The California Legal Update

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

Vol. 23 January 19, 2018 No. 2

Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

www.legalupdateonline.com
www.cacrimenews.com
www.sdsheriff.net/legalupdates

DONATION INFORMATION: If you wish make a voluntary financial contribution to help offset the costs of researching, writing, and publishing this *Legal Update*, please note the "*Support Legal Update*" button located on the face of the *Legal Update* notification (if you're a subscriber) as well as on the home page of the *LegalUpdates.com* website. Your support is greatly appreciated.

THIS EDITION'S WORDS OF WISDOM:

"*I don't mean to brag, but I put together a puzzle in 1 day and the box said 2-4 years.*" *(Anonymous)*

IN THIS ISSUE:

***Case Law*:** **pg.**

CASE LAW:

***Miranda and Custodial Interrogations*:**
***The Beheler Admonishment*:**

People v. Saldana **(Jan. 12, 2018) __ Cal.App.5th __ [2018 Cal.App. LEXIS 29]**

Rule: Advising an interrogated suspect that he's *not* under arrest and is free to leave is only one factor to consider when determining whether the suspect is in custody for purposes of *Miranda*.

Facts: Defendant was a 58-year-old gainfully employed legal immigrant from Mexico, with a sixth grade education, living in a trailer park in National City. He carried on a "steady relationship" with another resident of the trailer park; Martha H. Also living in the same trailer park was Martha H's sister-is-law; Angelica. Angelica had five children, including G.H., M.H., and Y.H, ages 11, 8, and 6, respectfully. Angelica's children, having known defendant all their lives, referred to him as "Tio (i.e., Uncle) Manual." They would often play in defendant's trailer. On February 3, 2015, eight-year-old M.H. complained to Martha's adult son, and then Angelica, that "Tio Manual" had touched her on her leg and her "private parts." Eleven-year-old G.H. complained of a similar touching, the act occurring on his sofa while he used a pillow to cover up what he was doing. The incident was reported to the National City Police Department. Various versions of the girls' complaint was repeated to a protective services employee for the County of San Diego, and later to a "forensic interview specialist." As more information came out, it was revealed that similar incidents had occurred about five times, with defendant touching the victims' vaginal area, although through their clothing. It also became apparent that six-year-old Y.H. may have been touched as well by defendant although she had a hard time talking about it. Eventually, with the above information, a National City P.D. detective unsuccessfully attempted to contact defendant at his trailer, leaving a message for him to call the detective. Defendant eventually did so, making an appointment to come to the station. On March 10, 2015, defendant voluntarily came in of his own accord and submitted to questioning. In a fifty-three minute, one-on-one, Spanish language interrogation that was videotaped, the detective started by obtaining of some simple basic biographical information. Defendant was then told that he was not under arrest and that he could "leave when you want." Although the door to the interview

