

# **Interviews & Interrogations Legal Pre-Course Reading Assignment**

## **I. INTRODUCTION**

There are certain legal considerations an officer should keep in mind when preparing to do an interrogation. Being knowledgeable in this area greatly increases the likelihood that statements obtained will be admissible in court.

The U.S. Constitution (in the Bill of Rights) guarantees specific rights to persons being interrogated – the right to due process of law, Miranda rights, the right to confront one’s accuser and the Sixth Amendment right to an attorney. Juvenile offenders also have certain specific rights under the Kentucky Revised Statutes.

### **A. Definitions**

Interrogation – Questioning (or other conduct) done by law enforcement officers for the purpose of getting an incriminating response from a suspect.

Admission – A statement that helps to prove the guilt of the person making it. (For example: “I was there the night of the crime,” or “The murder weapon belongs to me.”)

Confession – A statement that acknowledges the guilt of the person making it (For example: “I killed Miss Scarlet in the Library.”)

Admissions and confession may be oral, recorded or in writing.

### **B. Corroboration**

When a confession is not made (or repeated) in open court, the prosecution must corroborate (back-up or support) the confession with some other evidence that a crime was committed as well. This rule does not apply to admissions, one or more admission may be used to help establish that a crime has been committed. (RCR 9.60)

### **C. Legal Consequences of a Rights Violation**

If a statement is obtained by means of an interrogation that violates a constitutional right (due process, Miranda, right to counsel), the statement may be found inadmissible in Court pursuant to the Exclusionary Rule (KRE 613; KRE 801A)

## **D. Inevitable Discovery**

In Nix. v. Williams, 467 U.S. 431 (1984), the Court held that information that would have been found independently of improperly gained information might be admissible under the “inevitable discovery” exception.

## **II. DUE PROCESS OF LAW**

### **A. The Right to Due Process of Law**

The right to due process of law (“due process”) provided by the Fifth and Fourteenth Amendment to the U.S. Constitution is a very general right – the right of an individual to be treated fairly by the government. In the area of interrogation, due process of law requires that statements be obtained voluntarily. A statement is obtained involuntarily if it is the result of pressure (physical or psychological); that is, the person did not want to make the statement – it was made against his will.

It is a violation of due process even though the improper police conduct does not result in getting a statement, but the remedy will be something other than suppression.

### **B. How to Avoid Violating the Right to Due Process**

In determining “voluntariness,” courts look at all the circumstances of the situation. The two primary factors are 1) the actions of the interrogator and the 2) weakness of the suspect. Subtle psychological pressure may also be questionable.

## **III. MIRANDA**

### **A. Miranda Rights**

Miranda v. Arizona, 384 U.S. 436 (1966) requires law enforcement officers, prior to interrogation of a suspect in custody, to advise the suspect of the following:

- ★ You have the right to remain silent.
- ★ Anything you say can and will be used against you in court.
- ★ You have the right to consult with an attorney before making any statement and to have an attorney present during questioning.
- ★ If you want an attorney, but can’t afford one, an attorney will be appointed for you free of charge.
- ★ You may stop the questioning at any time.

The Miranda rights are a combination of rights guaranteed by the Fifth and Sixth Amendments in the U.S. Bill of Rights. The key terms are “in custody” and “interrogation.” If the suspect is not both “in custody” and being “interrogated,” Miranda does not apply. (In Kentucky, the law is different if the suspect is a juvenile; KRS 610.200 requires that a juvenile be advised of their “constitutional rights” as soon as they are taken into custody, even if they are not being interrogated, and this has been interpreted to mean that they must be given their Miranda rights.)

## **B. “In Custody”**

The Miranda Court limited the decision to situations in which the person has been “... taken into custody or otherwise deprived of freedom of action in any significant way.” In recent cases, custody has been interpreted to include 1) arrests and 2) situations in which a reasonable person (not necessarily the person actually involved) would think his/her freedom of action was restrained to the degree associated with arrest. Whether a custodial situation exists is not always clear-cut. For example, if the restraint is at the police station, or is in a police vehicle, or under a “police-dominated atmosphere,” it would be more likely to be considered custody. However, if the person is at their home or place of business, in their vehicle (in a traffic or Terry stop), on foot in a Terry stop, or at a crime scene, it would more likely to not be considered to be a custodial situation.

