# BRIEF BANK

## WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

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**CONFESSION DURING ILLEGAL DETEENTION FRUIT OF THE POISONOUS TREE**

*People* **v.** *Wallace, 7*Ol N.E.2d 87 (Ill.App. 1998).

The court held that a reasonable, innocent person placed in a murder defendant's position during police questioning would not ha", c felt himself free to leave a police station, and defendant's presence at the police station therefore became an involuntary seizure at some point prior to his formal arrest. The defendant, who was 15 years of age and with no prior arrests, was stopped by five uniformed officers, remained in the same interview room from 8:30 p.m. until he made an incriminating statement at 4:30 a.m., was given his *Miranda* rights several times, was not free to move about the police station, and was never told he was free to leave, and the door to his interview room was locked. The appellate court ordered a remand for an attenuation hearing upon its finding that defendant was subjected to an illegal arrest where the record was not clear enough to allow it to make an independent ruling on the question of whet her defendant's confession was sufficiently attenuated from his illegal arrest under the poisonous tree doctrine.

**CONSENT VOLUNTARINESS SHOW OF FORCE**

United States v. Worley, 193 F.3d 380 (6th Cir. 1999).

A defendant merely "acquiesced" to plainclothes officers' authority rather than giving a truly voluntary consent to search a plastic bag when he stated, "You've got the badge, I guess you can" in response to a search request by the officers who approached him as he was placing the bags into an airport locker. The officers asked for identification and defendant's ticket, and incorrectly insisted that his ticket was one-way rather than roundtrip as defendant stated.

The record indicated that defendant saw the officers' badges and did not assist in the search or make any additional statements indicating a free and voluntary consent. The bottom line was that mere submission to lawful authority is not a voluntary consent.

"...where the government purports to rely on a defendant's statement to establish that valid and voluntary consent was rendered, we must also examine the content of that statement to ensure that it 'unequivocally, specifically, and intelligently' indicates that the defendant consented. *Tillman, 963* F.2d at 143. Thus, in meeting its burden, the government must also establish that Worley's statement 'You've got the badge, I guess you can' was an unequivocal statement of free and voluntary consent, not merely a response conveying an expression of futility in resistance to authority or acquiescing in the officers request. *See Jones,* 641 F.2d at 429 ('[A] search based on consent requires more than mere expression of approval to the search.'

One judge dissented.

**CONFESSION VOLUNTARINESS INDUCEMENTS TO TALK**

*Johnson v. State, .21* So.2d 650 (Miss.App. 1998).

A confession was ruled involuntary in a case where there was testimony from two police officers that revealed that when defendant gave his written statement, he was eager to get out of jail on bond and was not able, on his own, to get assistance from his family in securing a bond, or to be transferred to the county jail. The officers, in their statements to the defendant, left him with the distinct impression that if he gave them a written statement they would assist him in locating his relations order to obtain bond for his release, or have him transferred to the county jail, from the unpleasant detention cell in which he had been held for two days. The sum total of the officers' statements added up to improper inducements for the confession.

Although both officers testified that they did not make any promises to Johnson in exchange for his confession or statement, it is clear that the statements to which they did admit left the Appellant with the impression that he would he either released on bond or moved from the cold and small detention area in which he had been held for at least two days. Based upon the record before us, we rule that the trial court erred in overruling the motion of the Appellant to suppress his statement. We find that Johnson's statement was improperly induced

## CONSENT WITHDRAWAL CONTINUATION OF SEARCH

*United States v. Booker,* 186 F.3d 1004 (8th Cir. 1999).

It has been held that police officers had probable cause to continue their search of a truck even after permission to conduct the search had been withdrawn by the vehicle owner, where the officer observed suspicious behavior in the truck's occupants, a police dog had alerted three times on some suitcases found in the truck bed, and, while nothing of relevance was found in the suitcases, an officer testified that drug dealers often put minute traces of drugs in suitcases and elsewhere to throw dogs off the track. The officer also testified that he could tell from his dog's behavior that it was responding to drugs but could not as yet indicate their exact location in the truck.

"It is plain to us that this testimony, together with the proof of Electro's dog training and past performance that the government introduced at the suppression hearing, provided more than an ample basis for the district court's conclusion that the officers had probable cause to continue their search even after permission to conduct one had been withdrawn. Probable cause to believe that an automobile contains contraband will, of course, support a warrantless search of that automobile

**MIRANDA AMBIGUOUS "UH UH"**

*State v.* Robertson, 712 So.2d 8 (La. 1998).

A defendant did not invoke his right to counsel and to remain silent by answering "uh uh" in response to a police question whether he wanted to say more about the alleged murders he was being questioned about. The court ruled that defendant's indication that he had nothing further to say about the crimes did not reasonably suggest a desire to end all questioning or to remain silent. The court focused on the fact that after this scenario defendant continued to talk to the police.

"In Davis v. United States, 512 U.S., 452 114 S.CT. 2350 129 L.Ed.2d 362 (1994), the United States Supreme Court addressed the issue of whether the arrestee had 'actually invoked' his *Miranda* right to counsel, as opposed to his Fifth Amendment right to remain silent, for purposes of triggering *Miranda's* proscription against further interrogation. The Supreme Court held that an equivocal or ambiguous statement, such as 'maybe I should talk to a lawyer,' was insufficient to constitute an invocation of the *Miranda* right to counsel, and that an unambiguous, clear assertion of the right was necessary to trigger the rule that interrogation cease upon invocation of the right.

