Miranda & other 5th Amendment rights

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I. VOLUNTARINESS

Before 1966, "Voluntariness" is all with which the Courts were concerned. They wanted to be sure a confession was not forced from a suspect. Today, "Voluntariness" remains as a second issue after compliance with the Miranda Rule.

Now, when a prosecutor wants to use an accused's statement against him in court, there must first be a hearing outside the presence of the jury to determine voluntariness and compliance with Miranda if applicable.

A. JACKSON V. DENNO HEARING

Before the accused's statements are brought before the jury there must be a so-called "**Jackson v. Denno**", 378 U.S. 368, 84 S.Ct. 1774 (1964) hearing in front of the judge outside the presence of the jury. At this hearing the judge hears what the suspect told the police and the circumstances under which the suspect made the statements. Then the judge decides (1) whether the statements were "voluntary" using the totality of the circumstances and (2) whether the statements were given after proper **Miranda** warnings or whether **Miranda** was violated, or applicable.

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). Nevada has adopted the procedure set forth, often referred to as the "Massachusetts rule". **Grimaldi v. State**, 90 Nev. 89, 518 P.2d 615 (1974).

If the statement was involuntary, it 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). If it was voluntary but **Miranda** was violated, it can be used only for impeachment if the defendant testifies and contradicts the statement. **Harris v. New York**, 401 U.S. 222, 91 S.Ct. 643 (1971) and **Oregon v. Hass**, 420 U.S. 714, 95 S.Ct. 1215 (1975), **McGee v. State**, 105 Nev. 718, 782 P.2d 1329 (1989) (use of Unmirandized statement in perjury prosecution). If it was voluntary and the result of proper **Miranda** warnings, it can be used for all purposes in court.

But note, even after the court permits the defendant's statements to be heard by the jury, the jury still has an opportunity to decide the voluntariness of the confession if voluntariness is raised as an issue. **Dawson v. State**, 108 Nev. 112, 825 P.2d 593 (1992). **Varner v. State**, 97 Nev. 486, 634 P.2d 1205 (1981) and the burden is on the State by 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). For approved jury instruction see **Carlson v. State**, 84 Nev. 534, 445 P.2d 157 (1968); **Ogden v. State**, 96 Nev. 258, 607 P.2d 576 (1980); **Varner**, Supra. Preponderance of evidence is likewise the test for Miranda rights waiver. **Falcon v. State**, Supra.

TEST FOR VOLUNTARINESS: "Totality of Circumstances" **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)

B. INTOXICATION, TRAUMATIC INJURIES AND VOLUNTARINESS

If, as a result of intoxication, the defendant 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 24 (1932) usually even if real 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 P.2d 342 (Nev. 1970); Drugs - **Falcon v. State**, Supra; **Chambers v. State**, 113 Nev. 974, 944 P.2d 805 (1997) confessiion volunitary even though .27% B.A., numerous drugs in system and open stab wound to arm.

C. PROMISES AND THREATS (BY POLICE OR AGENTS)

In most cases, okay to promise to convey cooperation to D.A. or promise to reduce charge. See generally, **United States v. Tingle**, 685 F.2d 1332 n..4- 5 (9th Cir. 1981); **McKenna v. State**, 101 Nev. 338, 705 P.2d 614 (1985). Although this implies that perhaps failure to cooperate will also be reported, such a statement to suspect is improper. See also, **United States v. Rutledge**, 900 F.2d 1127 (7th Cir. 1990). **United States v. Baldwin**, 60 F.3d 363 (7th Cir. 1995). There, the officer, after Mirandizing the suspect, advised that any cooperation he gave the police would be helpful. In upholding the subsequent confession as voluntary, the court stated:

"The law permits the police to pressure and cajole, conceal material facts, and actively mislead ... all up to limits not exceeded here."

Promises to be lenient on relatives, girlfriends, etc., or give people breaks, or not arrest others if defendant confesses, cooperates - generally okay. See **United States v. McShane**, 462 F.2d 5 (9th Cir. 1972); **Ferguson v. Boyd**, 566 F.2d 873 (4th Cir. 1977 Fn.7).

Threats: advising a defendant that if he did not cooperate, things would go worse for him renders all statements involuntary. **Collazo v. Estella**, 940 F.2d 411 (9th Cir. 1991) infra.

Police Agents: See **Arizona v. Fulminante**, 499 U.S. 279, 111 S.Ct. 1246 (1991) infra.

D. TRAFFICKING AND THE "SUBSTANTIAL ASSISTANCE" CLAUSE

The trafficking statute, **NRS 453.3405(2)** has a "substantial assistance" clause. 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 (**NRS 453.3405(2)**) which 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.

In **Sanchez**, the defendant spoke to the arresting officers and, although he did not render substantial assistance, he 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. These incriminatory statements were admitted into evidence at the defendant's trial and helped the D.A. in obtaining a conviction.

In upholding the defendant's conviction and sentence, the Nevada Supreme Court stated that the statutory admonishment does not constitute a promise by law enforcement officers of a lighter sentence upon the suspects 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. In addition, the court held that Sanchez' **Miranda** Rights were knowingly and intelligently waived, and that his statements were voluntary and admissible. See also, **United States v. Ceballos**, 706 F.2d 1198 (11th Cir. 1983); **United States v. Davidson**, 768 F.2d 1266 (11th Cir. 1985); **United States v. Karr**, 742 F.2d 493 (9th Cir. 1984).

E. MISREPRESENTATIONS AND THREATS OF ECONOMIC RETALIATION

Certain misrepresentations will negate voluntariness of confession.

Example: "You will be cut off from Aid To Dependent Children if you don't cooperate",

Lynumn v. Illinois, 372 U.S. 528, 83 S.Ct. 917 (1963), "your friend will loose his police officer job if you don't cooperate" - **Spano v. New York**, 360 U.S. 315, 79 S. Ct. 1202 (1959). But note, these are all in the form of threats.

The threat of loss of employment constitutes impermissible coercion. In **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 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 coerced statements in criminal proceedings where the statement was obtained under threat of removal from office. See also, **Gardner v. Broderick**, 392 U.S. 273, 88 S.Ct. 1913 (1968) wherein the United States Supreme Court ordered the reinstatement of a police officer who had been fired because he exercised his right to remain silent in a criminal investigation. An individual cannot be penalized for exercising their constitutional rights. The court held that when a policeman has been compelled to testify or give a statement under threat of removal from office or other sanction, the testimony or statement that he gives cannot be used against him in a later criminal prosecution. The statement given under these circumstances is deemed to be involuntary and coerced as a matter of law.

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:

I wish to advise you that you are being questioned as part of an official investigation of the police department. You will be asked questions specifi cally directed and narrowly related to the performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and constitution of this State and the Constitution of the United States, including the right not to be compelled to incriminate yourself. I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties or fitness for duty, you will be subject to departmental charges, which could result in your dismissal from the police department. If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent departmental charges.

Evidence derived from "Garrity" statement is inadmissible. The prosecutor must establish an independent source. ***United States v. Koon & Powell****, 34 F.3d 1416 (9th Cir. 1994) (Rodney King Appeal).*

PROPRIETY OF DA REVIEWING A "GARRITY" STATEMENT:

It is not improper for a prosecutor to review an internal affairs file including "Garrity" statements. The Fifth Amendment privilege protects only against the use of such statements. It was further suggested by the Ninth Circuit that perhaps the better approach is to have an attorney from the Civil Division review the internal affairs file and redact any "Garrity" type statements so that the actual prosecutor is not infected by same. In addition, a subsequent **Kastigar** hearing wherein the government must prove an independent source for all of its evidence will protect improper use of any such statement. (Referring to **Kastigar v. United States**, 406 U.S. 441, 92 S.Ct. 1653 (1992). See **In Re Grand Jury Subpoena**, 75 F.3rd 446 (9th Cir. 1996).

F.MISREPRESENTATIONS OR TRICKS IF NON- THREATENING ARE ACCEPTABLE

Example: **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 which falsely stated 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 and the dissent may well become the majority commencing January, 1997. 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.

Other examples of acceptable deception mentioned by the court would be (1) placing the defendant's vehicle at the crime scene; (2) falsely eluding to physical evidence linking the victim to the defendant's car; (3) the presence of the defendant's fingerprints at the crime scene or in a getaway car; (4) positive identification by an eyewitness; (5) identification of the defendant's semen in the victim or at a crime scene. Examples of unacceptable falsehoods (because they would be of a type which would be reasonably likely to procure an untrue statement or influence an innocent person to confess) would be as follows: (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; (5) representation that welfare benefits would be withdrawn or children taken away unless there was a confession; (6) suggesting harm or benefit to someone. See also, **Silva v. State**, 113 Nev. __, 951 P.2d 591 (1997) While questioning the suspect detectives falsely advised him that they already had conclusive evidence of his guilt. The Court cited **Bessey**, **supra**, with approval stating "A lie that relates to a suspect's connection to the crime is the Least likely to render a confession involuntary."

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. In **Frazier v. Cupp,** 394 U.S. 731, 89 S.Ct. 1420 (1969) officers interrogating Frazier represented falsely 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 invoke the "due process clause".

In **State v. Trieb**, 516 N.W.2d 287 (N.D. 1994) undercover officers made factual misrepresentations to defendant in order to get defendant to confess to participating in a murder. Held not outrageous conduct.

In **Ledbetter v. Edwards**, 35 F.3d 1062 (6th Cir. 1994) defendant confesses after police falsely tell 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. 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 and no physical punishment, the defendant was not deprived of food or bathroom privileges and the defendant had prior experience with the criminal justice system. The court simply concluded that in this case the false statements by the police would not have caused an innocent person to confess.

G. MENTAL DEFECT

In **Colorado v. Connelly**, 479 U.S. 157, 107 S.Ct. 515 (1986) the court ruled admissible, a defendant's confession wherein he stated that "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 in conclusion held that 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.

In **Criswell v. State**, 86 Nev. 573, 472 P.2d 342 (Nev. 1970), schizophrenic's confession admissible if understood meaning.

In **Geary v. State**, 91 Nev. 784, 544 P.2d 417 (1975), detectives advised the defendant that he

could apply for psychological help where there was evidence to suggest he might need it. The Nevada Supreme Court held the confession voluntary stating that so long as the defendant is mentally capable of understanding the meaning and consequences of his confession his condi tion does not preclude admission. Geary was convicted of 1st degree murder and sentenced to life without the possibility of parole. He was released from prison in 1986. In 1992 he committed another murder and was sentenced to death. See **Geary v. State**, 110 Nev. 261, 871 P.2d 927 (1994).

H. STATEMENTS MADE IN FURTHERANCE OF PLEA NEGOTIATIONS (See also discussion under CUSTODY)

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."

This section has been interpreted broadly and applies equally to statements made by an accused outside the courtroom. See,**Robinson v. State**, 98 Nev. 202, 644 P.2d 514 (1982), wherein the court held that statements made to a detective while the defendant was involved in plea negotiations were inadmissible. Most often of course, the statements that the prosecutor wishes to use are made in open court during an aborted plea of guilty or to a parole and probation officer pursuant to a plea of guilty which is later permitted to be withdrawn. Such statements cannot even be used for impeachment purposes. See **Mann v. State**, 96 Nev. 62, 605 P.2d 209 (1980). The question that the court will ask is whether the defendant subjectively believed that he was negotiating a plea at the time of the statements and whether the subjective belief on the part of the defendant was reasonable. (See **Mann)**. For this reason, it is always safest for the police officer to advise the defendant that he lacks the authority to make a deal, but that he will relay all information and indeed recommendations to the district attorney. See **McKenna v. State**, 101 Nev. 338, 705 P.2d 614 (1985).

Limitations: The statute is generally not applicable when officers enter into specific negotiations with the accused in order to obtain "substantial assistance" from the accused. See **United States v. Karr**, 742 F.2d 493 (9th Cir. 1984); **Sanchez v. State**, 103 Nev. 166, 734 P.2d 726 (1987); **NRS 453.3405**

Exception: Defendant agrees to waive exclusionary provisions of statements made in furtherance of plea bargain. Defendant can waive exclusionary provisions. **United States v. Mezzanatto**, 513 U.S. 196, 115 S.Ct. 797 (1995). Defendant agrees that district attorney could use defendant's statements to impeach him if case proceeded to trial - agreement upheld.

I. APPEALS (Introduction of Coerced Confession May Be Harmless Error)

In the recent case of **Arizona v. Fulminante**, 499 U.S. 279, 111 S. Ct. 1246 (1991), the United States Supreme Court ruled that the introduction of a coerced confession at trial may be considered "harmless error" on appeal. (There is a very good discussion in this case about the harmless error rule and the various Constitutional pronouncements to which it has applied.)

In **Fulminante**, the defendant's 11 year old step-daughter was found in the desert, shot twice in the head with ligature around her neck. Due to the state of decomposition, it was impossible to determine whether or not there had been a sexual assault connected with the murder. While in prison on unrelated charges, defendant **Fulminante** confessed to an FBI informant that he had driven his step-daughter out to the desert, sexually assaulted her, made her beg for her life on her knees and then shot her twice in the head. The United States Supreme Court upheld the lower court's determination that the confession to the informant had been coerced for the following reasons. The defendant had heard that his life was in jeopardy in the prison by hostile inmates and the 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 a credible threat of violence is enough

to constitute coercion. In applying the harmless error rule, the court held that in this particular case the error was not harmless and for that reason the case would have to be re- tried assuming the government had enough evidence to go forward.

J. "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).

K. 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).

L. 18 U.S.C. 3501: CONFESSIONS ADMISSIBLE IN FEDERAL COURT IF VOLUNTARILY GIVEN (MIRANDA WARNING NOT APPLICABLE)

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. Although this section has never been repealed, it has been ignored. In a 1994 United States Supreme Court decision of **Davis v. United States**, 512 U.S. 452, 114 S.Ct. 2350 (1994) Justice Scalia in a concurring opinion addressed this section of the law and, in so many words, stated that in the future, as a justice of the United States Supreme Court, he would invoke its provisions when confronted with a "Miranda" issue. He noted that the Justice Department and the court's failure to enforce its provisions may have led to "the acquittal and the non- prosecution of many dangerous felons, enabling them to continue their deprivations upon our citizens. There is no excuse for this."

Section 3501 does not apply to State prosecutions. See **United States v. Alvarez-Sanchez**, 511 U.S. 350, 114 S.Ct. 1599 (1994). Other cases construing this section are **United States v. Wilson**, 838 F.2d 1081 (9th Cir. 1988); **Mulry v. State**, 399 N.E.2d 413 (Ind. 1980); **United States v. Crocker**, 510 F.2d 1129 (10th Cir. 1975).

