The California Legal Update

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

Vol. 24 July 27, 2019 No. 8

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THIS EDITION'S WORDS OF WISDOM:

"*The difference between stupidity and genius is that genius has its limits*." (Albert Einstein)

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CASE LAW:

***Miranda; Intentional Violations*:**
***Voluntary Inculpatory Statements*:**
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***A Defendant's Reinitiation of an Interrogation Following an Invocation of Rights*:**

Bradford v. Davis **(9th Cir. May 3, 2019) 923 F.3rd 599**

Rule: The fact that *Miranda* is intentionally violated does not mean that the resulting incriminating responses to continued questioning are involuntary. Voluntary inculpatory statements obtained in violation of *Miranda*, while inadmissible in the People's case-in-chief, are admissible for purposes of impeachment should the defendant testify.

Facts: Lynea Kokes was hired as the new manager of an apartment complex in Panorama City called the Panorama City Lodge. She, her husband—Alexander—and their baby boy were scheduled to move into apartment 238 on April 18, 1988. Defendant lived with another person—Randall Beerman—in apartment 252 of the Lodge. By 2:00 p.m., Lynea was moving some of their stuff into apartment 238. Defendant, who had been observed by others "leering" at Lynea, described her as attractive. He bet Beerman that "he'd get her in bed that day while her husband was gone." Later that afternoon, the assistant manager had an altercation with defendant concerning him being behind in his rent and also possibly breaking into the Lodge's office. Defendant was told to move out. After this discussion, defendant sought Lynea out for the purported purpose of working out a payment schedule, ignoring the fact that he had just been evicted. Unaware that he'd been told to pack up and leave by the assistant manager, Lynea agreed to work something out with him. Defendant, however, unexpectedly responded to this kindness by "grabb(ing) her throat," and, as she gasped for air, pulling off her clothes. Lynea was repeatedly raped and sodomized while being continually hit until she lost consciousness. The forensic evidence later indicated that Lynea had been raped and sodomized, although there was also evidence of semen in her mouth. Her nipples had been "savage[ly]" bitten off, and never recovered. One eye was blackened and her nose was broken in several places. Hemorrhages on the right and left side of her neck were the result of force being applied to the larynx and neck area. A ligature was tied around her neck so tightly it cut off her air, and her throat was slashed twice. There were also seven penetrating stab wounds. Five of these wounds went through her rib bones, fracturing them, and four penetrated her heart. All of these injuries occurred while she was alive. The cause of death was determined to be from a combination of the strangulation and the stab wounds to her chest. When later interrogated, defendant admitted to leaving the semi-conscious Lynea after sexually assaulting her in order to wash up in his own apartment. Worried that she might survive and identify him as her assailant, he obtained a knife from his kitchen and returned to apartment 238, slashing Lynea's neck several times and repeatedly stabbing her in the chest until he was sure she was dead, breaking the blade off the knife in the process. Alexander found his dead wife that evening in their apartment. Defendant was quickly arrested based upon information supplied by his roommate, Beerman, who had found the parts to the broken knife and gave them to the police. Over the next two days, defendant was questioned four times by police investigators, the details of each being described below. Charged in state court with capital murder, parts of defendant's statements to the police

were admitted into evidence. Defendant was convicted of first degree murder and related charges, and sentenced to death upon the jury's finding true the special circumstance of killing the victim in order to prevent her from testifying against him. The California Supreme Court affirmed. (*People v. Bradford* (1997) 14 Cal.4th 1005.) However, upon filing a Writ of Habeas Corpus in federal court, it was ruled that none of defendant's statements should have been admitted into evidence. The People appealed.