"Analogizing to the instant case. defendant's indication he had nothing further to say about the crimes does not reasonably suggest a desire to end all questioning or to remain silent. Defendant's negative reply, 'uh uh,' [to a detective's statement, "Okay A!, so you don't want to say no more about what happened over there at them old people's house."] cannot plausibly be understood as an invocation, ambiguous or otherwise, to cut off all questioning in all respects. Rather, defendant was willing to talk to authorities even after the "uh, uh' response as indicated by his continuing to respond to questions and to assert his innocence. Defendant never indicated he did not want to speak to the police at all, only that he had nothing to say about the murders. The fact defendant continued to speak to police reflected an intent to continue the exchange, thus giving effect to the 'fundamental purpose of Miranda which was to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process *Green* 94-0887 at p. 10 n 8, 655 So.2d at 280, n. 8 (quoting C*onnecticut v. Barrett. 4*79 U.S. 523, 528, 107 S.Ct. 828. 831, 93 L.Ed.2d 920 (1987)). Because defendant did not invoke his right to remain silent prior to or during questioning, it was permissible for the investigators to continue to question him."

**MIRANDA CUSTODY CONSENSUAL SEARCH**

*United States v. Garcia,* 197 F.3d 1223 (8th Cir. 1999).

The initial detention of defendant, and a search of his person and his duffel hag, was consensual, and there was no requirement that he be given *Miranda w*arnings, where defendant was about 25-years-old, of average intelligence, was not intoxicated or under the influence of drugs, was questioned for only a few minutes and detained for just a little over two hours, was not threatened, physically intimidated, or punished by the police, was in a public place, and stood by silently while the search took place. Additionally, when an officer spoke to defendant in English, he replied without hesitation and without inquiry, that the search of his person was not a problem and said 'yes' to a request to search tile bag.

"We consider the particular 'characteristics' of Garcia and the 'environment' in which the purported consent was given. *United States v. Gipp,* 147 F.3d 680, 685-86 (8th Cir. 1998). *See also United States v. Chaidez,* 906 F.2d 377, 380-81 (8th Cir. 1990). Garcia was about twenty - five years old; of average intelligence, according to his attorney; was not intoxicated or under the influence of drugs; was questioned for only a few minutes and detained for a little over two hours; was not threatened, physically intimidated, or punished by the police; was in a public place; and stood by silently while the search took place.

"When the officer spoke to Garcia in English, he replied, without hesitation and without inquiry, that a search of his person was no problem and said 'yes' to a search of his duffel hag. Under somewhat similar circumstances, this court affirmed the district court's finding of consent and specifically rejected defendant's allegation that he did not understand English and that the officers 'knew or should have know of this language harrier, and that this harrier vitiated [his] consent to the luggage search,' in *Sanchez,* 156 F.3d at 877, 878; *see also Gavan v. Muro, 141* F.3d at 907.

> . . . until the police handcuffed Garcia, what took place between them was consensual. There was no requirement for a Miranda warning."

*See also, People v. Reddersen,* 992 P.2d 1176 (Cob. 2000) (defendant's consent to search of his person during traffic stop was voluntary, despite police officer's failure to give defendant *Miranda* advisement before conducting search; defendant had extensive experience with routine traffic stops, and officer's conduct toward defendant was non-confrontational and lasted a short time.)

**ARREST – WHAT CONSTITUTES DRAWN GUN**

*United States v. Campbell,* 178 F.3d *345* (5th Cir. 1999).

A *Terry* stop (reasonable suspicion) of a defendant for 10 to 25 minutes, during which time the police officer drew his weapon, ordered defendant to lie on the ground, handcuffed and frisked him, was not equivalent to a full blown arrest requiring probable cause for Fourth Amendment purposes The defendant matched the description of an armed bank robber and lie was approaching an automobile that matched the detailed description of a getaway vehicle and bore the same license plate. During the course of the stop, the officers investigated a passenger's alibi and matched bills found in defendant's pocket against a list of "bait bills" given to the bank robber.

"...Campbell argues that the totality of the officers' conduct constituted an arrest, rather than an investigatory stop, and was unsupported by probable cause. . . [But]

drawn guns and handcuffs do not necessarily convert a detention into an arrest. Nor did it convert the detention into an arrest to leave Billy Campbell handcuffed during the time it took to investigate Michael Campbell's [passenger] alibi and the serial numbers on the $20 hills here were substantial reasons to suspect Billy Campbell had been the hank robber, and he was detained for no longer than necessary to conduct a cursory check that could provide more conclusory evidence. The entire detention took between 10 and 25 minutes—not an unreasonable amount of time under the circumstances.

"The facts of this case demonstrate neither an arrest nor unreasonably excessive steps for an investigatory detention."

**SEIZURE – WHAT CONSTITUTES CHASING DEFENDANT**

*People v. Archuleta,* 980 P.2d 509 (Cob. 1999).

