannot afford one; (2) the defendant waived those rights, either expressly (by affirmatively indicating a waiver) or implicitly (by answering questions); and (3) prior to making the statements to be admitted, the defendant did not invoke either his right to remain silent or his *Miranda* right to an attorney. (*Miranda*, *supra*, 384 U.S. at pp. 444-445, 473-474, 476, 86 S.Ct. 1602; *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 218-219, 145 Cal.Rptr.3d 271, 282 P.3d 279.)

Critically, however, *Miranda*'s rule has a limit: It only applies when the suspect-defendant was the subject of "custodial interrogation." (*Miranda*, *supra*, 384 U.S. at p. 444, 86 S.Ct. 1602.) This limitation is a function of *Miranda*'s underlying rationale—namely, as a "constitutional rule" implementing the Fifth Amendment's privilege against self-incrimination. (*Dickerson v. U.S.* (2000) 530 U.S. 428, 440-444, 120 S.Ct. 2326, 147 L.Ed.2d 405 (*Dickerson*).) The Fifth Amendment provides that "[n]o person ... shall be *compelled* in any criminal case to be a witness against himself." (U.S. Const., 5th amend., italics added.) *Miranda* was the first case to acknowledge that "in-custody interrogation of persons suspected or accused of crime contains ***812** inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so." (*Miranda*, at p. 467, 86 S.Ct. 1602.) Although the "informal," "psychological" pressures inherent in "incommunicado interrogation" do not themselves render a statement involuntary (*id.* at pp. 445, 449, 461, 120 S.Ct. 2326; *Dickerson*, at p. 444, 120 S.Ct. 2326), *Miranda* reasoned that those pressures nonetheless necessitate a "protective device"—namely, *Miranda*'s rule—to ensure that suspects do not make the type of compelled statements at the core of the Fifth Amendment's privilege (*Miranda*, at pp. 458, 465, 86 S.Ct. 1602).

Defendant asserts that his confession to Martinez should have been suppressed for two independent reasons: (1) he invoked his *Miranda* right to counsel during the first interview and the police officers violated *Miranda* by subsequently sending Martinez to speak with him, and (2) the officers violated *Miranda* during the first interview, and that his subsequent confession to Martinez was the "tainted fruit" of that earlier violation.

A. *Does defendant's prior invocation of his* Miranda *right to counsel require suppression of his statements to Martinez?*

Defendant argues that his repeated invocation of his *Miranda* right to counsel ****345** during the first interview precluded the court from admitting the confession obtained during his subsequent, arranged meeting with Martinez. For support, he cites *Edwards v. Arizona* (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (*Edwards*), which holds that a suspect's invocation of his *Miranda* right to counsel precludes "further police-initiated custodial interrogation" unless and until counsel is present or the suspect "initiates further communication" with the police. (*Id.* at pp. 484-485, 101 S.Ct. 1880.) The People respond that defendant's confession to Martinez does not run afoul of *Miranda* because (1) Martinez was not an agent of the police, and (2) defendant did not know Martinez was working with the police. For support of their second argument, the People cite *Perkins*, *supra*, 496 U.S. 292, 110 S.Ct. 2394, which holds that "*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement." (*Id.* at p. 294, 110 S.Ct. 2394; accord *People v. Williams* (1988) 44 Cal.3d 1127, 1141-1142, 245 Cal.Rptr. 635, 751 P.2d 901 [same].) Substantial evidence supports the trial court's findings that Martinez was an agent of the police when she met with defendant (because the officers implored her to "get an explanation" from defendant) and that defendant did not know Martinez was such an agent (because there is no evidence defendant

knew of any of the conversations between Martinez and the officers). Accordingly, this case squarely presents the question: When a suspect invokes his *Miranda* right to counsel and law enforcement subsequently orchestrates a conversation between the suspect and someone the suspect does not know is an agent of law enforcement, which decision controls—*Edwards* or *Perkins*?

***813** We conclude that *Perkins* controls, and we do so for three reasons.

First, the language in *Edwards* itself dictates that *Edwards* is inapplicable. *Edwards* fleshed out what *Miranda* meant when it said that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (*Miranda*, *supra*, 384 U.S. at p. 474, 86 S.Ct. 1602.) Specifically, *Edwards* held that a suspect who has invoked his *Miranda* right to counsel may not be "subject[ed] to further *interrogation* by the authorities" on any crime at all unless (1) counsel is present "at the time of [any further] questioning," or (2) the suspect "himself initiates further communication, exchanges or conversations with the police." (*Edwards*, *supra*, 451 U.S. at pp. 484-485, 101 S.Ct. 1880, italics added; *Arizona v. Roberson* (1988) 486 U.S. 675, 677, 108 S.Ct. 2093, 100 L.Ed.2d 704 (*Roberson*); *Minnick v. Mississippi* (1990) 498 U.S. 146, 147, 153, 111 S.Ct. 486, 112 L.Ed.2d 489 (*Minnick*).) By their terms, *Edwards* and its progeny have applied these restrictions only to further "interrogation" of the suspect. (*Edwards*, at pp. 478, 482, 484-486, 101 S.Ct. 1880; *Roberson*, at pp. 677, 680, 687, 108 S.Ct. 2093; *Minnick*, at p. 157, 111 S.Ct. 486.) Indeed, *Edwards* specifically noted "[a]bsent ... *interrogation*, there would be no infringement of the [*Miranda*] right [to counsel] that Edwards invoked." (*Id.* at p. 486, 101 S.Ct. 1880, italics added; cf. *id.* at p. 485, 101 S.Ct. 1880 ["nothing ... would prohibit the police from merely listening to [a suspect's] voluntary, volunteered statements and using them against him at the trial."].)

For purposes of *Miranda*, "interrogation" means "express questioning" or "words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response." (****346** *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (*Innis*).) Because interrogation "reflect[s] a measure of compulsion above and beyond that inherent in custody itself" (*id.* at p. 300, 100 S.Ct. 1682), not all statements a defendant makes while in custody are "the product of interrogation" (*id.* at p. 299, 100 S.Ct. 1682). Whether the police action is "reasonably likely to elicit an incriminating response" is judged by what the suspect perceives, not what the police intend. (*Id.* at p. 301, 100 S.Ct. 1682.) Implicit in the definition of "interrogation" is that (1) the suspect is talking to the police or an agent of the police, *and* (2) the suspect *is aware* that he is talking to the police or one of their agents. This is why a suspect can be subject to "interrogation" when he knowingly interacts with the police or their agents. (*Id.* at p. 295, 100 S.Ct. 1682 [speaking with police]; *In re I.F.* (2018) 20 Cal.App.5th 735, 773, 229 Cal.Rptr.3d 462 [same]; *In Interest of D.W.* (1982) 108 Ill. App. 3d 1109, 1110-1111, 64 Ill.Dec. 588, 440 N.E.2d 140 [same]; *People v. Ghent* (1987) 43 Cal.3d 739, 750-751, 239 Cal.Rptr. 82, 739 P.2d 1250 [speaking with psychiatrist retrained by the police]; *People v. Sanchez* (1983) 148 Cal.App.3d 62, 69-70, 195 Cal.Rptr. 558 [speaking with doctor working with police in presence of police]; see also *Estelle v. Smith* (1981) 451 U.S. 454, 467-468, 101 S.Ct. 1866, 68 L.Ed.2d 359 [speaking with prison psychiatrist pursuant to court order].)

***814** Conversely, there is no "interrogation" when a suspect speaks with someone he does not know is an agent of the police. (*Arizona v. Mauro* (1987) 481 U.S. 520, 521, 526-529, 107 S.Ct. 1931, 95 L.Ed.2d 458 [spouse]; *People v. Tate* (2010) 49 Cal.4th 635, 685-686, 112 Cal.Rptr.3d 156, 234 P.3d 428 [possible accomplice/accessory]; *People v. Mayfield* (1997) 14 Cal.4th 668, 758, 60 Cal.Rptr.2d 1, 928 P.2d 485 [father]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1398-1402, 58 Cal.Rptr.3d 368, 157 P.3d 973 [father]; *People v. Webb* (1993) 6 Cal.4th 494, 526, 24 Cal.Rptr.2d 779, 862 P.2d 779 ["friend and lover"]; *People v. Thornton* (2007) 41 Cal.4th 391, 429-430, 432, 61 Cal.Rptr.3d 461, 161 P.3d 3 [grandmother]; *People v. Jefferson* (2008) 158 Cal.App.4th 830, 840-841, 70 Cal.Rptr.3d 451 ["friend[ ]" and "neighbor[ ]"].) Because there is no "interrogation" in these circumstances, there is also no basis to apply *Edwards's* restrictions on further "interrogation."

Second, the rationale underlying *Miranda* dictates that *Perkins*, not *Edwards*, should control. As described above, *Miranda*'s rule requiring a warning, a waiver and the cessation of questioning if a suspect invokes his *Miranda* rights is designed to dispel the "compelling" "psychological" "pressures" that are part and parcel of "in-custody interrogation." (*Miranda*, *supra*, 384 U.S. at pp. 448-449, 461, 467, 86 S.Ct. 1602.) *Edwards's* rule is based on those same pressures: A suspect's invocation of his *Miranda* right to counsel means "he is not capable of undergoing such questioning without advice of counsel," and "any subsequent

waiver [by the suspect of his *Miranda* rights] ... has come at the authorities' behest, and not at the suspect's own instigation. [Citation.]" (*Roberson*, *supra*, 486 U.S. at p. 681, 108 S.Ct. 2093.) *Edwards's* rule is accordingly "justified only in circumstances where th[ose] coercive pressures" exist. (*Maryland v. Shatzer* (2010) 559 U.S. 98, 115-116, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (*Shatzer*).) This makes sense: *Edwards* implements *Miranda*, so should be limited to the evil *Miranda* was created to combat.

Because "[t]he essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated ****347** person speaks freely to someone" that he thinks is a lover, a family member, a friend or even a fellow criminal (*Perkins*, *supra*, 496 U.S. at p. 296, 110 S.Ct. 2394; *People v. Terrell* (2006) 141 Cal.App.4th 1371, 1386, 46 Cal.Rptr.3d 927 ["there can be no coercion for *Miranda* purposes when the defendant is subjectively unaware of any police involvement in eliciting or recording his statements"]), *Miranda*'s (and, by extension, *Edwards's*) purpose in combating that atmosphere and compulsion is simply not implicated in such situations. To apply *Edwards* here is to require police to provide counsel while a suspect is speaking with a lover, family member or friend in what he (mistakenly) thought was a private conversation. This would undoubtedly discourage suspects from speaking to anyone and thus effectively convert *Edwards* into a rule automatically ***815** excluding all post-invocation statements, a result that *Edwards* itself acknowledged swept far beyond *Miranda*'s reach. (*Edwards*, *supra*, 451 U.S. at p. 486, 101 S.Ct. 1880; see also *Shatzer*, *supra*, 559 U.S. at pp. 110-111, 130 S.Ct. 1213 [post-invocation statements made after sufficient break in custody may be admitted].)

Third, and not surprisingly, California courts have uniformly come to the conclusion that *Perkins* controls when a suspect invokes his *Miranda* right to counsel but later speaks with someone he does not know is an agent of the police. That was the holding of *Guilmette*, *supra*, 1 Cal.App.4th at pp. 1540-1541, 2 Cal.Rptr.2d 750, and *Plyler*, *supra*, 18 Cal.App.4th at pp. 544-545, 22 Cal.Rptr.2d 772.

Defendant resists this conclusion with what boils down to five categories of arguments.

First, defendant contends that *Perkins* should not control because *Perkins* did not involve a suspect who had previously invoked his *Miranda* right to counsel; *Edwards*, he urges, should control where there is such an invocation. For support, he cites two sources. He cites a footnote from Justice Brennan's concurrence in *Perkins*, where Justice Brennan opined that "[i]f [Perkins] had invoked either [his *Miranda* right to remain silent or his *Miranda* right to counsel], the inquiry would focus on whether he subsequently waived the particular right" and then proceeded to cite *Edwards*. (*Perkins*, *supra*, 496 U.S. at p. 300, 110 S.Ct. 2394, fn. * (conc. opn. of Brennan, J.).) *Perkins* had a seven-justice majority, however, so Brennan's concurrence was not the critical fifth vote; as a consequence, the concurrence is dicta. (E.g., *Maryland v. Wilson* (1997) 519 U.S. 408, 412-413, 117 S.Ct. 882, 137 L.Ed.2d 41.) Justice Brennan also makes no attempt to reconcile *Edwards's* limitation to post-invocation "interrogations" with his concession elsewhere in his concurrence that the "questioning" of Perkins in that case "does not amount to 'interrogation.' " (*Perkins*, at p. 300, 110 S.Ct. 2394.) Defendant also cites the state appellate decision on remand from *Perkins*, where the court held that Perkins's conversation with the undercover agent constituted "interrogation." (*People v. Perkins* (1993) 248 Ill. App. 3d 762, 771, 188 Ill.Dec. 705, 618 N.E.2d 1275.) Curiously, however, that decision nowhere addressed the Supreme Court's prior decision in *Perkins* and, as a result, is simply incorrect in holding that the conversation constituted "interrogation."

Second, defendant asserts that the law otherwise dictates that conversations between a suspect and people he does not know are agents of the police constitute "interrogation," such that *Guilmette* and *Plyler* were wrongly decided. For support, he again cites two sources. He cites Justice Marshall's dissent in *Perkins*, where he opines that "[t]he Court does not dispute ****348** that the police officer here conducted a custodial interrogation of a criminal suspect." (*Perkins*, *supra*, 496 U.S. at p. 304, 110 S.Ct. 2394 (dis. opn. of Marshall, J.).) Beyond the ***816** obvious facts that what is said in a dissenting opinion is usually the *opposite* of the court's holding and is in any event dicta, Justice Marshall's characterization of the *Perkins's* majority decision is at odds with both the majority opinion itself and, as noted above, with Justice Brennan's concurrence. Defendant also cites language in a footnote in *Patterson v. Illinois* (1988) 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261, stating that "a surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any *Miranda* violation as long as the 'interrogation' was not in a custodial setting." (*Id.* at p. 296, fn. 9, 108 S.Ct. 2389.) *Patterson* made this statement in the context of distinguishing the protections afforded by *Miranda* from those afforded by the Sixth Amendment under

Massiah v. U.S. (1964) 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246. *Patterson* was not attempting to define the meaning of "interrogation" and, more importantly, *Patterson* came before *Perkins*. As the latter decided case that squarely addresses the issue, *Perkins* controls.

Third, defendant posits that even if *Guilmette* and *Plyler* are not wrongly decided, they are distinguishable. In each case, he points out, the suspect had been the one to initiate the post-invocation conversation that resulted in a confession. (*Guilmette*, *supra*, 1 Cal.App.4th at p. 1538, 2 Cal.Rptr.2d 750; *Plyler*, *supra*, 18 Cal.App.4th at p. 541, 22 Cal.Rptr.2d 772.) In this case, the evidence is conflicting over whether defendant was the one to suggest speaking with Martinez. But even if we assume that the police orchestrated the conversation, what makes *Edwards* apply rather than *Perkins* is whether the suspect *knew* he was talking to a police agent, not who initiated that talk in the first place.

Fourth, defendant urges that even if his conversation with Martinez did not start out as an interrogation, it became one once the officer returned with a summary of the autopsy findings and asked if either parent had "anything [they] want[ed] to say." Had defendant answered the officer's question with an incriminating statement, he would have been interrogated. But he did not. Instead, defendant said nothing, and the officer left. At that point, defendant resumed his one-on-one conversation with Martinez, completely unaware she was an agent of the police. His subsequent confession to her was accordingly not the product of an interrogation.

Lastly, defendant argues that the police engaged in a "persistent, underhanded attempt ... to obtain a confession" by blatantly disregarding his repeated requests for counsel and then orchestrating a tearful confrontation with his girlfriend and the mother of his now-dead infant. The police conduct in this case was deplorable. (Accord, *Missouri v. Seibert* (2004) 542 U.S. 600, 616, 124 S.Ct. 2601, 159 L.Ed.2d 643 (plurality) [decrying "police strategy adapted to undermine the *Miranda* warnings"].) But the question we must ***817** decide is whether it is *unconstitutional*.[4] *Miranda* ****349** is not a free-floating bulwark against unfair police tactics. Constitutional rules are anchored to their rationales (*Shatzer*, *supra*, 559 U.S. at p. 106, 130 S.Ct. 1213 ["A judicially crafted rule is 'justified only by reference to its prophylactic purpose ...' [citation]"]), and *Miranda*'s rule is moored to its purpose of "preventing government officials from using the coercive nature of confinement to extract confessions" (*Mauro*, *supra*, 481 U.S. at pp. 529-530, 107 S.Ct. 1931; *Oregon v. Elstad* (1985) 470 U.S. 298, 304-305, 105 S.Ct. 1285, 84 L.Ed.2d 222 (*Elstad*) [*Miranda* is designed to combat the "psychological pressures to confess emanating from ... official coercion"]). "*Miranda* forbids coercion," the Supreme Court has said, "not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be" someone he can trust. (*Perkins*, *supra*, 496 U.S. at p. 297, 110 S.Ct. 2394.) To construe *Miranda* to reach the noncoercive police conduct in this case is to untether *Miranda* from its purpose and, in so doing, undermine its legitimacy as one of the many bulwarks protecting the constitutional rights of criminal defendants. We decline to sully *Miranda* in this fashion.

B. *Is defendant's confession to Martinez the tainted fruit of his first interview?*

Defendant alternatively argues that, even if his confession to Martinez was not the product of an interrogation barred by *Edwards*, *supra*, 451 U.S. 477, 101 S.Ct. 1880, the confession must nevertheless be suppressed because it is the fruit of the first interview during which the police violated his *Miranda* rights by continuing to interrogate him despite his repeated invocation of his *Miranda* right to counsel. For support, defendant cites *People v. Montano* (1991) 226 Cal.App.3d 914, 277 Cal.Rptr. 327 (*Montano*).

When the police violate a suspect's *Miranda* rights, the statement immediately resulting from that violation is inadmissible in the prosecution's case-in-chief. (*Miranda*, *supra*, 384 U.S. at pp. 444-445, 86 S.Ct. 1602.) That violation may also warrant suppression of subsequent statements obtained as a result of the initial violation. (*People v. Storm* (2002) 28 Cal.4th 1007, 1027, 124 Cal.Rptr.2d 110, 52 P.3d 52.) However, because a violation of *Miranda* does not necessarily result in a confession that is "compelled" ***818** within the meaning of the Fifth Amendment (*Dickerson*, *supra*, 530 U.S. at 444, 120 S.Ct. 2326; *Elstad*, *supra*, 470 U.S. at p. 310, 105 S.Ct. 1285), an initial *Miranda* violation does not "inherently taint[ ]"—and thus warrant suppression of—all subsequent statements (*Elstad,* at p. 307, 105 S.Ct. 1285). Instead, a defendant seeking to suppress a statement as the tainted fruit of a *Miranda* violation must establish that any subsequent confession was involuntary. (*Storm,* at pp. 1029-1030, 124 Cal.Rptr.2d 110, 52 P.3d 52; *People v. Case* (2018) 5 Cal.5th 1, 23-26, 233 Cal.Rptr.3d 439, 418 P.3d 360 (*Case*); *People v. Bradford* (1997) 14 Cal.4th 1005, 1039-1041, 60 Cal.Rptr.2d 225, 929 P.2d 544 (*Bradford*).) We adjudge whether a confession was voluntary by looking

to the totality of the circumstances. (*Moran*, *supra*, 475 U.S. at p. 421, 106 S.Ct. 1135.)

