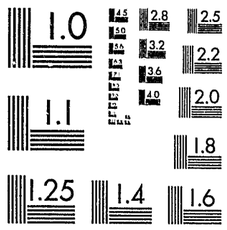

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Finetuning *Miranda* Policies

". . . officers should be advised that once they have decided that an arrest is going to take place, they should not continue with the questioning without first complying with *Miranda*."

By
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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

In 1966, the Supreme Court ruled in *Miranda* v. *Arizona*[1] that before a confession obtained through custodial interrogation could be used at trial, the government first had to prove that the defendant had been advised of, and waived, certain specified rights.[2] Although the holding in *Miranda* was limited to situations where both custody and interrogation existed simultaneously, it was uncertain in 1966 how the courts would define custody for purposes of applying the rule. Because of this uncertainty, many law enforcement agencies adopted broad warning and waiver policies that require compliance with *Miranda* prior to any interview of a suspect in a criminal case, regardless of whether the suspect is under arrest or otherwise deprived of his freedom of action at the time of the interview.

Broad warning and waiver policies, like the one described above, were justified in the late 1960's and early 1970's because of the uncertainty surrounding the proper parameters of the *Miranda* rule. However, in light of a series of Supreme Court decisions spanning the last 8 years, it is now clear that such policies are much broader than the law requires.

Post-*Miranda* Cases Defining Custody

In *Beckwith* v. *United States*,[3] agents of the Internal Revenue Service interrogated the defendant, a taxpayer who was the "focus" of a tax fraud investigation. Prior to the questioning, he was advised that he had a right to remain silent, that any statement made could be used against him, and that he was free to consult with counsel before the interview. He was not told that he had a right to an appointed attorney. He declined to exercise those rights, furnished incriminating statements and records, and was subsequently convicted. On appeal to the Supreme Court, he alleged that the IRS agents failed to comply with *Miranda* in conducting the interview.

The Court found that the agents were not bound by *Miranda* and that to apply the *Miranda* rule in those circumstances would separate the rule from its own explicitly stated rationale. *Miranda* application depends on *custodial* police interrogation, questioning in a coercive, police-dominated atmosphere. The idea that interrogation in a noncustodial setting, where the investigation has focused on a suspect gives rise to the *Miranda* requirement, was rejected. Moreover, the Court quoted with approval the view of a Federal appellate court that it is

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Special Agent Riley

the compulsive aspect of custodial interrogation, and not the strength of the government's suspicions, which governs the application of *Miranda.* Thus, it is not the status of the interviewee—whether subject, suspect, or focus—but rather the coercive circumstances of the questioning that controls.[4]

In a 1977 *per curiam* opinion, the Court further emphasized that something more than suspicion or focus is necessary before *Miranda* applies. In *Oregon* v. *Mathiason,*[5] the defendant was asked to come to the State patrol office for an interview with an officer investigating a burglary. The suspect was told he was not under arrest but was believed to have participated in the burglary. He was not given *Miranda* warnings. He confessed and was convicted. On appeal, the Oregon Supreme Court reversed the conviction, finding that the defendant was interviewed in a "coercive environment" (i.e., custody) and *Miranda* applied. The court concluded that since the officer failed to give the warnings and obtain a waiver, the confession should have been inadmissible. The U.S. Supreme Court disagreed. The Supreme Court pointed out that the defendant was not formally arrested, nor was his freedom of action restrained in any significant way, and that without such factors, *Miranda* simply does not apply. Part of that decision is especially pertinent:

> "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. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." [6]

More recently, the Supreme Court again addressed the issue of custody for purposes of *Miranda.* In *California* v. *Beheler,*[7] the defendant, Jerry Beheler, and several acquaintances attempted to steal a quantity of hashish from one Peggy Dean, who was selling the drug in the parking lot of a liquor store. Dean was killed by Beheler's companion and stepbrother, Danny Wilbanks, when she refused to relinquish the drugs. Shortly thereafter, Beheler called the police, who arrived almost immediately, and told the police that Wilbanks had killed the victim. Later that evening, Beheler voluntarily agreed to accompany the police to the station house and was specifically told that he was not under arrest.