Overruling prior case law, the Supreme Court of Colorado has ruled that a police officer's mere chasing of a fleeing suspect is not a "seizure" under the Fourth Amendment. Therefore, the officer did not need to have reasonable suspicion under *Terry* **v.** *Ohio* in order to chase the suspect.

"In *People v. Thomas,* 660 P.2d 1272 (Cob. 1983), we held that in a chase case, reasonable suspicion had to be evaluated at the point at which a suspect begins to run. If the officer did not then have a reasonable suspicion of criminal conduct, the chase was unwarranted. Accordingly, we concluded that '[flacts uncovered after a chase begins do not enter into the constitutional equation for reasonable suspicion.'

"Since we issued that opinion, however, the United States Supreme Court has further developed Fourth Amendment jurisprudence in a manner inconsistent with that position.

"In *California v. Hodari D., 499 U.*.S. 621 (1991)], the Court held that a police officer's chase of a suspect does not trigger the protections of the Fourth Amendment because it is not a seizure. Applying that conclusion to the facts of *Hodari D.*. the Court found that evidence discarded by a suspect as he was running from the police should not have been suppressed as the fruit of an unlawful seizure because no seizure of the suspect had taken place. *See Hodari D.,* 499 U.S. at 629, 111 S.Ct. 1547.

"The Court's conclusion in *Hodari D.* conflicts with part of our decision in *Thomas.* We therefore overrule *Thomas* to the extent that it is inconsistent with the Supreme Court's position in *Hodari D."* One justice dissented on the issue of whether there was reasonable suspicion for an investigative stop.

**MIRANDA EFFECT OF PRIOR UNMIRANDIZED STATEMENTS**

*State v. Armstrong,* 588 N.W.2d 606 (Wis. 1999). State. Overruling prior state case law, the Supreme Court of Wisconsin ruled that a written statement given by a defendant to police officers after he received *Miranda* warnings and made a knowing and voluntary waiver of rights was admissible in his murder prosecution, even though the written statement memorialized earlier oral statements that defendant made before he received *Miranda* warnings. The oral statements, although unmirandized, were voluntary.

The police officers initially interviewed defendant because they thought he might he a witness to a murder, and only came to believe that he was a suspect after he voluntarily told them that he was present at the time the victim died.

"In this case, we are faced with a question nearly identical to the one addressed by the Court in *Elstad [Oregon v.,* U.S. 298 (1985)]. Although the officers technically violated Miranda when they failed to administer *Miranda* warnings prior to Armstrong's oral confession, there is no claim that Armstrong made his oral or written statements involuntarily. Since Armstrong's written statement was given after Armstrong knowingly waived his *Miranda* rights, the written statement is admissible under *Elstad.*

"We hold first that the officers' failure to administer the *Miranda* warnings prior to Armstrong's oral statements was in the nature of a technical violation as **C**o**o**nceptualized by the *Elstad* Court. The Court in *Elstad* drew a distinction between violations of *Miranda* and violations of constitutional rights. According to the Court, a failure to administer the *Miranda* warnings which was 'unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will' was insufficient to result in an imputation of taint to subsequent statements. *Elstad,* 470 U.S. at 309. 105 S.Ct. 1285."

**MIRANDA – EQUIVOCAL RESPONSES**

*Davis v. State.* 501 S.E.2d 241 (Ga.App. 1998).

A defendant's equivocal statement regarding whether he needed a lawyer, to which a police officer responded that it was defendant's decision but that the officer wanted to continue talking to him, and a second statement by defendant that lie would feel a lot safer if he could afford a lawyer, which led to a conversation in which the officer asked defendant if he wanted an attorney, and defendant talked about how public defenders were ineffective and kept answering questions, were not invocations of the right to counsel and did not require the police to stop questioning him.

Davis contends he made statements invoking his right to counsel, requiring officers to cease interrogating him. During the interview at the apartment, Davis said. 'I don't know if I need a lawyer or not.' The investigator replied that if he needed one, that was his decision, hut the investigator wanted to continue talking to him. 1)avis replied. 'okay.' and questioning continued. Davis equivocal statement did not require officers to stop questioning him. . . . Again. during the noon interview, Davis said, 'I'd feel a lot safer if I could afford an attorney, but I know that's kinda like out of the question, so. . . 'The investigator then asked if Davis wanted an attorney. Davis replied, Well, I can't afford one, and a public defender is, they're so overworked all they want to do is make a deal with the state.

After complaining that public defenders were ineffective and that the judicial system was skewed in favor of those with money, Davis continued answering the investigator's questions. These equivocal statements did not require the investigator to stop his interrogation."

Additionally, the officer's statement during the interview that he would tell the district attorney that defendant had confessed and cooperated did not constitute an improper promise of a lighter sentence or more lenient treatment which would render his confession inadmissible as involuntary.

**MIRANDA FUNCTIONAL EQUIVALENT OF INTEROGATION**

*People v. Gonzales,* 987 P.2d 239 (Cob. 1999).

The Supreme Court of Colorado did not find the functional equivalent of interrogation within the meaning of *Miranda* where a police officer said "Sure" when a murder defendant whom he was transporting from a pretrial hearing back to jail asked him "Can I be up front with you?" Therefore the defendant's inculpatory statements to the officer were voluntary and were not obtained in violation of *Miranda.* The court noted that it was the defendant who initiated the conversation and the officer did nothing to deceive, intimidate, coerce. harangue, or threaten him, even if the officer knew or should have known that defendant was going to make an inculpatory statement.