Applying these standards, defendant's confession to Martinez was not the suppressible fruit of an earlier *Miranda* violation. Significantly, the officers' initial *Miranda* violation in questioning defendant ****350** despite his repeated request for counsel did not produce any confession. Instead, defendant steadfastly maintained his innocence. This is accordingly not a case where the initial *Miranda* violation produced a confession that, once made, put pressure on a suspect to reaffirm that prior confession; in this case, the proverbial "cat" never got out of the "bag." Further, and for the reasons outlined in detail above, defendant's statements to Martinez were voluntary because he (mistakenly) believed he was having a private conversation with his girlfriend; he had no idea that police were exerting any pressure on him at all.

Montano does not dictate a different result. *Montano* held that a police officer's repeated refusal to honor a suspect's invocation of his right to remain silent under *Miranda* by itself constituted "coercion" that automatically rendered any subsequent confession the tainted "fruit" of that earlier violation. (*Montano*, *supra*, 226 Cal.App.3d at pp. 933-934, 277 Cal.Rptr. 327.) Our Supreme Court subsequently rejected *Montano's* holding when it ruled that "continued interrogation after a defendant has invoked his" *Miranda* "right[s]" does not "inherently constitute coercion." (*Bradford*, *supra*, 14 Cal.4th at p. 1039, 60 Cal.Rptr.2d 225, 929 P.2d 544; *Storm*, *supra*, 28 Cal.4th at pp. 1031-1033, 124 Cal.Rptr.2d 110, 52 P.3d 52.) Indeed, *Storm* went so far as to declare *Montano* to be "not" "persuasive" on this precise point. (*Storm*, at p. 1037, fn. 13, 124 Cal.Rptr.2d 110, 52 P.3d 52.)

II. Due Process

Defendant argues that his confession should have been suppressed as obtained in violation of due process because the police officers (1) deliberately ignored his repeated requests for counsel during the first interview and thereafter sent Martinez in to "get the full explanation" from him; and (2) highlighted the seriousness of the crime, threatened to arrest him and put him in jail if he did not "explain what happened" and stated that he and Martinez were "looking at going to jail for child neglect." The People respond that ***819** defendant cannot raise a due process-based objection now because he did not do so before the trial court.

A. *Forfeiture*

Defendant has forfeited any due process challenge to his confession. His motion to suppress was based solely on *Miranda*, and our Supreme Court has held that a *Miranda*-based objection to a confession is legally distinct from a due process-based objection; one objection does not preserve the other for appellate review. (*People v. Ray* (1996) 13 Cal.4th 313, 339, 52 Cal.Rptr.2d 296, 914 P.2d 846.) However, because defendant responds that his counsel was constitutionally ineffective for not making a due process-based objection, we elect to exercise our discretion to reach the merits of his due process claim.

B. *Merits*

The constitutional right to due process secured by the federal and California Constitutions mandates the suppression of an involuntary confession. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176, 158 Cal.Rptr.3d 521, 302 P.3d 927 (*Linton*).) For these purposes, a confession is involuntary if official coercion caused the defendant's will to be overborn, such that the resulting statement is not the product of " ' " ' "a rational intellect and free will" ' [citation]." ' " (*Ibid.*; *People v. Guerra* (2006) 37 Cal.4th 1067, 1093, 40 Cal.Rptr.3d 118, 129 P.3d 321 (*Guerra*), overruled on other grounds by *People v. Rundle* (2008) 43 Cal.4th 76, 74 Cal.Rptr.3d 454, 180 P.3d 224.) We judge whether a confession was involuntary by examining ****351** the totality of circumstances surrounding the confession. (*Linton*, at p. 1176, 158 Cal.Rptr.3d 521, 302 P.3d 927; *Guerra*, at p. 1093, 40 Cal.Rptr.3d 118, 129 P.3d 321.)

1. *Officers' circumvention of Miranda*

The officers' deliberate circumvention of *Miranda*'s protections by disregarding defendant's requests for counsel and orchestrating the monitored conversation between defendant and Martinez did not violate due process.

Due process requires coercion and, for the reasons set forth above, defendant's statements to Martinez were not coerced because, as far as he knew, he was talking to his girlfriend. (Accord, *Webb*, *supra*, 6 Cal.4th at p. 526, 24 Cal.Rptr.2d 779, 862 P.2d 779 [finding no coercion under *Miranda* because "[f]rom defendant's perspective, he was talking with a friend and lover"].) The officers' behind-the-scenes manipulation is, at most, a form of deception, but " '[p]olice trickery ... does not, by itself, render a confession

involuntary.' " (*People v. Mays* (2009) 174 Cal.App.4th 156, 164-165, 95 Cal.Rptr.3d 219.) The ***820** trickery here consisted of placing defendant in a room with someone he trusted to see if he would talk. Because the "proximate caus[e]" of his ensuing confession was *the conversation*—and not the deceptive act of orchestrating its occurrence—the requisite proximate causal link between the police stratagem and defendant's confession is missing. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240, 74 Cal.Rptr.2d 212, 954 P.2d 475.)

Absent a showing that the police conduct in this case independently violates *due process*, defendant is effectively asking us to expand *Miranda* under the aegis of due process. This we may not do: "Where," as here, "a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive [or procedural] due process," must be the guide for analyzing these claims.' " (*Albright v. Oliver* (1994) 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114, quoting *Graham v. Connor* (1989) 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443; see also *Portuondo v. Agard* (2000) 529 U.S. 61, 74, 120 S.Ct. 1119, 146 L.Ed.2d 47; cf. *Doyle v. Ohio* (1976) 426 U.S. 610, 617-618, 96 S.Ct. 2240, 49 L.Ed.2d 91 [due process prohibits use of a defendant's silence after receiving *Miranda* warnings because such use independently violates due process, as it is "fundamentally unfair" to use a suspect's post-warning silence after implicitly promising not to do so].)

2. *Warnings about severity of penalty and threats of jail*

The officers' reminders to defendant that the penalty for causing Mia's death was severe, their threat to arrest him immediately if he did not "explain what happened" (by promising not to immediately arrest him if he did), and their reminder that he (and Martinez) were "looking at going to jail" for Mia's death did not violate due process. Law enforcement does not violate due process by informing a suspect of the likely consequences of the suspected crimes or of pointing out the benefits that are likely to flow from cooperating with an investigation. (*People v. Holloway* (2004) 33 Cal.4th 96, 115-116, 14 Cal.Rptr.3d 212, 91 P.3d 164 [recounting consequences]; *People v. Williams* (2010) 49 Cal.4th 405, 442-443, 111 Cal.Rptr.3d 589, 233 P.3d 1000 [same]; *People v. Spears* (1991) 228 Cal.App.3d 1, 27-28, 278 Cal.Rptr. 506 [benefits that flow from cooperation].) The officers' conduct in emphasizing the severity of the crime at issue and telling defendant that he was "looking at going to jail" for that crime did ****352** not transgress these limits. The officers' promise not to arrest defendant immediately if he confessed presents a closer question, but there is no causal link between that promise to give defendant a temporary reprieve from custody if he confessed for the simple reason that that promise did not produce any confession. To the contrary, defendant steadfastly stuck to his ***821** initial story and continued to request an attorney. As our Supreme Court recently observed, a defendant's "steadfast[ ] maint[enance]" of his "innocen[ce]" "tends to undercut the notion that his free will was overborne by the [officer's] remarks." (*Case*, *supra*, 5 Cal.5th at p. 26, 233 Cal.Rptr.3d 439, 418 P.3d 360.)

DISPOSITION

The judgment is affirmed.

Lui, P. J., and Chavez, J., concurred.

Opinion
A petition for a rehearing was denied March 7, 2019. On March 7, 2019 and March 25, 2019, the opinion was modified to read as printed above and appellant's petition for review by the Supreme Court was denied June 12, 2019, S254964.

All Citations

32 Cal.App.5th 802, 244 Cal.Rptr.3d 337, 19 Cal. Daily Op. Serv. 1959, 2019 Daily Journal D.A.R. 1739

Footnotes

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of footnote 3.

1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The People also alleged that defendant personally inflicted great bodily injury (§ 12022.7) regarding the murder, but later dismissed that allegation.

** See footnote *, *ante*.

4 Orchestrating the conversation between defendant and Martinez clearly constitutes "deliberate elicitation" within the meaning of the Sixth Amendment. (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 473, 106 S.Ct. 2616, 91 L.Ed.2d 364 (plurality opinion).) But this is doubly irrelevant: Not only is the Sixth Amendment's "primary concern" with stopping "secret interrogation" different from *Miranda*'s concern with stopping the coercion inherent in incommunicado interrogation (*id.* at p. 459, 106 S.Ct. 2616; *Roberson*, *supra*, 486 U.S. 675, 685, 108 S.Ct. 2093), but the Sixth Amendment is also inapplicable here because defendant was not yet formally charged with any crime at the time of his confession (*Moran v. Burbine* (1986) 475 U.S. 412, 428, 106 S.Ct. 1135, 89 L.Ed.2d 410 (*Moran*)).

86 Cal.App.4th 353, 102 Cal.Rptr.2d 921, 01 Cal. Daily Op. Serv. 532, 2001 Daily Journal D.A.R. 649

THE PEOPLE, Plaintiff and Respondent,

v.

JAMES PERACCHI,

Defendant and Appellant.

No. F031202.
Court of Appeal, Fifth District, California.
Jan. 17, 2001.

[Opinion certified for partial publication. *]

SUMMARY

Defendant was convicted of reckless driving while evading a police officer following a trial at which statements made by defendant during police interrogation were admitted into evidence. (Superior Court of Fresno County, No. 571767-3, Lawrence Jones, Judge.)

The Court of Appeal reversed and remanded for retrial. The court held that the trial court erred in not suppressing statements defendant made to police during interrogation, since the statements were made after defendant had invoked his right to remain silent. After being read his Miranda rights and asked whether he was willing to waive them, defendant stated he did not think he could talk at that moment. Although his initial statements to the officer regarding whether he was willing to waive his rights may have been ambiguous, his intent to remain silent became clear through further questioning. Ultimately, defendant stated, “I don't want to discuss it right now,” clearly indicating that he intended to invoke his right to remain silent. The officer's questions thereafter assumed that defendant did not wish to speak with him as the questions focused solely on the reason why defendant did not want to do so. Officers have no legitimate need or reason to inquire into the reasons why a suspect wishes to remain silent. The only reason the officer had to continue questioning was to keep defendant talking and to eventually evoke an incriminating response. (Opinion by Thaxter, Acting P. J., with Harris and Buckley, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Criminal Law § 620--Appellate Review--Scope of Review--Invocation of Right to Remain Silent.
In evaluating a claim of whether a ***354** defendant invoked his or her constitutional right to remain silent, the court accepts the trial court's factual findings and evaluations of credibility if supported by substantial evidence. While the court must undertake an independent review of the record to determine whether the right to remain silent was invoked, the court also gives great weight to the considered conclusions of a lower court that has previously reviewed the same evidence. Whether a suspect has invoked his or her right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context. The court applies federal standards in reviewing the defendant's claim that his or her statements were elicited in violation of his or her rights.

(2)
Criminal Law § 123--Interrogation; Advice as to Constitutional Rights-- When Interrogation Must Cease.
If an individual indicates in any manner, at any time prior to or during police questioning, that he or she wishes to remain silent, the interrogation must cease. No particular form of words or conduct is necessary to invoke the right to remain silent; the suspect may use any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely. However, if the suspect's invocation of the right to remain silent is ambiguous, the police may continue questioning for the limited purpose of clarifying whether he or she is waiving or invoking that right, although they may not persist in repeated efforts to wear down the suspect's resistance and make the suspect change his or her mind. Once a defendant invokes the right to remain silent, that decision must be scrupulously honored.

(3)

Criminal Law § 124--Interrogation; Advice as to Constitutional Rights-- When Interrogation Must Cease--Questions as to Why Defendant Wishes to Remain Silent.
In a criminal prosecution, the trial court erred in not suppressing statements defendant made to police during interrogation, where the statements were made after he had invoked his right to remain silent. After being read his Miranda rights and asked whether he was willing to waive them, defendant stated he did not think he could talk at that moment. Although his initial statements to the officer regarding whether he was willing to waive his rights may have been ambiguous, his intent to remain silent became clear through further questioning. Ultimately, defendant stated, "I don't want to discuss it right now," clearly indicating that he intended to invoke his right to remain silent. The officer's questions assumed that defendant did not wish to speak with him, as the questions focused solely on the reason why defendant did not want to do so. Officers have ***355** no legitimate need or reason to inquire into the reasons why a suspect wishes to remain silent.

[See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 132.]

(4)
Criminal Law § 117--Interrogation; Advice as to Constitutional Rights-- What Constitutes Interrogation--Questions as to Why Defendant Wishes to Remain Silent.
A police officer's persistent questioning of a suspect as to why he or she wished to remain silent constituted interrogation. This includes either express questioning or any words or actions by the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. An interrogator would only want to probe beyond the suspect's presumed desire to avoid self-incrimination if the interrogator expected either to evoke an incriminating response or determine how the suspect might be persuaded to abandon his rights.

(5)
Criminal Law § 671--Appellate Review--Harmless and Reversible Error-- Violation of Miranda Rights.
When a statement obtained in violation of a defendant's constitutional right to remain silent is erroneously admitted into evidence, the conviction may be affirmed if the error is harmless beyond a reasonable doubt.

COUNSEL
Victor Blumenkrantz, under appointment by the Court of Appeal, for Defendant and Appellant.
Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Robert P. Whitlock and Randall A. Pinal, Deputy Attorneys General, for Plaintiff and Respondent.

THAXTER, Acting P. J.

A jury convicted appellant, James Peracchi, of reckless driving while evading a police officer,[1] and being a felon in ***356** possession of a firearm.[2] The jury acquitted appellant on an additional charge of assaulting a peace officer with a firearm.[3] In a bifurcated proceeding, the trial court found that appellant had suffered two prior convictions within the meaning of the three strikes law.[4]

The trial court sentenced appellant to two concurrent terms of 25 years to life.

Appellant contends that the trial court erred in failing to suppress a statement in violation of *Miranda*,[5] that there is insufficient evidence to support the evading conviction, that prejudicial evidence was improperly admitted at trial, and that his *Pitchess*[6] motion was improperly denied. He also raises two sentencing issues.

We will conclude that the conviction for reckless driving while evading a police officer must be reversed because appellant's incriminating statements admitted at trial were obtained in violation of *Miranda*, and we will remand for retrial on that count and resentencing. In all other respects we will affirm.

Facts

At approximately 1:00 a.m. on June 20, 1996, California Highway Patrol Officers Gregory Taylor and John Layfield were on duty in a marked patrol vehicle driving east on North Avenue near Chestnut

in Fresno County. Officer Taylor, who was driving the patrol car, noticed a red Volkswagen in front of him driving at a slow rate of speed and weaving. Suspecting that the driver of the red car was under the influence, Officer Taylor initiated a traffic stop. The vehicle pulled over immediately, and Officers Taylor and Layfield began approaching the car on foot. Before the officers could reach the front of the car, the red car sped off. The officers followed the red car which began swerving back and forth across both lanes of traffic, driving from shoulder to shoulder. The car continued driving in an erratic manner, slowing down as if it were going to stop and then suddenly speeding up.

The Volkswagen turned north on Willow Avenue and continued driving in an erratic manner. It slowed for a stop sign at Jensen Avenue but proceeded through the intersection without stopping. Jensen Avenue is comprised of ***357** two lanes of traffic in each direction and is positioned in such a way that one cannot see if cross traffic is approaching without coming to a complete stop. There was traffic on Jensen when the red car crossed the intersection. In crossing Jensen, the red car "bottomed out" and threw some sparks. There were marks on the roadway at that point indicating that other cars had done the same thing.

The car resumed its erratic driving pattern and ran another stop sign on Church Avenue, traveling about 20 to 30 miles per hour. Continuing on Willow to Butler Avenue, the car turned east, traveling through a stop sign at 30 miles per hour. The car sped up to 60 miles per hour approaching Peach Avenue. At the intersection of Butler and Peach there is a stop sign and a cement barrier preventing eastbound traffic from continuing across Peach. The car went through the stop sign and swerved into the westbound lane, traveled around the barrier, and continued heading east on Butler. Officer Taylor testified that a vehicle which was traveling west at that intersection had to take evasive action to avoid being hit by the red car.

After going through this intersection, Officer Taylor noticed grinding noises coming from the red Volkswagen, and the car slowed to 40 miles per hour. The car made a sharp left turn onto Minnewawa, traveling at approximately 30 to 40 miles per hour, which caused it to spin out and come to rest facing the wrong direction.

The vehicle chase lasted approximately four minutes and covered four miles. The car was driven in a serpentine manner throughout the chase at speeds ranging from 20 to 60 miles per hour in 40to 50-mile-per-hour speed zones. Officer Taylor left his emergency lights on throughout the chase; however, he did not recall if he used his siren.

When the vehicle chase ended, two men exited the Volkswagen and ran toward nearby houses. The officers gave chase but were unable to find the men.

Officers Taylor and Layfield started to return to the Volkswagen to secure it. On the way back, Officer Layfield became separated from Officer Taylor when he stopped because he heard or sensed something. Officer Layfield shined his flashlight in the direction of a garbage can and a man jumped up, pointed a gun at him and told him not to move. The officer ran for cover, and the man began firing, striking him in the right leg. Officer Layfield returned fire, but the suspect was able to flee.

A substantial amount of evidence was produced at trial regarding who shot Officer Layfield. The jury ultimately acquitted Peracchi of the assault ***358** on the police officer. Since the identity of the shooter is not an issue on appeal, we will not recount that evidence here.

Officers subsequently found Peracchi at 7:56 a.m. hiding in a shed a quarter of a mile from the shooting scene. A loaded, .45-caliber handgun wrapped in a black watch cap was found in the shed, along with a .45-caliber bullet.

A search of the Volkswagen, which belonged to Peracchi, disclosed two ski masks, a dent puller with a screw on the tip, a live .45-caliber bullet, a screwdriver and a pair of pliers.

In an interrogation, Peracchi admitted driving the Volkswagen and possessing the gun.

I. *Appellant's Miranda Rights Were Violated*

Before trial, Peracchi moved to exclude statements he made during a police interrogation on the basis that he had invoked his right to remain silent under *Miranda v.*

Arizona, *supra*, 384 U.S. 436. To support his motion, defense counsel read a transcript of the tape-recorded interview:

"[Defense counsel]: They read him his rights. Then the question,

" 'Do you understand each of those rights I explained to you?

" 'Uh-huh. Then it says "affirmative" in parens.

" 'Is that a yes?

" 'Yes, I understand the rights.

" 'Having those rights in mind, do you want to talk to us now about the charges you're being arrested [*sic*]?

" 'At this point, I don't think so. At this point, I don't think I can talk.

" 'Q Why is that?

" 'I just feel like my mind is not clear enough to discuss this. My mind is not clear enough right now. I need to be able I think. Right now isn't a good time.

" 'Q Okay. And you're saying the reason is because— ***359**

" 'A Uh—something—uh, I guess I don't want to discuss it right now. I guess I want—

" 'Q You want what?

" 'I don't want to discuss it right now.

" 'Q Is it because you're too tired?