## **C. Interrogation**

Interrogation is not brief, routine, “booking” questions, it is an officer authoritatively seeking answers to incriminating questions. Conduct may constitute interrogation, as well.

### **a) Volunteered Statements**

If a statement is volunteered – not made in response to an attempt to get an incriminating response, it is not interrogation. Volunteered statements can occur at any time, even during an interrogation, if the suspect’s statement is not responsive to the officer’s question.

### **b) Clarifying Questions**

Since most volunteered statements are not very detailed, an officer may try to clarify (make clear) what is being said. The questions, however, must not be designed to expand upon what the person originally intended to say, but must be merely to clear up or explain the person’s statement.

### **c) Questioning by Private Citizens**

Miranda applies only to questioning conducted by law enforcement officers. Statements made by suspects in response to questioning by private citizens will be admissible in court despite a lack of any warning. However, it is universally held that law enforcement officers are forbidden from using private citizens as their agents in order to escape the Miranda rule.

If the suspect does not know that the interrogator is a law enforcement officer, there is no police-dominated atmosphere, and the situation is not considered interrogation for Miranda purposes. (*Illinois v. Perkins*, 495 U.S. 292 (1990))

### **D. How to Avoid Violating Miranda Rights**

In a situation that is covered by Miranda, the Miranda procedure should always be followed – i.e. the officer should give the Miranda warning by reading from an appropriate card, and should then ask the person to waive (give up) his rights and answer questions.

#### **a) When to give the warning**

The warning should be given when the suspect is both “in custody” and is about to be “interrogated.” Some law enforcement agencies require their officers to give a Miranda warning any time they make an arrest, but the federal Miranda requirement does not make this mandatory. In such situations, however, if the person is eventually interrogated, and much time has passed since the arrest, the warning should be given again, just prior to the interrogation. In any event, if much time as passed, more than a short break, and the same, or another, officer wishes to start another interrogation session, it is still advisable to give another Miranda warning.

Miranda applies no matter the seriousness of the offense – whether the custody is for an arrestable violation, a misdemeanor or for a felony.

#### **b) How to give the warning**

- 1) READ IT!
- 2) Suspect must understand their rights

In order for the requirements of Miranda to be met, the suspect must be able to understand their rights. Possible barriers to understanding include: subnormal intelligence, insanity, extreme intoxication, hearing difficulty, person in shock, great pain or extreme emotional disturbance, and language difficulties.

### c) **Waiver**

To “waive” a right is to voluntarily and intentionally give it up.

#### 1) Competency to Waive

The same circumstances that are possible barriers to communicating the warning may also affect the validity of the waiver. The law requires that the suspect, when waiving, be capable of making a competent decision. If the suspect is upset, etc., the officer should consider whether a waiver will be held to be valid.

#### 2) Conduct Constituting a Waiver

Remaining silent is not a waiver of rights. Body language might be sufficient, but an express (oral or written) waiver is strongly preferred. Ideally, a waiver should be written, signed and witnessed, but that is not always possible.

#### 3) Interrogation following an invocation of the right to remain silent.

In Michigan v. Mosley, 423 U.S. 96 (1975), the Court held that following an invocation of a right to remain silent, an officer may re-initiate discussion, at least to the extent of asking if a suspect is willing to continue an interrogation. In Mosley, the suspect had not requested an attorney and had been read Miranda warnings a second time.

## IV. **SPECIAL ISSUES**

### A. **Interrogation under emergency circumstances**

In certain circumstances, a failure to give Miranda warnings or a continuation of interrogation after Miranda had been given and rights invoked may be excused by a concern for public safety. This type of interrogation may be allowed if the law enforcement officers can show that the “paramount reason that the information is being sought [is] to save a life ....” In New York v. Quarles, 467 U.S. 649 (1984), officers caught a suspected thief after a foot chase through a supermarket. When they frisked him, they discovered he was wearing an empty shoulder holster. The officer asked about the gun, and the suspect told the officers where it could be found. The Court agreed that the suspect’s statement and the presence of the gun were admissible, although Miranda warnings had not been given at the time, as would otherwise have been required.