. . . we may infer that the functional equivalents of interrogation generally employ compelling influences or psychological ploys in tandem with police custody to obtain confessions. *See Arizona v. Miranda,* 481 U.S. 520, 529, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987).

"The Fifth Amendment protects defendants from improper forms of police interrogation, not from their own impulses to speak. Consequently, even assuming, *arguendo,* that Deputy O'Neill knew the defendant was asking whether he could make a voluntary, perhaps inculpatory statement, O'Neill did nothing improper by acquiescing."

**MIRANDA IMMIGRANT LIMITED LANGUAGE SKILLS**

*Thatsaphone v. Weber,* 137 F.3d 1041 (8th Cir. 1998).

A Laotian immigrants limited English language skills did not turn a short, otherwise non- custodial police interview into a custodial interrogation requiring Miranda warnings. The evidence indicated a detective repeatedly asked defendant if he could speak and understand English, and he responded affirmatively. During the confrontation defendant never expressed a desire to halt the interview, he responded in understandable English and chose to remain silent when asked questions he did not want to answer.

The court also noted that he rarely used an interpreter at a suppression hearing, and, throughout the proceedings, used both colloquial and sophisticated English terms. The court also found defendant's incriminating statements voluntary.

'"Coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.' *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, *522,* 93 L.Ed.2d 473 (1986); *LaRette v. Delo, 44* F.3d 681, 688-89 (8th Cir.), *cert. denied sub nom. LaRette v. Bowersox, 5*16 U.S. 894, 116 S.Ct. 246. 133 L.F.d.2d 172 (1995). As we have explained, Detective Bailey in the twenty minute interview used no improperly coercive questioning tactics, and Thatsaphone's responses and conduct gave no indication that coercion was causing his will to be overborne, either by his lack of English language skills or any other factor

**MIRANDA – INCONSISTENT STATEMENT "I DON'T KNOW"**

*State v. Parker,* 585 N.W.2d 398 (Minn. 1998).

Was a defendant's statement, "I don't know," in response to a question about what he did the night before a stabbing, an invocation if his *Miranda* rights? The court said "no," even though the statement was followed by, "because my lawyer told me not to know." The court ruled the statement was admissible as a prior inconsistent statement when defendant testified at trial, and noted that the state had not attempted to use defendant's silence as evidence against him.

The state did not attempt to draw meaning from actual silence, but rather sought to introduce a prior inconsistent statement made by the testifying defendant. In the present case, the appellant did not exercise his right to remain silent as to the statement 'I don't know,' in response to a question about what lie did the night before the stabbing. This statement was not an invocation of appellant's rights, and the trial Court did not err in admitting the statement as a prior inconsistent statement."

**MIRANDA INTERPRETER CONFUSING TRANSLATION**

*People v. Mejia-Mendoza,* 965 P.2d (Cob. 1998).

A defendant who spoke Spanish was not properly advised of his *Miranda* rights through an interpreter when he was subjected to custodial interrogation. The court said the interpreter was untrained in translation and in assisting law enforcement in explaining *Miranda* rights to arrested persons. Instead of directly translating the *Miranda* advisement, the interpreter provided misleading and confusing statements to defendant regarding his waiver and privilege against self-incrimination.

Among other errors, the interpreter used the phrases "nothing is being used against you" and "just because you say something you'll be released," which were inaccurate and confusing.

"In this case, the interpreter not only mistranslated the *Miranda* advisement but also volunteered statements, both to Mejia-Mendoza and on his behalf to the detective, that were inaccurate. The role of an interpreter in this setting is to act as a conduit by passing information between two participants, translating their words precisely without adding any of his or her own. 'Obviously, an Interpreter is not a participant... An Interpreter really only acts as a transmission belt or telephone. In one ear should come in English and out comes Spanish.'

United States *v. Anguloa,* 598 F,2d 1182, 1186 n. 5 (1979) (quoting the trial court's instructions to the jury). Interpreters have an ethical obligation to perform their duties scrupulously. Ethical guidelines require interpreters to "transmit everything that is said in exactly the same way it was intended." *Zobrest v. Catalina Foothills Sch. DISL,* 509 U.S. 1, 13, 113 S.CT. *2462,* 125 L.Ed.2d 1(1993).

"Many jurisdictions have statutory Standards or certification programs for in-court interpretation, and Colorado Rules of Evidence require interpreters to meet the standards of experts. We recognize that such exacting standards cannot be mandated in the more informal setting of police interrogation. However, a person's constitutional rights are no less meaningful during a police interrogation than in court, and a person acting as an interpreter must he sufficiently capable of accurately expressing the substance of the suspect's rights.

"Although we acknowledge that no translation is perfect, the transcript of the advisement reveals that the interpreter made inaccurate word choices, embellished the advisement with misleading statements, and improperly told the detective that Mejia-Mendoza had waived his rights when he had said nothing. The interpreter's deficiencies contributed to Mejia-Mendoza's inability to understand his *Miranda* rights.