Beheler was interviewed at the station house and told the police what had occurred that day. The interview, which was not preceded by a warning and waiver of *Miranda* rights, lasted approximately 30 minutes. At the conclusion of the interview, Beheler was permitted to return home with the understanding that his statement would be reviewed by the district attorney. Five days later, Beheler was arrested for aiding and abetting first-degree

". . . in determining where custody is present for purposes of *Miranda,* the inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."

murder. He was advised of his *Miranda* rights, which he waived, and gave a taped confession. Both confessions were used against him at trial, and he was convicted.

The California Court of Appeals reversed Beheler's conviction, holding that the first interview with police at the station house constituted custodial interrogation, which activated the need for *Miranda* warnings. In finding custody, the court noted that the interview took place in the station house, Beheler had already been identified as a suspect in the case, and the interview was designed to produce incriminating responses.

In reversing the California Court of Appeals decision, the Supreme Court, in a *per curiam* opinion, followed its previous holding in *Oregon* v. *Mathiason* [8] and ruled that in determining whether custody is present for purposes of *Miranda,* the inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. Holding there was no such restraint in this case, the Court noted that *Miranda* warnings are not required simply because questioning takes place in the station house or because the questioned person is one whom the police suspect. Finally, the Court stated that the amount of information the police have concerning a person who is to be questioned, and the length of time between the commission of a crime and a police interview, are not relevant to the issue of whether custody exists for purposes of *Miranda.*

Although the above decisions establish that *Miranda* was not intended to apply to all interrogation situations, they create somewhat of a dilemma for law enforcement agencies. On the one hand, broad warning and waiver policies are easily understood and applied by law enforcement officers. These positive features are enhanced by the fact that confessions are never suppressed because *Miranda* warnings are given too early—just too late. On the other hand, law enforcement officers understand that certain crimes may go unsolved and criminals unpunished if suspects are advised of their rights in situations where persons are not legally entitled to the protections afforded by the *Miranda* rule.

Law enforcement administrators, in conjunction with agency legal advisors and prosecutors, must balance the above factors before deciding on an appropriate departmental warning and waiver policy. Some agencies have weighed these factors and decided to retain broad warning and waiver policies, while others have decided to modify their policies to bring them more in line with *Miranda* and its progeny. The remainder of this article discusses legal issues concerning interrogations that law enforcement agencies should consider when promulgating or modifying warning and waiver policies. It also suggests approaches that can be used to help minimize legal problems that may subsequently arise in connection with these policies.

Formulating a *Miranda* Policy for Interrogations

Establishing a warning and waiver policy that conforms with the post-*Miranda* cases discussed above appears on its face to be a simple task. A policy that provides for compliance with *Miranda* only when a suspect is to be interrogated after he has been formally arrested or otherwise significantly restricted in his freedom of movement meets the standard enunciated by the Supreme Court in *Beckwith, Mathiason,* and *Beheler.* It does not, however, provide practical guidance to police officers who must apply the policy to varying fact situations. A *Miranda* policy should never be written in such detail that it becomes overly cumbersome and therefore difficult to remember and apply. But, it should address with some specificity how the policy applies in the most commonly recurring fact situations faced by officers.

Arrests

The logical starting point for a warning and waiver policy is the statement that officers must comply with *Miranda* before they interview a suspect who is under arrest or otherwise incarcerated. However, even this clearly worded policy leaves unanswered several questions frequently raised by police officers. For example, does this policy apply where the purpose of a custodial interview is to elicit statements concerning crimes other than those for which the interviewee was arrested? Must State and local officers comply with *Miranda* when the person to be interviewed has been arrested by Federal authorities and vice-versa? Does it apply in emergency situations where the police need quick answers to questions in order to prevent possible harm to themselves, fellow officers, or members of the public? Finally, does this policy apply to all arrests, or only those where the suspect has been arrested for a felony? All of these frequently asked questions have been addressed by the Supreme Court, and the answers should be incorporated into departmental *Miranda* policies.

