

STATEMENT HANDBOOK:
Questions To Ask About The Admissibility
Of A Criminal Defendant's Statements

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ADVANCING EQUALITY IN THE
CRIMINAL JUSTICE SYSTEM

John H. Blume
Samuel S. Leibowitz Professor of Trial Techniques
Director of the Cornell Death Penalty Project
Cornell Law School
112 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-1030

Emily C. Paavola
Attorney of Counsel
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044

Brianna L. Cruz
Death Penalty and Juvenile Advocacy Fellow
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044

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INTRODUCTION

The admissibility of a criminal defendant's statement implicates several distinct constitutional safeguards, including the Fifth Amendment right against compelled self-incrimination, the Sixth Amendment right to counsel, and the Fourteenth Amendment's Due Process Clause. Each constitutional protection serves a unique purpose and must be analyzed separately.

This handbook provides a practical framework to help you identify and analyze the constitutional provisions under which your client's statements may be inadmissible. For each safeguard, we provide a series of questions to ask yourself, discuss controlling federal and South Carolina case law, and provide examples of cases applying these principles. Where the law differs for juveniles, we flag those differences and explain the special considerations that arise because of age and developmental factors.

At the back of this handbook you will find a series of tables summarizing the material from each section for quick review. The tables can be removed for use as a pocket guide at trial.

WAS THE STATEMENT OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT?

The Fifth Amendment guarantees that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V; S.C. Const. Art. I, section 12. This provision governs state as well as federal criminal proceedings. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *Brown v. State*, 340 S.C. 590, 594, n.1, 533 S.E.2d 308, 310, n.1 (2000). The Fifth Amendment itself does not prohibit all incriminating admissions; “[a]bsent some officially coerced self-accusation, the Fifth Amendment privilege is not violated even by the most damning admissions.” *United States v. Washington*, 431 U.S. 181, 187 (1977). In *Miranda v. Arizona*, 384 U.S. 436 (1966), however, the United States Supreme Court presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights. The *Miranda* warnings therefore are “not themselves rights protected by the Constitution, but [are] instead measures to ensure¹ that the right against compulsory self-incrimination [is] protected.” *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

In the years since its decision in *Miranda*, the Court has frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of his *Miranda* rights, his responses cannot be introduced into evidence to establish his guilt. See, e.g., *Estelle v. Smith*, 451 U.S. 454, 466-467 (1981); *Rhode Island v. Innis*, 446 U.S. 291, 297-298 (1980); *Orozco v. Texas*, 394 U.S. 324, 326-327 (1969); *Mathis v. United States*, 391 U.S. 1, 3-5 (1968). Of course, as with most legal principles, *Miranda*'s basic tenet has a number of caveats and nuances, but they are not insurmountable. The Fifth Amendment analysis can be undertaken with a series of simple questions.

¹ It is perhaps more accurate to say that the *Miranda* warnings were originally *designed* to ensure that the Fifth Amendment right against compulsory self-incrimination is protected. Whether the warnings actually accomplish this task is a separate question, and many scholars agree that they do not. See, e.g., Welsh S. White, *Miranda's Waning Protections: Police Interrogation Practices after Dickerson* (2003); George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091 (2003); Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001); William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975 (2001); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 740, 745-46 (1992).

1. WAS THE SUSPECT IN CUSTODY?

The Fifth Amendment prohibits admitting certain statements given by a suspect during a “custodial interrogation” without a prior warning. Thus, the first question to consider is whether the suspect was in custody. Although all of the circumstances surrounding the interrogation must be considered, the ultimate inquiry is simply *whether there has been a formal arrest or whether the suspect’s freedom of movement has been restricted in any significant way*. *California v. Beheler*, 463 U.S. 1121 (1983); *Beckwith v. United States*, 425 U.S. 341 (1976); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *State v. Peele*, 298 S.C. 63, 378 S.E.2d 254 (1989); *State v. Ridgely*, 251 S.C. 556, 164 S.E.2d 439 (1968); *see also Howes v. Fields*, 565 U.S. 499, 508-09 (2012) (custody “is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion”).

Courts have consistently stated that *the “in custody” determination is governed by an objective test*. In *Stansbury v. California*, 511 U.S. 318 (1994), the United States Supreme Court held that courts must examine “all of the circumstances surrounding the interrogation” and determine “how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.” *Id.* at 322. Similarly, in *Thompson v. Keohane*, 516 U.S. 99 (1995), the Court offered the following description of the *Miranda* custody test:

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry; was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Id. at 112 (internal quotation marks and footnote omitted); *see also, State v. Easler*, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997) (holding that the custody

determination “depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being questioned”²), *overruled in part, on other grounds, by State v. Greene*, 423 S.C. 263, 283, 814 S.E.2d 496, 507 (2018); *Bradley v. State*, 316 S.C. 255, 257, 449 S.E.2d 492, 493-494 (1994) (holding that the custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody).

When determining whether a suspect was in custody based on the totality of the circumstances, consider the following factors:

- The location of the questioning (e.g. public roadside vs. police station).
- The duration and nature of the questioning.
- The purpose of the questioning if that purpose is made apparent to the suspect.
- Statements or actions by officers indicating the suspect was not free to leave.
- The circumstances of the questioning.
- How the suspect got to the police station (i.e., did he come voluntarily or was he escorted by the police; how many police officers were present; whether any weapons were drawn).
- Restraints on movement (e.g. handcuffs, access to exit blocked, otherwise not free to leave).

See, e.g., Stansbury v. California, 511 U.S. 318 (1994); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *State v. Evans*, 354 S.C. 579, 584, 582 S.E.2d 407, 410 (2003); *State v. Hill*, 425 S.C. 374, 382-83, 822 S.E.2d 344, 348-49 (Ct. App. 2018) (finding custody where the suspect had been released from jail a few hours earlier; was told pre-*Miranda* the officers could not decide whether he could go home “until we find out what you have to tell us” (a statement which, in itself, was enough to infer that a reasonable person would not have felt free to leave); was interrogated for over two hours; and was re-questioned after officers paused the interview to confer about inconsistencies in the suspect’s and witness’s statements); *State v. Daniels*, 439 S.C. 500, 520, 888 S.E.2d 9, 18-20 (Ct. App.

² “[A] police officer’s subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*.” *Stansbury*, 511 U.S. at 323. However, “[a]n officer’s knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned” because they shape how a reasonable person in the suspect’s position would understand the situation. *See id.* at 325.

2023) (*reh'g denied*), *cert. granted*, 2024 S.C. LEXIS 146, *cert. dismissed*, 445 S.C. 401, 914 S.E.2d 845 (2025) (no custody when the suspect was asked—not required—to ride to the station with police for questioning; was offered food and water; never asked to leave; the questioning was “conversational in nature”; and the pre-*Miranda* questioning at issue was only 31 minutes).

Because the “in custody” determination is an objective test, some objective personal characteristics may matter, but subjective characteristics do not. In *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), the United States Supreme Court was clear that age bears on the custody analysis when the suspect is a juvenile. *See the discussion of custody as it pertains to juveniles below.* The *J.D.B.* Court, in dicta, suggested physical impairments may also be an objective characteristic relevant to the custody analysis, noting that whether a suspect is blind or a juvenile, “the question becomes how a reasonable person would understand the circumstances, either from the perspective of a blind person or, as here, a 13-year-old child.” *See id.* at 278, n.9. The Court has not addressed whether other specific characteristics of the suspect – such as mental illness, intellectual disability, and cognitive limitations – should be considered in the analysis, but it has been clear that a suspect’s prior experiences with law enforcement should not be considered at all. *Id.* at 275 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004)). In sum, the custody analysis “entails reconstructing the circumstances of the interrogation” and considering the totality of the circumstances. *Hill*, 425 S.C. at 380, 822 S.E.2d at 348.

CUSTODY DETERMINATION FOR JUVENILES

Age matters to the custody analysis if the officer knew, or a reasonable officer would have known, that the suspect was a juvenile. In *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), the United States Supreme Court held that “a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.” *Id.* at 264-65. As such, age is “a reality that courts cannot simply ignore”³ when the accused is a juvenile and “the child’s age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer.” *Id.* at 277. “[A]ge is different” because childhood

³ While age must be considered in the custody analysis when the suspect is a juvenile, age will not necessarily be a “determinative, or even significant, factor in every case.” *J.D.B.*, 564 U.S. at 277.

yields “commonsense conclusions about behavior and perception” that do not require officers to make subjective determinations about a particular suspect’s mindset.” *Id.* at 272. As such, when the suspect is a juvenile, the relevant question becomes whether a reasonable child of a similar age would feel free to leave under similar circumstances. *Id.* In addition to the juvenile’s age, courts consider the same factors relevant to adult custody determinations (e.g., location and duration of questioning, use of restraints, and any apparent purpose of the questioning).