Held: The Ninth Circuit Court of Appeal reversed, reinstating the California Supreme Court's decision upholding defendant's conviction and death sentence. At issue was the admissibility of defendant's inculpatory statements made at each of his four separate interrogations:
Statement #1; *Ignoring a Miranda Invocation*: Defendant's first statement to detectives was ruled by the trial court to be inadmissible in the People's case-in-chief in that it was obtained in violation of the rules of *Miranda*. Despite their inadmissibility, defendant's statements were held by the trial court to be voluntary (i.e., not coerced); a ruling upheld by the California Supreme Court. Specifically, some six hours after his arrest, defendant was questioned by two detectives. After initially obtaining defendant's background information, he was read his *Miranda* rights and asked if he wanted to speak about "what happened last night." Defendant unhesitatingly declined, clearly and unequivocally asking for the assistance of counsel. The detectives continued to question him anyway, suggesting to him that they could continue "off the record." Defendant agreed. This questioning led to a number of incriminating statements. As a general rule, a suspect's incriminating statements obtained in violation of *Miranda* may still be admitted into evidence for the purpose of impeachment should the defendant choose to testify in a manner that is inconsistent with his otherwise inadmissible statements to police. (*Harris v. New York* (1971) 401 U.S. 222.) The U.S. Supreme Court has held that statements obtained in violation of *Miranda* are admissible for impeachment purposes so long as the trustworthiness of such statements satisfy the applicable legal standards. (*Mincey v. Arizona* (1978) 437 U.S. 385, 397-298.) The trial court in this case ruled that although the defendant's incriminating statements resulting from this interrogation were inadmissible in the People's case-in-chief, being the product of a *Miranda* violation, under a "totality of the circumstances" analysis, the statements were *not* involuntary, leaving them available for purposes of impeachment. On direct appeal, the California Supreme Court agreed. The federal district court, however, disagreed, holding that the California Supreme Court's decision to the effect that defendant's statements, although obtained in violation of *Miranda* were nonetheless voluntary, was "contrary to and an unreasonable application of federal law because the detectives continued to interrogate (defendant) after he invoked his right to counsel and made misleading statements regarding potential defenses." The Ninth Circuit overruled the district court's decision on this issue, finding that the California Supreme Court's "totality of the circumstances" analysis was neither contrary to, nor an unreasonable application of, federal law; the only issue in a habeas corpus analysis. Having the advantage of listening to the tape-recorded interrogation, the Court found defendant to be in full control of himself, noting specifically that the tone of his voice was "steady and flat." Without providing a detailed analysis of the issue, the Ninth Circuit simply found that the case law, as relied upon by the California Supreme Court, clearly supported the California Courts' (trial and Supreme) conclusions. Despite the detectives purposely ignoring defendant's unequivocal invocation of his right to counsel, therefore, the Court found that California's application of the federal voluntariness analysis was proper, and that defendant's incriminating statements were not involuntarily obtained.

Statement #2; *Booking Questions*: Defendant was booked by two officers not otherwise involved in the investigation of defendant's crimes about 45 minutes after his initial interrogation had ended. While defendant was being fingerprinted, a detective, who happened to be present conducting other business, mentioned to defendant that he looked "like a traffic ticket." Perhaps offended that he was being accused of something so menial, defendant corrected the detective by simply responding; "*Murder*." The detective left without further comment. Then, perhaps still thinking no one believed him, defendant volunteered in the presence of the two booking officers that that he had helped Lynea move into her apartment, choked her, left the apartment to clean up, and returned to kill her. One of the officers asked defendant if he felt sorry. Apparently receiving no response, she and the other officer then proceeded to ask him several questions about the crime. Neither officer thought to advise defendant of his rights. The Ninth Circuit broke their analysis of what was overall termed "booking questions" into two parts. It initially discussed defendant's simple comment, i.e., "*murder*," uttered after having been told he looked like he was no more important than a mere traffic ticket. Included in this first part was defendant's unsolicited recitation of the facts surrounding the murder for which he was being booked. The trial court had admitted this portion of defendant's booking question responses into evidence. The California Supreme Court agreed. The federal district court, however, ruled that this was all a direct product of the earlier illegal interrogation and thus involuntary, and should not have been admitted. The Ninth Circuit, siding with the California Supreme Court, again disagreed. The California Supreme Court had ruled that the detective's casual comment about defendant looking like a traffic ticket was unlikely to elicit an incriminating response, and thus did not constitute an interrogation. The Ninth Circuit found that this conclusion was not contrary to, nor an unreasonable application of, federal law. For the *Miranda* admonishment requirements to apply, there must be a custodial interrogation. A custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda v. Arizona* (1966) 384 U.S. 436, 444.) It has also been held that such an interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300.) The definition of an interrogation has further been defined by the Supreme Court to include the requirement that for there to be an interrogation, the officer "should have known (that his words or actions) were reasonably likely to elicit an incriminating response." (*Id.*, at p. 302.) The Court here agreed with the California Supreme Court that the detective's comment to defendant about looking like a traffic ticket did in fact constitute "questioning," but that even so, it was not something he should have known would elicit an incriminating response. As such, it was not an "*interrogation*," as the term is legally defined. Defendant's response, not requiring a *Miranda* admonishment or waiver to be admissible in evidence, was therefore properly used against him. After the detective left, defendant initiated on his own a brief recitation of the events surrounding the murder, made in the immediate presence of the two booking officers. The Court found that this portion of the booking-question scenario was also not the product of a custodial interrogation, his volunteered statements being unprompted by the officers. As such, defendant's unsolicited statements about the murder were properly admitted into evidence. The second half of defendant's booking statements involved that portion where he was in fact subjected to questioning by the booking officers without benefit of a *Miranda* admonishment. The California Supreme Court ruled that although inadmissible as a *Miranda* violation, such statements were not involuntary under the circumstances, and that any error in the admission of his responses to this questioning was harmless "beyond a reasonable