**MIRANDA PRISON INTERVIEW UNRELATED CHARGES**

*State v. Ford,* 738 A.2d 937 (N.H. *1999).*

A prison inmate was not in *Miranda* custody, as required to be entitled to *Miranda* warnings, during an interrogation for crimes unrelated to his imprisonment. The interrogation took place in the correctional officers' lunch room, no other person other than two police officers were present, the inmate was not pressured to disclose information about the unrelated crimes and was free to terminate the interview at any time. The court noted that the prisoner basically controlled the topics discussed and initiated much of the discussion with the officers.

> The interview took place in a relatively uncoercive area of the prison, the correctional officers' lunch room, not a prison cell or interrogation room except for the defendant and the two Hampton police officers, no other persons were present. The defendant was not pressured to disclose information and was free to terminate the interview, an option he exercised upon first meeting the officers. Of his own accord, he called the officers hack and agreed to speak with them. In the ensuing interview, the defendant largely controlled the topics discussed and initiated discussion of potential agreements with the State. In fact, until the defendant implicated himself, the officers did not consider him a suspect in the Hampton Beach robbery, creating the fair inference that they did not conduct the interview with the 'express purpose of eliciting incriminating statements.'..
>
> "We do not find that the officers' questioning imposed any additional restraint on the defendant's freedom of movement, and therefore conclude that the defendant was not in custody during the interview.

**MIRANDA – NON-ENGLISH SPEAKING DEFENDANT**

*Commonwealth v. Ardon,* 428 Mass. 496, 702 N.E.2d 808 (Mass. 1998).

It has been held that a non-English speaking suspect does not have a right to an independent interpreter during custodial interrogation, despite his claim that police officers who additionally serve as interpreters are inherently biased. The court said a suspect's rights are adequately protected by a rule requiring the prosecution to prove a voluntary and intelligent waiver of *Miranda* rights.

The court also noted the practical difficulties that would be encountered by implementing a rule of having an independent interpreter for custodial interrogation.

. . . we note the pragmatic difficulties in implementing such a rule. It would he an impossible burden to require that every police department have readily available independent interpreters for every non-English speaking suspect. Such a procedure would he prohibitively expensive, time consuming, and fraught with administrative problems. It would also work to the detriment of many people whom the police wish to interview by increasing the time they would be required to wait while the police obtained the required interpreter. We conclude that suspects' rights are adequately protected by the rule requiring the Commonwealth to prove a voluntary and intelligent waiver of *Miranda* rights...."

**MIRANDA NOT GIVEN - FOUND EVIDENCE STILL "OK"**

*United States v. Guzman,* 11 F.Supp.2d 292 (S.D.N.Y. 1998).

*Miranda* custody was found when a defendant gave a statement regarding a shooting of a police officer, where: (1) Defendant was told he had to go to a police station in a police car; (2) He was never told he did not have to go to the station or that he was free to leave; (3) He was told that people in the neighborhood said he was involved in the shooting; (4) He was questioned throughout the night for more than 12 hours; (5) The interrogators repeatedly told him that his answers were contradicted by facts known to the police; and (6) He was not free to move around the station without a police escort. Failure to give *Miranda* warnings made the statement inadmissible in the prosecution's case-in-chief.

However, since *Miranda* is not a constitutional requirement and the statement was voluntary, physical evidence found in defendants car as a result of the statement would not be suppressed as "fruit of the poisonous tree." even though the statement was made late at night and the officers exaggerated the extent of the evidence against him by stating he was seen in a car used in the shooting, defendant did not express any fatigue or desire to end the interrogation and the statement was the product of his free will, even though *Miranda-flawed.* The evidence showed defendant had been seen in a maroon car, and the car involved in the shooting was the same color.

. . . the police here did engage in misconduct' in the sense that they failed to provide the warnings required by M*iranda* before they initiated a custodial interrogation of Guzman. However, *Elstad [Oregon v.* 70 U.S. 298 (1985)] and *Tucker [Michigan v.***,** 417 U.S. 433 (1974)], make clear that a violation of *Miranda,* standing alone, does not amount to a violation of a substantive constitutional right. *See Elstad,* 470 U.S. at U.S. 105 S.Ct. 128S. Because the failure to mirandize Guzman prior to interrogation was the officers' only constitutionally significant misconduct, the physical evidence derived from that interrogation—the car and its contents—is admissible."

**MIRANDA VS 18USC 3501**

*United* States v. *Dickerson,* — F.3d —‘ 1999 WL 61200 (4th Cir. 1999).

Thirty one years ago Congress passed 18 U.S.C. S 3501, ostensibly overruling *Miranda* for the federal courts and federal law enforcement agencies. Section 3501 makes traditional due process voluntariness the sole standard for the admissibility of confessions and incriminating statements in federal court, the standard that existed prior to the *Miranda* gloss of warnings and waiver of Fifth Amendment rights. Section 3501, however, led a very lonely existence after it was passed in 1968. It was ignored by federal prosecutors, federal courts, and greeted with actual hostility by the United States Justice Department over the years.

A panel of the Fourth Circuit Court of Appeals has now ruled 2-1 that a confession which is determined to be voluntary may be admitted as evidence in federal court despite a technical violation of *Miranda,* pursuant to s. 3501.