II. MIRANDA v. ARIZONA - 384 U.S. 436, 86 S.Ct. 1602 (1966) (Re- trial 450 P.2d 364 (Ariz 1969)

A. FACTS OF MIRANDA

An excerpt from the dissenting opinion delivered by Justice Harlan concisely sets forth the facts.

On March 3, 1963, an 18 year old girl was kidnaped 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," 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.

B. HOLDING

An excerpt from the majority opinion delivered by Chief Justice Earl Warren:

"Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: The prosection 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 ques tioning. 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."*

C. THE WARNING

Rule: Prior to custodial interrogation the following must be given:

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?*

D. WARNING DOES NOT HAVE TO BE EXACT

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).

III. WHEN MIRANDA WARNINGS REQUIRED (Custodial Interrogation)

The prosection may not use statements ..."stemming from custodial interrogation of defendant [without the required warning]..."**Miranda v. Arizona**, supra.

It is important to note that the **Miranda** warnings 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.

A. INTERROGATION:

1. INTERROGATION DEFINED

Questioning and other acts designed to elicit incriminating statements. **Rhode Island v. Innis**, 446 U.S. 219, 100 S.Ct. 1682 (1980), infra; **Pendleton v. State**, 103 Nev. 95, 734 P.2d 693 (1987)

2. IS THE STATEMENT INCRIMINATING?

If the statement elicited from the suspect is not "incriminating" then the statement is not deemed to have been obtained as a result of interrogation and miranda is not applicable.

Asking for 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 itself be higly incriminating. See **United States v. Henley**, 984 F.2d 1040 (9th Cir. 1993). The Court went on to state 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). In **Henley**, 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 of Appeals, see **United States v. Hidalgo**, 7 F. 3d 1556 (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 concludes tht "every Federal Circuit Court which has addressed the Miranda issue in the context of a consent to search has concluded that it is not an incriminating statement. (Citing cases from the 10th, D.C. 7th, 8th, and 2nd Circuits). It should be noted that the Court in **Hidalgo**, likewise ruled that such a request, even if made after an indictment has issued against a suspect, does not implicate the Sixth Amendment to the United States Constitution because it is not a critical stage of a criminal proceeding. Citing the 2nd Circuit case of **United States v. Kon Yu-Leung**, 910 F.2d 33 (2nd Cir. 1990). That court reasoned that like the taking of a handwriting exemplar, the Sixth Amendment Right to Counsel does not apply to a consent to search.

Is This Your Car? Such a question of a suspect may or may not be incriminating depending upon the circumstances. If, for example, 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, in fact, the person were in custody. See **United States v. Henley**, 984 F2d 1040 (9th Cir. 1993). It is important to note however that suppressing such a statement may well be academic since there may well 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. In

addition, simply because the statement “Yes, this is my vehicle” is incriminating does not mean that fruits recovered from the automobile would be suppressed. As a general proposition, the physical evidence recovered as a result of a statement in violation of Miranda are generally not rendered inadmissible. See generally, **New York v. Quarles**, 467 U.S. 649, 104 S.Ct. 2626 (1984). See also, section on Fruit of the Poison Tree in this outline.

3. VOLUNTEERED STATEMENTS

"Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.. 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. 219, 100 S.Ct. 1682 (1980).

4. INTERROGATION OR ITS "FUNCTIONAL EQUIVALENT

While interrogation refers to the overt or express questioning of a suspect, the "functional equivalent" of express questioning refers to "any 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." (**Innis**, at 1689). To determine whether the questioning falls within the meaning of the functional equivalent of interrogation the focus is on the perception of the suspect, rather than the intent of the police. (**Innis**, at page 1690).

The facts in **Rhode Island v. Innis** were as follows: The defendant, **Innis**, was arrested shortly after committing an armed robbery. The officers advised him of his rights under **Miranda**, whereupon 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 in the area where the robbery occurred there were a lot of handicapped children and that if one of them found the weapon, someone might be hurt. The defendant thereupon 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".

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

The court, citing **Rhode Island v. Innis**, ruled that **Miranda** had been violated because Detective Dillard's statements to the defendant were de signed or were reasonably likely to illicit an incriminating response and therefore, although Detective Dillard did not engage in express ques tioning, his conduct amounted to its' functional equivalency.

A police officer’s response to a question in which a suspect, who initially asserted the right to remain silent and to counsel under **Miranda** after his arrest, asked what he was being charged with, in which the officer stated that the suspect was charged with “Assault on a Police Officer, because I get pissed off when someone shoots at me” was ruled not “interrogation” of the suspect. The court, therefore, ruled that the suspect’s response to the officer’s statement to the effect that the gun went off accidentally when he

threw it to the ground was admissible in evidence. See **United States v. Henry**, 940 F.Supp. 342 (D.D.C. 1996).

5. QUESTIONING BY SOMEONE OTHER THAN POLICE

a. DEFENDANT'S WIFE

In **Arizona v. Mauro**, 481 U.S. 540, 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 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. POLICE INFORMANT OR UNDERCOVER OFFICER

In **Illinois v. Perkins**, 496 U.S. 292, 110 S.Ct. 2394 (1990), Infra. the United States Supreme Court held that **Miranda** warnings are not required 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. In its ruling, the Supreme Court held that conversations between suspects and undercover agents or officers do not implicate the concerns underlying **Miranda** since **Miranda** was concerned with coercion from official interrogation.

Nevada does not follow the United States Supreme Court precedent in **Perkins**. 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) the court held that the same rule applies to police agents as police officers and, therefore, if a person is in custody and the agent 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.

c. PRIVATE CITIZEN/SECURITY GUARD

Miranda not required, but voluntariness 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).

d. CORRECTIONS OFFICERS OR PRISON COUNSELOR

Nevada Supreme Court held **Miranda** warnings 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).

e. MENTAL HEALTH COUNSELOR

In **Alward v. State**, 112 Nev. 141, 912 P.2d 243 (1996) the suspect was referred to 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 disallowed those statements and invoked the exclusionary rule on Due Process grounds, rather than Fifth Amendment grounds, because the suspect was led to believe that the conversation with the counselor was confidential. The court simply concluded that it would be "unfair" to admit into evidence a statement obtained in that

fashion.

6. SURREPTITIOUS RECORDING OF CONVERSATIONS (RECORDING CONVERSATIONS IN POLICE CARS)

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 - whether a person is under arrest or not.

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).

Although the Nevada Supreme Court has not addressed this issue, we do have a statute rather unique in this State which is **NRS 200.650**. It 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."

In Nevada the whole issue is whether or not the word "privacy" restricts the application of NRS 200.650 to those persons who would have a "reasonable expectation of privacy". That is the standard normally applicable to Fourth Amendment interests. The Nevada Supreme Court has never addressed this issue, however, there is an Attorney General's opinion which is set forth in the NRS annotations which states:

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.

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 in- consistent with the aims of a free and open society. See **United States v. Clark**, 22 F.3d 799 (8th Cir. 1994).

It is my opinion that unless our State Supreme Court says otherwise, the word "privacy" contained in **NRS 200.650** is 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.

B. CUSTODY

1. CUSTODY DEFINED

Custody is defined as formally placing a person under arrest or "where there has been such a restriction on a persons freedom as to render him in custody". **Oregon v. Mathiason,** Supra.

Some courts have adopted the same "custody" definition as is now used for 4th Amendment search and seizure issues, i.e., objective innocent person test. See **People v. Holmes**, 626 N.E.2d 412 (Ill. App. 1994). For 4th Amendment test see **Florida v. Bostick**, 501 U.S. 429, 111 S.Ct. 2382 (1991); **California v. Hodari D.**, 499 U.S. 621, 111 S.Ct. 1547 (1991). Other courts use multiple factors. See **United States v. Beraun- Panez**, 812 F.2d 578 (9th Cir. 1987).

In Nevada, "custody" was defined in **Alward v. State**, 112 Nev. 141, 912 P.2d 243 (1996), wherein the court adopted the test established in **Berkemer v. McCarty**, 468 U.S. 420, 104 S.Ct. 3138 (1984), infra, when the suspect has not been placed under formal arrest. The test there was "how a reasonable man in the suspect's position would have understood his situation." 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."

2. LOCATION OF INTERROGATION AND COERCIVENESS OF 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**, Supra.:

"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." (for contrary view see **Krueger v. State**, 92 Nev. 749, 557 P.2d 717 (1976) and **Orozco v. Texas,** 394 U.S. 324, 89 S.Ct. 1095 (1969) Infra.

It is important to note, however that in **Orozco**, one of the officers testified that the defendant was "under arrest" before the incriminating statements were obtained and in addition, this was a case decided by the **Warren** Court. The Nevada case of **Krueger v. State**, came one year before **Oregon v. Mathiason**, and therefore its continued rationale is questionable.

a. COURT ROOM 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). Judicial admissions made spontaneously in court do not require Miranda; **People v. Williams**, 265 Cal. App. 2d 888, 71 Cal. Rptr 773 (1968)

b. IN HOME:

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. The Court ruled defendant's statement admissible on the theory that **Miranda** was designed to protect suspects in police controlled environments while in custody or otherwise restrained - on the facts in this case Beckwith was not in custody.

In **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. - Court ruled defendant was "deprived of freedom of action in a significant way" and was in custody, so **Miranda** Warnings were required.

c. STATION HOUSE OR PROSECUTORS OFFICE:

Oregon v. Mathiason, supra. 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**. Officer told defendant police had found his prints at crime scene and defendant confessed. (No prints found at scene). Defendant was given **Miranda** Warnings and confessed again. Defendant was allowed to leave police station. The court ruled no **Miranda** was necessary because defendant was "not "in custody" or otherwise deprived of his freedom of action in any significant way".

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.

State v. Lanning, 109 Nev. 1198, 866 P.2d 272 (1993). The facts in **Lanning** are as follows: Vicki Workman (Workman) hired Mylissa Lanning (Lanning) to housesit while movers packed Workman's belongings. Shortly thereafter, Workman discovered that a number of her checks had been forged and cashed for an amount in excess of $3,700.00. Workman notified Nevada authorities of the forger. The Elko police department conducted an investigation into the missing checks. On February 25, 1992, Det. Ladd 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 Detective Ladd 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 Detective Ladd that "I should see an attorney because I do not want to incriminate myself." Again, Ladd 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. Lanning was charged with two counts of uttering an altered instrument and two counts of possession of a forged instrument.

The Nevada Supreme Court held that neither the defendant's 5th nor 6th Amendment Right to Counsel were 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. In addition, the non- custodial police interview was not a "critical stage" thereby eliminating the 6th Amendment Right to Counsel.

Silva v. State, 113 Nev. ___, 951 P.2d 591 (Nev.1997) Metro homicide detectives developed defendant Silva as a suspect in the murder and robbery of Howard Gibbons, the bartender at the Wagon Wheel Bar perpetrated on 03/12/92. When detectives caught up with suspect 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 the suspect was placed in an interview room at which time several statements were taken from the suspect. He was confronted with lies and accused of lying and ultimately made incriminating statements. After the third statement, Silva was finally given his Miranda rights and advised that he was no longer free to go (custody). Additional incriminating statements were thereafter obtained. The Court held that the un-Mirandized statements were admissible because the suspect was not in custody for Miranda purposes.

UNITED STATES V. ELLISON, 791 F.2D 821 (10TH Cir. 1986) U.S. Attorney's Office not custodial.

d. PROBATIONER

Minnesota v. Murphy, 485 U.S. 420, 104 S.Ct. 1136 (1984) Defendant was on probation for minor offense. Defendant's probation officer received information that defendant had committed a rape and murder and called defendant in for 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 all grand jury witnesses (and witnesses subpoenaed to court).

Conclusion:

The principle that law enforcement officers should derive from most of the cases cited above is that the police can purposely attempt to elicit incriminating evidence in a non-custodial interview without first advising a defendant of his **Miranda** rights. This principle was again enunciated by the United States Supreme Court in **Minnesota v. Murphy**, Supra.

e. DETENTION FOR MEDICAL EXAMINATION:

Detention for purpose of medical examination, such as in auto accident cases, where continued detention is for purpose of medical diagnosis is not **Miranda** custody. **Wilson v. Coon**, 808 F.2d 688 (8th Cir. 1987).

f. PRISON INMATE:

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 and generally conducts the interview in a non-coercive environment such as a visitor's room, library or other suitable location. Is the mere fact that the inmate is "in custody in a penal institution" adequate to constitute "custody" for **Miranda** purposes?

Although the law in this area is not entirely clear, many courts would 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 insti tution. These courts generally reason that the inmate's own cell for example, is his home and therefore not generally deemed to be a "coercive" environment. This would be in line with the police station cases such as **Mathiason** and **Beheler**, supra. Favorable rulings have come in the following cases. **United States v.**

Turner, 28 F.3d 981 (9th Cir. 1994); **Cervantes v. Walker**, 589 F.2d 424 (9th Cir. 1978); **United States v. Conley**, 779 F.2d 970 (4th Cir. 1985); **Flittie v. Solem**, 751 F.2d 967 (8th Cir. 1985); **United States v. Scalf**, 725 F.2d 1272 (10th Cir. 1985); **Garcia v. Singletary,** 13 F.3d 1487 (11th Cir. 1994); **Leviston v. Black,** 843 F.2d 302 (8th Cir. 1988); **People v. Crawford**, 578 N.Y.S.2d 814 (1991); **People v. Patterson**, 588 N.E.2d 1175 (Ill. 1992). Unfortunately, a couple of cases, including a Nevada case, reach a contrary result. See **Mathis v. United States**, 391 U.S. 1, 88 S.Ct. 1503 (1968) and **Walker v. State**, 102 Nev. 290, 720 P.2d 700 (1986).

g. TEMPORARY DETENTIONS DURING EXECUTION OF SEARCH WARRANTS:

Generally not deemed "custody" for Miranda. **United States v.Saadeh**, 61 F.3d 510 (7th Cir. 1995).

3. PREMATURE GIVING OF MIRANDA WARNING DOES NOT CREATE "CUSTODY"

People v. Holmes, 626 N.E.2D 412 (Ill. App. 1994) "A custodial situation cannot be created by the mere giving of Miranda warnings."