room was shut, and remained shut throughout the interview, the detective told defendant "the door is open, the door we came through. It's open. You can leave when you want, okay." After defendant responded, "I agree," the detective added; "Um, we're not going to arrest you right now. That's why the front door is open to go out without—without us arresting you." At no time was defendant handcuffed or otherwise restrained. However, he was also *not* read his *Miranda* rights. Questioned about the events from the prior February, defendant told the detective about his relationship with Angelica's children and how they often played in his trailer. But when asked about touching the victims, he adamantly denied ever inappropriately touching any of them. After telling defendant that M.H. claimed that he had his zipper down and that he (defendant) told her that he was going to put it in her butt (an apparently false statement in that no one ever reported that M.H. had made that claim), the detective engaged in an interrogation tactic called "*maximization/minimization*." After expressing his "rock-solid belief" in defendant's guilt, the detective began with *maximization*-type questions such as "making an accusation, overriding objections, and citing evidence, real or manufactured, to shift the suspect's mental state from confident to hopeless." Then, turning to *minimization*, the detective purported to provide the defendant with moral justification and face-saving excuses for having committed the crime, a tactic that "communicates by implication that leniency in punishment is forthcoming upon confession." The detective also provided more "false evidence," telling defendant that the victims claimed that this was not the first time he had inappropriately touched them. He also falsely told defendant that they were conducting DNA tests on the victims' clothing that would prove defendant's guilt. For the first 38 minutes of the interrogation, despite all the accusations, maximization and minimization, and false evidence, defendant remained steadfast in his denials, telling the detective more than 25 times that he did not do anything. Eventually, however, he began to weaken. Defendant started by telling the detective how embarrassed he was by what the victims' had said he did, admitting that he "touched them" when the girls would "sit there on my hand," but that it "wasn't my intention to do it." Defendant then stated he touched the vagina area "like twice or three times." The touching, per the defendant, was over the clothes. Defendant also claimed it happened "spontaneously" while they were playing on the sofa in his trailer. Asked if he got any pleasure out of touching the victims, defendant told him; "No, well, I don't know. The devil got in me, but no. No other thing. No other intentions." After defendant made these qualified admissions, the detective suggested that he write a "forgiveness letter" to the victims which, when completed read as follows: "To [G.H. and M.H.]. I ask forgiveness for the things that I did to you. I ask you in the way or please forgive me. I do not know why I did this. I feel so ashamed. I ask all your family for forgiveness. I am very sorry. Sorry. Thanks." Allowed to leave the police station as earlier promised, defendant was immediately stopped and arrested about a block away. Charged in state court with five counts of committing lewd acts upon a child (P.C. § 288(a)), the video recorded interrogation was admitted into evidence over the defendant's objection. Defendant himself also testified and denied that he had committed the alleged offenses. He told the jury that the "shame" he told the detective he felt was from being accused of the alleged acts. He also claimed to have written the apology letter only because the

detective asked him to. Defendant testified that he felt "bad about the accusation," and "(t)hat's why I asked them to forgive me." He also testified that when he said "the devil got in me" he was trying to say he did not do any touching for pleasure," but that he felt "horrible" because he was being accused of such terrible acts. Defendant was convicted of four counts of child molest (the jury hanging 9-to-3 for acquittal on one count related to the six-year-old Y.H.) and sentenced to six years in prison. He appealed, arguing that his videotaped admissions should not have been admitted into evidence.

Held: The Fourth District Court of Appeal (Div. 1) reversed. Defendant argued on appeal, as he did in the trial court, that his videotaped admissions should not have been allowed into evidence in that they were obtained in violation of his *Miranda* rights. The People, in opposition, argued that defendant was not in custody at the time of his interrogation and that *Miranda* was therefore inapplicable. The Court, in agreeing with defendant, found that defendant was in fact in custody, at least by the time he made his incriminating admissions, and that absent a *Miranda* admonishment and waiver, those statements should not have been allowed into evidence. As we've been told in the *Miranda* decision itself, as well as its progeny, the courts' primary concern in requiring a knowing and intelligent waiver of one's right to silence and to the assistance of counsel is to offset the "psychological pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely, (these pressures being the product of) . . . an incommunicado interrogation in an unfamiliar police-dominated atmosphere." But this rule is only applicable in those instances where a questioned suspect is in "*custody*," as the term is defined by the courts. In determining whether a person is in custody for purposes of *Miranda*, the issue is whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. In evaluating this issue, all the surrounding circumstances must be taken into consideration. The People's argument to the effect that defendant was not in custody during his 58-minute interrogation, thus negating any need for a *Miranda* admonishment, was based upon the fact that he was told by the detective that he was not under arrest and that he was free to leave at any time. Also, defendant had voluntarily come in for the interview under his own steam, he was never handcuffed, the interrogation room door, although closed, was not locked, the interrogation itself, which lasted less than an hour, was very low key and conducted in a professional manner, and only one interrogator was used. Being told that he was not under arrest and that he was free to leave (sometimes referred to as a "*Beheler* admonishment," per *California v. Beheler* (1983) 463 U.S. 1121.) was perhaps the People's strongest argument that defendant was not in custody. This is because, arguably, a reasonable person would not have felt like he was in custody after having been told that he was free to terminate the questioning and leave at any time. The Court noted however that the above listed factors, including the *Beheler* admonishment, are not the only ones a court is to take into consideration when evaluating the issue of custody. Outweighing the above, the Court noted that in this case the express purpose of the interview was to question defendant as a suspect in a child