A Note on Incarcerated Individuals:

An inmate is not categorically in custody for *Miranda* purposes because the baseline set of restraints imposed pursuant to a conviction “are expected and familiar and thus do not involve the same ‘inherently compelling pressures’ that are often present when a suspect is yanked from familiar surroundings in the outside world and subjected to interrogation in a police station.” *Howes v. Fields*, 565 U.S. 499, 512-11 (2012) (citing *Maryland v. Shatzer*, 559 U.S. 98, 113 (2010)). When an inmate is taken aside for questioning, factors relevant to the custody analysis include whether the inmate is placed in a higher level of security, subject to continuing restraints, or subject to continued detention *as a result of* the questioning, *Shatzer*, 559 U.S. at 114, and “the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted,” *Howes*, 565 U.S. at 514.

A Note on Traffic Stops:

Custody for Fourth Amendment purposes is not the same as custody for Fifth Amendment purposes. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the United States Supreme Court held that questioning during a roadside traffic stop is not custodial interrogation. The Court reasoned that even though such stops are “unquestionably a seizure within the meaning of the Fourth Amendment, such stops typically are brief, unlike a prolonged station house interrogation.” *Id.* at 438-439. The Court also emphasized that traffic stops commonly occur in the public view, not in a police-dominated atmosphere. *Id.*; *see also State v. Barksdale*, 433 S.C. 324, 335-36, 857 S.E.2d 557, 561-64 (Ct. App. 2021) (a suspect was not in custody at an accident scene because he could move freely, retrieve documents, remain in his car during EMS care, and was questioned in public view).

In the context of roadside questioning, therefore, *the suspect’s “freedom of action [must be] curtailed to a degree associated with formal arrest”* to trigger the requirement of *Miranda* warnings. *Berkemer*, 468 U.S. at 440 (internal quotations omitted); *State v. Morgan*, 282 S.C. 409, 319 S.E.2d 335 (1984) (*Miranda* warnings are not required for statements made at the scene of a traffic accident to be admissible); *State v. Peele*, 298 S.C. 63, 378 S.E.2d 254 (1989) (the performance of field sobriety tests at the request of a police officer following a routine traffic stop does not trigger Fifth Amendment rights); *State v. Easler*, 327 S.C. 121, 127, 489 S.E.2d 617, 620 (1997) (not a routine traffic stop where officers were advised that there had been an accident and went looking for an individual who had left the scene based on a description given by two eyewitnesses), *overruled in part, on other grounds, by State v. Greene*, 423 S.C. 263, 814 S.E.2d 496 (2018); *but see State v. Lowery*, 443 S.C. 473, 481, 905 S.E.2d 361, 365 (2024) (“targeted” search for the driver of a missing vehicle not a routine traffic stop). However, roadside questioning may become custodial if the questioning evolves in a way that “preclude[s] the possibility that the encounter would come to a relatively swift and innocuous conclusion.” *State v. Walker*, 430 S.C. 411, 418, 844 S.E.2d 405, 409 (Ct. App. 2020).

APPLICATION

In *State v. Evans*, 354 S.C. 579, 584, 582 S.E.2d 407, 410 (2003), the South Carolina Supreme Court reversed the lower court’s determination that Evans was not in custody when she confessed to setting her trailer-home on fire and killing her three small children. 354 S.C. at 584, 582 S.E.2d at 410. After the fire, an arson investigator from the South Carolina Law Enforcement Division (SLED) sought to contact Evans at her cousin’s home where she had been staying. *Id.* at 581, 582 S.E.2d at 408. Evans’s cousin drove her to the police station later that day where two male SLED agents questioned her in a small, back office for approximately two hours. *Id.* Family members who had accompanied Evans to the station asked to come with her into the interrogation room, but the SLED agents refused. *Id.* During the interview, Evans gave several reasons for how the fire may have started, but the officers insisted that they did not believe any of her explanations. *Id.* Evans was upset and sobbing and repeatedly asked the SLED agents to help her. *Id.*

Eventually, the agents suggested that a third, female SLED agent speak with Evans. Jennifer Edwards, of the child fatality unit, spoke with Evans alone for approximately forty-five minutes to an hour. *Id.* at 582, 582 S.E.2d at 410. Twice Edwards accompanied Evans to the bathroom and stood outside the door because, according to Edwards, she was afraid that Evans would try to harm herself. Evans continued to plead for help. Edwards responded: “I don’t know what kind of help you need until you tell me.” Evans then whispered, “I dropped a lit piece of paper on the floor. . . I walked next door and waited until somebody saw the fire.” *Id.* Edwards then summoned the two male SLED agents, and the three of them obtained a more detailed confession from Evans.

The South Carolina Supreme Court held that there was ample evidence to support the trial judge’s determination that Evans was in police custody at the time of her statement. *Evans*, 354 S.C. at 584, 582 S.E.2d at 410. First, the trial judge found that Evans was not free to leave because agent Edwards accompanied her to the bathroom and because the agents would not permit her family members to go back to the interview room. *Id.* Second, the place where the agents interviewed Evans concerned the trial judge in that it was a back office in the police station. *Id.* Third, the judge noted that the interview was lengthy, as it lasted three hours. *Id.* Finally, the judge was most concerned with the agent’s purpose, saying that once the officers began challenging Evans’s story, the circumstances changed from “just a routine inquiry” to something more. *Id.* The Court held that these facts, viewed together, were sufficient to place Evans in a custodial setting which warranted a recitation of her *Miranda* rights. *Id.*

2. WAS THE SUSPECT INTERROGATED?

Miranda warnings are required if a suspect is both in custody and subject to interrogation. Thus, the second question to consider is whether the suspect was interrogated. ***Interrogation occurs when the police engage either in express questioning or its functional equivalent.*** *Rhode Island v. Innis*, 446 U.S. 291, 299-300 (1980); *State v. Franklin*, 299 S.C. 133, 136, 382 S.E.2d 911, 912-913 (1989); *see also State v. Turner*, 371 S.C. 595, 597, 641 S.E.2d 436, 437 (2007) (holding *Miranda* was not implicated by a tape recording made while the defendant and his co-defendant were in the backseat of a police car

following their arrests because there was no actual interrogation or its functional equivalent). This test will turn on whether the police asked the suspect express questions or *whether their comments or actions were reasonably likely to elicit an incriminating response*.⁴ *Innis*, 446 U.S. at 300; *Franklin*, 299 S.C. at 136, 382 S.E.2d at 913. The test is partially objective. *The police officer's intent is relevant, but not determinative*. *Innis*, 446 U.S. at 301 n.7 (the intent of police “may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response”); *see also*, *State v. Hart*, 436 S.C. 153, 166, 871 S.E.2d 202, 209 (Ct. App. 2022) (no interrogation where the officer’s questions were intended to gauge the suspect’s demeanor and willingness to speak and told the suspect he would not discuss the evidence over the phone); *Walker*, 430 S.C. at 419-20, 844 S.E.2d at 409 (no interrogation where officer’s questions were intended to gather information about the officer’s safety under the circumstances). The *Innis* Court gave the following examples of what would constitute interrogation:

- The use of line-ups in which a coached witness picks the defendant as the perpetrator.
- The use of a “reverse line-up” in which a defendant is identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he is suspected.
- The use of psychological ploys and other techniques of persuasion, such as to posit the guilt of the subject, to minimize the moral seriousness of the offense, and to cast blame on the victim or on society.

446 U.S. at 299.

If a suspect is questioned by an undercover government agent about a crime for which he has yet to be charged, Miranda warnings are not required. In *Illinois v. Perkins*, 496 U.S. 292 (1990), the Court held that the essential ingredients of a police-dominated, coercive atmosphere are not present when an incarcerated person speaks freely to an undercover officer whom he believes to be a fellow inmate. In *Perkins*, a murder suspect was being held in jail for an unrelated aggravated battery charge; an undercover agent was placed in the jail

⁴ A question is reasonably likely to illicit an incriminating response when it goes to a factual element of the crime. *See State v. Medley*, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016) (officer should have known asking how much the defendant drank before getting behind a vehicle in a DUI case may illicit an incriminating response because that was the most important factual question of the case).

with him; and the suspect made incriminating statements about the murder to the agent. *Id.* at 295. Under these facts, *Miranda* warnings were not required for the statements to be admissible against the suspect in the murder case, but had the undercover agent questioned him about the aggravated-battery charge for which he was awaiting trial, *Miranda* warnings would have been required. *See id.* at 299 (holding *Massiah v. United States*, 377 U.S. 201, 206 (1964), which held the government may not use an undercover agent to interview a suspect about a charge the Sixth Amendment has attached to, does not apply where a suspect has not been charged).

