



# El Segundo Police Department

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## TRAINING BULLETIN

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### **MIRANDA: Establishing motive is an incriminating matter (People v. Anthony 2019)**

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One area that seems to be a mine field for law enforcement with *Miranda* law is when and to what extent can law enforcement speak with a Defendant who has invoked his 5th Amendment rights under *Miranda* but has now reinitiated contact with the police. The U.S. Supreme Court in *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 makes it clear that an accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation... until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Having said that, we still must show that the suspect makes a voluntary, knowing and intelligent waiver. The reinitiating of contact is not enough without a waiver. *People v. Anthony* (2019) 32 Cal.App.5th 1102 illustrates this issue, and what constitutes "incriminating" evidence.

Stephon Anthony and 3 of his fellow Oakland gang members were tried for the murder of Charles Davis and two others. Charles Davis' murder appeared to be in retaliation for the April 23, 2009 murder of Anthony's friend and fellow Oakland gang member. On April 23, 2009, in Oakland, California, three Oakland gang members had been gunned down, likely by a rival Berkeley street gang. One Oakland gangster, Ngo, died and two others were injured, including Stephon Anthony. In retaliation, on May 16, 2009, Charles Davis was walking down the street near his Berkeley home when a gold Cadillac drove up, a masked man jumped out with an automatic weapon and gunned Charles Davis down. The 3 occupants of the Cadillac cheered and did donuts in the street, picked up the shooter and sped off. Police took chase until the high-speed pursuit ended with the Cadillac colliding into another car, killing the driver and a nearby pedestrian. Stephon Anthony was arrested on scene along with one of the passengers. The other two participants were arrested later. Charles Davis was not a gang member, but his brother Jermaine Davis was a member of the Berkeley street gang believed to have orchestrated the April 23, 2009 shooting. All four

occupants of the Cadillac were charged and convicted of the murder of Charles Davis, and the other two innocent victims, with gang enhancements. Although defense only appealed the admission of one of Defendant Anthony's three statements, let's look at each one under *Miranda*.

On April 23, 2009, Defendant Anthony was questioned by Oakland detectives during their investigation of the murder of Ngo. Defendant Anthony was questioned at the police department. He was not mirandized. Police indicated he was not mirandized because he was only a victim and a witness to the shooting, not a suspect. So, although during the interview Anthony provided incriminating information regarding his gang involvement and the gang beef between the Berkeley gang and Oakland gang used in his trial for murdering Charles Davis, no *Miranda* violation occurred because no one could foresee this information would be incriminating for the future crime he hadn't committed yet.

On May 17, 2009, Defendant was interviewed by Berkeley police after his arrest for the murder of Davis. Defendant Anthony was advised of his *Miranda* rights using an admonishment and waiver form. The officer told Defendant Anthony where to initial but did not pay attention to what Defendant Anthony actually wrote on the form. Anthony was asked if he wished to speak with the officers and his answer was unclear, but the officer believed it must be affirmative because Anthony engaged in the conversation. However, before asking further questions, the officer noticed Anthony had written "No" on the waiver form to whether he wanted to speak to the officers. The officer, deciding this was unclear, assumed Anthony wanted to talk because he continued to do so and did not tell the officer he did not wish to speak to him. The officer proceeded to ask him questions until Anthony then said, "I wish I had my attorney present," and "I don't have nothing to say to you." At this point, officers ceased questioning him. Later in the day, another officer, knowing Anthony had already been questioned by two other officers, went to photograph Anthony's injuries in his jail cell. Defendant asked the officer what he was being charged with and the officer told him he was charged with three counts of murder. To that, Anthony said, "I didn't mean to kill those people. Man, I didn't mean for this to happen. They wouldn't stop chasing me. Why wouldn't they stop chasing me?" The officer then told Anthony that they pretty much knew what happened and who the others were in his vehicle. When the officer mentioned the names of two of the other occupants, Anthony replied, "You're on the right track." The officer continued, telling Anthony that he knew Ngo had been killed three weeks earlier. Defendant Anthony told the officer he was thinking of talking to detectives about that murder. The officer told him to let jail staff know if he wanted to talk to the detectives.