molest case, and to obtain a confession if possible. The location of the interview was on the detective's turf, i.e., in a police station, as opposed to in public or at the defendant's residence. And although told he was not under arrest and was free to leave, some of the wind was taken out of that assertion when the detective hedged a bit by adding, " . . . we're not going to arrest you right now," intimating that he might well be arrested later (as, in fact, he was). Most importantly, once the interrogation got underway in earnest, defendant became the target of some strong accusatory questioning with the detective telling him that, in effect, his guilt was a foregone conclusion, outright rejecting defendant's repeated denials. Despite being told that he was not under arrest and could leave at any time, it is recognized by some interrogation experts (as well as prior case law) that "the contemporaneous conduct of the police" might well "nullif(y) that advice" and that the advice "will not carry the day." Here, defendant was subjected to a specific interrogation tactic ("*maximization/minimization*") that is intended to overbear a suspect's will and force a confession. "(N)early all of (defendant's) interrogation was pointed and accusatory. From the outset, police treated (defendant) as guilty, confronted him with evidence of his guilt, and expressed not mere skepticism, but outright disbelief of his denials." False claims that evidence of his guilt existed, or could be obtained, were made. Defendant himself testified that he did not feel that he was free to leave under the circumstances. Based upon all these surrounding circumstances, the Court tended to believe defendant in this assertion and that any reasonable person would have so-believed. "Here, in light of the detective's repeated rejection of (defendant's) denials, a reasonable person in (defendant's) position eventually would have realized that telling the 'truth' meant admitting the detective's information was correct—and that until this 'truth' came out, the person could not leave." The Court further criticized the use of the "pretense" of letting defendant walk out the door so that the detective could keep his word that he would not arrest defendant "on the spot," only to arrest him minutes later about a block away, recognizing this as "more of a ruse than an actual statement of honest intent." Based upon this reasoning, the Court concluded that defendant was in fact in custody at least during the time he incriminated himself, and that he should have been *Mirandized* under these circumstance. As such, his admissions should not have been admitted into evidence.

Note: The problem here is that too many police interrogators are of the belief that taking the custody out of an interrogation by merely telling a suspect via a "*Beheler* admonishment" that he is not under arrest and that he is free to leave—an offer seldom taken advantage of by most criminal suspects—that that ends the issue and no *Miranda* admonishment is necessary. If only life were so simple. The reality is that it is never that black and white. *ALL* the surrounding circumstances must be taken into consideration in determining whether a suspect is in *Miranda*-custody. A *Beheler* admonishment, although important, is but one of those circumstances. It has long been recognized that "(t)he mere recitation of the statement that the suspect is free to leave or terminate the interview . . . does not render an interrogation non-custodial per se." (*United States v. Craighead* (9th Cir. 2008) 539 F.3rd 1073, 1088.) Following up a *Beheler* admonishment with a strong non-*Mirandized* accusatory interrogation creates the substantial risk

that what may have started out to be a non-custodial interview will turn into a custody situation necessitating a *Miranda* admonishment and waiver. That having been said, I have to tell you that in discussing this case with other "experts," not everyone agrees with this Court's conclusion. If fact, the California Supreme Court decided in *People v. Moore* (2011) 51 Cal.4th 386, at p. 402, that: "While the nature of the police questioning is relevant to the custody question, police expressions of suspicion, with no other evidence of a restraint on the person's freedom of movement, are not necessarily sufficient to convert voluntary presence at an interview into custody." Although the Supreme Court clouded its conclusion a bit by using the word, "*necessarily*," and fails to define what they mean by "*expressions of suspicion*," it still gives us an argument that where a *Beheler* admonishment is used, there has to be some evidence that the "restraint" has been escalated in some manner apart from an accusatory interrogation. But we'll have to wait and see whether this case is taken up before we can conclude that *Saldana* is wrong.

