

Garden State CLE Presents:

Changes & Updates to N.J. *Miranda*
Procedures



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Lesson Plan

Why do we have to record interrogations?

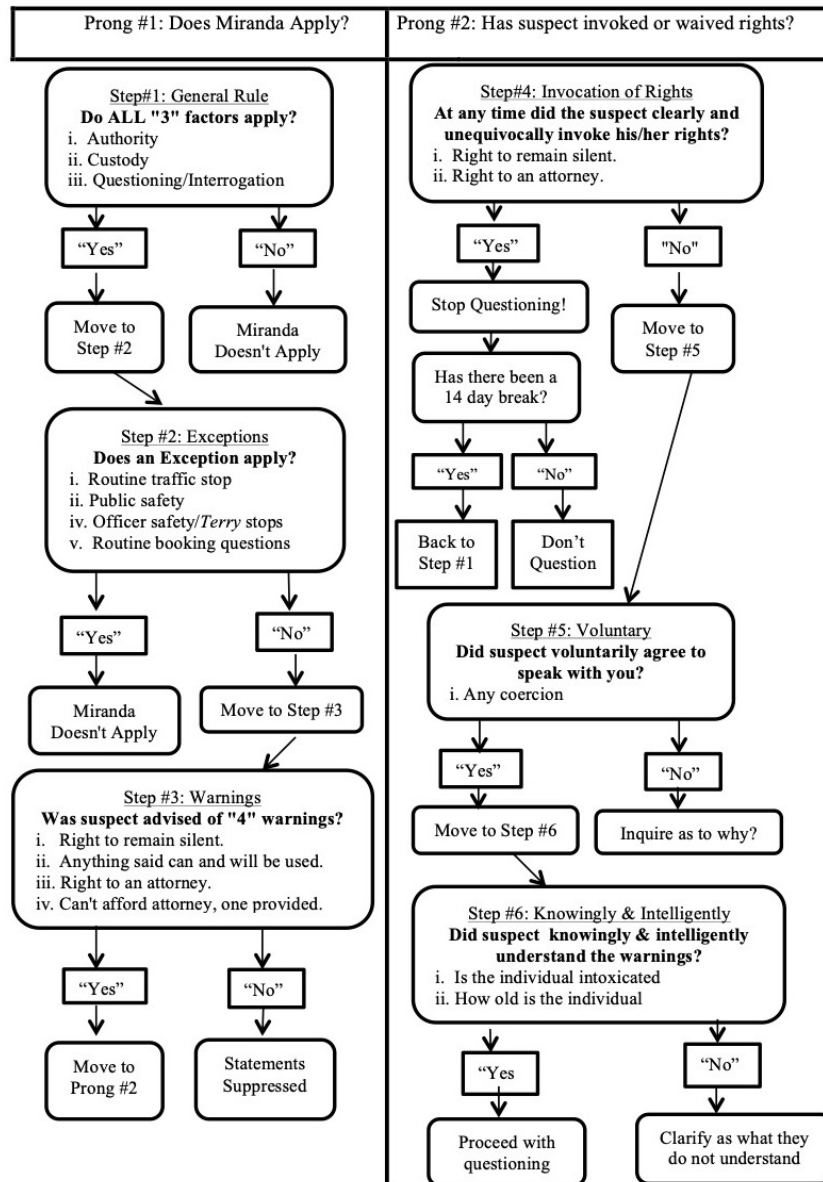
Rule 3:17 requires that police interrogations be electronically recorded whenever possible.

In the following scene, D'Angelo Barksdale has been brought into police headquarters for questioning as a suspect in a murder. His only response to initial police questioning following *Miranda* warnings is to repeatedly state the word, "Lawyer"

The police reaction to this request for counsel is as follows:



Figure 1: Miranda Flow Chart



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"You have the right to be confused! Understanding Miranda after 50 years."

Foundational Topics

1.) Legal basis - There is no specific constitutional protection afforded to criminal defendants in the New Jersey Constitution of 1947 related to an unqualified right to remain silent. Rather, this right comes from three sources:

i.) New Jersey Common Law – State v. O’Neill, 193 NJ 148 (2007)

ii.) Statute - N.J.S.A. 2A:84A-19 and N.J.R.E. 503. The statute and evidence rule both provide that “every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate.”

iii.) !4th Amendment due process clause per *Miranda v. Arizona*, 384 US 436 (1966).