". . . the availability of the [safety] exception does not depend on the motivation of the individual officers involved, but is limited by the emergency circumstances that justify it."

In *Mathis* v. *United States,*[9] the defendant was convicted by a jury in a U.S. district court on two counts of knowingly filing false claims against the Government in violation of Federal law. Part of the evidence on which the conviction rested consisted of documents and oral statements obtained from the defendant by a Government agent while the defendant was in prison serving a State sentence. Before eliciting these statements, the Government agent did not warn the defendant of his rights. Appealing his conviction to the Supreme Court, Mathis argued that his statements were used against him in violation of *Miranda.* The Government countered by arguing that *Miranda* did not apply because the defendant had not been put in jail by the officers questioning him, but was there for an entirely separate offense. Finding these distinctions "too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda,"* the Court reversed Mathis' conviction. As can be seen from this decision, in applying *Miranda,* the Supreme Court is not concerned with why a person has been arrested or by whom. It is the coercive aspect of custody itself, when coupled with police interrogation, that triggers the protections afforded by the rule.

With respect to emergency situations and the applicability of *Miranda,* on June 12, 1984, the Supreme Court recognized a "public safety" exception to *Miranda.* In *New York* v. *Quarles,*[10] a New York officer entered a supermarket to locate an alleged rapist who was described by the complainant as having a gun. The officer located the suspect, Quarles, in the store. Upon seeing the officer, the suspect ran toward the rear of the store. The officer lost sight of him, and upon regaining sight of him, ordered the suspect to stop and put his hands over his head. The officer frisked him and discovered he was wearing an empty shoulder holster. After handcuffing the suspect, the officer asked him where the gun was. Quarles nodded in the direction of some empty cartons and stated, "The gun is over there."

After the gun was located, Quarles was advised of his rights, waived those rights, and was questioned. Responding to this questioning, Quarles admitted ownership of the gun. In the prosecution for criminal possession of a weapon, the New York courts suppressed the gun and the statement concerning its location on grounds that the officer's failure to first advise the subject of his rights and obtain a waiver violated *Miranda.* Furthermore, Quarles' admission concerning ownership of the gun was suppressed as a fruit of the original *Miranda* violation.

Reversing the New York Court of Appeals, the Supreme Court agreed that Quarles was subjected to custodial interrogation without prior advice of his rights and waiver of those rights. The Court ruled, however, that the statement concerning the location of the gun and the gun itself were admissible under a "public safety" exception to the *Miranda* rule.

Explaining the exception, the Court held that a statement obtained as the result of custodial interrogation in the absence of the warnings and waiver is admissible so long as the statement is voluntary under the traditional due process/voluntariness test and the police questions that result in the admission are reasonably prompted by a concern for the public safety. In this case, there was no claim that Quarles' will was overborne by the actions of the officer, and thus, the Court did not address whether Quarles' statement concerning the location of the gun was voluntary under the due process/voluntariness test. The Court found that inasmuch as the gun was concealed somewhere in the supermarket, it posed a danger to the public safety. Consequently, the Court ruled that prior *Miranda* warnings and waiver had not been required and the New York Court of Appeals had erred in suppressing the gun, the statement concerning its location, and the later statement concerning ownership of the gun.

In creating this exception to *Miranda,* the Court ruled that the availability of the exception does not depend on the motivation of the individual officers involved, but is limited by the emergency circumstances that justify it. Therefore, police officers who rely on the exception must be able to later articulate specific facts and circumstances evidencing a need for the questioning in order to protect themselves, fellow officers, or the public. Furthermore, since this is a narrow exception to the *Miranda* rule, police officers should be instructed that once the emergency ends, any further custodial questioning should be preceded by the warnings and waiver.