4. ANTICIPATORY INVOCATION OF COUNSEL OR MIRANDA; INVOKING RIGHTS WHEN OUT OF CUSTODY.

The 5th Amendment right to counsel under **Miranda** requires custody. 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)

Silva v. State, 113 Nev. __, 951 P.2d 591 (Nev. 1997) Metro homicide detectives developed defendant Silva as a suspect in the murder and robbery of Howard Gibbons, the bartender at the Wagon Wheel Bar, perpetrated on 3/12/92. When detectives caught up with suspect 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 the suspect was placed in an interview room at which time several statements were taken from the suspect. He was confronted with lies and accused of lying and ultimately made incriminating statements. After the third statement, Silve was finally given his Miranda rights and advised that he was no longer free to go (custody). Additional incriminating statements were thereafter obtained. The Court held that the un-Mirandized statements were admissible because the suspect was not in custody for Miranda purposes. Although Silva had requested an attorney during his second pre-miranda statement the homicide detectives ignored him and continued questioning Silva. The Court held that the Fifth Amendment right to Counsel pursuant to the Miranda decision applies only when the suspect is subjected to custodial interrogation. Since Silva was not in custody during this pre-Miranda questioning, there could be no Miranda violation. It is important to note that during those pre-Miranda interrogations the detectives had specifically told Silva that he was not under arrest.

RULE: "One who is not in custody is not entitled to the Fifth Amendment Right to Counsel. Therefore, the police may continue asking the suspect questions, even if he asks for an attorney during the interrogation, as long as the statements are voluntary . . . . only if he were subjected to custodial interrogation would a request for an attorney require the police to immediately cease all questioning until an attorney is present."

5. APPEALS AND FEDERAL HABEAS

Federal Habeas extends to the issue of "custody" and there is no presumption of correctness extended to State Courts. **Thompson v. Keohane,** 516 U.S. 99,116 S.Ct. 457 (1995).

C. FOCUS OF INVESTIGATION ON A SUSPECT

Although this was once believed to be a critical element in determining whether or not a suspect was in "custody" for purposes of **Miranda**, this is no longer the case. See **Oregon v. Mathiason**, Supra.; contrary view, **Krueger v. State**, Supra. (However, **Krueger** was decided before **Mathiason**)

In **Stansbury v. California**, 511 U.S. 318, 114 S.Ct. 1526 (1994), the court held "...that an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody". Focus of suspicion is simply not relevant to **Miranda** if it remains undisclosed.

D. MIRANDA APPLICABLE TO FELONIES AND MISDEMEANORS

All custodial interrogations require **Miranda** warnings regardless of the crime classification or seriousness of the offense. **Berkemer v. McCarty**, and **Pennsylvania v. Bruder**, 488 U.S. 9, 109 S.Ct. 205 (1988) Infra.

E. 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 be cause 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.

For the same reason, a **Terry** stop (**Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868 (1968) does not render one to be in custody for purpose of **Miranda**. See generally **Berkemer v. McCarty**, Infra.

1. **BERKEMER V. MC CARTY**, 468 U.S. 420, 104 S.Ct. 3138 (1984). Police stopped car for erratic driving. Defendant got out of car and had hard time standing. Police concluded 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 drink ing beer and ingested marijuana. Thereafter defendant McCarthy 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. McCarthy was convicted and the conviction was upheld by the Ohio Supreme Court which held that **Miranda** is not applicable to misdemeanor offenses. The United States Supreme Court reversed the conviction and held as follows: The admissions made at the roadside stop were admissible because the defendant was not at that time in custody. The statements made at the police station however, were not admissible and should have been suppressed because **Miranda** applies to all arrests without regard to the seriousness of the crime.

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. Thereafter 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 thereafter placed under arrest after which time he was 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 by reinstating the conviction simply reiterated its previous holding in **Berkemer v. McCarty**, supra., stating that the non-coercive aspect of ordinary traffic stops prompts us to hold 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.

3. **STATE v. SMITH**, 105 Nev. 293, 774 P.2d 1037 (1989). In that case the defendant was talked into submitting to a breath test after she had been placed under arrest for DUI and without benefit of being advised of her **Miranda** Rights. The Nevada Supreme Court, pursuant to

Berkemer v. McCarty, Infra., ordered all statements made by the defendant to be suppressed but would not suppress the physical evidence, i.e., the Breath Test Results. Reason: A **Miranda** or Fifth Amendment Violation does not bar the forced production of real or physical evidence such as blood or breath samples. Additionally, the court held that the Fourth Amendment does not prohibit such warrantless seizures because evidence such as breath samples may be lost if not immediately seized, citing **Schmerber**, infra. In **Smith**, the court stated that it would construe Nevada's implied consent laws liberally and in so doing concluded that the breath test was voluntarily given.

4. PENNSYLVANIA v. MUNIZ, 496 U.S. 582, 110 S.Ct. 2638 (1990). The facts and holding of the Supreme Court in **Muniz** are broken down as follows:

a. SOBRIETY TEST AT POLICE STATION (Miranda not applicable)

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. This the court ruled, constituted "real" or "physical" evidence not protected by the Fifth Amendment Privilege and not custodial interrogation within **Miranda.**

b. STATEMENTS BY DEFENDANT DURING FIELD SOBRIETY TEST (Miranda Not Applicable)

During the process of the officer instructing the defendant on the sobriety tests and implied consent breath test, the defendant made a number of incriminating statements that were recorded on the video tapes. Again, the court ruled that these statements were admissible because they were not the product of interrogation within the meaning of **Miranda**.

c. ROUTINE BOOKING QUESTIONS (Miranda Not Applicable)

During the formal booking procedures at the station house, which was likewise video taped, the defendant was asked 7 different questions, to- wit: his name, address, height, weight, eye color, date of birth, and age. The defendant stumbled over two of these routine responses, but again the court ruled that this was a "record keeping" procedure "reasonably related to law enforcement administrative concerns" and that therefore, these questions fall within the confines of a "routine booking question" exception to **Miranda.** See also **State v. Burns,** 661 So.2d 842 (Fla. App. 1995) can repeat Field Sobriety Test for the camera at the station house. This was held to be ono-testimonial.

Routine booking questions, even though incriminating, may be admissible if they are asked for legitimate jail classification purposes. See **Nika v. State**, 113 Nev. __, 951 P.2d 1047 (1997). In that case the murder suspect was asked "Have you ever assaulted or battered anyone?" 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.

d. TRICK QUESTIONS: (Miranda Is Applicable)

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**. This last 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.

F. TERRY STOPS: TERRY V. OHIO, 392 U.S. 1, 88 S.Ct. 1868 (1968)

In **Berkermer v. McCarty**, Supra., the court held that **Terry** Stops (reasonable suspicion to believe that the person detained has committed or is about to commit a criminal offense) are not subject to the dictates of **Miranda**.

In part, the court held as follows: that although stopping a car and detaining its occupants constitutes a Fourth Amendment seizure, such a traffic stop is more analogous to a "**Terry** Stop" than to a formal arrest. In such a stop, the officer is permitted, without **Miranda** 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 detainees 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**."

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).

G. FELONY TRAFFIC STOPS:

Same rule applies as in misdemeanor cases. In **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 mirandizing him. Permissible to ask if he had been drinking, and how much.

H. ASKING DETAINED SUSPECT WHAT IS IN HIS POCKET:

In **State v. Scott**, 518 N.W.2d 347 (Iowa 1994) the officer after lawfully detaining the suspect in his vehicle which was leaving the scene of a shooting and after lawfully frisking him felt an object in suspect's pocket. The officer concluded that the object was not a weapon and rather than try to come within the "plain feel" exception asked the suspect, without first mirandizing him, what the object was. The suspect answered that the object contained marijuana. This was held to be admissible. (The "plain feel" case is **Minnesota v. Dickerson**, 508 U.S. 366, 113 S.Ct. 2130 (1993).

IV. RESUMPTION OF QUESTIONING FOLLOWING EXERCISE OF FIFTH AMENDMENT -- RIGHT TO REMAIN SILENT

Rule: After a defendant is placed "in custody", is given his **Miranda** rights and then invokes his right to remain silent all questioning must cease. He can however be reinterrogated after a reasonable period of time has elapsed or the defendant himself initiates further communication with the police.

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 then 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 U.S S.Ct in **Arizona v. Roberson**, 486 U.S. 675, 108 S.Ct. 2093 (1998), 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. It is important to note, however, that in **Michigan v. Mosley**, Supra., the defendant was Re-Mirandized, was questioned about a completely different offense and did not invoke his right to counsel. The rule should however 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.

V. RESUMPTION OF QUESTIONING FOLLOWING EXERCISE OF FIFTH AMENDMENT--RIGHT TO COUNSEL

Rule: After a defendant 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.

A. INTERROGATION PERTAINING TO SAME OFFENSE

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 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).

B. INTERROGATION PERTAINING TO DIFFERENT OFFENSE

Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093 (1988) 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. It is important to note that this officer was unaware of the fact that the defendant had previously been Mirandized and had previously invoked his right to counsel. The Arizona trial court suppressed the incriminating statement and the United States Supreme Court upheld that ruling citing **Edwards v. Arizona**, 451 U.S. 477, 101 S.Ct. 1880 (1981). 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).

The **Edwards** Rule therefore now applies not only to the crime under investigation at the time the request for counsel is made, but also as to other unrelated offenses of which the defendant may be a suspect. It is important to note that in **Roberson**, the defendant was still in custody and was still without counsel when the second interrogation occurred and the court emphasized those facts. The Court also distinguished this case from the **Michigan v. Mosely**, 96 S.Ct. 321 (1975) since there, the defendant had invoked only his 5th Amendment Right to silence rather than his Right to Counsel. It is also important to note that the second interrogation likewise involved a burglary which had occurred only one day prior to the date of the defendant's arrest. Whether this last fact had any impact on the Court is unknown. The Court did specifically address the fact that the officer who conducted the second interrogation did not know that the defendant had earlier requested counsel. They attached absolutely no significance to that fact.

BUT SEE: **Connecticut v. Barrett**, 479 U.S. 523, 107 S.Ct. 828 (1987) The Court refused to extend **Edwards** where the defendant refused to make a written statements without an attorney present, but agreed to give an oral statement without an attorney present. The Court ruled that this only was a limited invocation of the Sixth Amendment thus the oral confession was admissible. See **Michigan v. Jackson**, 475 U.S. 625, 106 S.Ct. 1404 (1986) if at arraignment, defendant requests counsel, this is tantamount to invoking the Sixth Amendment and protections and admonishments of **Edwards v. Arizona**, Supra., apply.

C. REQUEST FOR COUNSEL VS. ACTUAL RETENTION

In **Minnick v. Mississippi**, 498 U.S. 146, 111 S.Ct. 486 (1990), the Court again held that when counsel is requested, interrogation must cease, and officers may not re-initiate interrogation without counsel present, whether or not the accused has actually consulted with his attorney. If, of course, the suspect re-initiated communication with the officers about his case either before or after he had consulted with his attorney, the officer would be at liberty to continue interrogation.

D. THE FUNCTIONAL EQUIVALENT OF INVOKING THE RIGHT TO COUNSEL: CLARIFYING THE AMBIGUOUS INVOCATION

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 remaining warnings and then got waiver from defendant and questioned him. The Court ruled that the statements were inadmissible on an **Edwards v. Arizona** rationale.

Refusal to answer routine booking questions was deemed to constitute an invocation of the defendants **Miranda** right to counsel. 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).

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.

During the hour period of interrogation between the suspect's ambiguous invocation of right to counsel and his definitive invocation of right to counsel he made incriminating statements. 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.

The following statements by a suspect were 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.” **Brown v. State**, 668 S.2d 385 (Ala. App.1995); “I think I better talk to a lawyer first” **State v. Eastlack**, 883 P.2d 999 (Ariz. 1994); After signing a **Miranda** waiver card, the defendant confessed. The officers then advised the defendant that she would be indicted at which point the defendant said that she would need a lawyer. Thereupon the officer gave the defendant the prosecutor’s card and told her to have her lawyer call the prosecutor. Thereafter the officers again took the defendant’s confession this time on tape. The court upheld the first and the second confession reasoning that mentioning counsel preceding the second confession could reasonably have been understood by the officers, and the court as a recognition by the defendant of her need for an attorney in the future in the event she was indicted. **United States v. Scurlock**, 52 F.3d 531 (5th Cir. 1995).

The issue of an ambiguous invocation applies only after the defendant has waived his rights. See **State v. Leyva**, 906 P.2d 894 (Utah App.1995). Utah apparently takes the view that the issue of an ambiguous waiver only applies after the defendant has waived his Miranda rights and cannot apply before he has waived them. The reasoning being that if it comes before a waiver, the ambiguity must be interpreted as not understanding the rights.

E. RE-INITIATING COMMUNICATION BY DEFENDANT

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 make admissions. Court ruled no **Edwards** violation.

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

F. BREAK IN CUSTODY STATUS

The 11th Circuit Court of Appeals in **Dunkins v. Thigpen**, 847 F.2d 664 (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 if he is subsequently again taken into custody by the police. The court declared a break in custody dissolves a defendant's Edwards claim. It should, however, be noted that this case was decided before the U.S. Supreme Court's latest **Edwards** ruling in **Arizona V. Roberson**, supra. See **McNeil v. Wisconsin**, 501 U.S. 171, 111 S.Ct. 2204 (1991), wherein the Court was quite empathic that the **Edwards/Roberson** rule applies only so long as there has been no break in custody. (**McNeil** at page 2208).

G. DIFFERENCE BETWEEN FIFTH AND SIXTH AMENDMENT RIGHT TO COUNSEL

The **Miranda** Decision was based upon an interpretation of the Fifth Amendment to the United States Constitution. Although one of the **Miranda** warnings advises the suspect that he has a right to counsel, in the context of the **Miranda** Warning, the Court still refers to the right to counsel as being part of the interpretation of the Fifth Amendment. The Sixth Amendment right to counsel does not attach until a prosecution is commenced, i.e., until formal charges have been filed or the suspect has been arraigned. All critical stages of the judicial process invoke the Sixth Amendment Right to Counsel.

1. THE SIXTH AMENDMENT RIGHT TO COUNSEL:

When It Attaches

Once a person has been formally charged with the filing of a criminal complaint and arraignment thereon, his Sixth Amendment Right To Counsel attaches. This is because the courts have long held that the arraignment is a critical stage of the court process and a defendant is entitled to counsel at that stage. Since certain rights attach at this stage of the proceeding, it becomes the responsibility of the investigating officer to determine whether or not the defendant has been arraigned and whether or not he has retained counsel or counsel has been appointed for him. Since the Sixth Amendment Right To Counsel has attached, the rules become extremely restrictive as to the techniques that law enforcement might employ in order to obtain incriminating statements or admissions from the suspect. **United States v. Gouveia**, 467 U.S. 180, 104 S.Ct. 2292 (1984). Sixth Amendment attaches upon the initiation of adversary judicial proceedings.

Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404 (1986) holds that if during defendant's arraignment he invokes the Sixth Amendment by requesting counsel, then the **Edwards v. Arizona** rationale applies and prohibits interrogation except if initiated by defendant.

Patterson v. Illinois, 487 U.S. 285, 108 S.Ct. 2389 (1988). On August 23, 1983 a Cook County Grand Jury indicted the defendant for a gang related murder occurring 2 days earlier. The defendant who was in custody was advised that he had been indicted of the murder, was advised of his **Miranda** Rights and thereafter gave a lengthy incriminating statement to police. The United States Supreme Court held that although clearly the defendant was entitled to counsel, the **Miranda** Warning sufficiently advised him of that right and after waiving his rights the incriminating statements did not violate the Sixth Amendment. His waiver was knowing and intelligent.

2. SIXTH IS OFFENSE SPECIFIC, FIFTH APPLIES TO ALL OFFENSES

The Court in **McNeil v. Wisconsin**, Supra. made a distinction between the Sixth Amendment Right to Counsel and the Fifth Amendment Right to Counsel holding 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 and provided an attorney for the robbery committed in West Allis. At this point his Six Amendment Right to Counsel attaches. Thereafter, detectives 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 by the defendant. The United States Supreme Court upheld the conviction as well as the right of the State to use those confessions. The Court in effect 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**. While the Sixth Amendment Right to Counsel is offense specific, the Fifth Amendment guarantee against compelled self incrimination derived from Miranda is not offense specific and once invoked applies to all offenses (so long as there is no break in the defendant's custody status). See also **Michigan v. Jackson**, 475 U.S. 625, 106 S.Ct. 1404 (1986) infra.

3. ANTICIPATORY INVOCATION OF FIFTH OR SIXTH AMENDMENT RIGHT TO COUNSEL

a. SIXTH AMENDMENT

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)

b. FIFTH AMENDMENT

Although the United States Supreme Court has never directly addressed the right to invoke the Fifth Amendment anticipatorily the Court in **McNeil** did address this issue by stating 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 thereunder 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.

c. WAIVER OF SIXTH AMENDMENT RIGHT TO COUNSEL AND PRESUMPTIONS

General Rule:

If, after criminal charges have been filed against an accused, or if the accused has been indicted, a waiver pursuant to a Miranda warning will constitute a waiver of the accused's Sixth Amendment right to counsel. (**Patterson v. Illinois**). However, if after charges have been filed the accused actually has an attorney or he has made a formal request for one at his arraignment, then the rule of **Edwards v. Arizona**, applies and the officer can not initiate contact unless the purpose of the interrogation if for an offense different than that for which charges have been filed. This is so because the Sixth Amendment is offense specific.

Although discussed elsewhere in this outline, the question sometimes arises whether a suspect can be questioned after formal charges have been filed. Although there exists a presumption that a defendant requests a lawyers services at every critical stage of the prosecution, this presumption can be overcome if counsel was explicitly waived by the accused. See **McNeil** at page 2209. This presumption does not exist for the Fifth Amendment Right to Counsel. **McNeil** at 2209, 2210. It has been held that generally **Miranda** warnings are sufficient to make the defendant aware of his Sixth Amendment Right to Counsel and could lay the predicate for a waiver of this right to counsel and permit post charging questioning. See **Patterson v. Illinois**, 487 U.S. 285, 108 S.Ct. 2389 (1988); **Brewer v. Williams**, 430 U.S. 387, 97 S.Ct. 1232 (1977) and **United States v. Karr**, 742 F.2d 493 (1984). This waiver is extremely difficult to prove when counsel has actually been appointed. Generally, where waiver has only been recognized during that period between indictment or filing of charges and the actual arraignment where counsel is either requested or appointed or retained.

4. INVOKING 6TH AMENDMENT COUNSEL DOES NOT ALWAYS INVOKE 5TH AND DOES NOT ALWAYS PROHIBIT INTERROGATION

a. Requesting Counsel at Arraignment.

In **State v. Hatcher**, 448 S.E.2d 698 (Ga. 1994) the defendant requested counsel on a booking form. Police thereafter contacted defendant, mirandized defendant and defendant confessed. Confession admissible.

If, however, the request for an attorney is made at the defendant'sarraignment and the request is made of a judge, then the accused has legitimately invoked his right to counsel and he can no longer be approached by the police unless interrogation is initiated by the defendant. See **Michigan v. Jackson**, 475 U.S. 625, 106 S.Ct. 1404 (1986).

b. Counsel at Extradition Hearing.

Does not constitute invocation of Sixth since extradition is civil and thus can interrogate at a later date. **Chewning v. Rogerson**, 29 F.3d 418 (8th Cir. 1994)

But note, there are ethical prohibitions in contacting represented parties without the presence of counsel. See **Nevada S.Ct. Rule 187**.

5. "MCLAUGHLIN 48 HOUR RULE" Statements taken in violation.

To understand the rule see generally **Powell v. Nevada**, 511 U.S. 79, 114 S.Ct. 1280 (1994) and **Powell v. State**, 113 Nev. 41, 930 P.2d 1123 (1997). Powell stands for the proposition that if for any reason an accused is not provided a probable cause review by a judge within 48 hours of his arrest and the police, after the 48 hours period passes, obtain a confession from the accused, the confession is not necessarily suppressed. The court concluded that although such a confession would be taken du recent United States Supreme Court decision in **Arizona v. Evans**, 514 U.S. 1, 115 S.Ct. 1185 (1995) the court held that exclusion of evidence is only appropriate where the remedial objectives of the exclusionary rule are served. Since a violation of the 48 hour rule does not directly implicate police conduct,

Suppression of statements taken after the defendant remained in custody without a 48 hour hearing not automatic. See **Powell, supra**; **State v. Tucker**, 654 A.2d 1014 (N.J. 1995); **Black v. State**, 871 P.2d 35 (Okla. Cr. 1994)

H. CONSENT TO SEARCH AFTER INVOKING MIRANDA RIGHTS

The courts have found generally that there is no connection between a person's rights under Miranda and an officer's request for a consent to search. For that reason, it has consistently been held proper to ask for a consent to search even though the suspect has invoked his right to counsel under Miranda or the defendant's Sixth Amendment right to counsel has attached. In **United States v. Shlater**, 873 F.Supp. 162 (N.D. Ind. 1994) the court held that a request for a consent to search is not a "critical stage" of the proceeding and therefore unaffected by the Sixth Amendment. In addition, in **United States v. LaGrone**, 43 F.3d 332 (7th Cir. 1994) the court upheld the giving of a consent to search even though the defendant had been arrested, was in handcuffs and had invoked his Miranda rights.

See generally section on Interrogation in this outline under the heading IS THE STATEMENT INCRIMINATING? and the cases of **United States v. Henley**, 984 F.2d 1040 (9th Cir. 1993); **United States v. Hidalgo**, 7 F.3d 1566 (11th Cir. 1993).

VI. POST "CHARGING" INTERROGATION: JAILHOUSE INFORMANTS AND USING C.I.'S OR U.C.'S TO OBTAIN INCRIMINATING STATEMENTS

It is human nature to talk and share secrets and this is perhaps exaggerated in the case of suspects who are confined in jail or prison. Over the years, law enforcement officers have tried to take advantage of this compelling desire of inmates to talk or make friends and the case authority dealing with these efforts has been anything but consistent and as a result the law in this area is quite muddled.

A. STATEMENTS AND INTERROGATION AFTER THE SIXTH AMENDMENT HAS ATTACHED

1. OBTAINING STATEMENTS UNRELATED TO THE OFFENSE FOR WHICH THE SIXTH AMENDMENT HAS ATTACHED:

Even though the Sixth Amendment Right to Counsel has attached, i.e., the defendant has been formally "charged" by the District Attorney or he has been 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. See generally, **McNeil v. Wisconsin**, Supra. 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. See **Illinois v. Perkins**, 496 U.S. 292, 110 S.Ct. 2394 (1990). Any statement so obtained will be admissible so long as the defendant never invokes his **Miranda** right to counsel before being placed in custody or while in custody.

In **Illinois v. Perkins**, Supra., the United States Supreme Court held that Miranda Warnings are not required 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. This is so whether or not the defendant is in custody so long as the conversation does not pertain to a charge for which he has already been arraigned since that would invoke the Sixth Amendment Right to Counsel. In **Perkins**, an undercover police officer was placed in a cell housing the defendant. Perkins was incarcerated on charges unrelated to the subject of the officers investigation. Perkins was, at the time, in custody on a charge of aggravated battery on which he had been arraigned and the undercover police officer was investigating Perkins for a murder offense completely unrelated to the aggravated battery. While in the jail cell with suspect Perkins, the undercover officer engaged him in conversation pertaining to the murder by asking him if he, Perkins, had ever killed anybody. Perkins then made statements implicating himself in the murder being investigated. This resulted in Perkins being charged with murder. Before trial, the trial judge granted a motion to suppress ruling that Miranda was violated because the undercover officer obtained the statements of the defendant while engaging in "custodial interrogation". The United States Supreme Court disagreed. In its ruling, the Court held that conversations between suspects and undercover agents do not implicate the concerns underlying Miranda. Miranda was premised on the concern of coercion from official interrogation. Coercion is determined from the perspective of the suspect

and "when the agent carries neither badge nor gun and wears not police blue, but the same prison gray as the suspect, there is not interplay between police interrogation and police custody."

Nevada does not follow the rule of law set forth in **Perkins**. In Nevada, a jailhouse informant is treated exactly in the same fashion as if he were a uniformed police officer. See **Boehm v. State**, 113 Nev. 910, 944 P.2d 269 (1997).

2. OBTAINING STATEMENTS RELATED TO THE OFFENSE FOR WHICH THE SIXTH AMENDMENT HAS ATTACHED:

If the suspect whose Sixth Amendment Right to Counsel has attached makes admissions pertaining to the offense for which that right has attached then it is unlikely that those admission will be admissible in evidence even though the police or informant contend that the purpose of their efforts was to

obtain incriminating statements pertaining to an unrelated crime. This was the situation in **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 but 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. It is my guess, however, that if the defendant had made incriminating statements pertaining to an unrelated crime, then those statements may well have been admissible.

It is important to note that in **Illinois v. Perkins**, Supra., Perkins had been formally charged with the aggravated battery offense for which he was in custody and his Sixth Amendment Right to Counsel with respect to that crime had in fact attached. Nevertheless, the United States Supreme Court permitted the undercover officer to "interrogate" the defendant and ask questions designed to elicit incriminating responses without requiring the defendant to be Mirandized and when the incriminating responses pertained to an unrelated crime, the Sixth Amendment Right to Counsel was held to be not offended.

What if Perkins had, prior to incarceration, invoked his right to counsel under **Miranda**? (see analysis at Section "B" below)

3. THE LISTENING POST:

If the purpose of the undercover officer or the informant is to obtain incriminating statements from the defendant pertaining to the crime for which the defendant is in custody and for which he has been assigned counsel or he has been arraigned, then the officer or informant may only be a "listening post". So long as the informant or U.C. does not engage in the act of deliberately eliciting incriminating statements from the defendant the Sixth Amendment is not violated. 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 are admissible and further, it is the burden of the defendant to show that the plant stimulated the talk.

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 got information from defendant by engaging him in conversation. The Court ruled that his was interrogation designed to interfere with defendant's Sixth Amendment Right to an Attorney.

4. DEFENDANT OUT OF CUSTODY AND CONFESSES TO POLICE AGENT (MASSIAH)

Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199 (1964). In this case, after defendant was charged, arrested and released a co- defendant turned informant, obtained a taped confession without Massiah knowing that the co-defendant turned C.I. Confession thrown out on Fifth and Sixth Amendment Rights, i.e. defendant has right to have counsel present (basically unfair according to court). See also **Williams v. State**, 103 Nev. 106, 734 P.2d 700 (1987) (Oscar & Toy). similar, but different because charges were dropped.

5. CONCERNED CITIZENS VS. POLICE AGENTS

Two recent Nevada Supreme Court cases discuss the situation wherein concerned citizens contacted the police and thereafter assisted the police in obtaining incriminating evidence. See, **State v. Miller**, 110 Nev. 690, 877 P.2d 1044 (1994) (This was actually a Fourth Amendment case wherein the suspect's babysitter called the police and in cooperation with the police recovered certain items from the residence that she believed were possibly drugs. In **Simmons v. State**, 112 Nev. 91, 912 P.2d 217 (1996),

the court addressed agency in a Sixth Amendment context wherein a friend of the suspect contacted the police and advised the police that the suspect who was in custody and who had secured counsel wished to speak to him. The friend of the suspect thereafter cooperated with the police and a telephone call was thereafter recorded between the suspect and the friend. 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.

B. THE FIFTH AMENDMENT RIGHT TO COUNSEL:

Would invocation of right to counsel pursuant to Miranda prohibit questioning by a jailhouse informant or undercover officer assuming that the 6th Amendment right to counsel has not yet attached?

Edwards v. Arizona, **Arizona v. Roberson**, and **McNeil v. Wisconsin**, Supra. All stand for the proposition that once a defendant invokes his right to counsel pursuant to **Miranda** all questioning must cease and the defendant can no longer be questioned about **any** offense unless he, himself, initiated the conversation or there is a break in the custody status. In Nevada see **Boehm v. State**, 113 Nev. 910, 944 P2d 269 (1997). Although the Supreme Court in **Illinois v. Perkins**, Supra., held that the undercover officer did not have to advise the defendant of his Miranda Warnings, what if the defendant had been advised of his Miranda Rights prior to being incarcerated and had invoked his right to counsel? Would this have changed the court's ruling in **Perkins**? In a concurring opinion, Justice Brennan suggested that the use of a cell-mate informant would violate **Miranda** if the suspect had previously invoked his Fifth Amendment Right to Silence or Right to Counsel. It is important to note, however, that no other member of the court voiced agreement with Justice Brennan on this point and in fact it could be argued that the reasoning of the majority in **Perkins** contradicts this statement. If, as the majority held that questioning by the cell-mate informant did not constitute custodial interrogation, then it should not matter for purposes of **Miranda**, whether incarcerated suspects have previously invoked their rights. The Miranda Standard does not change when individuals invoke their rights -- only custodial interrogation is prohibited. The reason that the Court in Perkins found no "custodial interrogation" was that since Perkins was not aware of the undercover officers true identity, there was "no compulsion" from the point of view of the suspect.