doubt," in that it was duplicative of his fourth statement (below) and with the evidence of his guilt being so "overwhelming." Again, the federal district court ruled that these responses were also tainted by the initial coerced confession obtained by the investigator upon defendant's initial arrest. The Ninth Circuit, again overruling the district court, found that the California Supreme Court's conclusion that this part of the second statement was voluntary despite being inadmissible; a ruling that was neither unreasonable nor contrary to federal law.

Statement #3; *The Continued Interrogation*: Some eleven hours after initially being taken into custody, defendant was questioned again by yet another detective. This detective, before questioning defendant, even confirmed with him that he had previously invoked his right to counsel and that he continued to want the assistance of counsel. Despite this affirmation of defendant's request for counsel, the detective proceeded to re-interrogate him "off the record." This interrogation resulted in an extremely detailed and incriminating description of the murder and its aftermath. The federal district court found this confession to be not only unlawful under *Miranda*, but involuntary as well. Again, the Ninth Circuit disagreed, at least as to whether it was involuntary. Terming this interrogation as "unethical and . . . strongly disapproved," given the fact that it was conducted in the face of defendant's previous and reiterated invocation of his right to the assistance of counsel, the Ninth Circuit again agreed with the California Supreme Court's conclusion that even so, under the totality of the circumstances, defendant's responses were not involuntary. Contrary to the district court's findings, this statement was not tainted by a prior involuntary statement, having already decided that none of the prior statements were involuntary. There was also nothing to support an argument that this third statement, by itself, was involuntary even though inadmissible due to the clear violation of *Miranda*. During the interview, defendant betrayed no emotion, distress, or discomfort. There was no indication that defendant's will was "overborne" during the interrogation. As such, not being an involuntary statement, defendant's incriminating statements made in this interview would be admissible if needed for impeachment purposes, should defendant testify and change his story.

Statement #4; *Defendant Reinitiates*: Some 24 hours later, during which time there were no new law enforcement-initiated contacts, the in-custody defendant requested that one of the detectives contact him, indicating that he wanted to put a statement on the record. When asked by the responding detective why he wanted to talk with him, defendant told him: "*I had some questions and I'll probably talk, I don't know*." Defendant was told that if he wanted to give an "on the record statement," he must first be readvised of his constitutional rights, pointing out specifically that he still had the right to an attorney. Reminded several times that he still had a right to the assistance of counsel, and after having been re-advised of all his rights per the *Miranda* decision, defendant expressly waived his rights. A full confession followed. The California Supreme Court upheld the trial court's admission into evidence of this confession. On habeas, the federal district court again disagreed, ruling that it was tainted by what the district court felt were three prior involuntary statements. The Ninth Circuit again overruled the district court, finding once more that the conclusions of the California Supreme Court, upholding the admissibility of this confession, were neither unreasonable nor contrary to federal law. The law, coming directly from both the U.S. and California Supreme Courts, is clear: "A defendant who has asserted his right to counsel may still subsequently waive his *Miranda* rights." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485; *People v. Tully* (2012) 54 Cal.4th 952, 985.) An earlier invocation to one's right to the assistance of counsel "does not foreclose finding a waiver of Fifth Amendment protections . . . provided the accused has initiated the conversation or discussions with the authorities." (*Minnick v. Mississippi* (1990) 498 U.S. 146, 156.) Here, defendant himself initiated

this fourth interrogation without any prompting by law enforcement. The waiver of his rights under *Miranda*, before questioning was begun, was found to be knowing and intelligent, with nothing in the record to suggest otherwise. In fact, the detective—knowing that defendant had previously invoke his right to counsel—specifically reminded him of this fact, asking several times whether he was changing his mind about his request for the assistance of counsel. The Court also concluded that having already determined that the three prior statements made by defendant, whether or not admissible into evidence in the People's case-in-chief, were not involuntary, there was no reason why the California Supreme Court should have been concerned with whether this last statement was tainted by any or all of them. And there is no U.S. Supreme Court precedent dictating that just because some of a suspect's prior statements are inadmissible, having been obtained in violation of *Miranda*, that this fact alone prevents a suspect from changing his mind and waiving his rights in a later self-initiated interrogation. It therefore cannot be said that the California Supreme Court erred in concluding that nothing occurred in the first three interrogations that "amounted to psychological coercion" sufficient "to break down (defendant's) resistance," and "that 'no coercive threats or promises' were made.'"