The question of whether *Miranda* applies to nonfelony arrests has been the subject of controversy in the lower courts for several years. On July 2, 1984, the Supreme Court settled this controversy by ruling in *Berkemer* v. *McCarty*[11] that *Miranda* applies to interrogations of arrested persons regardless of whether the offense being investigated is a felony or a misdemeanor. Refusing to distinguish between misdemeanors and felonies for purposes of *Miranda,* the Court found that such a distinction would dilute the clarity of the rule because in many cases it is not certain at the time of arrest whether the subject is to be charged with a misdemeanor and/or a felony offense.

In light of the Supreme Court's stated purpose behind the *Miranda* rule and the holdings in the above cases, a more definitive *Miranda* policy might begin by advising officers that before they question a subject who is in Federal or State custody, or the custody of a foreign government, they must comply with *Miranda* and that this policy applies regardless of whether the subject has been arrested for, or is being questioned about, a felony or a misdemeanor. Additionally, while *Miranda* warnings need not be given in custodial interrogation situations where an emergency exists and the police officer's questions are prompted by a concern for the safety of the officer, fellow officers, or the public, any further custodial interrogation should be preceded by the warnings and waiver as soon as the emergency ends.

Investigative Detentions

In 1968, the Supreme Court ruled in *Terry* v. *Ohio*[12] that law enforcement officers are constitutionally justified in detaining persons against their will for short periods of time in order to investigate, and hopefully resolve, suspicious circumstances indicating that a crime has been, or is about to be, committed. Investigative detentions, or "Terry stops" as they have become known, are seizures within the meaning of the fourth amendment, and therefore, must be reasonable in order to be constitutional. But, since a temporary detention is less intrusive than a full custody arrest, the courts do not require police officers to establish that they had probable cause to justify the seizure as reasonable. Instead, a lower burden of proof, reasonable suspicion, is all that police officers need show to justify the detention as constitutional.

Investigative detention cases are closely scrutinized by the courts to ensure that this valuable investigative tool is not abused. One important factor in the reasonableness of a "Terry stop" is the length of the detention. The longer a person is detained, the more likely it becomes that a reviewing court will find that the seizure was actually an arrest requiring probable cause. Hence, officers who investigatively detain a suspect must resolve the suspicious circumstances that give rise to the detention as quickly as possible.

Police questioning of a detained person can be an effective method of resolving suspicious activities and circumstances so that the detaining officer can quickly make a decision to either release the suspect or subject him to a full custody arrest. The effectiveness of police questioning under these circumstances could very well be diminished if officers are required to first warn the suspect of his rights and obtain a waiver. Hence, the applicability of *Miranda* to investigative detentions is an important issue that should be addressed in departmental *Miranda* policies.

In *Berkemer* v. *McCarty,*[13] discussed briefly above, the Supreme Court squarely addressed this issue. On March 31, 1980, an Ohio State trooper observed McCarty's car weaving in and out of a lane on an interstate highway. After following the car for 2 miles, the trooper forced McCarty to stop and asked him to get out of the vehicle. McCarty complied; however, he had difficulty standing, and the trooper concluded that McCarty would not be allowed to leave the scene as he would be charged with a traffic offense. McCarty was not told that he would be taken into custody. While at the scene of the stop, McCarty was asked to perform a "balancing test," which he was unable to do without falling. Additionally, McCarty was asked whether he had been using intoxicants, to which he replied that "he had consumed two beers and had smoked several joints of marijuana a short time before." McCarty's speech was slurred, and the trooper had difficulty understanding him. At that point, McCarty was formally arrested, placed in the patrol car, and transported to the county jail.

At the jail, McCarty was given an intoxilyzer test which did not detect any alcohol in his blood. The trooper then resumed his questioning in order to obtain further information for his report. McCarty admitted that he had been drinking, and when asked if he was under the influence of alcohol, stated, "I guess, barely." McCarty also indicated in writing on the report that the marijuana he had smoked did not contain angel dust or PCP. At no point in the above scenario was McCarty advised of his rights.

