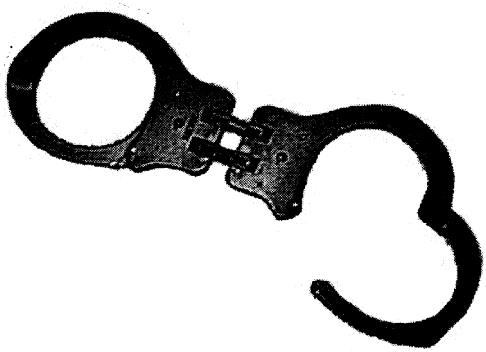
# MIRANDA

## "CUSTODIAL INTERROGATIONS" AND THE LAW OF

# CONFESSIONS

***Prepared for***
***Nevada Law Enforcement Officers***
***and***
***Criminal Law Practitioners***

## *October 2009*



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*Salus populi*
*Supreme lex esto*

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## PREFACE

This Manual is designed as a quick reference guide, research tool and training aide for law enforcement and practicing attorneys. It encompasses case law that impacts on the use and admissibility of suspect/defendant statements. This includes *Miranda* – right to counsel/silence and other 5th Amendment issues relating to the privilege against self-incrimination, 6th Amendment right to counsel issues and 14th Amendment due process concerns.

The Manual is periodically updated, but the user is ultimately responsible for verifying the continued viability of the cases and procedures. Everyday, courts across the nation issue opinions on these matters. The user should be particularly concerned with United States Supreme Court, Ninth Circuit Court of Appeals and Nevada Supreme Court opinions. Before using information from the manual in pleadings, counsel **must** review the authority for changes. Academies and other training programs should ensure they also have procedures in place for updating their materials in response to new case law or statutes and disseminating this information to line staff.

## I. HISTORICAL PERSPECTIVE

In 1935 the United States Supreme Court issued the first opinion applying federal constitutional law on suspect statements/confessions to state proceedings, **Brown v. State of Mississippi,** 297 U.S. 278, 56 S.Ct. 461 (1935). Under common law, a confession was admissible if the totality of the circumstances showed it was trustworthy, i.e. freely and voluntarily made. Involuntary statements violated federal due process. The Fifth Amendment's privilege against self-incrimination was not involved as the courts generally said it only applied to the courtroom, i.e. compelling the defendant

to testify. **Brown** similarly rejected the 5th Amendment, but did extend the 14th Amendment due process voluntariness test to state prosecutions. This was essentially the test until 1966, when **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602 (1966) was decided.

The Miranda case revolutionized confessions law by applying the 5th Amendment privilege against self-incrimination to non-court situations. It placed significant restrictions on police interrogation. Most modern suppression motions involve some aspect of **Miranda**. However, the *Miranda Rule* has not made traditional 14th Amendment due process voluntariness rules obsolete.

1. Voluntariness can still be an issue is cases where *Miranda Rights* are not required.

2. A confession can still be attacked on voluntariness grounds even if police give complete *Miranda Warnings* and obtain proper waivers.

3. Traditional voluntariness concepts are employed to test whether a *Miranda Waiver* is valid. To put it another way, *Miranda* waivers must be voluntary.

4. Statements taken in violation of **Miranda** can be used to impeach; involuntary statements cannot.

With this in mind, the Manual first discusses the 5th Amendment and **Miranda**; then the 14th Amendment Due Process requirement of voluntariness or other 14th Amendment issues. Thereafter, information is presented on the Sixth Amendment right to counsel and its affect on statement admissibility. Next the Manual reviews the court process for raising statement admissibility issues, burdens of producing evidence, burdens of proof, rules involving co-defendants, testimony or argument that comments on a defendant's right to remain silent or other pre-trial or trial related issues. Finally the Manual addresses other miscellaneous issues involving statements or confessions.

## II. THE FIFTH AMENDMENT AND MIRANDA

As noted above, the actual language of the 5th deals with a right against self-incrimination. Until **Miranda**, the Fifth Amendment was limited in application to the courtroom setting, a defendant could not be compelled to take the stand and answer questions. Most 5th Amendment litigation involves **Miranda**, but there are other situations where a 5th Amendment violation may be alleged, such as compelling a witness to testify under a guarantee of immunity. This Section concentrates on **Miranda**. Other Fifth Amendment issues are found in Sections V and VI.

### A. *MIRANDA RULE*

**Miranda v. Arizona** - 384 U.S. 436, 86 S.Ct. 1602 (1966)
Re-trial 450 P.2d 364 (1969)

### 1. FACTS OF MIRANDA

On March 3, 1963, an 18 year old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested and taken to the police station. At this time Miranda was a 23 year old, indigent, and educated to the extent of completing half of the ninth grade. He had an emotional illness of schizophrenic type, according to the doctor who eventually examined him.

The doctor's report also stated that Miranda was alert and oriented as to time, place, and person. He was intelligent within normal limits, competent to stand trial, and sane within the legal definition. At the police station, the victim picked Miranda out of a lineup, and two officers then took him into a separate room to interrogate him.

Though at first denying his guilt, within a short time Miranda gave a detailed oral confession and then wrote in his own hand, and signed, a brief statement admitting and describing the crime. All this was accomplished in two hours or less without any force, threats or promises but without any effective warnings at all.

## 2. HOLDING

An excerpt from the majority opinion:

> Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived or his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required prior to any questioning. The person must be warned **that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.** The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.

> Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements of his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

The Opinion indicated although Miranda's confession was not coerced (involuntary), the Court was concerned he had not knowingly waived his rights because you cannot waive what you do not know or understand.

## B. THE WARNING

**Rule:** Prior to "custodial interrogation" the person must be advised of the following:

1. Right to remain silent
2. Any statement may be used in evidence against him.
3. Right to have an attorney present.
4. Right to appointed counsel.

The term "presence" as used in the opinion means the right to have an attorney before questioning begins and during questioning.

So long as the warning as a whole sends the message to the defendant that he has a right to have a lawyer appointed before questioning begins, the warning does not have to follow a precise formula. See **California v. Prysock**, 453 U.S. 355, 101 S.Ct. 2806 (1981). **Duckworth v. Eagan**, 492 U.S. 195, 109 S.Ct. 2875 (1989). In addition, some states require additional language when advising juveniles. See Section II(H).

Law enforcement agencies use various versions of the warnings. The version used, at the time of publication, by the Las Vegas Metropolitan Police Department for adults and juveniles is found in Appendix A at the end of this Manual.

## 1. ADVISING SUSPECT OF NATURE OF CHARGES

**General Rule:** There is no requirement to advise a defendant of all possible charges which could be brought against him. So long as he knows the general nature of pending charges, *Miranda Warnings* were given (if applicable) and the statement is voluntary, it will not be suppressed.. **Sparks v. State**, 96 Nev. 26, 604 P.2d 802 (1980).

**Example:** **Colorado v. Spring** 479 U.S. 584, 107 S.Ct. 851 (1987). AFT agents were investigating firearms violations and after Mirandizing the defendants, the agents made inquiry regarding firearms violations. Then, without warning, agents began to ask about crimes of violence and murder - to which defendants confessed. The Colorado State Supreme Court held that failing to advise defendants of the subject matter of interrogation amounted to official trickery and invalidated **Miranda**. The United States Supreme Court disagreed and held that failure to advise a suspect of the subject matter of an interrogation does not affect the decision to waive the Fifth Amendment Privilege. "We hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." **Colorado v. Spring**, 479 U.S. at 577, 107 S.Ct. at 859 (emphasis in original).

## C. WHEN *MIRANDA* WARNINGS REQUIRED

**Rule**: **Miranda** only applies to **"custodial interrogations"**.

The prosecution may not use statements ..."stemming from custodial interrogation of defendant [without the required warning]..." **Miranda v. Arizona**, *supra.* The words "custody" and "interrogation" have special meanings under *Miranda.* "Custody" means more than arrest and "interrogation" includes more than asking questions. However, not all questioning asked of a suspect/defendant is interrogation under *Miranda.*

Thus is important to know what these terms mean because the *Miranda Warning* must be given only during situations where there is custodial interrogation. If the suspect is in custody but no interrogation is contemplated or conducted - no *Miranda Warning* need be given. If there is interrogation but the suspect is not in custody - no *Miranda Warning* need be given.

All custodial interrogations require *Miranda W*arnings regardless of the crime classification or seriousness of the offense. **Berkemer v. McCarty**, 468 U.S. 420, 104 S.Ct. 3138 (1984) and **Pennsylvania v. Bruder**, 488 U.S. 9, 109 S.Ct. 205 (1988) .

## D. INTERROGATION

To be "interrogation" under **Miranda**, the officer must intend that his questioning result in the suspect making incriminating statements and the statements must in fact be incriminating. It is a combination subjective and objective test.

**Example:**

**Is This Your Car?**

This question may or may not be incriminating depending upon the circumstances. If you are trying to determine ownership to avoid impounding it or to fill out a traffic accident report after arresting the driver, it is not incriminating. On the other hand if the automobile in question is suspected of being a getaway car in a robbery and a witness to the robbery obtained a license plate number, then the question of the person driving that car "Is this your automobile?" would clearly be incriminating and implicate the Fifth Amendment requiring a *Miranda Warning* if the person were in custody. *See* **United States v. Henley**, 984 F.2d 1040 (9th Cir. 1993).

It is important to note however, that suppressing such a statement may well be academic since there may be other ways to connect the accused to the vehicle. For example, if he is observed sitting behind the wheel of the automobile, or if the automobile is registered to the accused, such evidence would be independent of any statements elicited from the defendant.

## 1. "INTERROGATION" DEFINED

Questioning and other acts designed to elicit incriminating statements. **Rhode Island v. Innis**, 446 U.S. 291, 100 S.Ct. 1682 (1980), *infra*; **Pendleton v. State**, 103 Nev. 95, 734 P.2d 693 (1987)

## 2. "FUNCTIONAL EQUIVALENT"

Interrogation includes both: 1) the overt or express questioning of a suspect and 2) the functional equivalent of questioning. "Functional equivalent" is defined as "words or

actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." **Rhode Island v. Innis**, 446 U.S. 291, 100 S.Ct. 1682, 1689 (1980). To determine whether the questioning falls within the meaning of the functional equivalent of interrogation the focus is on the perception of the suspect; how a reasonable person would perceive the police action rather than the intent of the police. However, intent is a factor courts consider in evaluating the circumstances. (**Innis**, at page 1690). The examples below more fully illustrate this concept.

**Example # 1**: **Rhode Island v. Innis**, 446 U.S. 291, 100 S.Ct. 1682, 1689 (1980). A defendant was arrested shortly after committing an armed robbery. The officers advised him of his *Miranda Rights* and he stated he wished to speak a lawyer. The weapon used at the time of the robbery was a sawed off shotgun and it was not recovered. On the way to the police station, the transporting officers had a conversation between themselves about the missing shotgun and the fact that there were a lot of handicapped children in the area where the robbery occurred and that if one of them found the weapon, someone might be hurt. The defendant interrupted the conversation and directed the officers to the shotgun to protect the children. The shotgun was introduced in evidence during the trial of the case and the defendant was convicted.

The Rhode Island Supreme Court reversed the conviction ruling that the shotgun was found as a result of the "custodial interrogation" after the defendant had invoked his right to counsel. The United States Supreme Court disagreed, stating that in the context of this case, the conversation was strictly between the officers and the words were not "reasonably likely to elicit an incriminating response". Specifically, the trial court had found that the officers were not speaking for the defendant's benefit, knowing that he would hear their conversation. Instead they were simply discussing what they need to do next and that they needed to radio for assistance in searching the area or

warning about the danger. That factual finding was given deference.

**Example # 2**: **Weathers v. State**, 105 Nev. 199, 772 P.2d 1294 (1989). The day after the defendant was arrested for an unrelated battery, a detective questioned the defendant in an interview room located inside the Detective Bureau while the defendant was handcuffed to a security post. Upon entering the room, the detective told the defendant: "Shut up. Don't say anything. When I'm through talking, you can talk." The detective then confronted the defendant with facts pertaining to the homicide and these facts elicited an incriminatory response from the defendant. At that point the detective read the defendant his *Miranda Rights* at which time the defendant invoked those rights.

The Nevada Supreme Court, citing **Rhode Island v. Innis**, ruled that **Miranda** had been violated because the detective's statements to the defendant were designed or were reasonably likely to illicit an incriminating response and therefore, although the detective did not engage in express questioning, his conduct amounted to its' functional equivalency.

**Example # 3**: **United States v. Henry**, 940 F.Supp. 342 (D.D.C. 1996). A suspect, who initially asserted the right to remain silent and to counsel under **Miranda** after his arrest, asked about his charges. In response the officer told the suspect he was charged with "Assault on a Police Officer, because I get pissed off when someone shoots at me." The suspect's responded to the officer's statement indicating the gun went off accidentally when he threw it to the ground. Held: statement was admissible in evidence; officer's response was not an interrogation.

## 3. INCRIMINATING

If the questions or actions of the officer are not intended to obtain an "incriminating" statement or the elicited statement from the suspect is not "incriminating" then the statement is not the product of interrogation and **Miranda** is not applicable. (Even if the statement results in evidence favorable to the D.A.) Thus, you should always ask yourself whether the question is: 1) intended, or reasonably likely, to obtain an incriminating statement, and 2) is the answer incriminating.

### a) CONSENT TO SEARCH

It has consistently been held that the mere act of consenting to a search in response to an officer's question does not incriminate a suspect even though the evidence derived from the search might be highly incriminating. See **United States v. Henley**, 984 F.2d 1040 (9th Cir. 1993). In **Henley**, the court stated that "we have held that a consent to a search is not the type of incriminating statement toward which the Fifth Amendment is directed. It is not, in itself, evidence of a testimonial or communicative nature." Citing **United States v. Lemon**, 550 F.2d 467 (9th Cir. 1997), citing **Schneckloth v. Bustamonte**, 412 U.S. 218, 93 S. Ct. 2041 (1973). The defendant was in custody as a suspect in a robbery when he was asked by the officers if he would consent to a search of his car. The defendant had not been advised of his *Miranda Rights*.

In accord with the Ninth Circuit is the Eleventh Circuit, see **United States v. Hidalgo**, 7 F. 3d 1566 (11th Cir. 1993) In **Hidalgo**, the defendant was under arrest and had invoked his right to remain silent. Thereafter, the officers requested his consent to search his house and he granted that consent. Citing a long list of precedent, the Eleventh Circuit

Court of Appeals held that such a request, and the subsequent statement, whether verbal or in writing granting consent to search, is not incriminating and does not implicate the Fifth Amendment to the United States Constitution. The Court in its decision concluded that "every Federal Circuit Court which has addressed the **Miranda** issue in the context of consent to search has concluded that it is not an incriminating statement. (Citing cases from the 10th, D.C. 7th, 8th, and 2nd Circuits). *See also* **United States v. LaGrone**, 43 F.3d 332 (7th Cir. 1994).

**NOTE**: Lack of advice to the accused of his constitutional rights is a factor that may be considered in determining the voluntariness of consent. **Schneckloth v. Bustamonte**, *supra.* In addition, although the Fifth Amendment does not apply, there may also be Sixth Amendment or Fourth Amendment concerns. *See* Section IV(D)(2) under Sixth Amendment and Section VI(A)(3) under Miscellaneous Issues.

## b) NAME/IDENTIFICATION

The United States Supreme Court has held that asking a person to identify themselves is generally not an incriminating question under the 5th Amendment. **Hiibel v. Sixth Judicial District, Nevada,** 542 U.S. 177, 124 S.Ct. 2451 (2004). In **Hiibel**, the High Court stated:

> In this case petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it "would furnish a link in the chain of evidence needed to prosecute" him. *Hoffman v. United States,* 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).

> The narrow scope of the disclosure requirement is also important. One's identity is, by definition, unique; yet it is, in another sense, a universal characteristic. Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances. See *Baltimore City Dept. of Social Servs. v. Bouknight,* 493 U.S. 549, 555, 110 S.Ct. 900, 107 L.Ed.2d 992 (1990) (suggesting that "fact[s] the State could readily establish" may render "any testimony regarding existence or authenticity [of them] insufficiently incriminating"); cf. *California v. Byers,* 402 U.S. 424, 432, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971) (opinion of Burger, C. J.). Still, a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow. **Hiibel**, 542 U.S. at 190-191, 124 S.Ct. at 2461.

*See also* **United States v. Henley**, 984 F.2d 1040 (9th Cir. 1993)(Questions about name, address, birth date, etc. are not incriminating nor an interrogation.)

## 4. THRESHOLD QUESTIONS

Threshold questions are not considered interrogations. This is because they are not intended to elicit incriminating information pursuant to an investigation. Rather they are

questions asked so that the law enforcement official knows how to react to a situation. For example does the situation pose hazards to the public or officers, what medical attention should be summoned, how many officers should be responding, what is going on?

**Example # 1**: **Johnson v. State**, 92 Nev. 405, 551 P.2d 241 (1976). In **Johnson**, two Metro officers heard gunshots. Upon responding they observed the defendant with gun in hand and two men on the ground, apparently deceased. After ordering Johnson to drop the weapon at gun point and securing him with handcuffs, the officers asked: "What happened" and "Why did you shoot those two men". The Nevada Supreme Court suggested, but did not decide, whether this was a "custodial interrogation". Do drawn guns and handcuffs equal "custody"? Is determining whether the shooting was criminal, accidental or self-defense interrogation?

**Example # 3**: **State v. Billings**, 84 Nev. 55, 436 P.2d 212 (1968). Police got call from defendant asking to speak to specific officers. They were unavailable and when asked by the dispatcher "what's the trouble" the defendant said "I just killed my wife." Officers arrived at the scene and defendant came out of the house. He was asked again "what's the trouble" and responded by pointing to a body and a rifle and then stating he'd killed his wife for cheating on him. The Nevada Supreme Court held the statements admissible. *Miranda Warnings* were not required because the defendant was not in custody and the questions were not an interrogation. Defendant asked police to come to his house and the "what's the trouble" question was designed to give the officers some idea of what they were walking into or how they should react to the situation.

## 5. PUBLIC SAFETY EXCEPTION

Similar to Threshold Questions, law enforcement questions designed to ascertain the nature of an emergency or whether a current danger exists to the public or the officers are not considered interrogations for purposes of **Miranda**.

**Example # 1**: **New York v. Quarles**, 467 U.S. 649, 104 S.Ct. 2626 (1984). The police apprehended the defendant in a supermarket. The defendant matched the description of a person who had just raped a woman. The woman told police the man was carrying a gun. The defendant was frisked and he was found to be wearing an empty shoulder holster so the officer asked the defendant "where is the gun". The defendant nodded toward some cartons and said "the gun is over there". The court ruled defendant's statements and finding of the gun were okay. On balance the public safety outweighed the need to give *Miranda Warning*. The supermarket was a public setting and someone might be harmed by the gun before the police could secure the area and began a systematic search.

**Example # 2**: **United States v. Desantis**, 870 F.2d 536 (9th Cir. 1989). The Ninth Circuit extended the rational of **Quarles** to situations where a defendant asserts his right to counsel. After the defendant had been arrested in his home, he was advised of his *Miranda Rights* and the defendant asked for an attorney. Thereafter the defendant asked if he could change his clothes, the officers said yes and as defendant was about to go into a room to collect his clothing the police asked the defendant if there was a gun in the room. The defendant stated there was and pointed out its location. The weapon was recovered and used against the defendant in

a subsequent trial. Held: Police question was proper even though right to counsel was invoked as it was a safety issue.

**Example # 3**: **State v. Ramirez**, 871 P.2d 237 (1994). Police arrived at apartment in response to loud screams. They could see a man wearing suspenders in the apartment. When they gained entry, defendant was covered with blood near woman's body and a bloody knife, but he was not wearing suspenders. Consequently the officers were concerned about other armed individuals or victims. Officer asked "what happened, anyone else inside or "hurt?" Defendant responded by saying two other people were inside, both hurt. Held: no **Miranda** violation. Defendant's statements were made in response to questions necessary to secure the safety of both police and the public, so safety exception applied.

## 6. VOLUNTEERED STATEMENTS

**Rule:** If the suspect talks without a question being asked, **Miranda** does not apply.

"Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." **Miranda**, 86 S.Ct. at 1630. Interrogation, as conceptualized in the **Miranda** decision reflects a measure of compulsion above and beyond that inherent in custody itself. **Rhode Island v. Innis**, 446 U.S. 291, 100 S.Ct. 1682 (1980).

**Example # 1**: **State v. Billings**, 84 Nev. 55, 436 P.2d 212 (1968). After the initial "what's the trouble" question discussed above under Threshold Questions, the defendant simply started talking and told officers a variety of details about the murder. No questions were asked. Later, when the defendant had been arrested, officers attempted to advise him

of his *Miranda Rights*. Defendant interrupted the officers, saying he didn't need to hear them and again just started relating details of the murder. The officers simply let him talk and asked no questions. The Nevada Supreme Court held these were volunteered statements, not the product of interrogation.

**Example # 2**: **Floyd v. State**, 118 Nev. 156, 42 P.3d 249 (2002), *abrogated by* Grey v. State, ___Nev.___, 178 P.3d 154 (2008). The defendant went on a killing spree in a supermarket. He was arrested as he exited the market. Before *Miranda Warnings* were given, and without any questioning, the defendant said "I can't believe I shot those people." Held: although in custody, statement was volunteered – not made in response to questions or actions of law enforcement.

**Example # 3**: **Pennsylvania v. Muniz**, 496 U.S. 582, 110 S.Ct. 2638 (1990). While taking a series of physical field sobriety tests, the defendant made comments that incriminated him. They were not in response to any questions. The exact comments are not part of the opinion; it appears they were statements indicating he was doing poorly because he was drunk. Held: The unsolicited responses were voluntary. *See also* Section II(D)(7) below on Statements During Tests.

## 7. STATEMENTS DURING TESTS

Statements uttered by a defendant during an investigative test or procedure, such as a field sobriety or breath test, in response to questions designed to determine if the subject understands instructions or has any physical or mental problem that would affect the test, are not subject to **Miranda**. This is because the questions asked were not

designed to elicit incriminating information, but were a part of the testing procedures (i.e. do you have any medical conditions, do you understand the instructions?). The fact that a defendant may make an incriminating statement in response is irrelevant to **Miranda**. (i.e. I had too much to drink, I can't blow into the tube or I'd better wait before taking the test because I am drunk). **Pennsylvania v. Muniz**, 496 U.S. 582, 110 S.Ct. 2638 (1990).

However, when the testing procedure calls for a verbal response, the content of the response, is considered testimonial and incriminating under **Miranda**. As part of the recorded sobriety test, the defendant was asked to give the date of his sixth birthday. The defendant replied "I do not know." This, the Court held, constituted custodial interrogation within the meaning of **Miranda**. The response given by the defendant was labeled by the Court as a "testimonial act". For purposes of its ruling the Court gave the following definition of a "testimonial act": Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the cruel dilemma of truth, falsity or silence and hence, the response whether based on truth or falsity contains a testimonial element. **Muniz**, *supra*.

## 8. ROUTINE BOOKING AND ADMINISTRATIVE QUESTIONS

During formal booking or other administrative procedures, defendants are asked standard informational questions that are not intended to elicit incriminating information, therefore they are not an interrogation under **Miranda** So long as the purpose of the question is for record keeping, jail classification or other administrative needs, **Miranda** is inapplicable and a defendant's statements will not be suppressed even if incriminating.

**Example # 1:** **Pennsylvania v. Muniz**, 496 U.S. 582, 110 S.Ct. 2638 (1990). After being arrested, the defendant was taken to the station house where his performance on field sobriety tests, answers to questions relating to booking, the field sobriety tests and a breath test were video taped. Questions about the defendant's name, address, height, weight, eye color, date of birth, and age were asked to enter the arrest into the records system. The defendant stumbled over two of these routine questions, thus the content of his answers was incriminating. (The delivery - slurred and confused speech – was not testimonial and outside the scope of **Miranda**). Held: This was a "record keeping" procedure "reasonably related to law enforcement administrative concerns."

**Example # 2**: **Nika v. State**, 113 Nev. 1424, 951 P.2d 1047 (1997). In that case the murder suspect was asked "Have you ever assaulted or battered anyone?" The question was asked to determine how to classify the defendant for housing purposes. The response to that question implicated the defendant in the murder for which he was being arrested. The Court held that this question was a legitimate routine booking question for classification purposes and was, therefore, not interrogation within the meaning of the **Miranda** decision.

**Example # 3**: **Archanian v. State**, 122 Nev. 1019, 145 P.3d 1008 (2006). Officer asked suspect, who was sweating profusely, if he needed water and if he had any medical condition that needed attending because Officer was concerned suspect might be having a heart attack or some other reaction. Held: Although "in custody" for purposes of **Miranda**, the question was not designed to elicit incriminating information and responses were admissible even though no *Miranda Rights* were given.

## 9. THIRD PARTY QUESTIONING

Statements made by a suspect in response to questions asked by a third-party, even if the police are present, are not subject to **Miranda** so long as the third-party is not acting at the behest, solicitation or instigation of the police. If the person is acting on behalf of the police, then they become a "police agent" and **Miranda** applies. *See* Sections III(D)(3) and IV(G)(5) of this Manuel "Police Agents" for more information. Examples of common situations are discussed below.

### a) DEFENDANT'S SPOUSE

In **Arizona v. Mauro**, 481 U.S. 520, 107 S.Ct. 1931 (1987), the defendant was arrested for killing his son. He was *Mirandized* and after exercising his right to counsel all questions ceased. The defendant's wife, without police instigation, insisted on talking to the defendant and was permitted to do so, however, a police officer sat in on the conversation and openly tape recorded it. The statements made by the defendant were admissible.

The Court held that this was not interrogation within the meaning of **Miranda**. The Court stated police departments need not adopt inflexible rules barring suspects from speaking with their spouses, nor must they ignore legitimate security concerns by allowing spouses to meet in private. **Miranda**, the Court ruled, applies only to "using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment".

## b) PRIVATE CITIZEN/SECURITY GUARD

Assuming they are not acting on behalf of the police, **Miranda** is not required when a suspect is questioned by an employer, security guard, etc., but voluntariness is still an issue. *See* **Schaumberg v. State**, 83 Nev. 372, 432 P.2d 500 (1967). Slot mechanic involved in rigging jackpot confessed to four supervisors. Confession found voluntary and **Miranda** not required. See also **Klepar v. State**, 92 Nev. 103, 546 P.2d 231 (1976); **Silks v. State**, 92 Nev. 91, 545 P.2d 1159 (1976).

## c) CORRECTIONS OFFICERS OR PRISON COUNSELORS

Nevada Supreme Court held *Miranda Warnings* are required where a Nevada State Prison Correctional Classification Officer (Unit Counselor) obtained a statement from defendant in defendant's own prison cell. **Walker v. State**, 102 Nev. 290, 720 P.2d 700 (1986).

## d) MENTAL HEALTH COUNSELOR

In **Alward v. State**, 112 Nev. 141, 912 P.2d 243 (1996)(*overruled on other grounds by* Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005), the suspect was interviewed by a mental health counselor because the officers believed that the suspect was suicidal. This interview was videotaped and the suspect made incriminating statements. The Nevada Supreme Court found **Miranda** did not apply, but disallowed those statements on Fourteenth Amendment Due Process grounds. *See* Section III(H).

**Note**: Under the circumstances, the Court could also have easily concluded the counselor was acting as a "police agent" and applied **Miranda.**

In contrast, there is the Nevada Supreme Court's ruling in **Lincoln v. State**, 115 Nev. 317, 988 P.2d 305 (1999). In **Lincoln**, the suspect challenged the admission of statements he made during counseling sessions to a naval social worker regarding the sexual abuse of his daughter. The Nevada Supreme Court denied his claim. It distinguished the facts of **Lincoln** from **Alward**, noting that prior to the counseling sessions, the social worker had expressly indicated that she had to report any intimations of child abuse made by the suspect during those sessions. In addition, the social worker was not introduced to the defendant by investigating officers. The defendant was independently seeking counseling, while out of custody.

## e) ABUSE/NEGLECT SOCIAL WORKER

**Miranda** does not apply to interviews conducted by a social worker who was interrogating defendant in order to develop a plan to reunite the family. **Mejia v. State**, 122 Nev. 487, 134 P.3d 722, 724 (2006). Although out of custody, defendant claimed **Miranda** should apply because he was told the family could not be reunited unless he made an admission. He claimed this was tantamount to extortion. The Nevada Supreme Court found no 5th Amendment violation. (The Court found the circumstances did not implicate **Miranda** – so the custody issue was not discussed).

**Note**: the result could change if the social worker's interviews were routinely turned over to police investigators or police were present during the interview. The defendant did not allege the statement was involuntary on Fourteenth Amendment grounds, however the opinion suggests the Court

did not consider them involuntary because, as a matter of law, reunification is not possible in cases of denial. Thus this would not have been an impermissible threat under the Fourteenth Amendment and/or the counselor was not seen as a police agent. *See* Section III(D).

## 10. POLICE INFORMANTS OR UNDERCOVER OFFICERS

Frequently undercover police officers, or jail informants working with police, engage in conversations with inmates trying to solicit incriminating statements about criminal offenses. Whether this is proper depends on which jurisdiction will be prosecuting a case. Under Nevada State Constitution law, such conduct is considered a violation of the State Constitution equivalent of the Fifth Amendment. Under Federal law, it is not a violation of **Miranda**.