Conclusion: The Ninth Circuit concluded that "(n)one of the California Supreme Court's conclusions regarding the voluntariness and admissibility of (defendant's) four post-arrest statements deserve(d) to be disturbed on federal habeas review." This was because in affirming defendant's conviction and death sentence, the California Supreme Court did not unreasonably apply clearly established federal law nor reach conclusions that were contrary to federal law. This being the sole issue when reviewing a habeas corpus ruling out of a lower court, the California Supreme Court affirmance of defendant's conviction and death sentence was affirmed.

Note: The *Miranda* violations in this case were blatant and obvious. Some officers believe that such a tactic done for the purpose of obtaining impeachment evidence is not only okay, but advisable. While advocated by some *Miranda* experts, I am of the strong opinion that this is simply wrong, and will someday come back to bite us. It is at the very least questionable whether prosecutors, as "officers of the court," should be encouraging police interrogators to intentionally violate *Miranda*. Although it is true that the results of such an interrogation tactic are in fact admissible in evidence for impeachment purposes should defendant testify and change his story, and there is a definite prosecution tactical advantage to tying a defendant down to a specific description of his crime (often made up at a time when a suspect has yet had time to think up a lie that is supported by the evidence), the practice is still strongly criticized, at least in California. The California Supreme Court has told us several times that a statement purposely elicited from an in-custody suspect who has invoked his right to counsel (or to silence), even though done for the purpose of obtaining admissible impeachment evidence, is still "*obtained illegally*," and not condoned by the Court. "(*I*)*t is indeed police misconduct to interrogate a suspect in custody who has invoked the right to counsel*." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1075-1077; quoting *People v. Peevy* (1998) 17 Cal.4th 1184, 1205.) The Court has in fact warned us that if it is found that such a practice becomes "widespread," or "pursuant to an official police department practice," a new exclusionary rule may be developed to resolve the problem. Several lower California appellate courts have found intentional *Miranda* violations to be "*deplorable*" (*People v. Orozco* (2019) 32 Cal.App.5th 802, 816.) and "*troubling*" (*In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602; and *People v. Bey* (1993) 21 Cal.App.4th 1623, 1628.). And the Ninth Circuit in this decision, agreeing with the California Supreme Court, described the intentional *Miranda* violation in this case as "*unethical and . . . strongly disapproved*." (at p. 620.) Under the theory

that "*bad facts make for bad case law*," it is strongly recommended that *Miranda* not be intentionally violated despite some prosecutorial advantages to doing so.

***DUI FSTs and Miranda*:**
***Miranda and Interrogations*:**

People v. Cooper **(July 18, 2019) __ Cal.App.5th __ [2019 Cal.App. LEXIS 648]**

Rule: Questions asked by an arresting officer during the administration of a Field Sobriety Test does not, as a general rule, constitute an interrogation for purposes of *Miranda*.

Facts: Just after 8:30 p.m. in January, 2017, Yessenia Rosales and Edmundo Mendez were stopped in their Kia Forte at a red light on Manchester Avenue in Los Angeles. Just as the light turned green, another vehicle slammed into their rear, sending the Kia some 50 to 80 feet (by various estimates) across the intersection. A witness estimated that the vehicle that hit them had to have been traveling down Manchester (in a 35 mph zone) at about 75 to 80 miles per hour. The Kia was "totaled." Both Rosales and Mendez suffered knee, shoulder, and back injuries that continued to plague them some nine months later as they testified at defendant subsequent trial. Mendez called 911, but was told by the operator to merely exchange information with the driver of the other car. Mendez therefore contacted that driver—defendant in this case—and asked her for her identification. Defendant told Mendez that he had no authority to ask for her identification because he was not a police officer. Mendez (and other witnesses at the scene) noted that defendant's speech was slurred and she had the odor of alcohol on her breath. Mendez re-contacted the 911 operator who finally dispatched officers to the scene. Defendant then started "acting crazy," turning on Mendez, cussing at him, and asking him if "you (expletive) work for Trump or something like that." (Apparently, this whole episode is *also* President Trump's fault.) Within 10 minutes, LAPD Officers Samual Colwart and Nathan Grate arrived at the scene. They also noted indications that defendant had been drinking. When requested, defendant produced her driver's license but "became very upset" and "threw her wallet on the hood of the car." When asked for her vehicle registration and proof of insurance, she lost it altogether; "walking around" and "cursing." Although she answered some questions (what she had eaten and when she last slept), defendant denied that she had been drinking, refused to tell the officers where she had been going, and told them, "(a)in't your business" when asked if she was under a doctor's care. Defendant was handcuffed and transported to the police station—one and a half to two miles away—so that field sobriety tests (FSTs) could be administered in a more controlled environment. Officer Colwart later testified as to why the FSTs were not administered at the scene: "She just was really upset. She wasn't . . . with the investigation at the time . . . . It would be unsafe." Per the officer, defendant was "pacing around" and the roadway "was still an active collision scene." Once at the station, and with the handcuffs removed, Officer Colwart administered a series of field sobriety tests including a "modified Romberg test" (during which she estimated the passage of 30 seconds at the 23 second mark). Two of the tests (the "walk-and-turn test" and the "one-leg stand test") defendant refused to do, complaining that "her thighs were too big and her pants were too tight," and that "she wouldn't be able to do it because she had a disability," respectively. Asked the nature of her disability, defendant told the officer; "ain't [your] business." On the tests she did perform, she did poorly. Defendant was arrested and advised that she was required to submit to a breath or blood test (See V.C. §