## **B. Interrogation under deceptive circumstances**

In Springer v. Com., 998 S.W.2d 439 (1999), officers used an unrelated videotape of a suspect's residence to encourage a suspect to confess involvement in a murder. (Miranda warnings had actually been given, although the suspect was not in custody at the time.) The Court held that "the employment of a ruse. Or 'strategic deception,' does not render a confession involuntary so long as the ploy does not rise to the level of compulsion or coercion." Illinois v. Perkins, 496 U.S. 292 (1990). However, when the questioning is by a person who is not recognized as a law enforcement officer, such as an undercover officer posing as a fellow jail inmate, Miranda is not required.

## **V. RIGHT TO COUNSEL**

### **A. What constitutes a "right to counsel?"**

In Davis v. U.S., 512 U.S. 452 (1994), the Court held that a lawful interrogation need not stop simply because of an ambiguous request for an attorney. However, the line between ambiguous and unambiguous is very fine. For instance, a request for a probation officer (Fare v. Michael C., 442 U.S. 707 (1987)) was not held to be an invocation of the right to counsel, while the response "Oh yeah, I'd like to do that" to Miranda warnings was held to be so. (Smith v. Illinois, 469 U.S. 91 (1984)).

### **B. Re-initiation after invocation**

In Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that if a suspect has invoked the right to an attorney, an officer may not approach the suspect again before an attorney has been made available, to further interrogate, unless the suspect himself initiates further discussion with an officer. After an attorney has appeared in a case, the officer may not interrogate unless the attorney is present or unless the suspect specifically initiates discussion. Minnick v. Mississippi, 498 U.S. 146 (1990). Once a suspect has invoked the right to an attorney, police-initiated interrogation is not permissible even as to another, unrelated offense. Arizona v. Roberson, 486 U.S. 675 (1988).

### **C. Access to an attorney**

While federal law does not require that a suspect be informed that an attorney has appeared (at the request of another) to represent the suspect. Kentucky law does so require, by the Kentucky Rules of Criminal Procedure (RCr 2.14).

## D. How to Avoid Violating the Right to Counsel

### a) Defendant's Attorney Present

The officer may interrogate if the defendant's attorney is present and the defendant is willing to make a statement.

### b) Defendant's Attorney not Present

- 1) Defendant initiates contact and expressly requests to make statement.
- 2) Distinguish between conversation and interrogation
- 3) Non-LE informant – "listening post"

## VI Vienna Convention Rights

Article 36 of the VCCR requires that foreign nationals who are arrested or detained be given notice "without delay" of their right to have their embassy or consulate notified of that arrest. The notice can be as simple as a fax, giving the person's name, the place of arrest, and, if possible, something about the reason for the arrest or detention. The police must fax that notice to the embassy or consulate, which can then provide counsel or other assistance to the foreign national.

In March of 2005, the United States pulled out of the Optional Protocol to the convention, which allows the International Court of Justice to intervene when detained foreign nationals are denied access to consular officials when imprisoned in a country that is a signatory to the convention. In June 2006, the Supreme Court ruled that foreign nationals who are deprived of the right to consular notification and access after an arrest may not use the treaty violation to suppress evidence obtained in police interrogation or belatedly raise legal challenges after trial. Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006) This does not mean, however, that a detained foreign national may not use the deprivation of the right at an earlier stage in the trial, as many defense attorneys are now aware of the right. It is also possible that individual officers and agency may be sued under 42 U.S.C. §1983 for failing to provide the notification as required by the treaty.

## Appendix

### Kentucky Rules of Criminal Procedure

#### RCr 2.14 Right to contact attorney

(1) A person in custody shall have the right to make communications as soon as practicable for the purpose of securing the services of an attorney.

(2) Any attorney at law entitled to practice in the courts of this Commonwealth shall be permitted, at the request of the person in custody or of some one acting in that person's behalf, to visit the person in custody.