2.) Triggering events –

i.) *Miranda* is triggered only when a person is in custody and subject to questioning by law enforcement. The New Jersey Supreme Court has recognized that custody in the *Miranda* sense does not necessitate a formal arrest, nor does it require physical restraint in a police station, nor the application of handcuffs, and may occur in a suspect's home or a public place other than a police station. Whether an individual is in custody for purposes of administering *Miranda* warnings is a fact-sensitive inquiry. The critical determinant of custody is whether there has been a significant deprivation of the suspect's freedom of action based on the objective circumstances, including the time and place of the interrogation, the status of the interrogator, the status of the suspect, and other such factors. The inquiry is an objective one, determined by how a reasonable [person] in the suspect's position would have understood his situation. The inquiry is not based on the subjective views harbored by either the interrogating officers or the person being questioned. The long-held standard is whether a reasonable person in the defendant's position would have believed he was free to leave. (See discussion in *State v. Ahmad*, 246 NJ 592, 610-12 (2021))

3.) Impact of erroneous admission of a confession - If a defendant's un-Mirandized statement is admitted into evidence in error, an appellate court will not reverse the conviction unless the error was “of such a nature as to have been clearly capable of producing an unjust result.” R. 2:10-2. Stated differently, the error must be ‘sufficient to raise a reasonable doubt as to whether it led the jury to a result it otherwise might not have reached.

4.) Criteria for judging voluntariness of *Miranda* waiver – Totality of the circumstances:

Every case must turn on its particular facts. In determining the issue of voluntariness and whether a suspect's will has been overborne, a court should assess the totality of all the surrounding circumstances. It should consider the characteristics of the suspect and the details of the interrogation. Some of the relevant factors include the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved. A suspect's previous encounters with the law has been mentioned as an additional relevant factor.

5.) Burden of proof – The burden of production/proof is on the State to prove voluntariness beyond a reasonable doubt, both during a preliminary suppression hearing and at trial. NJRE 104(c). *Rules of Evidence* apply to this preliminary hearing. *State v. Galloway*, 133 NJ 631 (1993).

The standard is that the prosecution must ‘prove beyond a reasonable doubt that the suspect's waiver was knowing, intelligent, and voluntary in light of all the circumstances. *State v. Tillery*, 238 N.J. 293, 316 (2019).

6.) Use at trial - It also is well-established that while a statement taken in violation of *Miranda*'s strictures is automatically inadmissible in the State's case-in-chief, such a statement may nonetheless be admissible for the limited purpose of impeaching a defendant's testimony. *State v. Burris*, 145 N.J. 509, 535, 679 A.2d 121 (1996). Before admission for that purpose, however, the statement must be found to be trustworthy.

7.) Lies, trickery and deception - Police may use lies and deception during an interrogation with certain limitations, including:

i.) A police officer cannot directly or by implication tell a suspect that his statements will not be used against him because to do so is in clear contravention of the *Miranda* warnings;

ii.) Making false promises of leniency that, under the totality of circumstances, have the capacity to overbear a suspect's will;

iii.) Minimizing the importance of *Miranda* rights (“It is just a formality.”).

iv.) Fabrication of physical evidence - The fabrication of evidence by police to elicit a confession and admission of that evidence at trial, violates due process, and any resulting confession is *per se* inadmissible. *State v. Patton*, 362 NJ Super. 16 (App. Div. 2003)

8.) Special procedural rules for police during interrogations

i.) Attorney available - To satisfy *Miranda* 's requirement of a knowing waiver, police officers must inform a suspect in their custody if an attorney has been retained and is available for the suspect. *State v. Reed*, 133 N.J. 237, 269 (1993)

ii.) Active warrant - The police must inform the subject that a criminal complaint or arrest warrant has been filed or issued against him and he otherwise does not know that fact. *State v. A.G.D.*, 178 NJ 56 (2003); *State v. Vincenty*, 237 NJ 122 (2019).

iii.) Juveniles - The role of a parent in the context of a juvenile interrogation takes on special significance. In that circumstance, the parent serves as advisor to the juvenile, someone who can offer a measure of support in the unfamiliar setting of the police station. Thus, we have emphasized that “[w]henver possible and especially in the case of young children no child should be interviewed

except in the presence of his parents or guardian.” *State v. Presha*, 163 NJ 304 (2000)

iv.) Equivocal assertion of right to remain silent - Federal law - When a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning, an interrogating officer need not suspend questioning to clarify the remark..(*Davis v. United States*, 512 US 452 (1994))

v.) New Jersey law - When a suspect makes a statement that arguably amounts to an assertion of *Miranda* rights and the interrogating agent recognizes that the statement is susceptible to that construction, questioning should cease and the police should inquire of the suspect about the correct interpretation of the statement. *State v. Chew*, 150 NJ 30, 62 (1997).