APPLICATION

In *State v. Caulder*, 287 S.C. 507, 339 S.E.2d 876 (1986), the South Carolina Court of Appeals held that Caulder had been interrogated by a medical doctor who examined scratches on his chest. 287 S.C. at 514, 339 S.E.2d at 880. Caulder was arrested for the murder and criminal sexual assault of Jean Iriel, who was found dead in the trunk of her abandoned car. Two days after Iriel's body was discovered, a prospective tenant of a trailer owned by Caulder's step-father called the police after he discovered blood, pieces of flesh, and ladies clothing and accessories in the living room of the trailer. Caulder was arrested shortly thereafter. During the booking process, law enforcement officers noticed scratches on Caulder's chest. Pursuant to a search warrant issued by the court, a medical doctor examined the scratches and estimated them to be between one and five days old. During the course of the examination, and without first giving *Miranda* warnings, the doctor asked Caulder how he had received a particular scratch. *Id.* Over Caulder's objection, the doctor was later permitted to testify that Caulder stated he had received several of the wounds at work, but that he did not know how he got the particular scratch on his chest to which the doctor referred. The court held that "the solicitor and police should have known that . . . the [doctor's] questions were reasonably likely to produce incriminating responses." 287 S.C. at 516, 339 S.E.2d at 881. Further, that the questions came from a medical doctor, rather than a police officer, did not immunize the questions from *Miranda* scrutiny. *Id.* (citing *Estelle v. Smith*, 451 U.S. 454 (1981); *State v. Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982)). Finally, the court rejected the State's argument that Caulder's

response was not incriminating, noting that the definition of “incriminating” refers to “any response – whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial.” *Id.* (citing *Rhode Island v. Innis*, 446 U.S. at 302, n.4 (“The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination”))).

3. IF THE SUSPECT WAS IN CUSTODY AND INTERROGATED, WERE *MIRANDA* WARNINGS REQUIRED?

If the tests for both custody and interrogation are met, the next consideration is whether the *Miranda* warnings were required. *Miranda* warnings are not required if one of two possible exceptions applies: the public safety exception or the booking exception.

A. DOES THE PUBLIC SAFETY EXCEPTION APPLY?

The Public Safety Exception generally turns on *whether there is an objectively reasonable need to protect the police or the public from immediate danger*. In *New York v. Quarles*, 467 U.S. 649 (1984), Quarles was arrested in a supermarket after a young woman identified him as her rapist and told police officers that he had just entered the store and was carrying a gun. *Id.* at 652-653. Officer Frank Kraft placed Quarles under arrest, handcuffed and frisked him and discovered that he was wearing an empty shoulder holster. *Id.* at 653. Without advising Quarles of his *Miranda* rights, Officer Kraft asked him where the gun was. Quarles nodded in the direction of some empty cartons and responded, “the gun is over there.” *Id.* The Court found that *Miranda* does not apply in situations in which police officers ask questions “reasonably prompted by a concern for public safety.” *Id.* at 656; *cf. State v. Medley*, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016) (the public safety exception did not apply when an officer asked a DUI suspect how much he had been drinking following a high-speed chase, because he was handcuffed and pinned to the ground, no longer posing a risk to public safety, and the question was aimed at gathering DUI evidence rather than protecting the public).

In determining whether the public safety exception applies, *the motivation of the individual officers involved does not matter*. “The need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against

self-incrimination.” *Id.* at 657; *see also, United States v. Washington*, 2007 WL 320957, *3 (D.S.C. 2007) (public safety exception applies when police officers ask suspect whether he has a gun during a lawful arrest); *Green v. Dailey*, 2007 WL 1034999, *4 (D.S.C. 2007) (public safety exception applied where officers arrested plaintiff’s boyfriend in a hotel room she shared with him; the officers inquired as to whether there were any weapons in the room, plaintiff’s boyfriend responded that he had placed a gun under the mattress, and officers found illegal drugs while conducting a protective sweep).

B. DOES THE BOOKING EXCEPTION APPLY?

The Booking Exception may also eliminate the need for *Miranda* warnings. This will generally turn on whether the questions were “routine,” i.e., ***were the questions necessary to secure the biographical data necessary to complete booking or pretrial services.*** *Pennsylvania v. Muniz*, 496 U.S. 582, 602 (1990); *State v. Clute*, 324 S.C. 584, 592, 480 S.E.2d 85, 89 (Ct. App. 1996) (state conceded admission of videotaped sobriety test in custody without *Miranda* warnings was improper) (overruled on other grounds by *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000)).

APPLICATION

In *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), Muniz was arrested after he performed poorly on three standard field sobriety tests and told the arresting officer that he failed the tests because he had been drinking. *Id.* at 585. The officer transported Muniz to the police station where the booking process was recorded on videotape. Muniz was told that his actions and voice were being recorded, but he was not advised of his *Miranda* rights. An officer then asked Muniz to give his name, address, height, weight, eye color, date of birth and current age. Muniz responded to each of these questions, stumbling over his address and age. The officer then asked, “Do you know what the date was of your sixth birthday?” Muniz initially gave an inaudible reply, and ultimately responded that he did not know the answer. *Id.* at 586. Muniz was then asked to perform each of the three sobriety tests that he had failed during the roadside stop. Two of these tests required Muniz to perform tasks while counting from 1 to 9 and from 1 to 30. Muniz again failed all three tests. He was unable to walk in a straight line, he could not balance himself on one leg for more than a few

seconds, and he did not complete the requested verbal counts. Moreover, while performing the tests, Muniz attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform. Finally, the officer asked Muniz to submit to a breathalyzer test. Muniz asked a number of questions about the test and commented on his state of inebriation. Muniz ultimately refused to take the breathalyzer test. At that point, Muniz was for the first time advised of his *Miranda* rights. He signed a statement waiving his rights and then admitted that he had been driving while intoxicated. *Id.*

The Supreme Court held that Muniz's answers to questions about his name, address, height, weight, eye color, date of birth, and current age were all admissible despite the lack of *Miranda* warnings because the questions were designed to secure "biographical data" necessary for routine police administrative purposes and did not force the Muniz "to express the contents of his mind." *Id.* at 597 (quoting *Doe v. United States*, 487 U.S. 201, 210, n.9 (1988)). When Muniz was asked to provide the date of his sixth birthday, however, the Court held that this question was reasonably likely to elicit an incriminating response and therefore should have been suppressed. *Id.* at 605. On the other hand, most of Muniz's utterances in response to the officer's sobriety test instructions did not qualify as responses to custodial interrogation. *Id.* at 604, n.17. Aside from the officer's requests that Muniz count from 1 to 9 and from 1 to 30, the test instructions were "not likely to be perceived as calling for any verbal response and therefore were not 'words or actions' constituting custodial interrogation." *Id.* at 603. Instead, the officer's instructions were necessarily attendant to legitimate police procedure, and Muniz's utterances in response to these instructions were admissible. *Id.* at 605.

4. IF NEITHER THE PUBLIC SAFETY NOR BOOKING EXCEPTION APPLY, WAS THE SUSPECT GIVEN ADEQUATE *MIRANDA* WARNINGS?

In the absence of circumstances sufficient to support either the Public Safety Exception or the Booking Exception, a suspect in custody may not be subjected to interrogation unless she is informed that: (1) she has the right to remain silent; (2) anything she says can be used against her in a court of law;

(3) she has a right to the presence of an attorney; and (4) if she cannot afford an attorney, one will be appointed for her prior to any questioning, if she so desires. *See, e.g., State v. Hoyle*, 397 S.C. 622, 628-29, 725 S.E.2d 720, 723 (Ct. App. 2012) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)). “The South Carolina Supreme Court does not interpret *Miranda* to require an oral or written warning on the right to terminate an interrogation at any time and not to answer any further questions.”⁵ *Id.* at 629, 725 S.E.2d at 724 (citing *State v. Cannon*, 260 S.C. 537, 543, 197 S.E.2d 678, 680 (1973)).

While the warnings provided by *Miranda* are fixed in their content, *no “talismanic incantation” of the warnings is required as long as the officer’s explanation was the “fully effective equivalent” of the Miranda warnings.* *California v. Prysock*, 453 U.S. 355, 359-360 (1981); *State v. Singleton*, 284 S.C. 388, 391, 326 S.E.2d 153, 155, *cert. denied*, 471 U.S. 1111 (1985), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). ***Strict compliance with Miranda is not required if the warnings “touched the bases,” and reasonably conveyed a suspect’s rights.*** *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *State v. Easler*, 322 S.C. 333, 338, 471 S.E.2d 745, 749 (1996).