***Ident-A-Drug Website; Admissibility in Evidence*:**
***Ident-A-Drug Website; Hearsay and Confrontation Issues*:**
***Controlled Substances; Proof by Circumstantial Evidence*:**

***People v. Mooring* (Sep. 27, 2017) 15 Cal.App.5th 928**

Rule: Information from the Ident-A-Drug website concerning the controlled substance status of certain pills is hearsay, but is admissible in evidence under the "*compilation exception*" to the hearsay rule (Evid. Code § 1340). That same information is not "*testimonial*," and therefore its admission into evidence does not violate the Sixth Amendment Confrontation Clause. It is not legally required that a controlled substance be chemically analyzed to be admissible. Circumstantial evidence of the controlled nature of a substance is sufficient to convict.

Facts: In January, 2011, Richmond Police Sergeant Eduardo Soto, assigned to the narcotics unit, executed a search warrant at the home of Lanita Denise Davis, Darrel James Mooring, Sr., and Darrel Ellis Mooring, Jr. Over 4,000 prescription pills, plus various pill bottles (some with, some without, the names of the defendants on them), were seized. Defendants were charged in state court with various counts of possessing a controlled substances for sale, plus a number of enhancements. At trial, Shana Meldrum, a criminalist at the Contra Costa Sheriff's Crime Lab, testified as an expert in the presumptive identification of prescription pills. Aside from her 10 years of experience and over 400 hours of training in analyzing and identifying suspected controlled substances, Meldrum had received training on the various reference sources the crime lab uses to presumptively identify prescription pills, including the "Ident-A-Drug Website." This website, a fee based and log-in controlled service, contains information about, and images of, pharmaceutical pills derived from the FDA and pharmaceutical pill manufacturers. The procedure used is as follows: To presumptively identify a prescription pill, the crime lab would compare a pill's "individual characteristics"—its color, shape, and markings—to images on

Ident-A-Drug. The criminalist would then type into the website whatever markings were on the pill. The website then kicks back either one match or a list of possible matches that the pill might be. Then, based on the color and the shape and the imprints on the pill, the criminalist can make a determination as to whether or not to report that out as a presumptive identification. This method is generally accepted in the scientific community, and has been reviewed by the crime lab's accrediting board. Meldrum testified that she had presumptively identified prescription pills using Ident-A-Drug over 2,000 times. In this case, Meldrum testified that she had compared the markings, imprints, coloring, and shapes of the prescription pills seized from the defendants' residence to the information on Ident-A-Drug. Using the procedure described above, Meldrum presumptively identified the pills as follows: (1) 1,930 dihydrocodeinone (or Vicodin), a controlled substance; (2) 573 oxycodone, a controlled substance; (3) 132 diazepam, a controlled substance; (4) 785 methadone, a controlled substance; (5) 242 morphine, a controlled substance; and (6) 113 codeine, a controlled substance. Meldrum stated that she did not conduct chemical testing on the pills. Per her testimony, a "usable amount" (i.e., that would have some physical effect) of a prescription pill could be as little as half a pill. Meldrum further testified that she did not think the pills were counterfeit in that counterfeit pills are "a softer texture than a legal pharmaceutical" and may have a "slightly different color." As a result of this testimony, plus that from Sgt. Soto and another expert on the crime of possessing prescription pills for sale, defendants Davis and Mooring, Jr. were convicted. Sentenced to probation (with two years in county jail) and ten years in prison, respectively, defendant appealed.