C. COERCIVE QUESTIONING BY INFORMANTS OR U.C.'s:

It is important to recognize that even informants can question in a coercive fashion in order to induce conversation and for that reason the investigator must be extremely careful on how he engages in questioning or the guidelines that he gives to the informant. The case of **Arizona v. Fulminante**, supra., is quite illustrative of this point. Fulminate was serving a sentence on a weapons charge when rumors began to circulate at the prison that he had murdered a child. A fellow inmate who had befriended the defendant offered him protection from the other inmates who had begun mistreating him because of the rumors. Unbeknownst to the defendant his "friend" was working as a government informer and was under instructions to get information from the defendant. The informer told the defendant that in order to obtain protection, he would have to reveal 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. This is actually a Fifth Amendment Due Process problem and requires careful planning by law enforcement officers so that their informants can avoid making statements to suspects which could later be construed as threats or perhaps even promises of leniency.

D. JAILHOUSE INFORMANTS AS POLICE AGENTS

In Nevada, a jailhouse informant who is acting as the agent of the police is treated the same as a police officer for miranda purposes. In **Boehm v. State**, 113 Nev. 910, 944 P.2d 269 (1997) the police in Churchill County placed an informant in the same jail cell as defendant Steven Boehm. The police wanted

the informant to obtain incriminating statements against Boehm pertaining to a casino robbery for which he was not in custody. The defendant was in custody and the defendant did have an attorney on unrelated charges. The informant did, in fact, engage defendant Boehm in a conversation and the informant was wearing a wire. The defendant made extensive incriminating statements linking himself to the robbery and other crimes. All of this was on tape. The defendant was charged with the robbery, the tape and the transcripts of the tape were furnished to the jury, and the defendant was convicted. The Nevada Supreme Court reversed the conviction on the ground that the informant had not given Mr. Boehm his Miranda rights prior to engaging him in the conversation while in the jail. The Nevada Supreme Court realized that this ruling was directly contrary to a United States Supreme Court decision in **Illinois v. Perkins**, 496 U.S. 292, 110 S.Ct. 2394 (1990) wherein the United States Suprme Court stated that Miranda warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer or an informant working for a law enforcement officer so long as the statement is voluntary. The Nevada Supreme Court citing as precedence the previous Nevada decision in **Holyfield v. State**, 101 Nev. 793, 711 P.2d 834 (1985) simply stated that under the Nevada Constitution any interrogation while a subject is in custody, whether by an informant, undercover police officer, or officer requires compliance with the Miranda decision. It was somewhat disingenuous of our Supreme Court to suggest that this "illicit questioning does not aid the truth finding function" when in fact the admissions and confessions were on tape.

In **United States v. York**, 933 F.2d 1343 (7th Cir. 1991) the court had a good discussion of agency. Here the court permitted the informants testimony because the defendant had initiated the conversation - even though the court found the existence of an agency as a matter of law. See also **United States v. Henry**, 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. See also **United States v. Taylor**, 802 F.2d 1108 (9th Cir. 1986) not a government agent even though a history of being an informant and intentionally placed in defendant's cell.

See discussion on previous page entitled "CONCERNED CITIZENS VS. POLICE AGENTS."

E. INVOKING "RIGHT TO COUNSEL" WHEN OUT-OF- CUSTODY

The 5th Amendment "Miranda" right to counsel is not applicable when the defendant is not "in Custody" within the meaning of "Miranda". Therefore, the police are free to question a subject who is not "in custody" even if the subject expresses a desire to have an attorney present. Reason: Neither the 5th nor 6th Amendment Right to Counsel applies to a person who has neither been arrested nor charged. **State v. Lanning**, 109 Nev. 1198, 866 P.2d 272 (1993).

The facts in Lanning are as follows: Vicki Workman (Workman) hired Mylissa Lanning (Lanning) to housesit while movers packed Workman's belongings. Shortly thereafter, Workman discovered that a number of her checks had been forged and cashed for an amount in excess of $3,700.00. Workman notified Nevada authorities of the forger. The Elko police department conducted an investigation into the missing checks. On February 25, 1992, Det. Ladd 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 Detective Ladd 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 Detective Ladd that "I should see an attorney because I do not want to incriminate myself." Again, Ladd 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. Lanning was charged with two counts of uttering an altered instrument and two counts of possession of a forged instrument.

The Nevada Supreme Court held that neither the defendant's 5th nor 6th Amendment Right to Counsel were 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. In addition, the non-custodial police

interview was not a "critical stage" thereby eliminating the 6th Amendment Right to Counsel.

VII. FRUIT OF POISON TREE AND THE EXCLUSIONARY RULE

A. 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.

1. 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).

a. DUNAWAY V. NEW YORK, 442 U.S. 200, 99 S.Ct. 2248 (1979). Police suspect defendant of robbery but no probable cause for arrest. Defendant was picked up 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.

b. TAYLOR V. ALABAMA, 102 S.Ct. 2664 (1982). Taylor w
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.

c. 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).

2. 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 effect an arrest from within a person's residence. (**Payton, Riddick and Steagald,** Supra.)

a. BULLHORN USED TO EXTRACT OCCUPANT

In a recent Nevada Supreme Court case, it was held that the use of a bull horn by police to extract a suspect from his residence for the purpose of arresting him was in violation of his Payton. An admission made by the suspect after being Mirandized, and after having been removed from his residence pursuant to the bull horn command was held inadmissible, resulting in the reversal of Mr. Walter's conviction for the crime of murder. **Walters v. State**, 106 Nev. 45, 786 P.2d 1202 (1990) rehearing 108 Nev. 186 (1992). However, the Nevada Court reversed itself after the United States Supreme Court announced its holding in **New York v. Harris**, 495 U.S. 14, 110 S.Ct. 1640 (1990) and see **Walters v. State**, 108 Nev. 186, 825 P.2d 1237 (1992) (opinion on rehearing)

b. CONFESSION AFTER REMOVAL OF ARRESTEE FROM RESIDENCE

In **Harris** the Court held that where the police have probable cause to arrest a suspect, the Exclusionary Rule does not bar the state'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. In that case the police had probable cause to suspect the defendant of killing a Ms. Stanton. The police entered the defendant's residence without a warrant and without the defendant's consent and without exigent circumstances and there placed him under arrest. 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, thereupon, taken to the station house, again the informed of his Miranda Rights, whereupon he gave a written incriminating statement. The state sought the admission only of the station house written confession.

The Supreme Court reasoned that the Payton Rule was designed to protect the physical integrity of the home and the confession would not be excluded because it was taken outside of the home and therefore did not have a direct relation to the violation in question. The Court further reasoned that since the officer had probable cause to arrest the defendant for the murder, he WAS in lawful custody once he was removed from the house and taken to the station house.

3. EFFECT OF UNLAWFUL DETENTION: The McNabb- Mallory Rule, and NRS 171.178 (48 HOUR 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, and who provides a statement after that period of time when arraignment should have taken place, should be entitled to suppression of the statement, even though it is 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). 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.

This rule has been codified in most jurisdictions and 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 the arrest (excluding non-judicial days) the person will be released. The 72 hour rule is modified by case authority to 48 hours. Non-judicial days and holidays are included in tabulating the 48 hours. See **County of Riverside v. McLaughlin**, 500 U.S. 44, 111 S.Ct. 1661 (1991); **Powell v. State**, 108 Nev. 700, 838 P.2d 921 (1992); **Powell v. Nevada**, 511 U.S. 79, 114 S.Ct. 1280 (1994). In Clark County this review actually occurs within

24 hours of arrest. The Nevada Supreme Court had occasion to address this issue in **Huebner v. State**, 103 Nev. 29, 731 P.2d 1330 (1987). The Court therein stated that the purpose behind NRS 171.178 is to prevent resort to those reprehensible practices known as the "3rd Degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all evil implications of secret interrogation of persons accused of crime . . . it is intended to insure that the accused is promptly informed of his privilege against self incrimination. In **Harrison v. United States**, 392 U.S. 219, 88 S.Ct. 2008 (1968) a murder conviction was reversed even though defendant Harrison had three times confessed to going to the decedent's home and killing the decedent with a shotgun in the course of a robbery.

B. MIRANDIZED CONFESSION OBTAINED AFTER A PRIOR UNMIRANDIZED VOLUNTARY CONFESSION

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 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. 1258 (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 Poisoned Tree 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.

C. MIRANDA VIOLATION WILL NOT CAUSE SUPPRESSION OF NON-TESTIMONIAL EVIDENCE OBTAINED FROM IT.

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 are not generally rendered inadmissible simply because of the Miranda violation. Quoting the Ninth Circuit Court of Appeals in **United States v. Henley**, 984 F.2d 1040 (9th Cir. 1993) "the object of the Fifth Amendment Exclusionary Rule - Assuring Trustworthiness of Evidence Introduced at Trial - is not served by barring admission of the derivatively obtained evidence."

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.

United States v. Elie, 111 F.3rd 1135 (4th Cir. 1997). The Court ruled that since a Miranda violation is not of constitutional proportions, but only a violation of a prophylactic rule of evidence developed to protect the Fifth Amendment Right of arrestees, the "fruit of the poisonous tree" doctrine is not applicable. Only a voluntariness error would be a Constitutional violation and would implicate the doctrine. For that reason, firearms recovered from a defendant as a result of statements he made after he was arrested and pursuant to interrogation without benefit of Miranda would not be suppressed.

Crew v. State, 100 Nev. 38, 675 P.2d 986 (1984). 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).

In the case of **State v. Smith**, (Nev. 1989) supra., the defendant was talked into submitting to a breath test after she had been placed under arrest for DUI and without benefit of being advised of her Miranda Rights. The Nevada Supreme Court, pursuant to **Berkemer v. McCarty**, Infra., ordered all statements made by the defendant to be suppressed but would not suppress the physical evidence, i.e., the breath tests results. Reason: A Miranda or Fifth Amendment violation does not bar the forced production of real or physical evidence such as blood or breath samples.

The Court in **Smith** 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. 553, 103 S.Ct. 916, (1983), infra. In accord with **Smith** is **State v. Harris**, 525 N.W.2d 334 (Wis. 1994); **State v. Lozano**, 882 P.2d 1191 (Wash. 1994).

D. USE OF TAINTED STATEMENTS TO OBTAIN A SEARCH WARRANT: THE RULE OF UNFORSEEABILITY

The 9th Circuit Court of Appeals in **United States v. Patterson**, 812 F.2d 1188 (8th Cir. 1987) has held 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. For a questionably contrary result, see **Massachusetts v. White**, 439 U.S. 280, 99 S.Ct. 712 (1979) [facts and opinion at 371 N.E.2d 777 (Mass. 1977)].

The doctrine of unforseeability 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). An argument for admissibility can be made by analogy to the 4th amendment rule of "Unforseeability". See **Taylor v. State**, 92 Nev. 158, 547 P.2d 674 (1976); **Pellegrini v. State**, 104 Nev. 625, 764 P.2d 484 (1988); **Surianello v. State**, 92 Nev. 492, 553 P.2d 942 (1976); **Stone v. Powell**, 428 U.S. 465, 96 S.Ct. 3037 (1976).

E. CONFESSION OBTAINED AS A RESULT OF PHYSICAL EVIDENCE OBTAINED PURSUANT TO FOURTH AMENDMENT VIOLATION

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).

F.THE INDEPENDENT SOURCE AND INEVITABLE DISCOVERY EXCEPTION

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**, 478 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.

VIIIWAIVER AND WHO MAY INVOKE RIGHTS

Rule: The prosecutor has the burden to prove that the waiver of a suspect's 5th Amendment **Miranda** rights was voluntary, knowingly and intelligently made. This burden is on the prosecution by preponderance of the evidence. **Falcon v. State**, Supra. This is generally accomplished by demonstrating to the court that the officer advised the defendant 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. The voluntariness prong is normally judged under a totality of the circumstances existing at the time that the rights were read to the defendant. A waiver of rights need not be expressed, 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". It is sufficient if the officer obtains an affirmative response to the question whether the suspect understands the rights that were just read to him. See generally **Tomarchio v. State**, 99 Nev. 572, 665 P.2d 804 (1983); **North Carolina v. Butler**, 441 U.S. 369, 99 S.Ct. 1755 (1979) (defendant refused to sign the waiver but agreed to talk to the officers. This was an adequate waiver according to the United States Supreme Court). See also **Taque v. Louisiana**, 444 U.S. 469, 100 S.Ct. 652 (1980). See also, **Connecticut v. Barrett**, 479 U.S. 523, 107 S.Ct. 828 (1987), supra., wherein defendant agrees to make oral, but declines written statement.

A. THE KNOWING AND VOLUNTARINESS STANDARD

The U.S. Supreme Court in **Moran v. Burbine**, 475 U.S. 412, 106 S.Ct. 1135 (1986) addressed the issue as follows: The inquiry has two distinct dimensions. First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances" surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly concluded that the Miranda Rights have been waived. **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).

Unlike the Fourth Amendment, the purpose of Miranda is not to mold police conduct for it's own sake; instead, it is to dissipate compulsion inherent in custodial interrogation.

B. DEFENDANT'S SILENCE DOES NOT INVOKE MIRANDA

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) as cited by the Nevada Supreme Court in **Evans** and **Dullin v. State**, ODA filed 6/22/89. A defendant's silence, without more, is insufficient to require the police to discontinue questioning.

In **Harrison v. State**, 96 Nev. 347, 608 P.2d 1107 (1980), the court held that a defendant telling his co-defendant girlfriend to "shut-up" after the girlfriend made an incriminating statement - post Miranda - constituted an invocation of silence. The court further ruled that it was improper for the state to elicit the girlfriend's statement and the defendant's response in a trial of the defendant.

C. WHO MAY INVOKE THE RIGHTS?

Only the person being interrogated has the right to invoke a Miranda right. See **McClasky v. State**, 540 N.E. 2d 41 (Ind. 1989), attorney arrived at jail where defendant was being interrogated. The attorney had been dispatched to the 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 attempts to invoke right for son. **United States v. Scarpa**, 897 F.2d 63 (2nd Cir. 1990), attorney attempts to invoke right to counsel on behalf of his client where client was unaware of his attorney's efforts. **Moran v. Burbine**, 475 U.S. 412, 106 S.Ct. 1135 (1986) wherein unknown to the defendant, his sister retained an attorney and the attorney was assured by the police that they would stop questioning the defendant. 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."