" 'Not really. To be honest with you, not really. I mean, I'll give—I—I'll give you a little rundown maybe, but it's not going to be—go too deep about—that's what you want. It's not going—I didn't stop and that was it. Do you know what I mean?

" 'Q Why didn't—

" 'I lost control.

" 'Why didn't you stop.

"[Defense counsel]: And the rest is—is questions about the incident."

After hearing this evidence, the trial court stated that there did not appear to be any coercion in questioning Peracchi about the reason he did not want to talk, and went on to find "that there's proof beyond a reasonable doubt that the defendant made a voluntary, knowing, and intelligent statement to the extent that he felt that he was only giving, I guess, a shortened version of it at that time."

(1) In evaluating a claim of whether a defendant invoked his or her right to remain silent under *Miranda* we accept the trial court's factual findings and evaluations of credibility if supported by substantial evidence.[7] While we must undertake an independent review of the record to determine whether the right to remain silent was invoked,[8] we also " 'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence."[9] Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the ***360** words used must be considered in context.[10] We apply federal standards in reviewing appellant's claim that his statements were elicited in violation of *Miranda*.[11]

(2) Pursuant to *Miranda*, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[12] The United States Supreme Court has recently affirmed that the *Miranda* warnings are rights of constitutional dimension.[13] The California Supreme Court has previously observed "that no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent (*People v. Randall* [, *supra*,] 1 Cal.3d 948, 955 ...), and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely. (*People v. Burton*, *supra*, 6 Cal.3d 375, 382.)"[14] However, if the defendant's invocation of the right to remain silent is ambiguous,

the police may continue questioning for the limited purpose of clarifying whether he or she is waiving or invoking those rights,[15] although they may not persist "in repeated efforts to wear down his resistance and make him change his mind."[16] Once a defendant invokes his or her right to remain silent, that decision must be "scrupulously honored."[17]

(3) Respondent argues Peracchi's response to the officer's questions regarding whether he would waive his right to remain silent was ambiguous and the officer was justified in clarifying why he wished to remain silent to ensure that Peracchi was indeed invoking that right. We disagree.

Respondent relies primarily upon three cases in making this argument.[18] In each of these cases the courts found that ambiguous statements made by the defendant did not amount to an assertion of the defendant's right to remain silent and that the police were justified in asking additional questions ***361** to clarify the ambiguity relating to whether the suspect was invoking his rights and whether he understood those rights. They did not, as is the case here, question *why* the defendant wanted to invoke his rights. Thus, those cases provide little guidance here.

After being read his *Miranda* rights and asked whether he was willing to waive them, Peracchi stated he did not think he could talk at that moment. Although his initial statements to the officer regarding whether he was willing to waive his rights may have been ambiguous ("I don't think so. At this point, I don't think I can talk," "I need to be able I think," "I guess I don't want to discuss it right now"), his intent to remain silent became clear through further questioning. Ultimately, Peracchi stated, "I don't want to discuss it right now," clearly indicating that he intended to invoke his right to remain silent. Indeed, the officer's questions assumed that appellant did not wish to speak with them then and the questions focused solely on the reason why he did not want to do so. Unlike the cases respondent relied upon, the questions here were not directed at whether Peracchi was invoking his right to silence nor were they clarifying whether he understood his rights. Instead, the questions asked why he did not wish to waive his rights. This inquiry itself assumes that Peracchi had invoked his right to remain silent. Officers have no legitimate need or reason to inquire into the reasons why a suspect wishes to remain silent.[19]

Once Peracchi invoked his right to remain silent, the officer was required to cease questioning. As the court stated in *Miranda*: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."[20]

In *Michigan v. Mosley*, *supra*, 423 U.S. 96, the United States Supreme Court interpreted this passage and explained that permitting "the continuation of custodial interrogation after a momentary cessation would clearly ***362** frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned."[21] The court held that the admissibility of a statement made by a suspect after that person invoked his or her right to silence depended upon whether the right to cut off questioning was "scrupulously honored."[22] One can hardly contend that Peracchi's right to remain silent was scrupulously honored. Despite Peracchi's invocation of his right to remain silent, the officer persisted in asking him questions regarding why he did not wish to speak with the officers at that time without even a momentary cessation in questioning. It was only after this repeated questioning that Peracchi eventually decided to give the officer a shortened version of the events. Because Peracchi had already invoked his right to remain silent, and the officer refused to scrupulously honor that request, Peracchi's statements should have been suppressed.

(4) Pointing out that the officer's questions were not geared toward guilt or innocence but instead sought to discover why Peracchi did not wish to speak at that time, respondent impliedly argues that the

officer's questions did not amount to interrogation within the meaning of *Miranda*. In *Rhode Island v. Innis*, the United States Supreme Court defined the term "interrogation" as used in *Miranda* as either express questioning or "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[23] Using this definition we must determine whether the officer's questions, which were directed at why Peracchi did not wish to speak at that time, were reasonably likely to elicit an incriminating response. On this point *Anderson v. Smith*, *supra*, 751 F.2d 105, is instructive.

The defendant in *Anderson* was arrested for murder. Anderson was advised of his *Miranda* rights, and at one point during an interrogation stated "I done it." The officer then stated he wished to put the interrogation on videotape. At the beginning of the videotape interrogation, the officer again advised Anderson of his *Miranda* rights and asked Anderson "do you want to talk to me now?" Anderson replied, "No." Subsequently, the officer asked "You don't want to talk to me? Why?" Anderson replied, "I done told you already."[24] The questioning continued and Anderson eventually admitted he ***363** had something to do with the killing, relayed facts regarding the weapon used, and further stated that he had intended to rob the victim.[25] The Second Circuit held that the officer's inquiry into why Anderson did not want to speak was not a permissible clarifying question because Anderson had clearly invoked his right to remain silent.[26] Furthermore, inquiring into the reason why Anderson did not wish to speak to the police was an inquiry which the police should have known was reasonably likely to elicit an incriminating response. This is because the "interrogator never needs to know why a suspect wants to remain silent; once it is clear that the suspect wants to remain silent, the interrogation should cease. After all, the Fifth Amendment assumes that the suspect invokes his rights in order not to be a witness against himself; that is reason enough. An interrogator would only want to probe beyond the suspect's presumed desire to avoid self-incrimination if he expected either to evoke an incriminating response or to get a clue as to how the suspect might be persuaded to abandon his rights."[27] Like the officer in *Anderson*, the officer here had no reason to question Peracchi about his motivation for remaining silent. Indeed the facts of this case more strongly show that the officer's questions were designed to elicit an incriminating response than did the facts in *Anderson*. Peracchi invoked his right to remain silent before ever being questioned by the officer, unlike Anderson who, after confessing to the crime, suddenly exercised his right to remain silent. Peracchi never indicated in any manner that he was willing to speak with the officer, giving the officer little reason to inquire into Peracchi's unwillingness to talk. Yet the officer persisted in asking him why he did not wish to speak until Peracchi made incriminating statements. The only reason the officer had to continue questioning was to keep Peracchi talking and to eventually evoke an incriminating response. Because the officer continued interrogating Peracchi after he invoked his right to remain silent, Peracchi's statement should have been suppressed.

(5) When a statement obtained in violation of *Miranda* is erroneously admitted into evidence, the conviction may be affirmed if the error is harmless beyond a reasonable doubt.[28] Applying the standard announced in *Chapman v. California*,[29] we find that the error was not harmless beyond a reasonable doubt in relation to the evading count. The only direct evidence placing Peracchi behind the wheel of the red Volkswagen was his statement made to the police. The evidence demonstrated there were two men in the ***364** car, and there was a stipulation that the car belonged to Peracchi. From all the circumstantial evidence the jury may have reasonably inferred that he was the driver, but we cannot find beyond a reasonable doubt that the jury would have reached that conclusion had Peracchi's admission not been received in evidence.

Peracchi's conviction for possession of the handgun, however, need not be reversed. The evidence established that Peracchi was arrested in a shed located a quarter of a mile from the scene of the shooting. A loaded, Llama .45-caliber semiautomatic handgun was found in the shed wrapped in a black watch cap. Located next to the gun was a live .45-caliber bullet which was of the same type and brand as bullets found in the gun. A shirt and gloves were also found in close proximity to the gun. A live .45-caliber bullet was found in the Volkswagen between the driver and

passenger seats. Two additional watch caps/ski masks were found in the backseat of the car. Given the fact that the gun was located in close proximity to Peracchi when he was arrested, that the gun was concealed in a watch cap, that a bullet matching the caliber of the bullets loaded in the gun was found in Peracchi's car, and the fact that additional watch caps/ski masks were also located within Peracchi's car, we conclude that the evidence overwhelmingly established that Peracchi was in possession of the handgun and that the jury would have come to the same result without the admission of Peracchi's statement that he possessed the gun. Since Peracchi's admission relating to the handgun was harmless beyond a reasonable doubt, that conviction will stand.

II. -V.*

. . . . . .

Disposition

The conviction for evading a police officer is reversed. The matter is remanded for retrial on that count, if the prosecutor so elects, and for resentencing. In all other respects the judgment is affirmed.

Harris, J., and Buckley, J., concurred. ***365**

Footnotes

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II through V, inclusive, of the Discussion.

1 Vehicle Code section 2800.2.

FN2 Penal Code section 12021, subdivision (a)(1). All further statutory references are to the Penal Code unless otherwise indicated.

3 Section 245, subdivision (d)(2).

4 Sections 667, subdivisions (a)-(i), 1170.12, subdivisions (a)-(e).

5 *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974].

6 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897, 522 P.2d 305].

7 *People v. Box* (2000) 23 Cal.4th 1153, 1194 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Wash* (1993) 6 Cal.4th 215, 235 [24 Cal.Rptr.2d 421, 861 P.2d 1107].

8 *People v. Jennings* (1988) 46 Cal.3d 963, 979 [251 Cal.Rptr. 278, 760 P.2d 475]; *People v. Wash*, *supra*, 6 Cal.4th at page 236.

9 *People v. Jennings*, *supra*, 46 Cal.3d at page 979; *People v. Wash*, *supra*, 6 Cal.4th at page 236.

10 *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238 [74 Cal.Rptr.2d 212, 954 P.2d 475].

11 *People v. Crittenden* (1994) 9 Cal.4th 83, 129 [36 Cal.Rptr.2d 474, 885 P.2d 887].

12 *Miranda v. Arizona*, *supra*, 384 U.S. at pages 473-474 [86 S.Ct. at page 1627]; see also *People v. Burton* (1971) 6 Cal.3d 375, 381 [99 Cal.Rptr. 1, 491 P.2d 793]; *People v. Randall* (1970) 1 Cal.3d 948, 954 [83 Cal.Rptr. 658, 464 P.2d 114], overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478 [20 Cal.Rptr.2d 582, 853 P.2d 1037].

13 *Dickerson v. United States* (2000) 530 U.S. 428, ___ [120 S.Ct. 2326, 2336, 147 L.Ed.2d 405].

14 *People v. Crittenden*, *supra*, 9 Cal.4th at page 129.

15 *People v. Box*, *supra*, 23 Cal.4th at page 1194; *People v. Wash*, *supra*, 6 Cal.4th at page 239; *People v. Johnson* (1993) 6 Cal.4th 1, 27 [23 Cal.Rptr.2d 593, 859 P.2d 673].

16 *Michigan v. Mosley* (1975) 423 U.S. 96, 105-106 [96 S.Ct. 321, 327, 46 L.Ed.2d 313].

17 *Michigan v. Mosley*, *supra*, 423 U.S. at page 104 [96 S.Ct. at page 326].

18 *People v. Wash*, *supra*, 6 Cal.4th 215, *People v. Johnson*, *supra*, 6 Cal.4th 1, and *In re Brian W.* (1981) 125 Cal.App.3d 590 [178 Cal.Rptr. 159].

19 *Anderson v. Smith* (2d Cir. 1984) 751 F.2d 96, 105; see *People v. Marshall* (1974) 41 Cal.App.3d 129, 135 [115 Cal.Rptr. 821] (defendant's reason for asserting his right to remain silent is immaterial).

20 *Miranda v. Arizona*, *supra*, 384 U.S. at pages 473-474 [86 S.Ct. at pages 1627-1628], footnote omitted.

21 *Michigan v. Mosley*, *supra*, 423 U.S. at page 102 [96 S.Ct. at page 326].

22 *Michigan v. Mosley*, *supra*, 423 U.S. at page 104 [96 S.Ct. at page 326].

23 *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [100 S.Ct. 1682, 1689-1690, 64 L.Ed.2d 297], footnotes omitted.

24 *Anderson v. Smith*, *supra*, 751 F.2d at page 98.

25 *Anderson v. Smith*, *supra*, 751 F.2d at page 105.

26 *Anderson v. Smith*, *supra*, 751 F.2d at page 103.

27 *Anderson v. Smith*, *supra*, 751 F.2d at page 105.

28 *People v. Johnson*, *supra*, 6 Cal.4th at pages 32-33; *People v. Cahill*, *supra*, 5 Cal.4th at pages 509-510; *People v. Bey* (1993) 21 Cal.App.4th 1623, 1628-1629 [27 Cal.Rptr.2d 28].

29 *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705, 24 A.L.R.3d 1065].

* See footnote, *ante*, page 353.

127 Cal.App.3d 972, 180 Cal.Rptr. 15

THE PEOPLE, Plaintiff and Respondent,

v.

RANDALL JAMES PRYSOCK,

Defendant and Appellant.

Crim. No. 4051.
Court of Appeal, Fifth District, California.
Jan 18, 1982.

SUMMARY

Defendant, who was 16 years old at the time of charged offenses, was found guilty by a jury of first degree murder. The jury also returned special findings that the murder was wilful, deliberate, and premeditated, and personally committed by defendant during the commission of a robbery, and that it was wilful, deliberate, and premeditated, and personally committed by defendant involving the infliction of torture. The jury also found a charge of using a deadly weapon in the murder was true. Defendant was also found guilty of robbery of the murder victim with use of a dangerous weapon; burglary of the victim's residence accompanied with the use of a deadly weapon; auto theft; escape from a youth facility; and destroying evidence in violation of Pen. Code, § 135. The trial court sentenced defendant under the murder count to state prison for life without possibility of parole. The sentences for robbery and burglary and their related enhancements were stayed pursuant to Pen. Code, § 654. Sentences on all counts except murder were deemed to "merge into" and to run concurrently with the life sentence, and execution of the sentences was stayed pursuant to then Pen. Code, § 669. (Superior Court of Tulare County, No. 18655, David L. Allen, Judge.)

In an unpublished opinion, the Court of Appeal reversed and ordered a new trial on the basis that the warning given to defendant concerning his right to consult with a free lawyer before police interrogation if he could not afford to hire one was inadequate. Thereafter the United States Supreme Court granted the People's petition for certiorari, held the warnings given defendant were adequate as a matter of federal law, reversed the Court of Appeal decision, and remanded the case for further proceedings not inconsistent with the opinion. (*California* v. ***973** *Prysock* (1981) 452 U.S. 355, 362 [69 L.Ed.2d 696, 703, 101 S.Ct. 2806, 2810]).

On remand, the Court of Appeal affirmed defendant's convictions as to all charges except that of destroying evidence, as to which it reversed. The court also modified defendant's sentence on the conviction of first degree murder to life imprisonment, struck the special circumstances findings of the jury, and remanded for disposition of the use of a deadly weapon finding as to the murder charge. In accordance with the holding of the United States Supreme Court, the court held the warnings given defendant prior to his confession were adequate under federal law, and, since the provisions of U.S. Const., 5th Amend., and of Cal. Const., art. I, § 15, setting forth the privilege against self-incrimination are virtually identical, the court held the warnings were also adequate under California law. The court further held that the trial court had properly found that defendant's confession was freely and voluntarily given. The court also held the evidence was sufficient to support defendant's conviction of premeditated first degree murder. Rejecting a contention of prosecutorial misconduct in closing argument, the court held, as to statements concerning the prosecutor's personal beliefs, that most of them, taken in context, related to evidence, or inferences reasonably arguable from the evidence, and that failure to object at trial precluded raising the issue on appeal. Any harm from another statement, the court held, was cured by a prompt admonition by the trial court. With respect to defendant's conviction of destruction of evidence, the court referred to the requirement of Pen. Code, § 135, that the defendant know that the item destroyed is "about to be produced in evidence," and held that the prosecution had failed to show that any law enforcement investigation in fact had started at the time defendant and his companion destroyed clothes worn during the crimes, and/or that law enforcement officers were or would be looking for the particular items. The court held that, under former Pen. Code, § 190 et seq. (in effect at the time of the offense), life imprisonment without possibility of parole was not authorized for persons under age 18, and that those sections, read as a whole, offered no basis for even charging minors with special circumstances. (Opinion by Franson, Acting P. J., with Stone (C. V.), J.,* concurring. Separate dissenting opinion by Andreen, J.) ***974**

HEADNOTES

Classified to California Digest of Official Reports

(1)

Criminal Law § 118--Interrogation; Advice as to Constitutional Rights-- Duty of Police to Advise--Sufficiency of Advice.
Defendant, a 16-year-old boy, who was convicted of first degree murder and other crimes, was by California standards adequately advised, before making a confession to a police officer, of his right to remain silent, his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed to represent him prior to and during interrogation (at no cost if he could not afford one), where, though the warnings were not given in the standard wording or order, they were later held by the U. S. Supreme Court to be adequate by federal standards. The provisions of U.S. Const., 5th Amend. and Cal. Const., art. I, § 15, setting forth the privilege against self-incrimination are virtually identical.

[See **Cal.Jur.3d,** Criminal Law, § 176; **Am.Jur.2d,** Criminal Law, §§ 791, 792.]

(2a, 2b)
Criminal Law § 369--Evidence--Admissibility--Confessions-- Voluntary Character--Factors Affecting--Minor Defendants.
In a prosecution for first degree murder and other offenses, the trial court properly found that a confession by defendant, a 16-year-old boy, to a police officer was freely and voluntarily given. Though there was some evidence defendant had been drinking and was tired and hungry, neither defendant nor his parents asked for anything for him to eat or for him to be able to rest before the police interview, which was initiated by his mother. Defendant and his companion had had food with them in a stolen van they had traveled in the day before, and the interrogating officer testified that defendant was not unsteady on his feet, did not smell of alcohol, and there was nothing else unusual in his speech or appearance. The record showed that defendant, after having refused to talk to the officer following advice as to his constitutional rights, knowingly and intelligently waived such rights and asked to talk to the officer after conferring alone with his mother for about 20 minutes. There was nothing in defendant's responses during a taped interview to indicate that he was frightened into submission by the behavior of either the arresting or the interrogating officer. ***975**

(3)
Criminal Law § 620--Appellate Review--Scope--Questions of Law and Fact--Voluntariness of Confession.
On appeal, the question of the voluntariness of a defendant's confession is based on a review of the totality of circumstances surrounding the statements. The record must contain evidence from which the trial judge could have found beyond a reasonable doubt that the statement at issue was the product of a knowing and intelligent waiver of the defendant's constitutional rights. A reviewing court must examine the uncontradicted facts in the record to determine independently whether the trial court's finding of intelligent waiver was properly made. As to conflicting testimony, the reviewing court must accept that version of events which is most favorable to the People, to the extent that it is supported by the record.

(4)
Criminal Law § 369--Evidence--Admissibility--Confessions--Voluntary Character--Factors Affecting--Minor Defendants.
A minor does not lack the capacity as a matter of law, even in a case involving a capital offense, to waive his rights to remain silent and to have an attorney present during interrogation. The voluntariness of a confession is determined by the totality of the circumstances, including education, age, experience, and ability to comprehend the meaning and effect of a confession.