Held: Except for finding that one of the alleged substances (i.e., "dihydrocodeinone/Vicodin") was not proven to be a controlled substance, requiring the reversal of one count alleged in the information, and to remand for resentencing, the First District Court of Appeal (Div. 5) otherwise affirmed. Among the issues on appeal was the admissibility of the testimony of the Contra Costa Sheriff's Crime Lab's criminalist, Shana Meldrum, as it related to the information she gleaned from the Ident-A-Drug Website. Specifically, defendants argued that pursuant to the rule announced in *People v. Sanchez* (2016) 63 Cal.4th 665, her testimony regarding the Ident-A-Drug Web site was (1) inadmissible hearsay and (2) that its admission into evidence violated their Sixth Amendment confrontation rights. In *Sanchez*, the California Supreme Court considered the extent to which the U.S. Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36, had limited an expert witness from relating case-specific hearsay in explaining the basis for that expert's opinion, while clarifying the application of hearsay rules to that kind of expert testimony. *Crawford* had held that person's (i.e., a "declarant's) statements to police (or others) are inadmissible at trial, despite an applicable exception to the hearsay rule, unless it is proved that the declarant is (1) now unavailable to testify and (2) the defendant has had a prior opportunity to confront and cross-examine the declarant; a Sixth Amendment confrontation issue. S*anchez* held that case-specific out-of-court statements testified to by a prosecution gang expert constituted inadmissible hearsay under state law and, to the extent those statements were "testimonial," ran afoul of the rule in *Crawford*. In discussing the *Sanchez* and *Crawford* rules as

they apply to the information Shana Meldrum obtained from Ident-A-Drug, and used in her testimony in support of her expert opinion as to what the pills were, the Court here considered two issues: (1) *Hearsay*: Absent a statutory exception, hearsay is generally inadmissible. Defendants argued that Meldrum's testimony concerning what Ident-A-Drug had indicated to her about the pills in question constituted inadmissible hearsay; i.e., an "out-of-court" statement that is offered for the truth of the matter asserted. The Attorney General, conceding that the information from Ident-A-Drug is in fact hearsay, countered with the argument that it falls within the "*published compilation*" exception to the hearsay rule under Evid. Code § 1340. The Court agreed with the A.G. Looking at the elements of E.C. § 1340, the Court first held that Ident-A-Drug does in fact constitute a "*compilation*." As noted by the Court, the Ident-A-Drug Website collects information regarding prescription pills from the FDA and pharmaceutical pill manufacturers and presents the information in a searchable database. It is an "organized, edited presentation of a finite quantity of information that . . . has been recorded and circulated in [a] fixed form analogous to printing." Second, the compilation is "*published*" on the Internet. Third, the compilation is "*generally used*" in the crime lab's course of business, as evidenced by Meldrum's testimony that she's used it over 2,000 times to presumptively identify prescription pills and that the site is generally accepted in the scientific community. For these same reasons, the Ident-A-Drug Website is "generally . . . relied upon as accurate" by the crime lab in conducting its business. Also, Ident-A-Drug has a commercial incentive to be accurate and reliable because subscribers pay to access the Website. Trustworthiness is reasonably assured by the fact that the business community generally uses and relies upon this compilation of information and by the fact that its author knows the work will have no commercial value unless it is accurate. (2) *Confrontation Clause*: The Court next held that Sixth Amendment Confrontation Clause is not violated by using the Ident-A-Drug Website because the information obtained therein, and testified to by Meldrum as a basis for her expert opinion as to the controlled nature of the pills involved, was not "*testimonial*." "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." Also, in order to be considered testimonial, "the statement must be made with some degree of formality or solemnity." (People v. Ochoa (2017) 7 Cal.App.5th 575, 583.) Here, the Court held that the information from Ident-A-Drug is not testimonial in that it contains no more than generic data about various pharmaceutical pills, based on information provided from pharmaceutical manufacturers and the FDA. The primary purpose of collecting and compiling this content on the Ident-A-Drug Website is *not* to gather or preserve evidence for a criminal prosecution. Also, the information on Ident-A-Drug does not have the requisite level of formality or solemnity to constitute testimonial hearsay. Therefore, use by Meldrum in her testimony did not violate the rule of *Crawford*. As a final issue, defendants argued that the evidence of their possession of the alleged controlled substances was insufficient to convict because the pills were never chemically analyzed. The Court rejected this argument, noting that there is no legal requirement that the

pills be chemically analyzed. Their nature as a controlled substance may be proved circumstantially. In some cases, the fact that certain substances are an illegal drug may be proved by evidence that the substance in question was a part of a larger quantity which was chemically analyzed. It may be proved by the expert opinion of the arresting officer. Or it may be proved by the conduct of the defendant indicating consciousness of guilt. In this case, Meldrum presumptively identified the prescription pills and testified that she did not believe they were counterfeit. Also, the defense had several doctors testify that they had prescribed the pills to one or both of the defendants. Absent any evidence to the contrary, this was enough to prove, circumstantially, that the pills were in fact the controlled substances as alleged.

