# The California Legal Update

*Remember 9/11/2001: Support Our Troops; Support our Cops*

Vol. 25 May 26, 2020 No. 7

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## THIS EDITION'S WORDS OF WISDOM:

"*My wife and I have decided we don't want to have children. We'll be telling them tonight at dinner.*" (Unknown)

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**CASE LAW:**

***The Sixth Amendment and the Right to Confrontation*:**
***Hearsay Testimony and Deported Witnesses*:**
***Pre-Preliminary Examination "Due Diligence" Requirements*:**

***People v. Torres* (May 4, 2020) __ Cal.App.5th __ [2020 Cal.App. LEXIS 375]**

**Rule:** Failure of the prosecution to take certain steps to insure that preliminary hearing witnesses who are subject to deportation are available to later testify at trial, or to otherwise notify the defense before the prelim of this possibility, is a Sixth Amendment right to confrontation violation.

**Facts:** Albert Torres (defendant), Ramon Quinones (victim), and Alex Hernandez (witness) were all members of the Eastside Longos criminal street gang. Although defendant and Quinones had been friends all their lives, they apparently got into a power struggle in 2016 over control of their gang. Determined to settle their differences like the gangsters they were, they squared off to fight it out in an ally on March 29th with Hernandez as the only witness. The fight resulted in defendant as the victor, having stabbed Quinones with a knife. As a result of this altercation, defendant was charged in state court with attempted murder and assault with a deadly weapon. At the preliminary hearing on August 2, 2016, Quinones and Hernandez testified to the circumstances surrounding the fight. Hernandez, however, was brought to the prelim by federal Immigration and Customs Enforcement (ICE) officers; he being held by the Feds as an illegal alien pending deportation. By the time of the trial in July, 2017, Hernandez had been deported to Guatemala; a country with whom the United States apparently does not have any agreements allowing for the return of a witness to the U.S. for trial. At a pretrial readiness conference (with a different prosecutor, defense attorney, and judge), the then-assigned prosecutor cited authority to the effect that attempts to secure the attendance at trial of a witness who had been deported automatically established "due diligence" in attempting to locate that witness. (See *People v. Hernandez* (2010) 49 Cal.4th 613; a different "Hernandez" than the witness here) A DA Investigator had in fact unsuccessfully attempted to locate Hernandez's whereabouts in the hopes of contacting him and persuading him to return to the U.S. to testify. The prosecutor therefore asked the trial court to declare Hernandez to be an "unavailable witness" (per Evid. Code § 240) and to allow the reading of his prior preliminary hearing testimony to the jury pursuant to the hearsay exception as described in Evidence Code § 1291 ("Former Testimony"). It was agreed, however, that the prosecution hadn't taken any steps to keep Hernandez in the country. It was also stipulated that the defense never received notice that Hernandez was subject to deportation or that he might be gone by the time of trial (which is hard to believe in that when he testified at the prelim, he was in obvious ICE custody). After further evidentiary hearings, the trial court granted the prosecution's motion and allowed Hernandez's preliminary hearing testimony to be read to the jury. Hernandez's testimony, identifying defendant as the one who stabbed Quinones, became particularly important when, at trial, Quinones (claiming to have been high on dope) could no longer remember who it was that stabbed him. Defendant was convicted on both charges along with various enhancements. He appealed.

**Held:** The Second District Court of Appeal (Div. 8), in a split (2-to-1) decision, reversed. Following the dictates of a very similar case (i.e.: *People v. Roldan* (4th Dist. (Div. 3, Orange County), 2012) 205 Cal.App.4th 969.), a majority of the Court here held that the prosecution had failed to prove that they had done enough to insure the attendance of Hernandez at defendant's trial, thus depriving defendant of his Sixth Amendment right to confrontation. In both *Roldan* and this case, a necessary witness was deported after testifying at each respective defendant's preliminary examination, rendering the witness unavailable to testify at trial and necessitating the use of each witness' preliminary hearing testimony as read to the jury. This has the drawback of the jury not being able to hear firsthand the witness's account in what is typically a more abbreviated recitation of what he saw and/or heard, while also depriving the jury of the opportunity to gage the witness's demeanor in evaluating his credibility. The basic rules are simple: A defendant has a Sixth Amendment right to confront and cross-examine all witnesses at trial that the prosecution chooses to use. This right, however, is not absolute. The "former testimony" of a witness (such as presented at a preliminary examination) is admissible as an exception to the hearsay rule pursuant to Evidence Code section 1291 *if* it is proved by the prosecution that the witness is "unavailable" to testify at the trial, as "unavailability" is defined in Evidence Code § 240. To prove unavailability, it must be shown that the prosecution has exercised "*due diligence*" in its efforts to secure that witness' attendance at trial. What constitutes due diligence in any particular case depends upon the circumstances. Here, a DA Investigator did in fact make attempts to locate defendant, only to discover that he had been deported to Guatemala; a country with whom there are no treaties or other procedures for securing a witness to testify in a U.S. trial. The prosecutor here argued, and the trial court accepted, that he had exercised due diligence to locate and bring Hernandez back to testify. The Appellate Court disagreed that the prosecution had done enough, however, noting that due diligence includes the duty to make reasonable efforts *before* deportation when, as here, the prosecution knows there is a risk of deportation. Here, the prosecutor did nothing before Hernandez was deported to insure that he would be present. Citing *Roldan*, the Court lists the pre-deportation requirements for a finding of due diligence:

(1) Before the preliminary hearing, the defense must be told about the deportation risk, preferably "on the record," or at least in writing.
(2) The witness' preliminary hearing testimony may be videotaped.
(3) Judicial remedies (e.g., having the witness held as a "material witness," per P.C. § 1332), should be requested.
(4) Other "informal efforts" to delay deportation should be made such as by;
- (a) exploiting informal contacts between state and federal officials to persuade the Feds not to deport the witness,
- (b) subpoenaing the witness ahead of time,
- (c) giving that witness written notice about the trial,
- (d) impressing upon the witness that he or she is a material witness and get his or her assurance that the witness will return for trial,
- (e) giving the witness contact information so he or she can stay in touch with authorities here,
- (f) provide the witness with information and resources to facilitate his or her reentry into the United States to testify at trial, and/or

> (g) obtain (or make a record of attempts to obtain) reliable contact information about family in the United States and in the nation to which the witness will be deported.

A finding of due diligence does not require that a prosecutor do *all* of the above; just whatever is reasonable under the circumstances of the case at issue. Quoting *Rolden* (at p. 980), the Court ruled that "the prosecution 'cannot simply throw up its hands and do nothing when faced with the prospect of one of its witnesses being deported or leaving the country on his own accord. Instead, it must undertake reasonable efforts to preserve the defendant's constitutional right to be confronted with the witnesses against him.'" It was also noted that a prosecutor is not, as a general rule, required to "keep periodic tabs" of all material witnesses in any particular criminal case. But the general standards are different when the prosecution knows ahead of time that a witness is likely to be deported. Based upon the facts of this case, the Court held that the prosecutor here failed in its due diligence efforts to insure that witness Hernandez would be available for trial. As such, defendant's Sixth Amendment right to confront and cross-examine this important material witness had been denied. Also, given the fact that the only other significant evidence of defendant's guilt came from victim Quinones, who had proved himself to be "impressively unreliable," the Court found the error here to be prejudicial. Defendant's conviction, therefore was reversed.

**Note:** If you're a cop, you are probably wondering about this time what the heck this all has to do with you. *Isn't this the prosecutor's problem*? Well, "*yes*," but working on the assumption that law enforcement and prosecutors are all a part of what's commonly referred to as the "prosecution team," and assuming also that you would really like to see the efforts you made in arresting and investigating someone like Albert Torres lead to a positive result, then it would be helpful for you to tip off your prosecutor when you've got material witnesses in your case who *you* know (but not necessarily obvious to the prosecutor) are also dealing with deportation issues. The one dissenting opinion, by the way, that itself was about three times as long as the majority opinion, disagreed that the prosecution has any pre-prelim duty to warn the defense of the potential unavailability of a witness, or to do anything else to insure that the witness will be around when the case comes to trial other than to make a good-faith effort to look for him. But that opinion, and a dime, won't even get you a cup of coffee anymore. I only mention this because the *Rolden's* due diligence requirements, used here as a basis for this new decision, have yet to be tested in either the California or U.S. Supreme Courts. So we may hear about this issue again at some point.