McCarty was charged with operating a motor vehicle while under the influence of alcohol and/or drugs, which is a first-degree misdemeanor under Ohio law. He moved to have his incriminating statements excluded, arguing that introduction of his state-

ments would violate *Miranda* since he had not been informed of his rights prior to the questioning. The trial court denied the motion, and McCarty pleaded "no contest" and was found guilty. McCarty appealed his conviction and the Ohio State courts ruled that his rights had not been violated since *Miranda* does not apply to misdemeanor arrests.

McCarty then filed a petition for a writ of habeas corpus in Federal court. The district court denied the writ and held that "*Miranda* warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense." The Court of Appeals for the Sixth Circuit reversed, holding that *Miranda* applies to custodial interrogations regardless of whether the offense being investigated is a felony or a misdemeanor. Applying this principle to the facts of the case, the sixth circuit held that McCarty's postarrest statements at the jail were clearly inadmissible since he had not been afforded the protections guaranteed by *Miranda*. Since inadmissible evidence had been used against him, the sixth circuit reversed his conviction. The sixth circuit, however, did not clarify whether all of his statements would be inadmissible at a second trial or only those statements obtained at the jail after he was formally arrested.

This case then went to the Supreme Court, and two questions were presented for review. As noted earlier, one question was whether *Miranda* applies to misdemeanor arrests. Concluding that it does, the Supreme Court ruled that McCarty's statements at the jail, after he had been formally arrested, were the result of custodial interrogation. Thus, the Court concluded that the admissions he made at the jail were improperly used against him since the police had not complied with *Miranda*. This finding resulted in the Supreme Court affirming the court of appeals decision to reverse McCarty's conviction; however, the Supreme Court did not stop there. The Supreme Court went on to discuss whether the roadside questioning in this case—resulting in damaging admissions made before McCarty was formally arrested and transported to the jail—also constituted *custodial* interrogation requiring the protections of *Miranda*.

Citing *Terry* v. *Ohio*,[14] the Supreme Court noted that investigative detentions constitute fourth amendment seizures and therefore must be reasonable in order to be constitutional. The Court ruled, however, that they do not constitute "custody" for purposes of bringing the *Miranda* rule into operation since they are brief in duration and relatively nonthreatening in character when compared with a formal arrest. Likening the traffic stop in this case to a "Terry stop," the Court found no reason to treat the traffic stop differently for purposes of *Miranda* since McCarty was not told he was under arrest at the outset of the stop, the stop was made in public, and no other restraints comparable to those associated with a formal arrest were present until McCarty was formally arrested and transported to the jail. Although finding that custody for purposes of *Miranda* did not exist until McCarty was formally arrested, the Court made it clear that the custody determination must be made on a case-by-case basis taking into account all of the coercive factors, or lack thereof, present in a given case.

Based on this holding in *Berkemer*, it is recommended that departmental warning and waiver policies instruct officers that as a general rule, *Miranda* rights should not be given before an officer questions a suspect who is being investigatively detained. However, the policy should also instruct officers that if the detention is prolonged or other highly coercive factors are present (e.g., large number of officers present, restraining devices or weapons are involved, or the suspect must for some reason be moved from the location of the initial stop), then officers should administer the warnings and obtain a waiver before proceeding further with the questioning. An important aspect of this portion of the policy is to ensure that it allows for *Miranda* warnings and waivers in investigative detention situations where, although highly coercive factors are present, no formal arrest has been made. This will aid in rebutting subsequent arguments that by giving *Miranda* warnings, the officer impliedly admitted that the suspect was under arrest.

Other Factors Bearing on the Custody Issue

In the absence of a formal arrest or prolonged coercive investigative detention, defendants generally have a difficult time convincing courts that their confessions should be suppressed because of a failure to comply with *Miranda*. Some defendants, however, have successfully argued that they were in custody for purposes of the rule even in the absence of these factors.