In *State v. Tyson*, 283 S.C. 375, 323 S.E.2d 770 (1984), Tyson was initially arrested and advised of his full *Miranda* rights by Officer Hobson. *Id.* at 378, 323 S.E.2d at 770. Several hours later, Tyson was again advised of his rights by Detective Friarson. However, the detective failed to tell Tyson that he had the right to court-appointed counsel. *Id.* Instead, Friarson advised Tyson that he could talk to an attorney “if he wished.” *Id.* The South Carolina Supreme Court ruled that Friarson’s warnings constituted the “effective equivalent” of the *Miranda* warnings. *Id.*

5. IF THE WARNINGS WERE ADEQUATE, DID THE SUSPECT INVOKE HIS RIGHTS OR WAIVE HIS RIGHTS?

If the suspect was properly advised of his *Miranda* rights, the next consideration is *whether those rights were expressly or impliedly waived.* A valid waiver does not require an express statement. *Berghuis v. Thompkins*, 560

⁵ In *Hoyle*, the Court of Appeals “clarif[ied] any perceived confusion about the reach of *Kennedy*” (in which the *Miranda* warnings issued included the right to terminate the interrogation at any time and not to answer any further questions) holding “we interpret that part of *Kennedy* as being dicta” and that *Cannon* controls. 397 S.C. at 629, 479 S.E.2d at 724 (citing *State v. Kennedy*, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996)).

U.S. 370 (2010); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (an express waiver “is usually strong proof of the validity of that waiver, but it is not inevitably either necessary or sufficient to establish waiver”); *State v. Kennedy*, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998) (“[a]n express waiver is unnecessary”).

“[C]ourts must presume that a defendant did not waive his rights...[but] in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.” *Butler*, 441 U.S. at 373. For example, if the *Miranda* warnings are accurately given to a suspect, waiver may be implied from “the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver,” i.e., making an incriminating statement. *Berghuis*, 560 U.S. at 384; *see also Butler*, 441 U.S. at 385 (presuming a defendant who, with full understanding, “acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.”). But “mere silence [following warnings] is not enough.” *Id.* at 373; *State v. McCray*, 332 S.C. 536, 546, 506 S.E.2d 301, 306 (1998). Whether a waiver occurred is determined by the totality of the circumstances—“the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused”). *Butler*, 441 U.S. at 374-375.

6. IF THE SUSPECT WAIVED HIS RIGHTS, WAS THE WAIVER “KNOWING AND INTELLIGENT?”

Regardless of whether express or implied, a waiver must be made freely, knowingly, and voluntarily. *Dickerson v. United States*, 530 U.S. 428, 434 (2000); *State v. Doby*, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979) (a signed waiver form is not conclusive, as the State must still prove the waiver was knowing and voluntary); *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010). A valid waiver of rights must be made knowingly and intelligently,⁶ meaning that “*the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.*” *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *Moses*, 390 S.C. at 513, 702 S.E.2d at 401. “The record must show that the accused was offered counsel but intelligently and knowingly rejected the offer.” *McCray*, 332 S.C. at 546, 506 S.E.2d at 306; *see also North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (noting that “the prosecution’s burden [to show a valid *Miranda* waiver] is great.”).

⁶ See the section on Due Process for a more detailed discussion of voluntariness.

A suspect does not have to be aware of the scope of the interrogation for the waiver to be valid. *Colorado v. Spring*, 479 U.S. 564, 577 (1987) (“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”); *see also*, *State v. Crawley*, 349 S.C. 459, 463-464, 562 S.E.2d 683, 685 (Ct. App. 2002) (officer’s admission that she did not tell defendant the subject of the investigation before she signed the *Miranda* waiver did not affect the voluntariness of the confession). In *Spring*, the United States Supreme Court held that the failure of law enforcement to inform the suspect of the subject matter of the interrogation did not render the waiver invalid. 479 U.S. at 577. But the Court specifically noted that it was “not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation.” *Id.* at 576, n.8. The Court pointed out that the lower courts had made no finding of official trickery. As such, the Court did not reach the question of whether a waiver of *Miranda* rights would be valid in such a circumstance. *Id.*

Similarly, the suspect does not have to be informed that an attorney is trying to reach him for the waiver to be valid. *Moran v. Burbine*, 475 U.S. 412, 422 (1986) (“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”); *State v. Drayton*, 293 S.C. 417, 426-427, 361 S.E.2d 329, 334-335 (1987) (holding that the police’s failure to inform the defendant of the Public Defender’s office’s request to speak with him did not render the waiver invalid). In *Moran*, the Supreme Court suggested that even deliberate deception of an attorney, “[a]lthough highly inappropriate,” would not “affect a suspect’s decision to waive his *Miranda* rights unless he were at least aware of the incident.” 475 U.S. at 423.

Finally, ***the suspect does have the right to qualify his waiver.*** *See Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (suspect can refuse to have the statement recorded).

APPLICATION TO JUVENILES

In *State v. Miller*, 441 S.C. 106, 893 S.E.2d 306 (2023), a 15-year-old confessed to murder four times and challenged the admissibility of his

confessions under the Fourteenth and Fifth Amendments.⁷ Miller argued that his *Miranda* waiver was involuntary because he did not understand his rights when he waived them. *Id.* at 127, 893 S.E.2d at 317. The South Carolina Supreme Court found that Miller’s waiver was valid because the SLED agents properly advised him of his rights and, despite Miller’s age, he had been adjudicated delinquent and mirandized by law enforcement officers multiple times before. *Id.* at 128-29, 893 S.E.2d at 317-18. Based on these factors, the South Carolina Supreme Court found that Miller understood his *Miranda* rights when he waived them, making his statements voluntary under the Fifth Amendment. *Id.* at 128, 893 S.E.2d at 318.

7. IF THE SUSPECT INVOKED HIS RIGHTS, WHICH RIGHT(S) DID THE SUSPECT INVOKE?

The suspect *must* have an opportunity to invoke the rights before giving any answers or admissions. *Berghuis v. Thompkins*, 560 U.S. 370, 387 (2010).

RIGHT TO SILENCE?

IF THE SUSPECT INVOKED HIS RIGHT TO SILENCE, WAS THE INVOCATION “SCRUPULOUSLY HONORED?”

A suspect must “expressly invoke the privilege against self-incrimination in response to the officer’s questions” by clearly articulating his desire to end the interview, not just “by simply standing mute.” *Salinas v. Texas*, 570 U.S. 178, 181 (2013); *see also Davis v. United States*, 512 U.S. 452, 459 (1994); *State v. Reed*, 332 S.C. 35, 42, 503 S.E.2d 747, 750 (1998). The invocation must be unambiguous and unequivocal. *Berghuis*, 560 U.S. at 382. The South Carolina Supreme Court held that a suspect’s statement, “that’s all I’ve got to say,” was not a clear invocation of the right to silence because it was ambiguous in the context in which it was given, “indicating either a desire to discontinue questioning or simply the end of his story.” *State v. Aleksey*, 343 S.C. 20, 31, 538 S.E.2d 248, 253-254 (2000).

If the suspect clearly invokes the right to silence, however, law enforcement must “*scrupulously honor*” that invocation by immediately ceasing questioning

⁷ A discussion of the Fourteenth Amendment challenge is excluded here but is included as part of the due process section.

for at least a significant period of time and administer a new set of warnings prior to reinitiating interrogation. *Michigan v. Mosley*, 423 U.S. 96, 104-06 (1975). The South Carolina Supreme Court found that a suspect's invocation of the right to silence was scrupulously honored where the suspect told the arresting officer that he did not want to speak but, an hour later, agreed to speak with a SLED agent at the sheriff's office. *State v. Benjamin*, 345 S.C. 470, 475-476, 549 S.E.2d 258, 261 (2001). Other factors may include whether the interrogation involved the same or different charges and the location of the second interrogation. *Id.*

RIGHT TO COUNSEL?

IF THE SUSPECT INVOKED THE RIGHT TO COUNSEL, WAS THE INVOCATION AMBIGUOUS?

As with the right to silence, a suspect seeking to invoke the right to counsel must do so unambiguously. ***An unambiguous request for counsel occurs when the suspect articulates her desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.*** *Davis v. United States*, 512 U.S. 452, 459 (1994). This is an objective test. *Id.*

South Carolina courts have held that neither a suspect's request "to speak to either a lawyer or her mother," *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001), nor a suspect's inquiry, "[w]hat if I ask for an attorney?" *State v. Kennedy*, 325 S.C. 295, 309, 479 S.E.2d 838, 845 (Ct. App. 1996), qualifies as an unambiguous request for counsel. *See also, State v. McCray*, 332 S.C. 536, 547, 506 S.E.2d 301, 306 (1998) (holding that the appointment of a public defender alone does not invoke Fifth Amendment right to counsel); *State v. Goodwin*, 384 S.C. 588, 598-99, 683 S.E.2d 500, 505-06 (Ct. App. 2009) (defendant's statement – "can I have some time to think on this here? I can think on this?" – was not an invocation of right to counsel).