23612(a)(1)(A)). She chose to take a breath test, but then couldn't seem to blow hard enough to provide a sufficient sample. When told that she needed to cooperate in providing a breath sample, or in the alternative, a blood sample, defendant remained silent. The officers eventually took this lack of cooperation as a refusal. Charged in state court with the felony offense of driving while under the influence of alcohol within 10 years of a prior felony DUI conviction and related charges, defendant filed a motion to suppress all her statements made while at the police station, arguing that without a *Miranda* admonishment and waiver her statements were inadmissible. The trial court denied her motion, declining to apply the *Miranda* rules to the administration of the FSTs. Defendant was convicted of all charges and sentenced to six years in prison. She appealed.

Held: The Second District Court of Appeal (Div. 3) affirmed. Defendant argued on appeal (as she did in the trial court) that she was in custody upon being transported to the police station in handcuffs, and that she therefore should have been *Mirandized* before being asked any questions during the FSTs. Specifically, defendant challenged the admissibility of six separate statements she made at the police station: (1) "That her thighs were to[o] big [to] perform a field sobriety test;" (2) "That her jeans were too tight to perform a field sobriety test;" (3) "That she could not perform a field sobriety test because she suffered a disability;" (4) "That when asked the nature of her disability she stated, 'Ain't none of your business'" (5) '"I don't want to take any more tests;'" and (6) Her response to the modified Romberg test, when she opined that 30 seconds had passed when in fact only 23 seconds had lapsed. The Court never decided whether or not defendant was "in custody" for purposes of *Miranda* during the FSTs. Rather, the Court instead agreed with the trial court judge that the questions asked of her during the FSTs did not constitute an "interrogation." For *Miranda* to be necessary, an in-custody suspect must be subjected to an interrogation by a law enforcement officer. Whether or not defendant had been interrogated was the issue here. An "*interrogation*" for purposes of *Miranda* is defined as words or actions an officer would reasonably expect to elicit an incriminating response. (*Rhode Island v. Innis* (1980) 446 U.S. 291.) Citing the U.S. Supreme Court case of *Pennsylvania v. Muniz* (1990) 496 U.S. 582, as its authority, the Court noted that "dialogue" between a police officer and a DUI arrestee during the administration of FSTs consists primarily of carefully scripted instructions as to how the tests are to be performed. Such a dialogue also contains limited and carefully worded inquiries as to whether the arrestee understands the instructions. Such inquiries are those necessarily related to the administration of the tests and not ones an officer would reasonably expect to elicit incriminating responses. Any responses by the arrestee at that point are "'voluntary' in the sense that they (are) not elicited in response to (a) custodial interrogation." Absent a custodial interrogation, a *Miranda* advisal and waiver is legally unnecessary. Also, the administration of "FSTs does not violate the Fifth Amendment 'because the evidence procured is of a physical nature rather than testimonial.'" With these principles in mind, the Court found defendant's first four challenged statements (above) to have been completely voluntary, and not in response to any questioning. The fifth statement (about not wanting to take any more tests) similarly fails in that "(a) police inquiry to a suspect as to whether she will submit to a chemical test is not an 'interrogation' within the meaning of *Miranda*." (citing *South Dakota v. Neville* (1983) 459 U.S. 553, 564.) The Court found defendant's last contested statement (her estimation that 30 seconds had passed at the 23 second point; the Romberg Test) a bit more troubling, noting that there is case authority for the argument that the Romberg Test itself required the suspect to make a calculation and "to