Nevada follows the U.S. S.Ct. Rule. See **Goldstein v. State**, 89 Nev. 527, 516 P.2d 111 (1973) Father contacting 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. 1987).

D. CAN SILENCE CONSTITUTE WAIVER: "DO YOU UNDERSTAND"

This issue comes about in several contexts either by the officer failing to ask the suspect if he "understands" or after having asked the suspect if he understands his rights, the suspect simply fails to acknowledge the question.

In **United States v. Hayes**, 385 F.2d 375 (4th Cir. 1967), cert. denied 388 S.Ct. 1250 the 4th Circuit affirmed a conviction and permitted into evidence a confession wherein 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.

The general test on whether or not the defendant understood his rights and made a knowing waiver is a totality of the circumstances test by a preponderance of the evidence. See **Colorado v. Connelly**, 479 U.S. 157, 107 S.Ct. 515 (1986); **Tomarchio v. State**, 99 Nev. 572, 665 P.2d 804 (1983).

E. 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 204 (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); **Taque v. Louisiana**, 100 S.Ct. 652 (1980); **Connecticut v. Barrett**, 479 U.S. 523, 107 S.Ct. 828 (1987), supra.

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)."

F. WAIVER NEED NOT BE EXPRESSED

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).

IX. EMERGENCY EXCEPTIONS - Asking Arrestees About Weapons

In **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.

In **United States v. Desantis**, 870 F.2d 536 (9th Cir. 1989) The Court extended the rational of Quarles in the following factual context to-wit, 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 was about to go into a room to collect his clothing at which point 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 properly used against the defendant in a subsequent trial.

State v. Ramirez, 871 P.2d 237 (Ariz. 1994). Police arrive at apartment and hear loud screams. They enter to discover defendant covered with blood near womans body and a bloody knife. Officer asked "what happened, anyone else inside or hurt?" - No Miranda okay. "Self Protective inquiry".

See also general discussion under heading "Threshold Questions", infra.

X. ADVISING SUSPECT OF NATURE OF CHARGES

GENERAL RULE: If voluntary in all other respects and Miranda given, then mere fact that defendant was not advised of all possible charges which could be brought against him is not critical. So long as he knows the general nature of pending charges. **Sparks v. State**, 96 Nev. 26, 604 P.2d 802 (1980).

In **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 U.S. Supreme Court reversed the Colorado State Supreme Court which held that failing to advise defendants of subject matter of interrogation amounted to official trickery and invalidated Miranda. The U.S. 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. This Court's holding in Miranda specifically required that the police inform a criminal suspect that he has the right to remain silent and that anything he says may be used against him. There is no qualification of this broad and explicit warning. The warning, as formulated in Miranda, conveys to a suspect the nature of his constitutional privilege and the consequences of abandoning it. Accordingly, 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.

XI. THRESHOLD QUESTIONS

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 upheld the admissibility of these non-mirandized statements. **Johnson v. State**, 92 Nev. 405, 551 P.2d 241 (1976) and see **State v. Billings**, 84 Nev. 55, 436 P.2d 212 (1968). Police got call from defendant who says he killed his wife, police responded and ask "what's the trouble" or "what happened" - okay. In both **Jackson** and **Billings** the questions were threshold and preliminary and not characterized as interrogation. See also **State v. Ramirez**, Supra.. Similar result under the "emergency" exception. See also general discussion under heading "Emergency Exceptions" supra.

XII. RE-ADVISEMENT OR LAPSE OF TIME

Three hours between rights and interrogation which led to confession - no problem. As a general rule there is no need to re-advise each time you wish to question anew, nor is time a key factor. What is important is by applying the totality of circumstances test, defendant understands Miranda at time of interrogation. **Taylor v. State**, 96 Nev. 385, 609 P.2d 1238 (1980); **People v. Garcia**, 651 N.E.2d 100 (Ill. 1995). Delay of 12 days adequate 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)

XIIIMIRANDA 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.

A. ADVISING JUVENILE OF ADULT COURT POSSIBILITY

Because of the special **Parens Patriae** relationship of the 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 **Quiriconi v. State**, 96 Nev. 766, 616 P.2d 1111 (1980), **Marvin, a Minor, v. State**, 95 Nev. 836, 603 P.2d 1056 (1979). This, however, seems to be the minority view. See generally, **State v. Connor**, 346 N.W.2d. 8 (Iowa 1984) and **David Nissman, Law of Confessions**, Clark Boardman Callaghan 1994 2nd Ed.

In **Marvin, a Minor** The Nevada Supreme Court enunciated special safeguards as follows:

"Before being interviewed. A child should be advised of his rights and cautioned that any answers may be used in a special court as well as before the Juvenile Court. Special efforts should be made, especially in the case of young children, to interview the juvenile only in the presence of a parent or guardian . . . this should always be the policy when a child is being questioned or a formal statement concerning his participation is being taken. Clearly, the more serious the offense and the younger the accused, the greater the precaution which should be taken in the interrogation process." (emphasis added)

B. NOTIFYING PARENT, NRS. 62.170; ADVISING CHILD OF RIGHT TO HAVE PARENT PRESENT

It is important to note however, that these "special safeguards" only go to the voluntariness issue and are not rights of the type required to be given pursuant to the Miranda decision. The totality of the circumstances test would still apply to determine voluntariness. (See **Perkins v. State**, ODA#15558, filed 5/8/85.) Although **NRS 62.170** 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 the probation officer, this has never been interpreted to mean that a parent must be present during questioning or that a child must be advised that he had a right to have his parent present during questioning.

The Nevada Supreme Court in Dicta suggested in the case of **McCurdy v. State**, 106 Nev. 275, 809 P.2d 1265 (1991) that fundamental fairness and due process "would probably demand that a juvenile suspects parents be notified before police interrogation commenced". In that case, the Nevada Supreme Court did not have to squarely address the issue since defendants Warren, age 17, and McCurdy, age 15, were both convicted of murder. By statute, murder and attempt murder are offenses excluded from the juvenile act and for that reason the provisions of **NRS 62.170** are not applicable. The Court did suggest, however, that even though the offense was outside the purview of the juvenile court act, had the defendant been 8 or 9 years of age, due process (14th Amendment) might have required the parents to have been present prior to interrogation.

For a contrary view that a juvenile does not have a right (absent a statute) to be advised that he/she may have a parent present. see **United States Ex Rel Riley v. Franzen**, 653 F.2d 1153 (7th Cir. 1981) Cert. Den 102 S.Ct. 617; **Chaney v. Wainwright**, 561 F.2d 1129 (5th Cir. 1977) Cert. Den. 99 S.Ct. 3095. 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)

C. THE WARNING

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?

D. 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.

1. MURDER, ATTEMPT MURDER, SEXUAL ASSAULT OR USE OF DEADLY WEAPON

The juvenile court act does not apply to the crimes of murder or attempt murder or any related crimes arising out of the same facts as the murder or attempted murder. Regardless of the age of the offender, or in cases where the offender is 16 years of age or older, has a prior juvenile felony adjudication and is now charged with a forcible sexual assault or any felony with use of a deadly weapon. (**NRS 62.020, 62.040**). Therefore, a child charged with such an offense is not entitled to the Chapter 62 protections including the presence of a parent. See **Shaw v. State**, 104 Nev. 100, 753 P.2d 888 (1988).

2. ONCE CERTIFIED ALWAYS CERTIFIED

NRS 62.080 provides that once a child is certified to adult court, the child will automatically be treated as an adult for any subsequent offenses whether or not related to the certified offense. This certification process pertains to felony offenders 14 years of age and older.

XIV. MIRANDA AS IT APPLIES TO PROBATIONER AND GRAND JURY PROCEEDINGS

A. GRAND JURY PROCEEDINGS

In **United States v. Mandujano**, 425 U.S. 564, 96 S.Ct. 1768 (1976), the Court concluded that Miranda Warnings need not be given to a grand jury witness who is called to testify about criminal activities in which he may have been personally involved, and that therefore the failure to give such warnings would not require suppression of false statements made to the grand jury in a subsequent prosecution for perjury based upon such statements. The Court of course, noted correctly that the witness was free at every stage of the proceedings to invoke his constitutional privilege against self incrimination, but that perjury was not a permissible option, nor could the defendant hide behind the Miranda rationale to permit perjury. See also, **United States v. Wong**, 431 U.S. 174, 97 S.Ct. 1823 (1977), **United States v. Washington**, 431 U.S. 181, 97 S.Ct. 1814 (1977). It is important to note that in addition to not being required to advise a grand jury witness of his Miranda Rights, the government is also not constitutionally mandated to advise a witness that he is a potential target and in danger of being indicted. By statute, Nevada extends certain rights to grand jury witnesses and targets, see for example **NRS 172.195**, **NRS 172.197**, and **NRS 172.239**; **Sheriff v. Marcum**, 105 Nev. 824, 783 P.2d 1389 (1989).

B. MIRANDA AND THE PROBATIONER/PAROLEE

Minnesota v. Murphy, 485 U.S. 420, 104 S.Ct. 1136 (1984). The court held that interrogation of a probationer by his probation officer is not custodial interrogation and therefore Miranda advisement are not required. In this case Murphy had been sentenced to probation for a sex offense. One of the terms of his probation required Murphy to participate in a sexual offender treatment program and to report periodically to his probation officer. During the course of the treatment, the defendant admitted to having committed a rape/murder and this fact was communicated by Murphy's counselor to the probation officer. The probation officer thereupon arranged a meeting with the defendant in order to obtain more information about the rape/murder so that police could have the additional information. The probation officer thereafter questioned Murphy without advising him of his Miranda Rights and the U.S. Supreme Court held those statements to be admissible. According to the Supreme Court, Murphy was not "in custody" for purpose of receiving Miranda protection since there was no formal arrest or restraint on freedom of movement of the degree associated with formal arrest. Again, the court held that Murphy would have been entitled to claim his privilege against self-incrimination in a timely manner but, the probation officer was not obligated to advise Murphy of those rights.

XV. COMPELLING OR OBTAINING PHYSICAL EVIDENCE/DEMONSTRATION FROM THE SUSPECT/DEFENDANT - IN OR OUT OF COURT

A. THE FIFTH AMENDMENT SELF-INCRIMINATION CLAUSE

Compelling someone to speak, to write, to provide fingerprints, or to conduct themselves in a particular manner for 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); **Adams v. State**, 89 Nev. 422, 514 P.2d 208 (1973) (Fingerprints); **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 (E.D.Pa.1974) (Denal Exam), and see also, **Hayes v. Florida**, 470 U.S. 811, 105 S.Ct. 1643 (1985) for a discussion on seizing the individual for the purpose of compelling fingerprints or other physical evidence. This can generally be accomplished by either grand jury subpoena or search warrant.

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 Self- Incrimination Clause. **United States v. Crews**, 445 U.S. 463, 100 S.Ct. 1244 (1980). See generally, **United States v. Wade**, 388 U.S. 218, 87 S.Ct. 1926 (1967); **Gilbert v. California**, 388 U.S. 263, 87 S.Ct. 1951 (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 D.A. 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 generally, **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. **Burnett v. Collins**, 982 F.2d 922 (5th Cir. 1993). See also **United States v. Zammiello**, 432 F.2d 72 (9th Cir. 1970), **Jacobs v. State**, 91 Nev. 155, 532 P.2d 1034 (1975); **McCray v. State**, 85 Nev. 597, 460 P.2d 160 (1969). **Morgan v. State**, 558 A.2d 1226 (Md. App. 1989). The accused may be finger printed in the presence of the jury **United States v. Peters**, 687 F.2d 1295 (10th Cir. 1982).

B. THE FOURTH AMENDMENT UNREASONABLE SEARCH AND SEIZURE

Even though the Fifth Amendment Self-Incriminating Clause is not applicable, one must be mindful of the Fourth Amendment prohibition against unreasonable searches and seizures as well as the Fifth and 14th Amendment Due Process Clause dealing with outrageous government conduct.

1. BLOOD OR URINE DRAW

Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1952). the Supreme Court ruled that it was a violation of the due process clause to pump a defendant's stomach in order to extract narcotics which the

officers observed the defendant to swallow. In accord was the 10th Circuit Court of Appeals in **Yanez v. Romero**, 619 F.2d 850 (10th Cir. 1980) pertaining to the forceful use of a catheter to obtain a urine sample from a suspect. But note, an officer is permitted to threaten to use a catheter and if that results in the defendant voluntarily providing a urine sample there will be no constitutional violation.

In **Schmerber v. California**, 384. U.S. 757, 86 S.Ct. 1826 (1966) it was held that the taking of a blood sample, under medically supervised conditions was not an unreasonable search, given probable cause for an arrest and exigent circumstances. It should be noted however, that although the taking of a suspected drunk driver's blood with reasonable force is constitutionally permitted, the State of Nevada and many other states have restricted the officer's discretion in this area by enacting implied consent laws. See for example, **NRS 484.383(8)**. These laws provide that force may only be used under certain narrowly defined circumstances such as in the case of a felony DUI wherein death or substantial bodily harm to another person has been inflicted. See generally Implied Consent Laws, infra.

2. BODY CAVITY SEARCHES

Other types of intrusions into the body include the visual body cavity searches conducted at most detention facilities. Although this procedure has been approved as a standard operating procedure without probable cause there are limits, and probes would generally not be permitted, See **Bell v. Wolfish**, 441 U.S. 520, 99 S.Ct. 1861 (1979).

3. BULLET REMOVAL

In **Winston v. Lee**, 470 U.S. 753, 105 S.Ct. 1611 (1985) The Supreme Court held that surgery to remove a bullet fired from into a robbery suspect's chest, which bullet had been fired from the victim's weapon, was unreasonable under the Fourth Amendment. The Court reasoned that although the suspect's would be under general anesthesia, the medical risks, although not extreme, were in dispute because there was no compelling need for the bullet in light of other available evidence. It should be noted that in view of this ruling even a court order or search warrant would not justify the removal of a bullet. In this case, the State had obtained a court order and it was the legality or enforceability of that order that was being litigated.