On the other hand, the South Carolina Supreme Court has held that the statement, "[w]ell, I think I need a lawyer," is an "obvious" invocation of the right to counsel. *State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998). The *Kennedy* Court compared this statement to the one rejected as ambiguous in *Davis* – "[m]aybe I should talk to a lawyer" – and held that unlike *Davis*, *Kennedy*'s statement was not an uncertain request. *Id.* at 430,

510 S.E.2d at 715 (quoting *Davis*, 512 U.S. at 459). Moreover, notes taken by one of the interrogating officers indicated that he, a reasonable officer, believed Kennedy's statement to be a request for a lawyer. *Id.*; see also, *State v. Cox*, 287 S.C. 260, 263, 335 S.E.2d 809, 810 (Ct. App. 1985) (defendant effectively asserted his right to counsel by saying, "I'll tell you about it when I talk to my lawyer"), *overruled on other grounds by State v. Cox*, 290 S.C. 489, 351 S.E.2d 570 (1986).

If the suspect unambiguously invokes his right to counsel, questioning must cease immediately. *Edwards v. Arizona*, 451 U.S. 477 (1981). Police may not resume the interrogation unless the suspect's attorney is present, even if the suspect has already spoken with his attorney, for as long as the suspect remains in custody. *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) ("consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody that may increase as custody is prolonged"). If the suspect initially invokes her rights and then purports to waive them, a valid waiver "cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights", suggesting that new *Miranda* warnings are warranted before interrogation resumes. See *Edwards*, 451 U.S. at 484-85; see also *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-46 (1983) (police re-administered *Miranda* warnings after suspect waived rights and subsequently invoked them).

Note that a Fifth Amendment invocation of the right to counsel is not offense specific. In other words, it not only applies to the current charges, but it also applies to any additional or other charges the police may wish to ask the suspect about. *Arizona v. Roberson*, 486 U.S. 675, 684 (1988) ("there is no reason to assume that a suspect's state of mind is in any way investigation-specific"); *State v. McCray*, 332 S.C. 536, 546-547, 506 S.E.2d 301, 306 (1998) ("once an accused invokes the right to counsel for interrogation regarding one offense, he may not be approached regarding any offense unless counsel is present").

8. DID THE SUSPECT OR POLICE SUBSEQUENTLY INITIATE INTERROGATION?

A suspect's invocation of her *Miranda* rights does not provide indefinite protection. Even if a suspect has invoked her rights under the Fifth Amendment,

law enforcement may nonetheless speak with her if (a) the suspect reinitiates contact with the police, *Edwards v. Arizona*, 451 U.S. 477 (1981), or (b) the officer reinitiates contact with the suspect after ***a break in Miranda custody lasting more than 14 days***, *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (holding two weeks “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody”). Whether a suspect has initiated interrogation turns on ***whether the suspect’s comments or questions evidenced a willingness or desire to engage in a generalized discussion about the investigation***. *Bradshaw*, 462 U.S. at 1045-1046 (finding that a suspect’s question about what was going to happen to him met this test because “it was not merely a necessary inquiry arising out of the incidents of the custodial relationship”).

Even where the suspect has initiated interrogation, or where a government actor has re-initiated interrogation after two weeks, she is still entitled to adequate *Miranda* warnings, which must be validly waived. Thus, don’t forget to re-consider:

WERE THE NEW WARNINGS ADEQUATE?

WAS THERE A VALID WAIVER?

APPLICATION

In *State v. Sims*, 304 S.C. 409, 416, 405 S.E.2d 377, 381 (1991), the South Carolina Supreme Court held that Sims had initiated interrogation after first invoking his right to remain silent and his right to an attorney upon his arrest. On the following day, Sergeant Anderson visited Sims to ask him if he wanted to sign a form waiving extradition. *Id.* Sims stated that he did not and then requested to see the officers who had originally advised him of his rights. After a general discussion with those officers, Sims agreed to waive his rights and gave an incriminating statement. *Id.* The Court held that Sergeant Anderson’s question concerning extradition was “related to routine administrative processing and clearly was not an attempt to elicit an incriminating response.” *Id.* at 417, 405 S.E.2d at 382. Thus, it was Sims who initiated the interrogation by asking questions and then making statements which “open[ed] up a more generalized discussion relating . . . to the investigation.” *Id.* (quoting *Bradshaw*, 462 U.S. at 1045).

The South Carolina Supreme Court has held that a suspect may initiate interrogation even when the police explicitly invite him to do so, as long as that invitation is not the “functional equivalent” of an interrogation. *State v. Binney*, 362 S.C. 353, 359, 608 S.E.2d 418, 421 (2005). Binney was arrested at his home on murder charges. As he was being arrested, Binney’s wife was talking on a cordless phone to Bill Bannister, Binney’s attorney in another matter. *Id.* at 355, 608 S.E.2d at 419. While Binney’s wife was on the phone, she repeatedly told him not to say anything to the officers. After Binney’s arrest, public defender Don Thompson went to the county jail to talk to Binney and also told him not to talk to the police. *Id.* at 356, 608 S.E.2d at 419. Thereafter, SLED agent DeWitt McCraw and the solicitor repeatedly contacted Thompson, asking him for permission to interrogate Binney. *Id.* Thompson refused their requests. Undeterred, McCraw decided to try a different route. He contacted the jailer at the prison where Binney was incarcerated and asked the jailer to tell Binney that if he wanted to talk, he had to make a written request to speak to a detective without the presence of an attorney. *Id.* Hours later, McCraw received a handwritten note from Binney that included the specific request McCraw had suggested. McCraw then brought Binney to the Sheriff’s Office, where Binney executed a waiver of rights and gave a five-page statement confessing to the murder. *Id.* at 357, 608 S.E.2d at 420. The Court held that McCraw’s actions were not the initiation of interrogation because they were not reasonably likely to elicit an incriminating response. *Id.* at 361, 608 S.E.2d at 422. Instead, McCraw’s message “was simply an invitation for Binney to initiate contact,” which Binney subsequently did by sending McCraw the handwritten note. *Id.*

WAS THE STATEMENT OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT?

The Sixth Amendment right to counsel in judicial proceedings is distinct from the Fifth Amendment right to counsel upon request during custodial interrogation. The Sixth Amendment guarantees that in all criminal prosecutions “the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. The essence of this right is the opportunity

for the defendant to consult with an attorney and to have counsel investigate the case and prepare a defense for trial. *Powell v. Alabama*, 287 U.S. 45, 58 (1932). “The right is grounded in the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense.” *State v. Quattlebaum*, 338 S.C. 441, 446, 527 S.E.2d 105, 107 (2000) (quotation omitted). Whether a violation of the Sixth Amendment right to counsel occurred can be analyzed by addressing the following three questions.

1. DID THE DEFENDANT HAVE A SIXTH AMENDMENT RIGHT TO COUNSEL?

The Sixth Amendment right to counsel *attaches once formal adversary proceedings have commenced*—typically “by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (internal quotation omitted); *see also*, *State v. Register*, 323 S.C. 471, 477, 476 S.E.2d 153, 157 (1996) (“The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages”) (citing *Michigan v. Harvey*, 494 U.S. 344 (1990)). *The right is offense specific*, meaning a government actor may not interrogate the defendant about the charged offense without the presence of counsel—unless the defendant initiates the interrogation or makes a valid waiver—but they *may* interrogate him about another unrelated offense. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (“It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced”); *State v. Wilder*, 306 S.C. 535, 537, 413 S.E.2d 323, 324 (1991).

After the Sixth Amendment right attaches, law enforcement may still approach a defendant, administer *Miranda* warnings, and seek a waiver. If the defendant *clearly asserts* the right to counsel at that point, then the analysis shifts back to Fifth Amendment considerations and questioning must cease unless the defendant reinitiates the conversation. *Montejo*, 556 U.S. at 797–98 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)). Even if the defendant subsequently agrees to waive his rights, that waiver is invalid under *Edwards* if it follows an unequivocal election of the right to counsel. *See Montejo*, 556 U.S. at 796 (“Although our holding means that the Louisiana Supreme Court correctly rejected Montejo’s claim under *Jackson*, we think that Montejo should be given an opportunity to contend that [his statement] should still have been suppressed under the rule of *Edwards*”).

2. DID A GOVERNMENT AGENT DELIBERATELY ELICIT AND INCRIMINATION STATEMENT?

If the Sixth Amendment right to counsel has attached, the next consideration is *whether the defendant's statement was "deliberately elicited" by a government actor*. *Massiah v. United States*, 377 U.S. 201, 206 (1964); *Brewer v. Williams*, 430 U.S. 387, 405 (1977); *State v. Stahlnecker*, 386 S.C. 609, 620, 690 S.E.2d 565, 571 (2010). The right applies only when an officer or other individual (e.g. a snitch) is acting as a government agent; it does not reach statements made to private individuals acting on their own initiative. *Id.* There is no bright-line rule for determining agency, but there must be "some evidence that an agreement, express or implied, between the individual and a government official existed at the time the elicitation takes place." *Stahlnecker*, 386 S.C. 609 at 621, S.E.2d at 572 (quoting *Depree v. Thomas*, 946 F.2d 784, 793-94 (11th Cir. 1991)).