***Border Patrol Detentions and Arrests*:**
***The Collective Knowledge Doctrine*:**
***Miranda and Selective Invocations*:**

***United States and Garcia-Morales*** **(9th Cir. Oct. 31, 2019) 942 F.3rd 474**
(See also, **782 Fed. Appx. 653**, unpublished)

**Rule:** (1) Under the "collective knowledge doctrine," the combined information known to separate officers may be sufficient to justify a detention for investigation. (2) An in-custody suspect's refusal to answer certain questions during an interrogation may, depending upon the circumstances, constitute a "selective invocation" of one's right to remain silent.

**Facts:** Border Patrol Agents arrested three undocumented aliens at the dead end of Calzada de la Fuente, a road that ends at the foothills in the Otay Mountain Wilderness Area (San Diego County), next to the U.S.-Mexico border. One of the aliens was carrying a cellphone under circumstances (not described) that led the agents to believe he was using it to coordinate with a "load driver." (I.e., a person "hired by a smuggling organization to pick up groups of undocumented aliens.") About thirty minutes later, defendant Abrahan Garcia-Morales was observed driving to the end of Calzada de la Fuente, turning around, and waiting about five minutes without entering any of the available parking lots. Defendant then left, but was followed by another border patrol agent for about six miles on the freeway. While following defendant, this agent observed defendant's "shifting eye contact." Defendant also slowed his vehicle enough to cause a safety hazard. Believing this to be consistent with the actions of an alien smuggler, and knowing that defendant had appeared to have been looking for the previously arrested illegal aliens, the agent eventually stopped and detained him. Defendant claimed at this time that he'd driven to Calzada de la Fuente to merely "scope out the area," with the intent turn any illegal aliens he picked up over to the Border Patrol. Taken into custody, defendant was later questioned by Border Patrol Agent Kahl. In a videotaped interview, defendant received and waived his *Miranda* rights. In response to Agent Kahl's questions, defendant admitted to a past attempt to transport aliens and to having been offered a job transporting aliens by a smuggler that morning. Agent Kahl asked defendant to name his smuggling contacts. In response, defendant stated that he was not "*feeling cool with that camera*" (i.e., the camera that was videotaping the interview). Asked again to "*give him a name*," defendant responded "*I don't . . .*" his voice trailing off as he shook his head "*no.*" Agent Kahl told defendant; "*alright well, well later on I'll turn off the camera and you can tell me*." Defendant nodded his head "*yes*" twice in response. This exchange lasted approximately forty-five seconds. Defendant continued answering other questions for the remainder of the interrogation. Defendant was eventually charged in federal court with the attempted transportation of aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). Those portions of the videotape depicting the above statements were played for the jury. Agent Kahl testified that defendant never did provide any actual information about his co-conspirators even after the videotape was turned off, although he did try to engage in negotiations to avoid going to jail. In closing arguments, the prosecutor focused primarily on contradictions between defendant's statements to Agent Kahl, and the statements he'd made earlier when first contacted, arguing that defendant's "evasiveness" about the other people involved showed that he had not really intended to turn over any illegal aliens he found to the border patrol, as he had claimed when first being detained. Convicted by the jury, defendant appealed.

**Held:** The Ninth Circuit Court of Appeal, in a split (2-to-1) decision, affirmed. On appeal, defendant argued that (1) he had been illegally detained, and (2) his refusal to talk about his "smuggling contacts" was a "selective invocation of his right to silence" and should not have been used either in evidence or by the prosecutor in his closing argument to the jury.
(1) *Defendant's Detention*: In a separate unpublished (i.e., not citable as case authority) and poorly written memorandum opinion, the Court unanimously held that the combination of defendant's suspicious actions at the Calzada de la Fuente dead end, its proximity to the International Border, the arrest of three illegal aliens (one with a cellphone, appearing to use it to contact a "load driver") at that location 30 minutes earlier, and then defendant's observed actions on the freeway as he was leaving the area, were, in combination, sufficient to provide the border