4. IMPLIED CONSENT LAWS: NRS 484.383-389 (DUI)

Most states have adopted implied consent laws for persons suspected of driving while under the influence. See **NRS 484.383 - NRS 484.389** When an officer has reasonable grounds to believe that a person was driving or in actual physical control of a vehicle while under the influence of liquor or a controlled substance, the officer can request the person to provide a sample of his blood, urine or breath. If the person refuses to submit to such a test reasonable force can be used to extract blood from the defendant. (See NRS 484.383). If the suspect is dead, unconscious or otherwise in a condition incapable of refusing, blood may be withdrawn without the necessity of advising the suspect of the implied consent law. It should additionally be noted that if a suspect refuses to voluntarily provide a sample of his blood, urine or breath, the prosecutor may comment on that refusal before the jury or judge trying the case. See NRS 484.389 and see also **State v. Smith**, supra., and **South Dakota v. Neville**, 459, U.S. 553, 103 S.Ct. 916 (1983). See also **McCharles v. State**, 99 Nev 831, 673 P.2d 488 (1983) which reinforces the fact that forcing the production of real or physical evidence such as blood or breath samples for traffic violations does not implicate either the Fifth or Sixth Amendments to the United States Constitution. Therefore a defendant need not be Mirandized prior to taking the samples nor is the defendant entitled to an attorney before submitting to a breath or chemical test.

5. UNDER THE INFLUENCE OF CONTROLLED SUBSTANCE (UICS, NRS 453.411)

If a person is not driving a vehicle but is suspected of having used or being under the influence of a controlled substance, in Nevada, a search warrant must be obtained to draw a sample of the suspect's

blood, unless he consents. **State v. Jones & Pullar**, 111 Nev. 774, 895 P.2d 643 (1995).

XVI. STATEMENTS TO PSYCHIATRISTS

When the court orders a psychiatrist to examine the defendant, the psychiatrist becomes a state agent and the rules regarding interrogation apply to the psychiatrist. If the defendant does not waive self incrimination rights, neither the statements of the defendant to the psychiatrist nor the conclusions of the psychiatrist based on the interview are admissible. **Estelle v. Smith**, 451 U.S. 454, 101 S.Ct. 1866 (1981), however, if the defense raises the insanity issue at trial he will have deemed to have waived the self incrimination rights and opened the door to the testimony of the physiatrist who interviewed him. See **People v. Lyles**, 478 N.E. 2d 291 (Ill. 1985), cert. denied, 106 S.Ct. 204 (1985), **State v. Craney**, 347 N.W.2d 668 (Iowa 1984), cert. denied, 469 U.S. 884 (1984), **Haynes v. State**, 103 Nev. 309, 739 P.2d 497 (1987).

* See discussion below under.
XVII. IMPEACHMENT as it pertains to impeaching a psychiatrist with statements taken of the accused in violation of Miranda.

XVII IMPEACHMENT

A. IMPEACHMENT (See also section on Voluntariness, supra.)

Although statements taken in violation of the prophylactic **Miranda** Rules may not be used in the prosecutions 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, when the defendant testified in his own defense and testified contrary to the Un-Mirandized 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 . . ." The United States Supreme Court extended this reasoning to the situation where the defendant invoked his right to counsel after police gave the defendant his **Miranda** Warning. See **Oregon v. Hass**, 420 U.S. 714, 95 S.Ct. 1215 (1975). Nevada follows Harris. See **Allan v. State**, 103 Nev. 512, 746 P.2d 138 (1987).

In **Michigan v. Harvey**, 494 U.S. 344, 110 S.Ct. 1176 (1990) The Court extended the **Harris** rationale to a Sixth Amendment violation as well as the Fifth Amendment violation under **Miranda**. A Sixth Amendment violation occurs after formal charges have been filed against the defendant and/or counsel has been appointed such as the **Massiah** situation. See discussion regarding 6th Amendment, supra.

Exceptions

1). If the court finds that the statement was involuntary or coerced. See **Mincey v. Arizona**, 437 U.S. 385, 98 S.Ct. 2408 (1978) **New Jersey v. Portash,** 440 U.S. 450, 99 S.Ct. 1292 (1979).

2). If the statement was made per negotiations and falls under **NRS 48.125** -See I - H. See section 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 (1985).

B. UNMIRANDIZED STATEMENT 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 as affirmative evidence to prove perjury in a trial following the one concerning the confessed crime. The rationale of the Nevada Supreme Court was very similar to that used in the Fourth Amendment field governing unforseeability. See **Taylor v. State**, 92 Nev 158, 547 P.2d 674 (1976). The court reasoned that since perjury is beyond the control of the police authorities excluding Unmirandized statements from a perjury prosecution would not discourage future police misconduct.

C. USE OF UNLAWFULLY OBTAINED CONFESSION TO IMPEACH A WITNESS AND/OR PSYCHIATRIST

Rule: A confession taken in violation of Miranda can be used to impeach the defendant if he testifies or to impeach a witness who bases his testimony on the false or contradictory statement of the defendant.

In **James v. Illinois**, 493 U.S. 307, 110 S.Ct. 648 (1990) the 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 with 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 the color black. The defendant, in a statement taken in violation of Miranda, had stated that his hair was reddish- brown. This was relevant since the suspect's hair was reddish-brown in color. The prosecution, thereupon, 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.

Two subsequent decisions by lower courts have distinguished the United States Supreme Court decision by permitting a witness to be impeached with the defendant's statement taken in violation of Miranda where the witness in their testimony rely in all or part on the statement (lies) of the defendant. See **Wilkes v. United States**, 631 A.2d 880 (D.C. App. 1993); **State v. DeGraw**, 470 S.E.2d 215 (W.V. 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. The distinction between the rule in **James** and these latter two decisions is that in these two cases 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."

In **Wilkes** the expert testified as to insanity while in **DeGraw** the expert testified on diminished capacity.

XVIII COMMENT ON DEFENDANT'S SILENCE (POST AND PRE-MIRANDA SILENCE)

A. DOYLE ERROR:

As a general rule of law, after the defendant has beeninformed 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). **Edwards v. State**, 90 Nev. 255, 524 P.2d 328 (1974); **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). In Nevada District Attorney can't comment on post-arrest silence even if not mirandized. **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).

In **Harrison v. State**, 96 Nev. 347, 608 P.2d 1107 (1980), the court held that a defendant telling his co-defendant girlfriend to "shut-up" after the girlfriend made an incriminating statement - post Miranda - constituted an invocation of silence. The court further ruled that it was improper for the state to elicit the girlfriend's statement and the defendant's response in a trial of the defendant.

In **McCraney v. State**, 110 Nev. 250, 871 P.2d 922 (1994), defendant **McCraney** 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 **McCraney** had killed both victims and was the sole shooter. When the defendant took the witness stand he testified that this brother Lorne had taken the gun from him and had fired the fatal shots into the victim as the victim lay face down in the street. This was the first time that **McCraney** had made this or any other statement. The prosecution thereupon cross examined the defendant as to why he had not said something sooner or why he had not told anyone about that earlier, and why he had not told that to the police. The Supreme Court reversed the conviction ruling that this cross examination as well as similar comment in closing argument was reversible error even though defense counsel did not object at the time of the cross examination in question. This is **Doyle** error and improper impeachment of defendant's credibility. See also **Washington v. State**, 112 Nev. 1054, 921 P.2d 1253 (1996). District Attorney brought out through the defendant on cross-examination that he never told this story to police "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?"

See also, **McGee v. State**,105 Nev. 718, 782 P.2d 1329 (1989) wherein the Nevada Supreme Court reversed a burglary conviction. There, the defendant, after being arrested and after being advised of his miranda rights chose to remain silent. At trial, the defendant named "Pedro" as the perpetrator of the crime. On cross examination the prosecutor questioned the defendant at length about why he had not given this exculpatory version to the police upon his arrest. See also **Vipperman v. State**, 92 Nev. 213, 547 P.2d 682 (1976).

B. DOYLE ERROR MAY BE HARMLESS:

Mere passing reference to post Miranda silence without more may be harmless. See **Shepp v. State**, 87 Nev. 179, 484 P.2d 563 (1971); **Vipperman v. State**, Supra., **Greer v. Miller**, 483 U.S. 756, 107 S.Ct. 3102 (1987). In Greer, the U.S. S.Ct. found no Doyle error when the trial court sustained an objection to the prosecutor's question: "Why didn't you tell this story to anybody after you got arrested?" The Court held that without an answer and no further infraction or comment, the due process clause was not violated.

C. ADVISING THE JURY THAT DEFENDANT INVOKED HIS MIRANDA RIGHTS

Related to the Doyle error is the situation when 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 likewise 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) (Cannot use defendant's request for an attorney, or, to remain silent as proof of sanity in an NGI defense case).

Such a comment, if it is mere passing reference, can be harmless error particularly if the judge immediately admonishes the jury to disregard the comment and the prosecutor does not comment on it in argument. See **Lingren v. Lane**, 925 F.2d 198 (7th Cir. 1991). In that case an 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."; **Deutscher v. State**, 95 Nev. 669, 601 P.2d 407 (1979). (In that case Metro Homicide Detective Bert Levos testified concerning a red stained fifty dollar bill found in the defendant's possession and after displaying same to defendant, defendant refused comment.) The courts in **Lindgren** and **Deutscher** ruled the comments harmless error.

D. ERROR TO ADVISE JURY THAT DEFENDANT FIRST TOLD HIS STORY AT TRIAL AFTER LISTENING TO ALL OF THE WITNESSES

A related issue which has resulted in the reversal of a case is where the prosecutor advises the jury that the defendant was the only witnesses who had the luxury to review all of the reports, listen to all of the testimony and then relay his account for the first time. See **Murray v. State**, 105 Nev. 579, 781 P.2d 288 (1989). It is not clear from the Murray case whether the defendant had in fact been given his Miranda rights and invoked those rights following his arrest.

E. POST ARREST SILENCE - NOT INDUCED BY MIRANDA

Except in Nevada a defendant's sile

examination, after the defendant has chosen to testify on his own behalf. In **Jenkins v. Anderson**, 477 U.S. 231, 100 S.Ct. 2124 (1980), a case dealing with pre-arrest silence, the prosecutor, during cross-examination was permitted to question the defendant concerning his failure prior to his arrest to report the incident to the police and at that time offer his exculpatory story. In **Fletcher v. Weir**, 455 U.S. 603, 102 S.Ct. 1309 (1982) the Supreme Court used the same rationale employed in Jenkins, to permit such questioning even though the silence commented upon was the silence following the defendant's

arrest for murder. 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. See also **State v. Brown**, 573 A.2d 886 (N.J. 1990); **Raffel v. United States**, 271 U.S. 494, 46 S.Ct. 566 (1926). In Nevada district Nev. 11, 930 P.2d 121 (1997)

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 before the time that he had received his **Miranda** warnings about the shooting being an accident. The United States Supreme Court held that this was proper comment and proper impeachment by the prosecutor.

It is important to remember that in neither **Jenkins**, **Fletcher** nor **Brecht** was silence induced by Miranda since in neither instance had the defendant been Mirandized.

F. PRE-ARREST SILENCE: (CASE-IN-CHIEF)

There is a split in the circuits in this area, however, as a general proposition a citizen has no obligation to voluntarily speak to police when they have knowledge of a crime and to that extent pre-arrest silence cannot be used against the defendant since it would be introduced for the purpose of inferring guilt. The law of adoptive admission does, of course, permit the introduction of evidence of the accused's silence when it is not induced by police contact. Some of the cases and the rationale contained therein follows.

1. 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: **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 under **Griffin**, the testimony was error because the prosecutor could not refer to any exercise of Fifth Amendment rights at any time once the defendant invoked his right to silence); **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 - although harmless error in this case, the court stated that **Jenkins** did not stand for the proposition that a defendant's pre-arrest silence could be used in the State's case in chief).

In general, the court's arguments have centered around the premise cited below:

"Because appellant did not take the stand, and the state's purpose in referring to appellant's silence was to suggest that he was guilty (rather than to impeach his testimony), the problem does not involve the application of **Doyle v. Ohio**, 426 U.S. 610, 96 S.Ct. 2240 (1976) ... but rather involves the application of **Griffin v. California**, 380 U.S. 609, 85 S.Ct. 1229 (1965). That case held that neither the prosecutor nor the court may invite the jury to draw an inference of guilt from an accused's failure to take the stand. This court has specifically held that where impeachment by silence is permissible, the government may not argue that a defendant's silence is inconsistent with a claim of innocence. **United States v. Shue**, 766 F.2d 1122, 1130 (7th Cir. 1985). The court noted that while a slight suggestion of guilt is inevitable when the government uses silence as impeachment, 'the slight suggestion of guilt is grudgingly permitted only because the government needs to impeach the defendant's preferred reason for remaining silent.' Id. At 1131." Lane, 832 F.2d at 1017.

In sum, our laws do not compel individuals to voluntarily speak to police when they have knowledge of a crime. Therefore, any reference to pre- arrest silence by the State in their case in chief can only be intended to infer guilt, which is constitutionally impermissible since it goes against both the Fifth Amendment and the general premise that there is no duty to speak or confess. Therefore, any reference to pre-arrest silence is not permitted. [It should be noted though that none of the above cases refer to a situation where defendant voluntarily failed to offer information to the police].

2. AUTHORITIES PERMITTING PRE-ARREST SILENCE EVIDENCE

Several circuits do permit a prosecutor, in his case in chief, to comment on a defendant's pre-arrest silence: **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 asserted defense - Fifth Amendment protects against compelled self-incrimination but does not preclude proper evidentiary use and prosecutorial comment about every communication or lack thereof that may give rise to an incriminating inference); **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); **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); **United States v. Robinson**, 523 F.Supp. 1006, 1009-1011 (E.D. N. Y. 1981) (defendant paid fine in cashier's office of criminal court building with counterfeit money and when told to give real money, defendant said nothing but handed over true money - government argued in their case in chief that an average innocent citizen in the same situation would react in a different way. Court held there was no compulsion that would activate Fifth Amendment concerns. Therefore, this was an evidentiary and not a constitutional issue. Evidence admissible as adoptive admission because the circumstances demonstrated that it was more reasonably probable that a man would answer the charge made against him than that he would not).

These cases cite the same concurring opinion of Justice Stevens in **Jenkins**, wherein the Justice said:

"The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police...When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment." **Jenkins**, 447 U.S. at 243- 244, 100 S.Ct. At 2132.

In sum, Justice Stevens concluded that the prosecution can raise prior silence for impeachment or rebuttal, even if the defendant does not elect to testify, so long as the evidence is relevant and the silence was not in response to governmental inquiry. **Jenkins**, 447 U.S. at 244 n.7, 100 S.Ct. At 2132 n.7. The cases citing **Jenkins** simply extended the law to include the use of prior silence in the State's case in chief.

G. COMMENT ON DEFENDANT'S SILENCE AFTER WAIVER OF MIRANDA

In **United States v. Mitchell**, 558 F.2d 1332 (8th Cir. 1977) the Court 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). Although not directly on point see **Quillen v. State**,

H. COMMENT ON DEFENDANT'S FAILURE TO TESTIFY

Reference by the prosecutor to a trial jury of 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).