Note: This long and involved case provides an excellent review of the issues raised by the *Sanchez* and *Crawford* decisions, both of which, when decided, halted long-standing prosecution practices that, at the time, made it reasonably easy to get before a jury some very damaging evidence in the form of expert opinion or non-witness statements. So it's a good thing to understand what these cases allow, and what they prohibit, so that as a law enforcement officer you know what other supporting evidence you need to be looking for.

***Miranda; Waiver of Rights and Implied Waivers*:**
***Juveniles and Interrogations*:**
***Interrogation Tactics; Offers of Leniency*:**
***Interrogation Tactics; Use of Deceptions*:**

***People v. Jones* (Jan. 19, 2017) 7 Cal.App.5th 787**

Rule: An implied waiver of one's *Miranda* rights will be upheld absent evidence that the waiver was involuntary or not knowingly made. Juveniles have the capacity to waiver their constitutional rights, but courts are to use special care in scrutinizing the record to insure that a juvenile's custodial confession was not involuntarily. An offer of leniency will not require the suppression of incriminatory statements where it is shown that those statements were not caused by the offer. The use of deceptions in an interrogation are lawful so long as they are unlikely to cause an involuntary or unreliable confession.

Facts: On November 21, 2012, 16-year-old defendant was hanging out with fellow Hoover criminal street gang members outside an apartment building on 110th Street near Budlong Avenue in Los Angeles, when Early Smith and Demajah Strawn (neither of whom belonged to a gang) walked by. Minutes later, a young Black man approached Smith and Strawn from behind and fired eight .40-caliber rounds at them, wounding Smith. Interviewed by police, Strawn made a very tentative ID of defendant as the shooter (i.e., "possibly the shooter.") from a photographic lineup. Smith couldn't identify anyone. Both Smith and Strawn were unable to identify defendant at trial, saying that they didn't see the shooter's face. But Strawn admitted that he did

not want to testify at trial because he was afraid of retaliation from the Hoover gang. Less than three month later, on February 12, 2013, three young men in the area of 112th Street and Budlong approached Derrick Jackson in front of his house and asked him where he was from. Told by Jackson that he didn't belong to a gang, they moved on. But then, as told to police by Jackson and another neighbor named John Marshall, a couple of cars came down the street. The three men yelled "Hoover" at one of the passing cars. The men then walked into the middle of the street as one of them fired a gun multiple times in the direction of the car. All three men then ran from the area. Six .40-caliber casings were recovered from the scene shortly after the shooting. The driver of the targeted car also fled from the scene and was never identified. Both Jackson and Marshall were able to provide physical descriptions of the three men. Jackson, however, could not identify defendant in a photo lineup. And Marshall later denied that he had witnessed the shooting or had described any of the suspects to the police. Both Jackson and Marshall testified that they were aware of gang violence in the area and were reluctant to testify at trial because of fear of retaliation. On March 1, 2013, investigators executed a search warrant at defendant's father's apartment, which was in the area of both shootings. A loaded .40-caliber Glock handgun was recovered from the father's locked bedroom. The Glock was later shown by ballistics testing to have fired the rounds in both of the shootings. On April 3, 2013, Los Angeles County Sheriff's Detectives Derek White and Gene Takashima conducted an audio-recorded interview of Jones. After defendant was read his *Miranda* warnings, and he acknowledged that he understood his rights (but without an express waiver of those rights), and after Detective Takashima finished questioning defendant about some other unrelated robbery, Detective White took over and questioned defendant about the above two shootings. Defendant admitted that he was from the "11 Deuce" subset of the Hoover criminal street gang, and that he got into the gang because his father was a member. Although he did not yet have the results of ballistics testing on the Glock, Detective White told defendant that it "came back to a few shootings," but that defendant's father did not match the description of the shooter. Detective White also told Jones that it "would look bad" for his father to go to prison for "something he didn't do." Defendant denied any involvement in the shootings. Detective White then falsely told defendant that his fingerprints had been found on the gun. Defendant responded that he sometimes held the gun, but "everybody did" as well. Defendant told White that the Glock did not belong to his father, but was a "Hoover" gun available to anyone in the gang. Getting down to the details of the shootings, Detective White showed defendant two fake photo arrays with defendant's photograph circled and purported witness handwritten statements indicating that he was the shooter in each case. Detective White also falsely suggested that he had spoken to people in the gang who had implicated defendant in the shootings, telling him that if he was proud to be a Hoover gang member, he should "stand up" and admit what he had done. Although defendant continued to deny that he was involved in either shooting, he weakened a bit and admitted that he'd been present at the scenes of both. Defendant said that he gave the gun to other gang members and that after each shooting, they would return it to him. He then gave Detective White a detailed account about how each of the shootings had occurred, but claimed that in the first, "Melvin" (no