If a government actor is involved, *the next question is whether the statement was deliberately elicited*— that is, whether the agent "knowingly circumvent[s] the accused's right to have counsel present" to obtain incriminating information. *Maine v. Moulton*, 474 U.S. 159, 176 (1985). *An officer's intent matters*: deliberate elicitation requires purposeful conduct designed to obtain information outside the presence of counsel, while statements obtained "by luck or happenstance" are not deliberately elicited. *Id.* The prohibition applies equally to direct or indirect efforts using "investigative techniques that [are] the functional equivalent to interrogation." *Kuhlmann v. Wilson*, 477 U.S. 436, 457 (1986); *Brewer v. Williams*, 430 U.S. 387, 405 (1977) (holding officer's "Christian burial speech" was tantamount to interrogation). In determining whether deliberate elicitation occurred, courts consider the officer or agent's subjective intent, the purpose of the conversation, who initiated it, and whether the agent attempted to exploit the encounter. *Moulton*, 474 U.S. at 176.

The government may not use an undercover agent to solicit incriminating information about a charged offense after the Sixth Amendment right to counsel has attached. *United States v. Henry*, 447 U.S. 264, 272 (1980) (citing *United States v. White*, 401 U.S. 745 (1971) (holding that the Fifth Amendment is not implicated by the use of undercover Government agents before charges are filed because of the absence of potential for compulsion)).⁸ In *Henry*, the Court

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found a Sixth Amendment violation where a government informant “developed a relationship of trust” with the defendant and “deliberately used his position to secure incriminating information...when counsel was not present.” *Id.* at 269-270; *see also, Moulton*, 474 U.S. 159 (finding violation where cooperating accomplice wore a wire, discussed the pending charges, and encouraged the defendant to recount the crime).

However, the Sixth Amendment protection does not bar the admission of statements made to a “passive” listener who merely listens without stimulating the conversation about the crime charged. *Kuhlmann*, 477 U.S. at 456. The defendant must show that the government or its informant “took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.” *Id.* at 459.

3. IF THERE WAS INTERROGATION BY THE POLICE, DID THE SUSPECT MAKE A VALID WAIVER?

After *Montejo*, a valid *Miranda* waiver generally suffices to establish a knowing and intelligent waiver of the Sixth Amendment right to counsel for purposes of post-indictment questioning. *Patterson v. Illinois*, 487 U.S. 285, 292 & n.4 (1988); *Montejo*, 556 U.S. at 786. The State bears the burden of proving ***a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel.*** *Patterson* 487 U.S. at 292 & n.4; *Brewer*, 430 U.S. at 404; *Hines v. State*, 443 S.C. 32, 40-41, 902 S.E.2d 377, 381 (2025); *State v. Dial*, 429 S.C. 128, 132, 838 S.E.2d 501, 503 (2020).

Courts consider the totality of the circumstances, including the defendant’s understanding of the warnings, voluntariness, and capacity to make an informed decision. When *Miranda* warnings are properly given, they “sufficiently inform the defendant of his right to have counsel present during questioning and make him aware of the consequences of waiving that right.” *Montejo*, 556 U.S. at 786 (quoting *Patterson*, 487 U.S. at 292).

WAS THE STATEMENT OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSE?

The Due Process Clause of the Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property without due process of law.” U.S. Const. Amend. XIV; *see also*, S.C. Const., Article I, Section 3.

By virtue of the Due Process Clause, “certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.” *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *State v. Collins*, 442 S.C. 444, 456 900 S.E.2d 426, 432 (2024). Whether or not a statement was voluntary is determined by a totality of the circumstances test. ***The relevant inquiry is whether the particular suspect’s will was overborne.*** *Arizona v. Fulminate*, 499 U.S. 279, 287 (1991) (finding that the defendant’s confession was coerced by a credible threat of physical violence where the defendant confessed to a government informant who promised to protect him from other inmates in exchange for information about the crime); *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) (holding the pertinent inquiry is always whether the defendant’s will was overborne), *overruled on other grounds by State v. Burdette*, 832 S.E.2d 575, 427 S.C. 490 (2019); *see also, Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (holding that a confession was coerced because the interrogating police officer promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door). All of the relevant facts and circumstances should be considered, including but not limited to:

- The youth of the accused.
- His lack of education or his low intelligence.
- The lack of any advice to the accused of his constitutional rights.
- The length of detention.
- The repeated and prolonged nature of the questioning.
- The use of physical punishment such as the deprivation of food or sleep.
- Promises of leniency or deliberate misrepresentations of evidence against the accused.⁹

State v. Miller, 441 S.C. 106, 121, 893 S.E.2d 306, 314 (2023) (collecting cases); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *see also, State v. Pittman*, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007) (citing *Schneckloth*).

⁹ *State v. Collins*, 442 S.C. 444, 458, 900 S.E.2d 426, 434 (2024) (holding misleading statements about the consequences of proceeding with an interview –such as false assurances of confidentiality– are *inherently* coercive, regardless of whether the statement is accompanied by *Miranda* warnings, but misleading statements about the facts of an investigation are not); *but see State v. Pittman*, 373 S.C. 527, 568, 647 S.E.2d 144, 165 (2007) (officer’s statements about minimizing the suspect’s sentence were not coercive).

No single factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. *Schneckloth*, 412 U.S. at 226.

The Due Process Clause voluntariness inquiry is not limited to the context of custodial interrogation, but the statement must be obtained by a police officer or other state agent. In other words, there must be a link between the coercive activity of the state and the confession. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (“Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law”); *State v. Salisbury*, 330 S.C. 250, 272, 498 S.E.2d 655, 666 (Ct. App. 1998) (“Coercive police activity is a necessary predicate to finding a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment”). In *Connelly*, the Court held that there was no Due Process violation where the defendant, a chronic schizophrenic in a psychotic state, felt compelled by “voices” and “the voice of God” to approach a police officer and confess to murder. *Id.* at 161.

DUE PROCESS & JUVENILES

A juvenile’s age in itself is not evidence of coercion. *State v. Pittman*, 373 S.C. 527, 569, 647 S.E.2d, 144, 166 (2007). Determining whether a juvenile’s statement was obtained in violation of the Due Process Clause is a two-part inquiry that involves evaluating (a) the juvenile’s individual characteristics and (b) the circumstances surrounding the waiver and interrogation. While courts may consider the same factors they would consider for an adult defendant, they may also consider other “special concerns” including:

- The presence and competence of parents.
- The juvenile’s prior experience with law enforcement.
- The juvenile’s background.
- Whether the juvenile has the capacity to understand the nature of his Miranda warnings and the consequences of waiving those rights.
- The juvenile’s development of an alibi to conceal his involvement in the crime.
- The juvenile’s “street smarts.”

Miller, 441 S.C. at 121-22, 893 S.E.2d at 314 (collecting cases); *see also id.* at 125, 893 S.E.2d at 316 (finding juvenile was “street smart

enough” to understand his rights when he spoke to SLED, despite his “limited” education and academic difficulties); *State v. Moses*, 390 S.C. 502, 513-14, 702 S.E.2d 395, 401 (Ct. App. 2010) (collecting cases and finding factors to be considered include the “length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep”). Even though “courts have given confessions by juveniles special scrutiny,” they have generally found them voluntary “whe[n] there is no evidence of extended, intimidating questioning or some other form of coercion.” *State v. Pittman*, 373 S.C. 527, 568, 647 S.E.2d, 144, 165 (2007).

APPLICATION TO JUVENILES

In *Miller*, a 15-year-old confessed to murder four times – twice to his friends and twice to law enforcement. 441 S.C. at 109-10, 893 S.E.2d at 308. The Court found that even though Miller’s final confession was made following a 30-minute break in the interview, “such a minimal break” did not require officers to re-mirandize him. *Id.* at 123, 893 S.E.2d at 315. Further, Miller was not handcuffed or charged during the interview, and the officers only promised to inform the prosecution of his cooperation, not leniency. *Id.* at 124, 893 S.E.2d at 315-16.

As to youth specific considerations, Miller’s guardian was present at the beginning of the interview –even though a parent’s presence is not required– and there is no indication that she could not have stayed longer had she or Miller wanted her to. *Id.* at 124-25, 893 S.E.2d at 316. The Court also found that even though Miller was “much smaller” than SLED agents, struggled academically, and had a limited education, these facts were outweighed by Miller’s “good physical condition”, sobriety at the time of the interview, and history with law enforcement: Miller knew several of the officers’ names, was on probation at the time, and had “street smarts”, as evidenced by his efforts to convince the SLED agents that he had an alibi. *Id.* at 125-26, 893 S.E.2d at 316-17. The Court held that, on balance, Miller’s confession was voluntary and did not offend due process. *Id.* at 127, 893 S.E.2d at 317.