vi.) When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as *Edwards*, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. *Edwards v. Arizona*, 451 US 477, 484-85 (1981).

vii.) Fresh *Miranda* warnings – The prosecution cannot use any statements made during [the defendant's] second interrogation, before which new *Miranda* warnings were not given. *State v. McCloskey*, 90 NJ 18, 30 n.3 (1982).

9.) Voluntariness vs. diminished capacity – *State v. Burney*, ___ N.J. Super. ___ (App. Div. 2022) (In hospital connected to an IV line); *State v. Ahmad*, 246 NJ 592 (2021) (Just had a bullet removed); *State v. Warmbrun*, 277 NJ Super 51 (App. Div. 1994) (Intoxicated defendant – The testimony indicated that, although defendant was very intoxicated, he was capable of communicating and that he was responsive in answering questions and could answer correctly questions such as his name, age, etc. The court found that

this testimony was credible and that the evidence indicated a knowing and intelligent waiver given defendant's continued discussion of the matter. This finding is supported by substantial credible evidence in the record.)

10.) Scrupulously honored - Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; and *a statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.* Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. *Michigan v. Mosley*, 423 US 96 (1975). Fresh *Miranda* warning (and a voluntary waiver) must be provided if subject subsequently changes his mind. *State v. Hartley*, 103 NJ 252 (1986).

Police response to attorney request

Law enforcement officers must convey certain important warnings to individuals before they can be interrogated while in custody. Among other familiar principles, suspects must be told they have the right to remain silent and that anything they say can and will be used against them.

In this appeal, a detective administered *Miranda* warnings but repeatedly undermined them throughout an interrogation. To encourage defendant to confess, the detective, for example, said the warnings were “[j]ust a formality” and that anything discussed would remain “confidential between us.” Just the opposite is true, however.

A defendant's statement to the police, made in custody, is admissible if it is given freely and voluntarily, after the defendant received *Miranda* warnings, and after he knowingly, voluntarily, and intelligently waived his rights. The State must prove beyond a reasonable doubt that a defendant's waiver was valid. Courts look to the totality of the circumstances to assess whether the State has met its burden.

Because a detective here repeatedly contradicted and minimized the significance of the *Miranda* warnings -- starting at the outset of the interrogation and continuing throughout -- the State cannot shoulder its heavy burden. We therefore affirm the judgment of the Appellate Division majority, which concluded defendant's statement had to be suppressed.

State v. Dorff, 468 N.J. Super. 633 (App. Div. 2021)

Police response to attorney request

In this appeal the court held that defendant's Fifth Amendment right to counsel was violated during a stationhouse interrogation, reversing the trial court order denying defendant's suppression motion. Detectives at the outset of the interrogation advised defendant of her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). During the interrogation, defendant made several references to her need to speak with an attorney. The court held that defendant's statement, "[t]hat's why I feel I might need a lawyer," was sufficient to invoke her right to counsel. A detective then commented, "[w]ell, I mean that's a decision you need to make. . . . But if you didn't do anything [wrong], you certainly don't need to have [an attorney]." Defendant immediately responded that she felt she had not done anything wrong and elected to continue with the interrogation. She eventually made an inculpatory admission.

The court ruled the detective's brief, spontaneous comment undercut the *Miranda* warnings and impermissibly burdened the Fifth Amendment right to counsel. By suggesting in effect that innocent persons do not need an attorney, the detective implied that a request to terminate the interrogation to speak with counsel would evince a consciousness of guilt, thereby discouraging the assertion of the right to counsel. The court emphasized the State bears the burden to show scrupulous compliance with *Miranda*, adding that there is no "good faith" exception to the *Miranda* rule. Rather, the court held, a *Miranda* violation such as the one that occurred in this case triggers the exclusionary rule whether it was intentional or inadvertent.