(5)
Homicide § 63--Evidence--Sufficiency--First Degree Murder-- Premeditation.
In a prosecution for murder and other offenses, the evidence was sufficient to support defendant's conviction of premeditated first degree murder, where defendant admitted he was present when a coparticipant in the crime stated, at some time during a 45-day period preceding the killing, that he was going to "take care of" the victim, where the evidence showed defendant and his companion entered the victim's house after ascertaining she was at home, where defendant had been "innocently" with the companion at a time when the companion was arrested for an automobile theft reported by the victim's son, and where the evidence showed a deadly beating of the victim that was pursued until the companion, and perhaps defendant, was assured she was indeed dead, not just unconscious. Thus, the evidence supported a finding that defendant was present for the purpose of encouraging and assisting his companion in killing the victim and that he knew of the companion's purpose in entering the victim's house, i.e., to kill her. ***976**

(6a, 6b)

Criminal Law § 453--Argument and Conduct of Prosecutor--Closing Argument--Opinion on Defendant's Guilt--Statements Related to Evidence.
In a prosecution for murder and other offenses, the record did not establish prejudicial misconduct by the prosecutor in arguing his personal beliefs. Most of the statements made, taken in context, related to the evidence, or inferences reasonably arguable from the evidence. Though statements relating to the brutal and nauseating nature of the crime were overstated and unnecessary, they were not susceptible to an inference that the prosecutor's opinion was based on information other than evidence adduced at trial. Moreover, defendant was precluded from raising the issue on appeal, where no objection was made to the remarks in the trial court. A timely admonition would have cured any harm from the statements, even if they were deemed to constitute misconduct.

(7)
Criminal Law § 453--Argument and Conduct of Prosecutor--Closing Argument--Opinion on Defendant's Guilt--Statements Related to Evidence.
It is within the domain of legitimate argument for a prosecutor to state his deductions or conclusions drawn from the evidence adduced at trial, and, more particularly, to relate to the jury that, in his opinion, the evidence shows that the defendant is guilty of the crime charged. He may also comment on the credibility of a witness in light of all the evidence presented.

(8)
Criminal Law § 649--Appellate Review--Harmless Error--Trial--Conduct of Prosecutor.
In a prosecution for murder and other offenses, the record did not establish prejudice to defendant from a remark by the prosecutor to the jury concerning statements and possible testimony of a coparticipant in the crime who was not called as a witness, where the trial court sustained a defense objection to the remark and promptly admonished the jury to disregard it. Even if the statement constituted misconduct, the prompt admonition cured any harm. Any reasonable jury would have reached the same verdict even in the absence of the prosecutor's remark.

(9)
Obstructing Justice § 4--Falsifying or Concealing Evidence--Destruction.
In a prosecution for murder and other offenses, the evidence did not support defendant's conviction of violating Pen. Code, § 135, which makes it a misdemeanor for a person to destroy ***977** an item knowing that it is "about to be produced in evidence," with intent to prevent it from being produced, where the charge was based on the burning by defendant and his companion of clothing worn by them at the time of commission of the killing and other crimes, and where the prosecution failed to show that any law enforcement investigation in fact had started at the time of such destruction and/or that law enforcement officers were or would be looking for the particular items.

(10)
Criminal Law § 286--Evidence--Admissibility--Relevance--Discretion of Trial Court.
In a prosecution for murder and other offenses, the trial court properly permitted cross-examination of defendant on the fact he was (innocently) with a coparticipant in the crimes when the companion was arrested some four months earlier for an auto theft reported to the authorities by the son of the murder victim, where defendant admitted that he was present when the companion told a fellow juvenile hall resident that he was going to "take care of" the mother. The question and answer concerning the arrest tended to disprove defendant's testimony in which he alleged he did not know of the son or his family and tended to disprove his statement at trial that he did not know what the companion meant when he "overheard" him telling another juvenile hall resident that he was going to "take care of" the mother. A trial court is vested with wide discretion in deciding the relevance of evidence, and it was within the trial court's discretion to admit the testimony.

(11)
Criminal Law § 244--Trial--Instructions--Flight.
In a murder prosecution, the record established no prejudicial error with respect to the trial court's instruction to the jury on flight as evidence of guilt in accordance with Pen. Code, § 1127c. Defendant conceded there was evidence of flight and he presented nothing to support his assertion the trial court should have modified the standard instruction, *sua sponte,* to limit the effect of flight to issues other than his mental state.

(12)
Homicide § 100--Punishment--Minors--Life Imprisonment Without Possibility of Parole.

Defendant in a prosecution for first degree murder committed when he was 16 years of age was entitled to modification of his sentence of life imprisonment without possibility of parole to life imprisonment, and to have stricken the ***978** jury's findings of special circumstances. Under former Pen. Code, § 190 et seq. (in effect at the time of the offense), life imprisonment without possibility of parole was not authorized for persons under age 18, and those sections, read as a whole, offered no basis for even charging minors with special circumstances.

(13)
Criminal Law § 514--Punishment--Enhancements--Use of Deadly Weapon.
Defendant, who was found guilty by a jury of first degree murder with a finding of use of a deadly weapon in the murder (Pen. Code, § 12022, subd. (b)), was required to be resentenced with respect to the weapon enhancement finding, where defendant was not sentenced pursuant to the finding and the record did not reflect the trial court ever exercised its discretion under Pen. Code, § 1170.1, subd. (g), to strike the enhancement. On remand, the trial court should either exercise its discretion to strike the enhancement or stay the one-year term of punishment thereon pending finality of defendant's conviction and service of sentence on the murder count.

(14)
Criminal Law § 514--Punishment--Enhancements--Use of Deadly Weapon.
In sentencing defendant convicted of robbery and burglary, enhancements for use of a deadly weapon with respect to both counts were improper, where the robbery and burglary charges both arose out of a single-victim indivisible transaction. As to the burglary, the intent was to commit theft, and robbery is simply an assaultive version of theft with the same underlying intent. Therefore only one deadly weapon use enhancement was proper.

COUNSEL
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FRANSON, Acting P. J.

Appellant, Randall James Prysock, aged 16 at the time of the offenses charged herein, was found guilty by jury of first degree murder of Iris Donna Erickson as charged in count one of an amended information. The jury also returned special findings that the murder was (1) wilful, deliberate and premeditated, and was personally committed by appellant during the commission of a robbery; and (2) was wilful, deliberate and premeditated and personally committed by appellant involving the infliction of torture. The jury also found the charge of using a deadly weapon in the murder was true. (Pen. Code, §§ 187, 190.2,[1] 12022, subd. (b).)

The jury also returned verdicts of guilty on the following charges: count two, robbery of Iris Donna Erickson with the use of a dangerous weapon (Pen. Code, §§ 211, 12022, subd. (b)); count three, burglary of the residence occupied by Iris Donna Erickson and accompanied with the use of a deadly weapon (Pen. Code, §§ 459, 12022, subd. (b)); count four, auto theft (Veh. Code, § 10851); count five, escape from a youth facility (Welf. & Inst. Code, § 871); and count six, destroying evidence (Pen. Code, § 135). Mark Danley, appellant's coparticipant and also a juvenile, was found guilty of the same charges in a later trial, including the special findings and an additional charge not relevant here.

The court sentenced appellant under count one to state prison for life without possibility of parole. The sentences on counts two and three, and their related enhancements, were stayed pursuant to Penal Code section 654. Additionally, the sentences for counts two through six were deemed to "merge into" and to run concurrently with the life sentence, and the execution of the sentences were stayed pursuant to then Penal Code section 669.

This is the second time this case has been before this court. On December 5, 1980, we reversed the trial court and ordered a new trial because of what we considered to be *Miranda* error (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974]) in that the warning given to appellant concerning his ***980** right to consult with a free lawyer before police interrogation if he could not afford to hire one was inadequate. After granting the respondent's petition for certiorari, the United States Supreme Court held the *Miranda* warnings were adequate as a matter of federal law, reversed our decision and remanded the case to us "for further proceedings not inconsistent with this opinion." (

California v. Prysock (1981) 453 U.S. 355, 362 [69 L.Ed.2d 696, 703, 101 S.Ct. 2806, 2810].)

For the reasons to be explained, we conclude appellant's conviction should be affirmed on all counts with the exception of count six, destroying evidence in violation of Penal Code section 135. We also modify appellant's sentence on the conviction of first degree murder (count one) to life imprisonment as required by *People v. Davis* (1981) 29 Cal.3d 814 [176 Cal.Rptr. 521, 633 P.2d 186] and Penal Code section 190 as it existed at the time of the commission of the instant offense. We also strike the special circumstances findings of the jury and remand for disposition of the Penal Code section 12022, subdivision (b) finding on count one (murder).

Facts

Brad Erickson, the victim's 16-year-old son, had reported a car theft of coparticipant Mark Danley some 4 months prior to the incidents in question. Danley subsequently made the boast that he was going to "take care of" Brad Erickson's mother, the murder victim. Appellant overheard this statement. Appellant had been (innocently) with Danley when he was arrested for this prior car theft.

Appellant testified to the following additional facts at trial after his unsuccessful motion to suppress his taped statement to the authorities on the night of his arrest. The appellant and Danley escaped from a juvenile detention facility during the evening of Saturday, January 28, 1978. Danley stole a vehicle in which the boys rode about in Tulare County on Sunday. Danley collided with a tree and set the interior on fire. The next day, Monday, appellant stole a Datsun pickup. Danley then drove it around the Town of Porterville. He drove to his house to obtain clothing and food, but did not stop because his mother was at home.

Danley then drove past the victim's house several times, saying that he knew where they could get food and clothes. The victim's car was apparently known to Danley; on that date it was at a repair shop. The ***981** victim's son, Brad Erickson, had left in his pickup earlier to take some papers to a recycling center. The appellant and Danley stopped long enough to allow Danley to look in the garage. Danley made two separate telephone calls to an unknown number from a convenience store located near the house. According to appellant, there was no conversation over the telephone.

The pair then parked on a nearby street and walked to the rear of the house. Danley attempted to force entry by breaking out a window. When confronted by the victim, who was inside the house, both boys ran to the front of the house and entered through the front door.

When the victim announced that she was going to call the police, appellant hit her two or three times with a wooden dowel which he found near where he was standing in the living room. Danley then hit her with a metal fireplace poker, stabbed her in the back eight times with an ice pick to a consistent depth of one inch to one and one-quarter inch and eventually strangled her to death with a telephone cord.

After the murder, the boys stole a shotgun, food, money and tapes from the house. They also stole clothes which they changed into, subsequently burning the clothes which they wore at the time of the killing. Later that day, their vehicle, full of incriminating evidence, was spotted by the police resulting in a chase and their arrest.

(1)*The Miranda Warnings Were Adequate*

Shortly after being taken to the police station, appellant was given a statement of his "*Miranda*" rights by Sergeant Byrd. Appellant declined to talk. The record does not reveal the exact content of the advisement.

Appellant's parents were called, and they came to the station. About 20 minutes after appellant had refused to talk, his mother entered the room where her son was located. She talked with him about 20 minutes. Appellant's mother exited and indicated appellant wished to discuss the events earlier in the day.[2] A few minutes after this Sergeant Byrd reentered the room where appellant was located; appellant's parents ***982** followed. Byrd took a taped statement from appellant which was admitted into evidence. The tape reflects the following warnings were given to appellant prior to any questioning: "Sgt. Byrd: Okay. Mr. Randall James Prysock, earlier today I advised you of your legal rights and at that time you advised me you did not wish to talk to me, is that correct?

"Randall P.: Yeh.

"Sgt. Byrd: And, uh, since then you have asked to talk to me, is that correct?

"Randall P.: Yeh.

"Sgt. Byrd: And, uh, during, at the first interview your folks were not present, they are now present. I want to go through

your legal rights again with you and after each legal right I would like for you to answer whether you understand it or not .... Your legal rights, Mr. Prysock, is follows:

"Number One, you have the right to remain silent. This means you don't have to talk to me at all unless you so desire. Do you understand this?

"Randall P.: Yeh.

"Sgt. Byrd: If you give up your right to remain silent, anything you say can and will be used as evidence against you in a court of law. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: *You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this*?

"Randall P.: *Yes*.

"Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?

"Randall P.: *Yes*. ***983**

"Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: *You all, uh-if,-you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this*?

"Randall P.: *Yes*.

"Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?

"Randall P.: Yes." (Italics added.)

At this point, at the request of Mrs. Prysock, a conversation took place with the tape recorder turned off. According to Sergeant Byrd, Mrs. Prysock asked if appellant could still have an attorney at a later time if he gave a statement at that time without one. Sergeant Byrd assured Mrs. Prysock that appellant would have an attorney when he went to court and "he could have one at this time if he wished one."[3]

The United States Supreme Court ruled in *California v. Prysock*, *supra.*, 453 U.S. 355, 361 [69 L.Ed.2d 696, 702, 101 S.Ct. 2806, 2810], that Sergeant Byrd "fully conveyed to [appellant] his rights as required ***984** by *Miranda*. He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one. *These warnings conveyed to [appellant] his right to have a lawyer appointed if he could not afford one prior to and during interrogation*. The Court of Appeal erred in holding that the warnings were inadequate simply because of the order in which they were given." (Italics added, fn. omitted.)

The Supreme Court noted it had never suggested "any desirable rigidity in the *form* of the required [*Miranda*] warnings. [¶] Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures ...." (*California v. Prysock*, *supra.*, 453 U.S. at p. 359 [69 L.Ed.2d at p. 701, 101 S.Ct. at p. 2809].) The *Prysock* warnings were then deemed to be "a fully effective equivalent" to the precise warnings required by *Miranda*. (*Ibid.*)

The high court distinguished *People v. Bolinski* (1968) 260 Cal.App.2d 705 [67 Cal.Rptr. 347], which was relied on by this court in our prior unpublished *Prysock* opinion. It was emphasized that Sergeant Byrd's warnings concerning appointed counsel were not linked to a future point in time after police interrogation such as "if he [were] charged" as in *Bolinski* or at arraignment or trial as in *United States v. Garcia* (9th Cir. 1970) 431 F.2d 134. "Here ... nothing in the warnings given [appellant] suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right 'to a lawyer before you are questioned ... while you are being questioned, and all during the questioning.'" (*California v. Prysock*, *supra.*, 453 U.S. at pp. 360-361 [69 L.Ed.2d at p. 702, 101 S.Ct. at p. 2810].)

This court in its first opinion also relied on *People v. Stewart* (1968) 267 Cal.App.2d 366 [73 Cal.Rptr. 484] in holding Sergeant Byrd's warnings to appellant were inadequate under *Miranda*. In retrospect, we believe the reliance was misplaced for two reasons: First, *Stewart* is distinguishable in that there the officer told the defendant "'... that he had a right to an

attorney, and he could have his attorney *here*; ... [that] he had a right to have the Public Defender appointed in case he couldn't afford an attorney; ...'" (*Id.*, at p. 378, fn. 16.) The reviewing court in *Stewart* invalidated the warnings on the ground that informing ***985** the defendant he had a right to an attorney "here" did not make clear his right to an attorney during interrogation. "... the warning could well have been interpreted to mean no more than that the court appointed attorney would, at some *future time*, visit defendant in jail. This is not the equivalent of telling him that the interrogation would suspend until the attorney arrived." (*Id.*, at p. 378, italics added.) As emphasized by the United States Supreme Court, in the instant case appellant was explicitly told of his right to have an attorney present "'before you are questioned, ... while you are being questioned, and all during the questioning.'" (*California v. Prysock*, *supra.*, 453 U.S. at p. 361 [69 L.Ed.2d at p. 702, 101 S.Ct. at p. 2810].)

Second, if the *Stewart* warnings are not truly distinguishable from the warnings given in the present case, i.e., the right to an attorney "here" carries the same impact as the right to an attorney before and during interrogation, then *Stewart* was wrongly decided. The *Stewart* warnings adequately conveyed to the defendant his right to a free lawyer during interrogation as explained in *California v. Prysock*.

Both *Bolinski* and *Stewart* were decided by the California Court of Appeal on federal grounds.

Appellant now urges this court to hold that Sergeant Byrd's warnings to him were inadequate as a matter of state law, i.e., that the warnings do not comply with the prohibition against self-incrimination guaranteed to the people of California under article I, section 15 of our state Constitution. (*People v. Pettingill*, *supra.*, 21 Cal.3d 231, 237; *People v. Disbrow* (1976) 16 Cal.3d 101, 114-115 [127 Cal.Rptr. 360, 545 P.2d 272]; *People v. Norman* (1975) 14 Cal.3d 929, 939, fn. 10 [123 Cal.Rptr. 109, 538 P.2d 237].) Appellant argues that unless such a holding is made "the [United States] Supreme Court decision in this case encourages [police officers] to throw away their *Miranda* cards and *ad lib* the warnings, with severe adverse results." (Italics original.) Appellant's argument is unduly pessimistic-it is reasonable to assume law enforcement will continue to use the standard *Miranda* warning cards in order to be sure the language used to advise suspects of their rights will be able to withstand later court scrutiny. If officers begin to vary from the standard language, their burden of establishing that defendants have been adequately advised before waiving their rights will increase substantially as evidenced by the present case. If Sergeant Byrd had read appellant his rights from the *Miranda* card, we would not be faced with the question of the adequacy of the warnings. ***986**

Appellant directs this court's attention to a recent law review article which showed that 55.3 percent of juveniles and 23.1 percent of adults tested did not adequately understand at least one of the four *Miranda* warnings and, significantly, that the most frequently misunderstood *Miranda* warning for both samples was the statement that a suspect has the right to consult an attorney before interrogation and to have an attorney present during interrogation. (Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis* (1980) 68 Cal.L.Rev. 1134, 1153-1154 (hereinafter cited as *Juveniles' Capacities to Waive Miranda*).) Appellant contends these numbers will only increase when the police start "extemporizing the warnings," rather than stating them in the language of *Miranda*.

However, we note the Grisso study also concluded that most suspects adequately understood the warning that the court would appoint an attorney if the suspect cannot afford one (juveniles 85.6 percent; adults 85.4). (*Juveniles' Capacities to Waive Miranda*, *supra.*, at p. 1154.) The study further concluded that while 16 year olds' comprehension of their rights was significantly below that of adults age 23 and over, it was not below the performance of persons age 17 to 20 years old. (*Juveniles' Capacities to Waive Miranda*, *supra.*, at p. 1157.) Finally, while the study concluded prior court experience bore no direct relationship to understanding the words and phrases in the *Miranda* warning (e.g., consult, interrogation, appoint, entitled, right), prior court experience was related to increased understanding of the function and significance of the right to remain silent and the right to counsel. (*Juveniles' Capacities to Waive Miranda*, *supra.*, at p. 1160.)

We should keep in mind that this was not appellant's first brush with the law; he had previously been arrested on an armed robbery charge and an attorney had been appointed to represent him. He had been advised of his *Miranda* rights in connection with that charge. In the present case, he had been given his "*Miranda* rights" by Sergeant Byrd about 30 minutes before his parents arrived at the police station, and he refused to talk with the police.

While we fully recognize that the *Miranda* doctrine, as incorporated in California law, is not limited to the United

States Supreme Court holdings interpreting *Miranda* as a matter of federal law (see *People v. Pettingill*, *supra.*, 21 Cal.3d 231, 237; ***987** *People v. Disbrow*, *supra.*, 16 Cal.3d 101, 114-115),[4] we decline to nullify the warnings in the present case under the California Constitution (art. I, § 15) contrary to the holding of the United States Supreme Court.