All of the statements made on May 17, 2009 were excluded at trial. Defendant signed the waiver form "No," which is about as unequivocal as you can get. He then later invoked his right to an attorney and again his right to remain silent. I am not privy to the arguments made in the trial court, but I'm sure the prosecutor argued that the initial confessions about the deaths resulting from the car chase should be admissible because the officer simply answered Defendant Anthony's question; however, the trial court likely excluded them because the officer continued to converse about other topics and so the court deemed it to be

"interrogation" likely to elicit an incriminating response. This was not a knowing and intelligent waiver of *Miranda*. *Miranda* does not simply refer to questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from a suspect. Even if Anthony's question was deemed "re-initiated contact," the officer can't elicit incriminating information without a waiver of his *Miranda* since he had already invoked. Thus, these were additional questions or actions after Defendant had invoked his rights under *Miranda*.

On May 18, 2009, the Oakland officer assigned to investigate the April 23rd homicide got word that Anthony wished to speak with him, so he obtained a removal order from the court and had him transported to the police station. The detective knew Anthony was a suspect in the May 16, 2009 homicide for which he was now in custody. The detective also knew the two gang homicides were likely related. Anthony was placed in the interview room in restraints at 5:49pm but was not interviewed by detectives until 10:20pm. Detectives did not re-Mirandize Anthony. Instead, officers explained to him that they could not discuss the May 16th homicide with him because he had invoked his right to an attorney. They assured him they would not be discussing that homicide but were here to talk to him about the Ngo homicide. At no time did they ask him why he had re-initiated contact or what he was there to tell them. Rather, officers jumped right in with questions about Anthony's gang involvement and the beef between the Berkeley gang and his gang. Anthony, upon being shown a picture by officers, identified victim Charles Davis' brother Jermaine as the one he believed called for Ngo's murder. At trial, the prosecution sought to introduce this interview to show motive for Anthony and the other Defendants to kill Davis and to show this was for the benefit of the gang. The trial court allowed it, indicating that since Anthony had reinitiated the contact, he implicitly waived his right to counsel from the day before. The trial court ended its analysis there. The trial court believed that the fact the prosecution wants to offer it against Defendant Anthony is not relevant to the analysis. The Appellate Court disagreed.

First, the Appellate Court found Anthony to be "in custody" at Oakland PD because he was not free to leave and had been left handcuffed in the interview room for almost 5 hours before questioning began. The Appellate Court further found that the waiver of his *Miranda* rights from the previous day must be knowing and intelligent. The court discussed a couple scenarios. One, if a defendant requests counsel, then interrogation must stop until an attorney is present, but "nothing in the Fifth and Fourteenth Amendments prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial." Not the case here. Next, if the Defendant's statement is not only voluntary, but constitutes a knowing and intelligent waiver of his right to counsel, then interrogation can resume. The best way to confirm it is a knowing and intelligent waiver is to re-Mirandize the Defendant, as the court will consider that in light of the totality of the circumstances. The initiation of a conversation with officers by a suspect is strong and essential evidence of a knowing and intelligent waiver, but not dispositive. Here, it was not dispositive because although Anthony asked to speak to Oakland PD, no one ever asked him why or what he wished to discuss. Instead he was interrogated on the topics the officers

wished to discuss, which was incriminating to him. More importantly, instead of ensuring he was waiving his rights now, officers said "once another agency arrests you, then you, you know, you invoked your right to counsel... You know what that mean? When they start questioning, you asked for a lawyer?" reaffirming that he had invoked. They explained they aren't allowed to talk to him about that case... exactly opposite of getting a knowing and intelligent waiver. After confirming his invocation from the day before, the officers assured him they would not ask any questions regarding the Berkeley homicide - "in effect promising they would not ask him questions that could cause him to incriminate himself in that case." Of course, the information elicited from Defendant incriminated Defendant by providing motive and gang affiliation for that homicide.

The good news is that the officers had built a solid case without these statements so other evidence presented at trial was overwhelming. Thus, although deemed a *Miranda* violation, it was harmless error and the verdicts were still affirmed.

What does this mean for you? The best practice is to always re-mirandize a Defendant after they have invoked and later re-initiated contact with you, no matter what topic you choose to discuss. You never know what will become relevant, and therefore likely incriminating, to the pending case.