communicate an implied assertion of fact or belief." (*People v. Bejasa* (2012) 205 Cal.App.4th 26, at p. 43.) But the Court was able to differentiate *Bejasa* on its facts in that the defendant in *Bejasa* had already been physically arrested (handcuffed and placed into a patrol car) on a parole violation before the administration of the FSTs). The Court also found that even if *Bejasa* applied, admission of the Romberg Test results in this case was harmless error, given the amount of other evidence of defendant's guilt. The bottom line is that no *Miranda* admonishment and waiver was legally required before having defendant submit to a field sobriety test.

Note: So was defendant arrested, or just detained, while being given the FSTs? The officer considered it only a detention, testifying to his reasons for why he elected to conduct the FSTs at the station rather than out on the street. But the officer does not get to dictate whether a transported suspect is only detained as opposed to arrested. It will depend upon the Court's objective evaluation of the circumstances. There is in fact good case law that says that a non-consensual transportation from the scene of a detention does not necessarily convert that detention into an arrest, at least if there is a good reason why the officer found the transportation to be necessary. (E.g., *United States v. Charley* (9th Cir. 2005) 396 F.3rd 1074, 1080: "(T)he police may move a suspect without exceeding the bounds of an investigative detention when it is a reasonable means of achieving the legitimate goals of the detention 'given the specific circumstances' of the case.") But the general rule is to the contrary, finding a non-consensual transportation of a detainee to be enough to convert a detention into an arrest. (*Kaupp v. Texas* (2003) 538 U.S. 626, 630; *Dunaway v. New York* (1979) 442 U.S. 200.) Fortunately, the Court didn't have to decide this issue here, finding instead that *Miranda* isn't necessary absent an interrogation irrespective of whether or not he has been arrested, and that conducting FSTs does not generally involve an interrogation (with the possible exception of the so-called Romberg test). *However*, note that under *People v. Bejasa*, in asking the preliminary questions typically asked of a DUI suspect (e.g., "*What have you been drinking*?," "*How much*?," "*When did you start*?," "*When did you stop*?," "*Do you feel the effects of the alcohol*?," and/or "*Do you think that you should be driving*?"), a different result may be dictated depending upon when in the sequence of events these questions are asked. Such questioning does in fact constitute "*words or actions an officer would reasonably expect to elicit an incriminating response*," and therefore fits the definition of an interrogation. If asked after the subject has been arrested, as opposed to that earlier time period during which the officer is involved in the initial evaluation of the circumstances, then the responses will indeed be suppressed under *Miranda* if the subject has not already waived his or her rights. That's what *Bejasa* tells us. In such a circumstance, therefore, whether or not a non-consensual transportation of the suspect to the police station (when done before asking these questions) constitutes an arrest, as opposed to a continuing detention, does in fact become relevant, and will have to be litigated.

***Second Degree Murder*:**
***Privacy Interests in a Hospital Room*:**
***Consent Searches*:**
***Miranda and Non-Custodial Questioning*:**
***Miranda Waivers; Voluntariness*:**
***Pretrial Diversion per P.C. §§ 1001.35 and 1001.36*:**

In re M.S. **(Mar. 11, 2019) 32 Cal.App.5th 1177**

Rule: Purposely (but without premeditation or deliberation) stabbing a newborn child qualifies as a second degree murder. A warrantless entry of a suspect's hospital room with a nurse's permission does not violate the Fourth Amendment. *Miranda* warning are not necessary for a crime scene reenactment with an out-of-custody suspect. Physical and mental impediments do not necessarily preclude the obtaining of a free and voluntary *Miranda* waiver. Pretrial Diversion per P.C. §§ 1001.35 and 1001.36 is not available to a murder suspect, nor is it applicable to juvenile court proceedings.