The importance of deference by state courts to constitutional interpretations of the United States Supreme Court, particularly where the language of the federal and state constitutional provisions are virtually identical, as in the present case,[5] is forcefully explained by Justice Richardson in his dissenting opinion in *People v. Disbrow*, *supra.*, 16 Cal.3d 101, 118-121. Absent a showing of some unique or distinctive California conditions which would justify a departure from a general principle favoring uniformity, Justice Richardson states: "[W]e should defer to the leadership of the nation's highest court in its interpretation of nearly identical constitutional language, ... The reason for the foregoing principle is that it promotes uniformity and harmony in an area of the law which peculiarly and uniquely requires them. The alternative ... must inevitably lead to the growth of a shadow tier of dual constitutional interpretations state by state which, with temporal variances, will add complexity to an already complicated body of law.

"The vagaries and uncertainties of constitutional interpretations, particularly in the Fourth and Fifth Amendment sectors of our criminal law, are the hard facts of life with which the general public, the courts, and law enforcement officials must grapple daily. This condition necessarily breeds uncertainty, confusion, and doubt. It will not be eased or allayed by a proliferation of multiple judicial interpretations of nearly identical language." (*Id.*, at p. 119.)

We also note that our California Supreme Court in a similar situation (reversal and remand of its own case by the United States Supreme Court) entered a minute order upholding a trial court's ruling, which ***988** was a reversal of its own earlier opinion. *In re Michael C.* (1978) 21 Cal.3d 471 [146 Cal.Rptr. 358, 579 P.2d 7] reversed a trial court's admission of a juvenile's incriminating statements in light of the fact the juvenile asked to see his probation officer after being given his *Miranda* rights; the California Supreme Court found this to be a per se invocation of Fifth Amendment rights in the same way a request for an attorney was found in *Miranda* to be. The United States Supreme Court reversed and remanded in *Fare v. Michael C.* (1979) 442 U.S. 707 [61 L.Ed.2d 197, 99 S.Ct. 2560] after noting "the judgment of the California Supreme Court rests firmly on that court's interpretation of *federal law*." (442 U.S. at pp. 716-717 [61 L.Ed.2d at p. 207, 99 S.Ct. at p. 2567], italics added.) The United States Supreme Court noted the per se aspect of *Miranda* was based on the unique role the lawyer plays in the adversarial system of criminal justice and did not extend to a probation officer, who was not in the same posture with regard to either the accused or the system of justice as a whole. (442 U.S. at pp. 719-720 [61 L.Ed.2d at p. 209, 99 S.Ct. at pp. 2569-2570].) On remand the California Supreme Court entered a minute order affirming the trial court's judgment. (Minutes of the Supreme Court, Apr. 17, 1980.)

In short, the high court of our land-the very court which created the *Miranda* rules-has declared the sufficiency of the warnings given to appellant by Sergeant Byrd. As an intermediate state appellate court, we should abide by this holding. We therefore find appellant was adequately advised of his right to consult with a court-appointed attorney if he and his parents could not afford one before he was questioned by Sergeant Byrd.

(2a)*Appellant's Statement Was Freely and Voluntarily Given*

(3)On appeal, the question of the voluntariness of a confession is based upon a review of the totality of circumstances surrounding the statements. (*Fare v. Michael C.*, *supra.*, 442 U.S. 707, 724-725 [61 L.Ed.2d 197, 212, 99 S.Ct. 2560, 2571-2572]; *People v. Sanchez* (1969) 70 Cal.2d 562, 576 [75 Cal.Rptr. 642, 451 P.2d 74], cert. dism. (1969) 394 U.S. 1025 [23 L.Ed.2d 743, 89 S.Ct. 1646]; *In re Cameron* (1968) 68 Cal.2d 487, 498 [67 Cal.Rptr. 529, 439 P.2d 633].) The record must contain evidence from which the trial judge could have found beyond a reasonable doubt that the statement at issue was the product of a knowing and intelligent waiver of defendant's *Miranda* rights. (*People v. Braeseke* (1979) 25 Cal.3d 691, 701 [***989** 159 Cal.Rptr. 684, 602 P.2d 384], judgment vacated cause remanded (1980) 446 U.S. 932 [64 L.Ed.2d 784, 100 S.Ct. 2147], reiterated (1980) 28 Cal.3d 86 [168 Cal.Rptr. 603, 618 P.2d 149], cert. den. (1981) 451 U.S. 1021 [69 L.Ed.2d 395, 101 S.Ct. 3015]; cf. *People v. Jimenez* (1978) 21 Cal.3d 595, 608 [147 Cal.Rptr. 172, 580 P.2d 672].) A reviewing court must examine the uncontradicted facts in the record to determine independently whether the trial court's finding of intelligent waiver was properly made. As to conflicting testimony, the reviewing court must accept that version of events which is most favorable to the People, to the extent that it is supported by the record. (*Id.*, at p. 609.)

Appellant was 16 years old at the time of the offense. (4)However, a minor can effectively waive his constitutional rights. In *People v. Lara* (1967) 67 Cal.2d 365, 377-378 [62 Cal.Rptr. 586, 432 P.2d 202], an 18 year old, with a mental age of less than 10 1/4 years, was held to have intelligently and understandingly waived his rights. The court held that a minor does not lack the capacity as a matter of law, even in a capital offense, to waive his rights and that the voluntariness of a confession is determined by the totality of the circumstances, including education, age, experience and ability to comprehend the meaning and effect of confession. (*Id.*, at p. 383.)

(2b)No evidence of appellant's blood alcohol content was admitted during the hearing, although reference was made to a blood alcohol having been drawn from appellant at trial. After his mother questioned him about drinking, he stated he was "dizzy." He further stated he had not eaten in two days.[6] ***990**

However, as respondent notes, Sergeant Byrd testified that while appellant had a red, runny nose and that his eyelids were red, like someone who had been crying, appellant was not unsteady on his feet, did not smell of alcohol and there was nothing else unusual in his speech or appearance. And while appellant may well have been tired and hungry, it does not appear appellant or his parents asked for anything for appellant to eat or for appellant to be able to rest before the interview, which was initiated by his mother. Furthermore, the boys did have food with them in the stolen van they traveled in on January 30.

Appellant appears somewhat "tired" on the tape,[7] but there is nothing in his responses to Byrd to show that he was frightened into submission by Byrd's, or the arresting officer's, behavior. Indeed, appellant first refused to talk with the authorities at the time *closer* to the arrest, when it is logical to believe appellant would have been most intimidated as a result of any action taken at the time of his arrest.

After refusing to waive his *Miranda* rights initially, Byrd apparently called appellant's parents because appellant was a juvenile (Byrd was acquainted with Mr. Prysock). Appellant was never held "incommunicado." After speaking with her son alone for approximately 20 minutes, Mrs. Prysock indicated appellant wished to talk and this is established by appellant on the tape.

The prosecution has an especially heavy burden to show that once a defendant has invoked his rights, any subsequent questioning must be shown to be the product of a knowing and intelligent waiver. (*People v. Braeseke*, *supra.*, 25 Cal.3d at p. 702.) However, the transcript of the tape shows that when Sergeant Byrd asked appellant if he had subsequently asked to talk to him after initially refusing to do so, appellant responded "yes." At the hearing on the admissibility of appellant's confession during trial, appellant and his mother both stated the renewed questioning was her idea and appellant had just gone along with her.

Appellant and both his parents further argued "involuntariness" as a result of not having been properly advised of their right to a free attorney ***991** prior to questioning. Although Mr. and Mrs. Prysock and appellant testified they did not understand that if appellant could not afford to hire a lawyer one would not only be appointed at no cost but *prior* to questioning, Mrs. Prysock admitted appellant's armed robbery involvement the previous month was handled by an appointed private attorney.[8] The trial court's reasoning in finding appellant knowingly and intelligently waived his *Miranda* rights is set forth in the margin.[9]

As did the trial court, we find that appellant's confession was the product of his own volition and not the result of pressure or coercion by the officers. The evidence shows that appellant was fully aware of his rights and was not frightened into submission by the officer's behavior or questioning. (*People v. Davis*, *supra.*, 29 Cal.3d 814, 825.) Viewing ***992** the disputed facts in the light most favorable to the prosecution, we agree with the trial court that the confession was voluntarily given.

(5)*Sufficient Evidence Supports Appellant's Conviction of Premeditated First Degree Murder*

Appellant charges there was no evidence of premeditation and deliberation and the first degree finding "may have involved the jury's determination that [appellant] premeditated and deliberated Mrs. Erickson's killing; ..." The jury was instructed on several theories of first degree murder-(1) wilful, premeditated and deliberated; (2) first degree felony murder under two theories-burglary and robbery;[10] (3) murder by torture. As previously noted, the jury found appellant guilty of first degree murder with use of a deadly weapon and further found both special circumstances to be true.

The jury was instructed pursuant to CALJIC No. 8.20 regarding deliberate and premeditated murder and a special instruction on degree of reflection required by the concept.[11] ***993**

The jury was also instructed on a theory of aiding and abetting in the commission of a crime (CALJIC Nos. 3.00, 3.01) and that mere presence at the scene of the commission of the offense and failure to take steps to prevent a crime do not establish aiding and abetting. (*People v. Hill* (1946) 77 Cal.App.2d 287, 294 [175 P.2d 45].)

In *People v. Anderson* (1968) 70 Cal.2d 15 [73 Cal.Rptr. 550, 447 P.2d 942] the California Supreme Court suggested three factors which might lead an appellate court to sustain a finding of premeditated murder: "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing-what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' (*People v. Thomas*, *supra.*, 25 Cal.2d 880, at pp. 898, 900, 901 [156 P.2d 7]); (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2).

"Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3) ...." (*Id.*, at pp. 26-27.)[12]

The entire record in the present case, viewed in the light most favorable to the prosecution (see *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 573, 99 S.Ct. 2781, 2789]; *People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.Rptr. 431, 606 P.2d 738]), affords a sufficient basis upon which the jury could infer that appellant's involvement ***994** in the killing of Mrs. Erickson was not a rash, impulsive act but a product of premeditation under the *Anderson* analysis.

As to the first type of evidence-facts showing prior planning activity-appellant himself admitted on tape and at trial that he was present with coparticipant Danley in juvenile hall when Danley told one Roy Hipp that he was going to "take care of" Brad Erickson's mother. This was sometime in the 45 days preceding Mrs. Erickson's death.[13] Detective Bill Lyon also testified to an early morning conversation with appellant on January 31 in which appellant talked about Danley's "plan."

Appellant testified he and Danley ended up at what he only later found out was the Erickson house, two days after their escape from Meyers Youth Center, because Danley's mother was apparently present in the Danley home when the boys drove by there in search of food and clothing. Appellant further testified neither he or Danley thought anyone was at home in the Erickson residence when they tried to break in the back window.[14] However, as pointed out by respondent, the two did ***995** enter the house after ascertaining Mrs. Erickson was home. Mrs. Erickson was then killed, the house ransacked, and the boys changed and gone within an hour.

As to the second category, facts suggesting motive, appellant was with Danley in 1977 when Danley was arrested for auto theft. (There is no indication in the record that any charges were ever filed against appellant stemming from this event.) This was the car Danley had tricked Brad Erickson into leaving and that Brad had reported as being stolen to the highway patrol. However, appellant did not know Brad Erickson and Brad Erickson did not know appellant prior to his mother's death.

The final category-facts about the manner of the killing which suggest a preconceived design-also accords with the *Anderson* requirements. Mrs. Erickson was attacked with a variety of objects-a wooden stick (by appellant), a fireplace poker (by Danley) and finally an ice pick (by Danley). Mrs. Erickson was beaten about the head with the fireplace poker and stabbed numerous times in the back with the ice pick (apparently in a rhythmic motion since the stab wounds were of a consistent depth). The cause of death was strangulation by a telephone cord that had been "cut" in two places with a knife from a nearby telephone. In *People v. Cruz* (1980) 26 Cal.3d 233, 245 [162 Cal.Rptr. 1, 605 P.2d 830], the court concluded that the victim's killing, perpetrated by blows to

only the head and by a shotgun blast in the victim's face "permit[ted] the jury to infer that the manner of killing was so particular and exacting that defendant must have killed intentionally according to a preconceived design and for a reason." (*Ibid.*) The instant case presents evidence of an equally deadly beating that was pursued until Danley, and perhaps appellant, was assured the victim was indeed dead, not just unconscious.

The evidence supports a finding that appellant was present for the purpose of encouraging and assisting Danley in killing Mrs. Erickson[15] and that he knew of Danley's purpose in entering Mrs. Erickson's house, i.e., to kill Mrs. Erickson. ***996**

(6a)*The Prosecution Was Not Guilty of Prejudicial Misconduct During Closing Argument*

Appellant first argues the prosecutor improperly argued his personal beliefs and cites the excerpts noted in the margin.[16]

Appellant argues not so much that the statements were improper expressions of personal opinion, but that "the prosecutor certainly should not have made *these many* expressions of personal opinion." (Italics added.) ***997**

(7)It is "within the domain of legitimate argument for a prosecutor to state his deductions or conclusions drawn from the evidence adduced at trial, and, more particularly, to relate to the jury that, in his opinion, the evidence shows that the defendant is guilty of the crime charged." (*People v. Dillinger* (1968) 268 Cal.App.2d 140, 144 [73 Cal.Rptr. 720].) He may also comment on the credibility of a witness in light of all the evidence presented. (*People v. Roberts* (1966) 65 Cal.2d 514, 520 [55 Cal.Rptr. 412, 421 P.2d 420], mod. on another point in *In re Roberts* (1970) 2 Cal.3d 892, 893 [87 Cal.Rptr. 833, 471 P.2d 481].)

(6b)Most of the statements made, when taken in context, relate to the evidence, or inferences reasonably arguable from the evidence. While statements relating to the brutal and nauseating nature of the crime were overstated and unnecessary, they are not susceptible to an inference that the prosecutor's opinion was based on information other than evidence adduced at trial.[17] Language even more inflammatory has been held permissible (e.g., *People v. Thornton* (1974) 11 Cal.3d 738, 762-763 [114 Cal.Rptr. 467, 523 P.2d 267], disapproved on another point in *People v. Flannel* (1979) 25 Cal.3d 668, 684 [160 Cal.Rptr. 84, 603 P.2d 1]).

Importantly, none of the cited statements elicited an objection below. (No. 5 in fn. 16, *ante*, was not an objection but a request for clarification.) Therefore *People v. Green* (1980) 27 Cal.3d 1, 34 [164 Cal.Rptr. 1, 609 P.2d 468], precludes raising this issue for the first time on appeal, since a timely admonition would have "cured" any harm from the statements if they were even deemed to constitute misconduct.

(8)One additional incident remains to be discussed. The prosecutor stated as follows: "Now, as defense counsel points out, Mr. Danley's not here. He hasn't testified in this trial. I'll have my turn with Mr. Danley on the 31st of July. Mr. Danley has a Fifth Amendment privilege not to come in here and testify. Okay. If Danley would have made any statement to the police admitting striking Mrs. Erickson, you'd heard about it in court." Defense counsel objected and counsel then approached the bench with the reporter. The prosecutor maintained that such a statement, ***998** if made, would have been a declaration against penal interest and admissible if Danley had been called to testify and then testified. Defense counsel maintained it would have been unethical for him to call Danley in light of the previous trial severance and relied on Evidence Code section 930. After a few minutes discussion, the court sustained the defense objection and admonished the jury as follows: "The defense objection is well taken and the jury should disregard it in regard to calling Danley. [¶] Remember what I told you at the outset, this is argument and it is not evidence. Keep that in mind, jurors. Again, I'd also advise you that if you don't agree with any [of] the attorney's versions of the fact or recollection, why, that's your purview, because you are the triers of facts, not us."

Respondent contends and we agree that if the remark constituted misconduct, the prompt admonishment cured any harm. Even if we should find the statement to have been misconduct, the test of prejudice is whether it is "reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant. [Citations.]" (*People v. Beivelman* (1968) 70 Cal.2d 60, 75 [73 Cal.Rptr. 521, 447 P.2d 913]; *People v. Bolton* (1979) 23 Cal.3d 208, 214 [152 Cal.Rptr. 141, 589 P.2d 396].)

We find that any reasonable jury would have reached the same verdict even in the absence of the prosecutor's remarks.

(9)*Appellant's Conviction Under Penal Code Section 135 (Destruction of Evidence) Was Improper*

Penal Code section 135 provides: "Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is *about to be produced in evidence* upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor." (Italics added.)

Appellant contends that the evidence is insufficient to establish that the clothing and shoes burned by himself and Danley after the crime were "about to be produced" in evidence and/or that he so knew.

Respondent asserts that the evidence sufficed because the clothing was burned after crimes as to which the clothing would be evidence and ***999** because appellant knew that an investigation was imminent or in progress.

In *People v. Fields* (1980) 105 Cal.App.3d 341 [164 Cal.Rptr. 336], this court affirmed a conviction for violation of section 135, where the defendant, a county jail inmate, flushed marijuana down a jail toilet after a deputy sheriff had discovered the drug and seized it during a routine search. This court held that the statute applies to evidence seized in the course of a police investigation, even though no formal legal proceedings were pending: "Again, appellant's interpretation is contrary to the fair import of the statute; it ignores the words 'or investigation *whatever*' (italics added). The seizure and examination of the marijuana by Deputy Ray was an authorized police investigation of possible criminal activity in the jail. It must be presumed that once the deputy had satisfied himself as to the nature of the article seized, he would have reported the incident to his superiors and the articles would have been sequestered for possible use in a future criminal prosecution of the jail inmates.

"Appellant, a prisoner in the county jail, obviously knew that possession of marijuana was unlawful and that he and his fellow inmates could be prosecuted for possessing the marijuana. Thus, when appellant grabbed the contraband from Officer Ray and flushed it down the toilet, he intentionally destroyed the contraband to prevent it from being 'produced in evidence' at a 'trial, inquiry or investigation ....' The contemplated statutory inquiry and investigation had commenced when Deputy Ray seized the evidence." (*Id.*, at pp. 345-346.)

Fields relied on dicta in *People v. Superior Court (Reilly)* (1975) 53 Cal.App.3d 40 [125 Cal.Rptr. 504], which held "where the suspect, in fear of imminent disclosure or arrest, is observed to secrete an article, which if left in plain sight would have been subject to seizure, there was no constitutionally unreasonable search or seizure in retrieving that article from the place where the suspect was observed to have placed it." (*Id.*, at p. 48.) A police officer, through a motel window, saw defendant's confederate working with a camera and driver's license. After the officers made their presence known, defendant was observed to hide a wallet and what appeared to be a traveler's checks container. The officers entered and arrested the counterfeiters. The court remarked at page 49: "It must also be borne in mind that it is a criminal offense to destroy or conceal evidence. (Pen. Code, § 135. See *People v. Mijares*, *supra.*, 6 Cal.3d 415, 422; and *People v. Lee* (1970) 3 Cal.App.3d 514, 526 ***1000** .... Cf. *People v. Edgar* (1963) 60 Cal.2d 171, 174-175 ....) Here, unlike *People v. Edgar*, *supra.*, there was an attempt to conceal the evidence witnessed by the officers. It would be incongruous to prohibit the officers from seizing evidence of the misdemeanor which was committed in their presence, while at the same time upholding their right to arrest the perpetrator." (Fn. omitted.)