In *United States* v. *Lee*,[15] the defendant was questioned by two Federal agents in a Government car parked in front of his home, concerning the death of his wife. Lee agreed to answer questions, and when he entered the vehicle, was told he was free to leave or terminate the interview at any time. Lee was not afforded *Miranda* rights, and after approximately 60–90 minutes of questioning, which included the agents advising him of the incriminating evidence they had collected in the case, he admitted that he had choked his wife. The interview was ended, and Lee was not arrested until the next day when he voluntarily appeared at the police station for further questioning.

Relying on the above facts, the Ninth Circuit Court of Appeals ruled that "considering the totality of the circumstances a reasonable person could conclude that Lee reasonably might feel he was not free to decline the agent's request that he be interviewed." Consequently, the appeals court agreed with the trial court that Lee was in custody for purposes of *Miranda* during the questioning, and therefore, his confession was not admissible against him.

Several other courts have adopted the "totality of the circumstances" test for deciding the custody issue, but their results have often been contrary to the decision in *Lee*. For example, in *United States* v. *Dockery*,[16] a 24-year-old female employee of a federally insured bank was interviewed by two FBI Agents investigating a theft of funds from the bank. The interview was conducted in what the court described as a small, vacant office in the bank building. At the outset of the interview, the Agents advised Dockery that she did not have to answer any questions, that she was not under arrest or going to be arrested, and that she was free to leave at any time. During the interview, which lasted 16 minutes, the Agents told Dockery that they believed she was involved in the theft of bank funds and that they had her fingerprints. In fact, the only fingerprints the Agents had were those retrieved from the bank's personnel records. Dockery denied any involvement in the thefts, and the interview was ended. Dockery was asked to wait in the reception area outside the interview room in the event that bank officials wanted to question her.

A few minutes later, while waiting in the reception area, Dockery asked a bank official to find the two Agents because she wanted to talk to them again. The Agents returned and again repeated their warnings, that Dockery did not have to talk to them and was free to leave whenever she desired. Dockery began to once again deny her involvement in the thefts, at which point one of the Agents told her that he was busy and was not interested in hearing her repeat what she had already said. He then asked, "Why don't you tell me what happened?" Dockery then gave a signed statement implicating herself in the thefts.

Noting that Dockery was never handcuffed, physically restrained, physically abused, or threatened during the interview, the *en banc* Eighth Circuit Court of Appeals ruled that Dockery was not in custody during the interviews, and therefore, her confession was properly used against her at trial. With respect to the Agent's representation concerning the fingerprints, the court cited *Oregon* v. *Mathiason*,[17] where the Supreme Court ruled that such statements have nothing to do with whether a suspect is in custody for purposes of *Miranda*.

The Fifth Circuit Court of Appeals uses a four-factor test in determining whether custody exists for purposes of *Miranda*. The court considers whether the interrogating officers had probable cause to arrest, the subjective intent of the officer, the subjective belief of the suspect, and the focus of the investigation.[18] Other factors considered by the courts in these cases include the language used by officers during questioning, the physical surroundings where the questioning takes place, and the extent to which the suspect is confronted with evidence of his guilt.[19]

Regardless of which test is used, they all afford defendants the opportunity to argue that based on the factors present in their individual cases, they were justified in believing they were in custody at the time they were questioned, and therefore, should have been advised of their rights. The numerous factors that courts consider when making the custody decision, coupled with the varying weights given these factors by different judges, make it impossible for law enforcement agencies to write definitive *Miranda* policies covering all of these situations. However, a *Miranda* policy can address some of the more basic problems faced by officers in interview situations and offer advice regarding how these situations should be handled.

A good starting point is the situation where an officer questions a suspect with the specific intention of making an arrest at the end of the interview. While it does not necessarily follow that a suspect was in custody during an interview simply because he was arrested at its conclusion, the close proximity of the arrest to the questioning is likely to weigh heavily in a later decision on the custody issue. Therefore, it is recommended that departments instruct officers that when they find themselves in this situ-

"Advising a suspect that he is not under arrest and/or is free to terminate the interview at any time should . . . resolve any doubt concerning the issue of custody for purposes of *Miranda*."

ation they should, as a matter of policy, comply with *Miranda* at the outset of the interview.