‘The court stated: “In response to the Supreme Court’s decision in *Miranda v. Arizona,* 384 U.S. 436 (1966), the Congress of the United States enacted 18 U.S.C.A. 5 3501 (West *1985),* with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. Although duly enacted by the United States Congress and signed into law by the President of the United States. the United States Department of Justice has steadfastly refused to enforce the provision. In fact, after initially ‘taking the Fifth’ on the statute’s constitutionality, the Department of Justice has now asserted, without explanation, that the provision is unconstitutional. With the issue squarely presented, we hold that Congress, pursuant to its power to establish the rules of’ evidence and procedure in the federal courts, acted well within its authority in enacting 5 3501. As a consequence, 5 3501, rather than Miranda governs the admissibility of confessions in federal court. Accordingly, the district court erred in suppressing Dickerson’s voluntary confession on the grounds that it was obtained in technical violation of *Miranda.”*

The panel’s decision is certain to be reviewed by the full Circuit *en banc,* with possible review by the United States Supreme Court down the road. Many experts are predicting that if the case reaches the High Court the Court may do major surgery on *Miranda,* possibly limiting its effect even more than has been done over the last thirty years. The better view, however, is that the Court is not likely to reverse *Miranda.*

**MIRANDA – TERRY STOP – EXPLAINING PRESENCE**

*State v. Gregory,* 50 Conn.App. 47*,* 741 A.2d 986 (Conn.App. 1999).

A police officer's single question during a proper *Terry* stop as to why defendant was hiding in an alley was not "interrogation" so as to require *Miranda* warnings. The court further made it clear that during the course of a *Terry* stop, the police may request identification or inquire about a suspect's activities without advising him of his Miranda rights.

"...The defendant concedes that the officers could lawfully detain and question him, but argues that because the officers restricted his movement by handcuffing him, any questions that were posed to him constituted a custodial interrogation thus requiring that the defendant be given *Miranda* warnings.

As a general rule, *Miranda* rights are not required to he given before asking a *Terry* detainee to explain his presence in the area. See *Berkemer v. McCarty,* 468 U.s. 420, 439-40, 104 S.Ct. 3138, 82 L.Ed. 2d 317 (1984). During the course of a *Terry* stop, the police may request identification or inquire about a suspect's activities without advising the suspect of his Miranda rights. . In this case, the officers' single question was not restrictive enough to constitute an interrogation so as to require a *Miranda* warning"

**MIRANDA UNSOPHISTICATED RESPONSE**

*People* v. *Romero.* 953 P.2d 55() (Colo. 1998).

An interrogating officer, alter Mirandizing defendant, asked questions which were directed at ascertaining his involvement in a shooting and his mental state with regard to the crime. Defendant said, "I should talk to a lawyer," but the officer continued to ask questions. The court ruled that although defendant's comment was unsophisticated, it nevertheless adequately conveyed his desire for the assistance of counsel in light of the officer's line of questioning. Statements made by the defendant subsequent to his comment had to he suppressed.

" Whether an accused had invoked the right to counsel during questioning is an objective inquiry. In a 1994 decision, the United States Supreme Court held that the question requires the trial court to consider whether the accused's statement '"can reasonably be construed to be an expression of *a* desire for the assistance of an attorney." *Davis v. United States,* 512 U.S. 452. 459, 114 S.Ct. *2350, 2355,* 129 L.Ed,2d 362 (1994) (quoting McNeil v. Wisconsin. 501 U.S. 717, 178. 111 S.Ct. 2204, 2209, 115 L.Ed.2d 158 (1991)) (emphasis added). If the desire for counsel is presented sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney,' no ambiguity or equivocation exists, and all questioning must cease until the person can consult counsel or the accused voluntarily reinitiates conversation.

*Davis v. State* 512 U.S. at 459, 1141 S.Ct. at 2355 (emphasis added).

*"Davis* requires a person to make a recognizable 'expression of a desire' for legal assistance. Davis, 512 U.S at 459, 114 SQ. at 2355. We have said that a statement sufficiently reflects a desire for counsel when it 'puts the officers on notice that the defendant intends to exercise his right to counsel and his right against self-incrimination.' *People v. Fish,* 660 P.2d 505, 509 (Colo.1983) (defendant's question to interrogating officer whether he needed an attorney to which officer answered 'no' sufficiently clearly invoked right to counsel).

"Here, the trial court engaged in a totality of the circumstances analysis under *Davis* in ruling that Romero sufficiently expressed his desire for the assistance of legal counsel. In light of the record, we defer to the trial court's findings and agree with the courts conclusions."

**SIXTH V. FIFTH AMENDMENT RIGHTS - INTERROGATION**

*United States v. Melgar* 139 F.3dl 1005 (4th Cir, 1998).

A federal immigration agent did not violate defendant's Fifth Amendment right to counsel when he interrogated him on potential federal charges after counsel was appointed for him at his arraignment on state charges. Defendant". invocation of the right to counsel at the arraignment was grounded in the Sixth Amendment, which is crime specific, not the Fifth Amendment Miranda right to counsel, which arises only in an interrogation setting and is not crime specific. Defendant had voluntarily and knowingly waived his Miranda Fifth Amendment right to counsel prior to the interrogation on the federal matters.