### a) NEVADA LAW

Under the Nevada Constitution, **Miranda** applies even where the suspect is unaware he is talking to a police agent, such as an undercover police officer or police informant. See **Boehm v. State**, 113 Nev. 910, 944 P.2d 269 (1997). The Nevada Supreme Court established a bright line rule and, relying on its earlier decision in **Holyfield v. State**, 101 Nev. 793, 711 P.2d 834 (1985), held that **Miranda** applies to police agents and undercover police officers and, therefore, if a person is in custody and the agent/officer questions the person, then **Miranda** is implicated and the statement is not admissible unless the police agent/informant or undercover officer first advised the suspect of his *Miranda Rights*.

## b) FEDERAL LAW

Federal law holds **Miranda** is inapplicable when the suspect is unaware that he is speaking to a law enforcement officer (or informant working for law enforcement) and gives a voluntary statement. **Illinois v. Perkins**, 496 U.S. 292, 110 S.Ct. 2394 (1990). *See also* Section IV(G)(3)(4) and (5).

**NOTE**: There is an apparent exception to the Nevada rule set forth in **Boehm**. In **Honeycutt v. State**, 118 Nev. 660, 56 P.3d 362 (2002)(*overruled on unrelated issue by* Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005), the suspect approached a fellow inmate and solicited the murder of a witness. The inmate then contacted Metro, who sent the inmate back to speak with the suspect regarding the solicitation. The inmate also arranged for the suspect to meet with an undercover Metro officer. The suspect then provided the officer with a piece of paper that said he wanted a witness to disappear. The suspect subsequently challenged the statements he made to his fellow inmate as a violation of **Miranda**.

In Footnote 6 of its decision, the Nevada Supreme Court concluded, without explanation, that his argument was without merit. **Honeycutt**, at 667, fn.6. From a reading of **Honneycutt**, it appears the Court felt **Miranda** was not at issue because the statements were, in and of themselves, elements of a crime (solicitation for murder) and therefore not the product of a custodial interrogation.

## E. CUSTODY

Rule: **Miranda** only applies if the suspect is in custody. (Even if the suspect is being questioned by an officer, so long as the suspect is not in custody, **Miranda** does not apply.)

## 1. "CUSTODY" DEFINED

Custody is defined as formally placing a person under arrest or "where there has been such a restriction on a person's freedom as to render him in custody". **Oregon v. Mathiason,** 97 S.Ct. 711 (1977). "Custody" for purposes of the 5th Amendment is distinct from "seizure" under the 4th Amendment. **Pennsylvania v. Bruder**, 488 U.S. 9, 109 S.Ct. 205 (1988). States are free to expand their definition of "custody" to include all 4th Amendment seizures and some states have done so, but Nevada is not one of them.

In **State v. Taylor**, 114 Nev. 1071, 968 P.2d 315 (1998), the Court made it clear that in Nevada the definitions of "seizure" and "in custody" for purposes of **Miranda** are not the same as those terms have been defined for Fourth Amendment Purposes. For example, a person can be seized pursuant to a traffic stop, a *Terry* stop or for pat-down purposes but this does not necessarily render a person "in custody" per **Miranda**.

In Nevada, "custody" (other than a formal arrest) was defined in **Alward v. State**, 112 Nev. 141, 912 P.2d 243 (1996) *overruled on other grounds by* Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005)). In **Alward**, the Nevada Supreme Court stated if a reasonable person in the suspect's position would have understood he/she was free to leave, then they are not in custody. See also **Berkemer v. McCarty**, 468 U.S. 420, 104 S.Ct. 3138 (1984). The court went on to state that in such instances important factors would include the following: "(1) the site of the interrogation; (2) whether the investigation has focused on the subject; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning." No one factor is controlling.

The case law below illustrates the factual circumstances that courts look at in determining custody for purposes of **Miranda**. Again, no single fact is dispositive,

rather it is the combination of facts looking at one issue: was this a coercive atmosphere – that is would a reasonable person feel free to leave. Briefly, courts look at: 1) site of interview – home, office, law, enforcement facility; 2) time of interview – early morning, day, late-night; 3) length of interview; 4) conditions of interview – extreme temperatures, no beverages, no bathroom break, harsh lightening, small area; 5) physical restraints – locked rooms, handcuffs, drawn guns; 6) who was present – family, multiple officers, etc.; 7) arrival – drove, officer transported, appointment; 8) person was targeted suspect; 9) told free to leave and questioning voluntary; and 10) officer demeanor and form of questioning – threatening attitude, standing in front of exit, tone of voice. **Taylor**, 114 Nev. at 1082, 968 P.2d at 323

Finally it is an objective test which looks at all the circumstances of the encounter. A suspect's or the police's subjective view (police believe that the person is a suspect in a crime but do not mention this to the person) of the circumstances does not determine the suspect is in custody. **Oregon v. Mathiason**, 429 U.S. 492, 97 S.Ct. 711 (1977) and **Stansbury v. California**, 511 U.S. 318, 114 S.Ct. 318 (1994). *See also*, **Archanian v. State**, 122 Nev. 1019, 145 P.3d 1008 (2006). Murder suspect was stopped at gun point and ordered to front of patrol car. Suspect was frisked for weapons, but not handcuffed. Nevada Supreme Court held suspect was "in custody" as a reasonable person would not feel free to leave under the circumstances.

## 2. LOCATION AND ENVIRONMENT

Although the location where questioning occurs might suggest a "coercive environment", this is not determinative of "custody". In this regard the United States Supreme Court stated in **Oregon v. Mathiason**, 429 U.S. 492, 97 S.Ct. 711 (1977):

> Any 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. But police officers are not required to administer *Miranda Warnings* to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.

Thus a suspect is not automatically in custody because the interview takes place at a police station, nor is a suspect out of custody simply because the interview takes place at the suspect's residence. Whether the suspect is in custody will depend on the circumstances of the case and the coerciveness of the atmosphere.

**NOTE:** A change in circumstances during an interview may change a non-custodial interrogation into a custodial one. In **Krueger v. State**, 92 Nev. 749, 557 P.2d 717 (1976) the suspect voluntarily entered the police station and was free to go during an initial interview. However, before a second interview, circumstances changed and the Court concluded a reasonable person would not feel free to leave and, in fact, the police intended to arrest the suspect and advised him pursuant to **Miranda**.

Consider the cases below.

**a) RESIDENCES**

**Example # 1:** In **Beckwith v. United States**, 425 U.S. 341, 96 S.Ct. 1612 (1976) defendant was the focus of a criminal

investigation and was interviewed in his home by IRS Agents without receiving full *Miranda Warnings*. Interview took place at 8:00 a.m. Suspect invited agents into home. Suspect was free to move about house. Interview took place in living room. Suspect later met officers at suspect's office to turn over documents. Trial court determined Beckwith was not in custody, Supreme Court Affirmed.

**Example # 2:** **Orozco v. Texas**, 394 U.S. 324, 89 S.Ct. 1095 (1969). Suspect was questioned by four policemen in his boardinghouse bedroom at 4:00 a.m. Woken up by police officers, one officer testified suspect was not free to leave and was under arrest and questioning took place while suspect still in bed. - Court ruled defendant was "deprived of freedom of action in a significant way" and was in custody, so *Miranda Warnings* were required.

**Example # 3:** **Avery v. State**, 122 Nev. 278, 129 P.3d 664 (2006). Officers asked suspect to come to police station. Suspect said not able but invited officers to home. Officers arrived at midnight. After interviewing suspect, Officers placed him under arrest and transported him. Supreme Court said not in custody. Invited officers to home, not handcuffed or restrained, questioning was not so lengthy or repetitive so as to be coercive.

## b) LAW ENFORCEMENT OFFICES

**Example # 1**: **Oregon v. Mathiason**, 429 U.S. 492, 97 S.Ct. 711 (1977). Defendant was a suspect in a burglary. Police left a note at suspect's apartment to call them. Defendant called and agreed to meet officer at police station. Defendant was told he was not under arrest and was not given *Miranda Warnings*. Officer falsely told defendant police had found his prints at crime scene and defendant confessed. Defendant

was given *Miranda Warnings* and confessed again. Defendant was allowed to leave police station. The court ruled no *Miranda Warning* was necessary because defendant was not "in custody" or otherwise deprived of his freedom of action in any significant way.

**Example # 2:** **California v. Beheler**, 463 U.S. 1121, 103 S.Ct. 3517 (1983). Murder occurred and defendant was developed as suspect. Defendant agreed to go to police station and was questioned a few hours after the murder. Defendant was not *Mirandized* and was not arrested. The court ruled that defendant's statements were admissible since defendant was not subject to custodial interrogation. Same situation as **Mathiason** except there questioning was 25 days after crime.

**Example # 3:** **State v. Lanning**, 109 Nev. 1198, 866 P.2d 272 (1993). Lanning was the suspect in a forged check case. She was asked to come to the police station so that she could be interviewed about her knowledge of the checks. Lanning agreed to meet with the detective later that afternoon. At the police station, Lanning was advised that she was not in custody and that she was free to leave at any time. No *Miranda Warnings* were given. She told the detective "I should see an attorney because I do not want to incriminate myself." The detective reminded Lanning that she was not in custody and that she was free to leave at any time. Suddenly, Lanning broke down crying, confessed to the forgeries, and gave the police a handwriting exemplar.

The Nevada Supreme Court held that the defendant's 5th Amendment Right to Counsel was not violated. The defendant was at the police station of her own free will and therefore not in custody, thus eliminating the 5th Amendment right to counsel.

**NOTE**: This case also presents issues that were not decided by the Court because it was not a custodial situation. If the Court had concluded **Miranda** applied, it would then have looked to see if this was an equivocal invocation and whether the statements were volunteered. See Sections II(D)(6) and II(G)(1)(b)(1).

**Example # 4:** **Silva v. State**, 113 Nev. 1365, 951 P.2d 591 (Nev. 1997). Homicide detectives developed defendant Silva as a suspect in a murder and robbery. When detectives located Silva they asked him if he would mind accompanying them to the police station. Suspect Silva cooperated and went with the detectives. At the station Silva was placed in an interview room at which time several statements were taken from him. The detectives accused Silva of lying, confronting him about information in the statements. Ultimately Silva changed his story and made incriminating statements. Silva was then given his *Miranda Rights* and advised that he was no longer free to go (custody). Additional incriminating statements were obtained. The Court held that all of the statements were admissible. Silva was not in custody for **Miranda** purposes until told he was not free to leave.

**Example # 5:** **United States v. Ellison**, 791 F.2d 821 (10th Cir. 1986) U.S. Attorney's Office not custodial.

## c) MEDICAL RESTRAINTS

**Example:** **Wilson v. Coon**, 808 F.2d 688 (8th Cir. 1987). Wilson was involved in a car accident. When the medical personnel tried to attend to Wilson, he belligerently refused medical attention. At least one medical attendant restrained Wilson and examined him for injuries. The investigating officer asked Wilson whether he had driven one of the cars involved in the collision. Wilson first denied driving but then

quickly admitted that he had. Because the restraint was necessary to medical treatment and in a public setting, it was not deemed coercive. Wilson was not in custody.

## d) PRISONS

Factually, this issue arises when an investigator wishes to talk to an inmate about a crime unrelated to the offense for which the inmate is in custody, but for which the investigator suspects the inmate's involvement. The investigator does not give the inmate his *Miranda Rights*. Is the mere fact that the inmate is "incarcerated" adequate to constitute "custody" for **Miranda** purposes?

Although the United States Supreme Court has not issued an opinion rejecting a per se custody rule for incarcerated persons, the Nevada Supreme Court and many Federal Circuit Courts have ruled that *Miranda Warnings* are not mandated for all interrogations of a prison inmate. In particular, the Ninth Circuit held that the United States Supreme Court ruling in **Mathis v. United States**, 391 U.S. 1, 88 S.Ct. 1503 (1968) did not establish a per se rule, rather it simply found the inmate in that case was "in custody" for purposes of *Miranda*. **Cervantes v. Walker**, 589 F.2d 424 (9th Cir. 1978). **Cervantes** indicated that the test for "custody" in prison settings is whether, under the circumstance, a reasonable person would believe there has been a restriction of his freedom over and above that in his normal prison setting. The Nevada Supreme Court adopted this standard in **Mitchell v. State,** 114 Nev. 1417, 971 P.2d 813 (1998), *overruled on other grounds*, Sharma v. State, 118 Nev. 648, 56 P.3d. 868 (2002).

Similarly other courts that reject a per se rule require, as a condition to suppression, that the "custody" experienced by the inmate during the interrogation be more restrictive and

coercive than the custody generally experienced by the inmate in the particular institution.

Favorable rulings have come in the following cases. **United States v. Conley**, 779 F.2d 970 (4th Cir. 1985), *cert. denied,* 479 U.S. 830, 107 S.Ct. 114 (1986); **Flittie v. Solem** 751 F.2d 967 (8th Cir. 1985) *cert. denied* 475 U.S. 1025, 106 S.Ct. 1223 (1986); **United States v. Scalf**, 725 F.2d 1272 (10th Cir. 1985); **Garcia v. Singletary**, 13 F.3d 1487 (11th Cir. 1994), *cert. denied*, 513 U.S. 908, 115 S.Ct. 276 (1994); **Leviston v. Black**, 843 F.2d 302 (8th Cir. 1988), *cert. denied*, 488 U.S. 865 U.S. 865, 109 S.Ct 168 (1988); **United States v. Turner**, 28 F.3d 981 (9th Cir. 1994), *cert. denied* 513 U.S. 1158, 115 S.Ct. 1117 (1995); **People v. Crawford**, 578 N.Y.S.2d 814 (1991). **People v. Patterson**, 588 N.E.2d 1175 (I11. 1992). However at least two Circuits, the First and the Fifth, disagree and conclude **Mathis** established a per se rule. **Battie v. Estelle**, 655 F.2d 692 (5th Cir. 1981); **Palmigiano v. Baxter**, 510 F.2d 534, (1st Cir. 1974) *rev'd on other grounds*, 425 U.S. 308, 96 S.Ct. 1551 (1976).

Factors that courts consider in determining whether the prison setting was coercive include the location (visitor room, library, inmates' cell); language used to summon the prisoner to the interview area; nature of the confrontation between officers and inmate (confronting with evidence of guilt), and any additional pressure asserted to detain him beyond normal prison measures (handcuffs, locked doors). The examples below are from two Nevada cases.

**Example # 1: Walker v. State**, 102 Nev. 290, 720 P.2d 700 (1986). Walker, an inmate at NSP, was accused of battery on a prison guard. A correctional classification officer was assigned to investigate the offense and obtained a non-*Mirandized* statement from inmate Walker. The interview was conducted in Walker's cell and the opinion suggests Walker was not free to leave the interview. (The Court also

found it was an "involuntary interrogation."). Held: situation amounted to custody under **Miranda**, statement suppressed.

**Example # 2:** **Mitchell v. State**, 114 Nev. 1417, 971 P.2d 813 (1998) *overruled on other grounds*, Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). Defendant Mitchell was suspected of attempt murder and other offenses. Investigating detectives interviewed Mitchell while he was in custody at the Soledad Prison in California for an unrelated offense. The interview lasted two hours; it was conducted in an unlocked room inside the prison library; the exit doors to the library were locked pursuant to prison procedure because the library was closed; Mitchell was advised by the detectives that he could leave the interview at any time and return to his cell; finally he was not handcuffed during the meeting. Held: Not in custody for **Miranda** purposes.

## e) PROBATION VISITS/CONFERENCES

Defendants on probation must comply with court ordered/statutory conditions of probation. A common condition requires a probationer to obey a probation officer's directives regarding home visits or office conferences. Although the defendant's presence is compelled and his/she faces possible revocation for non-compliance, the United States Supreme Court held *Miranda Warnings* are not required simply because the condition exists.

**Example:** **Minnesota v. Murphy**, 465 U.S. 420, 104 S.Ct. 1136 (1984). Defendant was on probation for a minor offense. Defendant's probation officer received information that defendant had committed a rape and murder and called defendant in for a conference during which defendant admitted the rape and murder. No *Miranda Warnings* were given to defendant. The court ruled defendant's statements

admissible because defendant was not in custody. The obligation of the probationer to appear was not relevant to the custody question and according to the court is no more coercive than the obligation imposed on witnesses subpoenaed to court. Probationer was free to invoke 5th Amendment and refuse to answer questions.

## 3. TEMPORARY DETENTIONS

The law permits temporary detentions in a number of circumstances. A person is not free to leave but the courts have concluded that such detentions do not rise to the level of "custody" for purposes of the 5th Amendment, though they may be a form of custody for other constitutional provisions, such as "seizures" under the 4th Amendment.

### a) TRAFFIC AND ROADSIDE STOPS

**Rule:** Although a traffic stop significantly curtails freedom of action of the driver and passenger of the detained vehicle, *Miranda* is not required because the traffic stop is presumptively temporary and brief and the motorist does not feel completely at the mercy of the police because the activity is generally exposed to public view.

**Example # 1:** **Berkemer v. McCarty**, 468 U.S. 420, 104 S.Ct. 3138 (1984). The police stopped a car for erratic driving. The defendant got out of car and had a hard time standing. Police concluded that the defendant would be arrested and not allowed to leave the scene but defendant was not aware of this. Defendant was questioned at the side of the road about drinking whereupon he admitted that he had been drinking beer and smoking marijuana. Thereafter defendant was taken to the police station, under arrest, where he was questioned further and made more admissions. At no time

was the defendant provided his rights pursuant to the **Miranda** decision.

The United States Supreme Court reversed the conviction and held as follows: the statements made at the roadside stop were admissible because the defendant was not in custody. The statements made at the police station however, were not admissible and should have been suppressed because McCarty was in custody (under arrest), and **Miranda** applies to all arrests without regard to the seriousness of the crime.

**Example # 2: Pennsylvania v. Bruder**, 488 U.S. 9, 109 S.Ct. 205 (1988). The fact pattern in Bruder was almost identical to that in Berkemer. Bruder was stopped for DUI and provided a field sobriety test. Without advising Bruder of his *Miranda Rights* the officer made inquiry about the defendant's consumption of alcohol. The defendant answered that he had been drinking and was returning home. The defendant was then placed under arrest and advised of his *Miranda Warnings*. The Pennsylvania Supreme Court reversed the conviction stating that the roadside questioning constituted "custodial interrogation".

The United States Supreme Court reinstated the conviction emphasizing its previous holding in **Berkemer v. McCarty**, stating that the non-coercive aspect of ordinary traffic stops compels the conclusion that persons temporarily detained pursuant to such stops are not in custody for the purposes of **Miranda**. The Court reiterated that although such stops are seizures within the meaning of the Fourth Amendment, such traffic stops typically are brief, they commonly occur in public view, and in an atmosphere far less police dominated than the types of interrogations at issue in **Miranda**. In addition the detained motorist's freedom of action is not curtailed to a degree associated with formal arrest.

**Example # 3:** **State v. Ferguson**, 886 P.2d 1164 (Wash. App. 1995) Officers came upon a fatal accident and finding the defendant sitting on the side of the road suspected he had been driving. The court found that there was no need to *Mirandize* the defendant prior to asking him if he had been driving, and further, believing he had been drinking it was permissible to make reasonable inquiry without *Miranda Warnings* if he had been drinking, and how much. Same rules apply to felony traffic stops as to misdemeanors.

**NOTE:** The discussion is felony traffic stop – not a felony car stop – i.e. probable cause to believe car or occupants involved in commission of a felony – guns drawn, etc. For reasonable suspicion automobile stops, see rules relating to *Terry Stops* below.

**b) TERRY STOPS - Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868 (1968)

The rules are quite similar to the previous discussion pertaining to Traffic and Roadside stops. **Miranda** is not applicable until the detention evolves into an arrest. In **Berkermer v. McCarty**, *supra.*, the United States Supreme Court noted that since *Miranda Warnings* are not required for *Terry Stops* (reasonable suspicion to believe that the person detained has committed or is about to commit a criminal offense) they should not be required for roadside traffic detentions. The Court said that in a *Terry Stop*, the officer is permitted, without *Miranda Warnings*, to:

> ...ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obligated to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be

> released. The comparatively non-threatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of **Miranda**.
>
> **Miranda** becomes applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. (citations omitted) If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him in custody for practical purposes, he will be entitled to the full panoply of protections prescribed by **Miranda**.

This case was followed and explained in **United States v. Leshuk**, 65 F.3d 1105, 1109 (4th Cir. 1995), where the Court said "the perception that one is not free to leave does not convert a Terry stop into an arrest. Terry stops differ from custodial interrogation in that they must last no longer than necessary to verify or dispel the officer's suspicion. From these standards we conclude that a lawful stop (where the suspect is not free to leave) is not necessarily elevated into a custodial arrest for Miranda purposes."

Nevada follows the rules set forth above. See **Schnepp v. State**, 84 Nev. 120, 437 P.2d 84 (1968), **Miranda** not applicable to a defendant who was detained pursuant to a burglary investigation.

Even where defendants were handcuffed, **Miranda** not required since it did not change the investigatory stop into an arrest sufficient to constitute a "police dominated and compelling" atmosphere in which *Miranda Warnings* must be given. **United States v. Bautista**, 684 F.2d 1286 (9th Cir. 1982).

**Example**: **State v. Scott**, 518 N.W.2d 347 (Iowa 1994). An officer conducted a *Terry* stop of a vehicle. Defendant was a passenger in the vehicle and was lawfully frisked for

weapons. The officer felt an object in Scott's pocket and concluded it was not a weapon. The officer believed the object was a drug baggie and asked Scott what he had in his pocket. Scott answered that the object contained marijuana. Held: Scott was not in custody for purposes of **Miranda** therefore his response was admissible.

### c) SEARCH WARRANT DETENTIONS

**Example:** **United States v. Saadeh**, 61 F.3d 510 (7th Cir. 1995). Defendant was temporarily detained and questioned during execution of search warrant. Court held, based on Supreme Court case law on temporary detentions in **Michigan v. Summers**, 452 U.S. 692, 702, 101 S.Ct. 2587, 2594 (1981) suspect who is detained during the execution of a search warrant has not suffered a restraint on freedom of movement of the degree associated with a formal arrest, and therefore is not "in custody." Most detentions that occur during the execution of a search warrant are "comparatively non-threatening." They are often short in duration and less intrusive than the search itself.

## 4. CONSENSUAL ENCOUNTERS - FIELD INTERVIEWS

A Field Interview involves a government agent encounter with a person where the officer documents information gained from the encounter on some sort of card or form. It is a method of compiling data that might be used in a future investigation – such as name, gang affiliation, photographs, monikers, tattoos, location of encounter, etc. Where the encounter is consensual, **Miranda** does not apply because the person is not in custody, nor is he being interrogated. **Somee v. State**, 124 Nev.___, 187 P.3d 152 (2008). Calling an encounter a Field Interview, however,

does not establish that the encounter was consensual. The courts will look at the totality of the circumstances to see whether or not the encounter amounted to a "custodial interrogation." Because the information gleaned from a Field Interview may not be connected to any criminal activity until months or even years after the encounter, it is important that the encounter be properly documented so that a future court will have the facts necessary to determine whether **Miranda** was applicable.

**Example #1:** **People v. Rodriguez**, 21 Cal.App.4th 232, 26 Cal.Rptr.2d 660 (Cal.App. 1993). Officers saw Rodriguez and four companions standing together in front of an apartment complex. The area was known as a gathering place for local gang members and Rodriguez and his companions were dressed in a manner consistent with gang membership. The group was talking and socializing. Officers in uniform approached the group intending to get the youths' identification, take their pictures and find out what gang they claimed. One of the officers approached the youths and told them to "stay there." The youths were patted down ordered to sit on the curb and the sidewalk. The officers then interviewed them one at a time, asking each about his name, address, date of birth, and so forth, and took a photograph of each one. The entire process took 15 to 20 minutes. **Held:** They were not free to go and were "seized" in violation of the 4th Amendment since there was no basis for a *Terry Stop*. This was not a consensual encounter. This was a 4th Amendment case, but a court might conclude they were "in custody" under the 5th Amendment. Note however that under these facts there appears to be no "interrogation" and **Miranda** would be inapplicable.

## 5. AFTER TEMPORARY DETENTION

It is quite common in drug interdiction and other cases for officers to interact with individuals after the purpose for the initial stop or temporary detention has ended. The situation arises when an officer no longer has an reason to detain a person or vehicle but asks the person or driver if they would mind answering a few questions or having their vehicle searched

The Fourth Circuit Court of Appeals in **United States v. Sullivan**, 138 F.3d 126 (1998) held that this police questioning does not constitute a seizure for Fourth Amendment purposes citing **Florida v. Bostick**, 501 U.S. 429, 111 S.Ct. 2382 (1991). The objective test set forth in **Bostick** was whether or not under a totality of the circumstances a reasonable innocent person, in suspect's position, would have felt free to decline the officer's request or otherwise terminate the encounter. **Sullivan** likewise held that this was not **Miranda** custody - even though the entire scenario lasted approximately twenty minutes - because the officer made no threats and did nothing that would lead a reasonable person to believe that he was not free to leave.

The court also cited the United States Supreme Court case of **Ohio v. Robinette**, 519 U.S. 33, 117 S.Ct. 417 (1996) which held that the Fourth Amendment does not require police officers executing traffic stops to inform motorists that they are free to go before engaging in consensual interrogation.

## 6. PREMATURE *MIRANDA* WARNINGS

Sometimes police officers, in an abundance of caution, will give a suspect his *Miranda Rights* even though the suspect is not under arrest and not "in custody". This does not create "custody". **United States v. Akin**, 435 F.2d 1011

(5th Cir. 1970) *cert, denied*, **Akin v. United States,** 1011, 91 S.Ct. 1263 (1971);
**People v. Holmes**, 626 N.E.2d 412 (Ill. App. 1994) "A custodial situation cannot be created by the mere giving of *Miranda Warnings*." Remember, however, that the *Miranda Warning* can be considered in the totality of the circumstances when determining if a reasonable person would have understood he was not in custody. Thus it is always wise to let the suspect know he is not under arrest and is free to leave after a premature *Miranda Warning*.

## 7. ANTICIPATORY INVOCATION OF COUNSEL

### a) OUT-OF-CUSTODY

A suspect who is out of custody for purposes of **Miranda** cannot convert the situation into custody by requesting an attorney. The 5th Amendment right to counsel under **Miranda** does not extend to out-of-custody examinations. Thus, police are free to question an out of custody subject even if that person requests an attorney. **State v. Lanning**, 109 Nev. 1198, 866 P.2d 272 (1993); **United States v. LaGrone**, 43 F.3d 332 (7th Cir. 1994);" **Alston v. Redman**, 34 F.3d 1237 (3rd Cir. 1994); **McNeil v. Wisconsin**, 501 U.S 171, 111 S.Ct. 2204 (1991). *See also* **Dettloff v. State**, 120 Nev. 588, 97 P.3d 586 (2004).

**Example # 1: Silva v. State**, 113 Nev.1365, 951 P.2d 591 (Nev. 1997). Suspect went to the police station voluntarily and was not in custody so no *Miranda Warnings* were given. While being questioned he asked for an attorney. The police ignored the request. Incriminating statements made thereafter were held admissible because suspect was not "in custody" when he asked for an attorney. It is important to note that

during those *pre-Miranda* interrogations the detectives had specifically told Silva that he was not under arrest.

**Example # 2:** **State v. Lanning**, 109 Nev. 1198, 866 P.2d 272 (1993). Lanning was suspect in check forgery case. Detective asked Lanning to come to the police station so that she could be interviewed about her knowledge of these checks. Lanning agreed to meet with the detective later that afternoon. At the police station, Lanning was advised that she was not in custody and that she was free to leave at any time. No *Miranda Warnings* were given. Lanning told the detective "I should see an attorney because I do not want to incriminate myself." Lanning was reminded that she was not in custody and that she was free to leave at any time. Lanning confessed. Held: **Miranda** inapplicable.

## b) IN COURT ON OTHER CHARGES

What happens if a defendant being arraigned on unrelated charges tries to invoke his Fifth Amendment rights on other offenses? Although the United States Supreme Court has never directly addressed this issue, language in **McNeil** notes that **Miranda** may be invoked only in the context of custodial interrogation and since court proceedings, including arraignments or preliminary hearings, are not generally deemed to be custodial for purposes of **Miranda**, the rights guaranteed there under should not be permitted to be invoked by either the defendant or counsel just as it should not be permitted to be invoked by letter. *See* **McNeil** at page 2211 and fn.3. This is also consistent with the Court's primary holding in **McNeil**, that the Sixth Amendment right to counsel may only be invoked as to pending charges, not all future prosecutions.

## 8. FOCUS OF INVESTIGATION ON A PERSON

Where an individual is unaware that he or she is a suspect, the officer's subjective view that the person committed the crime is irrelevant to a determination of custody. **Stansbury v. California**, 511 U.S. 318, 114 S.Ct. 1526 (1994). Even when the person knows he or she is a suspect or is confronted with actual or alleged incriminating evidence, these are only facts to be considered in determining whether custody exists. Being the focus of an investigation, standing alone, does not constitute custody. *See* **Oregon v. Mathiason**, 429 U.S. 492, 97 S.Ct. 711 (1977).