Facts: Defendant—a 15-year-old female minor—was brought to a hospital in Santa Maria by her parents on January 17, 2016, complaining of abdominal pain and vaginal bleeding. An examination revealed an umbilical cord protruding from her vagina. When questioned by a physician's assistant, defendant admitted that she had just given birth to a baby boy, but claimed that the baby had been stillborn. Defendant provided differing accounts of the circumstances surrounding the baby's birth. The police were called. Santa Maria Police Detectives Andrew Brice and Michael McGehee responded. After speaking to the hospital staff, the plain clothes detectives contacted defendant in her hospital room. Interviewing her in her room with the door open and a nurse present, they later testified to making this contact with "open mind(s)," not knowing yet whether they had a criminal offense or a "medical event." In a recorded interview, the detectives got some four different versions of what had happened to the baby before defendant finally told them that the infant's body was in a plastic bag in the bathroom vanity. Defendant gave her verbal consent to the detectives to search the family's apartment. After the interview, a criminalist technician came in and took photographs of bruises to defendant's abdomen and groin area. Defendant cooperated in this procedure without objection by moving her clothing aside. She was not required to disrobe. Meanwhile, other officers went to the apartment and, after obtaining defendant's father's written permission, conducted an initial warrantless search. The deceased baby was found in a clear trash bag in the bathroom. A blood-stained broccoli knife was also found. A later autopsy revealed that the baby had been born alive, dying from a neck wound consisting of two or three strikes, severing the carotid artery and trachea. The torso of the baby's body also showed "hesitation marks." Meanwhile, Detective Brice returned to the hospital and obtained defendant's oral and written consent to search her cellphone and her laptop. She also provided the detective with the password for her phone. Data subsequently downloaded from defendant's cellphone reflected Internet searches on possible ways to cause a miscarriage and the treatment of abdominal pain during pregnancy. Three days later (January 20), upon execution of a search warrant on the family's apartment, defendant was asked to participate in a video-taped reenactment of the occurrences that led to the infant's death. Defendant was told that she was "not in any trouble right now," was "free to leave," and did not have to participate. In her parents' presence, defendant agreed to do the reenactment. Using a toy doll, she demonstrated how she had used the knife to cut the umbilical cord. She continued to insist, however, that the baby was stillborn; "wasn't moving at all." A week after the murder, Detectives McGehee and Brice questioned defendant in a video-recorded interview at the police station. As her parents waited in a nearby waiting room, defendant was informed of her *Miranda* rights for the first time. After expressly waiving her rights, defendant continued to claim that the baby was stillborn. But when confronted with the autopsy results, she finally admitted to cutting the baby's throat although she claimed she did not intend to kill him. Immediately following this interview, defendant submitted to an interview by a psychologist who determined that defendant

was not psychotic. At the outset of this interview, the psychologist re-advised defendant of her *Miranda* rights and told her that their conversation was not confidential. It was eventually determined that defendant had been having unprotected sex with her boyfriend for several years before finding out that she was pregnant. The alleged motive for killing the baby was to prevent her parents from finding out that she was pregnant; a fact she was able to keep secret up until the baby's birth. A Welf. & Inst. Code section 602 petition was filed in the Juvenile Court alleging that defendant had committed murder (P.C. § 187(a)), with a deadly weapon use allegation (P.C. § 12022(b)(1)). Despite evidence presented by a defense expert to the effect that defendant suffered from "pervasive pregnancy denial, a dissociative disorder," the Juvenile Court magistrate sustained the allegations, finding that defendant had committed a second degree murder while personally using a knife. Specifically, the trial court found that defendant harbored express malice, but that the prosecution failed to prove beyond a reasonable doubt that she acted with the requisite premeditation and deliberation necessary for first degree murder. The magistrate declared her to be a ward of the court and placed her at Casa Pacifica. She appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. On appeal, defendant raised six separate issues:

(1) *Sufficiency of the Evidence for Second Degree Murder*: Second degree murder is an unlawful killing of a human being with (express or implied) malice aforethought, but without premeditation or deliberation. The Court found that even aside from defendant's eventual admissions as to the circumstances of the baby's death, sufficient physical evidence existed to prove that she had intended to kill him, even if without premeditation and deliberation. Based upon the results of the autopsy showing multiple stab wounds to the neck along with other "hesitation marks," the Court found "substantial evidence" of defendant's intent to kill. Additionally, "consciousness of guilt" evidence was provided by her repeatedly false and inconsistent statements as to the baby being stillborn and that the baby's death was an accident. "The juvenile court properly considered her various and inconsistent explanations to determine guilt."

(2) *Confronting Defendant in Her Hospital Room, Photographing Her, and Obtaining Her Consent to Search Her Cellphone, as Fourth and/or Fifth Amendment Violations*: Defendant argued that because she had a reasonable expectation of privacy in her hospital room, a search warrant should have been obtained before officers entered her room to question her, obtain her consent to search her cellphone, and then to "intrusively" photograph her. The Court held that defendant had forfeited her Fifth Amendment, *Miranda* argument, in that it was not raised at the trial court level. The Court did hold, however, that "no Fourth Amendment violation occurs when a nurse (the hospital having "joint dominion" of the room) permits an officer to enter a sentient patient's hospital room for purposes unrelated to a search, [and] the patient does not object to the visit." As for the cellphone search, the Court found substantial evidence to support the trial court's determination that defendant had freely and voluntarily (and in writing) consented to the officers searching the contents of her phone. As for the photographs of defendant's abdomen and groin, the Court found the issue to be irrelevant in that nothing of any evidentiary value was obtained. Also, if it was error, the error was harmless.