A related situation is where an officer does not begin an interview with the intention of making an arrest, but during the questioning, decides that he is going to arrest the interviewee at the conclusion of the questioning. Again, because of the proximity of the arrest to the questioning, it is recommended that officers be advised that once they have decided that an arrest is going to take place, they should not continue with the questioning without first complying with *Miranda*.

A more troublesome scenario is where an officer has no intention of making an arrest at the conclusion of an interview, but the circumstances surrounding the questioning are sufficiently ambiguous that a reviewing court might determine that custody existed (e.g., where the location or duration of the interview might indicate a highly coercive environment or where the person interviewed is young and inexperienced). In these cases, it is suggested that officers be instructed that such ambiguity can usually be eliminated—thus negating the need for the warnings and waiver—by informing the suspect that he is not under arrest and/or is free to terminate the interview at any time. In cases where such assurances are given, officers should make this fact a matter of record in the investigative file.

Advising a suspect that he is not under arrest and/or is free to terminate the interview at any time should, as in the *Mathiason, Beheler,* and *Dockery* cases, resolve any doubt concerning the issue of custody for purposes of *Miranda*. There could, however, be occasional instances where an officer, after advising an interviewee he is not under arrest, still believes the custody issue sufficiently ambiguous that the rights should be given before any further questioning. While these situations should arise infrequently, it is recommended that *Miranda* policies be written to allow officers to exercise discretion in such situations. This approach allows an officer, who is in the best position to evaluate the "totality of the circumstances," to afford the warnings and waiver, without having his decision later viewed as a tacit admission that the interviewee was in custody.

The Sixth Amendment Right to Counsel

Standard warning and waiver forms, developed in response to *Miranda,* are often used by law enforcement agencies in obtaining waivers of the right to counsel guaranteed by the sixth amendment, in addition to the *Miranda* rights guaranteed by the fifth amendment. Inasmuch as the sixth amendment right to counsel applies in some cases where *Miranda* rights do not, law enforcement agencies that use the same warning and waiver policy for both purposes should ensure that their policies are broad enough to cover those cases where only the sixth amendment right is at issue.

An example of a case in which *Miranda* and the sixth amendment right to counsel do not overlap is where a suspect is arrested for burglary, taken before a magistrate or judge, and then released on bond. If a police officer attempts to interview this defendant while he is free on bond, *Miranda* does not apply because the defendant is not in custody.

As discussed above, custody is an essential element of the *Miranda* rule. However, the defendant at this point has been formally charged with burglary, and the officer's goal is to deliberately elicit incriminating statements concerning this charge. Since he has been formally charged, however, the defendant's sixth amendment right to counsel has attached even though he is not in custody, and this right must be waived before an admissible statement can be obtained.

Two very important limitations on the sixth amendment right to counsel deserve mention at this point. First, the sixth amendment right to counsel only applies, and therefore only becomes an issue, where the defendant has been formally charged with a crime. A defendant has been formally charged with a crime when an indictment has been returned, an information filed, or the defendant has had a judicial hearing or appearance on the charge.[20] Second, the sixth amendment right to counsel only applies to those crimes for which the defendant has been formally charged.[21]

Based on the above, it is recommended that agencies include a statement in their warning and waiver policies advising officers that they should give the warnings and obtain a waiver before attempting to interview a defendant about a crime for which he has been formally charged (i.e., where the defendant has been indicted, had a court appearance, or an information has been filed), and that this policy applies *regardless of whether the subject is in custody or not at the time of the interview.*