In **Stansbury**, the police suspected the defendant had raped and murdered a child. Police went to the defendant's home and asked him if he would come to the police station to answer some questions. The police did not tell the defendant he was a suspect, but rather said he was a potential witness. The defendant agreed to meet with police. At the police station, officers questioned him about his whereabouts and other matters. Some of his answers made the police suspicious that he was the perpetrator; however, the police did not communicate their suspicions to him. After less than thirty minutes of questioning, the defendant told police that he had previously been convicted of rape, kidnapping and child molestation. The police advised the defendant of *Miranda Warnings*, he requested an attorney, questioning ceased, and he was arrested.

The issue before the Supreme Court was whether the information the police learned through interrogation before arrest was a violation of Miranda because the police had focused on him as a suspect although the defendant was only told he was a potential witness. The Supreme Court held that the internal thoughts of the police (i.e., focusing on him as a suspect) had nothing to do with the requirement of giving Miranda because the police did not convey these thoughts to

the suspect. The Court said that the sole issue was whether he was in an arrest level of custody in the first part of the interview. The Court determined that he was not in custody, explaining that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. 511 U.S. at 323, 114 S.Ct. at 1529.

**NOTE:** Nevada has one case, decided before **Mathiason** and **Stansbury**, that suggests when a person becomes the focus of an investigation, custody ensues and *Miranda* applies. In **Krueger v. State**, 92 Nev. 749, 557 P.2d 717 (1976), the Nevada Supreme Court indicated that when Krueger became the focus of the investigation his out-of-custody status became an in-custody situation and *Miranda* applied. However, it appears the court considered the focus issue together with other facts, rather than holding the focus element, standing alone, created a custody situation.

In **Krueger**, the police found a dead body at the scene of a car wreck. It was determined the deceased died as a result of blows to the head, not injuries sustained in what turned out to be a staged accident The police went to the home listed on the car registration and encountered the defendant and the deceased's wife. Both agreed to be interviewed and a date was arranged for them to appear at the police station. After being interviewed, Krueger was sitting in a hallway waiting for the wife. He was free to leave. Unbeknownst to him, she told the police Krueger killed her husband with an axe. Officers then asked Krueger to accompany them to another interview room and confronted him with wife's statement. The Nevada Supreme Court noted that up to that point, Krueger was not in custody, but after the wife's confession, he became the focus of the investigation and *Miranda* applied. Because the court rested its decision on

federal constitutional grounds, it is doubtful that **Kruegar** is still good law after **Mathiason.**

## 9. PSYCHOLOGICAL INTIMIDATION

As noted in the Location and Environment Section above, how the officers act can contribute to a finding of custody. The Ninth Circuit found a combination of psychological factors created a custody situation in **United States v. Beraun-Panez**, 812 F.2d 578 (1987). The suspect was confronted in a remote area where he was herding cattle. He was isolated from a co-worker, who was told to leave the area. Police accused him of lying and confronted him with false witness information. The suspect was not held or handcuffed; but he was positioned between two officers beside the hood of a truck. Finally officers either stated, or implied, that if he did not confess he would be separated from his family and deported. The Ninth Circuit found the totality of the circumstances created a psychological environment which would lead a reasonable person to conclude he was not free to leave. The confession was suppressed as no *Miranda Rights* were given. **Note:** The comments about deportation might also be considered an impermissible promise or threat. *See* Section III(D).

## F. MIRANDA WAIVER

If **Miranda** applies and a statement is taken from a suspect, before it can be used in court, the prosecutor has the burden to prove that the waiver of the suspect's 5th Amendment *Miranda Rights* was voluntarily, knowingly and intelligently made. The State must prove these facts by a preponderance of the evidence. **Falcon v. State**, 110 Nev. 530, 874 P.2d 772 (1994). A preponderance of the evidence means "more likely than not." In making a determination on waiver, a

court looks to the totality of the circumstances surrounding the interrogation **Fare v. Michael C.**, 442 U. S. 707, 99 S.Ct. 2560 (1979). *See also* **North Carolina v. Butler**, 441 U.S. 369, 99 S.Ct. 1755 (1979). In Nevada, see **Williams v. State**, 113 Nev. 1008, 945 P.2d 438 (1997) (receded from on other grounds by **Byford v. State**, 116 Nev. 215, 994 P.2d 700 (2000).

## 1. KNOWING AND INTELLIGENT

The United States Supreme Court has indicated that a knowing and intelligent waiver involves a full awareness by the suspect of the nature of the right being abandoned and the consequences of the decision to abandon it. **Moran v. Burbine**, 475 U.S. 412, 106 S.Ct. 1135 (1986). This is generally accomplished by demonstrating to the court that the officer advised the suspect of his *Miranda Rights* and at the conclusion of the advisement asked the suspect if he understood his rights. An affirmative response by the suspect normally satisfies the knowingly and intelligent portion of the waiver.

Again, the general test on whether or not the defendant understood his rights and made a knowing waiver is a totality of the circumstances test proven by a preponderance of the evidence. See **Colorado v. Connelly**, 479 U.S. 157" 107 S.Ct. 515 (1986); *but see* **Tomarchio v. State**, 99 Nev. 572, 6"5 P.2d 804 (1983)(Nevada Supreme Court rejected totality of the circumstances and voluntariness as the sole standard, noting that prosecution must also show knowingly and intelligently waived.)

## 2. VOLUNTARINESS

The voluntariness prong is also judged under a totality of the circumstances test where the courts look at the circumstances existing at the time that the rights were read to

the defendant. In **Moran v. Burbine**, the United States Supreme Court indicated a waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion or deception. **Fare v. Michael C.**, 442 U. S. 707, 99 S.Ct. 2560 (1979). *See also* **North Carolina v. Butler**, 441 U.S. 369, 99 S.Ct. 1755 (1979). In Nevada see **Williams v. State**, 113 Nev. 1008, 945 P.2d 438 (1997) (receded from on other grounds by **Byford v. State**, 116 Nev. 215, 994 P.2d 700 (2000).

**NOTE:** For more detailed information on voluntariness, see Section III of this Manual.

## 3. METHOD OF WAIVING

### a) EXPRESS WAIVER UNNECESSARY

A waiver of rights need not be express, i.e., the suspect need not say "I waive my *Miranda Rights*" nor need the officer ask the suspect "do you waive your *Miranda Rights* ". Usually, so long as the suspect indicates he/she understands the rights that were just read to him/her and there is no evidence of coercion or invocation, a court will find the rights were waived. It is sufficient that the defendant understand his rights. If thereafter, he chooses to speak, a specific waiver is not required. **Allen v. State**, 91 Nev. 568, 540 P.2d 101 (1975); **State v. Thai**, 575 N.W2d 521 (Iowa App. 1997)(officer need not ask if he wishes to waive his rights.) *See also* **North Carolina v. Butler**, 441 U.S. 369, 99 S.Ct 1755 (1979).

### b) SILENCE EVIDENCING WAIVER

This issue comes about in two contexts: 1) the officer fails to ask the suspect if he "understands" the rights or 2) the suspect simply doesn't answer or acknowledge the "do you

understand" question. Subsequently the suspect gives a statement. Although it is still possible to find a waiver in this scenario, it is a riskier proposition.

In **United States v. Hayes**, 385 F.2d 375 (4th Cir. 1967), *cert. denied* 88 S.Ct. 1250, the 4th Circuit affirmed a conviction and permitted into evidence a confession where, after the defendant was read his rights, the defendant was never asked if he understood them. What impressed the court was that thirty minutes into the statement, the defendant invoked his right to counsel causing the court to conclude that he obviously understood his rights and waived them until he invoked.

## c) REFUSAL TO SIGN WAIVER OR GIVE WRITTEN STATEMENT

A defendant's refusal to sign a written waiver, or refusal to give a formal taped statement or refusal to sign a written statement does not make an oral statement inadmissible. **United States v. Ellis**, 457 F.2d 1204 (8th Cir. 1972); **United States v. Ruth**, 394 F.2d 134 (3rd Cir. 1968); **North Carolina v. Butler**, 441 U.S. 369, 99 S.Ct. 1755 (1979)(defendant refused to sign waiver but agreed to talk to officers); **Connecticut v. Barrett**, 479 U.S. 523, 107 S.Ct. 828 (1987)(defendant agrees to oral, but not written statement).

In **Brown v. Sheriff**, 85 Nev. 544, 459 P.2d 215 (1969) defendant's burglary conviction was upheld and verbal confession ruled admissible wherein the defendant advised interrogating detectives:

"I'll answer any question you want to know, but I won't sign that (the waiver)."

## d) AMBIGUOUS WAIVER

At least one state court has found that an ambiguous response to a waiver question is insufficient to demonstrate a valid waiver. **State v. Leyva**, 951 P.2d 738, 740 (Utah,1997). In **Leyva**, an officer informed Leyva of his *Miranda Rights* and asked Leyva if he understood those rights. Leyva responded, "Yes." Rather than stop there, the officer then asked, "Having these rights in mind, do you want to talk to us now?" Leyva responded, "I don't know." The officer then added: "You don't have to answer questions if you don't want to. It is up to you." Instead of orally responding to this statement, Leyva merely nodded his head. The Utah Supreme Court held that the head nod was ambiguous because it could mean Leyva understood whether he spoke to the officer was his choice or that he was now agreeing to speak to the officer. The subsequent statements were suppressed.

## G. INVOKING *MIRANDA RIGHTS*

Invocation refers to the assertion by a suspect of rights under **Miranda**. This is distinct from the concept of waiver. They should not be confused. Waiver deals with the initial question of whether the suspect understood he had rights, the consequence of waiving the rights by speaking to officers and whether the decision to speak despite those rights was voluntary. Invocation is the affirmative communication by the suspect to the government agent that the suspect is exercising the rights granted to him under the Constitution.

## 1. RIGHTS INVOKED UNDER 5TH AMENDMENT

A suspect has two rights that can be invoked: 1) right to silence (refusal to answer any questions) and 2) right to

counsel (before and during questioning). After a suspect has waived his 5th Amendment rights, he must affirmatively invoke them. A suspect may invoke either or both of the rights. However, the analysis for determining if a right has been invoked may differ depending upon the right. Thus they are discussed separately.

In addition, invoking the right to silence is not treated as an automatic invocation of the right to counsel. The Nevada Supreme Court found that when a person was told she was a suspect and she responded by stating "I don't want to talk to anybody" this was an invocation of the right to silence but not a request for an attorney. The Court concluded absent a specific unequivocal and unambiguous request for counsel, invocation of the right to silence would not be considered an automatic invocation of right to counsel. **Dewey v. State**, ___Nev.___, 169 P.2d 1149 (2007).

## a) RIGHT TO SILENCE

While a defendant may indicate in any manner that he wishes to remain silent, he nonetheless must "indicate" his desire. **People v. Cooper**, 731 P.2d 781 (Colo. App. 1986) relied on by the Nevada Supreme Court in an order dismissing appeals (as noted in **Evans v. Demosthenes**, 902 F.Supp. 1253 (D. Nev. 1995). A defendant's silence, without more, is insufficient to require the police to discontinue questioning.

However, the Ninth Circuit has held that where a suspect remains silent for an extended period of time (in that case about ten minutes) in the face of repeated questioning, the refusal to respond will be treated as an invocation of *Miranda* right to silence. **United States v. Wallace**, 848 F.2d 1464, 1475 (9th Cir. 1988). Similarly, refusal to answer routine booking questions was deemed to constitute an invocation of the defendants *Miranda* right to silence. The

court reasoned that if defendant won't even answer non-incriminating questions, he certainly won't confess. **United States v. Montana**, 958 F.2d 516 (2d Cir. 1992).

Any statement or action by a suspect that communicates he does not wish to talk to officers is sufficient, even if it is ambiguous, or not made in response to a police question. At that point any questioning must cease. In **Harrison v. State**, 96 Nev. 347, 608 P.2d 1107 (1980), the court held that a defendant telling his co-defendant to "shut-up" after the co-defendant made an incriminating statement – *post-Miranda* - constituted an invocation of silence on his part. [The court also rejected the statement as an adoptive admission of the co-defendant's statement].

## b) RIGHT TO ATTORNEY

Unlike the right to remain silent, to invoke the right to an attorney, law enforcement officers are entitled to an unambiguous and unequivocal request for an attorney. However, once a suspect unambiguously and unequivocally invokes his right to an attorney, all questioning must cease.

In **Smith v. Illinois**, 469 U.S. 91, 105 S.Ct. 490 (1984) defendant was arrested and police started to give *Miranda Warnings*. When police got to "you have the right to an attorney before questioning" the defendant answered "uh yeah, I'd like to do that". Police finished giving defendant the remaining warnings and then got a waiver from defendant and questioned him. The Court ruled that the statements were inadmissible. Once the defendant invoked, even if in the middle of *Miranda Warnings*, no questions could be asked and the subsequent waiver was invalid.

## 1) AMBIGUOUS/EQUIVOCAL REQUESTS FOR ATTORNEY

**Example # 1:** **Davis v. United States**, 512 U.S. 452, 114 S.Ct. 2350 (1994). The suspect, a member of the United States Navy, initially waived his rights to remain silent and to counsel when he was interviewed by Naval investigators in connection with the murder of a sailor. About one and a half hours into the interview the suspect stated "maybe I should talk to a lawyer." Investigators thereupon asked the suspect if he was asking for a lawyer and the suspect replied that he was not. Investigators took a short break and thereafter continued the interview for another hour until the suspect specifically asked for a lawyer.

Held: The United States Supreme Court held that investigators have the right to an unambiguous request for counsel and questioning does not have to cease immediately upon the making of an ambiguous or equivocal reference to an attorney. *See also*, **Connecticut v. Barrett**, *supra*.

**Example # 2:** **Brown v. State**, 668 S.2d 102 (Ala. App.1995); The following statement by a suspect was held to be ambiguous invocations of counsel and therefore questioning could continue as follows: "Is it going to piss y'all off if I ask for my - to talk to a friend that is an attorney. I mean, I'm going to do whatever I have got to do. Don't get me wrong."

**Example # 3:** **State v. Eastlack**, 883 P.2d 999 (Ariz. 1994). "I think I better talk to a lawyer first." Held: ambiguous – "I think" insufficient.

The context of the alleged invocation will also be considered. After a *Mirandized* first confession, a suspect was told she would be indicted to which she replied she

would need an attorney. The Fifth Circuit found it to be an ambiguous invocation because the officers might reasonably have thought she meant an attorney in the future to handle the indictment, rather than a request for an attorney immediately. **United States v. Scurlock**, 52 F.3d 531 (5th Cir. 1995).

## 2) LIMITED INVOCATION OF ATTORNEY

In **Connecticut v. Barrett**, 479 U.S. 523, 107 S.Ct. 828 (1987); the Court noted that where the defendant refuses to make a written statement without an attorney present, but agrees to give an oral statement without an attorney present, a limited invocation has occurred and the taking of an oral statement was permitted.

## 2. WHO MAY INVOKE THE RIGHTS?

Only the person being interrogated has the right to invoke a **Miranda** right. **Moran v. Burbine**, 475 U.S. 412, 106 S.Ct. 1135 (1986). In **Moran**, defendant's sister retained an attorney and the attorney was assured by the police that they would stop questioning the defendant. The defendant was unaware of his sister or the attorneys' actions. The police did not stop questioning the defendant and obtained a confession which was subsequently ruled to be admissible by the United States Supreme Court. Justice Sandra Day O'Conner speaking for the majority of the Court stated as follows:

> Events occurring outside the presence of the suspect, and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." **Moran v. Burbine**, 475 U.S. at 422, 106 S.Ct. at 1141.

Nevada follows **Moran**. *See* **Goldstein v. State**, 89 Nev. 527, 516 P.2d 111 (1973)(father hiring attorney is insufficient for invocation of counsel). If, however, the attorney arrives because the attorney was summoned by the defendant, interrogation must cease. **State v. Middleton**, 399 N.W.2d 917 (Wis. 1986)(*overruled on other grounds* by State v. Anson, 698 N.W.2d 776, 787 (Wis. 2005).

Other examples include **McClasky v. State**, 540 N.E. 2d 41 (Ind. 1989)(attorney dispatched to jail by the defendant's grandmother); **Rider v. State**, 570 N.E.2d 1286 (Ind. App. 1991) and **Terry v. LeFevre**, 862 F.2d 409 (2nd Cir. 1988) (mother's attempt to invoke right for son). **United States v. Scarpa**, 897 F.2d 63 (2nd Cir. 1990)(attorney hired by a third party attempts to invoke right to counsel on behalf of his client where client was unaware of his attorney's efforts.)

## 3. CONSEQUENCES OF INVOKING – RE-INITIATING COMMUNICATION WITH DEFENDANT

Once a suspect invokes one or both of his rights under **Miranda**, all questioning, about any crime, must cease. However, under certain limited circumstances, an officer may reinitiate contact with a suspect, re-advise the suspect of his *Miranda Warnings* and, if a proper waiver occurs, question the suspect. The procedures are discussed in this Section.

### a) RESUMPTION OF QUESTIONING AT REQUEST OF DEFENDANT

Regardless of whether the defendant invokes his right to silence or an attorney or both, police agents are not prohibited from questioning a defendant when the arrestee initiates further communication with the police. **Oregon v.**

**Bradshaw**, 462 U.S. 1039, 103 S.Ct. 2830 (1983) and **Wyrick v. Fields**, 459 U.S. 42, 103 S.Ct. 394 (1982) were two cases in which the court found that defendant had re-initiated dialogue with the police.

In **Bradshaw** defendant was *Mirandized*, asked for a lawyer and then asked police "what is going to happen to me now". The officer said that "since you asked for a lawyer anything you say has to be of your own free will". Defendant continued to talk and made admissions.

In **Fields**, the suspect was *Mirandized* and got a lawyer. Then defendant agreed to a polygraph and was *Mirandized* again then questioned in post-polygraph talk where he made incriminating statements. The court ruled that the defendant had waived the right to have an attorney present and initiated conversation with the police.

However, it must be clear that the defendant's decision to seek out the police after invoking was voluntary. In **Collazo v. Estella**, 940 F.2d 411 (9th Cir. 1991), police told defendant if he did not cooperate, things would go worse for him. Defendant requested an attorney, but three hours later he called police back, said he was ready to talk and confessed after he was re-*Mirandized*. Court held that the earlier threats carried over and thus, waiver was involuntary.

The United States Supreme Court has indicated two inquiries should be made when a court is reviewing the admissibility of a statement under the defendant re-initiation scenario: 1) did the defendant intend to reinitiate discussion concerning the investigation being conducted and 2) whether the subsequent waiver of the Fifth Amendment rights was knowingly, intelligently and voluntarily made. **Oregon v. Bradshaw**.

## b) BREAK IN CUSTODY STATUS

Although the United States Supreme Court has not issued an opinion in this area, several Federal circuit courts have indicated when a defendant is no longer in custody, on any charge or holding status, then police may reinitiate contact with the defendant, re-advise him of his *Miranda Rights*, and, if there is a proper waiver, question him. This applies whether the defendant originally invoked his right to counsel, silence or both during the initial custody status. The courts agreed that so long as a defendant is out of custody, he has a reasonable opportunity to seek counsel and any questioning would no longer be in a coercive atmosphere.

The 11th Circuit Court of Appeals in **Dunkins v. Thigpen**, 854 F.2d 394 (11th Cir. 1988) has ruled that even though an arrestee invokes his right to counsel, if he is released from custody he can again be questioned.. The court declared a break in custody dissolves a defendant's *Edwards* claim. (An *Edwards* claim arises whenever police continue to question a suspect in custody after the right to counsel has been invoked). *See* **McFadden v. Garraghty**, 820 F.2d 654, 661 (4th Cir.1987); **United States v. Fairman**, 813 F.2d 117, 125 (7th Cir.), *cert. denied,* 483 U.S. 1010, 107 S.Ct. 3240 (1987); **United States v. Skinner**, 667 F.2d 1306, 1309 (9th Cir.1982), *cert. denied,* 463 U.S. 1229, 103 S.Ct. 3569 (1983). *See also* **McNeil v. Wisconsin**, 501 U.S. 171, 111 S.Ct. 2204 (1991), where the United States Supreme Court noted parenthetically that the case assumed no break in custody, implying if a break had occurred, no constitutional violation would exist. **McNeil** at 2208; **People v. Storm**, 52 P.3d 52 (Ca. 2002), *cert. denied* 123 S.Ct. 899 (2003).

**Note**: The Eleventh Circuit specified that the break in custody must not be contrived or pretextual. **Dunkin**, 854 F.2d at 397-398.

## c) LAPSE IN TIME – RIGHT TO SILENCE ONLY

**Rule:** After a suspect is placed "in custody," given his *Miranda Rights* and then invokes his **right to remain silent** all questioning must cease. He can however be re-interrogated after a reasonable period of time has elapsed or, as noted above, the arrestee himself initiates further communication with the police. In any event, he should be *re-Mirandized.*

In **Michigan v. Mosley**, 423 U.S. 96, 96 S.Ct. 321 (1975), the defendant was arrested for robbery. *Miranda* was given and defendant decided not to talk by invoking his right to remain silent. The officer immediately ceased questioning and defendant was taken to jail. Two hours later another policeman questioned defendant about an unrelated murder, after first giving him the *Miranda Warning.* The defendant did not invoke his right to counsel or re-invoke his right to silence and made inculpatory admissions. The Court ruled that defendant's admissions were legally obtained because defendant's *Miranda* right to cut off questioning' was scrupulously honored by police. This case was cited with approval by the United States Supreme Court in **Arizona v. Roberson**, 486 U.S. 675, 108 S.Ct. 2093 (1988), *infra.*

In effect the Supreme Court has interpreted the invocation of the "Right to Remain Silent" as a request for time so the suspect can think about his position. Although in **Michigan v. Mosley**, *supra*, the defendant was questioned about a completely different offense after being *re-Mirandized*, the rule should be the same even if he were questioned about the same offense. In **United States v. Hsu**, 852 F.2d 407 (9th Cir. 1988), interrogation about the same crime after a fresh *Miranda Warning* thirty minutes after defendant invoked his right to remain silent was deemed satisfactory. The confession was admissible.

Following the rationale in **Michigan v. Mosley**, the Nevada Supreme Court found no violation when a suspect invoked the right to remain silent in first interview and questioning immediately stopped. Two hours later, detective *re-Mirandized.* Suspect read and signed *Miranda* waiver and she was repeatedly reminded could end interview at any time. Suspect gave incriminating statements. During third interview, suspect invoked right to counsel and the interview ceased. Held: Statements in second interview admissible, no violation.

**NOTE: The lapse in time doctrine does not apply to the right to counsel. If the suspect invokes right to counsel, absent a break in custody, they may not be approached by police again, regardless of the passage of time.**

## d) RIGHT TO COUNSEL

**Rule:** After a suspect is placed "in custody", is given his *Miranda Rights* and then invokes his **right to counsel**, all questioning must cease and he cannot again be questioned about any criminal matter without the benefit of counsel unless he initiates further communication or there is a break in custody.

In **Edwards v. Arizona**, 451 U.S. 477, 101 S.Ct. 1880 (1981), defendant was arrested for robbery and murder and *Mirandized.* Defendant waived *Miranda* and sought to make a deal but the officer stated that he didn't have the authority to make a deal. Defendant then stated he wanted an attorney. Questioning ceased and defendant was taken to a cell. Next morning, two detectives went to see defendant, gave him *Miranda Warnings* and played a tape recording of his co-defendant confessing and implicating defendant. Defendant then made a confession. The Court ruled the confession

inadmissible. Once defendant asks for counsel no further questioning can take place unless defendant initiates the questioning - despite renewed giving of *Miranda Warnings*. *See also*, **Koza v. State**, 102 Nev. 181, 718 P.2d 671 (1986).

The High Court rule in **Edwards** controls regardless of whether the new questioning involves a different offense, any lapse in time between questioning and lack of knowledge by the officer of a prior invocation of counsel. In **Arizona v. Roberson**, 486 U.S. 675, 108 S.Ct. 2093 (1988), the defendant was arrested in Tucson, Arizona at the scene of a just-completed burglary. After being *Mirandized*, the defendant advised the arresting officer that he "wanted a lawyer before answering any "questions". Three days thereafter, and while still in custody, a different officer (who was not aware that the defendant had requested assistance of counsel three days earlier) questioned the defendant about a completely different burglary. This officer likewise advised the defendant of his *Miranda Rights* and thereafter obtained an incriminating statement from defendant on the unrelated burglary. The Arizona trial court suppressed the incriminating statement and the United States Supreme Court upheld that ruling citing **Edwards v. Arizona**. The Supreme Court held that once a suspect invokes his right to counsel all questioning must cease unless the suspect himself initiates further communication. In Nevada see **Boehm v. State**, 113 Nev. 910, 944 P.2d 269 (1997).

**NOTE: See break in custody exception above.**

**e) FAILURE TO RE-ADVISE**

Although it is always preferable to re-advise a suspect of *Miranda Rights* when reinitiating questioning or responding to a defendant initiating contact, the failure to do so is not, in and of itself, a violation of **Miranda**. Rather

whether a defendant was *re-Mirandized* will be considered as part of the totality of circumstances test in determining if the defendant understands and waived **Miranda** at time of interrogation. **Taylor v. State**, 96 Nev. 385, 609 P.2d 1238 (1980)(delay of twelve days did not negate original advisement where defendant stated she remembered her rights). **Biddy v. Diamond**, 516 F.2d 118 (5th Cir. 1975). *See* **Wyrick v. Fields**, 459 U.S. 42, 103 S.Ct. 394 (1982); **Koger v. State**, 117 Nev. 138, 17 P.3d 428 (2001) (cautioning that twelve day old *Miranda* only sufficient due to facts of case and different facts may result in different outcome).

## H. MIRANDA AND JUVENILES

The U.S. Supreme Court in the landmark case of **In Re Gault**, 387 U.S. 1, 87 S.Ct. 1428 (1967) held that the 14th Amendment Due Process clause extends the same due process rights afforded adults to juveniles if the proceedings in juvenile court may result in the juvenile's commitment to an institution (or may result in certification). These rights include the right to be represented by counsel, the right against self-incrimination and the right to be advised thereof prior to custodial interrogation. Thus **Miranda** applies to juveniles. All of the information given in this Manual applies equally to juvenile offenders. However, Nevada law adds extra requirements when obtaining statements from juvenile offenders.

### 1. ADVISING JUVENILES OF ADULT COURT USE OF ADMISSIONS

Because of the special Parens Patriae (quasi-parental) relationship of a court to the juvenile offender, the warnings and protections afforded to juveniles who commit crimes vary

from state to state. In Nevada the child should be cautioned that his statement can be used against him in an adult court. *See* **Elvik v. State**, 114, Nev. 883, 965 P.2d 281 (1998); **Quiriconi v. State**, 96 Nev. 766, 616 P.2d 1111 (1980); (A juvenile should be advised of his rights and informed of the possibility of an adult trial.)

Failure to inform the child about adult court consequences will not automatically render statements inadmissible, but will be considered in determining if a *Miranda Waiver* and statement were knowingly, intelligently and voluntarily made. If the nature of the charges and the identity of the interrogator reflect the existence of an unquestionably adversary police atmosphere and the suspect is reasonably mature and sophisticated with regard to the nature of the process, and the record otherwise supports a finding of voluntariness, a statement will not be suppressed. **Quiriconi**, 96 Nev. at 771, 616 P.2d at 1114. **Marvin, a Minor v. State**, 95 Nev. 836, 603 P.2d 1056 (1979).

In **Elvik**, a 14 year old was convicted of murder and robbery. A *Mirandized* statement was admitted into evidence even though he was not advised that the statement could be used against him in an adult trial. Although cautioning police and prosecutors, the Court refused to set aside the conviction because Elvik was above average intelligence, had previously been arrested and *Mirandized* and clearly understood the charges and his environment.

So the failure to advise a juvenile that any statements may be used in adult court is not a per se violation of **Miranda**, which makes any waiver invalid nor does it automatically render any statement involuntary. It does, however, shift the burden to the State to prove the validity of the waiver and the voluntariness of the statement. And, of course, the failure to advise about adult court consequences is a factor that may be considered in evaluating the validity of the waiver and voluntariness under the applicable totality of

the circumstances test. *See generally*, **State v. O'Connor**, 346 N.W.2d. 8 (Iowa 1984) and **David Nissman, Law of Confessions**, Clark Boardman Callaghan (1994 2nd Ed.) for factors used in evaluating the validity of juvenile statements.

## 2. PARENTAL PRESENCE NOT MANDATED

A juvenile is not entitled to have his parents present during a custodial interrogation. Parental presence is not required by **Miranda** or for a statement to be voluntary. However, the absence or presence of a parent is a factor that may be considered, under the totality of the circumstance test, in evaluating whether *Miranda Rights* were voluntarily, knowingly and intelligently waived and the voluntariness of the statement.

In **Marvin, a Minor**, the Nevada Supreme Court discussed parental presence and suggested it was prudent to advise a child of that option. The Court noted "the more serious the offense and the younger the accused, the greater the precaution which should be taken in the interrogation process." **Marvin, a Minor**, 95 Nev. at 839. To the extent that **Marvin** contained some language that may be interpreted to mandate parental presence, it has been overruled by **Ford v. State**, 122 Nev. 796, 138 P.3d 500 (2006).