(3) *Failure to Advise Defendant of Her Miranda Rights Prior to the Video Reenactment*: The Juvenile Court magistrate ruled that defendant was not in custody when asked if she would participate in a reenactment of her baby's birth and death, and thus no *Miranda* admonishment and waiver was necessary. The Appellate Court agreed. The reenactment took place during the

execution of a search warrant on the residence. When asked if she would participate, the officers were aware of defendant's age. Her parents were there and, along with defendant, also consented to their daughter's participation after being told that she was not required to do so. It was further noted that "the officers 'took great care to make sure this was not a coercive environment [and were] sensitive to (defendant's) physical condition.'" Under these circumstances, with the reenactment lasting about 30 minutes, the Court failed to find any evidence to support defendant's argument that she was custody. *Miranda*, therefore, was not applicable to these circumstances.

(4) *Voluntariness of Defendant's Miranda Waiver*: Defendant argued that she did not voluntarily waive her *Miranda* rights during the January 27th formal police interview. Specifically, defendant asserted that she was "physically exhausted from having given birth 10 days prior" to the interview, that she "suffered from posttraumatic stress disorder," "that the detectives used coercive tactics" and that "she had no prior experience with law enforcement." After noting that it is the prosecution's burden to show by a preponderance of the evidence that a *Miranda* waiver is "knowing, intelligent, and voluntary," and that the court is to consider "factors such as the juvenile's age, experience, education, background and intelligence, and whether he or she has the capacity to understand the *Miranda* warnings, the nature of their Fifth Amendment rights, and the consequences of waiving those rights," the Court here upheld the trial court's denial of defendant's motion on this issue. Looking at the circumstances of the interrogation, it was noted that defendant told the detectives at that time that she "felt okay." Upon being read her *Miranda* rights, she responded affirmatively that she understood her rights and wanted to speak with the detectives. The interview was low-key and non-obtrusive, the detectives, with whom defendant was now familiar, inviting her to call them by their first names. No threats nor offers of leniency were made, rejecting defendant's argument that one of the detective's offer to obtain counseling for her (which she already had) was an "offer of leniency." Noting that defendant was 15 years old and a sophomore in high school, that she spoke rationally in the English language during the interview, and that she never indicated that she wanted to stop the questioning or see her parents, the Court failed to find any evidence of coercion.

(5) *Voluntariness of Defendant's Statements to the Prosecution Psychologist*: Immediately following the above interview, defendant was questioned by a psychologist brought in by law enforcement. The Court side-stepped whether it was error to do this, noting that nothing he learned was used at the Juvenile Court jurisdictional hearing. The Court also held that if it was error for the police to use a psychologist, it was harmless error under the circumstances.

(6) *Mental Health Pretrial Diversion*: Defendant lastly argued on appeal that she was entitled to a remand of her case to the trial court to determine whether she was eligible for mental health diversion under the newly enacted P.C. §§ 1001.35 and 1001.36, pointing out that according to her expert, she suffered from pervasive pregnancy denial, a dissociative disorder, and posttraumatic stress disorder. Although her crime occurred before these new diversion statutes came into effect (June 27, 2018), she argued that they are retroactive (per *People v. Frahs* (2018) 27 Cal.App.5th 784.) and should apply to her. The Court, however, noted that (1) diversion is not available to someone accused of murder (P.C. § 1001.36(b)(2)(A)), and (2) they don't apply to juvenile proceedings that are not intended to be criminal in nature, there being a distinction between adult criminal prosecutions and juvenile delinquency proceedings.

Note: There is really nothing surprising in the Court's rulings here. But it is worth noting that the two detectives (Andrew Brice and Michael McGehee of the Santa Maria Police Department)

did an excellent job in their handling of what had to be a very difficult and sensitive situation. In an era of court rulings criticizing police interrogations of juvenile offenders, the detectives here handled M.S. with caution and compassion, involving her parents every step of the way. No mind games, no trickery, no gamesmanship; taking their time to insure they got it right. As a result, they insured M.S.'s (and her parents') continuing cooperation, eventually getting some solid admissions and a just legal conclusion. Good job.