Both *Fields* and *Reilly* cited *People v. Mijares* (1971) 6 Cal.3d 415, 422 [99 Cal.Rptr. 139, 491 P.2d 1115], in which the Supreme Court held that handling a narcotic solely for disposal purposes does not constitute possession, but observed "certain actions relating to abandonment of narcotics may also fall within the proscription of section 135 of the Penal Code, forbidding the destruction or concealment of evidence." As a civilian witness watched, Mijares leaned inside a parked car, removed an object therefrom, and threw it into a nearby field. In *Fields*, this court questioned whether section 135 would apply to the *Mijares* facts. "We question the applicability of Penal Code section 135 to the *Mijares* fact situation since it would appear that the defendant's act of disposing of the drugs occurred prior to the commencement of any police investigation. Nor can it be said the police investigation was 'about' to commence when Mijares disposed of the drugs." (105 Cal.App.3d at p. 346, fn. 4.)

Fields is, historically, the last word on point. The instant case presents a first impression point as to *when* evidence is about to be produced in a police or law enforcement department investigation. In other words, should section 135 apply to the destruction of articles which the defendant knows-or should know-would, if discovered in an investigation which

the defendant knows-or should know-is imminent, have evidentiary value.

The Penal Code section 135 phrase "about to be produced in evidence upon any trial, inquiry or investigation whatever" connotes an immediacy or temporal closeness. In *Fields*, the authorities had already seized the evidence. In *Reilly*, they had discovered it and seizure was imminent. Presumably, the statute would apply where the defendant knows that the officers are en route with a search warrant. (Cf. *People v. Edgar* (1963) 60 Cal.2d 171, 173-174 [32 Cal.Rptr. 41, 383 P.2d 449] [officers sought incriminating photos from defendant's mother, after defendant overheard asking her to hide them. Though her initial refusal to give them to officers did not violate § 135, the court implies that subsequent ***1001** concealment would violate the section]; *People v. Santos* (1972) 26 Cal.App.3d 397, 402-403 [102 Cal.Rptr. 678] [defendant, charged with firearm murder, overheard telling wife to "Get rid of it." The confidential marital communications privilege (Evid. Code, § 980) "does not cover communications made to enable the other to commit a crime (Evid. Code, § 981), destruction or concealment of evidence being a crime. (Pen. Code, § 135.)"].)

The statute requires that the actor know that the object is *about to be* produced in evidence. We conclude that whatever the statute's exact meaning, the evidence herein falls short because the prosecution failed to show that any law enforcement investigation in fact had started and/or that law enforcement was or would be looking for the particular item. Unless this or a similar limiting interpretation is given, the statute would appear virtually open ended, at least in all but "victimless" crimes.

(10)*Admission of Evidence That Appellant Was With Danley When the Latter Was Arrested Was Proper*

Over timely objection on the ground of relevancy, the prosecution was permitted to cross-examine the appellant on the fact that the latter was (innocently) with Danley when Danley was arrested for car theft. It will be recalled that the victim's son had reported this theft to law enforcement. There was no evidence that the appellant knew this fact at the time of the arrest, but appellant admitted that he was present when Danley told a fellow juvenile hall resident that he was going to "take care of" Mrs. Erickson.

The question and answer tend to disprove those portions of appellant's testimony in which he alleged he did not know of any Brad Erickson or his family and tends to disprove his statement at trial that he did not know what Danley meant when he "overheard" Danley telling another juvenile hall resident that he was going to "take care of" Brad Erickson's mother.

A trial court is vested with wide discretion in deciding relevance of evidence. (*People v. Warner* (1969) 270 Cal.App.2d 900, 908 [76 Cal. Rptr. 160].) It was within the trial court's discretion to admit the testimony. ***1002**

(11)*The Flight Instruction Was Warranted by the Evidence*

Appellant contends the trial court prejudicially erred when it gave CALJIC No. 2.52, the standard flight instruction.[18] He implicitly concedes that evidence of flight existed but argues the instruction might have been used by the jury to find appellant's state of mind at the time the crime was committed, which it is claimed, is contrary to *People v. Anderson*, *supra.*, 70 Cal.2d 15, 32-33.

Respondent asserts that Penal Code section 1127c mandated the instruction, that the instruction did not direct the jury to consider flight as bearing on appellant's mental state, and that other instructions informed the jury as to the intent required.

Penal Code section 1127c provides: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:

"The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

"No further instruction on the subject of flight need be given."

Appellant has cited no authority which suggests that the instruction was improper here. *Anderson* did not involve CALJIC No. 2.52 or flight evidence at all. Rather, it concerned other evidence of cognizance of guilt.

In essence, appellant's argument appears to be that the instruction should have been modified to limit the effect of flight to issues other than appellant's mental state. ***1003**

The trial court has no *sua sponte* duty to modify the instruction.

Appellant's Sentence on Count One Must Be Modified to Life Imprisonment; the Finding of Special Circumstances Should Be Stricken, and the Case Remanded for Disposition of the Weapon Use Enhancement.

(12)Appellant, a juvenile at the time of the commission of the offense, cannot be sentenced to life imprisonment without possibility of parole. In *People v. Davis*, *supra.*, 29 Cal.3d 814, 827-832, the Supreme Court examined the language and history of former Penal Code section 190 et seq. and concluded it could not be interpreted as authorizing life imprisonment without possibility of parole for persons under age 18. The court ordered that Davis' sentence be reduced to life imprisonment, the only alternative sentence authorized by the applicable statute.

Since *Davis* also holds former Penal Code section 190 et seq., read as a whole, offers no basis for even *charging* minors with special circumstances, we conclude the jury's determination of special circumstances in the present case was a nullity. (*People v. Davis*, *supra.*, 29 Cal.3d at pp. 831-832.) Accordingly, we shall strike the special circumstance findings.

At sentencing, the trial court mentioned the jury finding of a weapon use enhancement and mentioned the fact appellant used a weapon as a factor in aggravation and as a potential reason to deny probation, in the context of discussing count one.

(13)When the life without possibility of parole sentence was imposed on count one, no mention was made of the Penal Code section 12022, subdivision (b) finding of the jury. The separate abstract of judgment for count one reflects the Penal Code section 12022, subdivision (b) finding but apparently appellant was neither sentenced pursuant to this enhancement finding nor does the record reflect the trial court ever exercised its discretion to strike the enhancement, as provided in Penal Code section 1170.1, subdivision (g). Therefore, the case must be remanded for the limited purpose of resentencing as to use of a deadly weapon in conjunction with count one. (*People v. Williams* (1980) 103 Cal.App.3d 507, 518-519 [163 Cal.Rptr. 169].) In the event the trial court does not exercise its discretion to strike the additional term of punishment for the deadly weapon use enhancement, the one-year term of punishment for use of a deadly weapon must be stayed, pursuant to the reasoning of *People v. Walker* (1976) 18 Cal.3d 232, 243-244 ***1004** [133 Cal.Rptr. 520, 555 P.2d 306], pending finality of appellant's conviction and service of sentence on count one.

Other Sentence Modifications

The trial court also imposed deadly weapon enhancements as to both counts two (robbery) and three (burglary). (14)Appellant contends the use finding and enhancement must be stricken as to one of these counts. Appellant relies on *In re Culbreth* (1976) 17 Cal.3d 330 [130 Cal.Rptr. 719, 551 P.2d 23].

Respondent asserts that both enhancements were proper because appellant acted with separate intents (to commit theft and later to rob). Alternatively, respondent argues that only the enhancement, not the finding should be stricken.

Respondent's premise appears to be mistaken. As to burglary, the intent was to commit theft, and robbery is simply an assaultive version of theft with the same underlying intent. Therefore only one deadly weapon use enhancement was proper. Even if technically different intents existed, respondent would be wrong. *Culbreth* holds that "if all the charged offenses are incident to one objective and effectively comprise an indivisible transaction, then section 12022.5 may be invoked only once and not in accordance with the number of the victims." (*Id.*, at pp. 333-334.)

A fortiori, the same result should follow in a single-victim indivisible transaction, like the instant case.

The appropriate remedy is to modify the judgment to provide that appellant serve only one additional period of imprisonment pursuant to Penal Code section 12022, subdivision (b). (*Id.*, at p. 335.) However, regardless of broad language in *Culbreth*, no striking of the underlying finding is required. This court need only insure that only one finding is effectuated. (*People v. Walker*, *supra.*, 18 Cal.3d 232, 243-244.)

As a practical matter, this result was achieved when the trial court, pursuant to Penal Code section 654, properly stayed execution of sentence as to counts two and three, including of course, the additional enhancement terms for each. However, in the event that the Penal Code section 654 stay should be vacated, the additional term as to count ***1005** three must be stayed pending finality of conviction and service of sentence on count two, the stay then to become permanent. (*In re*

Culbreth, *supra.*, 17 Cal.3d at pp. 333-334.) We will modify the judgment to so provide.

The trial court purported to "merge" the sentences imposed as to counts two through six into the count one life term. As to counts two and three, this was inappropriate (*People v. Miller* (1977) 18 Cal.3d 873, 886-887 [135 Cal.Rptr. 654, 558 P.2d 552]). The stay of execution was proper. As to counts four and five, the merger was proper. As noted above, we have reversed the judgment as to count six.

The judgment is modified to provide that appellant is sentenced to state prison as follows: On count one (murder), to a term of life, the special circumstances findings are stricken; on count two (robbery), for the three-year middle base term plus an additional one-year term for use of a deadly weapon; execution of the sentence as to count two is stayed until finality of the conviction and sentence on count one, at which time the stay shall become permanent; on count three (burglary), for the two-year middle base term plus an additional one-year term for use of a deadly weapon; sentence on count three shall run concurrently with sentence as to count two; execution of the sentence as to count three is stayed until finality of the conviction and sentence on count one, at which time the stay shall become permanent; further, in the event that the stay of execution of sentence is vacated as to counts two and three, execution of the additional term for use of a deadly weapon as to count three is stayed until finality of the conviction and sentence as to count two, at which time the stay shall become permanent; on count four (vehicle theft), for the two-year middle base term; upon the finality of the conviction and sentence on count one, sentence as to count four is merged into the life term imposed on count one; on count five (escape), appellant is sentenced to county jail for six months; upon the finality of the conviction and sentence on count one, sentence as to count five is merged into the life term imposed on count one. Judgment as to count one is reversed and remanded for the limited purpose of resentencing as to the use of a deadly weapon. In the event the trial court does not exercise its discretion to strike the additional term of punishment for the deadly weapon enhancement, the one-year term for use of a deadly weapon is stayed pending finality of conviction and sentence on count one. As to count six, the judgment is reversed. The trial court is directed to prepare an amended abstract of judgment which reflects ***1006** such modification and to forward a certified copy of the amended abstract to the Department of Corrections, which shall file same.

Stone (C. V.), J.,* concurred.

ANDREEN, J.

I respectfully dissent.

I will attempt to demonstrate that even if a proper *Miranda*[1] warning was given, there was insufficient proof of a knowing and intelligent waiver of the right to the assistance of a court-appointed attorney prior to and during the questioning. Following that, I will discuss why I believe that the Supreme Court's opinion in *California v. Prysock* (1981) 453 U.S. 355 [69 L.Ed.2d 696, 101 S.Ct. 2806]) is an ill-considered disservice to the police, the courts and the public which is unsuitable for application to California's Constitution, "'a document of independent force.'"[2] Then I will discuss whether there was sufficient evidence to support a finding of premeditation and, finally, will question the majority's holding that Penal Code section 135 does not apply to the facts of this case.

Knowing Waiver of Counsel

Sergeant Byrd did not advise defendant that he had a right to a free attorney in the interrogation room. Instead the officer advised the minor defendant of his right to have an attorney there, then diverted the discussion into an irrelevant dissertation of the right to have parents present, followed by the statement that he had a right to an appointed attorney. It is our duty to examine whether a trial court could make a finding, using the beyond-a-reasonable-doubt standard, that the defendant connected the two statements together and inferred therefrom that his rights included that of having an appointed attorney present prior to and during the questioning.

Circumspection must be exercised when making this determination because of the defendant's age. Thus, ***1007** *In re Gault* (1967) 387 U.S. 1, 55 [18 L.Ed.2d 527, 561, 87 S.Ct. 1428], when discussing the waiver of the constitutional privilege against self-incrimination by minors, stated: "If counsel was not present ... when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights ...." As stated in *In re Anthony J.* (1980) 107 Cal.App.3d 962, 971 [166 Cal.Rptr. 238]: "The burden is

upon the prosecution to establish that an accused's statements are voluntary; the burden is greater in the case of a juvenile than the case of an adult ....”

The caution expressed in *Gault* has found verification in Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis* (1980) 68 Cal.L.Rev. 1134 (hereinafter cited as *Juveniles' Capacities to Waive Miranda*). The study's results, however, should be used with some caution, since in the statement of *Miranda* rights, the subjects were given an admonition which incorporated the word “interrogation,” whereas Sergeant Byrd used the word “questioning,” a more commonly used word. If the study had used “questioning” instead of “interrogation,” one may expect that greater comprehension would have been obtained by the test subjects. (See the relatively low score of those who gave an adequate response to a vocabulary test of the word “interrogation” at p. 1153.)

Another factor which is impossible to weigh is the fact that the empirical research was conducted in a relatively unthreatening social situation and setting-one that differs markedly from that faced by the defendant here.

After making these allowances, however, one is struck with the fact that “The most frequently misunderstood *Miranda* warning ... was the statement that a suspect has the right to consult an attorney before interrogation and to have an attorney present during interrogation. Inadequate (zero-credit) descriptions of this warning were given by 44.8% of the juveniles and 14.6% of the adults.” (*Juveniles' Capacities to Waive Miranda*, *supra.*, at p. 1154.)[3] ***1008**

We may disregard the effects lack of sleep and nutrition and any alcoholic ingestion as having been found against the defendant by the court below. However, even though the majority has found that the admonition meets constitutional muster, its opacity and ambiguity should be considered in determining whether the defendant knew that he had the right to a free lawyer prior to and during questioning.

It cannot be denied that the warnings given by Sergeant Byrd did not expressly advise defendant that, if he could not afford an attorney, he had a right to have one appointed at no cost prior to and during questioning. The defendant was told at one point that he had a right to have an attorney before and during questioning. At another point, he was informed: “... You all, uh-if-you have the right to have a lawyer appointed to represent you at no cost to yourself ....” Although the United States Supreme Court found this to be an adequate admonition, it nevertheless requires an inference that the discussion in reference to the appointment of a free attorney relates back to the right to have a lawyer prior to and during questioning. The two were not expressly connected together. In the face of the misunderstanding of the juveniles in *Juveniles' Capacities to Waive Miranda*, *supra.*, as to this right and the caution expressed by the court in *Gault*, how can it be said that there is evidence from which the trial judge could have found *beyond a reasonable doubt* that the statement at issue was the product of a knowing and intelligent waiver of defendant's *Miranda* rights? (*People v. Braeseke* (1979) 25 Cal.3d 691, 701 [159 Cal.Rptr. 684, 602 P.2d 384], judgment vacated and cause remanded (1980) 446 U.S. 932 [64 L.Ed.2d 784, 100 S.Ct. 2147], reiterated (1980) 28 Cal.3d 86 [168 Cal.Rptr. 603, 618 P.2d 149], cert. den. (1981) 451 U.S. 1021 [69 L.Ed.2d 395, 101 S.Ct. 3015].)

Although it is the defendant's understanding, not that of his parents, which we must examine, it is relevant to note Mrs. Prysock asked to go off the record with some questions about counsel almost immediately after Sergeant Byrd's admonition, and when they returned to the tape “their ensuing colloquy with the sergeant related to their option 'to *hire* a lawyer.'” (*California v. Prysock*, *supra.*, 453 U.S. 355, 365 [69 L.Ed.2d 696, 704, 101 S.Ct. 2806, 2812] (dis. opn. of Stevens, J.).) ***1009**

I can draw but one conclusion: The prosecutor failed to show beyond a reasonable doubt the necessary knowing and intelligent waiver of the right to a court-appointed attorney prior to and during the questioning.

California's Privilege Against Self-Incrimination

Shortly after being taken to the police station, the defendant was given a statement of rights by a Sergeant Byrd. Defendant declined to talk. The record does not reveal the exact content of the advisement, the officer merely testified that he read a recitation of *Miranda* rights. (The majority does not suggest that there is a presumption that the statement was adequate. Proof of the contents of the statement should be a matter of the state's burden of proof.)

Defendant's parents were called, and they came to the station. About 20 minutes after defendant refused to talk, his mother entered the room where her son was located. She talked with him about 20 minutes. Defendant's mother exited and indicated defendant wished to discuss the events of earlier in the day. A few minutes after this Sergeant Byrd reentered

the room where defendant was located; defendant's parents followed. Byrd took a taped statement from defendant which was admitted into evidence.

A. The Advisement

The issue can be presented by selecting portions of the statement and pertinent testimony given by Sergeant Byrd as to an off-tape discussion. The tape reflects the following:

"Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this? ***1010**

"Randall P.: Yes.

"Sgt. Byrd: You all, uh-if-you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?

"Randall P.: Yes."

B. Conversation Off the Record

Shortly thereafter, at the request of the defendant's mother, Mrs. Prysock, the conversation went off the record. The transcript then continues:

"Sgt. Byrd: Okay, Mrs. Prysock, you asked to get off the tape, we are going back on the tape and the time now is 22:55 hours, we, on 1/30/78, the time, uh, we were off the air, the record, record for approximately five minutes. During that time you asked, decided you wanted some time to think about getting, whether to *hire* a lawyer or not.

"Mrs. P.: 'Cause I didn't understand it.

"Sgt. Byrd: And you have decided now that you want to go ahead and you do not wish a lawyer present at this time?

"Mrs. P.: That's right.

"Sgt. Byrd: And I have not persuaded you in any way, is that correct?

"Mrs. P.: No, you have not.

"Sgt. Byrd: And, Mr. Prysock, is that correct that I have done nothing to persuade you not to, to *hire* a lawyer or to go on with this?

"Mr. P.: That's right." (Italics added.)

At trial, Sergeant Byrd was cross-examined in reference to a conversation after the statement was taken: "Q. [Defense counsel] Did you ever mention to Mr. or Mrs. Prysock or Randy how much it would cost them to *hire* an attorney? ***1011**

"A. I think Mr. Prysock made some remarks to me that he didn't have money to hire an attorney. And I told him that the price of an attorney that Randy qualified for the Public Defender's office.

"And that the price of the attorney that this would be the proper people *to contact*, and that they had some excellent attorneys, I believe is the statement I made to him." (Italics added.)

C. Discussion

In *Miranda v. Arizona*, *supra.*, 384 U.S. 436, the United States Supreme Court held: "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and *unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored*, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, *that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires*. Opportunity to

exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." (*Id.*, at pp. 478-479 [16 L.Ed.2d at p. 726] fn. omitted, italics added.)

In our earlier opinion, we held that defendant's confession was procured in violation of his federal *Miranda* rights because "he was not given an adequate warning that he could have the services of a free attorney before and during the interrogation."

In so holding, we relied on two appellate court decisions, *People v. Bolinski* (1968) 260 Cal.App.2d 705 [67 Cal.Rptr. 347] and *People v. Stewart* (1968) 267 Cal.App.2d 366 [73 Cal.Rptr. 484].