further details) was the shooter. In the second shooting (i.e., at the car), one of his "friends" shot at the car, and then gave the gun back to defendant afterwards. After these admissions, Detective White told defendant that he needed to "either clear your name or you go and do a little time in camp for something you did or did not do." When defendant asked how he could clear his name, Detective White responded: "I'd rather the truth, to be honest with you. If you did it, then be proud of it and do a little time in camp and move on." Defendant made no further admissions other than to again admit that he had been present at the scene of both shootings. (Subsequent to these events, on June 15, 2013, defendant shot and killed a 16-year-old acquaintance, Joseph Jordan, during an argument over Jordan's sister. A .45-caliber handgun, which was never recovered, was used in this homicide. This shooting, for which defendant was eventually convicted of second degree murder, was not the subject of the *Miranda* and interrogation issues discussed here.) Pre-trial, defendant moved to suppress his statements to Detective White in the April 3rd interrogation, arguing that his admissions were coerced and the product of an offer of leniency. The trial court, after an evidentiary hearing, denied the motion. In the subsequent trial on the two shootings discussed here, plus the June 15th Jordan homicide, a gang expert testified that defendant was a member of a subset of the Hoover street gang and that each of the shootings had been committed for the benefit of, and in association with, a criminal street gang. Defendant was convicted of two counts of premeditated attempted murder of victims Early Smith and Demajah Strawn from the November, 2012, shooting, with various firearm and gang enhancement allegations found to be true. He was acquitted of an attempted murder of the vehicle's unknown occupant in the February shooting, with the jury hanging on a charge of shooting at an occupied vehicle (that count later being dismissed). He was found guilty of a second degree murder of Joseph Jordan in the June shooting, finding true the related firearm enhancement, but not true on a gang enhancement. Sentenced to 80 years to life, defendant appealed.

Held: The Second District Court of Appeal (Div. 7) affirmed. Among the issues on appeal, the defendant submitted that his Fifth Amendment right against self-incrimination and his Fourteenth Amendment right to due process had been violated when the trial court admitted into evidence his April 3, 2013, statements to the Detective White. Defendant argued that his statement should have been excluded at trial because it was involuntary and the result of coercive police conduct.

(1) *Defendant's Waiver of Rights*: The law is well-settled that an in-custody suspect must be read his rights as dictated by the *Miranda* decision, that he must understand those rights, and that he waive them before being interrogated. In the case of juveniles, consideration must be given to factors such as the juvenile's age, experience, education, background, and intelligence. A juvenile must also be shown to have the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. Although juveniles, as a rule, are perfectly capable of waiving those rights, the courts are admonished that they must use "special care in scrutinizing the record" to evaluate a claim that a juvenile's custodial confession was not voluntarily given. In this case, on the issue of the validity of

defendant's waiver, the Court noted that defendant was a 16-year old high school student. More importantly, he had been through the system before, having prior arrests for battery, grand theft, unlawful taking of a vehicle, and marijuana possession. The record reflects that defendant was able to understand the detectives' questions and to provide coherent responses to those questions. Although defendant did not expressly waive his *Miranda* rights during the interview, he did so implicitly by acknowledging that he understood those rights and then voluntarily answering the detectives' questions without hesitation. The Court therefore ruled that defendant's implied waiver of his *Miranda* rights was legally valid.