## 3. PARENTAL NOTIFICATION STATUTE NRS 62C.010

NRS 62C.010 requires that when a child is taken into custody, the officer shall immediately notify the parent, guardian or custodian of the child, if known, and any probation officer of the detainment. However the statute does not give the child a right to have a parent present during questioning or that a child must be advised that he had a right to have his parent present during questioning.

In **Ford v. State**, the Nevada Supreme Court clarified that the purpose of the statute was to make the parent aware of the child's custodial status. The statute does not impose a duty upon law enforcement to notify a juvenile's parents as a condition to obtaining a voluntary statement or waiver of *Miranda Rights*. **Ford**, 122 Nev. at ___, 138 P.3d at 504-05. **Ford** also disapproved of *dictum* in **McCurdy v. State**, 107 Nev. 275, 809 P.2d 1265 (1991) to the contrary.

As with parental presence, parental notification is a factor that may be considered in determining the voluntariness of the statement. **United States v. Doe**, 155 F.3d 1070 (9th Cir. 1998); **Ford**, 122 Nev. at ___, 138 P.3d at 504-05.

In addition, at least one court has held that if the juvenile requests to see a parent, it will be construed as an invocation of the juvenile's right to remain silent. **People v. Rivera**, 710 P.2d 362 (Cal. 1985). **Rivera** was discussed in **People v. Hector**, 83 Cal.App.4th 228, 235-36; 99 Cal.Rptr.2d 469 (Ca1.App.2.Dist. 2000). The **Hector** Court indicated that a request to see parents is considered in the totality of the circumstances when determining the voluntariness of a *Miranda Waiver* or a statement and a request to speak to a parent is construed as an invocation of the Fifth Amendment unless there is evidence demanding a contrary conclusion.

## 4. JUVENILE WARNING

Because of the above cases, the cautious officer would therefore give a juvenile the following advisement:

1. ***You have the right to remain silent.***
2. ***Anything you say can be used against you in either juvenile or adult court.***
3. ***You have the right to the presence of an attorney.***

4. ***If you cannot afford an attorney, one will be appointed before questioning.***
5. ***Do you wish a parent or guardian to be present?***
6. ***Do you understand these rights?***

## 5. JUVENILE ACT EXCLUSIONS

Not all persons under the age of eighteen (18) at the time the offense was committed will be considered juveniles for purpose of prosecution under NRS Chapter 62 governing procedures in juvenile cases. The act excludes certain types of offenses, therefore those acts are treated as criminal offenses regardless of the age of the suspect.

### a) MURDER, ATTEMPT MURDER, SEXUAL ASSAULT OR USE OF DEADLY WEAPON

The juvenile court act does not apply to the crimes of murder or attempted murder or any related crimes arising out the same facts as the murder or attempted murder, nor, depending on age and circumstances, sexual or attempted sexual assault involving the use or threatened use of force, as well as other enumerated crimes. *See* **NRS 62B.330 (3)** (juvenile court does not have jurisdiction over specific enumerated charges). Therefore, a child charged with such an offense is not entitled to the Chapter 62 protections.

### b) EFFECTS OF ADULT CERTIFICATION

**NRS 62B.330(3)(e)** provides that once a child is certified to adult court and is convicted of a criminal offense, the child will automatically be treated as an adult for any subsequent offenses whether or not related to the certified offense. Thus juvenile **Miranda** or other acts will not apply.

# I. CONSEQUENCES OF MIRANDA VIOLATIONS

**General Rule:** Statements made as a result of a **Miranda** violation are inadmissible, but physical or other evidence derived from the statement is not suppressed.

This section discusses what happens in different circumstances when a **Miranda** violation occurs. Can a statement ever be used? If the confession led to the discovery of physical evidence (i.e. gun, body), is that evidence suppressed? What if the defendant testifies to something not found in, or different from, his *un-Mirandized* statement?

## 1. IMPEACHMENT

### a) OF DEFENDANT

Although otherwise voluntary statements taken in violation of **Miranda** may not be used in the prosecution's case-in-chief, they are admissible to impeach conflicting testimony by the defendant. **Harris v. New York**, 401 U.S. 222, 91 S.Ct. 643 (1971). In **Harris**, the defendant testified. His testimony was contrary to the un-*Mirandized,* and therefore inadmissible, statement he had given to the police, The trial court permitted the prosecution to introduce the prior statement into evidence for the purpose of impeaching the defendant's testimony. The United States Supreme Court upheld the conviction and stated "the shield provided by **Miranda** cannot be perverted into a license to use perjury by way of a defense . . ." **Id**. at 226. Nevada follows **Harris**. *See* **Allan v. State**, 103 Nev. 512, 746 P.2d 138 (1987).

Subsequently, the United States Supreme Court extended **Harris** to situations where incomplete *Miranda Warnings* were given or where the police ignored an

invocation of the *Miranda Rights*, such as the right to counsel. While the statement obtained was not admissible in the State's Case-in-Chief, it could be used for impeachment when the defendant testified in a manner contrary to the statement. *See* **Oregon v. Hass**, 420 U.S. 714, 95 S.Ct. 1215 (1975).

### 1) DELIBERATE POLICE VIOLATION

One state, California, has indicated that police may deliberately ignore a suspect's invocation of right to counsel to gain impeachment evidence and that such statements are admissible for impeachment purposes. **People v. Peevy**, 953 P.2d 1212 (Cal. 1998). However, the California Supreme Court has also indicated that this tactic may be considered in determining whether a statement was voluntarily given, and if it is found to be involuntary, it cannot be used at all. Moreover, if a subsequent statement is given after *Miranda Warnings*, the earlier deliberate violation of **Miranda** will also be considered in determining the voluntariness of a *Miranda Waiver*. **People v. Neal**, 72 P.3d 280 (2003). Neither the United States Supreme Court nor the Nevada Supreme Court has approved of this conduct. As such, it is recommended police departments not rely upon this case absent some ruling from one of those courts. In addition, it should be noted that the Nevada Supreme Court has accorded greater rights in this area under the Nevada Constitution than that afforded by the Federal Constitution.

### b) OF A WITNESS

Whenever a witness' testimony is based in whole or in part upon statements by the defendant to the witness, contradictory information contained in statements obtained per a *Miranda* violation can be used to challenge the witness.

This usually arises in circumstances where an expert witness, such as a psychiatrist, is relying upon a defendant's history or version of events in forming an opinion. In that case, it is permissible to use the *Miranda* violation statement to challenge the validity of the opinion by showing the defendant has given contrary versions. *See* **Wilkes v. United States**, 631 A.2d 880 (D.C.App. 1993); **State v. DeGraw**, 470 S.E.2d 215 (W.Va. 1996). In both cases the prosecution was permitted to impeach a psychiatrist's opinion because it was based in large part on the contradictory statements made by the defendant.

Note however, that statements taken in violation of **Miranda** cannot be used to impeach a witness about their own observations. In **James v. Illinois**, 493 U.S. 307, 110 S.Ct. 648 (1990), the United States Supreme Court ruled that the prosecutor could not impeach a defense witness with statements illegally obtained from the defendant in violation of **Miranda**. However, the witness in **James** was not relying upon the false or contradicted testimony of the accused, but rather on her own observations. In **James**, the witness testified that on the day of the crime she had been in the company of the defendant and at that time his hair was black. The defendant, in a statement taken in violation of **Miranda**, stated that his hair was reddish-brown. The color of the defendant's hair was relevant since the suspect's hair was reddish-brown in color. The prosecution confronted the witness with the statement made by James in an effort to impeach the witness' testimony. The Court ruled that it was error to permit such impeachment.

The distinction between the rule in **James** and the other two decisions is that the real witness being impeached was not the defense witness, i.e., the psychiatrist, but rather the defendant. It is important to note that this rule of admissibility applies even though the defendant never testifies so long as the expert or witness relied upon the statement of

the defendant or so long as the expert opinion is based "to any appreciable extent on the defendant's statements to the expert." **Wilkes**, 631 A.2d 880-891.

## c) EXCEPTIONS TO IMPEACHMENT RULE

In the following circumstances, a statement taken in violation of **Miranda** will not be admissible even for impeachment purposes.

1). If the court finds that the statement was involuntary. See **Mincey v. Arizona**, 437 U.S. 385, 9" S.Ct. 2408 (1978)" (holding that statements made while defendant was in the intensive care unit with unbearable pain and on the brink of a coma were not voluntary statements);

2). If the statement was made per negotiations and falls under **NRS 48.125.** See Sections on Negotiations *supra*. It is always safest for the police officer to advise the defendant that he, the officer, lacks the authority to make a deal, but that he will communicate all information, cooperation and recommendations to the district attorney. **McKenna v. State**, 101 Nev. 338, 705 P.2d 614 (1985).

3). If the defendant makes statements under promises of immunity. **Jersey v. Portash**, 440 U.S. 450, 99 S.Ct. 1292 (1979) (holding that the testimony of a defendant given in response to promises of legislative immunity was essentially a coerced statement).

## 2. USE IN PERJURY TRIAL

In **McGee v. State**, 105 Nev. 718, 782 P.2d 1329 (1989), the court held that a confession obtained in violation of **Miranda** may be used by the State in its case-in-chief at a perjury trial arising from the defendant's testimony in the underlying case. The Nevada Supreme Court reasoned that perjury is beyond the control of the police authorities and entirely in the control of the defendant. Thus excluding *un-Mirandized* statements from a perjury prosecution would not discourage future police misconduct or promote the underlying policy considerations behind **Miranda**

## 3. DERIVATIVE EVIDENCE

Derivative evidence is a statement or physical item that was obtained or discovered only as a result of information contained in defendant's *un-Mirandized* statement. Such evidence is not automatically suppressed as the "fruit of the poisonous tree" as would be true of Fourth Amendment violations. Common examples are discussed below.

### a) *MIRANDIZED* STATEMENTS TAKEN AFTER INITIAL MIRANDA VIOLATION.

**Rule:** If the prior statement was voluntary but **Miranda** was violated, a subsequent *Mirandized* statement is generally admissible. If the prior statement was involuntary then *Miranda Warnings* generally cannot cure a second statement unless the court finds that the second statement is free of the coercive influences of the first. This then becomes a voluntariness issue.

In **Oregon v. Elstad**, 470 U.S. 298, 105 S.Ct. 1285 (1985), the Court ruled that mere failure to give *Miranda Warnings* does not taint investigatory process so as to make a

later waiver of **Miranda** ineffective, Fruit of Poisonous Tree Doctrine does not apply to **Miranda**. However, the Court cautioned that this was a case where police did not purposely seek to violate **Miranda**. *See* **Crew v. State**, 100 Nev. 38, 675 P.2d 986 (1984)(different result if first confession coerced/involuntarily obtained). *See* **Missouri v. Seibert**, 542 U.S. 600, 124 S.Ct. 2601 (2004) (confession suppressed where *Miranda Warnings* were intentionally withheld until suspect confessed).

## b) PHYSICAL EVIDENCE

Although statements obtained in violation of **Miranda** may not be admitted against the accused in the prosecution's case-in-chief, the physical evidence produced as a result of the statements is not generally rendered inadmissible simply because of the **Miranda** violation. **United States v. Patane**, 542 U.S. 630, 124 S.Ct. 2620 (2004) (failure to give a suspect *Miranda Warnings* does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements).

**Example # 1**: **Michigan v. Tucker**, 417 U.S. 433, 94 S.Ct. 2357 (1974). Identity of witness learned from voluntary statement taken from defendant without *Miranda Warning* would not result in that witness' testimony being suppressed.

**Example # 2**: **United States v. Sterling**, 283 F.3d 216 (4th Cir. 2002). Acknowledged that a **Miranda** violation is of constitutional significance, but refused to extend the Fruit of the Poisonous Tree Doctrine to derivative evidence obtained as a result of an unwarned but voluntary statement

**Example # 3**: **Crew v. State**, 100 Nev. 38, 675 P.2d 986 (1984). Absent a direct infringement on Fifth Amendment rights, a violation of **Miranda** will not result in the exclusion of evidence derived from the statement. In this case, the police found the two bodies of the victims as a result of the statement. Bodies and evidence derived therefrom not suppressed. *See also* **Rhodes v. State**, 91 Nev. 17, 530 P.2d 1199 (1975) and **Jones v. State**, 95 Nev. 154, 591 P.2d 263 (1979).

**Example # 4**: **State v. Smith**, 105 Nev. 293, 774 P.2d 1037 (1989). Defendant's statements after she had been placed under arrest for DUI and without benefit of being advised of her *Miranda Rights* were suppressed, but breath tests were not.

**Example # 5**: **Pennsylvania v. Muniz**, 496 U.S. 582, 110 S.Ct. 2638 (1990). After being placed under arrest for DUI, the defendant was taken to a police booking facility where he underwent a number of sobriety tests. These tests were video taped and the tape showed the defendant exhibiting slurred speech and lack of physical coordination. The Court ruled, the video tapes constituted "real" or "physical" evidence not protected by the Fifth Amendment Privilege and the fact that the tests were performed at the request of an officer did not make them custodial interrogations within **Miranda**. However a "test" that was designed to elicit incriminating responses was suppressed. *See* Section II(D)(7) above.

## 4. USE IN OBTAINING SEARCH WARRANT

The United States Supreme Court has not reached the specific issue of whether information obtained in violation of **Miranda** may be used as probable cause in a search warrant application. The Massachusetts State Supreme Court held

this was improper in **Massachusetts v. White**, 371 N.E.2d 777 (1977). The United States Supreme Court granted certiorari, but was evenly split (Justice Powell did not participate) so no opinion was issued. However, since **White**, the Ninth Circuit concluded use of **Miranda** violation information is permissible in certain circumstances.

The 9th Circuit Court of Appeals held in **United States v. Patterson**, 812 F.2d 1188 (9th Cir. 1987) that if the police obtain a statement from a defendant that is in violation of **Miranda** such statements can be used to obtain a search warrant, i.e. such statement may be used in the affidavit establishing probable cause so long as the statements are voluntary and trustworthy.

### 5. USE IN UNRELATED CRIMINAL TRIAL

In the context of the Fourth Amendment, courts have held that evidence illegally seized in a case may be used against a defendant in a totally unrelated criminal action that was not the target of, or foreseeable to, the officers at the time of the search. *See* **Taylor v. State**, 92 Nev. 158, 547 P.2d 674 (1976)(mattress illegally photographed in rape case later used to identify mattress related to murder committed after the rape case.). This concept seems to have been adopted by the Nevada Supreme Court as applicable to 5th Amendment violations. *See* **McGee v. State**, 105 Nev. 718, 782 P.2d 1329 (1989).

## J. MIRANDA NOT REQUIRED WHEN INTERVIEW BEING CONDUCTED AT THE REQUEST OF THE DEFENDANT AND HIS ATTORNEY

In **Gardner v. State**, 91 Nev. 443, 537 P.2d 469 (1975), the defendant was in custody and represented by

counsel and requested to take a polygraph examination. Although counsel was not present in the room where the polygraph was being conducted, counsel was present in an adjoining room and would have been permitted to talk to his attorney whenever he wished. The polygraph examiner did not give the defendant his *Miranda Rights* before asking the defendant questions which resulted in the defendant giving him a confession. The Nevada Supreme Court simply held that under the circumstances the constitutional safeguards provided by **Miranda** during custodial interrogation were met.

## III. VOLUNTARINESS AND THE 14TH AMENDMENT DUE PROCESS CLAUSE

No statement/confession of a suspect is admissible unless the State can demonstrate it was freely and voluntarily given. This is true, even where *Miranda Rights* have been properly given and waived. A proper *Miranda Warning* and waiver, however, creates a presumption the statement was voluntarily given. This puts the burden upon the defendant to produce evidence that challenges the voluntariness of a statement. If this is done, the burden shifts back to the State to prove it was freely and voluntarily made.

Thus when a court is analyzing the admissibility of a confession, the analysis starts with whether **Miranda** was applicable, properly given and waived. If the court finds **Miranda** was complied with or inapplicable, then it turns to a review of the voluntariness of the statement. It will use the voluntariness test to determine if the **Miranda** waiver was freely made as well as whether the statement was un-coerced. In addition, as noted above, a voluntary statement taken in violation of **Miranda** may still be admissible in limited circumstances, whereas an involuntary statement ceases to

exist legally and can't be used for any purpose. *See* **Mincey v. Arizona**, 437 U.S. 385, 98 S.Ct. 2408 (1978).

Voluntariness is also a factor in determining if a defendant waived his right to counsel under the Sixth Amendment before making a statement and the admissibility of the statement.

## A. TEST FOR VOLUNTARINESS

Courts use a "totality of the circumstances" test in evaluating voluntariness. **Mincey v. Arizona**, 437 U.S. 385, 98 S.Ct. 2408 (1978); **Tomarchio v. State**, 99 Nev. 572, 665 P.2d 804 (1983) **Passama v. State**, 103 Nev. 212, 735 P.2d 321 (1987); **Alward v. State**, 112 Nev. 141, 912 P.2d 243 (1996)(*overruled on other grounds by* Roske v. State, *121 Nev. 184, 111 P.3d 690 (2005)*; **Steese v. State**, 114 Nev. 479, 960 P. 2d 321 (1998).

The ultimate question is whether pressure, in whatever form, was applied to cause the suspect's will to be overborne and his capacity for self-determination to be critically impaired. **Culombe v. Connecticut**, 367 U.S. 568, 602 (1961). Inasmuch as the degree of pressure necessary to crush one's will varies with the individual and the circumstances of the arrest and detention, a finding of coercion and involuntariness must be based upon a careful consideration of the totality of the circumstances. **Schneckloth v. Bustamonte**, 412 U.S. 218, 226 (1973). Courts look at a variety of factors, some of the most common are: 1) location of interview; 2) length of interview; 3) who was present; 4) condition of suspect – intoxicated, injured, sleep deprived, lack of food/water; 5) officer demeanor; 6) officer interview techniques – promises, threats and tricks.

**Example # 1**: **Ledbetter v. Edwards**, 35 F.3d 1062 (6th Cir. 1994). In this case although interrogation lasted approximately three hours before the defendant finally confessed, the Circuit Court was persuaded to uphold the confession because there were no threats; no physical punishment; the defendant was not deprived of food or bathroom privileges and the defendant had prior experience with the criminal justice system. Falsehoods by officers regarding evidence were not improper.

## B. INTOXICATION, TRAUMATIC INJURIES

**Rule**: Rarely renders a confession involuntary.

If, as a result of intoxication, the suspect is not conscious of what he is saying or is unable to understand the meaning of statements made, then the statement is considered involuntary. *See* **State v. Clark**, 434 P.2d 636 (Ariz. 1967); **State v. Hall**, 54 Nev. 213, 13 P.2d 624 (1932) usually even if really drunk - confession upheld; even if shot and in emergency room - **Wallace v. State**, 84 Nev. 603, 447 P.2d 30 (1968); Drugs - **Pickworth v. State**, 95 Nev. 547, 598 P.2d 626 (1979); Alcohol 2.0% - **Tucker v. State**, 92 Nev. 486, 553 P.2d 951 (1976); Alcohol 3.0% - **Mallott v. State**, 608 P.2d 737 (Ala. 1980); Schizophrenic - **Criswell v. State**, 86 Nev. 573, 472 –.2d 342 (1970); Drugs - **Falcon v. State**, *supra*; **Chambers v. State**, 113 Nev. 974, 944 P.2d 805 (1997) confession voluntary even though .27% B.A., numerous drugs in system and open stab wound to arm.

**NOTE**: Although injuries and intoxication may not render a statement involuntary; they can still affect a suspect's ability to understand and waive *Miranda Rights.* Thus where **Miranda** applies, a judge might find the statement was voluntarily made, but still suppress the statement because the

suspect was too injured or intoxicated to comprehend his *Miranda Rights*.

## C. MENTAL DEFECTS OR CONDITIONS

A defendant's mental health condition, standing alone, generally does not render a confession involuntary. As with injuries and intoxication, so long as the suspect understands the meaning of the statements (isn't babbling or rambling incoherently) and the consequences of the confession, the confession will be admissible. **Geary v. State**, 91 Nev. 784, 544 P.2d 417 (1975). However, it is a factor which can be considered when evaluating state action in obtaining the confession and the voluntariness of the statement. That is, did the police take unfair advantage of the condition to coerce a confession.

**Example # 1:** **Colorado v. Connelly**, 479 U.S. 157, 107 S.Ct. 515 (1986). A defendant approached a police officer and indicated he wanted to discuss a murder he committed. At some point a custodial interrogation occurred wherein the defendant was advised of his *Miranda Rights*. It was later determined that the defendant suffered from schizophrenia and was motivated to confess by auditory hallucinations. The defendant believed "the voice of God" ordered him to confess. The Court held that even though a confession or admissions may be prompted by a mental or emotional condition that prevents it from being "the product of rational intellect and free will" if it is free from government coercion or official compulsion then it is not involuntary. The Court also noted that defendant's condition did not prevent him from understanding he was confessing to a murder and was talking to the police or the consequences of his actions. As such his waiver of **Miranda** was also voluntary.

## D. PROMISES AND THREATS (BY POLICE OR AGENTS)

**Rule**: Generally promises that can be fulfilled do not render a statement involuntary. However threats of any type are coercive and will make the confession involuntary.

### 1. PROMISES

In most instances promises made to a suspect to encourage a statement/confession are not considered a form of coercion and do not affect the voluntariness of the statement. However, the promise must be one the officer is capable of fulfilling. *See* **United States v. Tingle**, 685 F.2d 1332 (9th Cir. 1981). Because an officer cannot control what charges will be filed or what a judge may do in sentencing, it is improper for an officer to "promise," directly or indirectly, a more lenient offense or sentence, i.e. "negotiate" the case.

**Example # 1**: **United States v. Glasgow**, 451 F.2d 557 (1971). Government agent promised to bring suspect's cooperation by confessing to attention of prosecutors and judge. Agent fulfilled the commitment and there was no evidence it was a false commitment or issued with no intent to perform. *See also* **United States v. Frazier**, 434 F.2d 994, 995-96 (5th Cir. 1970); **United States v. Ferrara**, 377 F.2d 16, 17-18 (2d Cir. 1967), *cert. denied,* 389 U.S. 908, 88 S.Ct. 225, (1967); **Fernandez-Delgado v. United States**, 368 F.2d 34, 36 (9th Cir. 1966).

**Example # 2**: **United States v. McShane**, 462 F.2d 5 (9th Cir. 1972). Illegal guns were found in an apartment occupied by defendant and his girlfriend. The defendant was arrested and both were taken to the station for questioning. The girlfriend was briefly questioned. The defendant then told

one officer that he would confess if they would let the girlfriend go. The agent said that she could leave at any time. A confession followed. Held: Officers had never threatened to arrest the girlfriend or hinted at any deals with respect to her. In addition, officers had a legitimate reason for questioning the girlfriend in light of her legal interest in the apartment. There was no coercion and confession was voluntary.

**NOTE**: If officers have no legitimate nexus between a third party and the crime or make affirmative representations or hints that a third party will not be arrested or blamed if a confession is made, this is an impermissible promise tantamount to a threat. The confession will be deemed involuntary. *See* **Ferguson v. Boyd**, 566 F.2d 873, fn. 7 (4th Cir. 1977).

**Example # 3**: **United States v. Davidson**, 768 F.2d 1266, 1271 (11th Cir. 1985). Agent testified that he advised appellant that he couldn't promise anything, but that if appellant did cooperate with substantial assistance the U.S. Attorney could recommend a shorter sentence. Held: A statement made by a law enforcement agent to an accused that his cooperation would be passed on to judicial authorities and would probably be helpful to him is not a sufficient inducement so as to render a subsequent incriminating statement involuntary. *See also* **United States v. Ballard**, 586 F.2d 1060, 1063 (5th Cir.1978).

### a) TRAFFICKING STATUTE – "SUBSTANTIAL ASSISTANCE" CLAUSE

The trafficking statute, **NRS 453.3405 (2)** has a "substantial assistance" clause. The statute states in effect that if the court finds that a person convicted of the offense of trafficking rendered "substantial assistance" to law

enforcement, then the court may reduce or suspend the sentence of the person convicted of trafficking in controlled substance. An officer may not promise a suspect that he will get more lenient treatment upon cooperation under the statute, but it is permissible for an officer to inform the suspect of the existence of the statute by reading applicable statutory language {NRS 453.3405(2)} to a suspect. *See* **Sanchez v. State**, 103 Nev. 166, 734 P.2d 726 (1987).

In **Sanchez**, the defendant was arrested in Reno, Nevada for the offense of trafficking in the controlled substance heroin. Upon placing the defendant under arrest, the officer read defendant Sanchez his *Miranda Rights* in Spanish and thereafter, read Sanchez the portion of the trafficking statute. The defendant spoke to the arresting officers and confessed his criminal involvement in the offense and acknowledged the fact that his conduct was in violation of the laws of the State of Nevada. The confession was not "substantial assistance."

The Nevada Supreme Court stated that the statutory admonishment did not constitute an impermissible promise by law enforcement officers of a lighter sentence upon the suspect's cooperation but is simply an explanation that the possibility of a reduced or suspended sentence exists if the judge, not the officers, makes the appropriate determination of substantial assistance.

## 2. THREATS

Advising a defendant that if he does not cooperate, things would go worse for him renders all statements involuntary. **Collazo v. Estella**, 940 F.2d 411 (9th Cir. 1991) infra" **Passama v. State**, 103 Nev. 212, 735 P. 2d 321 (1987). As noted in **Ferguson**, *supra*, tactics which imply a friend or relative will be in trouble if the defendant does not cooperate

are considered a threat which will render a confession involuntary and inadmissible. This is especially true when a person is compelled to answer questions as a part of an employment agreement and an internal investigation.

**Example # 1**: **United States v. Tingle**, 685 F.2d 1332 (9th Cir. 1981). FBI agent questioned suspect in back of a patrol car for approximately one hour. Knowing she had a young child, the agent told her she was facing about 30 years in prison and would never see her son again (or for a long time). He also promised to help her if she cooperated and would inform the prosecutor if she was "stubborn" and uncooperative. Held: References to maximum sentences and to attenuated crimes as well as statements regarding child and consequences if she did not cooperate (unfavorable comment to prosecutor) were deemed threats. Confession involuntary.

**Example # 2**: **Lynumn v. Illinois**, 372 U.S. 528 (1963). Suspect was told that benefits from the Aid to Dependent Children program (Welfare) would be cut off if suspect did not cooperate; that she would not see her children; that her children would be taken away from her and, if she cooperated, none of this would happen because the officers would speak on her behalf. Held: Although conveyed in the aspect of a promise to help if she cooperated, the officers' statement of possible consequences went beyond possibilities and indicated certain "bad" things would happen. In addition, statements amounted to an implied promise that the bad things would not happen if she cooperated which was untrue as the police had no ability to carry out the promises. Confession was coerced and involuntary.

**Example # 3**: **Spano v. New York**, 360 U.S. 315 (1959). Defendant was informed that if he did not cooperate, his friend, who was a police officer, would lose his job. Held: confession involuntary.

**Example # 4**: **Garrity v. New Jersey**, 385 U.S. 493, 87 S.Ct. 616 (1967). A police officer was subjected to custodial interrogation pursuant to an investigation wherein he was suspected of accepting bribes to ignore traffic violations. The officer was properly *Mirandized* but was thereafter threatened with discharge from the police department if he failed to cooperate. The confession was held to be inadmissible.

The United States Supreme Court concluded that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights. The 14th Amendment due process clause prohibits the use of a coerced statement in criminal proceedings where the statement was obtained under threat of removal from office

**Note**: See Section VI(F) – Miscellaneous Issues regarding internal affairs investigations and **Garrity**.

## 3. POLICE AGENTS

The fact that the person conveying the impermissible promise or threat is not a government officer is irrelevant. A person who is working with law enforcement is deemed a police agent and his/her actions will be attributed to the government for purposes of determining the voluntariness of a confession.

**Example # 1**: **Arizona v. Fulminante**, 499 U.S. 279, 111 S.Ct. 1246 (1991). The defendant heard that his life was in jeopardy in the prison by hostile inmates. An informant, after consulting with an FBI Agent, offered to give the defendant protection if the defendant would give a full confession to

him pertaining to his knowledge about the death of his step-daughter. The court held that this was an implied coercive threat of violence, i.e. if he did not confess he would be harmed and therefore the confession was involuntary.

**See also Section IV(G)(5) and (7).**

## E. MISREPRESENTATIONS OR TRICKS

In some cases a police officer is permitted to lie to a suspect in order to encourage the suspect to confess. So long as the lie does not involve a promise or creates a threat, the lie itself is not considered coercive.

Examples of acceptable deception mentioned by the Nevada Supreme Court include falsely: (1) placing the defendant's vehicle at the crime scene; (2) eluding to physical evidence linking the victim to the defendant's car; (3) indicating the presence of the defendant's fingerprints at the crime scene or in a getaway car; (4) stating positive identification of the suspect by an eyewitness; (5) identifying defendant's semen in the victim or at a crime scene.