In *People v. Bolinski*, *supra.*, 260 Cal.App.2d 705, 718, 723, prior to giving a statement the defendant was told by one officer that if he was ***1012** charged he would be appointed counsel. Another officer told him that he had a right to a lawyer. The parties were then in Illinois and the second officer testified: "I advised him that the court would appoint one in Riverside County" and that "'a public defender would be furnished for him by the court.'" The court held these advisements were inadequate.

People v. Stewart, *supra.*, 267 Cal.App.2d 366 held that a warning which told the defendant "'... that he had a right to an attorney, and he could have his attorney here; ... [¶] [that] he had a right to have the Public Defender appointed in case he couldn't afford an attorney; and that if he didn't want the Public Defender to be appointed, that he could pick an attorney and this attorney would be appointed by the Court for him,'" was not adequate. (*Id.*, at p. 378, fn. 16.) The court stated at page 378: "It is argued that the statement that defendant might have his attorney 'here' distinguishes *Bolinski* and satisfies *Miranda*. We do not agree. The burden is on the People to show that warnings of all the constitutional rights were given, that defendant understood them, and that he thereafter voluntarily and intelligently waived those rights. Ambiguities in the warnings must be resolved against the prosecution. As recounted in the case at bench, the warning could well have been interpreted to mean no more than that the court-appointed attorney would, at some future time, visit defendant in jail. This is not the equivalent of telling him that the interrogation would suspend until the attorney arrived."

We noted that the *Bolinski* warnings contained a stronger implication than the instant warnings that free counsel would be provided later. But the *Bolinski* warnings resembled the instant warnings in that there was no statement that free counsel would be provided prior to questioning if desired.

We also observed that the instant warnings closely paralleled the *Stewart* warnings. There the defendant was told that he could have his attorney "here," and that he had the right to have the public defender appointed. (*People v. Stewart*, *supra.*, 267 Cal.App.2d at p. 378.) In the instant case defendant was told that he had a right to talk to a lawyer before and during questioning and that he had a right to have a lawyer appointed to represent him at no cost. In neither case was the defendant told that the free attorney could be present in the interrogation room.

In *California v. Prysock*, *supra.*, 453 U.S. 355 [69 L.Ed.2d 696, 101 S.Ct. 2806], in a *per curiam* opinion to which three justices dissented, ***1013** the United States Supreme Court held that our original opinion was error as follows: "... the police in this case fully conveyed to [defendant] his rights as required by *Miranda*. He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one. These warnings conveyed to [defendant] his right to have a lawyer appointed if he could not afford one prior to and during interrogation. The Court of Appeal erred in holding that the warnings were inadequate simply because of the order in which they were given." (453 U.S. at p. 361 [69 L.Ed.2d at p. 702, 101 S.Ct. at p. 2810], fn. omitted.)

At the outset, the Supreme Court remarked that our original opinion "essentially laid down a flat rule requiring that the content of *Miranda* warnings be a virtual incantation of the precise language contained in the *Miranda* opinion." (453 U.S. at p. 355 [69 L.Ed.2d at p. 699, 101 S.Ct. at p. 2807].)

After setting up this straw man, the Supreme Court knocked it down by observing that: "Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures. The Court in that case stated that '[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admission of any statement made by a defendant.' 384 U.S. at 476 (emphasis

supplied).” (453 U.S. at pp. 359-360 [69 L.Ed.2d at p. 701, 101 S.Ct. at p. 2809].)

The Supreme Court distinguishes *Bolinski* as follows: “In both instances [of warnings] the reference to appointed counsel was linked to a future point in time after police interrogation, and therefore did not fully advise the suspect of his right to appointed counsel before such interrogation.

“Here, in contrast, nothing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right 'to a lawyer before you are questioned, ... while you are being questioned, and all during the questioning.' [Citation.]” (453 U.S. at pp. 360-361 [69 L.Ed.2d at p. 702, 101 S.Ct. at p. 2810].)

The Supreme Court noted our reliance on *Stewart* but made no effort to distinguish it. (453 U.S. at p. 359 [69 L.Ed.2d at p. 701, 101 S.Ct. at p. 2809].) ***1014**

The dissent criticized the majority for failing to come to terms with our finding that defendant was not given the information required by *Miranda*-the right to the presence of appointed counsel prior to and during questioning if desired. (453 U.S. at p. 362 [69 L.Ed.2d at p. 703, 101 S.Ct. at pp. 2811-2812].)

For the reasons stated below, I believe that defendant's confession was procured in violation of his privilege against self-incrimination contained in article I, section 15, of the California Constitution, which provides that “Persons may not ... be compelled in a criminal cause to be a witness against themselves, ...”

In *People v. Pettingill* (1978) 21 Cal.3d 231 [145 Cal.Rptr. 861, 578 P.2d 108], the California Supreme Court held that defendant's confession was inadmissible under the California Constitution because it was the product of a custodial interrogation renewed by the police after defendant had twice indicated to them that he wished to remain silent. *Pettingill* arose from *Miranda's* rule that “If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” (*Miranda v. Arizona*, *supra.*, 384 U.S. at pp. 473-474 [16 L.Ed.2d at p. 723], fn. omitted.) The court discussed a series of California holdings “which have applied that language and made it an intrinsic part of the law of this state.” (*People v. Pettingill*, *supra.*, 21 Cal.3d at p. 237.)

Earlier, in *People v. Disbrow*, *supra.*, 16 Cal.3d 101, 113, our Supreme Court held: “... the privilege against self-incrimination of article I, section 15, of the California Constitution precludes use by the prosecution of any extrajudicial statement by the defendant, whether inculpatory or exculpatory, either as affirmative evidence or for purposes of impeachment, obtained during custodial interrogation in violation of the standards declared in *Miranda* and its California progeny ....”

Pettingill and *Disbrow* establish that the basic standards declared in *Miranda* have become “an intrinsic part of the law of this state.” Those standards include, of course, a warning to the effect that the interrogated defendant “has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” (*Miranda v. Arizona*, *supra.*, 384 U.S. at p. 479 [16 L.Ed.2d at p. 726].) It remains for us to decide whether, under California law, defendant was adequately so warned. ***1015**

He was not.

Miranda itself explained the importance of this particular requirement: “The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more 'will benefit only the recidivist and the professional.' Brief for the National District Attorneys Association as *amicus curiae*, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. *Escobedo v. Illinois*, 378 U.S. 478, 485, n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning but also to have counsel present during any questioning, if the defendant so desires.” (*Miranda v. Arizona*, *supra.*, 384 U.S. at pp. 469-470 [16 L.Ed.2d at p. 721].)

The need for clear advisements in this particular area is underscored by the Grisso study which showed that 55.3 percent of juveniles and 23.1 percent of adults tested did not adequately understand at least one of the four *Miranda* warnings. *The most frequently misunderstood Miranda warning for both samples* was the statement that a suspect has the right to consult an attorney before interrogation and to have an attorney present during interrogation. (*Juveniles' Capacities to Waive Miranda*, *supra.*, at pp. 1153-1154.)

California v. Prysock sets up a straw man, knocks him down, pays lip service to *Miranda*, and, in my view, proceeds to honor it in the breach. The *per curiam* opinion fails to explain how the instant advisements were a "fully effective equivalent" to the warning articulated in *Miranda*. The three dissenters were not persuaded. Neither am I.

The methodology selected by Sergeant Byrd here (first a statement of a right to have a lawyer before and during questioning, then the several ***1016** totally gratuitous comments relating to the right to have his parents present, followed by a general advisement of the availability of an appointed lawyer) is hardly a functional equivalent to a traditional *Miranda* warning.

As the dissent observed in *California v. Prysock*: "The ambiguity in the warning given respondent is further demonstrated by the colloquy between the police sergeant and respondent's parents that occurred *after* respondent was told that he had the 'right to have a lawyer appointed to represent you at no cost to yourself.' Because lawyers are normally 'appointed' by judges, and not by law enforcement officers, the reference to appointed counsel could reasonably have been understood to refer to trial counsel. That is what respondent's parents must have assumed, because their ensuing colloquy with the sergeant related to their option 'to hire a lawyer.'" (*California v. Prysock*, *supra.*, 453 U.S. 355, 364 [69 L.Ed.2d 696, 704, 101 S.Ct. 2806, 2812], fn. omitted, italics original (dis. opn. of Stevens, J.).)

The *per curiam* opinion responds that "the reference to 'appointed' counsel has never been considered as suggesting that the availability of counsel was postponed ...." (453 U.S. at p. 361, fn. 3 [69 L.Ed.2d at p. 702, 101 S.Ct. at p. 2810].) Perhaps not, because under the traditional *Miranda* warnings as memorialized in thousands of department-issued *Miranda* cards the defendant has been told that the appointment would occur "prior to any questioning if he so desires." When the term "appointment" is used without such equivalently clear indication as to timing, it lends itself to the very ambiguity found herein.

To reiterate, the defendant was told that he had a right to talk to a lawyer before he was questioned and to have him present during the questioning. The officer then could and should have advised the defendant that if he could not afford an attorney one would be appointed for him prior to any questioning if he desired. Instead, the officer diverted the conversation to a discussion of the minor's right to have his parents present. This was a needless excursion, since both parents were seated in the room with their son. Then, instead of advising the minor that a free attorney would be provided prior to questioning if desired, the officer said, "You all, ... you have the right to have a lawyer appointed to represent you at no cost to yourself." ***1017**

I repeat what we said in our earlier opinion: "Unfortunately, the minor was not given the crucial information that the services of the free attorney were available *prior to the impending questioning*.

"The matter was obfuscated, rather than clarified, by the off-the-record discussion ...."

The question before us is not, as the United States Supreme Court *per curiam* opinion would have it framed, whether there must be a "talismanic incantation" of the *Miranda* language. (*California v. Prysock*, *supra.*, 453 U.S. at p. 359 [69 L.Ed.2d at p. 701, 101 S.Ct. at p. 2809].) Rather, the question is whether appellant was "adequately and effectively apprised of his rights," "in clear and unequivocal terms." (*Miranda v. Arizona*, *supra.*, 384 U.S. at pp. 467-468 [16 L.Ed.2d at p. 720].) I believe that as a matter of California law, the advisement in the instant case did not adequately inform the defendant of his key right to have a free lawyer before and during the police interrogation. The basis of this is not a requirement of an exact recitation of the traditional *Miranda* warning,[4] nor a requirement of any particular sequencing, but simply the reality that the words chosen by the sergeant did not communicate the necessary information.

The majority herein cites the subsequent history of *In re Michael C.* (1978) 21 Cal.3d 471 [146 Cal.Rptr. 358, 579 P.2d 7] as authority as to how we should handle the remand. In that case, the California Supreme Court had held that when a juvenile asked to see his probation officer this was an invocation of Fifth Amendment rights. The United States

Supreme Court disagreed. (*Fare v. Michael C.* (1979) 442 U.S. 707 [61 L.Ed.2d 197, 99 S.Ct. 2560].) It distinguished the role of a probation officer from that of an attorney, and reversed and remanded. Our Supreme Court acceded to that view. ***1018**

The case at bench is quite different. Whatever may be said of *California v. Prysock*, *supra.*, 453 U.S. 355 [69 L.Ed.2d 696, 101 S.Ct. 2806], it cannot be gainsaid that it is a retrenchment from the requirement of a clear and unequivocal statement of *Miranda* rights. As such, it is a departure from California law which requires an explicit statement that a defendant may have a free lawyer before and during his interrogation. *Miranda* warnings are an intrinsic part of the law of this state. It is not an expansion of that law to hold that the admonition given here was insufficient. Rather, such a holding is necessary to preserve a well-established body of our jurisprudence.

Miranda, as applied in California, has stood the test of time. With this case as an exception, law enforcement practices have adjusted to its strictures. Two of its virtues are that its meaning is clear and its requirements easily met.

When interpreting the self-incrimination clause of the California Constitution (art. I, § 15), California courts treat it as "'a document of independent force' (*People v. Disbrow* (1976) 16 Cal.3d 101, 115...; *People v. Brisendine* (1975) 13 Cal.3d 528, 549-550 ...), 'whose construction is left to this court, informed but untrammeled by the United States Supreme Court's reading of parallel federal provisions. [Citations.]' (*Reynolds v. Superior Court*, *supra.*, 12 Cal.3d 834, 842.)" (*Allen v. Superior Court* (1976) 18 Cal.3d 520, 525 [134 Cal.Rptr. 774, 557 P.2d 65].)

There is little to be gained and much to be lost by creating ambiguity where certitude existed before. The rule in *California v. Prysock*, 453 U.S. 355 [69 L.Ed.2d 696, 101 S.Ct. 2806] serves neither the public nor private interest.[5] Engrafting it onto California constitutional law would be ill advised. This court should not do so.

Sufficiency of Evidence to Support Premeditation

I concede that if the defendant's statement to Sergeant Byrd is admissible, there is sufficient evidence to show premeditation. I write this to demonstrate, however, that absent such admissibility, there is insufficient ***1019** evidence.[6] In this discussion, I will disregard the statements of Prysock to Sergeant Byrd and the fruit of those statements in form of his trial testimony.

When considering defendant's contention that substantial evidence does not support his conviction of first degree murder, the standard enunciated in *People v. Johnson* (1980) 26 Cal.3d 557, 576-578 [162 Cal.Rptr. 431, 606 P.2d 738], is applicable. We must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence-that is, evidence which is reasonable, credible, and of solid value-such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. In performing this task, we do not limit our review to that evidence which is favorable to respondent. The issue is resolved in the light of the whole record-the entire story put before the jury-rather than a review of isolated bits of evidence selected by the respondent. From that review, we judge whether the evidence of the commission of each of the essential elements of the crime is substantial enough to support the conclusion of a reasonable trier of fact under the beyond-a-reasonable-doubt standard. It is not enough for the respondent simply to point to "some" evidence supporting the finding. The evidence, together with those inferences which can be reasonably deduced therefrom, must be substantial in light of the other facts.

The finding of deliberation and premeditation may have been the basis of the verdict of murder of the first degree. (Pen. Code, § 189.)

The California Supreme Court has made clear that when circumstantial evidence arguably forms the basis for proving premeditation and deliberation, special caution must occur. "[W]e must determine in any ***1020** case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citations], or whether it 'leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.' ..." (*People v. Anderson* (1968) 70 Cal.2d 15, 25 [73 Cal.Rptr. 550, 447 P.2d 942], italics original.) The high court then went on to describe how the sufficiency of the evidence for premeditation and deliberation should be assessed: "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as

intended to result in, the killing-what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2).

"Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3) ...." (*Id.*, at pp. 26-27, italics original.)

As to *Anderson's* first category (planning), the two boys, defendant and Danley, drove aimlessly around the Tulare County countryside from the time of the escape from the Robert K. Meyers Youth Center, sometime before 8 p.m. January 28, 1978, until the midmorning of January 30. They needed food and clothes and went to Danley's house to obtain the same on January 30, but were frustrated by his mother's presence at the house. Danley then drove to the Erickson house, remarking that he knew a house where they could get some food and clothes. The evidence of what they did at that house is indicative of ***1021** planning a burglary of an empty house, not a homicide. They drove by several times; Danley checked the garage, presumably looking for the victim's car which was not there because it was being repaired. Danley made several calls from a local convenience store, probably to see if anyone was home. He did not converse with anybody, presumably because the calls went unanswered. They did not arm themselves; they attempted entry by breaking out a rear window.

On the other hand, the boys did not flee when confronted by the victim, but instead entered the house. Defendant may have known the identity of the victim, and was present when, a few weeks before, Danley told another juvenile that he was going to "take care of" Brad Erickson's mother.

On balance, it is apparent that a reasonable trier of fact would find that the boys had attempted to avoid Mrs. Erickson up to the time that she discovered Danley breaking the glass, and that the death was not the result of premeditation and deliberation but rather was the result of Danley's explosion of violence after they had entered the residence and after defendant struck the first two (or three) blows with a wooden dowel. As stated in *People v. Anderson*, *supra.*, 70 Cal.2d at page 26: "... we find no indication that the Legislature intended to give the words 'deliberate' and 'premeditated' other than their ordinary dictionary meanings. Moreover, we have repeatedly pointed out that the legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill. [Citations.]"

With regard to the second category (motive), defendant, as previously stated, was with Danley when Danley was arrested for auto theft as a result of a report made by the victim's son, Brad Erickson. On the other hand, defendant knew neither Mrs. Erickson nor her son Brad; had never been slighted by the Erickson family; was not arrested in connection with the auto theft reported by Brad Erickson; and as a casual friend of Danley for two years, was never shown to have known or shared Danley's desire for revenge as a result of the arrest discussed above. Defendant repeatedly testified that he never desired or intended to have Mrs. Erickson die.

In reference to the third category (manner), the evidence fails entirely. Respondent points to the fact that Danley stabbed the victim eight ***1022** times with an ice pick in the back. The wounds were shallow, approximately one inch to one and one-quarter inch in depth. Respondent argues that this denotes "careful, calculated stabbing." The pathologist testified that the wounds "did not penetrate the body cavity. They stopped at the bony structures, ..." Rather than showing the precision of a surgeon with his scalpel, the shallow wounds demonstrate only that the blows were strong enough to go through subcutaneous fat and muscle but not strong enough to penetrate the rib cage. Nor does the fact that death was caused by strangulation by a telephone cord demonstrate deliberation and premeditation. The cord was not carried to the premises by Danley-he cut it from the telephone receiver during the attack. In short, the record is devoid of any evidence tending to prove that the killing was done in such a particular and exacting fashion that premeditation and deliberation could be inferred.

The evidence adduced at trial showed no strong evidence of planning. It also demonstrated that any knowledge of or prior relationship with the victim on defendant's part is pure speculation in light of the fact none of the Ericksons who testified knew him. Finally, the manner of execution of the crime showed lack of sophistication and any demonstrated forethought.

I would conclude that there is no substantial evidence by which a reasonable trier of fact could find deliberation and premeditation beyond a reasonable doubt. This conclusion does not mean that upon a retrial the defendant could not be found guilty of first degree murder on grounds other than on a finding of deliberation and premeditation.

Penal Code Section 135

Defendant levels a three-part attack on his conviction of violating Penal Code section 135, which provides: "Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor."

Defendant argues that the evidence of his guilt is insufficient, that the trial court erred in failing to instruct *sua sponte*, on the meaning of the phrase "about to be produced in evidence," and that the statute is unconstitutionally vague. ***1023**

A. *Evidentiary Sufficiency*

Defendant contends that the evidence is insufficient to establish that the clothing and shoes burned by himself and Danley after the crime were about to be produced in evidence and/or that he so knew.

Respondent asserts that the evidence sufficed because the clothing was burned after crimes as to which the clothing would be evidence and because appellant knew that an investigation was imminent or in progress.

Although the point appears to be one of first impression, other statutes dealing with the same general topic as Penal Code section 135 are instructive.

In *People v. McAllister* (1929) 99 Cal.App. 37 [277 P. 1082] the trial court entered a dismissal following the sustaining of a demurrer in an action which charged defendant with offenses of offering and giving bribes to persons about to be called as witnesses in a civil case not yet filed. Penal Code section 137 proscribed bribing a person "about to be called as a witness." The defendant in that case, as the one here, contended that the section had no application where it does not appear that there was any action or proceeding pending which might be affected by any misconduct of the defendant.