State v. Diaz, 470 N.J. Super. 495 (App. Div. 2022)

Trickery in Interrogation by police (Pre-Sims case)

This interlocutory appeal arises from an ongoing prosecution for strict liability for drug-induced death, N.J.S.A. 2C:35-9, following a fatal heroin overdose. The State appeals from a trial court order suppressing incriminating statements defendant made during a stationhouse interrogation because the officers did not advise him that a death had occurred and that he was facing prosecution for a first-degree homicide offense. The trial court had initially held the statements were admissible but granted defendant's motion for reconsideration that cited to the majority opinion in *State v. Sims*, 466 N.J. Super. 346 (App. Div.), certif. granted, 246 N.J. 146 (2021). While the parties and the trial court knew that the Supreme Court had granted certification, they appeared to be unaware that the Supreme Court had stayed the *Sims* opinion.

In *Sims*, the majority announced a new *per se* rule that when police make an arrest following an investigation, they must at the outset of a custodial interrogation advise the interrogee of the offense(s) for which he or she was arrested regardless of whether a complaint-warrant or arrest-warrant has been issued. 466 N.J. Super. at 367. The question to be addressed by the Supreme Court is: "[w]ere the officers required to advise defendant, who was not charged with any offenses at the time, why he was arrested before proceeding with the custodial interrogation."

In the present case, the court follows an alternate analytical route that does not depend on the outcome in *Sims*. The court leaves to the Supreme Court to decide whether police may remain silent during a *Miranda* colloquy with respect to the essence of unfiled charges for which the interrogee was taken into custody. Rather, the court focuses on the impact of the police decision in this instance to advise defendant of the reason for his arrest in a manner that was misleading. Under this analytical approach, the failure to advise defendant of the overdose death was a relevant factor to be considered in determining whether defendant's waiver of *Miranda* rights was made knowingly.

The court concludes, considering the totality of the circumstances, the State failed to prove beyond a reasonable doubt that defendant's waiver of his right against self-incrimination was made knowingly because the detectives affirmatively misled defendant by providing a deliberately vague and incomplete answer to his question of why he was taken into custody. The court reasons that it is one thing for police to withhold information; it is another

thing entirely for them to provide an explanation that creates or reinforces a false impression.

The court recognizes that police are permitted, within limits, to use trickery or deception in the course of a custodial interrogation. The court draws a fundamental distinction, however, between police trickery with respect to the strength of the evidence against an interrogee on the one hand, and trickery with respect to the seriousness of the offense(s) for which he or she was arrested on the other hand. While police are allowed to use certain forms of trickery following a knowing and voluntary *Miranda* waiver, the court finds no New Jersey precedent that authorizes trickery as part of the waiver process. Indeed, the court notes that *Miranda v. Arizona* expressly held that "any evidence that the accused was . . . tricked . . . into a waiver will, of course, show that the defendant did not voluntarily waive his [or her] privilege." 384 U.S. 436, 476 (1966).

The court adds that affirmatively misleading an interrogee about the seriousness of the offense for which he or she was taken into custody strikes at the heart of the waiver decision. The court does not, however, propose a categorical, per se rule that any deception or trickery of this type automatically warrants suppression. Rather, the court holds that the use of such a stratagem is an important factor to be considered as part of the totality of the circumstances in determining whether the State has met its burden of proving, beyond a reasonable doubt, that defendant made a knowing waiver of his right against self-incrimination.

Finally, the court rejects the State's argument that the detectives did not have probable cause to charge defendant with the strict liability for drug-induced death offense pending the completion of autopsy and toxicology reports. Applying de novo review, the court concludes that the detectives were aware of facts constituting probable cause that defendant committed the strict liability homicide offense, viewed from the standpoint of an objectively reasonable police officer.

State v. Sims 250 N.J. 189 (2022)

Basis for *Miranda* waiver

The Court declines to adopt the new rule prescribed by the Appellate Division and finds no plain error in the trial court's denial of defendant's motion to suppress his statement to police. The Court also concurs with the trial court that the victim's testimony at the pretrial hearing was admissible under N.J.R.E. 804(b)(1)(A)'s exception to the hearsay rule for the prior testimony of a witness unavailable at trial, and that the admission of that testimony did not violate defendant's confrontation rights.