The case illustrates the difference between a Sixth Amendment right to counsel, which arises by virtue of initiation of a formal adversary proceeding, such as an arraignment, which right to counsel is crime-specific, and applies only to the crime as to which it attaches, and a *Miranda* Fifth Amendment right to counsel which is unlimited in its scope but arises only in the context of interrogation and is not crime-specific. Since the federal agent's questioning did not involve the crime for which the defendant had been arraigned in state court, he could properly approach the defendant and attempt to interrogate him about a different crime, after first giving *Miranda* warnings.

. . . . although Melgar invoked his right to counsel at his arraignment on state charges, the right invoked was grounded in the Sixth Amendment, not the Fifth. In order for the Fifth Amendment protection to arise, a suspect must be in a custodial interrogation context. Melgar's arraignment did not constitute an interrogation any more than the initial hearing in McNeil v. Wisconsin *501* U.S. 171 (1991)] constitutes an interrogation. McNeil. 501 1.5, at 175-79, 111 SQ. at 22~9-10. Accordingly, when Melgar requested counsel at his state arraignment, no Fifth Amendment right was available to him. Of course, a Sixth Amendment right to counsel was available at the time of arraignment and, in accord with it, the state judge appointed counsel For Melgar [on the state charge].

"A few days after his arraignment in state court, Agent Miner interrogated Melgar [where he was incarcerated awaiting trial on the state charges. If Melgar had requested counsel at that juncture. he could have availed himself of his Fifth Amendment ri2ht to counsel, but Melgar did not ask for counsel at any time during the interrogation. Rather, after Agent Miner twice read Melgar his lfirinda rights in Spanish, Melgar signed a written waiver of them. Moreover, as Judge Ellis found, 'nothing . . . suggests that this waiver was anything less than fully informed and voluntary.' Melgar, 927 F.Supp. at 950.

'For these reasons, Agent Miner's interrogation of Melgar on federal matters did not violate the Fifth Amendment. Judge Ellis correctly rejected Melgar's claim to the contrary."

**VOLUNTARINESS ADMISSION TO FELLOW INMATES ACTING AS GOV'T AGENTS**

*United States* v. *Ingle,* 157 [3d 1147 (8th Cir. 1998).

Even if defendant's fellow prison inmates were acting as government agents, they did not coerce defendant's incriminating admissions to them, and, thus, his tape-recorded admissions would not be suppressed as involuntary. The evidence indicated that defendant was unaware that one inmate was cooperating with the FBI, and a transcript of the inmates' conversation gave no indication that defendant felt intimidated by them or by his surroundings. Additionally. contrary to defendants argument that he was under the influence of methamphetamine. the trial court found no evidence of drug use by defendant at the time he made the admissions.

On another point, the court ruled, on the basis of I*llinois v. Perkins,* 496 U.S. 292 (1990), that the defendant was not "in (custody" within the purview of *Miranda* and therefore was not entitled to Miranda warnings before his conversations with his fellow inmates.

> Ingle was unaware that Jones [fellow prisoner] was cooperating with the FBI, and the transcript of the conversation with Jones and Bell [another inmate] gives no indication Ingle felt intimidated by them or by his surroundings. The fact that the government encouraged the conversation, and Ingle's attempt to pass off his incriminating statements as 'jailhouse bluster,' do not establish the kind of coercive police activity than renders a confession involuntary. *See Colorado v. Connelly, 479* U.S. *157,* 163-67, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

"Ingle argues his tape-recorded statement was inadmissible because Jones and Bell subjected him to custodial interrogation without giving the warnings required by *Miranda v. Arizona.* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 964 (1966). Like the district court, we disagree. In *Illinois v. Perkins,* 1996 1,5. 292*,* 300, 110 SQ. 2394, 110 L.Ed.2d 2~i3 (1990), the Supreme Court held that an incarcerated suspect is not entitled to *Miranda* warnings prior to questioning by an undercover agent posing as an inmate . . . .

**VOLUNTARINESS – CONFESSION TO AVOID VIOLENCE**

*People v. Hall,* 92 Cal.Rptr.2d 68' (Cal.App. 2000).

A confession to murder was not "involuntary" so as to be excludable on due process grounds, even if it were made by defendant in an effort to escape the acts of violence against him by guards at the state prison where he was incarcerated, where the investigator to whom the confession was made did not himself engage in misconduct and the guards were not attempting by their actions to compel defendant to confess to a crime. The court said a confession should be excluded as involuntary when the process undertaken to secure it involves threats, promises, violence, or other forms of improper influence, but due process does not require exclusion, even if misconduct motivated the confession in whole or in part, when that misconduct was not a part of the investigation of criminal activity or a part of the interrogation process itself.

To reject the confession in this type of situation would not serve the deterrent purpose of the exclusionary rule.

"While misconduct is certainly not to he condoned, the exclusion of highly relevant evidence exacts a heavy price. That price we readily pay when the threat of exclusion has the salutary effect of encouraging fair and lawful investigations and interrogations. The exclusion of a confession, however, is less supportable when the misconduct related to it was in no way related to the extraction of that confession or the solving of a crime. This is so since the threat of exclusion can have no meaningful effect on the conduct of those not engaged in investigation and interrogation."