CAN THE STATEMENT BE USED FOR IMPEACHMENT PURPOSES?

Bear in mind that even if a confession is not admissible during the prosecution's case-in-chief, it may still be admissible for impeachment purposes. A statement obtained in violation of *Miranda* may be used for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 225-226 (1971) ("Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief. . . The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances"); *State v. Brown*, 296 S.C. 191, 193, 371 S.E.2d 523, 525 (1988) ("A statement obtained in violation of a defendant's fifth amendment right to counsel is admissible for impeachment, as is a confession obtained in violation of *Miranda*") (citations omitted).

Moreover, a statement obtained in violation of the Sixth Amendment right to counsel may also be used for impeachment purposes. *Michigan v. Harvey*, 494 U.S. 344, 350-351 (1990) ("We have already decided that although statements taken in violation of only the prophylactic *Miranda* rules may not be used in the prosecution's case in chief, they are admissible to impeach conflicting testimony by the defendant . . . There is no reason for a different result in a [Sixth Amendment] case"); *State v. Anderson*, 357 S.C. 514, 518, 593 S.E.2d 820, 822 (Ct. App. 2004) ("statements obtained in violation of [The Sixth Amendment] may not be admitted as substantive evidence in the prosecution's case in chief").

On the other hand, an involuntary confession is inadmissible for any purpose, including impeachment. *Mincey v. Arizona*, 437 U.S. 385, 401 (1978) (holding statements made by defendant to police officer while defendant was in the hospital in the intensive care unit, while he was in unbearable pain and unable to think clearly, and while he was encumbered by tubes, needles and a breathing apparatus, were not voluntary and could not be used against defendant, either as direct evidence, or to impeach his in-court testimony); *State v. Victor*, 300 S.C. 220, 223, 387 S.E.2d 248, 249 (1989) ("an accused's *involuntary* incriminating statement is *inadmissible for any purpose*, including impeachment") (emphasis in original).

IS EVIDENCE DERIVED FROM THE STATEMENT ADMISSIBLE?

Even if an illegally obtained statement is inadmissible in the prosecution's case-in-chief, derivative evidence obtained because of that statement may still be admissible. For Fifth Amendment violations, "[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy" for a *Miranda* violation. *United States v. Patane*, 542 U.S. 630, 643 (2004). Thus, ***the exclusionary rule does not extend to physical evidence derived from statements taken in violation of Miranda.*** *Id.* at 639-40; *see also State v. Bonilla*, 429 S.C. 253, 262, 838 S.E.2d 1, 6 (Ct. App. 2019) (holding that even if the defendant's statement disclosing the location of the victim's body was suppressible, the evidence gathered from the location where the body was found remained admissible). Such evidence is not "inherently tainted" and is admissible as substantive evidence, provided that the statement was made voluntarily. *Id.*

By contrast, the exclusionary rule does apply to evidence derived from statements obtained in violation of the Sixth Amendment. Such evidence constitutes "fruit of the poisonous tree" and must be suppressed unless "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means" (i.e. the independent source and inevitable discovery doctrines). *Nix v. Williams*, 467 U.S. 431, 444 (1984); *State v. Moore*, 421 S.C. 167, 178, 805 S.E.2d 585, 591 (Ct. App. 2017).

Finally, the "physical fruit of actually coerced (or involuntary) statements" must always be excluded. *Patane*, 542 U.S. at 644. The Court has consistently held "that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial." *Id.* at 640 (quoting *Chavez v. Martinez*, 538 U.S. 760, 769 (2003)).

Quick Reference



Quick Reference



QUICK REFERENCE TABLES

Fifth Amendment	
<p>WAS THE SUSPECT IN CUSTODY?</p>	<ul style="list-style-type: none"> • Formal arrest or freedom of movement restricted in a significant way? <i>California v. Beheler</i>, 463 U.S. 1121 (1983); <i>Beckwith v. United States</i>, 425 U.S. 341 (1976). <ul style="list-style-type: none"> ○ For traffic stops, freedom must be curtailed to a degree associated with formal arrest. <i>Berkemer v. McCarty</i>, 468 U.S. 420 (1984); <i>State v. Walker</i>, 430 S.C. 411, 844 S.E.2d 405 (Ct. App. 2020). • This is an objective test. <i>Stansbury v. California</i>, 511 U.S. 318 (1994); <i>State v. Easler</i>, 327 S.C. 121, 489 S.E.2d 617 (1997); <i>Bradley v. State</i>, 316 S.C. 255, 449 S.E.2d 492, (1994). • Adult suspect: Would a reasonable adult have felt free to leave under similar circumstances? <i>Stansbury v. California</i>, 511 U.S. 318 (1994); <i>Thompson v. Keohane</i>, 516 U.S. 99 (1995); <i>Bradley v. State</i>, 316 S.C. 255, 449 S.E.2d 492 (1994). • Juvenile suspect: If the officer knew, or a reasonable officer would have known, that the suspect was a juvenile: Would a reasonable child of a similar age feel free to leave under similar circumstances? <i>J.D.B. v. North Carolina</i>, 564 U.S. 261 (2011). • Factors to consider: <ul style="list-style-type: none"> ○ Location of questioning. ○ Length and nature of questioning. ○ Statements or actions indicating suspect was not free to leave. ○ Purpose of questioning if made apparent to suspect. ○ How suspect got to the police station. ○ Restraints on movement or freedom to leave. ○ Age (only in juvenile cases when age was known or objectively apparent). • <i>See, e.g., J.D.B. v. North Carolina</i>, 564 U.S. 261 (2011), <i>Stansbury v. California</i>, 511 U.S. 318 (1994); <i>Berkemer v. McCarty</i>, 468 U.S. 420 (1984); <i>State v. Evans</i>, 354 S.C. 579, 582 S.E.2d 407 (2003).

<p>WAS THE SUSPECT INTERROGATED?</p>	<ol style="list-style-type: none"> 1. Express questioning or its functional equivalent? <i>Rhode Island v. Innis</i>, 446 U.S. 291 (1980); <i>State v. Franklin</i>, 299 S.C. 133, 382 S.E.2d 911 (1989). 2. Comments or actions reasonably likely to elicit an incriminating statement? <ul style="list-style-type: none"> ○ Officer’s intent is relevant but not determinative. <i>Island v. Innis</i>, 446 U.S. 291 (1980); <i>State v. Hart</i>, 436 S.C. 153, 871 S.E.2d 202 (Ct. App. 2022). ○ No <i>Miranda</i> warnings required if suspect does not know he is speaking to an undercover government agent (i.e. snitch). <i>Illinois v. Perkins</i>, 496 U.S. 292 (1990); <i>State v. Lynch</i>, 375 S.C. 628, 654 S.E.2d 292 (2007).
<p>IF THE SUSPECT WAS IN CUSTODY AND INTERROGATED, WERE <i>MIRANDA</i> WARNINGS REQUIRED?</p>	<ol style="list-style-type: none"> 1. Does the Public Safety Exception apply? <ul style="list-style-type: none"> ○ Objectively reasonable need to protect against immediate danger? <i>New York v. Quarles</i>, 467 U.S. 649 (1984); <i>State v. Medley</i>, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016). 2. Does the Booking Exception apply? <ul style="list-style-type: none"> ○ Were the questions routine? <i>Pennsylvania v. Muniz</i>, 496 U.S. 582 (1990); <i>State v. Clute</i>, 324 S.C. 584, 480 S.E.2d 85 (Ct. App. 1996).
<p>IF NEITHER EXCEPTION APPLIES, WERE THE <i>MIRANDA</i> WARNINGS ADEQUATE?</p>	<ul style="list-style-type: none"> • No “talismanic incantation” required if explanation was “fully effective equivalent” of <i>Miranda</i> warnings. <i>California v. Prysock</i>, 453 U.S. 355 (1981); <i>State v. Singleton</i>, 284 S.C. 388, 326 S.E.2d 153 (1985). • Strict compliance not required if the warnings “touched the bases.” <i>Duckworth v. Eagan</i>, 492 U.S. 195 (1989); <i>State v. Easler</i>, 322 S.C. 333, 471 S.E.2d 745 (1996).