The appellate court reversed and ordered the trial court to overrule the demurrer. The court stated at pages 40-41: "At the outset it must be remembered that this is a law primarily to prevent the corrupt interference with the administration of justice. Its purpose is to go back as far as necessary and say in effect that any attempt to so influence prospective witnesses that the truth will not be presented in anticipated litigation is felonious. In *State v. Holt*, 84 Me. 509 [24 Atl. 951], it was said in effect, although perhaps the statement is *obiter dictum*, that in a prosecution similar to the one before us the indictment need not aver that the witness had been summoned, or even that a cause was pending requiring the attendance of witnesses. Surely, it is not the imminence of the person being called as a witness nor the fact that his being called may be postponed for a time that is determinative of the act coming within the purview of this section. It is the intent of the person interested and his purpose and design that is decisive of that question. True, a person cannot be a witness unless there is an action pending, but a person ***1024** may be about to be called as a witness even though no action is pending ...."

To the same effect, see *People v. Martin* (1931) 114 Cal.App. 392, 394-395 [300 P. 130], where an offer of a bribe shortly after an automobile accident and before any suit had been filed was a bribery of a person "about to be called as a witness."

People v. Broce (1977) 76 Cal.App.3d 71 [142 Cal.Rptr. 628] involved an attempt to induce a witness to give false testimony by threats of force regarding facts establishing probable cause to arrest. The attempt to influence testimony occurred two days after an arrest and before any action was filed. This was sufficient to sustain a conviction of violation of section 137 of the Penal Code of attempting to induce a person "about to be called as a witness" to give false testimony. The court stated at page 75: "Defendant contends that he did not violate Penal Code section 137. He points out that Weinald was neither a witness nor a possible witness with respect to the weapons possession charge pending against defendant. This is true, but irrelevant. Weinald's observations were material to the legality of defendant's arrest -whether he planned to

raise its illegality as a defense to the criminal charges or, affirmatively, in an action for false arrest. Nor does it matter that no such action was pending at the time of the threat. Section 137 contains no such requirement."

I acknowledge that this court has opined in dicta in *People v. Fields* (1980) 105 Cal.App.3d 341 [164 Cal.Rptr. 336] that a fact situation as it existed in *People v. Mijares* (1971) 6 Cal.3d 415 [99 Cal.Rptr. 139, 491 P.2d 115] would not sustain a conviction for violation of Penal Code section 135. In *Mijares* it was the defense contention that the defendant picked up a friend at a street corner in a drowsy condition which progressed into unconsciousness. Unable to revive him, the defendant decided to secure medical help at a fire station. He looked inside his friend's pockets and found some heroin which he threw into a field before he sought assistance. The Supreme Court reversed a conviction for possession of narcotics holding that the jury should have been instructed that if it believed the defendant had no contact with the heroin other than to remove it from his friend's pocket for disposal, such handling is insufficient for conviction of the crime of possession as defined by former section 11500 of the Health and Safety Code. ***1025**

Nine years after *Mijares*, this court, in a footnote to *People v. Fields*, *supra.*, 105 Cal.App.3d at page 436, footnote 4, said: "We question the applicability of Penal Code section 135 to the *Mijares* fact situation since it would appear that the defendant's act of disposing of the drugs occurred prior to the commencement of any police investigation ...." The statement was not necessary to the opinion and there was no recognition of *McAllister*, *supra.*, 99 Cal.App. 37, or its progeny. The goal of preventing interference with the administration of justice will not be met if evidence may be destroyed with impunity merely because the police have not commenced their investigation.

Although the matter is not clear, I would hold that the evidence was sufficient to sustain a conviction of section 135.

B. *Instructional Error*

Appellant argues that ambiguity of the phrase "about to be produced in evidence" necessitated a *sua sponte* instruction. The jury was instructed regarding the violation of Penal Code section 135 in the language of the statute. Appellant did not request a cautionary instruction as to the meaning of "about to be produced in evidence." Absent a specific request, the court need only instruct on general principles of law and need not give a cautionary instruction. (*People v. Baker* (1974) 39 Cal.App.3d 550, 557 [113 Cal.Rptr. 248].)

C. *Vagueness*

Defendant contends that section 135 is void for vagueness under state and federal guaranties of due process.

"'[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning ... violates the first essential of due process of law.'" (*People v. McCaughan* (1957) 49 Cal.2d 409, 414 [317 P.2d 974], quoting *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 328, 46 S.Ct. 126].) "A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it." (*People v. McCaughan*, *supra.*, 49 Cal.2d at p. 414.) ***1026**

Section 135 comports with all requirements of due process. It adequately notifies those potential violators that evidence which is or will imminently be sought for trial, inquiry or investigation shall not be destroyed. It gives ample guidance to the courts in enforcing the law. The contention that the statute is void for vagueness is meritless.

Conclusion

I would reverse because of the *Miranda* error and because there was not an adequate showing of an intelligent waiver of the presence of a court-appointed attorney during the interrogation.

A petition for a rehearing was denied February 17, 1982. Andreen, J., was of the opinion that the petition should be granted. Appellant's petition for a hearing by the Supreme Court was denied April 15, 1982. Bird, C. J., Mosk, J., and Reynoso, J., was of the opinion that the petition should be granted.

Footnotes

* Assigned by the Chairperson of the Judicial Council.

1 Appellant is accused of having committed the offenses on January 30, 1978, therefore, he is being tried under laws enacted by the Legislature in 1977. (Stats. 1977, ch. 316, § 9, pp. 1257-1258, eff. Aug. 11, 1977.)

2 The facts suggest possible *Pettingill* error but none occurred. The mother came to the station house at police behest and requested permission to talk with her son. After 20 minutes of conversation, she then advised the police that her son was ready to talk (see *People v. Pettingill* (1978) 21 Cal.3d 231 [145 Cal.Rptr. 861, 578 P.2d 108]).

3 The tape reflects the following concerning the off-the-record discussion:

"Sgt. Byrd: Okay, Mrs. Prysock, you asked to get off the tape, ... During that time you asked, decided you wanted some time to think about getting, whether to hire a lawyer or not.

"Mrs. P.: 'Cause I didn't understand it.

"Sgt. Byrd: *And you have decided now that you want to go ahead and you do not wish a lawyer present at this time*?

"Mrs. P.: That's right.

"Sgt. Byrd: And I have not persuaded you in any way, is that correct?

"Mrs. P.: No, you have not.

"Sgt. Byrd: And, Mr. Prysock, is that correct that I have done nothing to persuade you not to, to hire a lawyer or to go on with this?

"Mr. P.: That's right.

"Sgt. Byrd: Okay, everything we're doing here is strictly in accordance with Randall and yourselves, is that correct?

"Mr. P.: That is correct.

"Sgt. Byrd: Okay. Uh, all right, Randy, I can't remember where I left off, I think I asked you, uh, with your legal rights in mind, do you wish to talk to me at this time? *That is with everything I told you, all your legal rights, your right to an attorney, your right, and your right to remain silent*, and all these, I mean *do you wish to talk to me at this time about the case*?

"Randall P.: *Yes*." (Italics added.)

4 *People v. Pettingill*, *supra.*, 21 Cal.3d 231, contrary to *Michigan v. Mosley* (1975) 423 U.S. 96 [46 L.Ed.2d 313, 96 S.Ct. 321], held inadmissible a confession which was the product of custodial interrogation by police after defendant had twice invoked his right to remain silent. *People v. Disbrow*, *supra.*, 16 Cal.3d 101 held, contrary to *Harris v. New York* (1971) 401 U.S. 222 [28 L.Ed.2d 1, 91 S.Ct. 643], that a statement inadmissible in the case-in-chief because it was obtained in violation of *Miranda* could not be used to impeach defendant's trial testimony.

5 The federal Constitution Fifth Amendment provides: "No person ... shall be compelled in any criminal case to be a witness against himself, ..." The California Constitution, article I, section 15 provides: "Persons may not ... be compelled in a criminal cause to be a witness against themselves, ..."

6 Mrs. Prysock, appellant's mother, testified that the following occurred after her arrival at the police station on January 30, 1978: "Q. [Defense counsel] When you went into the room where Randy was located, what was Randy doing?

"A. He was sitting in this chair that looked like a school desk type. And he had his head laying down on the desk. And he was handcuffed. And his handcuffs were on the chair and his head was on the desk with his head laying down.

"Q. Who spoke first, you or Randy?

"A. I did.

"Q. What did you say?

"A. I said, 'Randy, mother is here.'

"Q. What did he say?

"A. Then I said-he still didn't raise his head up. I said, 'Son, what is wrong?' He said, 'I am sick, dizzy.'

"Q. What did he say next?

"A. I said, 'Well, what is the matter?' He said, 'Well, Mom, I haven't eaten in three days. I haven't slept in three days.'

"Then I looked him in the face. And I said, 'Well, something else is wrong, Randy.' You know, 'you are not acting right. Your eyes are red.' And I said, 'Son, have you been drinking or taking drugs?'

"Q. What did he say?

"A. He says, 'No, we have been drinking.'"

7 The actual tape of appellant's statement to Byrd was made part of the record on appeal.

8 The armed robbery was committed December 11, 1977, with Mark Danley. Despite appellant's contrary contention, at the time of arrest on the robbery charge on December 11, 1977, appellant orally waived his *Miranda* rights and then signed a written waiver.

9 "The Court: All right. I have considered all of the evidence and number of points and authorities. And the main issue, of course, is ... the ability of the Prysock's ability to reason ... and comprehend or resist were so disabled that he was incapable of free or rational choice in deciding to make a statement to Detective Byrd. And, of course, considering what disability there was, if any, would be the lack of sleep, whether he had eaten, how long since he had eaten, and the extent of any intoxication.

"I have considered these in light of some case[s], *People v. Lara*, 67 Cal.2d 365; *In re Cameron*, 68 Cal.2d 487;the *Morris* case cited by counsel; and *People v. S[ch]wartzman* (1968) 266 Cal.App.2d 870 [72 Cal.Rptr. 616].

"It is my opinion after hearing the totality of the evidence that Prysock was cognizant and aware of rights that he was being advised of by Detective Byrd. His responses to questions regarding Miranda rights appear on the tape to be rational, coherent and responsive. Appears to this Court that his decision to proceed and answer questions as asked by Detective Byrd was [the] product of his rational intellect and his free will. [¶] I feel, therefore, that his statement that he gave was voluntary and knowing.

"And [in the] S[ch]wartzman case it is pointed out that the minor's capacity to waive his rights, for instance, the attorney, one of the basic *Miranda* rights, is a function of his individual intelligence, compensability [*sic*]. Unrelated to the desires or wishes of his parents.

"But [what] the Court was pointing out is [a] minor makes the ultimate decision as to whether or not he is going to waive his rights or not, regardless of what his parents may want to do or not want to do.

"In this case, it appears to the Court that Prysock was freely advised; that he indicated that he understood; and that he would waive this right, these rights under *Miranda*, and proceed to make the statement.

"As I mentioned, I took into consideration what drinking he had been doing, the lack of sleep and other matters. And I cannot see from the evidence that they would have impaired, only [*sic*] appreciable degree or only [*sic*] ability to interfere with his rational intellect and his free will. And for that reason, I feel that his statement that he gave to Detective Byrd was voluntary.

"There are some other cases, but they are merely on the extent of the blood alcohol. And that apparently wasn't gone into in this case. I don't know what his blood alcohol was."

10 The jury was cautioned on the robbery theory that the specific intent to rob must have been formed *prior* to infliction of the fatal wounds.

11 CALJIC No. 8.20 stated at time of trial: "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with malice aforethought is murder of the first degree. [¶] The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word 'premeditated' means considered beforehand.

"If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

"The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill."

The special instruction stated as follows: "*Special Instruction A-Degree of Reflection-Deliberation and Premeditation versus Intent to Kill* [¶] In order to find a deliberate and premeditated killing you must find substantially more reflection on the part of the defendant than is involved in the mere formation of the specific intent to kill."

12 The *Anderson* analysis regarding premeditation continues to be utilized by the Supreme Court as recently as *People v. Murtishaw* (1981) 29 Cal.3d 733, 749-750 [175 Cal.Rptr. 738, 631 P.2d 446].

13 The pertinent taped testimony is as follows:

"Sgt. Byrd: Okay. You were telling me earlier, or, uh, something about you met a guy in, in camp. And that's just before I walked in, this was just something you blurted out to me, uh, as we was coming in here. What, what was this, I don't recall exactly what it was. Something about somebody in camp give you an idea to do it or something. What was this?

"Randall P.: Oh, I said Mark [Danley] told Hipp that his plans, what he was going to do.

"Sgt. Byrd: Okay, now, who is Hipp?

"Randall P.: Roy Hipp.

"Sgt. Byrd: And where'd you meet him at?

"Randall P.: At Juvenile Hall.

"Sgt. Byrd: And how long ago was this?

"Randall P.: About three, two or three weeks.

"Sgt. Byrd: And what did Mark tell this guy that he was going to do?

"Randall P.: He told him what all he was going to do was rob, and what he was going to do to Brad Erickson's mom.

"Sgt. Byrd: What'd he say he was going to do to her?

"Randall P.: Kill her.

"Sgt. Byrd: Well, why, how, why did he want to kill her?

"Randall P.: I don't know. He never did tell me.

"Sgt. Byrd: Are these things that you're telling me the truth?

"Randall P.: Yes ...."

14 The dissent's conclusion that a reasonable trier of fact could only find appellant and his coparticipant had attempted to avoid the victim prior to the time she discovered Danley breaking the rear window is based on appellant's self-serving testimony on this issue. The frequent drive-bys and phone calls which purportedly involved no conversation are susceptible to a dual interpretation-the other being that appellant and Danley were waiting until the victim's son departed and they could find the victim alone at the house.

15 As noted *ante*, "mere presence alone at the scene of the crime is not sufficient to make the accused a participant, and while he is not necessarily guilty if he does not attempt to prevent the crime through fear, such factors may be circumstances that can be considered by the jury with the other evidence in passing on his guilt or innocence." (*People v. Durham* (1969) 70 Cal.2d 171, 181 [74 Cal.Rptr. 262, 449 P.2d 198].)

16 The portions of the following excerpts which are underscored indicate the language complained of by appellant:

(1) "The People of the State of California in every single one of the counts that we've charged, believe the defendant to be guilty."

(2) "In connection with that, again, Mr. Prysock's remorse on the stand here in front of you 12 who are going to judge him doesn't ring true to his actions after the murder. He puts 26 quarters of Mrs. Erickson's money that she got from her job as an L. A. Times distributor and puts it in his pocket. Okay. I don't know about you, but if I would have walked up to that scene like Mrs. Erickson's son did, I probably would have puked my guts out, much less witnessing the event."

(3) "Burglary is the entering of a dwelling house with the intent to commit larceny or any other felony. Once I get inside that house, it's burglary, it's burglary. Now, if I take something once I get inside that house- I've prosecuted a jillion of these-that shows some intent on the part of the person who came in the house to show that he did have that intent when he came in. The fact that he took something shows that circumstantially."

(4) "If you come to the ridiculous conclusion that Prysock had the intent to commit burglary and that attempt to commit that burglary was frustrated and that when he ran around the house and went in that front door he didn't have the intent to commit burglary, then you just let him walk right out of here. That to me-if you believe that, I-words don't describe my feelings on that particular point."

(5) "[Defense counsel] says there's no evidence of any intent to kill when Prysock entered that house, and I don't believe that's true. I don't believe it's true that Mr. Prysock didn't know all about Brad Erickson, Brad Erickson's mother, Phinnis Ralph [*sic*] the guy that Danley stole that pickup from; it's incredible.

"[Defense counsel]: Your Honor, excuse me. It's unclear to me whether or not counsel is stating his personal opinion or stating it based on the evidence.

"[Prosecutor]: My personal opinion based on the evidence, your Honor.

"[Defense counsel]: Thank you."

(6) "Now, a person accused of murder, it's not unusual for them to get up and lie on the stand. Okay. But Mr. Prysock says on the stand that he didn't hit-excuse me-he doesn't remember where he hit Mrs. Erickson when he hit her in the chair. He doesn't remember which part of the body. He just doesn't remember. His memory fails him on that point. On the taped statement he says he hit her on the head. Why doesn't he just come out and state it?"

(7) "This type of conduct in this particular case, in my opinion, is one of the most brutal and atrocious crimes that's ever been committed in this county, and you may live a long time before you'll hear about one more depraved than this one."

(8) "This is a crime that certainly deserves the charges we brought, and beyond any reasonable doubt they're true."

17 It should further be noted that the prosecutor opened his closing argument to the jury with the following comment: "[A]nything I say is only my opinion of what I feel the evidence shows. The evidence shows certain things; from these things you can infer that other things have happened. Throughout the course of my argument I will be giving you my opinions from what I feel the evidence shows. I've already formed my opinion in this case; you have not."

18 CALJIC No. 2.52 stated as follows at time of trial: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine."

* Assigned by the Chairperson of the Judicial Council.

1 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974].

2 *People v. Disbrow* (1976) 16 Cal.3d 101, 115 [127 Cal.Rptr. 360, 545 P.2d 272], quoting *People v. Brisendine* (1975) 13 Cal.3d 528, 549-550 [119 Cal.Rptr. 315, 531 P.2d 1099].

3 The majority's emphasis on that part of the study that concluded that most juvenile suspects understood the warning that the court would appoint an attorney if the suspect could not afford one is misplaced. The issue before us is whether the defendant knew that the appointment could *precede interrogation*. Likewise, the majority's reference to prior court experience as creating increased understanding must be read in the context of the entire report. The youths who had significantly higher scores in comprehension were those who had two or more prior felony referrals. The defendant was not in that category.

4 Although the precise words normally recited in a *Miranda* wording are not the exclusive way of adequately imparting rights to a suspect, I would hope that, since the *Miranda* requirements can be met so easily by reading from a card, that the traditional liturgy will continue to be used. Otherwise, courts will be forced back to the pre-*Miranda* task of individually examining the nuances of the advisement in order to determine on a case-by-case basis whether a suspect understood his rights.

In its decisions incorporating *Miranda* into state law, the California Supreme Court has repeatedly recognized that the cardinal virtue of *Miranda* is that it creates "a single, uncomplicated, universally applicable test" (*People v. Disbrow*, *supra.*, 16 Cal.3d at p. 111) and that this promoted "stability and predictability of the law on this important topic." (*People v. Pettingill*, *supra.*, 21 Cal.3d at p. 250.)

Many areas of the law do not lend themselves to clear-cut, workable rules. The content of *Miranda* warnings, however, does, and it is a disservice to the police and to the courts, as well as suspects, not to provide them "bright-line" rules in this regard.

5 See footnote 4, *ante*, and the discussion in *Fare v. Michael C.*, *supra.*, 442 U.S. 707, 718 [61 L.Ed.2d 197, 208, 99 S.Ct. 2560, 2568] which discusses the specific nature of the *Miranda* rules benefiting the accused and the state alike.

6 If there were to be a retrial, it would be necessary to discuss the issue of sufficiency of evidence to support the finding that defendant killed his victim with deliberation and premeditation because of the holding in *People v. Bonner* (1979) 97 Cal.App.3d 573 [158 Cal.Rptr. 821]. In *Bonner*, the trial court found the defendant guilty of possessing for sale one-half ounce or more of heroin. The appellate court affirmed the conviction of guilt but found that the record did not contain substantial evidence that the substance in question weighed one-half ounce or more, and remanded for trial on the sole issue of weight. On a petition for rehearing, the appellate court, relying on *Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141], ruled that the double jeopardy clause forbade a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. The matter was thus

remanded for the purpose of sentencing defendant as a person convicted of possessing for sale less than one-half ounce of a substance containing heroin.

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