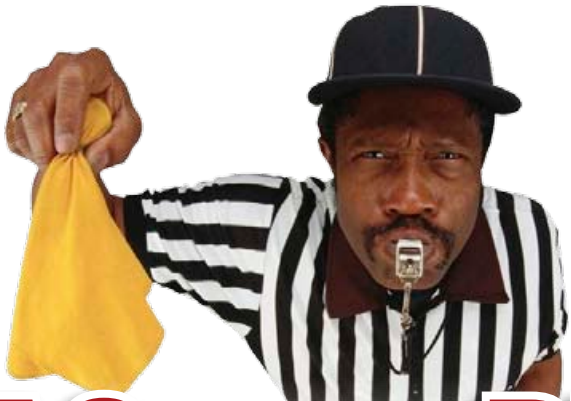
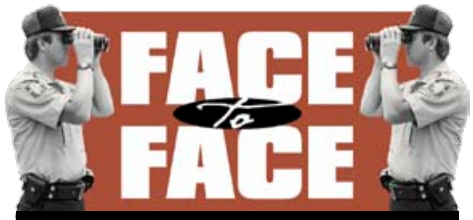


FLAG ON THE PLAY

Involuntary statement - Case dismissed

PART I of II



Interpersonal Communications for Conservation Officers

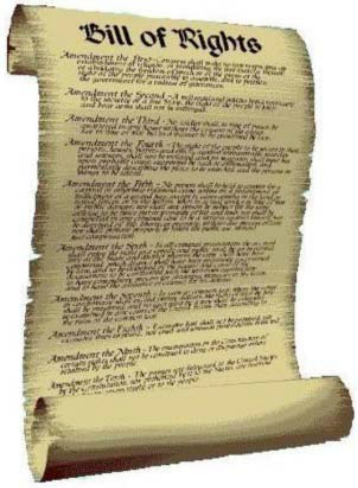
By Jeff Baile
Certified Forensic Interviewer

IT was a holding call which erased an almost sixty yard gain for my hometown team. Behind me a visibly upset parent sprung to his feet and, with cupped hands, yelled out, "Stupid mistake guys, it's all coming back!" That last bit, *it's all coming back,* caught my attention. Hadn't heard that quip since I retired, but boy did it resonate. I used to hear the defense attorneys mumble those words in the courthouse halls when the police had extracted an involuntary confession. It was said to me many times. A weird image for sure but as the penalty yardage was marked off, this crazy picture formed in my mind of a referee standing in the interrogation room throwing flags left and right yelling, "Objection, involuntary statement, move to dismiss your honor." Indeed though, all of us would really pay attention to what we say and do if this was the case. Just imagine how precise we would be knowing someone could throw an interrogation flag right there in the room.

IT'S US, IT'S NOT THEM

"Motion granted," the judge ordered after defense attorney Robin Boucher requested my breathalyzer test be excluded. With no confession to fall back on and marginal field sobriety scores, the state's attorney had to dismiss.

No person … shall be compelled in any criminal case to be a witness against himself …



I really wanted to know how he saw that small contradicting nuance in my report that got his client off. So I asked Robin to join me for lunch. I'm sure glad I did because it was then I learned some key information about defense attorneys I carried the remainder of my career. When asked how he formulated his questioning he shrugged saying, "No biggy Jeff," as he grabbed a sheet of paper. "I saw it right away; we look at things differently than you guys."

To demonstrate he riddled the paper with holes then held it out and said, "This is what your case looks like after I read it for the first time." Without pause he expanded those holes three-fold tearing the paper to shreds saying with an accompanying smirk (I really do remember that smirk), "And this is what your case looks like after I cross-examine you." It was his next statement that got me:

"Defense attorneys just exploit the loopholes that you create for us."

Wow!

In my case, the loophole might have seemed slight, but in legal speak it was cavernous to the defense attorney's trained eye. The mandated observation period for a DUI in Illinois is 20 minutes before the suspect can take the breath test. My observation period was incorrectly documented at 18 minutes;

18 isn't 20. Robin said he saw the timing loophole after his first read. Wow again.

That serendipitous moment back in the 80's really caused me to overarch and extend Boucher's loophole proclamation directly to the interrogation process. If he could see that DUI conflict he could easily spot an interrogation anomaly. The meeting triggered me to think inversely, deeper, more analytical when I encountered people. How would defense respond to what I'm about to say or do? How is this next ten minute talk going to playout six months from now in court? If we don't pay close attention to legal procedures we can unwittingly become an ally for the defense by creating the legal loopholes our suspects escape through.

INVOLUNTARY STATEMENTS AS IT APPLIES TO MIRANDA

Miranda v. Arizona, 384 U.S. 436 (1966)

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently…

Both times I viewed the Constitution in Washington D.C., I stared so long at the Bill of Rights the security guard had to ask me to keep moving. So I circled back and saw it again and again, and got yelled at again and again. I was entirely mesmerized with that document because, in a peculiar way, it felt like I was finally meeting my lifelong distant adversary. Now, right in front of me there it was, in tangible form, the root of all my suppression hearings. The essence of just about everything a conservation officer does.