patrol agent with a "*reasonable suspicion to believe that criminal activity may* [*have been*] *afoot*," thus justifying the detention. Under the so-called "*collective knowledge doctrine*," the agent who made the stop adopted all the information known to the other agents who had arrested the illegal aliens earlier, and who had observed defendant's suspicious actions at Calzada de la Fuente dead end. (What, if anything, occurred after that point to justify his arrest was not challenged, nor discussed.)
(2) *The Alleged Selective Invocation*: As noted above, the jury heard evidence in the form of a videotape of the actual conversation where defendant declined to identify the persons for whom he was to transport the illegal aliens. In closing arguments, the prosecutor used this "evasiveness" on defendant's part to contradict his claim that he had intended to turn over any illegal aliens he might find to the Border Patrol. Defendant argued on appeal that the use of such evidence violated his Fifth Amendment "due process" rights. The general rule is simple: "Because the Fifth Amendment's self-incrimination clause carries an implicit guarantee that silence will carry no penalty, a prosecutor violates (a suspect's) due process (rights) by eliciting testimony about a suspect's silence." (*Doyle v. Ohio* (1976) 426 U.S. 610, 617-619.) While defendant acknowledged that he had waived his right to silence under *Miranda*, he argued on appeal that his obvious reluctance to identify his co-conspirators constituted a "*selective invocation*" to his right to silence. A majority of the Ninth Circuit didn't buy this argument. While the law recognizes the theory of a "selective invocation," the general rule is that such a mid-interrogation invocation must be clear and unambiguous. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 381-382.) It is also a general rule that merely sitting there in silence is not an invocation. (*Salinas v. Texas* (2014) 570 U.S. 178.) However, there are exceptions. (See *United States v. Wallace* (9th Cir. 1988) 848 F.2nd 1464, 1475; remaining silent during ten minutes of questioning after the admonition held to be an attempt to invoke.) Under the circumstances of this case, however, a majority of the Court held that defendant had *not* selectively invoked his right to silence. Specifically, defendant's alleged selective invocation was really no more than him telling Agent Kahl that he did not want to reveal the identities of his co-conspirators while being videotaped, but that he was open to talking about that issue later with the videotape turned off. As such, it was not error for the trial court to admit that portion of the videotape into evidence (his "evasiveness" on this issue being relevant as a contradiction to his later claim that he intended to turn over any illegal aliens he found to the Border Patrol), or for the prosecutor to talk about it in his closing arguments.

**Note:** We don't see a lot of "selective invocation" cases, so I thought this would be a good one to brief. But note that the Court was split on this issue, two-to-one, with the dissent arguing that defendant had in fact validly invoked his right to silence as to any questions about who he was working for. So it can be a close question. When in doubt, my only suggestion is to seek some clarification from your suspect before proceeding. Or, alternatively, charge on blindly (as was done here) and we'll just litigate the issue later, knowing that at the very least his statements should be available for the prosecution to use for impeachment purposes.

***Parole Searches of Residences*:**
***Third Party Rights During a Parole Search*:**
***Probable Cause for Believing that a Parolee Resides in a Searched Residence*:**

***United States v. Ped*** **(9th Cir. Nov. 15, 2019) 943 F.3rd 427**

**Rule:** A parolee's home is subject to search by any law enforcement officer, day or night, with or without any suspicion of criminal wrongdoing. Third parties living at the same residence of a parolee risk having the common areas (along with the parolee's private areas) searched. With probable cause to believe a parolee lives at a specific address, that residence is subject to search even though it is later determined he no longer lives there.

**Facts:** Defendant Anthony Lee Ped's brother, Nick Wilson, was released from the custody of the California Department of Corrections in April, 2016, and placed on post-release community supervision pursuant to P.C. §§ 3450 et seq. (similar to parole, but having served his prison time in a local county jail, he does his parole time under the supervision of a probation officer). The terms of his release included a "*Fourth Waiver*," permitting any law enforcement officer to search Wilson's "residence and any other property under [his] control . . . without a warrant day or night." Wilson informed his probation officer that he would be living at the family home on Eliot Street in Santa Paula, California. Shortly thereafter, Santa Paula PD officers conducted a warrantless search of that residence. Although Wilson was not home at the time, defendant and their mother were home, both confirming that that was indeed Wilson's place of residence. At another time shortly thereafter, officers responded to the Eliot Street address on a disturbance call, during which they again confirmed that Wilson continued to live there. Then, In June, 2016, Wilson's probation officer provided the Santa Paula Police Department with a list of names and addresses of parolees subject to supervised release. The list included Wilson as living at the Eliot Street address. The very next day, however, Wilson got pop'd on some unrelated charge, ending out staying in jail for the next three months. When finally released, he told his probation officer that he would be living at a different address in Newbury Park, California. The probation officer neither verified this fact nor updated the list he had previously given to the Santa Paula Police Department. Ten days later, Santa Paula police officers, believing that Wilson still lived on Eliot Street, randomly selected this residence for a routine Fourth waiver search. Upon arrival, Wilson was not there, but defendant was. When first contacted, defendant was observed by the officers to be holding a methamphetamine pipe. Defendant and his mother both told the officers that Wilson no longer lived there although neither knew his new address. Not believing them, the officers did a probation search on the residence and recovered seven firearms; a definite no-no in that defendant was a convicted felon himself. Charged in federal court with being a felon in possession of a firearm (18 U.S.C. § 922(g)(1)), among other charges, defendant's motion to suppress the firearms was denied. He pled guilty, was sentenced to 5 years and 10 months in prison, and appealed.