#### RCr 9.60 Corroboration of confession

A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed.

### Kentucky Rules of Evidence

#### KRE 613 Prior statements of witnesses

(a) Examining witness concerning prior statement. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is impossible to comply with this rule because of the absence at the trial or hearing of the witness sought to be contradicted, and when the court finds that the impeaching party has acted in good faith.

(b) This provision does not apply to admissions of a party-opponent as defined in KRE 801A.

#### KRE 801A Prior statements of witnesses and admissions

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:

(1) Inconsistent with the declarant's testimony;

(2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or

(3) One of identification of a person made after perceiving the person.

(b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:

(1) The party's own statement, in either an individual or a representative capacity;

(2) A statement of which the party has manifested an adoption or belief in its truth;

(3) A statement by a person authorized by the party to make a statement concerning the subject;

(4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(5) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(c) Admission by privity:

(1) Wrongful death. A statement by the deceased is not excluded by the hearsay rule

when offered as evidence against the plaintiff in an action for wrongful death of the deceased.

(2) Predecessors in interest. Even though the declarant is available as a witness, when a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is not excluded by the hearsay rule when offered against the party if the evidence would be admissible if offered against the declarant in an action involving that right, title, or interest.

(3) Predecessors in litigation. Even though the declarant is available as a witness, when the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is not excluded by the hearsay rule when offered against the party if the evidence would be admissible against the declarant in an action involving that liability, obligation, duty, or breach of duty.

## Kentucky Revised Statutes

### 610.200 Duties of peace officer

(1) When a peace officer has taken or received a child into custody on a charge of committing an offense, the officer shall immediately inform the child of his constitutional rights and afford him the protections required thereunder, notify the parent, or if the child is committed, the Department of Juvenile Justice or the cabinet, as appropriate, and if the parent is not available, then a relative, guardian, or person exercising custodial control or

supervision of the child, that the child has been taken into custody, give an account of specific charges against the child, including the specific statute alleged to have been violated, and the reasons for taking the child into custody.

(2) Unless the child is subject to trial as an adult or unless the nature of the offense or other circumstances are such as to indicate the necessity of retaining the child in custody, the officer shall release the child to the custody of his parent or if the child is committed, the Department of Juvenile Justice or the cabinet, as appropriate; or if the parent is not available, then a relative, guardian, or person exercising custodial control or supervision or other responsible person or agency approved by the court upon the written promise, signed by such person or agency, to bring the child to the court at a stated time or at such time as the court may order. The written promise, accompanied by a written report by the officer, shall be submitted forthwith to the court or court-designated worker and shall detail the reasons for having taken custody of the child, the release of the child, the person to whom the child was released, and the reasons for the release.

(3) If the person fails to produce the child as agreed or upon notice from the court, a summons, warrant, or custody order may be issued for the apprehension of the person or of the child, or both.

(4) The release of a child pursuant to this section shall not preclude a peace officer from proceeding with a complaint against a child or any other person.

(5) Unless the child is subject to trial as an adult, if the child is not released, the peace officer shall contact the court-designated worker who may:

(a) Release the child to his parents;

(b) Release the child to such other persons or organizations as are authorized by law;  
(c) Release the child to either of the above subject to stated conditions; or  
(d) Except as provided in subsection (6) of this section, authorize the peace officer to retain custody of the child for an additional period not to exceed twelve (12) hours during which the peace officer may transport the child to a secure juvenile detention facility, a juvenile holding facility, or a nonsecure facility. If the child is retained in custody, the court-designated worker shall give notice to the child's parents or person exercising custodial control or supervision of the fact that the child is being retained in custody.

(6) (a) Except as provided in paragraph (b) of this subsection, no child ten (10) years of age or under shall be taken to or placed in a juvenile detention facility.

(b) Any child ten (10) years of age or under who has been charged with the commission of a capital offense or with an offense designated as a Class A or Class B felony may be taken to or placed in a secure juvenile detention facility or youth alternative center when there is no available less restrictive alternative.

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## **U.S. Bill of Rights**

### **Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **Amendment VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

### **Amendment XIV (partial)**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.