Over the years, I have become aware that most officers do not have a lot of court time. Not the case for me. In the Peoria area, for whatever reason, it was almost robotic to request a trial. Even for small violations. Still is. I testified in hundreds of bench trials and hundreds of suppression hearings, even had three jury trials over fishing license violations. Almost all of these proceedings involved some facet of Fourth and Fifth Amendment issues. Right out of the academy, it was trial by fire and I became real good real fast at managing my confession cases. After losing trial after trial, I made myself a Miranda and confession "expert", paying extraordinarily close attention to exactly what I said and exactly what I did every single time I was mining incriminating statements. And sure enough, I wasn't getting flagged as much.

"Defense attorneys just exploit the loopholes that you create for us."

THIS BEAST CALLED "CUSTODY"

We all know the two criteria of Miranda – custody and questioning. A large majority of Supreme Court Miranda cases really do, however, revolve around the custody prong, which is one place our imaginary referee may throw a flag.

It's pretty easy to tell when someone is in actual police custody. Handcuffed, in jail, back of a cage car or told they're under arrest. Clearly Miranda sensitive conditions and the courts presume any statement to be involuntary solely from the lack of a Miranda reading under these circumstances. It's the "… deprived of freedom in any significant way…" we need to learn to regulate on the spot. Any significant way is and always will be a subjective condition ripe for instantly morphing non-custody to custody merely by a slight change in our language or behavior. Shifting from investigatory to accusatory can be tricky though considering our inspection authorities. We must be careful. I had trouble with this particular stage my entire career. I found myself always trying to soften the encounter as much as possible, relentlessly adjusting. Consider, then, when we accuse this will be the exact moment, as the Supreme Court says, "Our adversarial process begins to operate..."

Whether a suspect is in-custody for Miranda purposes is a neutral determination involving two thoughts: 1) what were the circumstances surrounding the interrogation; 2) would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. In Stansbury v. California, 511 US 318, the court, using the "totality of the circumstances" criteria, states; "The police and courts must examine all the circumstances surrounding the interrogation…including those that would have affected how a reasonable person in the suspect's positon would perceive his or her freedom to leave."

There are countless times when we would want the person to remain non-custodial but it will always be and should be an officer's subjective decision to, when in doubt, read Miranda. If, however, we still want to question freely but nonetheless be able to use any inculpatory statements that might pop up, then we must refrain from doing certain things that may cause the person to perceive they were in custody.

Return personal property – An easy item defense can add to their list would be to show the government controlled defendant's personal property. An insurance card, fishing / hunting license, gun, trap, coat, hat, etc., anything in possession of the government at the time of questioning, would provide the defense a decent shot at successfully arguing their client believed they were being restrained.

To gain courtroom experience, I used to observe random trials from DUI's to animal control cases to

retail thefts to drug cases, even a murder trial. It's quite an eye opener to watch the action with no presupposed ideas. Try it sometime. One trial involved a state trooper on a simple marijuana case. The defense cleverly allowed the officer to back himself into a hole. From there, he had to admit that the admission (no Miranda) to him, "Yeah that's mine," came when the trooper still possessed the suspect's driver's license. Defense successfully convinced the court his client could not legally drive (could not leave) without a driver's license. Therefore he was in custody for Miranda purposes. The case was gone. If you have taken anything from the subject and assuming it's safe to do so, return it before asking incriminating questions. This issue was typically the first line of defense questioning in my cases.

Proxemics – Consent requires the subject had not been forced or intimidated by the government, even subtly, into believing he must acquiesce. Proxemics can play a role in this. Pay close attention to your precise whereabouts when questioning or asking permission to search. Standing directly in front of someone can be deemed a trapping of custody under the right circumstances. For example, a person walking on a narrow park trail lined with deep gullies may be able to successfully claim police blocked the only way forward. Thus they were not free to leave. An angler on a narrow peninsula, a jetty for example, could have a legitimate argument he was not free to leave because police were blocking the only way off the breakwater. Multiple officers exacerbate these examples. Try to ask your questions standing side by side and walk *with* the person.

No enforcement – To vividly demonstrate the subject truly was not in custody, no enforcement action whatsoever should be taken after a confession. This can be tricky especially with serious violations because the urge will be strong to arrest. If a serious violation is at hand, it's probably best the read the warnings. That said, if it was a confession case, as best I could, it was my practice to postpone issuing any paperwork. Sometimes the delay would be only a few hours. Still, that was sufficient time to illustrate the confession came from a non-custodial environment.

Ask. Don't tell – Requests and commands are as different as buck and doe. Where you have a choice, request first then request again, then again … and then again. Giving orders creates that dreaded loophole the defense can leverage as custodial parley. Place the person's exact answer, in quotes, in your report such as "sure y'all come right on in" or "yeah I shot that damm thing." Make sure, as well, that your body language matches what you are saying, especially voice tone.

We can testify they were not in custody all day long, but we really do have to demonstrate this to the court. We do this by, among other things, telling them they were free to go, that they can leave anytime (then actually let them leave with no paper), that the doors are all unlocked, and they are not under arrest. In addition, now we can also say we did not possess their personal property, we were not blocking their progress, we did not use any coercive language / behavior and made requests not issue commands. No doubt defense will always have something to bring up even given these countermeasures. Why fuel the fire?

In **PART II**, we will continue to examine involuntary statements, specifically addressing promises of benefit and creating interrogation stamina.

I am grateful to Don Hays from Illinois Prosecutor Services for guidance with case law search. A complete list of article references available from IGW (contract the editor).

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