Examples of unacceptable falsehoods include: (1) assurances of divine salvation upon confession; (2) promises of mental health treatment in exchange for a confession; (3) assurances of more favorable treatment rather than incarceration in exchange for a confession; (4) misrepresenting the consequences of a particular conviction (crime carries a ten year sentence when it really carries a minimum of twenty years); (5) representation that welfare benefits would be withdrawn or children taken away unless there was a confession; (6) suggesting harm or benefit to someone. These kinds of falsehoods are considered unacceptable because they are reasonably likely to procure an untrue statement or influence an innocent person to confess

[in order to prevent harm to a third person, get help for their problem or get absolution].

**Example # 1**: **Oregon v. Mathiason**, 429 U.S. 492, 97 S.Ct. 711 (1977), confession admitted even though police advised defendant falsely that his prints had been found at the scene.

**Example # 2**: **Frazier v. Cupp**, 394 U.S. 731, 89 S.Ct. 1420 (1969). Officers interrogating Frazier falsely represented that a person named Rawls, who was with the defendant, had already confessed and in addition suggested falsely that perhaps the victim's homosexual advances had provoked the defendant. The Court did not find these misrepresentations sufficiently outrageous to render the confession involuntary.

**Example # 3**: **Ledbetter v. Edwards**, 35 F.3d 1062 (6th Cir. 1994). Defendant confessed after police falsely told him that they 1) made him on prints, 2) he had been positively identified, 3) victim was outside interrogation room ready to ID defendant. Confession held admissible.

**Example # 4**: **Sheriff v. Bessey**, 112 Nev. 322, 914 P.2d 618 (1996). In a sexual assault case, wherein the 14 year old victim advised police that she had been sexually assaulted by the suspect on a couch in a particular apartment, the officers presented the suspect with a false crime laboratory report stating that the suspect's semen had been found on the couch in question. The Nevada Supreme Court stated that this type of police trickery is acceptable and does not in itself render a confession involuntary. **Caution**: This was a split decision. The dissent would permit police verbal deception, but prohibit the use of falsehoods or deception in written documents such as lab reports, witness statements or doctored photographs.

## F. "OFF THE RECORD" DISCUSSIONS

Incriminating statements made during an agreed upon "off the record" discussion will usually be deemed involuntary. See **United States v. Walton**, 10 F.3d 1024 (3rd Cir. 1993). If they are "off the record", it is an implied promise they will not be used.

## G. USE OF EXPERT WITNESS TO ESTABLISH INVOLUNTARINESS OF CONFESSION

The Seventh Circuit Court of Appeals has held that in a proper case it may be appropriate for the trial court to permit the testimony of an expert mental health witness such as a psychiatrist or psychologist to testify pertaining to the "false confession phenomenon". In other words, the issue would be whether or not this particular defendant is prone to confess to a crime he did not commit simply to please his interrogator. *See* **United States v. Hall**, 93 F.3d 1337 (7th Cir. 1996).

## H. OTHER DUE PROCESS ISSUES

Even when a statement/confession is deemed voluntary and it does not violate the Fifth or Sixth Amendments, a court may still find that the admission of the statement would be fundamentally unfair such that it would deprive the defendant of a fair trial under the general provisions of the Due Process Clause of the Fifth or 14th Amendments. Examples are given below.

**Example # 1**: **Alward v. State**, 112 Nev. 141, 912 P.2d 243 (1996)(*overruled on other grounds by* Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005)). As noted earlier in Section I, this is the case where officers had a mental

health counselor interview the suspect to determine if he was suicidal. However, the police then videotaped the interview and the suspect made incriminating statements. The Nevada Supreme Court disallowed those statements on general Due Process grounds for several reasons: 1) the suspect was led to believe that the conversation with the counselor was confidential; 2) it was unclear whether the conversation fell within a privilege statute and 3) the circumstances came close to "compelled" examination where **Miranda** would apply. Thus the Court concluded that it would be "unfair" to admit a statement obtained under the circumstances.

## IV. SIXTH AMENDMENT RIGHT TO COUNSEL

The Fifth Amendment does not expressly provide for a right to counsel. That right comes from the interpretation given to the Fifth Amendment by the United States Supreme Court in **Miranda** and cases decided since **Miranda**. In contrast, the Sixth Amendment to the United States Constitution expressly provides for a right to an attorney, but the United States Supreme Court has interpreted this only applies at "critical stages" of judicial proceedings.

If the Sixth Amendment applies to a statement, then the State has the burden of proving the statement was freely, voluntarily and knowingly made and that any waiver of the Sixth Amendment right to counsel was also voluntarily, knowingly and intelligently made.

The Sixth Amendment right to counsel is not self-executing. It must be invoked. **McNeil v. Wisconsin**, 501 U.S. 171, 173, 111 S.Ct. 2204, 2206 (1991); **Patterson v. Illinois**, 487 U.S. 285, 290, 108 S.Ct. 2389, 2393-94 (1988).

**NOTE: Whenever a person is questioned, an officer must determine whether either or both the Amendments are applicable and, if so, comply with them. An attorney**

**facing a motion to suppress must determine if the motion is based on one or both of the Amendments and respond accordingly.**

## A. DIFFERENCES BETWEEN FIFTH AND SIXTH AMENDMENT RIGHTS TO COUNSEL

The Fifth Amendment "right to counsel" begins upon custodial interrogation and applies to questions about any crime or criminal activity. The Sixth Amendment "right to an attorney" begins (attaches) after the initiation of adversarial judicial proceedings and only applies to the specific crimes involved in the adversarial proceedings. In addition, it only applies to "critical stages" of the adversarial process. An easy way to remember this is as follows:

1. All suspects, who are subject to a custodial interrogation, have a Fifth Amendment right to counsel.
2. Only a defendant, against whom adversarial proceedings have been initiated, has a Sixth Amendment right to counsel.

## B. WHEN SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHES

The Sixth Amendment "right to counsel" attaches at the initiation of adversarial proceedings. **United States v. Gouveia**, 467 U.S. 180, 104 S.Ct. 2292 (1984). In turn, the initiation of adversarial proceedings means the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. **Brewer v. Williams**, 430 U.S. 387, 398-399, 97 S.Ct. 1232 (1977); **Michigan v. Jackson**, 475 U.S. 625, 629, n. 3, 106 S.Ct. 1404 (1986). Adversarial

proceedings would also be initiated by the filing of a complaint or information or indictment return.

Courts interpreted the term "formal accusation" in **Gouveia**, to mean an indictment, information or complaint and that arraignment referred to formal arraignment on this type of document. *See* **United States v. Moody**, 206 F.3d 609 (Cir. 6 2000)(citing **Kirby v. Illinois**, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 1881-1882 (1972)). It was thought that the Sixth Amendment right to counsel did not attach at probable cause hearings or initial presentments, where a defendant was told what he was arrested for, bail was set and a probable cause determination was made based upon an officer's declaration of arrest. However, in **Rothgery v. Gillespie County**, ___U.S.___, 128 S.Ct. 2578 (2008), the United States Supreme Court indicated that adversarial proceedings begin, and the right to counsel attaches, at the first appearance before a magistrate, regardless of whether or not a formal charging document has been filed.

In **Rothgery**, the Supreme Court interpreted a declaration of arrest as a "formal accusation" document and the probable cause appearance before a magistrate as an "arraignment" and determined that the combination of the two was the "initiation of adversarial proceedings" under the Sixth Amendment. Under the Texas law at issue in **Rothgery**, probable cause determinations under **County of Riverside v. McLaughlin**, 500 U.S. 44, 111 S.Ct. 1661 (1991) are combined with initial presentments required under **McNabb v. United States**, 318 U.S. 332, 63 S.Ct. 608 (1943); **Mallory v. United States**, 354 U.S. 449, 77 S.Ct. 1356 (1957). *See* Section VI(D) on *McLaughlin* and *McNabb-Mallory Rules*.

It is clear under **Rothgery**, that a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger

attachment of the Sixth Amendment right to counsel. **Rothgery**, 128 S.Ct. at 2592. Thus if a defendant appears before a judge for a probable cause determination or initial "arraignment" under NRS 171.178 (Justice Court arraignment), the Sixth Amendment attaches. It also attaches whenever a complaint, information or indictment is filed.

However, in Nevada, probable cause determinations can be made without the appearance of the accused. **Powell v. State**, 113 Nev. 41, 930 P.2d 1123 (1997). Initial presentment to a magistrate under NRS 171.178 may be the first time a defendant appears before a judge. **Rothgery** does not address the situation where, based upon a declaration of arrest, a judge determines probable cause exists without ever seeing the defendant.

Given the unsettled state of the law, police departments may wish to take a cautious approach and assume, in Nevada, that the Sixth Amendment right to counsel attaches when a declaration of arrest is filed **and** a judge has made an initial probable cause determination, regardless of whether the defendant was present.

Since certain rights attach at the initiation of adversarial proceedings, it is the responsibility of the investigating officer to determine whether any charges have been formally filed (complaint, information or indictment) or whether a declaration of arrest was filed and the defendant has appeared before a magistrate. Once the officer knows the Sixth Amendment right to counsel has attached, he cannot talk to the defendant without counsel unless the defendant waives his Sixth Amendment right to counsel. Moreover, if the defendant invokes his right to counsel, the officer must end the contact.

## C. SIXTH AMENDMENT OFFENSE SPECIFIC

Unlike the Fifth Amendment, the right to counsel under the Sixth Amendment only applies to the specific crimes subject to the adversarial proceedings.

The United States Supreme Court, in **McNeil v. Wisconsin**, 501 U.S. 171, 111 S.Ct. 2204 (1991), held that the Sixth Amendment is offense specific. The facts will better illustrate this distinction. In **McNeil**, the defendant was arrested for armed robbery committed in the town of West Allis, Wisconsin. Upon his arrest, and after being advised of his *Miranda Rights*, the defendant declined to speak to the detectives but did not ask for an attorney. In other words, he invoked his right to remain silent, but not his right to counsel.

Shortly thereafter, the defendant was brought before a judge, arraigned, provided an attorney for the robbery committed in West Allis and a preliminary hearing was set. At this point his Sixth Amendment right to counsel attaches. Detectives subsequently visited the defendant in jail and after *re-Mirandizing* him, questioned him about a murder and robbery committed in the town of Caledonia, Wisconsin. Detective repeated this process on three separate occasions and each time the detectives *re-Mirandized* the defendant. The defendant gave three separate incriminating statements. On none of these occasions did the defendant initiate the questioning.

The defendant subsequently went to trial on the murder with the prosecution using the three separate statements obtained from the defendant. The United States Supreme Court upheld the conviction as well as the right of the State to use those confessions. The Court held that the defendant's invocation of his Sixth Amendment "right to counsel" during the arraignment did not constitute invocation of his "right to counsel" derived from **Miranda v. Arizona**. The Sixth Amendment "right to counsel" only applied to the

West Allis robbery and there was no Sixth Amendment violation. And because he only invoked his right to silence under **Miranda** and the Fifth Amendment, nothing prohibited the officers from letting a reasonable period of time pass and then contacting him, *re-Mirandizing* him and asking questions about the Caledonia offense. Since there were also no Fifth Amendment violations, the statements were admissible.

**Example # 1**: **Kaczmarek v. State**, 120 Nev. 314, 91 P.3d 16 (2004). The defendant was identified as a suspect in a murder. He was in jail on unrelated charges for which he had an attorney. Police then went to the jail and, after advising him of **Miranda**, questioned the defendant about the murder. Defendant admitted to the murder. That confession was used against him at trial. Held: the confession was admissible. The Sixth Amendment "right to counsel" had not attached to the murder charges as the Sixth Amendment "right to counsel" was specific to crimes for which the defendant had actually been arraigned.

**Example # 2**: **Texas v. Cobb**, 532 U.S. 162, 121 S.Ct. 1335 (2001). In **Cobb**, the Supreme Court refused to extend the Sixth Amendment to uncharged crimes that arise out of the same factual background and are closely related to a charged crime where the "right to counsel" had attached. **Cobb** involved a defendant who reported his home was burglarized and his wife and daughter were missing. He later confessed that he committed the burglary and was charged with that crime. Counsel was appointed. He was later interviewed about the murder of his wife and child after being *Mirandized.* The Supreme Court indicated his Sixth Amendment "right to counsel" did not apply to the murder investigation. **NOTE**: The Supreme Court did say that the Sixth Amendment attaches to lesser-included crimes as

defined in **Blockberger v. United States**, 284 U.S. 299, 52 S.Ct. 180 (1932).

## D. CRITICAL STAGE OF PROCEEDINGS

Even after the Sixth Amendment has attached, it is only applicable to "critical stages" of the proceedings relating to the specific offenses. **United States v. Gouveia**, 467 U.S. 180, 104 S.Ct. 2292 (1984). That is, the failure to provide an attorney or the absence of an attorney at a non-critical stage is not a Sixth Amendment violation. The Supreme Court has defined "critical stage" as "any stage where counsel's absence might derogate from the accused's right to a fair trial." **Id.**; **United States v. Wade**, 388 U.S. 218, 226-227, 87 S.Ct. 1926 (1931-1932). This can include non-trial activity, such as a formal line-up.

### 1. EXTRADITION HEARINGS

Generally extradition hearings are not considered critical stages of a proceeding. *See, e.g.,* **Chewning v. Rogerson**, 29 F.3d 418 (8th Cir. 1994); **Judd v. Vose**, 813 F.2d 494, 497 (1st Cir.1987); **Caltagirone v. Grant**, 629 F.2d 739, 748 n. 19 (2nd Cir.1980). Therefore, the presence of counsel in the fugitive state at such a hearing or a request for an attorney at an extradition hearing is not considered an invocation of the right to counsel in the underlying case, even though the right has attached because a charging document was filed in order to obtain the fugitive warrant.

This changes, however, if the attorney's representation went beyond the scope of the extradition hearing, i.e. whether defendant wished to waive extradition proceedings. Similar concerns are raised if the defendant specifically requests counsel to discuss the underlying charge, rather than extradition issues. In such situations, a court may conclude

the Sixth Amendment was invoked. *See also* Section E below discussing the recent United States Supreme Court decision of **Montejo v. Louisiana**.

Thus Nevada officers who interview defendants after an extradition hearing and before arraignment in Nevada, may wish to see if defendant invoked prior to contacting the defendant, *Mirandizing* her, and conducting an interview.

**NOTE**: For attorneys, remember, there are also ethical prohibitions with contacting represented parties, about the subject matter of the representation, without the presence of counsel. *See* Nevada Rule of Professional Conduct 4.2.

## 2. CONSENT TO SEARCH

Asking for consent to search after a charging document has been filed (attachment) but before the Sixth Amendment has been invoked, does not violate the Sixth Amendment. The Second and Eleventh Circuits have indicated that asking a defendant for consent to search in a post-indictment/pre-arraignment situation, is not subject to the Sixth Amendment as it is not a critical stage of the proceedings. Thus it is irrelevant that the defendant, at the time of the search, was unaware of the indictment and his right to counsel. However, neither case dealt with a post-indictment situation where the defendant had invoked his Sixth Amendment right to counsel. The Eleventh Circuit specifically noted this might make a difference in the "critical stage" determination. *See* **United States v. Hidalgo**, 7 F.3d 1566 (11th Cir. 1993); **United States v. Kon Yu-Leung**, 910 F.2d 33 (2nd Cir. 1990).

**Caution**: These cases were decided before the United States Supreme Court decision in **Fellers v. United States**, 540 U.S. 519, 124 S.Ct. 1019 (2004). *See* Section IV(E). Whether asking for consent to search would violate **Fellers** is unsettled

## E. WARNINGS AND WAIVER OF SIXTH AMENDMENT RIGHT TO COUNSEL

**General Rule:** No specific warning is required for Sixth Amendment "right to counsel" and a waiver of right to counsel under the Fifth Amendment after *Miranda Warnings* will also constitute a waiver of Sixth Amendment "right to counsel" so long as the accused as not previously invoked his Sixth Amendment "right to counsel." However, in the absence of *Miranda Warnings*, where the Sixth Amendment has attached, the accused must be advised of his Sixth Amendment right to counsel and waive that right.

In **Patterson v. Illinois**, 487 U.S. 285, 108 S.Ct. 2389 (1988) the United States Supreme Court held that officers do not need to specifically advise a defendant of his Sixth Amendment "right to counsel" if defendant has received *Miranda Warnings*. On August 23, 1983 a Cook County Grand Jury indicted the defendant for a gang related murder occurring two days earlier. The Sixth Amendment "right to counsel" attached upon filing of the indictment. The defendant, who was in custody, had not been arraigned (where he would have been advised of his Sixth Amendment right to counsel and invoked). Detectives interviewed defendant about the murder. They advised that he had been indicted on the murder and of his *Miranda Rights*, but did not advise him of his right to counsel on the murder charge. He thereafter gave a lengthy incriminating statement to police.

The United States Supreme Court held that *Miranda Warnings* are sufficient to advise a defendant of his right to

an attorney under either Amendment. Moreover, because defendant had not invoked his right to counsel (the questioning took place between the filing of the indictment and the arraignment where counsel would normally be invoked), the waiver pursuant to **Miranda** would suffice to demonstrate a waiver of the Sixth Amendment right

Until the recent case of **Montejo v. Louisiana**, ___U.S.___, ___S.Ct.___(May 26, 2009), Sixth Amendment waivers based upon *Miranda Rights* have generally only been recognized during that period between the attachment of the Sixth Amendment right and invocation of the right. Previously, under **Edwards v. Arizona** and **Michigan v. Jackson**, police were prohibiting from initiating contact with a defendant after he invoked his Sixth Amendment right to counsel or counsel was appointed. So police violated the Sixth Amendment by initiating contact, and even a valid **Miranda** waiver (because the defendant only invoked right to silence under **Miranda** or the contact was initiated on other charges) will not be considered a waiver of the Sixth Amendment right to counsel.

Prior to **Montejo**, the Supreme Court had repeatedly held that once a person had invoked the right to counsel under the Sixth Amendment, that right may not be waived during police-initiated interrogation unless the waiver is made in the presence of the person's lawyer. *See, e.g.*, **McNeil v. Wisconsin**, 501 U.S. 171, 175, 111 S.Ct. 2204, 2207 (1991); **Michigan v. Jackson**, 475 U.S. 625, 635-36, 106 S.Ct. 1404, 1410-11 (1986); **Maine v. Moulton**, 474 U.S. 159, 176, 106 S.Ct. 477, 487 (1985).

However, **Michigan v. Jackson** was overruled in **Montejo v. Louisiana** and the United States Supreme Court stated that the rationale of **Edwards v. Arizona** does not extend to the Sixth Amendment right to counsel. Thus, under **Montejo**, even if a suspect invokes his Sixth Amendment right to counsel or counsel has been appointed, the police are

not prohibited from initiating or reinitiating contact with the suspect, outside the presence of counsel, obtaining a valid waiver of the Sixth Amendment and then questioning the defendant. The High Court also indicated standard *Miranda Warnings* were still sufficient to advise a defendant of his Sixth Amendment rights. The fact that the defendant previously requested or was appointed counsel is only a consideration in evaluating the validity of the waiver.

The effect of **Montejo** on Nevada law is unknown as of the date of this Manual, October of 2009. The Nevada Supreme Court approved of **Michigan v. Jackson** in two Nevada cases: **Koza v. State**, 102 Nev. 181, 718 P.2d 671 (1986) and **Kaczmarek v. State**, 120 Nev. 314, 91 P.3d 16 (2004). Whether the Nevada Supreme Court will retreat from **Michigan v. Jackson** and adopt **Montejo** or reject **Montejo** and continue to follow **Michigan v. Jackson** cannot be predicted. Police agencies and prosecutors need to be aware of this issue in determining procedures and evaluating the admissibility of statements.

Regardless of whether **Montejo v. Louisiana** or **Michigan v. Jackson** applies, the State must demonstrate the defendant was informed of, and waived, his Sixth Amendment right to counsel. As with *Miranda* waivers, for a statement to be admissible under the Sixth Amendment, the State must prove that the Sixth Amendment waiver was voluntarily, knowingly and intelligently made. The standards and law discussed under Section II(F)(1) and (2) for Fifth Amendment waivers also applies to Sixth Amendment waivers. Giving of *Miranda Rights* demonstrates the waiver was intelligent and knowing. Voluntariness of the waiver is determined by the totality of the circumstances test as discussed in Section III(A).

If no *Miranda Rights* were given, then the State must show that the defendant was aware of his Sixth Amendment right to counsel before waiving it. **Fellers v. United States**,

540 U.S. 519, 124 S.Ct. 1019 (2004). In **Fellers**, officers went to the defendant's home to arrest him on an indictment warrant. He was informed of the indictment, but was not initially given *Miranda Rights* or informed of his right to counsel under the Sixth Amendment. Officers told him they wanted to discuss his involvement with the drug ring referenced in the indictment and defendant made several incriminating statements. He was then arrested and transported to jail. At the jail he was given *Miranda Rights* and repeated his previous incriminating statements.

The Supreme Court indicated that, in a post-indictment/pre-arraignment situation, officers have a duty to advise the defendant of his Sixth Amendment right to counsel, if *Miranda Warnings* were not given, when the officers engage in conduct designed to elicit incriminating information. Absent a valid waiver, the statements would be a Sixth Amendment violation. Moreover, the Court left open whether a Sixth Amendment violation can be cured by a subsequent **Miranda** advisement and waiver under the Fifth Amendment doctrine announced in **Oregon v. Elstad**, 470 U.S. 298, 105 S.Ct. 1285 (1985). *See* Section II(I)(3)(a).

## F. INVOCATION OF SIXTH AMENDMENT RIGHT TO COUNSEL

A defendant invokes the Sixth Amendment "right to counsel" by requesting an attorney. Once a defendant invokes the Sixth Amendment "right to counsel", all questioning must cease. As noted above, prior to **Montejo v. Louisiana**, no further communication with the defendant on the specific offenses was permitted unless the defendant initiated contact. **Minnick v. Mississippi**, 498 U.S. 146, 111 S.Ct. 486 (1990); **Michigan v. Jackson**, 475 U.S. 625,106 S.Ct. 1404 (1986).

**Jackson** held that once a defendant invokes the Sixth Amendment by requesting counsel or counsel is hired or appointed, then **Edwards v. Arizona** applies and prohibits interrogation except if initiated by defendant. See also **Kaczmarek v. State**, 120 Nev. 314, 91 P.3d 16 (2004). However, **Montejo** now provides that **Edwards** does not apply to the Sixth Amendment. Therefore, under Federal law, so long as police honor the initial invocation of counsel, they may reinitiate contact with a defendant and, if a valid Sixth Amendment waiver is obtained, proceed to question the defendant. Also as noted above, whether the Nevada Supreme Court will follow **Montejo** is unknown. *See* Section II(G) above for factors courts have considered in evaluating the validity of a post-invocation waiver and reinitiating contact with a defendant in the Fifth Amendment context.

### 1. ANTICIPATORY INVOCATION NOT RECOGNIZED

In **McNeil v. Wisconsin**, 501 U.S. 171, 111 S.Ct. 2204 (1991), the Supreme Court noted that since the Sixth Amendment Right to Counsel is offense specific it cannot be invoked once for all future prosecutions. Quoting from the majority in **McNeil v. Wisconsin**, "it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." **McNeil** at page 2207. The Court went on to explain that to permit an anticipatory invocation of right to counsel of offenses not yet charged would "unnecessarily frustrate the public's interest in the investigation of criminal activity". **McNeil** at page 2208, see also **State v. Lanning**, 109 Nev. 1198, 866 P.2d 272 (1993); **United States v. LaGrone**, 43 F.3d 332 (7th Cir. 1994); **Alston v. Redman**, 34 F.3d 1237 (3rd Cir. 1994).

## 2. LIMITED INVOCATION OF ATTORNEY

As noted earlier when discussing the Fifth Amendment, in **Connecticut v. Barrett**, 479 U.S. 523, 107 S.Ct. 828 (1987); the Court noted that where the defendant refuses to make a written statements without an attorney present, but agrees to give an oral statement without an attorney present, a limited invocation has occurred and the taking of an oral statement was permitted

## 3. INVOCATION VIA ONGOING OR CONTINUING REPRESENTATION

The Ninth Circuit has recognized that, in certain limited circumstances, ongoing pre-indictment representation may create a situation that automatically triggers invocation of the Sixth Amendment "right to counsel." In **United States v. Harrison**, 213 F.3d 1206 (2000), defendant was involved in a drug distribution organization. Defendant murdered an informant who gave significant information to the FBI about the organization. A federal grand jury was investigating the cartel, the murder and the defendant. He retained an attorney to represent him during grand jury proceedings. At the grand jury, defendant refused to testify under the Fifth Amendment. His attorney negotiated "use immunity" in return for testimony. Thereafter, the attorney continued to represent the defendant in several meetings with FBI or Assistant United States Attorneys regarding polygraphs and surrender if defendant was indicted.

An indictment issued and defendant was arrested out-of-state. While awaiting transport, FBI agents *Mirandized* the defendant, obtained a waiver and incriminating statements. The Ninth Circuit held that the statements were taken in violation of the Sixth Amendment. The Court noted that the

pre-indictment representation continued after the defendant testified, the AUSA was aware of the ongoing representation and discussed issues regarding post-indictment procedures with counsel. On these facts, once the indictment issued, the ongoing representation was considered an invocation and could not be waived through police initiated conduct. Whether **Harrison** remains good law after **Montejo** remains to be seen.

## G. POST-ATTACHMENT/INVOCATION INTERROGATION: POLICE AGENTS AND UNDERCOVER OFFICERS

If the Sixth Amendment has attached and the right to counsel invoked, the police cannot initiate contact with a defendant to question him about charged crimes without obtaining a valid waiver. Assuming no Fifth Amendment invocations or **Miranda** problems, the police may still communicate with the defendant about other uncharged crimes.

Law enforcement officials have used various methods to obtain incriminating statements from suspects who are confined in jail or prison. These include confidential informants, jailhouse informants and undercover police officers. Whether the use of informants or undercover officers to obtain information violates the Sixth Amendment depends on the circumstances of the interaction between the defendant, the third party and the law enforcement officials and whether state or federal law will apply.

### 1. QUESTIONS - UNRELATED OFFENSES

Even though the Sixth Amendment "right to counsel" has attached, i.e., the defendant has been formally "charged" and arraigned, the Sixth Amendment "right to counsel" is

offense specific and thus it attaches only as to the offenses for which the defendant has been formally charged. Therefore, a police informant, agent, or undercover officer can be placed in the same cell as the defendant and, through non-coercive deception, or other techniques, get the defendant to talk about an unrelated offense. Such conduct does not violate the Sixth Amendment. See **Illinois v. Perkins**, 496 U.S. 292, 110 S.Ct. 2394 (1990).

As noted earlier in Section I, **under federal law**, it also does not violate the Fifth Amendment because **Miranda** does not apply when the suspect is unaware that he is speaking to a law enforcement officer (or informant working for law enforcement) and gives a voluntary statement. However, as noted in Section II(D)(10)(a) the Nevada Supreme Court rejected **Perkins** in **Boehm v. State**, 113 Nev. 910, 944 P.2d 269 (1997).

Nevertheless, **Boehm** only discussed Fifth Amendment right to counsel issues. Questioning of a defendant by informants or undercover officers about unrelated criminal offenses would not be a Sixth Amendment violation under **Boehm**.

## 2. UNSOLICITED STATEMENTS RELATED TO CHARGED OFFENSES DURING QUESTIONING ABOUT UNCHARGED CRIMES

What happens if a defendant is being questioned about unrelated offenses, but then makes unsolicited admissions pertaining to the offense for which the Sixth Amendment right has attached and been invoked? It is unlikely that those statements will be admissible even though the police or informant contends that the purpose of their efforts was to obtain incriminating statements pertaining to an unrelated crime. **Maine v. Moulton**, 474 U.S. 159, 106 S.Ct. 477 (1985).

In that case a co-defendant, while wired for sound with the cooperation of the police, obtained an incriminating statement from the defendant (while the defendant was out of custody so **Miranda** inapplicable) after his Sixth Amendment "right to counsel" had attached. The majority of the United States Supreme Court was not impressed with the police contention that the reason that they wired the co-defendant was not to obtain incriminating statements on the case for which the defendant had been arraigned but that they had received information that the defendant was going to try to kill a state's witness.

In **Moulton**, the only statements made pertained to the charged offense and the questions were asked in a meeting between the defendants where they were planning their defense strategy on the charged offenses. It is unclear whether the ruling would be different if the questions were about a totally unrelated offense and unsolicited admissions about the charged offense were made. The language in the opinion is broad and states that police may not use statements obtained under circumstances where they knew investigation of the other offense might elicit incriminating statements on the charged offense. However, the ruling may also be different if the statements, in and of themselves, constitute elements of a criminal offense. *See* **Honeycutt v. State**, 118 Nev. 660, 56 P.3d 362 (2002)(*overruled on unrelated issue by* Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005)[the suspect approached a fellow inmate and solicited the murder of a witness, inmate subsequently arranged meeting with undercover officer posing as contract killer.]

### 3. BEFRIENDING DEFENDANTS

The State may not use statements made by a defendant to jailhouse informants, undercover officers or other police agents who made friends with a defendant to get defendant to

open up and tell his "friend" what happened on the charged offenses. In **United States v. Henry**, 447 U.S. 264, 100 S.Ct. 2183 (1980), defendant was in custody charged with robbery. An attorney was representing defendant. FBI put informant in defendant's cell and told him to keep his ears open. Informant buddied up to the defendant by engaging him in general conversation. No questions were asked about the charged offenses, but defendant talked to the informant about his case as a result of the general conversations and formed "friendship." The Court ruled that this was interrogation designed to interfere with defendant's Sixth Amendment right to an attorney.