**Held:** The Ninth Circuit Court of Appeal affirmed (although reversing on the issue of the validity of a separate probation condition, not discussed here.) Searches of one's home are "presumptively unreasonable" (meaning, "*unconstitutional*"). It is also recognized, however, that parolees "have severely diminished expectations of privacy by virtue of their status." (*Samson v. California* (2006) 547 U.S. 843.) As such, they are subject to warrantless searches of their homes without a warrant and without any suspicion of criminal wrongdoing. Third parties, who are not subject to such search conditions, take the risk of living with someone who is. While areas exclusive to such a third party are off limits, the parolee's private areas and all common areas in the house are subject to search. Therefore, while parolee Nick Wilson lived there, the Eliot Street residence, except for areas exclusive to defendant and/or his mother—with

neither of whom being subject to a Fourth waiver—was subject to a warrantless Fourth wavier search. Here, however, by the time the search in issue was conducted, Wilson had moved out. But no one, except for defendant and his mother, told the Santa Paula police department that Wilson no longer lived there. The issue in this case, therefore, was whether the search was lawful when based upon what the officers reasonably believed at the time they searched the residence and considering the "*totality of the circumstances*." The Court held that it was. When the search was conducted, two recent visits to the house had confirmed the fact that Wilson lived there. Also, the Santa Paula Police Department had been informed by Wilson's probation officer that he lived there. When the search was conducted, the probation officer knew that Wilson had moved to a different address, but he failed to relay this information to the Santa Paula Police Department. While further inquiry by the Santa Paula Police Department would have revealed this fact, the Court ruled that with the information they already had, "they were not required to take further steps to verity (Wilson's) reported address." Also, three months having expired since Wilson was last known to live at the Eliot Street house was not so long that the police were obligated to verify his continued residency. The police need only "be reasonably sure that they are at the right house." Citing U.S. Supreme Court authority: "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials." (*Heien v. North Carolina* (2014) 574 U.S. 54, 60-61.) The legal standard is one of "*probable cause*." "(O)fficers must have probable cause to believe that the parolee is a resident of the house to be searched." (*United States v. King* (9th Cir 2012) 687 F.3rd 1189.) The Court held here that it was reasonable for the officers to rely upon their prior information that Wilson was living at the residence that was searched. The fact that Wilson's probation officer knew that he had moved, and that defendant and his mother both told the officers that Wilson had moved, was not enough to lessen the probable cause as it existed at the time. Absent "*convincing evidence*" that the information they already had was incorrect, the officers were not obligated to believe either defendant or his mother. (*Motley v. Parks* (9th Cir. 2005) 432 F.3rd 1072, 1082.) Neither defendant nor his mother could provide the officers with a new address for Wilson. Also, both were considered "less-than disinterested source(s)" of information, what with defendant having already been caught in possession of a meth pipe, and mom, . . . well, . . . we all know that mothers will almost always cover for their less than perfect children. (*My opinion*; not necessarily the Court's.) After further ruling that the evidence did not come close to satisfying defendant's burden of showing that the officers conducted the search for an improper purpose, such as a desire to harass him or out of personal animosity toward him, the search was held to be lawful. The trial court, therefore, ruled correctly in denying defendant's motion to suppress.

**Note:** The Ninth Circuit has consistently ruled, as it did here, that the standard of proof for believing that a parolee (or probationer with Fourth waiver conditions) lives at the residence to be searched is "*probable cause*." Although first noting that officers only need to be "*reasonably sure* that they are at the right house," the Court then specifically states that full probable cause is required (pg. 430). In so ruling, the Court fails to discuss the elephant in the room: Does not "*reasonably sure*" that the officers are at the right house imply a lower, and easier to prove, "*reasonable suspicion*" standard? Neither the California nor the U.S. Supreme Courts have discussed this issue. But California's Fourth District Court of Appeal (Div. 2; Riverside) has. In *People v. Downey* (2011) 198 Cal.App.4th 652, the Fourth Appellate District, in agreeing with five other federal circuit courts (listed in the opinion at pg. 661), specifically held that