**VOLUNTARINESS LOW IQ DEFENDANT**

*People v. Sexton,* 601 N.W.2d *399* (Mich.App. 1999).

A defendant's confession to shooting his cousin was ruled involuntary where his defense attorney was intentionally kept by the police from contacting defendant, the attorney's requests that defendant's interrogation be stopped were ignored, defendant was subjected to lengthy, accusatory interrogation, and the interrogating officer knew that defendant had no previous experience with the police. The defendant had a mental condition making it difficult to integrate what he heard and had an intelligence quotient (IQ) of only 72.

The court said a retained attorney's attempt to consult with his client while he is being interrogated is not an unwarranted interruption in the criminal justice investigatory process and any attempts by the police to frustrate such contact are to he discouraged. All of Miller's requests that defendant's interrogation be stopped until Miller could speak to him were ignored. The desk officer indicated that he delayed informing defendant about Miller's presence because the officer did not want defendant's interrogation to be interrupted. We agree with the Michigan Supreme Court that such behavior on the part of the police is 'reprehensible.' *People v. Wright,* 441 Mich. 140, 155, 490 N.W.2d 3S1 (1992). An attorney's attempt to consult with a client is not an unwarranted interruption to the criminal justice process, and attempts to frustrate such contact must not be encouraged.

"Further, the prolonged and accusatory character of the interrogation, and the holding of defendant incommunicado, contributed to establishment of a coercive environment . . . One judge dissented.

**VOLUNTARINESS INTOXICATION LOW IQ**

*Mills v. Commonwealth, 996* S.W.2d 13 (Ky. *1999).*

Is a defendant's intoxication and injuries, when considered in conjunction with his low IQ and limited intelligence, a sufficient combination of factors to render his confession to murder involuntary and unreliable? This court answered "no.' The confession can still he considered voluntary using the totality of the circumstances test if there is no duress or coercion by the police. In this case the police videotaped the confession and it was useful evidence to establish the prosecutor's burden of proof on voluntariness.

While low intelligence and limited education are elements to be considered in the totality of the circumstances analysis, these factors are only relevant inasmuch as their presence causes a defendant to be predisposed to yield to coercive police tactics. "Therefore, upon careful review of the videotape, and taking into account the additional circumstances of Mills' low IQ and limited intelligence, we conclude that Mills' confession was voluntary. The record contains no evidence of police 'coercion of a confession obtained by physical violence or deliberate means calculated to break [Mills'] will.' *Oregon v. Elstad, 470* U.S. 298, 312, 105 S.Ct. 1285, 1295, 84 L.Ed.2d *222* (1985). What the tape reveals is Mills answering willingly questions posed to him by Detective Hall. Additionally, Mills does not appear to be so intoxicated or injured so as to render his confession unreliable. *See Britt,* 512 S.W.2d at 500 (the issue is not whether a drunk's confession is a product of free volition, but rather whether the confessor was in sufficient possession of his faculties to give a reliable statement."

**VOLUNTARINESS OFFICER PROMISES RE PROBATION**

*Johnson v. State,* 972 S.W.2d 935 (Ark. 1998).

A police officer's promise to a defendant that he would recommend probation to the prosecutor if defendant were truthful with him and if no other drugs were found in his car, did not render the defendant's inculpatory statement involuntary, where more drugs were found in the car and the condition of the promise was not met.

". . . Johnson argues that his inculpatory statement to officer Poe should have been suppressed because Poe falsely promised to recommend that he be given probation. He cites the established rule that custodial statements are presumed to be involuntary, and asserts that his statement was not freely and voluntarily given because he gave his statement in reliance upon Poe's promise. which was not forthcoming. Johnson's argument was dependent upon whether the trial court believed his version of what prompted his statement to Officer Poe. While Poe told Johnson he would recommend probation to the prosecution if Johnson was truthful and if no other drugs were found, Poe testified that those conditions were never met. More drugs were found. Although Johnson denied any knowledge of the additional methamphetamine found in his car's fender well after Poe made his promise, the trial court was not bound to believe Johnson's story. . . Accordingly, we affirm the trial court's ruling denying Johnson's motion to suppress his statement."

**VOLUNTARINESS PROMISE BY POLICE OF HELP WITH PROSECUTOR**

*McLeod v. State,* 718 So.2d ~27 (Ala. 1998).

A police statement while defendant was under interrogation that if he cooperated, they would make his cooperation known to the prosecutor and court, did not make defendant's confession to murder involuntary. There was no evidence that defendant was threatened with physical intimidation or psychological pressure, that the questioning lasted for an extraordinary length of time or that defendant was deprived of either food or sleep.

The court also considered the facts that defendant was not under the influence of alcohol or drugs, and that defendant was an adult who could read and write, and who signed a knowing, intelligent, and voluntary waiver. The court noted that "the mere promise to make cooperation known to law enforcement authorities, as opposed to a direct promise of a reduced sentence, generally is not considered an illegal inducement. .", citing precedents from the First. Fifth, Seventh, Eighth, Ninth and Eleventh Circuits (footnote in the court's opinion).

Three justices concurred and four justices concurred in the result.