## 4. THE LISTENING POST

Even when a defendant's Sixth Amendment "right to an attorney" has attached and been invoked, law enforcement is not prohibited from placing an agent in defendant's cell to observe defendant's conversations. It is irrelevant that the police agent was placed with the intent of obtaining incriminating statements on charged offenses, so long as the agent does nothing to elicit incriminating statements from the defendant. *See* **Kuhlmann v. Wilson**, 477 U.S. 436, 106 S.Ct. 2616 (1986). That case stands for the proposition that if the jailhouse plant makes no effort to stimulate talk but simply listens then incriminating conversations pertaining to the charged crime overheard by the agent are admissible. In addition, the defendant has the burden of showing the agent was the person who stimulated the talk.

## 5. POLICE AGENTS DEFINED

Not every incident of a third party helping police will result in the third party being deemed a police agent under the Sixth Amendment Whether a person is a State agent is

determined based on the totality of the facts and circumstances of each case. **United States v. Taylor**, 800 F.2d 1012, 1015 (10th Cir.1986); **Simmons v. State**, 112 Nev. 91, 99, 912 P.2d 217, 221 (1996).

Factors that courts have considered include: 1) whether the State directed or steered the person to cozy up to or elicit information from the defendant; 2) whether there was an implied or express agreement for benefits in return for information; 3) whether the person had previously worked as an informant; 4) whether the person was currently working as an informant in other cases; 5) whether the defendant or the person initiated the contact; 6) whether State facilitated the contact, i.e. placed them together to obtain information; 7) whether the State had reason to know the person expected a benefit from the transaction. *See* **United States v. York**, 933 F.2d 1343 (7th Cir. 1991) (*overruled on other grounds by* Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999); **United States v. Henry**, 447 U.S. 264, 100 S.Ct. 2183 (1980); **United States v. Malik**, 680 F.2d 1162 (7th Cir. 1982)(although previously an informant, he was not acting in that capacity when he obtained the incriminating statements).

**Example**: **Simmons v. State**, 112 Nev. 91, 912 P.2d 217 (1996). The defendant, who was in custody and had an attorney, contacted his friend. Defendant wanted to set-up a phone conversation from the jail. Defendant was aware that jail calls could be monitored and intercepted. The friend contacted the police who arranged for a legal interception of the friend's phone. The friend was instructed not to elicit incriminating statements and to act only as a listening post. When the defendant called; the ensuing conversation was taped. At one point, despite the police instructions, the friend did ask a question that might produce an incriminating response.

The Court found that an agency did not exist for the following reasons: (1) the suspect had initiated the call; (2) the friend did not make any deal with the police; (3) the friend went to the police, rather than the police seeking out the friend. The Court then concluded the Sixth Amendment had not been violated.

## 6. COERCIVE QUESTIONING BY POLICE AGENTS

Because any statement must be voluntary, any action by a police agent that is considered coercive will affect the voluntariness and admissibility of a statement, even if the statement does not violate the Sixth Amendment. This includes improper promises, threats or any other coercive action designed to induce conversation. *See* Section II on Voluntariness. For that reason the investigator must be extremely careful on how he engages in questioning or the guidelines that he gives to a police agent. The case of **Arizona v. Fulminante**, 499 U.S. 279, 111 S.Ct 1246 (1991), discussed in the Voluntariness Section, is illustrative of this point.

Fulminante was serving a sentence on a weapons charge when rumors began to circulate at the prison that he had murdered a child. The Sixth Amendment was not implicated as to the murder. As a result, other inmates began mistreating Fulminante. A fellow inmate who was working as a government informer, befriended the defendant and offered him protection if he revealed the truth about the rumors. The defendant then revealed to his "friend" that he had killed his young step-daughter because he had been engaging her in sex and was afraid that she was going to go to the authorities. The United States Supreme Court, while admitting that the question was a close one, concluded that the confession was the product of coercion.

As is evident from this case, even the most innocuous statements can be made to appear threatening or coercive by the courts. While **Fulminante** was decided on Due Process grounds, it is repeated here to demonstrate why using agents requires careful planning by law enforcement officers so that their informants can avoid making statements to suspects that could later be construed as threats or perhaps even promises of leniency.

*See also* discussion in Section II(D)(9)(10) regarding third party questioning and police agents in the context of the Fifth Amendment.

## H. DEFENDANT'S CUSTODY STATUS IRRELEVANT (MASSIAH)

Unlike the Fifth Amendment, where a break in custody status allows police to initiate contact with a defendant even after **Miranda** "right to counsel" has been invoked, a change in custody status does not affect a defendant's Sixth Amendment right to an attorney. Law enforcement agents may not use undercover informants to initiate contact with an out-of-custody defendant and question him about charged offenses to which the Sixth Amendment has attached. **Massiah v. United States**, 377 U.S. 201, 84 S.Ct. 1199 (1964).

In **Massiah**, the defendant was charged, arrested and released. A co-defendant, turned informant, obtained a taped confession from Massiah. Confession was held inadmissible as a violation of Sixth Amendment right to counsel.

**Massiah** has also been cited to prohibit police from openly approaching a defendant after counsel has been invoked or obtained. However, in light of **Montejo v. Louisiana**, **Massiah** is limited to undercover situations or

situations where no valid advisement and waiver of the Sixth Amendment right to counsel occurred.

**Note:** A voluntary statement taken in violation of **Massiah** may still be used for impeachment purposes. **Kansas v. Ventris**, ___U.S.___, ___S.Ct.___(2009).

## I. CONSEQUENCES OF SIXTH AMENDMENT VIOLATION

If a statement is taken in violation of the Sixth Amendment, it is inadmissible in the prosecution's case-in-chief. However, it may be used to impeach a defendant who testifies. **Michigan v. Harvey**, 494 U.S. 344, 110 S.Ct. 1176 (1990). In that case, the United States Supreme Court extended the rationale of **Harris v. New York** (5th Amendment violations) to Sixth Amendment violations. So long as the statement is voluntary, it may be used for impeachment. The United States Supreme Court reaffirmed this concept in **Kansas v. Ventris**, ___U.S.___, ___S.Ct.___(2009). Whether it may be used in other circumstances, such as those discussed in Section II(I), involving the Fifth Amendment is undecided.

## V. PRE-TRIAL, MOTIONS, COURTROOM AND TRIAL ISSUES

### A. SUPPRESSION MOTIONS AND HEARINGS

#### 1. JACKSON V. DENNO HEARING

In **Jackson v. Denno**, 378 U.S. 368, 84 S.Ct. 1774 (1964), the Supreme Court set forth the procedure for suppression issues. Although phrased only on the issue of voluntariness, since that issue is present in every suppression

argument, the procedures apply equally to other issues involving Fifth, Sixth or Fourteen Amendment violations. The burden to ask for such a voluntariness hearing is on the defendant. *See* **Wilkins v. State**, 96 Nev. 367, 609 P.2d 309 (1980).

Once a defendant asks for a statement to be suppressed, the trial court will first determine if an evidentiary hearing is required. Evidentiary hearings are required whenever the factual allegations made by the defendant, if true, would warrant suppression of the statement. The hearing takes place outside the presence of the jury. At this hearing testimony is presented about what the suspect/defendant told the police and the circumstances under which the suspect made the statements. Then the judge decides, depending upon the grounds raised in the suppression motion: (1) whether **Miranda** or the Sixth Amendment were applicable; (2) whether **Miranda** or the Sixth Amendment were violated; (3) if no violations occurred, were the statements "voluntary" using the "totality of the circumstances test." A judge may also review whether there is any general due process reason for not admitting the statements. If the trial judge determines no violations occurred and the statement is voluntary, it is admissible.

## 2. TRIAL PROCEDURES

Nevada has adopted the "Massachusetts Rule" when the voluntariness of a statement is challenged. According to that rule, a judge makes the final ruling on any constitutional violations and a preliminary ruling on voluntariness. Final say on the voluntariness of a statement is left to the jury. The witness will testify regarding the circumstances under which the statement was made. **Carlson v. State**, 84 Nev. 534, 445 P.2d 157 (1968); **Grimaldi v. State**, 90 Nev. 83, 89, 518 P.2d 615 (1974). *See also* **Dawson v. State**, 108 Nev. 112, 825

P.2d 593 (1992). **Varner v. State**, 97 Nev. 486, 634 P.2d 1205 (1981).

The State must prove the statement was voluntarily made by a preponderance of evidence **Brimmage v. State**, 93 Nev. 434, 567 P.2d 54 (1977); **Falcon v. State**, 110 Nev. 530, 874 P.2d 772 (1994) and **Colorado v. Connelly**, 479 U.S. 157, 107 S.Ct. 515 (1986).

## a) VOLUNTARINESS JURY INSTRUCTION

In **Carlson**, the Nevada Supreme Court approved the following instruction on voluntariness:

> The fact that the court has admitted into evidence the alleged confession or admission of a defendant does not bind the jury to accept the court's conclusion; and the jury, before it may take a confession or admission into consideration, must for itself find whether or not it was a voluntary confession or admission. If the jury concludes that a confession or admission was not made voluntarily, it is the duty of the jury to entirely disregard the same and not consider it for any purpose.

An alternate version encompassing the State's burden of proof is set forth below:

> The fact that the court has admitted into evidence the alleged confession or admission of a defendant does not bind the jury to accept the court's conclusion; and the jury, before it may take a confession or admission into consideration, must determine for itself whether or not the confession or admission was made voluntarily. State has the burden of proving the

voluntariness of an admission or confession by a preponderance of the evidence. This means the jury must find the existence of the contested fact is more probable than its nonexistence.

Voluntariness is a question of fact to be determined from the totality of the circumstances on the will of the accused. An involuntary statement is one made under circumstances in which the accused clearly had no opportunity to exercise a free and unconstrained will. A voluntary confession must be the product of a rational intellect and a free will. If the jury concludes that a confession or admission was not made voluntarily, it is the duty of the jury to entirely disregard the same and not consider it for any purpose.

The jury never decides whether **Miranda**, the Sixth Amendment or some other Constitutional right was violated.

## B. COMPELLING OR OBTAINING PHYSICAL EVIDENCE/DEMONSTRATIONS FROM THE SUSPECT/DEFENDANT - IN OR OUT OF COURT

Compelling someone to speak, to write, to provide fingerprints, or to conduct themselves in a particular manner for the purpose of identification is not within the protection of the Fifth Amendment Self-Incrimination Clause. Obtaining physical evidence from a suspect such as blood, breath samples, hair samples, urine samples, fingerprints, voice samples, handwriting samples, and the like are also not protected by the self-incrimination clause. *See generally,* **Schmerber v. California**, 384. U.S. 757, 86 S.Ct. 1826

(1966); **South Dakota v. Neville**, 459 U.S. 553, 103 S.Ct. 916 (1983) (Breath Samples); **United States v. Mara**, 410 U.S. 19, 93 S.Ct. 774 (1973) (Handwriting); **United States v. Dionisio**, 410 U.S. 1, 93 S.Ct. 764 (1973) (Voice Exemplars); **McCharles v. State**, 99 Nev. 831, 673 P.2d 488 (1983) (Blood or Breath); **State v. Smith**, (Nev. 1989) supra., (Breath Test); **United States v. Holland**, 378 F.Supp 144 (D.C.Pa.1974) (Dental Exam), **Scott v. State**, 83 Nev. 468, 434 P.2d 435 (1967) (fingerprints).

## 1. OUT-OF-COURT LINE-UPS AND OTHER PARTICIPATIONS

Similarly, compelling a suspect to appear before a potential witness for identification purposes or to wear distinctive clothing or other apparel for viewing by witnesses are actions not within the protection of the Fifth Amendment. *See generally*, **United States v. Wade**, 388 U.S. 218, 87 S.Ct. 1926 (1967); **Holt v. United States**, 218 U.S. 245, 31 S.Ct. 2 (1910).

## 2. IN-COURT - UNWILLING OR RELUCTANT PARTICIPATION BY ACCUSED AT TRIAL

Initially it should be pointed out that an accused does not have a right to be tried in absentia. *See* **United States v. Moore**, 466 F.2d 547 (3rd Cir. 1972). In addition, the prosecution may be permitted to require the accused to participate in the presentation of the State's case. Such participation is normally for the purpose of identification such as exhibiting certain identifying characteristics or requiring the accused to put on certain disguise, an article of clothing, to speak or even to shave or not shave. See **Burnett v. Collins**, 982 F.2d 922 (5th Cir. 1993) (holding that requiring a defendant to participate in a voice exemplar did not violate

his right against self-incrimination): **United States v. Zammiello**, 432 F.2d 72 (9th Cir 1970) (requiring a defendant to stand in court for the purpose of identification was not a violation of Fifth Amendment rights); **Jacobs v. State**, 91 Nev. 155, 532 P.2d 1034 (1975) (requiring a defendant to bare tattoo in court was not a violation); **McCray v. State**, 85 Nev. 597, 460 P.2d 160 (1969) (requiring a defendant to wear the clothing he was arrested in before the jury did not violate his Fifth Amendment right); **Morgan v. State**, 558 A.2d 1226 (Md. App. 1989) (requiring a defendant to try on a coat which contained cocaine at the time of the search warrant execution was not a violation of his rights). *See also*, **Joseph Cook, Constitutional Rights of the Accused**, 2nd Ed., The Lawyers Cooperative Publishing Co., and Bancroft Whitney Co., 1986. Compelling a defendant to speak certain words or phrases and/or to provide a voice exemplar in the presence of the jury is not a 5th Amendment violation. **United States v. Peters**, 687 F.2d 1295 (10th Cir. 1982).

## C. COMMENT ON DEFENDANT'S SILENCE (POST AND PRE-MIRANDA SILENCE)

**NOTE: This is an area where officers and prosecutors create problems at trial**

### 1. DOYLE ERROR

As a general rule of law, after the defendant has been informed of his right to remain silent, he should not have his silence later used against him as an implied admission of guilt. **Doyle v. Ohio**, 426 U.S. 610, 96 S.Ct. 2240 (1976). **Bernier v. State**, 96 Nev. 670, 614 P.2d 1079 (1980) (error to cross examine defendant on his failure to advise police that he had alibi witnesses or other defense witnesses and likewise error to comment on defendant's failure to testify at the

preliminary hearing); **Mahar v. State**, 102 Nev. 488, 602 P.2d 189 (1986) (error to comment in argument and to cross examine defendant on post **Miranda** silence); **Aesoph v. State**, 102 Nev. 316, 721 P.2d 379 (1986), **Neal v. State**, 106 Nev. 23, 787 P.2d 764 (1990); **Washington v. State**, 112 Nev. 1054, 921 P.2d 1253 (1996).

**Doyle** applies to *post-Miranda* silence. However the Nevada Supreme Court has extended the rule in **Doyle** by prohibiting a prosecutor from commenting on a defendant's *post-arrest silence*. **Coleman v. State**, 111 Nev. 657, 895 P.2d 653 (1995); **Washington v. State**, 112 Nev. 1054, 921 P.2d 1253 (1996), **Morris v. State**, 112 Nev. 260, 913 P.2d 1264 (1996); **Angle v. State**, 113 Nev. 757, 942 P.2d 177 (1997).

*Doyle Error* applies to the following State conduct:

1. Eliciting testimony that the defendant said nothing after arrest, never told his trial story to the police or anyone else.

2. Volunteered testimony regarding silence – police officer says *Miranda Warning* given and defendant said nothing.

3. Arguments that this is the first time defendant has told the story, never heard this defense before, etc.

**Doyle** does not apply to impeaching/cross-examining/commenting on **pre-arrest** silence when defendant takes the stand. **Jenkins v. Anderson**, 477 U.S. 231, 100 S.Ct. 2124 (1980); **Dettloff v. State**, 120 Nev. 588, 97 P.3d 586 (2005)(citing **Jenkins**); *see also* **Angle v. State**, 113 Nev. 757, 763 n. 2, 942 P.2d 177, 181 n. 2 (1997) (prosecutor's remark regarding defendant's pre-arrest silence

was proper); **Murray v. State**, 113 Nev. 11, 17 n. 1, 930 P.2d 121, 125 n. 1 (1997) (prosecutor's comment on defendant's pre-arrest silence was not improper). In **Jenkins**, the prosecutor, during cross-examination, was permitted to question the defendant concerning his failure, prior to his arrest, to report the incident and offer his exculpatory story to the police. The United States Supreme Court found no error.

In addition, **Doyle** does not prohibit asking a witness about conversations they had with a defendant and what they were told or asking a defendant who testified if he talked to people about the case and what he told those people. The State may then comment that the story presented at trial is different than the story the defendant gave to other people. Finally, if defendant waived **Miranda** (or **Miranda** was inapplicable) and made a statement, the State may cross-examine the defendant and point out that the statement made after waiver differs from the statement in court or make a comment on that fact in argument.

*See also* **United States v. Velarde – Gomez**, 269 F.3d 1023 (9th Cir 2001) (a subsequent waiver of *Miranda Rights* does not render admissible any comment on the defendant's pre-waiver silence).

**Example # 1**: **McCraney v. State**, 110 Nev. 250, 871 P.2d 922 (1994). Defendant was arrested for the killing of Kinnie and Tony Poole. Following his arrest, he was read his rights pursuant to **Miranda** but chose to remain silent. Testimony produced by the prosecution demonstrated that the defendant had killed both victims and was the sole shooter. When the defendant took the witness stand he testified that his brother had taken the gun from him and had fired the fatal shots. This was the first time that the defendant made this or any other statement. The prosecution asked why he failed to say something sooner or told anyone this story earlier. The State

also asked why he did not tell this to the police. The Supreme Court reversed the conviction ruling that this cross-examination as well as similar comments in closing argument was reversible error.

**Example # 2**: **Washington v. State**, 112 Nev. 1054, 921 P.2d 1253 (1996). The prosecutor asked the following question during cross examination, "From the time you had your *Miranda Rights* read to you till today have you ever told the police officer or someone in authority your story?" Held: question was an improper comment on right to silence.

**Example # 3**: **Murray v. State**, 105 Nev. 579, 781 P.2d 288 (1989). Prosecutor argued that defendant's story might appear credible because he was able to review all reports, sit silently, listen to all of the testimony and then relay his account for the first time. Held: Improper comment under **Doyle**, case reversed.

**NOTE:** **Murray** was decided before the United States Supreme Court decided **Portuondo v. Agard**, 529 U.S. 61, 120 S.Ct. 1119 (2000). In **Portuondo**, the High Court held that if the defendant takes the stand, it is not a **Doyle** or **Griffin** error to comment on defendant's credibility by noting defendant had the opportunity to listen to the State's testimony before testifying himself. Because the Nevada Supreme Court was relying on federal law in **Murray**, the holding in **Portuondo** may affect the future validity of **Murray**.

## 2. ADVISING THE JURY THAT DEFENDANT INVOKED HIS MIRANDA RIGHTS

Related to **Doyle** error is the situation where the prosecutor elicits from a police witness at trial the fact that the defendant had been advised of his **Miranda** Rights but "asked for a lawyer" or "said he did not wish to speak". On other occasions, a police witness will volunteer this information without being directly asked by the prosecutor. In either event, this is may create reversible error. See **Aesoph v. State**, 102 Nev. 316, 721 P.2d 379 (1986); **Wainwright v. Greenfield**, 474 U.S. 284, 106 S.Ct. 634 (1986) (holding that it was error to use defendant's request for an attorney, or, to remain silent as proof of sanity).

**Example # 3:** **Diomampo v. State**, ___Nev.___, 185 P.3d 1031 (2008). Prosecutor asked police officer if defendant indicated he understood his *Miranda Rights* and then asked if defendant said anything after that. Held: **Doyle** type error and case reversed.

**Example # 4**: **Sampson v. State**, 121 Nev. 820, 122 P.3d 1255 (2005). State asked officer what he did when he arrived at the scene and if he made contact with the defendant. In response, the officer indicated the defendant was in a patrol car when he arrived and he did not make contact because defendant had invoked right to silence and attorney. Held: the State was not soliciting the information and did not expect that answer based upon police reports. The improper comment was unsolicited and a passing reference therefore it was harmless beyond a reasonable doubt.

## 3. APPELLANT STANDARD - HARMLESS BEYOND A REASONABLE DOUBT

The United States Supreme Court has indicated that a **Doyle** or related error will result in reversal of a conviction unless the reviewing court can say that the error is harmless beyond a reasonable doubt. **United States v. Hasting**, 461 U.S. 499, 510, 103 S.Ct. 1974 (1983); **United States v. Bushyhead**, 270 F.3d 905, 911 (9th Cir. 2001); **Sampson v. State**, 121 Nev. 820, 122 P.3d 1255 (2005). The Nevada Supreme Court looks at whether the information presented to the jury about post-arrest silence or related issues was a "mere passing reference" and whether the evidence of guilt was overwhelming. **Id**.

**Example #** 1: **Lingren v. Lane**, 925 F.2d 198 (7th Cir. 1991). Officer testified that the defendant stated that "he had been out fishing all night, that he purchased a fishing license and at that point he didn't wish to say anymore." Held: harmless error.

**Example # 2**: **Deutscher v. State**, 95 Nev. 669, 601 P.2d 407 (1979). Detective testified concerning a red stained fifty dollar bill found in the defendant's possession and after displaying same to defendant, that the defendant refused comment on the source of the stains. Held: harmless error.

## 4. POST-ARREST SILENCE – FEDERAL PROSECUTION RULE

As noted above, Nevada does not follow federal law on the ability to impeach a defendant on the witness stand with post-arrest/*pre-Miranda* silence. However, because officers or prosecutors using this Manual may also have cases in federal courts, the federal rule is discussed here.

**Remember this rule does not apply to State court prosecutions.**

A prosecutor may, if the defendant testifies, cross-examine him about why, after arrest but prior to *Miranda*, he did not tell his current story to police. **Fletcher v. Weir**, 455 U.S. 603, 102 S.Ct. 1309 (1982). In **Fletcher**, the United States Supreme Court used the same rationale employed in **Jenkins**, to permit such questioning. At his trial, the defendant claimed self defense whereupon the prosecutor, in cross-examination, inquired as to why he had failed to give that explanation to the arresting officer and why he had failed to disclose the location of the knife he had used to stab the victim. Such cross-examination was ruled to be permissible even though it was a comment on defendant's silence since the defendant had not been given his **Miranda** Warnings and the defendant chose to testify on his own behalf.

In **Brecht v. Abrahamson**, 507 U.S. 619, 113 S.Ct. 1710 (1993), the defendant was charged and convicted of murder. When the defendant testified on his own behalf at his jury trial, he claimed for the very first time that the shooting had been an accident. The prosecutor impeached the defendant's testimony by pointing out to the jury that the defendant had failed to tell anyone this version of the events before he received his *Miranda Warnings*. The United States Supreme Court held that this was proper comment and proper impeachment by the prosecutor.

## 5. PRE-ARREST SILENCE (CASE-IN-CHIEF)

The above cases dealt with impeachment when the defendant had taken the stand. The questions or comments on silence went to the credibility of defendant's trial testimony. However, the law changes when evidence of pre-arrest silence or refusal to talk to police is admitted in the prosecution's case-in-chief as consciousness of guilt.

There is a split of opinion in the Federal Circuit Courts in this area. Some courts have found this violates a defendant's Fifth Amendment right against self-incrimination. These courts conclude a citizen's right against self-incrimination includes pre-arrest investigation, particularly because there is no duty to voluntarily speak to police. They reason this is akin to a comment on defendant's failure to testify under **Griffin v. California**, 380 U.S. 609, 85 S.Ct. 1229 (1965). The First, Second, Sixth, Seventh and Tenth Circuits fall in this category.

The Fifth and Eleventh Circuits have rejected this view, finding the use of pre-arrest silence in the face of police questions or conduct that would arguably generate some comment does not violate **Griffin** or **Doyle**. These court rely on the concurring opinion of Justice Stevens in **Jenkins v. Anderson**, 447 U.S. 231, 240-243, 100 S.Ct. 2124, 2132, where Justice Stevens indicated the Fifth Amendment applies only to situations where a person might feel compelled to speak. However, **Jenkins** involved a situation where defendant stabbed the victim and was not immediately apprehended or questioned. He waited two weeks and then approached the police claiming self-defense. Justice Stevens concluded the Fifth Amendment did not apply to the two week period and his failure to report sooner was the proper subject of impeachment and rebuttal. He also said that although a citizen has no duty to report a crime, nothing in the Fifth Amendment prohibits a reasonable inference of guilt from silence in circumstances where an ordinary citizen would speak out. Unfortunately, Justice Stevens also talked about the case in light of the fact the silence occurred before any police contact. **Id**.

Finally, the Ninth Circuit has cited the Fifth and Eleventh Circuit cases in support of the proposition that pre-arrest, pre-*Miranda* silence is admissible as substantive evidence in the prosecution's case-in-chief. **United States v.**

**Oplinger**, 150 F.3d 1061, 1066-1067 (Cir. 9th 1998). However, **Oplinger** did not involve silence in the face of a pre-arrest police investigation, conduct or questions. The defendant was being questioned by his employer about his role in defrauding the employer. His silence, and a statement of "I don't know" in the face of the allegations, was admitted. **Id**. And, although the Court also cites to Justice Stevens' concurrence in **Jenkins**, it specifically highlighted that portion of the concurrence that references silence before contact with police. The issue is further confused because the Ninth Circuit further stated it was rejecting the **Griffin** rationale and refusing to follow the First, Seventh and Tenth Circuits, but then noted they all involved silence in the face of pre-arrest police questioning or conduct. **Id**. Thus it is unclear how the Ninth Circuit would rule in a situation where a defendant refused to respond to pre-arrest investigation questions by police or silence in the face of pre-arrest police conduct that would reasonably solicit some response from an ordinary citizen.

Regardless of the split, nothing in the authorities prohibits the use of silence as an adoptive admission when it relates to non-governmental questions or conduct. *See* **United States v. Oplinger**, 150 F.3d 1061, 1066-1067 (9th Cir. 1998); **United States v. Nabors**, 707 F.2d 1294, 1298-1299 (11th Cir. 1983) (defendant failed to respond to request by insurance company regarding his use and damage of aircraft which contained marijuana and methaqualone - court held that actions of a defendant which are inconsistent with innocence are admissible without regard to The Fifth Amendment privilege).

## a) AUTHORITIES PROHIBITING PRE-ARREST SILENCE EVIDENCE

The following Circuit cases prohibit evidence of pre-arrest silence to be used in a prosecutor's case in chief: **Combo v. Coyle**, 205 F.3d 269 (6th Cir. 2000)(error to admit pre-arrest response to question by police -"talk to my lawyer"); **United States v. Burson**, 952 F.2d 1196, 1200-1201 (10th Cir. 1991) (I.R.S. criminal investigators testified at trial that defendant would not answer questions during a pre-arrest, non-custodial interrogation; **Coppola v. Powell**, 878 F.2d 1562, 1564-1568 (1st Cir. 1989) (police testified that they asked accused whether he would be willing to talk with them about a rape, accused replied "Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy." - Court held defendant's constitutional rights were violated by the use of the statement in the prosecutor's case in chief); **United States Ex. Rel. Savory v. Lane**, 832 F.2d 1011, 1016-1017 (7th Cir. 1987) (State presented evidence that prior to arrest defendant refused to talk to police - court held that **Griffin** applied equally to a defendant's silence before trial and even before arrest); **United States v. Caro**, 637 F.2d 869, 874-876 (2nd Cir. 1981) (In argument the prosecutor referred to defendant's silence when custom inspectors started to cut a hole in his suitcase filled with counterfeit money.).

## b) AUTHORITIES PERMITTING PRE-ARREST SILENCE EVIDENCE

Two circuits do permit a prosecutor, in his case in chief, to comment on a defendant's pre-arrest silence in the face of police questioning or conduct: **United States v. Zanabria**, 74 F.3d 590, 593 (5th Cir. 1996) (customs officer

testified that prior to arrest defendant said nothing about threats against daughter and his need for help, which was his trial assertion); **United States v. Rivera**, 944 F.2d 1563, 167-1568 (11th Cir. 1991) (defendant was expressionless and did not protest when inspectors broke into suitcase and discovered cocaine - government may comment on a defendant's silence if it occurred prior to arrest and prior to *Miranda Warnings* although it is not proper for government to ask the jury to draw a direct inference of guilt from silence);

These cases cite Justice Stevens' concurrence in **Jenkins** and extend **Jenkins** beyond impeachment and rebuttal to include the use of pre-arrest silence in the State's case-in-chief.

## 6. COMMENT ON DEFENDANT'S SILENCE AFTER WAIVER OF MIRANDA

Generally, the prosecution is forbidden to comment at trial upon a defendant's election to remain silent following his arrest and after being advised of his *Miranda Rights*. **Murray v. State**, 113 Nev. 11, 930 P.2d 121 (1997). However, if a suspect waives **Miranda** and gives a statement, then a prosecutor may present evidence of silence in the face of police evidence that contradicts the statement.