"something less than would be required for a finding of probable cause" is the correct legal standard. This makes the Ninth Circuit's opinion, "stand(ing) alone" on this issue, what we commonly refer to as a "minority opinion." *On another issue*, also note that after holding that the officers' three-month-old information was still considered reliable, the Ninth Circuit said: "We do not question that at a certain point, a reported address would become so old that it would no longer be reasonable for officers to rely on it." (Pg. 431.) The Court, however, does not give us any hint as to when that "certain point" is reached. The easiest way to eliminate the issue altogether is to simply check with the probation (or parole) officer just before doing the search. In this case, a 3-minute phone call would have eliminated months of appellate wrangling and piles of unnecessary paperwork.

***Miranda Custody and Minors*:**
***Welf. & Inst. Code § 625.6 and Minors Age 15 Years and Less*:**
***Implied Waivers and Minors*:**
***Coercive Interrogations and Fourteenth Amendment Due Process*:**

***In re Anthony L.*** **(Dec. 16, 2019) 43 Cal.App.5th 438**

**Rule:** (1) Whether or not a minor is in custody for purposes of *Miranda* depends upon an evaluation of the totality of the circumstances. (2) California's constitutional "Truth in Evidence" provisions (i.e., Proposition 8) dictate that voluntariness of a minor's incriminatory statements be evaluated using U.S. constitutional standards. Enactment of Welf. & Inst. Code § 625.6 does not alter this rule. (3) Where a minor willingly answers questions after acknowledging that he understood his *Miranda* rights, his implied waiver of those rights is valid. (4) A low-key, non-confrontational interrogation does not violate the Fourteenth Amendment due process clause.

**Facts:** In February, 2018, fifteen-year-old Anthony L. was one of five juvenile hoodlums who walked up behind a 61-year-old man's car as the man was waiting in his driveway for his automatic garage door to open. One of the juveniles hit or kicked the rear of the car. When the man got out of his car to protest, an argument ensued, resulting in the gang-of-five surrounding and attacking the man. They hit and kicked him repeatedly about the head and face, continuing the assault until a neighbor came out and yelled that he had called the police. The whole incident was recorded on nearby security cameras. The video and resulting still photographs were taken by the police to the nearby school where a teacher identified defendant as one of the assailants. Sergeant Christopher Smith of the San Francisco Police Department arranged with defendant's mother to talk to her son. Detective Smith, in plain clothes with a visible badge and gun, and a Spanish-speaking officer in a police uniform, got defendant out of bed on the morning of February 21st. Contacting defendant in his bedroom, Detective Smith received permission from defendant's mother to interview defendant in his room. Defendant was allowed to get dressed before the officers sat him on his bed and, with his mother present, began to question him in a recorded interview. With the officers standing over him and between him and the door, Detective Smith told defendant that he was "not under arrest right now," but that because he was a juvenile they were going to read him his rights anyway. Detective Smith used a "Juvenile Know Your Rights" form, which he showed to defendant before advising him of his rights. Defendant said that he understood his rights. However, he was *not* asked for an express waiver,

Detective Smith later testifying that under the circumstances, he did not consider defendant to be in custody. In the ensuing 20-minute interrogation, defendant admitted to kicking the car, telling the officers that he hit the victim because the victim had upset him (God forbid he complain about the little farts kicking his car). Defendant was arrested at the end of the interrogation. A juvenile wardship petition alleged defendant to have committed assault with force likely to cause great bodily injury. (Pen. Code § 245(a)(4)) After denying defendant's motion to suppress his incriminating statements, the Juvenile Court magistrate found the allegations of the petition true. The magistrate declared defendant to be a ward of the court and placed him on probation in his Mother's home. Defendant appealed.

**Held:** The First District Court of Appeal (Div. 4) affirmed. On appeal, defendant made a number of arguments related to his interrogation and the admissibility of his resulting incriminating statements.

(1) *Custody, for Purposes of Miranda*: Detective Smith *Mirandized* defendant, but only because Welf. & Inst. Code § 625 requires it and not because he thought defendant was in custody. So as a "preliminary issue," the Court analyzed whether or not defendant was in custody at the time he was questioned. Whether or not a person (including a juvenile) is in custody for purposes of *Miranda* is an objective test (i.e., what a reasonable person, under the circumstances, would have believed), taking into account the totality of the circumstances. Those circumstances include (but are not necessarily limited to) the following:

> Whether contact with law enforcement was initiated by the police or the person interrogated; whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation.