(2) *Due Process Voluntariness Issues*: The test for determining whether a confession is voluntary, be the defendant an adult or a minor, is whether the defendant's will was overborne at the time he confessed. A confession that is extracted by threats or violence, obtained by direct or implied promises of leniency, trickery, or intimidation, or secured by the exertion of improper influence, are subject to being suppressed. The constitutional safeguard of voluntariness ensures that any custodial admission flows from the volition of the juvenile, and not the will of the interrogating officers. Although coercive police activity is a necessary predicate to establish an involuntary confession, such coercion does not itself compel a finding that a resulting confession is involuntary. The statement and the inducement must be "*causally linked*." In other words, a confession is not rendered involuntary by coercive police activity that is not the 'motivating cause' of the defendant's decision to incriminate himself. As for the admissions defendant eventually made (i.e., being at the scene of the shootings and supplying the gun), defendant argued that Detective White's "use of coercive tactics, including threats, deception, and promises of leniency" made those statements inadmissible. The Court disagreed. Looking at the circumstances of the interview, the Court first noted that the interview took place in the afternoon. Defendant was never handcuffed during the interview, which lasted only one hour and 10 minutes. The detectives were never aggressive with defendant who never appeared to be afraid while answering questions. The interrogation was more of a back-and-forth conversation during which the detectives expressed their belief that defendant was the shooter and he consistently denied that allegation. Although Detective White did in fact talk about defendant "clear(ing) (his) name," and "do(ing) a little time in camp," assuming those comments were in fact "offers of leniency," they weren't made until after defendant had already admitted to being at the scenes of the two shootings and supplying the gun used. After these comments by the detective were made, defendant offered no more in the way of incriminating statements. There was therefore no "*causal link*" between the detective's comments and defendant's admissions. The Court further ruled that the detectives' comments about his father being in trouble was not a threat that would have prompted any unreliable statements from defendant in that he was also told that his father did not match the physical description of the shooter. Lastly, the Court held that deceptions used during an interrogation are not improper so long they are not the type of a deception which might cause a suspect to give an involuntary or unreliable statement. In this case, it was held that the use of the false photographic arrays and telling defendant that witnesses had identified him as the shooter, telling him that the casings at the scene matched the gun

(which, although true, was not known to the detective yet), and that his fingerprints were on the gun when they were not, were not the types of deceptions that might cause an involuntary or unreliable confession. Even so, except to admit that he was at the scenes of the two shooting and provided the gun used, defendant remained adamant that he was not the shooter. So the ruses used had little if any effect on him. Therefore, based upon the totality of the circumstances, the Court ruled that defendant's admissions were not the result of coercive police interrogation tactics, and were properly admitted into evidence.

Note: Despite the rulings in this case, police interrogators should know that juries (which have the power to acquit if pissed off) are seldom impressed with interrogation tactics that involve falsehoods (liberally referred to as blatant and intentional "lies" by defense counsel). Perhaps more importantly, courts (and state legislators) are becoming less and less sympathetic with interrogation mind-games played upon juvenile suspects. As indicated by this Court, juveniles are to be given "special care" in evaluating their confessions. Certain justices on the Ninth Circuit Court of Appeal would have had a field day with the People's case upon hearing evidence in this case that a 16-year-old misguided (albeit violent, criminally sophisticated) young boy was subjected to such sophisticated adult-style interrogation tactics as threats to possibly prosecute a loved one, offers of leniency, and false evidence, and would have given a completely different twist to the propriety of such tactics. So while I recognize that the inherent difficulties in investigating and prosecuting gang cases sometimes call for pushing the envelope a bit, I would caution gang detectives to use a little discretion when questioning juveniles, using deceptions, suggesting that cooperation will bring lighter sentences, and inferring that a loved one will take the heat if a confession is not forthcoming.