IF THE WARNINGS WERE ADEQUATE, DID THE SUSPECT INVOKE HIS RIGHTS OR WAIVE HIS RIGHTS?			
Waiver	Invocation		
<p>IF THE SUSPECT WAIVED HIS RIGHTS, WAS THE WAIVER “KNOWING AND INTELLIGENT”?</p> <ul style="list-style-type: none"> Was there a “full awareness” of nature and consequences? <i>Moran v. Burbine</i>, 475 U.S. 412 (1986). Waiver does not have to be express, but will not be presumed from silence. <i>North Carolina v. Butler</i>, 441 U.S. 369 (1979); <i>State v. McCray</i>, 332 S.C. 536, 506 S.E.2d 301 (1998). Suspect does not have to be aware of the scope of the interrogation, <i>Colorado v. Spring</i>, 479 U.S. 564 (1987); <i>State v. Crawley</i>, 349 S.C. 459, 562 S.E.2d 683 (2002), or that an attorney is trying to reach him. <i>Moran v. Burbine</i>, 475 U.S. 412 (1986); <i>State v. Drayton</i>, 293 S.C. 417, 361 S.E.2d 329 (1987). Suspect has the right to qualify the waiver. <i>Connecticut v. Barrett</i>, 479 U.S. 523 (1987). 	<p>IF THE SUSPECT INVOKED HIS RIGHTS, WHICH RIGHT(S) DID THE SUSPECT INVOKE?</p> <table border="1"> <tr> <td> <p>Right to silence</p> <p>Did the suspect clearly articulate a desire to end the interrogation? <i>Davis v. United States</i>, 512 U.S. 452 (1994); <i>State v. Reed</i>, 332 S.C. 35, 503 S.E.2d 747 (1998).</p> <p>If so, was the invocation “scrupulously honored”? <i>Michigan v. Mosley</i>, 423 U.S. 96 (1975); <i>State v. Benjamin</i>, 345 S.C. 470, 549 S.E.2d 258 (2001).</p> </td> <td> <p>Right to counsel</p> <p>Was the invocation ambiguous? <i>Davis v. United States</i>, 512 U.S. 452 (1994); <i>State v. Kennedy</i>, 333 S.C. 426, 510 S.E.2d 714 (1998).</p> <p>If so, did the police cease questioning immediately? <i>Edwards v. Arizona</i>, 451 U.S. 477 (1981).</p> </td> </tr> </table>	<p>Right to silence</p> <p>Did the suspect clearly articulate a desire to end the interrogation? <i>Davis v. United States</i>, 512 U.S. 452 (1994); <i>State v. Reed</i>, 332 S.C. 35, 503 S.E.2d 747 (1998).</p> <p>If so, was the invocation “scrupulously honored”? <i>Michigan v. Mosley</i>, 423 U.S. 96 (1975); <i>State v. Benjamin</i>, 345 S.C. 470, 549 S.E.2d 258 (2001).</p>	<p>Right to counsel</p> <p>Was the invocation ambiguous? <i>Davis v. United States</i>, 512 U.S. 452 (1994); <i>State v. Kennedy</i>, 333 S.C. 426, 510 S.E.2d 714 (1998).</p> <p>If so, did the police cease questioning immediately? <i>Edwards v. Arizona</i>, 451 U.S. 477 (1981).</p>
	<p>Right to silence</p> <p>Did the suspect clearly articulate a desire to end the interrogation? <i>Davis v. United States</i>, 512 U.S. 452 (1994); <i>State v. Reed</i>, 332 S.C. 35, 503 S.E.2d 747 (1998).</p> <p>If so, was the invocation “scrupulously honored”? <i>Michigan v. Mosley</i>, 423 U.S. 96 (1975); <i>State v. Benjamin</i>, 345 S.C. 470, 549 S.E.2d 258 (2001).</p>	<p>Right to counsel</p> <p>Was the invocation ambiguous? <i>Davis v. United States</i>, 512 U.S. 452 (1994); <i>State v. Kennedy</i>, 333 S.C. 426, 510 S.E.2d 714 (1998).</p> <p>If so, did the police cease questioning immediately? <i>Edwards v. Arizona</i>, 451 U.S. 477 (1981).</p>	
<p>DID THE SUSPECT OR LAW ENFORCEMENT SUBSEQUENTLY INITIATE INTERROGATION?</p> <p>Suspect: Did suspect’s comments or questions evidence a willingness or desire to engage in generalized discussion about the investigation? <i>Oregon v. Bradshaw</i>, 462 U.S. 1039 (1983); <i>State v. Sims</i>, 304 S.C. 409, 405 S.E.2d 377 (1991).</p> <p>Law enforcement: Had at least fourteen days passed between the time of the previous interrogation and when the officer initiated the subsequent interrogation? <i>Maryland v. Shatzer</i>, 559 U.S. 98, 110 (2010).</p>			
<p>IF THE SUSPECT INITIATED INTERROGATION:</p> <ul style="list-style-type: none"> Were new warnings given? Were the new warnings adequate? Was there a valid waiver? 			

Sixth Amendment

DID THE DEFENDANT HAVE A SIXTH AMENDMENT RIGHT TO COUNSEL?

- Have formal proceedings been initiated? *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *State v. Register*, 323 S.C. 471, 477, 476 S.E.2d 153, 157 (1996).
- The Sixth Amendment right to counsel is offense specific. *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *State v. Wilder*, 306 S.C. 535, 413 S.E.2d 323 (1991).

WAS THERE INTERROGATION UNDER THE SIXTH AMENDMENT?

- Did the police deliberately elicit incriminating statements? *Masiah v. United States*, 377 U.S. 201, 206 (1964); *Brewer v. Williams*, 430 U.S. 387, 405 (1977).
- The subjective motivation of the police officer or government agent does matter. *Maine v. Moulton*, 474 U.S. 159, 176 (1985).
- Relevant considerations:
 - Purpose of the questions or comments?
 - Who set up the encounter?
 - Was there an attempt to exploit or otherwise take advantage of the encounter?
- The Sixth Amendment applies to snitches and informants. *United States v. Henry*, 447 U.S. 264 (1980).
- But does not include passive listeners. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

IF THERE WAS INTERROGATION BY THE POLICE, DID THE SUSPECT MAKE A VALID WAIVER?

- Was there a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel? *Patterson v. Illinois*, 487 U.S. 285, 292, and n.4 (1988); *State v. Dial*, 429 S.C. 128, 838 S.E.2d 501 (2020).

Due Process

CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES, WAS THE STATEMENT VOLUNTARY?

- Given the totality of the circumstances, was this particular suspect's will overborne? *Arizona v. Fulminate*, 499 U.S. 279 (1991); *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996).
- **Special considerations when the accused is a juvenile:** the presence and competence of parents; prior experience with law enforcement; background; whether the juvenile has the capacity to understand the nature of his Miranda warnings and the consequences of waiving those rights; juvenile's development of an alibi to conceal his involvement in the crime; and the juvenile's "street smarts." *State v. Miller*, 441 S.C. 106, 893 S.E.2d 306 (2023).
- The voluntariness inquiry is not limited to the context of custodial interrogation, but the statement must be obtained by a police officer or other state agent. *Colorado v. Connelly*, 479 U.S. 157 (1986); *State v. Salisbury*, 330 S.C. 250, 272, 498 S.E.2d 655, 666 (Ct. App. 1998).

Impeachment Issues

EVEN IF THE CONFESSION IS NOT ADMISSIBLE DURING THE GOVERNMENT'S CASE-IN-CHIEF, IT STILL MAY BE ADMISSIBLE FOR IMPEACHMENT PURPOSES.

- A statement obtained in violation of *Miranda* may be used for impeachment purposes. *Harris v. New York*, 401 U.S. 222 (1971); *State v. Brown*, 296 S.C. 191, 193, 371 S.E.2d 523, 525 (1988).
- A statement obtained in violation of the Sixth Amendment right to counsel may be used for impeachment purposes. *Michigan v. Harvey*, 494 U.S. 344 (1990); *State v. Anderson*, 357 S.C. 514, 518, 593 S.E.2d 820, 822 (Ct. App. 2004).
- An involuntary confession is inadmissible for any purpose, including impeachment. *Mincey v. Arizona*, 437 U.S. 385 (1978); *State v. Victor*, 300 S.C. 220, 223, 387 S.E.2d 248, 249 (1989).

Admissibility of Physical Evidence

EVEN IF THE CONFESSION IS NOT ADMISSIBLE DURING THE GOVERNMENT'S CASE-IN-CHIEF, EVIDENCE DERIVED FROM THAT STATEMENT MAY BE:

- Evidence derived from statements taken in violation of Miranda is admissible as substantive evidence. *United States v. Patane*, 542 U.S. 630 (2004); *State v. Bonilla*, 429 S.C. 253, 838 S.E.2d 1 (Ct. App. 2019).
- Evidence derived from statements taken in violation of the Sixth Amendment is fruit of the poisonous tree and inadmissible unless the information would have ultimately or inevitably been discovered by lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984); *State v. Moore*, 421 S.C. 167, 805 S.E.2d 585 (Ct. App. 2017).
- Evidence derived from an involuntary statement must be excluded. *United States v. Patane*, 542 U.S. 630, 643 (2004).