Where the person being questioned is a minor, the court may also consider the child's age as long as the child's age was either known to the officer or objectively apparent to a reasonable officer. In this case, defendant (a 15-year old) was questioned in his own bedroom—a place that is a lot less intrusive than at the police station—and with his mother present. Also, he was specifically told that he was "not under arrest" (at least not yet). The detective's tone was calm and non-confrontational. The interview lasted no longer than 20 minutes. All of this tends to indicate that defendant was *not* in "*Miranda* custody." However, on the other side of the coin, no one asked defendant whether he wanted to speak with the police; mom just bringing them into his bedroom without defendant's permission as he slept. Defendant was never told that he was free to leave and nothing in his conduct suggested that he might have thought that it was okay to do so. The bedroom was small with the officers standing between him and the door. After questioning, defendant was physically arrested. The trial court ruled that upon balancing all this, defendant was in fact in custody for purposes of *Miranda*. Without necessarily agreeing with the

trial court, the Appellate Court held here that for purposes of the appeal, although a "close issue," it "assume(d)" that the trial court's ruling was correct. Defendant was in custody.
(2) *Voluntariness and the Applicability of Welf. & Inst. Code § 625.6*: Two month before defendant's arrest, Welfare & Institutions Code § 625.5 went into effect. Pursuant to subd. (a) of this new section, it is now mandated that, "[p]rior to a custodial interrogation, and before the waiver of any *Miranda* rights, a youth 15 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference." Also pursuant to this section: "The consultation may not be waived." Defendant, being 15 years old when questioned, gets the benefit of this new statute. Subd. (b), however, says: "The court shall, in adjudicating the admissibility of statements of a youth 15 years of age or younger made during or after a custodial interrogation, consider the effect of failure to comply with subdivision (a)." Detective Smith failed to comply with Section 625.6, but did so, according to his testimony, because he did not consider defendant to be in custody. Having ruled (above) that defendant had in fact been in custody, a discussion of the consequences of Detective Smith's failure to abide by Section 625.6's requirements is necessary. Section 625.6 takes into account the simple fact that the younger the suspect, the less likely he or she will be mature enough to "recognize and avoid choices that could be detrimental to them." (Uncodified portion of Senate Bill 395.) The Legislature, therefore, sought some assurance that in-custody youthful suspects (age 15 and younger) receive independent legal advice before agreeing to talk with the police. However, by its terms, Section 625.6 provides but another factor for a court to consider in determining the voluntariness of a minor's wavier of his rights. Either way, the Court here ruled in determining voluntariness, it is bound by the so-called "Truth-in-Evidence" provision of the California Constitution; i.e.: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. . . ." (Proposition 8: Cal. Const., art. I, § 28(f)(2).). Under this provision, relevant evidence may be excluded only if exclusion is required by the United States Constitution or a statute enacted by two-thirds of each house of the Legislature. Section 625.6 (not having passed by a two-thirds legislative majority) does not authorize a court to exercise its discretion to exclude statements if those statements are otherwise admissible under federal law. Defendant's youth, his lack of sophistication or experience, and his not having had immediate access to an attorney, however, may all still be considered as a part of the "totality of the circumstances" in evaluating whether, under U.S. constitutional standards, he voluntarily waived his rights. Under these standards, defendant's wavier of rights was not involuntary, and his resulting incriminating statements were properly admitted against him by the trial court despite not having first consulted with an attorney.
(3) *Express vs. Implied Waiver of Miranda Rights*: Defendant argued that his statements were admissible because he did not expressly waive his *Miranda* rights. The Court found that defendant did in fact *understand* his rights, having been shown a written copy of the rights, and was then verbally informed of those rights. As each right was read to him, he answered "without hesitation" that he understood them. Having never before been arrested, being only 15 years old, and not having *expressly* waived his rights, was held to be insufficient to overcome what was otherwise a voluntary waiver of those rights. The fact that he never expressly waived his rights was held to be irrelevant, noting that a minor (as well as an adult) may waive *Miranda* "implicitly by willingly answering questions after acknowledging that he understood those rights." (*People v. Lessie* (2010) 47 Cal.4th 1152, 1169.) After rejecting defendant's argument