1. The Court first considers the trial court's decision denying defendant's motion to suppress his statement to police. Under New Jersey law, the State bears the burden to prove beyond a reasonable doubt that a suspect's waiver of his privilege against self-incrimination prior to an inculpatory statement was knowing, intelligent, and voluntary in light of all the circumstances. In *State v. A.G.D.*, the Court departed from the totality-of-the-circumstances rule and required law enforcement officers to inform a suspect that a criminal complaint has been filed or arrest warrant has been issued before interrogating him. 178 N.J. 56, 68-69 (2003). The Court reasoned that the failure to inform a suspect that a criminal complaint or arrest warrant has been filed or issued deprives that person of information indispensable to a knowing and intelligent waiver of rights. The rule announced in *A.G.D.* is clear and circumscribed. If a complaint-warrant has been filed or an arrest warrant has been issued against a suspect whom law enforcement officers seek to interrogate, the officers must disclose that fact to the interrogatee and inform him in a simple declaratory statement of the charges filed against him before any interrogation. The officers need not speculate about additional charges that may later be brought or the potential amendment of pending charges.

2. The Appellate Division's expansion of the rule stated in *A.G.D.* is unwarranted and impractical. *A.G.D.* mandates disclosure of factual information about pending charges that the officer can readily confirm and clearly convey. The principle stated in *A.G.D.* stands in stark contrast to the Appellate Division's expanded definition of an arrestee's *Miranda* rights, which relies not on an objective statement of the charges pending against the arrestee, but on an officer's prediction, based on information learned to date in a developing investigation, of what charges may be filed. The Appellate Division's new rule would starkly depart from the Court's prior precedent and from the law of every other jurisdiction. The Court affirms the trial court's application of the totality-of-the-circumstances standard to deny

defendant's motion to suppress his statement. Defendant was read his *Miranda* rights and waived those rights verbally and in writing.

State v. Gonzalez, 249 N.J. 612(2022)

Basis for *Miranda* waiver

Defendant's question about the attorney was an ambiguous invocation of her right to counsel. Under settled New Jersey law, see, e.g., *State v. Reed*, 133 N.J. 237,253 (1993), the detective was required to cease questioning and clarify whether defendant was requesting counsel during the interview. Because the State played defendant's recorded statement at trial and read the apology note -- written at the detective's suggestion -- to the jury, the error in failing to suppress that evidence was harmful. The Court also finds plain error in the trial court's admission of certain challenged evidence, and it provides guidance for the proceedings on remand.

If a person subject to custodial interrogation "states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). "The United States Supreme Court has drawn a strict line to identify what will qualify as a request for counsel." *State v. Alston*, 204 N.J. 614, 620 (2011). Under the federal bright-line rule, officers must stop questioning a suspect only when the suspect's request for counsel is "unambiguous or unequivocal." *Davis v. United States*, 512 U.S. 452, 461-62 (1994). If a suspect makes an ambiguous or equivocal statement regarding the right to counsel, officers are under no obligation to stop questioning him.

In *State v. Chew*, the New Jersey Supreme Court rejected the standard enunciated in *Davis* and continued to require, in accordance with state precedent, that interrogators conduct an appropriate inquiry into a suspect's ambiguous invocation of the right to counsel. 150 N.J. 30, 63 (1997). Under New Jersey's more flexible approach, a suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel. The Court provided guidance in *Alston* and reaffirmed that, in situations where "a suspect's statement 'arguably' amount[s] to an assertion of *Miranda* rights," conducting a follow-up inquiry is the only way to ensure that a suspect's waiver of their right was knowing and voluntary. 204 N.J. at 621-23. The Court instructed that where the suspect's "statements are so ambiguous that they cannot be understood to be the assertion of a right, clarification is not only permitted but needed." The *Alston* Court noted, however, that officers are under no obligation to give a suspect advice about whether he should assert any of his rights.

Here, defendant's first mention of counsel, "[b]ut what do I do about an attorney and everything?" was an ambiguous invocation of her right to

counsel that required the detective to cease all questioning and seek clarification. Defendant did not seek an opinion about whether she should have a lawyer present, but rather inquired about the availability of counsel. Additionally, defendant's query made it unclear whether she wanted an attorney present at that time or in the future. Thus, defendant's statement was "arguably" a request for counsel. Although the detective was under no obligation to give defendant any advice about obtaining counsel, she was required to cease the interrogation and ask follow-up questions to clarify defendant's obstruse statement regarding counsel.

Because the detective made no further inquiry, all portions of defendant's statement made thereafter, as well as defendant's note of apology to the [victims] should have been excluded at trial; admitting the evidence was plain error.