Although the United States Supreme Court has not addressed this issue, the Eighth Circuit and the Nevada Supreme Court have found such evidence and comment upon it does not constitute a **Doyle** violation. In **United States v. Mitchell**, 558 F.2d 1332 (8th Cir. 1977), the Eighth Circuit ruled testimony about defendant's silence admissible where the defendant, after waiving **Miranda**, provided an exculpatory statement to the police and when faced with evidence contradicting his statement remained silent. See also **Santillanes v. State**, 104 Nev. 699, 765 P.2d 1147

(1988)(After waiving **Miranda**, suspect agreed to meet with police. Suspect canceled two appoints and then went to Mexico. Use of cancellations as evidence of guilt permitted.) Although not directly on point, see **Quillen v. State**, 112 Nev. 1369, 929 P.2d 893 (1996).

## D. COMMENT ON DEFENDANT'S FAILURE TO TESTIFY

Reference by the prosecutor to the defendant's failure to testify is a violation of the Fifth Amendment to the United States Constitution. **Griffin v. California**, 380 U.S. 609 (1965), **Harkness v. State**, 107 Nev. 800, 820 P.2d 759 (1991). However, when a defendant, through cross-examination or defense testimony, presents a theory of the case, a prosecutor may comment on the failure of the *defense* as opposed to the *defendant* to counter or explain the testimony presented or evidence introduced without violating **Griffin**. **United States v. Lopez-Alvarez**, 970 F.2d 583, 596 (9th Cir. 1992). *See also* **Evans v. State**, 117 Nev. 609, 28 P.3d 4498 (2001); **Knight v. State**, 116 Nev. 140, 993 P.2d 67 (2000).

Finally, a direct reference to a defendant's decision not to testify is always a violation of the Fifth Amendment. When a reference is indirect, the test for determining whether prosecutorial comment constitutes a constitutionally impermissible reference to a defendant's failure to testify is whether "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." **United States v. Lyon**, 397 F.2d 505, 509 (7th Cir.), *cert. denied sub nom.* **McNelton v. State**, 111 Nev. 900, 904, 900 P.2d 934, 936 (1995); **Rippo v. State**, 113 Nev. 1239, 1254-1254, 946 P.2d 1017, 1026-1027 (1997); **United States v. Ursery**, 109 F.3d 1129 (6th Cir. 1997). . The standard for

determining whether such remarks are prejudicial is whether the error is harmless beyond a reasonable doubt under **Chapman v. California**, 386 U.S. 18, 21-24, 87 S.Ct. 824, 826-28 (1967). **McNelton**, at 904.

**CAUTION**: While such comments may not violate **Griffin**, prosecutors must also ensure they do not violate the rules regarding shifting the burden of proof. In the above case, the prosecutor was using "defense" to mean the theory of defense, not the defendant or counsel. See Section V(I).

## E. COMMENT ON DEFENDANT'S REFUSAL TO TAKE BLOOD, URINE OR BREATH TEST

The Court in **State v. Smith**, 105 Nev. 293, 774 P.2d 1037 (1989, additionally upheld the right of the prosecutor to comment at trial on the defendant's refusal to submit to a presumptive test citing **NRS 484.389 (1)**. *See also*, **South Dakota v. Neville**, 459 U.S. 459 U.S. 553, 103 S.Ct. 916 (1983), (admission into evidence of defendant's refusal to submit a chemical test did not violate Fifth Amendment). In accord with **Smith** is **State v. Harris**, 525 N.W.2d 334 (Wis. 1994); **State v. Lozano**, 882 P.2d 1191 (Wash. 1994).

## F. RULES NOT APPLICABLE TO DEFENSE WITNESSES SUCH AS ALIBI WITNESSES

**Doyle** and **Griffin** do not prohibit full and complete cross examination of defense witnesses, including alibi witnesses, about their failure to provide the exculpatory information to the police or others at an earlier time. While a witness has no legal duty to cooperate with the police, this does not alter the fact that the witness' motives and biases are relevant. Thus, it is proper to make inquiry of an alibi witness why the witness had not contacted the police before

the trial as it pertained to the alibi. See **State v. Brown**, 395 P.2d 727 (Utah 1964); **King v. State**, 748 P.2d 531 (Okla. Cr. 1988); and generally, **Wigmore On Evidence** 3rd. Ed. Sec. 1042(3). The argument for admissibility generally is whether it would have been natural for the person to contact the police or the proper authorities. If so, the fact that the witness remained silent bears on the witness' credibility and/or bias.

## G. INVITED ERROR

In **United States v. Robinson**, 485 U.S. 25, 108 S.Ct. 864 (1987) the Supreme Court held that it was permissible for the prosecutor, in rebuttal summation, to advise the jury that the defendant could have testified had he chosen to tell "his story" to rebut defense attorney's argument that the D.A. had "not allowed the defendant to tell his side of the story". The Invited Error Doctrine is extremely narrow and only allows the prosecutor to avoid an allegation of prosecutorial misconduct where the prosecutor is responding to specific conduct of the defense and not one bit beyond. The Nevada Supreme Court takes a dim view of the Invited Error Doctrine as a justification for committing what would otherwise be misconduct.

## H. IMPEACHMENT INVOLVING PARTIAL SUSPECT STATEMENT

When a suspect, either before or after his *Miranda Warnings*, gives a partial statement, then the prosecutor may admit it and comment on it; that is the statement is inconsistent with the defense presented at trial. A prosecutor may also impeach the defendant by asking why he didn't give his trial testimony information to the police when he made the partial statement. **Anderson v. Charles**, 447 U.S. 404, 100 S.Ct. 2180 (1980).

In **Anderson** the defendant was charged with murder after being detained in a stolen car. He told the arresting officers, after **Miranda**, that he stole the automobile from one location, however, at trial he stated that he took the automobile from a different location. The prosecutor was permitted to ask the defendant why, if his trial testimony was the truth, he did not tell anyone that story at the time of his arrest. The Supreme Court held that **Doyle** does not apply to cross-examination that merely inquires into prior inconsistent statements. Citing **Doyle v. Ohio**, 426 U.S. 610, 96 S.Ct. 2240 (1976).

In **Quillen v. State**, 112 Nev. 1369, 929 P.2d 893 (1996), the Nevada Supreme Court cited with approval the United States Supreme Court case of **Anderson v. Charles**. The court held that there is not a Doyle violation in situations where the district attorney goes into post-arrest statements after the defense has opened the door by eliciting testimony regarding exculpatory statements made by the defendant after his arrest.

## I. PROSECUTOR COMMENTING ON DEFENDANT'S FAILURE TO CALL CERTAIN WITNESSES – BURDEN SHIFTING

Generally, a prosecutor's comment on the defense's failure to call a witness impermissibly shifts the burden of proof to the defense. *See* **Whitney v. State**, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996); **Ross v. State**, 106 Nev. 924, 803 P.2d 1104 (1990) (ruled to be improper even where the defendant had put on a case); **Colley v. State**, 98 Nev. 14, 639 P.2d 530 (1982). However, as noted above, a prosecutor can comment that the evidence at trial does not support the defense theory. **United States v. Lopez-Alvarez**, 970 F.2d 583, 596 (9th Cir. 1992).

**Example # 1**: **Franco v. State**, 109 Nev. 1229, 866 P.2d 247 (1993). The Nevada Supreme Court reversed the defendant's conviction for murder and held that it was misconduct for the D.A. to comment on the defendant's failure to call his wife as a witness. (This was also an improper comment on the invocation of the spousal privilege.)

**Example # 2**: **Sonner v. State**, 112 Nev. 1328, 930 P.2d 707 (1996). The Nevada Supreme Court addressed the propriety of a prosecutor's comment during closing argument on the defendant's failure to call his mother as a witness. In **Sonner**, the defense attorney had told the jury, during opening statement, that it intended to call the defendant's mother. The prosecution was, therefore, commenting on the defendant's "unfulfilled promise" made in the opening statement. Although the Supreme Court hinted that this may be error on the part of the prosecutor, it avoided addressing the issue directly.

**Example # 3**: **Washington v. State**, 112 Nev. 1054, 921 P.2d 1253 (1996). The defendant mentioned three witnesses in his testimony who would allegedly support his story. None of the witnesses testified. During closing arguments the prosecutor rhetorically asked why the defendant had failed to call those witnesses. This, according to the court, was error because it "shifted the burden of proof to Washington and may have misled the jury into believing that Washington had a burden to prove his innocence."

**Example # 4**: **Rippo v. State**, 113 Nev. 1239, 946 P.2d 1017 (1997). Again the District Attorney commented on the defense's failure to present witnesses to support the defense that someone else committed the murders. "You haven't heard any witness . . . say Mike Beudoin told me he did it or that Tom Simms told he did it." Due to overwhelming

evidence of guilt this "burden shifting" by commenting on defense's failure to call a witness was deemed harmless.

**Example # 5**: **Evans v. State**, 117 Nev. 609, 639, 28 P.3d 498, 513 (2001). In responding to defense counsel's argument that other persons might have committed the murders, the prosecutor asked, "where's the evidence?" The Nevada Supreme Court held, citing to **Lopez-Alvarez**, that Evans injected the theory that someone else had committed the murders into the trial and the prosecutor's remarks did not comment that defense called no witness to support the theory, rather the argument was that the evidence presented did not support such a theory.

## J. DEFENDANT'S PRIOR TESTIMONY IS ADMISSIBLE AT A NEW TRIAL

Once a defendant has waived his 5th Amendment right by testifying in a prior proceeding, whether trial, grand jury or preliminary hearing, that testimony can be published and used by the prosecutor in its case in chief upon trial or re-trial of the case. See **Turner v. State**, 98 Nev. 103, 641 P.2d 1062 (1982) **Brown v. United States**, 356 U.S. 148, 78 S.Ct. 622 (1958); **Harrison v. United States**, 392 U.S. 219, 88 S.Ct. 2008, 2010 (1968). See **United States v. Duchi**, 944 F.2d 391 (8th Cir. 1991); **Nessman v. Sumpter**, 615 P.2d 522 (Wash. App. 1980).

## K. BRUTON AND RELATED ISSUES

In **Bruton v. United States**, 391 U.S. 123, 88 S.Ct. 1620 (1968), the court held that the confession of a non-testifying co-defendant may not be introduced at a joint trial if it implicates the other defendant. A limiting instruction will not cure the defect. See **Davies v. State**, 95 Nev. 553, 598 P.2d 636 (1979); the harmless error rule can apply, see **Corbin v. State**, 97 Nev. 245, 627 P.2d 862 (1981).

## 1. INTERLOCKING CONFESSIONS

In **Cruz v. New York**, 481 U.S. 186, 107 S.Ct. 1714 (1987), the court extended the *Bruton Rule* to apply to interlocking confessions. Therefore, even if the non-testifying co-defendant's confession incriminates himself as well as the other defendant, the confrontation clause bars the introduction of the non-testifying co-defendant's confession. A severance is normally required to resolve the issue. *See* **Crawford v. Washington**, 541 U.S. 36, 124 S.Ct. 1354 (2004) (reaffirming the holding in **Cruz**).

## 2. BRUTON NOT APPLICABLE WHEN STATEMENT IS NON-HEARSAY: CO-CONSPIRATOR STATEMENTS AND ADOPTIVE ADMISSIONS

The rule in **Bruton** comes about as a result of the confrontation clause and therefore is specifically limited to hearsay which is inadmissible under traditional Rules of Evidence. If the statement is, therefore, admissible as a co-conspirator exception to the hearsay rule then **Bruton** is not applicable. See **United States v. Kendricks**, 623 F.2d 1165 (6th Cir. 1980); **United States v. Coco**, 926 F.2d 767 (8th Cir. 1991); in Nevada, see **Barker v. State**, 95 Nev. 309, 594 P.2d 719 (1979). The same rule would apply if the statement were admissible as an adoptive admission under NRS 51.035(3)(a)(b). See **Maginnis v. State**, 93 Nev. 173, 561 P.2d 922 (1977).

But bare in mind the holding **Crawford**, *supra*, when evaluating the admissibility of an out-of-court statement. In **Crawford**, the court held that "testimonial" statements are no longer admissible unless the witness was subjected to cross-

examination or testifies in court. **Crawford**, 541 U.S. 36, 124 S.Ct. 1354 (2004). So a co-conspirator statement or adoptive admission must also be "non-testimonial" under **Crawford**.

## 3. REDACTED CONFESSION

To avoid **Bruton** problems without severing co-defendant's trials, some jurisdictions permit a co-defendant's confession to be admitted if it can be redacted so that it does not implicate the remaining defendants.

The United States Supreme Court in **Richardson v. Marsh**, 481 U.S. 200, 107 S.Ct. 1702 (1987) approved the procedure of redacting a co-defendant's confession "to eliminate not only the defendant's name, but any reference to her existence. Subsequently in **Gray v. Maryland**, 523 U.S. 185, 118 S.Ct. 1151 (1998) the Supreme Court indicated that a redaction must also not reference the defendant by implication. The Ninth Circuit and Nevada Supreme Court have both indicated this means more than using neutral pronouns, a redacted statement that references other accomplices still presents a problem if the only inference to be drawn is that the second person is the defendant. See **United States v. Parks**, 285 F.3d 1133 (9th Cir. 2002); **Stevens v. State**, 97 Nev. 443, 634 P.2d 662 (1981).

In **Stevens**, the defendant's name was blanked out and a neutral pronoun was used when referring to the accomplice. However the Nevada Supreme Court stated that "it appeared likely that the jury read the appellant's name into the blanks in each one of Oliver's statements introduced at the trial below." The Court concluded that, given the other evidence in the case, the jury would still know that defendant was the accomplice referred to in the redacted statement.

The Ninth Circuit said in **Parks**, that no Confrontation Clause violation occurs when the confession is redacted to

eliminate not only the defendant's name, but any reference to his or her existence. **Parks**, 285 F.3d at 1138.

*See also* **People v. Fletcher**, 30 Cal. App. 4th 687, 36 Cal.Rptr.2d 177 (1994), rehearing 891 P.2d 803; **State v. Rakestraw**, 871 P.2d 1274 (Kan. 1994)(conviction was reversed where the effect of redacting a co-defendant's statement distorted the meaning of the defendant's statement resulting in appearance that he confessed to additional actions).

In **Ducksworth v. State**, 113 Nev. 757, 942 P.2d 177 (1997), the co-defendant's conviction was overturned because the court concluded that the jury "inevitably" inferred that the co-defendant was the unnamed accomplice referred to in Ducksworth's confession.

If a statement is admitted erroneously, it is subject to a harmless beyond a reasonable doubt analysis. **Laboa v. Calderon**, 224 F.3d 972 (9th Cir. 2000).

## L. PRIVILEGE AGAINST SELF INCRIMINATION APPLIES THROUGH SENTENCING ON GUILTY PLEA

A plea of guilty acts as a waiver of self-incrimination after sentencing. Until then, the plea only constitutes a limited waiver relating to the plea canvass. Once a judgment has been entered, the waiver becomes complete as to that crime even while an appeal is pending. *See generally* **Mitchell v. United States**, 526 U.S. 314, 119 S.Ct. 1307 (1999).

## M. CONVICTION UPON TRIAL; CONTINUED FIFTH AMENDMENT PRIVILEGE UNTIL CONVICTION AFFIRMED ON APPEAL

The majority rule appears to be that the Fifth Amendment right not to testify pertaining to events for which a person has been convicted upon trial continues until the time for appeal has expired or until the conviction has been affirmed on appeal. See **United States v. Duchi**, 944 F.2d 391, 394 (8th Cir. 1991). The **Duchi** court concedes that there is a split in authority and cites some cases at page 394. In accord with the **Duchi** court is **Ottomano v. United States**, 468 F.2d 269 (1st Cir. 1992); **State v. Crislip**, 796 P.2d 1108 (N.M. App. 1990).

## N. WITNESS INVOKING THE 5TH AMENDMENT BEFORE THE JURY

Is it error for the prosecution to call a witness that the prosecutor knows will invoke his Fifth Amendment? What procedure should be followed if, during questioning, a witness invokes their Fifth Amendment right?

The Nevada Supreme Court in **Ducksworth v. State**, 113 Nev. 780, 942 P.2d 157 (1997) suggests that it is not error to call such a witness even if the prosecutor believes that the witness will invoke the Fifth Amendment so long as that witness has pertinent and relevant testimony, assuming that the Fifth were not invoked. **Ducksworth** relied upon **United States v. Compton**, 365 F.2d 1 (6th Cir. 1966). The State is not required to believe the witness will actually invoke or that the witness has a valid basis for invoking.

However, when the State knows a witness will invoke and has a valid basis for doing so, the State may not call the witness and then ask a question that creates incriminating

inferences. For example, asking a witness "You assisted the defendant in robbing the liquor store?"

Once the witness invokes his Fifth Amendment privilege, no further questioning may occur. If the trial court or the parties want explore whether the privilege is being properly asserted, this should take place outside the presence of the jury. **Silva v. State**, 113 Nev. 1365, 951 P.2d 591 (1997).

Nor may the State admit the witness' testimony through other means that deprive the defendant of his Sixth Amendment right to confrontation. For example, the State could not ask the witness a series of questions based on a prior statement and have the witness respond with an invocation. **Douglas v. Alabama**, 380 U.S. 415, 85 S.Ct. 1074 (1965).

However, the State is not prohibited from introducing previous testimony of a witness who has invoked at trial if the opportunity for cross-examination was available at the previous proceeding. In **Thomas v. State**, 114 Nev. 1127, 965 P2d 111 (1998), a witness invoked his Fifth Amendment privilege at trial. The witness previously testified at a preliminary hearing. The Nevada Supreme Court held that the witness was "unavailable" and therefore the prosecution could publish for the jury the testimony given at the preliminary hearing. *See* **NRS 51.055, 51.325** and **171.198**.

## O. WITNESS INVOKES FIFTH OUTSIDE JURY'S PRESENCE

The Nevada cases in this area are **Foss v. State**, 92 Nev. 163, 547 P.2d 688 (1976); **Eckert v. State**, 96 Nev. 96, 605 P.2d 617 (1980). When the witness invokes in this situation, the trial court will generally determine if the invocation is proper. If so, then the witness will be excused. The question then arises whether the jury should be informed of this fact. The prosecution (or for that matter the defense, if

it was a defense witness) may want the jury to know why the witness was not called. For example, the witness may have been mentioned in an opening statement before the attorney knew of the privilege problem. Or the attorney knows the witness' name will come up from other testimony.

In **Foss**, the Nevada Supreme Court suggested that an instruction to the following effect be given:

> "through no fault of either the state or the defendant, witness X was not available to testify. You are not to consider this witness' non-appearance in any way as evidence against the defendant. The jury should not consider the non-appearance of the witness as evidence of the defendant's guilt or innocence."

The instruction **does not tell the jury why the witness was unavailable** so there is **no chance** the jury will draw a **negative inference** from the witness' Fifth Amendment privilege assertion.

## P. CAUTIONARY INSTRUCTION FOR ORAL CONFESSION

Some states give an instruction that says oral incriminating statements or confessions are to be viewed with caution, The Nevada Supreme Court has explicitly rejected such instructions for Nevada. See **Ford v. State**, 99 Nev. 209, 660 P.2d 992 (1983); **Levi v. State**, 95 Nev. 746, 602 P.2d 189 (1979).

## Q. THE 5TH AMENDMENT – COMPELLING AND USING PSYCHIATRIC OR MENTAL HEALTH EXAMINATIONS

### 1. COMPELLING EXAMINATIONS

Where the defendant raises the defense of insanity, guilty but mentally ill, or any other defense that places his mental health at issue, he waives both his Fifth Amendment privilege against self-incrimination and the attorney-client privilege. See **Buchanan v. Kentucky**, 483 U.S. 402, 107 S.CT. 2906 (1987); **Estelle v. Smith**, 451 U.S. 454, 101 S.Ct. 1866 (1981); **Mitchell v. State**, 192 P.3d 721 (2008); **Estes v. Smith**, 122 Nev. 1123, 146 P.3d 1114 (2006). *See also*, **State v. Bonds**, 653 P.2d 1024 (Wash. 1982), *cert. denied*, 464 U.S. 831, 104 S.Ct. 111 (1983) (attorney-client privilege should not extend to testimony of a psychiatrist when the issue of insanity is raised by the defense; **People v. Edney**, 350 N.E. 2d 400 (N.Y. 1976) (a plea of innocence by reason of insanity constitutes a complete and effective waiver by the defendant of any claim to the attorney-client privilege); **State v. Steinkraus**, 417 P.2d 431 (N.M. 1966) (attorney-client privilege applies only to "communications," rather that "facts"; observations and conclusions by a psychiatrist are "facts").

In such cases, a court may compel the defendant to undergo a state-ordered psychiatric or other mental health examination for the purpose of rebutting defense expert testimony based on examinations of the defendant. As noted in **Mitchell v. State**, *supra*, this includes any defense where it is alleged defendant's mental status affected his ability to commit the crime. **Mitchell** involved allegations that due to post-traumatic stress syndrome, the defendant was hypersensitive and paranoid. Thus he was prone to perceive a threat of harm under circumstances where a person without

the syndrome would perceive no threat. He claimed self-defense based on this heightened awareness. The Nevada Supreme Court, relying on **Buchanan** and **Estelle** as well as numerous state cases, found that compelled psychiatric/mental health examinations were not limited to insanity defense cases.

Nevada has not ruled on the remedy to be provided when a defendant refuses to cooperate with a court-ordered examination. Language in **Mitchell** suggest that where this is the case, the defense would be prohibited from introducing evidence based upon a defense examination and both sides experts would be confined to general testimony on a particular illness or on other evidence available to both sides, such as witness testimony. **Mitchell**, at 724. Whether or not the court could preclude the defense from going foreword with its insanity defense or psychiatric evidence under such circumstances remains an open question. See generally, **Pope v. United States**, 372 F.2d 710 (8th Cir. 1967); **People v. Atwood**, 420 N.Y.S.2d 1002 (1979). An analogy could certainly be made to the defense of alibi. See **Williams v. Florida**, 399 U.S. 78, 90 S.Ct. 1893 (1970).

## 2. USE OF INCRIMINATING STATEMENT MADE DURING COMPELLED EXAMINATION

In **Estes v. Smith**, 122 Nev. 1123, 146 P.3d 1114 (2006), the defendant was sent to Lakes Crossing Center for evaluation of competency to stand trial. The defendant asserted an insanity defense at trial, but did not introduce any expert testimony. The State then called personnel and doctors from Lakes Crossing to rebut the defense. The Nevada Supreme Court acknowledged the general rule that compelled examinations to rebut mental health defenses are not prohibited by the Fifth Amendment. The Court then

discussed what information, gained from a compulsory examination, is admissible. **Estes** at 1120-1121.

The State may never use direct inculpatory or incriminating statements produced by interrogation for medical purposes in its case-in-chief or to impeach the defendant unless the defendant's *Miranda Rights* were explained to him. In addition, experts may not testify that the defendant had or did not have the requisite intent or capacity at the time of the offense. Volunteered statements, answers to questions unrelated to purpose of the examination, observations, non-incriminating statements and the opinion of experts on the existence of a mental state, defect or disease are admissible. The Court also noted these distinctions apply through sentencing and regardless of whether the professionals were selected by the defense, court or State so long as it was a compelled examination. **Estes** at 1120-1123. *See generally*, **Brown v. State**, 113 Nev. 275, 287-290, 934 P.2d 235, 243-245 (1997); **DePasquale v. State**, 106 Nev. 843, 803 P.2d 218 (1990); **Winiarz v. State**, 104 Nev. 43, 752 P.2d 761 (1988); **McKenna v. State**, 98 Nev. 38 (1982), **Esquivel v. State**, 96 Nev. 777, 617 P.2d 587 (1980).

In a related issue, it has been held that post-*Miranda* silence could not be used to prove that the defendant was sane at the time he committed the offense. In **Wainwright v. Greenfield**, 474 U.S. 284, 106 S.Ct. 634 (1986), the United States Supreme Court held that the State could not use the defendant's post arrest/post-*Miranda* silence as substantive evidence of sanity since it would betray the implied promise to an arrestee of the substance of the *Miranda Warning*.

## R. POST-MIRANDA ADOPTIVE ADMISSIONS

If an incriminating statement is heard and understood by an accused, and his response justifies an inference that he agreed or adopted the admission, then evidence of the

statement is admissible at trial. **Maginnis v. State**, 93 Nev. 173, 561 P.2d 922 (1977); NRS 51.035(3)(b). However, an accused has a constitutional right to remain silent and to avoid self-incrimination. Therefore, no adverse inference may be drawn from his *post-arrest* silence when he is confronted with an inculpatory statement by a government agent or in an agent's presence. The inculpatory statement and the accused's silence are inadmissible. **United States v. Yates**, 524 F.2d 1282 (D.C. Cir. 1975); **Harrison v. State**, 96 Nev. 347, 349, 608 P.2d 1107, 1108-1109 (198); *see also* **Vipperman v. State**, 92 Nev. 213, 547 P.2d 682 (1976).

Similarly, when an equivocal response is given, the statement is not admissible if the accused does not unambiguously assent to the statement, **United States v. Coppola**, 526 F.2d 764 (10th Cir. 1975), or the response represents a desire not to communicate incriminating information. *See generally* **McCormick on Evidence § 161** (2d ed. 1972);

## S. JUDGE TO ADVISE DEFENDANT OF RIGHT NOT TO TESTIFY

Every defendant should be advised by the trial court on the record, **outside the presence of the jury**, of his Fifth Amendment right against self-incrimination and whether he wishes to waive that right and testify. This should take place at or near the end of the state's case-in-chief. **Phillips v. State**, 105 Nev. 631, 782 P.2d 381 (1989). It should include informing the defendant of any felony convictions the State intends to use for impeachment. At the close of the case, **only if the defendant requests**, an instruction should be given pursuant to NRS 175.181.

## T. DA COMMENT ON UNFULFILLED PROMISES MADE IN DEFENDANT'S OPENING STATEMENT

In **Sonner v. State**, 112 Nev. 1328, 930 P.2d 707 (1996) the Nevada Supreme Court addressed the propriety of a prosecutor's comment during closing argument on the defendant's failure to call his mother as a witness. In **Sonner**, the defense attorney had told the jury, during opening argument, that he intended to call the defendant's mother. The prosecution was, therefore, commenting on the defendant's "unfulfilled promise" made in the opening statement. Although the Supreme Court hinted that this may be error on the part of the prosecutor, it avoided addressing the issue directly.

## U. INVOKING THE 5TH AMENDMENT/ TRANSACTIONAL vs. USE IMMUNITY

If the questions or the answer to a question would tend to incriminate a witness, then the witness may invoke his Fifth Amendment privilege. If that occurs, the prosecutor has the choice of granting the witness statutory immunity. If, after being immunized, the witness still refuses to answer the question, the prosecutor should certify the questions and petition the Court for an Order to Show Cause/Motion for the Adjudication of Civil Contempt. For this procedure the attorney should familiarize himself with NRS Chapter 22 and the cases of **Ex-parte Heeden**, 29 Nev. 352, 90 P 737 (1907); In re **Grand Jury appearance of Alvin S. Michaelson, Esq.**, 511 F.2d 882 (9th Cir. 1975), cert denied 95 S.Ct. 1979 (1975).

## 1. TRANSACTIONAL IMMUNITY – NRS 178.572

Nevada recognizes only Transactional Immunity which means that once granted to a witness, the prosecution is forever barred from prosecuting "the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony." (NRS 178.574)

## 2. USE IMMUNITY, 18 U.S.C. 6002

The Federal government and many States provide for a narrower version of immunity. The immunity only extends to the testimony given or any information derived from that testimony. Such information cannot be used against the witness in a future prosecution of the crimes referred to in the testimony, but the government is not prohibited from instigating a prosecution based on other evidence. In part, the Federal Statute provides:

> . . . but no testimony or other information compelled under the order (or any information directly or in-directly derived from such testimony or other information may be used against a witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

To date, the Nevada Legislature has not provided this investigative tool to prosecutors in the State of Nevada.

## 3. IMMUNITY COEXTENSIVE

All grants of immunity are "Coextensive" i.e. full faith and credit applies and another jurisdiction cannot prosecute to avoid the immunity. In **Murphy v. Waterfront Commission**, 378 U.S. 52, 84 S.Ct. 1594 (1964), the United States Supreme Court held that when a State grants a witness immunity the compelled testimony and its proof cannot be used in any manner by Federal officials in connection with a criminal prosecution against the witness. Likewise, if the Federal jurisdiction grants the witness immunity the testimony so given cannot be used against the witness in a State criminal prosecution. For example, if the State of Nevada gave immunity to a bank robber, the Federal authorities could still prosecute that individual but could not use that person's statements, or evidence derived from it, in any such prosecution. See **Kastigar v. United States**, 406 U.S. 441, 92 S.Ct. 1653 (1972); **In re Grand Jury Subpoena**, 75 f.3d 446 (9th Cir. 1996).

## 4. FEAR OF FOREIGN PROSECUTION

Fifth Amendment does not extend to a witness' fear of prosecution by a foreign country. In **United States v. Balsys**, 118 S.Ct. 2218 (1998), the Supreme Court held that the concern with foreign prosecution on the part of a witness was beyond the scope of the Fifth Amendment privilege against self-incrimination.

## V. COURTROOM OR JUDICIAL PROCEEDING STATEMENTS

### 1. COURTROOM INTERROGATION

**Miranda** not required since non-coercive atmosphere. See **State v. Williams**, 284 A.2d 172 (N.J. 1971); **Beckley v. State**, 443 P.2d 51 172 (Ala. 1968).