But see **Septer v. Warden**, 91 Nev. 84, 530 P.2d 1390 (1975) and **Fernandez v. State**, 81 Nev. 276, 402 P.2d 38 (1965). Those cases stand for the proposition that a reference to evidence or testimony that stands uncontradicted is acceptable. You may be able to push such comments a bit further by generically stating that the defense produced no evidence to contradict certain points if, in fact, the defense put on a case. In that event you could say words to the effect "although the defense presented evidence, there was non presented to refute ---". So long as you do not refer to the accused specifically, your comments should be acceptable. For example, in **Biederstadt v. State**, 92 Nev. 80, 545 P.2d 202 (1976) a comment substantially as follows was ruled to be acceptable "the defendant's story as to what happened is unsupported and uncorroborated by any other witness. The defense has the same power of subpoena that I do, they control who testifies, and the witnesses could have come forth." See also, **United States v. Slanblendorio**, 830 F.2d 1382 (7th Cir. 1987). There, the defendant did not testify and the defense, in closing argument, challenged the prosecution for failing to call certain witnesses. The prosecution in rebuttal, responded by pointing out that the defense was equally able to call such witnesses. This was ruled to be proper comment.

CAUTION: Comment on Defendant's Failure to Call Witnesses and Shifting the Burden of Proof (See detailed discussion Section "M" infra).

The discussion so far is to some degree in conflict with the 1990 Nevada Supreme Court decision of **Ross v. State**, 106 Nev. 924, 803 P.2d 1104 (1990). That case was reversed based on numerous errors committed by the prosecutor and it was this totality of numerous errors which caused the court problems. As it pertains to this issue, the prosecutor commented on the defendant's failure to produce a certain witness. The Nevada Supreme Court held that this is generally considered to be "outside the boundaries of proper argument" and "can be viewed as impermissibly shifting the burden of proof to the defense". Griffin error may be harmless. See **McNelton v. State**, 111 Nev. 900, 900 P.2d 934 (1995).

Test if Comment is Error:

The record must reflect and the court must find that the District Attorney intended his comments to be taken as a reference to defendant's failure to testify. See, **Rippo v. State**, 113 Nev. 1239, 946 P.2d 1017 (1997) ; **United States v. Ursery**, 109 F.3d 1129 (6th Cir. 1997)

I. COMMENT ON DEFENDANT'S REFUSAL TO TAKE BLOOD, URINE OR BREATH TEST:

The Court in **Smith** 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**, and discussion under Implied Consent, supra.

J. RULES NOT APPLICABLE TO DEFENSE WITNESSES SUCH AS ALIBI WITNESSES

Full and complete cross examination of defense witnesses including alibi witnesses for failing to timely reveal to the police or other authority the non involvement of the defendant in the charged crime is proper. While a witness has no legal duty to cooperate with the police, this does not alter the fact that the witnesses 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, and if so and the witness remained silent, then that fact bears on the witnesses credibility and/or bias.

K. 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 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".

L. IMPEACHMENT OKAY WHEN SUSPECT GIVES PARTIAL STATEMENT (IMPEACHMENT)

When a suspect, either before or after his Miranda warnings, does not remain silent and gives a partial statement then the prosecutor may comment thereon. In **McKenna v. McDaniel,** 65 F.3d 1483 (9th Cir. 1995) the defendant stated "I don't want to take about it. I don't want to implicate anybody and I won't give you a written statement." This the court stated was not an invocation of his right to remain silent and that recitation was fair comment by the D.A. See also **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 his Miranda warnings that he stole the automobile from one location, however, at trial he stated that he took the automobile from a different location. Cross-examination was permitted in that case in order to impeach the defendant. 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.

The Nevada Supreme Court in **Quillen v. State**, 112 Nev. 1369, 929 P.2d 893 (1996) cited with approval the United States Supreme Court case of **Anderson v. Charles.** In **Quillen** 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.

M. D.A. COMMENTING ON DEFENDANT'S FAILURE TO CALL CERTAIN WITNESSES

In **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.) See also **Whitney v. State,** 112 Nev. 499, 915 P.2d 881 (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).

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 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.

In **Washington v. State**, 112 Nev. 1054, 921 P.2d 1253 (1996) the prosecutor commented on three persons who the defendant mentioned in his testimony but who the defendant failed to call as witnesses during the presentation of his case. 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." The court additionally held that defense counsel was ineffective for failing to object to these comments. The conviction was reversed.

In **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.

XIX. MISCELLANEOUS 5TH AMENDMENT ISSUES

A. 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). for an Opposing Viewpoint see **State v. Crislip**, 796 P.2d 1108 (N.M. App. 1990).

B. 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.

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).

3. REDACTED CONFESSION:

The jurisdictions are clearly split on the redaction issue and each case must be evaluated on its own merits. 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." Redaction with the use of neutral pronouns or substituting the co-defendant's name with the word 'individual' was likewise approved in **United States v. Enriquez- Estrada,** 999 F.2d 1355 (9th Cir. 1993); **United States v. Sears,** 663 F.2d 896 (9th Cir. 1981) (the phrase "some others" in the name of the co- defendants); **United States v. Gonzales,** 749 F.2d 1329 (9th Cir. 1984) (the phrase "the other man" for the defendant's name). Unfortunately, the Nevada Supreme Court case of **Stevens v. State,** infra, was reversed when although the defendant's name was blanked out, it was the opinion of the Nevada Supreme Court 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 use of a neutral pronoun to refer to the accomplice was not a sufficient redaction where other evidence makes it clear that the defendant was the accomplice. See **Stevens v. State**, 97 Nev. 443, 634 P.2d 662 (1981); **People v. Fletcher**, 30 Cal. App. 4th 687, 36 Cal.Rptr.2d 177 (1994), rehearing 891 P.2d 803. In **State v. Rakestraw**, 871 P.2d 1274 (Kan. 1994) a conviction was reversed where the effect of redacting a statement

distorted the meaning of the defendant's statement and in effect had the defendant doing more than what he actually confessed to.

The latest Nevada cases to address the issue of redaction and the use of neutral pronouns are the cases of **Ducksworth and Martin v. State,** 113 Nev. 757, 942 P.2d 177 (1997) and **Lisle v. State**, 113 Nev. 473, 937 P.2d 473 (1997). While **Lisle** appeared to permit the use of neutral pronouns, **Ducksworth** does not and for that reason we have filed a petition for rehearing before the Nevada Supreme Court. **Lisle** was filed 6-17-97 while **Ducksworth** was filed 7-15-97.

C. PRIVILEGE AGAINST SELF INCRIMINATION NO LONGER APPLICABLE AFTER THE DEFENDANT HAS PLED GUILTY

In **Jones v. State**, 108 Nev. 651, 837 P.2d 1349 (1992), the court held that after a witness/defendant had pled guilty, the privilege against self incrimination is no longer available to that witness/defendant. This is so even though the witness has not yet been sentenced. See also, **Miller v. Angliker**, 848 F.2d 1312 (2nd Cir. 1988), cert. denied 109 S.Ct. 224; **Bank of Cleveland v. Abe**, 916 F.2d 1067 (6th Cir. 1990); **State v. Anderson**, 732 P.2d 732 (Kan. 1987).

D. 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).

E. 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) (see below) suggests that the prosecution should be permitted 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. However, once the witness invokes his Fifth Amendment privilege then it would be improper under the guise of impeachment to put that witness' testimony before the jury because such a witness cannot be cross-examined and, therefore, there would be a violation of the confrontation clause. See **Douglas v. Alabama**, 380 U.S. 415, 85 S.Ct. 1074 (1965). Cited with approval by the Nevada Supreme Court in **Silva v. State**, 113 Nev. ___, 951 P.2d 591 (1997). There may, of course, be a hearsay exception which would permit the former testimony to come before the jury. See for example, **NRS 51.325** entitled Former Testimony.

In **Douglas v. Alabama**, supra, the prosecution in Douglas' trial called co- defendant Lloyd as a witness. Lloyd had previously been tried and convicted. Lloyd had previously made a statement to the police implicating defendant Douglas and when Lloyd invoked the Fifth Amendment self- incrimination clause the judge ordered him to answer questions and threatened to hold him in contempt. Although this was all proper since the defendant Lloyd no longer had a Fifth Amendment claim when the judge premitted the prosecutor to read Lloyd's prior statement to the jury, the United States Supreme Court reversed the conviction because the confrontation clause was violated.

In **Silva v. State**, supra, the Nevada Supreme Court held that once a witness invokes their Fifth Amendment privilege the Court must terminate the prosecutor's efforts since, in the majority of cases, the prosecution will, in effect, end up testifying through the guise of impeachment without, at the same time, permitting cross-examination by the defendant. The typical question by the prosecutor is predicated by the

clause "Isn't it true that you told Detective _____ _____"

The Court in **Silva** concluded "At the very least, when it became apparent that (the witness) was not going to answer questions even under the threat of contempt charges, the judge should have discontinued the questioning and investigated the matter outside the presence of the jury."

F. 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). In Foss, the court suggested that an instruction to the following effect be given:

"through no fault of either the state or the defendant, the witness _____ was not available to testify. You are not to consider this witnesses 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 court did recognize that not bringing the fact of the witnesses unavailability to the attention of the jury could leave a prejudicial gap in the State's case. For the prejudicial effect of calling a witness that the prosecutor knows will invoke the 5th, see **Cota v. Eymann**, 453 F.2d 691 (9th Cir. 1971). It should further be noted that in the Foss case the trial judge actually instructed the jury that the witness had advised the court that if called to testify, the witness would invoke the 5th Amendment privilege against self incrimination and for that reason the court had excused the witness from testifying. This was not ruled to be error by the Nevada Supreme Court. The **Eckert** case seems to imply that it would not be error to require a witness to invoke his 5th Amendment in the presence of the jury. See also **Palmer v. State**, 112 Nev. 763, 920 P.2d 112 (1996).

Discretionary With Court: The case of **Ducksworth and Martin v. State,** 113 Nev.757, 942 P.2d 157 (1997) stands for the proposition that it is permissible to require the witness to invoke his Fifth Amendment in the presence of the jury so long as the desired testimony is relevant and admissible. Quoting with approval, the language of a Sixth Circuit case the Nevada Court stated:

"Government counsel need not refrain from calling a witness whose attorney appears in court and advises court and counsel that the witness will claim his privilege and will not testify. However, to call such a witness, counsel must have an honest belief that the witness has information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed. It is an unfair trial tactic if it appears that counsel called such a witness merely to get him to claim his privilege before the jury to a series of questions not pertinent to the issues on trial . . . ." citing **United States v. Compton**, 365 F.2d 1 (6th Cir. 1966).

G. PROSECUTOR WHO WAS FORMERLY DEFENSE ATTORNEY FOR THE DEFENDANT CONDUCTS THE INTERROGATION

In **Larsen v. State**, 93 Nev. 397, 566 P.2d 413 (1977), Larry Leavitt, a Deputy District Attorney who had represented the defendant prior to becoming a deputy obtained a confession from the defendant. This was not error under the circumstances because in addition to being advised of his Miranda rights, the defendant was repeatedly admonished of Leavitt's present position and that he should be viewed the same as a police officer and that no confidential relationship existed.

H. 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.

I. CAUTIONARY INSTRUCTION FOR ORAL CONFESSION

Not required in Nevada. See **Ford v. State**, 99 Nev. 209, 660 P.2d 992 (1983); **Levi v. State**, 95 Nev. 746, 602 P.2d 189 (1979).

J. THE 5TH AMENDMENT AND THE INSANITY DEFENSE - COMPELLING A PSYCHIATRIC EXAMINATION

Where the defendant raises the defense of insanity or diminished capacity he waives both his Fifth Amendment privilege against self-incrimination and the attorney-client privilege. See **State v. Nuss**, 763 P.2d 1249 (Wash. App. 1988); **State v. Brewton**, 744 P.2d 646 (Wash. App. 1987); **State v. Anderson**, 723 P.2d 464 (Wash. App. 1986). See also **State v. Nichols**, 877 S.W.2d 722 (Tenn. 1994); (psychologist's notes admissible during penalty phase because psychologist was untimely with his report; **Haynes v. State**, 103 Nev. 309, 739 P.2d 497 (1987); **State v. Craney**, 347 N.W.2d 668 (Iowa 1984); **Grandviel v. Estelle**, 655 F.2d 673 (5th Cir. 1981); **People v. Lyles**, 478 N.E.2d 291 (Ill 1985), cert. den. 106 S.Ct. 171; **People v. DelVecchio,** 475 N.E.2d 840 (Ill. 1985), cert. den. 106 S.Ct. 204.

Certainly, if the defendant asserts the defense of insanity and refuses to permit a state's expert to examine him, then at the very least the prosecution should be permitted to comment on that fact to the jury. 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).

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 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.

In **DePasquale v. State**, 106 Nev. 843, 803 P.2d 218 (1990), the court held that a psychiatric examination for the limited purpose of rebutting a defendant's insanity defense does not implicate the 5th Amendment. This would, however, be limited to non-incriminatory observations and/or statements if it is a psychiatrist employed by the defense or a court-appointed psychiatrist unless the defendant's Miranda rights were explained to him. See generally, **Haynes v. State**, 103 Nev. 309, 739 P.2d 497 (1987), **McKenna v. State**, 98 Nev. 38 (1982), **Esquivel v. State**, 96 Nev. 777, 617 P.2d 587 (1980).

A defendant who asserts a diminished capacity defense may be compelled to undergo an examination by a state psychiatrist and Miranda warnings are not required. See **Commonwealth v. Morley**, 658 A.2d 1357 (Pa. 1995).

K. JUDGE TO ADVISE DEFENDANT OF RIGHT TO TESTIFY

Every defendant should be advised on the record but outside the presence of the jury, by the court of his right to testify at or near the end of the state's case in chief. **Phillips v. State**, 105 Nev. 631, 782 P.2d 381 (1989). For Instruction see **NRS 175.181**.

L. 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 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.

M. 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 Mirand rights. The confession was video taped and upon review it became clear that the suspect had unequivacally invoked his right to counsel. In suppressing the confession, the Court reasoned that although the 4th amendment exclusionary rule is designed to deter unlawful police conduct, the 5th amendment is designed to ensure protection of the suspects right against compulsory self-incrimination. It is this theoretical difference underlying the two amendments which convinced the California court to reject the Good Faith exception.