that his mother's presence in the room had any bearing on the waiver issue (noting the defendant's mother's understanding of *Miranda* is irrelevant), the Court held that defendant's implied waiver was valid.
(4) *Voluntariness of Defendant's Statements and Coercion*: Defendant lastly argued that even if his *Miranda* wavier was valid, his resulting incriminating statements were nonetheless inadmissible in that they were the product of "*coercion*;" a Fourteenth Amendment, "due process" issue. For statements to be voluntary, they must be found to be the product of a defendant's "rational intellect and free will." The issue is whether, due to the officers' interrogation tactics, or other pressures placed on him at the time, the defendant's "will was overborne at the time he confessed." A confession that is obtained through threats or violence, direct or implied promises, or improper influence may be found involuntary. Again, the "totality of the circumstances" are considered in an effort to determine whether a confession was voluntary, such circumstances to include the characteristics of the accused and the details of the interrogation. Differentiating this case from two prior cases (i.e., *In re Elias V.* (2015) 237 Cal.App.4th 568, and *In re T.F.* (2017) 16 Cal.App.5th 202.), where high-intensive, abusive interrogation tactics were used, the Court held that this defendant's will was not overborne through aggressive and suggestive tactics. Specifically, in a low-key, 20-minute interview in defendant's own bedroom with his mother present, defendant was never subjected to the abusive interrogation tactics employed in *Elias V.* and *T.F.* Contrary to what happened in *Elias V.* and *T.F.*, Detective Smith never insisted on defendant's guilt in the face of persistent denials. Defendant readily admitted his participation in the assault at issue without any undue pressure from Detective Smith, nor by being told that his guilt was a foregone conclusion as evidenced by the fact that the assault was recorded in a video in which defendant was identified. The fact that defendant had to put on his pants in the presence of Mother and the officers, that his bedroom was small and that Officer Martinez stood between him and the door, that defendant spoke in a low, sometimes barely audible voice, that at one time he said he did not feel like talking, and with his limited experience with law enforcement, were all insufficient to overcome defendant's immediate acknowledgement that he was involved in the assault. As such, defendant cannot validly argue that his will was overcome. Also, the fact that defendant's mother had encouraged him to give up the names of his cohorts (which defendant declined, several times, to do), does not change the result. Defendant's confession was not coerced.

**Note:** My brief on *In re Elias V.* can be found at *California Legal Update*; Vol. 21, #3 (Feb. 23, 2016). For whatever reason, I neglected to brief *In re T.F.* (although it's cited numerous times in my "*Miranda and the Law*" Outline). Both of these cases involved intensive, in-your-face interrogations of young (13 and 15 years old, respectively), criminally unsophisticated minors, using interrogation tactics specifically geared to make each feel like continued denials were useless and confessing was their only way to end their respective ordeals. Both cases reflect interrogation tactics that were held to violate the Fourteenth Amendment's due process clause in that the use of such tactics were intended to, and did in fact, "overcome the will" of the defendants, resulting in what were likely false confessions. I've always criticized playing such "*mind games*," particularly with criminally unsophisticated suspects; minors or adults. No such abuse occurred in this case, however, or even came close. So defendant was grasping at straws in making such an argument. The perhaps more interesting aspect of this case is the Court's discussion of Welf. & Inst. Code § 625.6, and how it really doesn't affect the validity of a young (15 years of age or less) suspect's *Miranda* waiver, whether or not its attorney-consultation

requirement is complied with. Section 625.6 presents a real dilemma for me, however. I've always preached that whether you agree with it or not, when the Legislature dictates some procedure to be used, as it does in Section 625.6, we at the very least have an ethical and professional obligation to comply, even if there is no sanction for failing to do so (an opinion *not* shared by all experts). In the case of Section 625.6, however, should you take the time to hook up a minor with a lawyer, you just know what that lawyer, if he's worth his salt, is going to tell the minor: "*Do not, under any circumstances, waive your rights*!" Period. End of discussion. So compliance with Section 625.6 means that you've just shot yourself in the foot and lost any likelihood of a waiver let alone a confession. If you fail to comply with 625.6, however, then there is no real sanction, the admissibility of the resulting statements being decided according to federal search and seizure rules, as interpreted under the U.S. Constitution, and as dictated by the thousands of *Miranda* cases already decided. *So what should you do*? I don't know: I can only leave that up to you and your conscience.