A Word of Caution

The above recommendations concerning waivers of the sixth amendment right to counsel assume that a waiver of *Miranda* rights is sufficient to waive the sixth amendment right to counsel. In fact, courts have rarely questioned the general rule that a proper waiver of *Miranda* rights also operates as a waiver of the sixth amendment right to counsel. One Federal circuit court of appeals, however, has ruled that a waiver of *Miranda* rights is not sufficient to waive the sixth amendment right to counsel, at least where the defendant has been indicted at the time of the interview. Holding that "waivers of Sixth Amendment rights must be measured by a 'higher standard' than are waivers of Fifth Amendment rights," the Court of Appeals for the Second Circuit ruled in *United States* v. *Mohabir*[22] that a waiver of the sixth amendment right to have counsel present during a postindictment interview must be preceded by a Federal judicial officer's explanation of the content and significance of this right.

Waiver of the sixth amendment right to counsel has been litigated frequently in recent years, and legal advisors must be alert for decisions like *Mohabir* so that departmental warning and waiver policies can be modified accordingly.

Conclusion

Some have hailed the *Miranda* decision as a positive step toward the protection of fifth amendment rights, while others have viewed it as a serious impediment to effective law enforcement. Regardless of these differing views, the decision stands as a milestone in the history of American constitutional criminal procedure. The unique nature of the decision, coupled with uncertainty as to its meaning and application, was undoubtedly the basis for the development of broad warning and waiver policies by law enforcement agencies beginning in the late 1960's. While recent Supreme Court decisions have reaffirmed the *Miranda* rule, they have also made it clear that it was only intended to apply in custodial interrogation situations. The clarification provided by these cases should make it easier for law enforcement agencies to comply with both the letter and spirit of *Miranda,* without unnecessarily hampering legitimate investigative efforts.

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Footnotes

[1] 384 U.S. 436 (1966).
[2] The warnings required before custodial interrogation are: (1) The accused has the right to remain silent; (2) anything he says may be used against him; (3) he has a right to consult with a lawyer before or during questioning; and (4) if he cannot afford an attorney, one will be provided without cost.
[3] 425 U.S. 341 (1976).
[4] *Id.* at 346, referring to *United States* v. *Caiello,* 420 F. 2d 471, 473 (2d Cir. 1969).
[5] 429 U.S. 492 (1977) (*per curiam*).
[6] *Id.* at 495.
[7] 103 S.Ct. 3517 (1983) (*per curiam*).
[8] 429 U.S. 492 (1977) (*per curiam*).
[9] 391 U.S. 1 (1968).
[10] 81 L.Ed.2d 550 (1984).
[11] 82 L.Ed.2d 317 (1984).
[12] 392 U.S. 1 (1968).
[13] 82 L.Ed.2d 317 (1984).
[14] 392 U.S. 1 (1968).
[15] 699 F.2d 466 (9th Cir. 1982) (*per curiam*).
[16] 736 F.2d 1232 (8th Cir. 1984).
[17] 429 U.S. 492 (1977) (*per curiam*).
[18] *United States* v. *Montos,* 421 F.2d 215 (5th Cir.), *cert. denied,* 397 U.S. 1022 (1970).
[19] *See, United States* v. *Dennis,* 645 F. 2d 517 (5th Cir.), *cert. denied,* 454 U.S. 1034 (1981); *United States* v. *Phillips,* 668 F.2d 52 (8th Cir. 1982); *United States* v. *Chamberlain,* 644 F.2d 1262 (9th Cir. 1980); *United States* v. *Booth,* 669 F.2d 1231 (9th Cir. 1981).
[20] *See,* C. E. Riley, III, "Confessions and the Sixth Amendment Right to Counsel," (Part 1) *FBI Law Enforcement Bulletin,* August 1983, pp. 24-31; (Conclusion) *FBI Law Enforcement Bulletin,* September 1983, pp. 24-30.
[21] *Id.*
[22] 624 F.2d 1140 (2d Cir. 1980). *See also, United States* v. *Payton,* 615 F.2d 922 (1st Cir. 1980); *United States* v. *Durham,* 475 F.2d 208 (7th Cir. 1973).