Inculpatory statement made by defendant at arraignment not result of coercion. **Bailey v. State**, 490 A.2d 158 (Del. 1983); **Douglas v. State**, 692 S.W.2d 217 (Ark 1985). Admissions made spontaneously in court do not require **Miranda**; **People v. Williams**, 265 Cal. App. 2d 888, 71 Cal. Rptr 773 (1968).

### 2. STATEMENTS MADE IN FURTHERANCE OF PLEA NEGOTIATIONS WHICH LATER FAIL

**PROSECUTORS AND POLICE BEWARE**

**NRS 48.125** provides:

"evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or any other crime is not admissible in a criminal proceeding involving the person who made the plea or offer." For the Federal Rule see **Federal Rule of Criminal Procedure Rule 11 (e) (6)**.

## a) STATEMENTS MADE BY A DEFENDANT IN COURT PURSUANT TO A PLEA OF GUILTY.

If for any reason the plea of guilty is aborted or set aside and the defendant chooses to go to trial, then the statements made by the defendant during the plea canvass cannot be used against him. Under these facts, the Nevada Supreme Court in **Mann v. State**, 96 Nev. 62, 605 P.2 209 (1980), stated:

> "We hold that NRS 48.125 prohibits the prosecution from making any use of statements made by the accused, either during plea negotiations or while entering a plea of guilty, at a later trial on the same charges."

It is clear from this decision, that in Nevada no use can be made of such a statement, not even for the purpose of impeaching the defendant if he testifies at a later trial and contradicts his prior statements.

## b) STATEMENTS MADE OUTSIDE THE COURTROOM "DURING PLEA NEGOTIATIONS"

The decision in **Mann v. State**, discussed above, would be equally applicable if the defendant reasonably believed at the time that he was making the incriminating statement that he was negotiating a plea bargain at the time. This requires that the defendant have a reasonable expectation that the person with whom he is talking has the authority to negotiate a plea bargain. See **McKenna v. State**, 114 Nev. 1044, 968 P.2d 739 (1998); **McKenna v. State**, 101 Nev. 338, 705 P.2d 614 (1985). The same reasonable belief in the police officer's authority to enter in plea negotiations has

been adopted by the Ninth Circuit. See **United States v. Karr**, 742 F.2d 493 (9th Cir. 1984).

For the reasons set forth, if the prosecutor is present at the time the defendant makes the incriminating statements the defendant would no doubt have good reason to believe that he was making the statements pursuant to plea negotiations if in fact that subject matter had been discussed. In addition, if the detectives make representations to the suspect that they have communicated with the District Attorney and that the District Attorney has made certain promises in return for the statement/cooperation then the suspect again has reasonable expectation and the statements cannot be used against him for any purpose in the event he decides not to plead guilty and proceeds to jury trial.

## CONCLUSION:

For the reasons set forth above it is always best if the prosecutor is not involved in taking statements from crime suspects or accomplices and it is always recommended that the police limit their promises by advising the suspect that he, the officer, lacks the authority to make a deal but that he will relay all information, including the suspect's cooperation to the District Attorney.

The Nevada Supreme Court appeared to have directly addressed the issue of incriminating statements made to a detective during plea negotiations but outside the courtroom in the case of **Robinson v. State**, 98 Nev. 202, 644 P.2d 514 (1982). Unfortunately the one paragraph decision does not set forth any facts and simply reversed the conviction because:

> During the prosecution's case-in-chief, testimony was elicited from a police detective concerning admissions made by appellant during

plea negotiations. Such testimony is inadmissible. NRS 48.125 (1).

However, more recently in **Garner v. State**, 116 Nev. 770, 6 P. 3d 1013 (2000) (*overruled on other grounds by* Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), the Nevada Supreme Court held that NRS 48.125 was not violated when the State admitted Garner's statements to the police, made after Garner tried unsuccessfully to negotiate some form of clemency. The Court rejected Garner's claim that NRS 48.125 had been violated and noted that during his attempts to negotiate he made no substantive admissions of guilt, rather, those admissions came later in his statements after any attempt to negotiate had ended.

**c) WAIVER OF STATUTE**

If a prosecutor or police officer wishes to obtain a confession or statement from a suspect by promising lenient treatment, for example a plea of guilty to a lesser charge, then the following condition should be a part of any promise: "As a condition for the lenient treatment you will have to be completely truthful and you have to agree that any statements that you make to us can be used to impeach any contradictory testimony you might give at trial in case you decide not to plead guilty".

The above stated condition was found to be a valid waiver of the suspect's statutory right by the United States Supreme Court in **United States v. Mezzanatto**, 513 U.S. 196, 115 S.Ct. 797 (1995). The Supreme Court of the United States specifically held that there is a presumption that most contractual, statutory or even basic constitutional rights can be waived if done so by a criminal defendant knowingly and

voluntarily. A specific waiver provision does not have to be provided for in the statute.

### d) EXCEPTION TO STATUTE – SUBSTANTIAL ASSISTANCE DRUG TRAFFICKING CLAUSE

NRS 48.125 is not applicable to situations when the government simply informs a defendant of the "substantial assistance" provisions pursuant to the provisions of NRS 453.3405. *See* **Sanchez v. State**, 103 Nev. 166, 734 P.2d 726 (1987).

## VI. MISCELLANEOUS CONFESSION/STATEMENT ISSUES

### A. FRUIT OF POISON TREE AND THE EXCLUSIONARY RULE

Even where there is no Fifth, Sixth or Fourteenth Amendment violation, a confession may still be suppressed if it is derivative of a Fourth Amendment violation under the Fruit of the Poisonous Tree Doctrine. In addition, the State may not introduce evidence of a suspect's refusal to consent to a search or invocation of his Fourth Amendment right to insist upon a warrant. Such situations are discussed below.

### 1. VOLUNTARY MIRANDIZED CONFESSION OBTAINED AFTER AN UNLAWFUL ARREST OR DETENTION

**Rule:** It is generally the law that a confession obtained after an unlawful arrest or unlawful detention is inadmissible in evidence. This is the rule even though the confession is voluntary and the unlawfully arrested/detained subject was properly *Mirandized.*

## a) EFFECT OF ILLEGAL ARREST DUE TO INSUFFICIENT PROBABLE CAUSE

Unless intervening events break the causal connection between the arrest and confession so that the confession is an act of free will sufficient to purge the primary taint, the confession will be deemed to be involuntary. (The mere fact that **Miranda** was given is of little consequence). "Voluntariness alone does not purge the taint" (**Lanier**). See **Dunaway v. New York**, 442 U.S. 200, 99 S.Ct. 2248 (1979), **Taylor v. Alabama**, 457 U.S. 687, 102 S.Ct. 2664 (1982), **Lanier v. South Carolina**, 474 U.S. 25, 106 S.Ct. 297 (1985); **Arterburn v. State**, 111 Nev. 1121, 901 P.2d 668 (1995).

**Example** # 1: **Dunaway v. New York**, 442 U.S. 200, 99 S.Ct. 2248 (1979). Police suspect defendant of robbery but no probable cause for arrest. Despite this, defendant was arrested and brought to police station for questioning, was *Mirandized* and then questioned. Defendant waived his rights and confessed. The Court ruled that the defendant was in custody and threw out the confession as "fruits of the poisoned tree", a direct result of the unlawful arrest.

**Example** # 2: **Taylor v. Alabama**, 457 U.S. 687, 102 S.Ct. 2664 (1982). Taylor was arrested for armed robbery based on "tip" - illegal arrest due to lack of probable cause. Police book defendant and get a match on fingerprints. They use prints to get a *Mirandized* confession. Confession and prints suppressed due to unlawful arrest. *See also* **Davis v. Mississippi**, 394 U.S. 721, 89 S.Ct. 1394 (1969). Fruit of Poison Tree principle applied based on Fourth Amendment seizure violation. Fingerprints and confession deemed Fruit of Poison Tree.

**Example # 3:** **Brown v. Illinois**, 422 U.S. 590, 95 S.Ct. 2254 (1975). Defendant was arrested without probable cause - *Mirandized* and then confessed about two hours later. The Court ruled the statement inadmissible as a "Fruit" or a direct result of the unlawful arrest. Cited with approval and followed by Nevada Supreme Court in **Arterburn v. State**, 111 Nev. 1121, 901 P.2d 668 (Nev. 1995).

## b) EFFECT OF UNLAWFUL ARREST FROM RESIDENCE (Payton Violation)

It is now an accepted rule of constitutional law that, absent valid consent or exigent circumstances, an arrest or search warrant is required to affect an arrest from within a person's residence. **Payton v. New York**, 445 U.S. 573, 100 S.Ct. 1271 (1980); **Steagald v. United States**, 451 U.S. 204, 101 S.Ct. 1642 (1981); **Perez v. Simmons**, 884 F.2d 1136 (1989); **Nev. Const. Art. 1 Section 8.** Confessions/statements made in the residence and obtained as a result of a **Payton** violation will be suppressed under Fruit of the Poisonous Tree Doctrine. However the **Payton** rule will not be applied to statements made after the suspect has been removed from the residence, even if the removal was produced by tricks.

**Example # 1:** **New York v. Harris**, 495 U.S. 14, 110 S.Ct. 1640 (1990). The police had probable cause to suspect the defendant of killing a Ms. Stanton. The police entered the defendant's residence without a warrant, without the defendant's consent and without exigent circumstances to arrest him. Inside the residence, they advised the defendant of his *Miranda Rights* and after acknowledging that he understood his rights, he readily admitted that he had killed Ms. Stanton. The defendant was taken to the station house, again the informed of his *Miranda Rights*, whereupon he gave

a written incriminating statement. The prosecution sought the admission only of the station house written confession.

The Court held that where the police have probable cause to arrest a suspect, the *Exclusionary Rule* does not bar the government's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of **Payton**.

**Example # 2**: **Walters v. State**, 108 Nev. 186, 825 P.2d 1237 (1992) (opinion on rehearing). Police used a bull horn to extract a suspect from his residence for purpose of arresting him. Outside of the residence, the suspect was *Mirandized* and made admissions. The Nevada Supreme Court found a **Payton** violation. The Court originally suppressed the confession. However, after the United States Supreme Court announced its holding in **New York v. Harris**, the Nevada Court adopted the reasoning of the Supreme Court in **Harris**. Basically, the Court acknowledged that the rule in **Payton** was designed to protect the integrity of the home and not to grant criminal suspect's protection from statements made outside their home when the police have probable cause for arresting the suspect for a crime.

## 2. CONFESSION OBTAINED AS A RESULT OF UNLAWFULLY SEIZED PHYSICAL EVIDENCE UNDER FOURTH AMENDMENT

As a general proposition, when property has been unlawfully seized from a defendant or from his premises and the defendant thereafter confesses because he is aware that the police have the incriminating property, the confession may be suppressed as a product of a Fourth Amendment violation. **Fahy v. Connecticut**, 375 U.S. 85, 84 S.Ct. 229 (1963).

## 3. COMMENTING ON EXERCISE OF FOURTH AMENDMENT RIGHTS

When a suspect refuses to consent to a search and insists upon a warrant, that fact may not be introduced into evidence, nor may the prosecutor comment upon it. The Nevada Supreme Court and the Ninth Circuit indicate such evidence or comments is akin to *Griffin* or *Doyle* error. **United States v. Prescott**, 581 F.2d 1343, 1351 (9th Cir. 1978); **Ramet v. State**, ___Nev.___, 209 P.3d 268 (2009).

## B. THE INDEPENDENT SOURCE AND INEVITABLE DISCOVERY EXCEPTIONS

Although both concepts arose out of cases in the Fourth Amendment context, these exceptions to the exclusionary rule apply equally to Fifth and Sixth Amendment violations. See generally **Murray v. United States**, 487 U.S. 533, 108 S.Ct. 2529, 2533 (1988) and **Nix v. Williams**, 467 U.S. 431, 104 S.Ct. 2501 (1984).

The independent source rule applies whenever the evidence was discovered both as a result of a lawful search and an unlawful search and further that the lawful discovery was independent of the unlawful search. The inevitable discovery rule simply means that if the evidence unlawfully found would have been found anyway through lawful means then the evidence will not be excluded.

The analysis become complex when multiple doctrines and constitutional violations are involved. In **Proferes v. State**, 116 Nev. 1136, 13 P.3d 955 (2000)(*overruled on other grounds by* Rosky v. State, 121 Nev. 1814, 190, 111 P.3d 690, 694 (2005) the defendant was illegally seized as he approached a house being searched pursuant to a lawful search warrant. During an *un-Mirandized* custodial interrogation, he admitted he had methamphetamine in his

coat pocket. Here there were Fourth and Fifth Amendment violations. The State alleged that a routine check for outstanding warrants on all persons detained at the location would have revealed defendant had an outstanding warrant. (No check was actually done.). The drugs would have been inevitably discovered after his arrest on the warrant. The Court disagreed noting that if defendant had not been illegally detained in the first place, no warrant check would have been run, defendant would not have been arrested and there would be no inevitable discovery of the drugs.

## C. GOOD FAITH EXCEPTION

Although clearly applicable to 4th Amendment violations, it has not gained acceptance to 5th amendment violations. **People v. Smith**, 31 Cal. App. 4th 1185, 37 Cal. Rptr. 2d 524 (1995). In **Smith**, the suspect was deaf and the sign language expert mistakenly led the detective to believe that the accused waived his *Miranda Rights*. The confession was video taped and upon review it became clear that the suspect had unequivocally invoked his right to counsel

## D. McLAUGHLIN AND McNABB-MALLORY RULES

The *McLauglin Rule* deals with Fourth Amendment law involving the timing of a magistrate's probable cause for detention determination. The McNabb-Mallory Rule involves statutory mandates on presenting a suspect to a magistrate in a timely fashion. A violation of either rule may result in the suppression of the suspect/defendant's statements.

## 1. McLAUGHLIN "48" RULE

In **County of Riverside v. McLaughlin**, 500 U.S. 44, 111 S.Ct. 1661 (1991), the United States Supreme Court said that the Fourth Amendment requires that a person arrested without a warrant must have a "probable cause" determination by a judicial officer within a reasonable time after arrest, citing to **Gernstein v. Pugh**, 420 U.S. 103, 95 S.Ct. 854 (1975). The Supreme Court set 48 hours as the presumptive reasonable time period. A judicial officer must make a probable cause determination within 48 hours of arrest or the continued detention would be presumptively unlawful under the Fourth Amendment. The State would have to overcome the presumption and show any additional delay was reasonable.

In **Powell v. State**, 113 Nev. 41, 930 P.2d 1123, (1997), the Nevada Supreme Court indicated a probable cause determination could be done outside of the defendant's presence. [Some counties do so by having a magistrate review the probable cause affidavit/declaration of arrest.] If the *McLaughlin Rule* was violated, any statements made by the defendant after the 48 hour period are subject to suppression, but exclusion is not automatic or mandated. **State v. Tucker**, 654 A.2d 1014 (N.J. 1995); **Black v. State**, 871 P.2d 35 (Okla. Cr. 1994).

The Court noted that the *McLaughlin Rule* is designed to deter police conduct that would jeopardize a defendant's self-incrimination rights. If, in fact, the officers did not violate **Miranda** and the Court determined that the confession was voluntary, the statements may be admissible in evidence. Citing from the United States Supreme Court decision in **Arizona v. Evans**, 514 U.S. 1, 115 S.Ct. 1185 (1995) the Nevada Court held that exclusion of evidence is only appropriate where the remedial objectives of the exclusionary rule are served. Thus a court looks at the reason

for the delay, the conduct of the police, whether defendant was prejudiced (did the delay contribute or influence to the decision to make a statement) and whether the statements were given after **Miranda** or other protections were given and waived.

## 2. McNABB-MALLORY RULE

The substance of the *McNabb-Mallory Rule* is that any person who, although lawfully arrested, is not taken before a magistrate promptly after arrest, may be entitled to suppression of any statement taken after the time period, even though the statements are entirely voluntary. **McNabb v. United States**, 318 U.S. 332, 63 S.Ct. 608 (1943); **Mallory v. United States**, 354 U.S. 449, 77 S.Ct. 1356 (1957). Exclusion of statements is based upon a violation of a statutory mandate that presentment (initial appearance before a magistrate) take place within a specified period of time and not upon any constitutional provision. In **McNabb** and **Mallory**, federal statutes and rules required a person to be brought "forthwith" or immediately after an arrest. In **McNabb**, the federal agents waited three days before presenting the defendant, during which time they were extensively interrogated with no advisement of rights.

The purpose of the rule is to encourage police and prosecutors to bring arrestees before judges promptly so that they may be advised of the charges against them, have bond set, obtain a lawyer and expedite the period of time between arrest and the filing of formal charges.

Nevada, like most states, has a statutory timely presentment requirement which can be found at NRS 171.178. In relevant part, it provides that an arrestee must be brought before a magistrate without unnecessary delay and if the person is not brought before the magistrate within 72

hours after arrest (excluding non-judicial days) the person will be released.

The Nevada Supreme Court adopted the *McNabb-Mallory Rule* and has discussed it in several cases. With regard to statements, violation of the rule does not result in automatic suppression. Like the analysis in **Powell**, the courts look to the length of the delay, police conduct, whether the delayed influenced the decision to make a statement and what types of advisement took place before the statement was given. **Elvik v. State**, 114 Nev. 883, 965 P.2d 281 (1998). In **Deutscher v. State**, 95 Nev. 669, 680, 601 P.2d 407, 414 (1979), the Court opined:

> We subscribe to the rule of law which provides that when an accused voluntarily waives his right to counsel, he concurrently waives his right to be seasonably arraigned. The reason for this rule is that the primary purpose of an arraignment is to inform the defendant of his rights. But a delay in arraignment is not prejudicial when a defendant has already been advised of his rights, was promptly so advised, and voluntarily waived those rights.

**Deutscher** involved whether the entire case should be dismissed as a result of pre-presentment (arraignment) delay, not whether the statements should be suppressed. (The statements and *Miranda Waiver* occurred within the 72 hour statutory period.) However, it presents a good analysis of why violations of NRS 171.178 require prejudice before sanctions are imposed upon the State.

## E. APPELLATE REVIEW

When reviewed by an appellate court, a trial court determination to admit statements/confessions presents a mixed question of fact and law. Issues of law are reviewed de novo. The trial court's factual findings about the circumstances surrounding the utterance of the statement and the credibility of the witnesses, will be given deference and not disturbed absent clear error. Clear error means not supported by substantial evidence. **Rosky v. State**, 121 Nev. 184, 190-191, 111 P.3d 690 (2005).

An improperly admitted statement is subject to harmless beyond a reasonable doubt review. **Arizona v. Fulminante**, 499 U.S. 279, 111 S. Ct. 1246 (1991). (There is a very good discussion in this case about the constitutional harmless error rule and the various Constitutional pronouncements to which it has applied.)

## F. INTERNAL AFFAIRS INVESTIGATIONS

As noted above, in **Garrity v. New Jersey**, 385 U.S. 493 (1967), the United States Supreme Court held that requiring a police officer to answer questions pursuant to an internal affairs investigation, when that investigation might implicate the officer in criminal activity, made any statements given by the officer involuntary and inadmissible in the criminal trial arising out of the internal affairs investigation. In a companion case, **Gardner v. Broderick**, 392 U.S. 273 (1968), the Court held that a police officer could not be fired solely for refusing to waive his *Miranda Rights* in a criminal investigation. The officer could be required by statute to cooperate and answer questions in the investigation or forfeit his job, but he could not be required to sign a waiver that would allow any statements made pursuant to the statute to be used against him in a criminal investigation.

The **Garrity** and **Gardner** cases have prompted some police departments to provide officers with what is referred to as a *Garrity Warning* for internal affairs type investigations. The *Garrity Warning* presently used by the Las Vegas Metropolitan Police Department reads as follows:

> Truthfulness
>
> As a part of an internal investigation, you are required to give a statement and answer questions truthfully. The scope of the questions asked of you will be related to alleged misconduct being investigated. If you are not truthful in your statements or answers to questions, you will be subject to termination as provided in Department Regulation 4/101.19 Truthfulness Required at All Times.
>
> Self Incrimination
>
> The Department is compelling you to answer questions under threat of termination. Your truthful statement or any information or evidence which is gained through such questioning cannot be used against you in any subsequent criminal proceedings as provided by the U.S. Supreme Court decision in **Garrity v. State of New Jersey**, 385 U.S. 493 (1967). This notice is being provided whether or not a criminal issue has been raised as a part of investigation.

A *Garrity Warning* has the affect of offering use immunity to the officer by indicating any statements made will not be used in a criminal prosecution.

### 1. REVIEW OF INTERNAL AFFAIRS STATEMENTS

It is not improper for a prosecutor to review an internal affairs file including **Garrity** statements or any other statement that was given in return for immunity. The Fifth Amendment privilege protects only against the use of such statements. For example, a state prosecutor may wish to review federal grand jury testimony when considering state charges arising from the subject of the investigation. That transcript might include information obtained under a promise of immunity. However, in a subsequent criminal prosecution of an individual or officer who was given use immunity or a *Garrity Warning*, the government must demonstrate an independent source for any evidence that could have been derived from the immunity statements pursuant to **Kastigar v. United States**, 406 U.S. 441, 92 S.Ct. 1653 (1972).

To facilitate proving an independent source, at least one court has suggested that the better approach is to have an attorney from another division or agency, such as the Civil Division of the District Attorney's Office or the Attorney General's Office, review the internal affairs file and redact any *Garrity* type statements. The prosecutor would then only see information that could be used against the defendant, creating a better record for an independent source. *See* **In Re Grand Jury Subpoena**, 75 F.3d 446 (9th Cir. 1996).

## G. 18 U.S.C. § 3501 RULED UNCONSTITUTIONAL

Police officers and prosecutors sometimes stumble across this statute and unwisely rely upon it. **It is not valid law.** In 1968, two years after the **Miranda** decision, Congress passed, and President Lyndon Johnson signed, the Omnibus Safe Streets and Crime Control Act (18 U.S.C.

§3501) which holds that if a confession is voluntary, then it is admitted into evidence regardless of a **Miranda** violation. The Act was routinely ignored and was eventually declared unconstitutional in **Dickerson v. United States**, 530 U.S. 428, 120 S.Ct. 2326 (2000).

## H. MIRANDA AND GRAND JURY PROCEEDINGS

In **United States v. Mandujano**, 425 U.S. 564, 96 S.Ct. 1768 (1976), the Court considered whether *Miranda Warnings* must be given to a grand jury witness who is called to testify about criminal activities in which he may have been personally involved and, if so, did the failure to give warnings require suppression of **false statements** made to the grand jury in a subsequent prosecution for perjury. Only eight justices participated in the decision. Four concluded **Miranda** did not apply to grand jury proceedings. The opinion discusses in detail why certain rights granted under **Miranda** are not applicable to a grand jury proceedings. They also indicated that, regardless of **Miranda**'s applicability, it did not protect against perjury prosecutions for false testimony. The remaining justices concurred that **Miranda** did not protect against false testimony. The Court did not discuss why a Grand Jury proceeding constitutes a "custodial interrogation."

In a subsequent case, **United States v. Wong**, 431 U.S. 174, 97 S.Ct. 1823 (1977), another perjury case, the Court again avoided deciding the **Miranda** issue. It did discuss, as did the Court in **Mandujano**, that the Fifth Amendment applies and there may be some type of duty to tell witnesses about their general right against self-incrimination. The Court also noted that the prosecution had given *Miranda Warnings* to the witness; she was claiming she did not understand and waive her rights.

The last case, **United States v. Washington**, 431 U.S. 181, 97 S.Ct. 1814 (1977), involved a witness who was the target of the grand jury investigation. He was advised he had a right not to answer questions that would incriminate him and that his answers could be used against him in a criminal proceeding. His answers were subsequently used in a Grand Larceny prosecution. The Court again discussed why **Miranda** "custodial interrogations" are distinguishable from a grand jury proceeding and again refused to decide a grand jury proceeding is a sufficiently coercive environment under the Fifth Amendment, and if it is, what type of warnings might be required. It found the warnings given were sufficient and no error resulted in the admission of the grand jury statements. The Court also concluded that the government is also not constitutionally mandated to advise a witness that he is a potential target and in danger of being indicted.

Thus this is an area where prosecutors should exercise caution. Based upon these cases, it is unlikely that **Miranda** would be applicable to grand jury proceedings. But, in each case, the Court noted that some advisement of the privilege against self-incrimination was give. Based on **Washington**, prosecutors should at least advise a witness about that right and that statements could be used against them.

Whether or not some type of warning is constitutionally require, Nevada extends certain statutory rights to grand jury witnesses and targets. *See,* **NRS 172.195**, **NRS 172.197**, and **NRS 172.239**; **Sheriff v. Marcum**, 105 Nev. 824, 783 P.2d 1389 (1989). These statutes impose certain duties upon the prosecution, for example, targets must be notified they are a target and have a right to testify, but only if they sign a written waiver of the privilege against self-incrimination.

# I. SURREPTITIOUS RECORDING OF CONVERSATIONS IN POLICE CARS NRS 200.650

Although this is a Fourth Amendment rather than Fifth Amendment issue, since we are dealing with the "seizure" of suspects' conversations, a brief discussion is included. The section discusses whether recording conversations between suspects in a police car is constitutionally and/or statutorily prohibited.

## 1. FEDERAL CONSTITUTIONAL ISSUES

The overwhelming weight of authority in the United States follows the rule of **United States v. McKinnon**, 985 F.2d 525 (11th Cir. 1993), to the effect that for Fourth Amendment purposes, police car monitoring is beyond the pail of constitutional protection and it is of no consequence whether the persons monitored are under arrest or not; there simply can be no reasonable expectation of privacy in the backseat of a police car.

Professor Wayne LaFave addresses this issue in Section 10.9(d) of his 5 volume Search and Seizure Treatise, Third Edition. No cases are cited by LaFave contrary to **McKinnon**, and indeed, this same rationale extends to a police department interview room. See **People v. Califano**, 5 Cal. App. 3rd 476, 85 Cal. Rptr. 292 (1970). The rationale adopted by these courts comes primarily from the United States Supreme Court decision in **Lanza v. New York**, 370 U.S. 139, 82 S.Ct. 1218 (1962). (No reasonable expectation of privacy in the visitors' room of a public jail).

The Eighth Circuit Court of Appeals follows the rationale of **McKinnon**, *supra*, allowing police to record statements made by individuals seated inside a patrol car because according to the court this does not violate a

constitutionally protected right to privacy nor does it intrude upon privacy and freedom to such an extent that it could be regarded as inconsistent with the aims of a free and open society. *See* **United States v. Clark**, 22 F.3d 799 (8th Cir. 1994).

So long as no interrogation takes place, such recording does not implicate the Fifth or Sixth Amendments.

## 2. NRS 200.650 AND NEVADA CONSTITUTION

Nevada has a rather unique statute prohibiting surreptitious recording of private conversations. **NRS 200.650** provides:

> . . . A person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring, or recording, or attempting to listen, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect, or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

The Nevada Supreme Court has not interpreted the term "private conversation." It could be identical to the definition of privacy in Fourth Amendment law, that is, whether a person had a "reasonable expectation of privacy". The Nevada Attorney General's Office has issued an opinion regarding monitoring inmate conversations along these lines, noting that:

> *Monitoring of inmates conversations by employees of county jail by use of intercom system does not violate NRS 200.650 . .*

*.because conversations of inmates are not private and where notice of monitoring is not surreptitious.*

Absent a contrary ruling from the Nevada Supreme Court, it is likely the Legislature meant the word "privacy," as contained in **NRS 200.650,** to be a term of art meaning "reasonable expectation of privacy." Therefore, consistent with Fourth Amendment jurisprudence, the placing of a recorder in the patrol car is legally admissible in the State of Nevada whether or not the officer is present during the recordation. But this is an area of unsettled law and police agencies should be cautious. In addition, even if the Nevada Supreme Court found police taping of suspect conversations in a patrol car did not violate the statute, it might also consider whether the policy would somehow be fundamentally affair under the Due Process Clause of the 14th Amendment. *See* **Alward**, *supra*.

# TABLE OF AUTHORITIES

**CASES**

**NEVADA REVISED STATUTES**



**OTHER AUTHORITIES:**

## APPENDIX A

Las Vegas Metropolitan Police Department *Miranda Warnings*

*ADULT - ENGLISH*

1. *You have the right to remain silent.*
2. *Anything you say can be used against you in a court of law.*
3. *You have the right to the presence of an attorney.*
4. *If you cannot afford an attorney one will be appointed before questioning.*
5. *Do you understand these rights?*

*ADULT - SPANISH*

1. *Usted tiene el derecho de permanecer en silencio.*
2. *Caulquier cosa que usted declare puede ser usada contra usted en la corte.*
3. *Usted tiene el derecho de tener un abagado presente.*
4. *Si no tiene usted recursos para pagar un abogado, la corte le asignara un abogado antes de serinterrogado.*
5. *Entiende usted estos derechos?*

*JUVENILES (Under 18 Years of Age)*

1. *You have the right to remain silent.*
2. *Anything you say can be used against you in either juvenile or adult court.*
3. *You have the right to the presence of an attorney.*
4. *If you cannot afford an attorney, one will be appointed before questioning.*
5. *Do you wish a parent or guardian to be present?*
6. *Do you understand these rights?*