The California Legal Update

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

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

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THIS EDITION'S WORDS OF WISDOM:

"*My wife tells me I never listen to her, . . . or something like that*." (Unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Driving on a Suspended or Revoked License (or Never Had a License), per V.C. § 14601.1 (or V.C. § 12500), and the Community Caretaking Doctrine*:** In the previous *California Legal Update* (Vol. 24, #11, Oct. 28, 2019), my brief of a Fourth District Court of Appeal (San Diego) decision, ***People v. Lee (Oct. 3, 2019) 40 Cal.App.5th 853, brought forth a number of (sometimes) irate ("*don't kill the messenger*") responses concerning the impounding of vehicles. As I noted in my brief, ***Lee*** specifically held that despite the existence of authorizing statutes (e.g., **V.C. § 14602.6(a)(1)**), it is a **Fourth Amendment** violation to impound a vehicle and conduct a subsequent warrantless inventory search unless such an impoundment is also allowable under the so-called "*Community Caretaking Doctrine*." In ***Lee***, the defendant was caught driving while his license was suspended. Among the arguments the People made in ***Lee*** in attempting to justify the warrantless impoundment and inventory search of defendant's vehicle was that **§ 14602.6(a)(1)** authorizes such a procedure. The Appellate Court ruled to the contrary. Per ***People v. Lee***, to be lawful, the impoundment of a vehicle must be *both* authorized by statute (such as **V.C. § 14602.6(a)(1)**) *and* in compliance with the Community Caretaking Doctrine. (pp. 867-869.) (***Lee*** also stands for the proposition that an inventory search of an impounded motor vehicle, when done for the purpose of finding evidence of ordinary criminal wrongdoing as opposed to merely protecting the owner's personal possessions, is illegal. See also ***United States v. Johnson*** (9th Cir. 2018) 889 F.3rd 1120, 1125. But that is not the issue here.) Generally, the Community Caretaking Doctrine has been held to apply (allowing for the impoundment of a vehicle) *only* when the vehicle, if left at the scene, is parked illegally, blocks traffic or passage, or stands at risk of theft or vandalism. A number of you told me that you use **V.C. § 14602.6(a)(1)** (or other impound statutes; e.g., **V.C. § 22651**; see below) to justify the impoundment and inventory of vehicles on a regular basis without concern about the applicability of the Community Caretaking theory, and that no one ever complains. Well, that may be. But if so, it's likely that in those instances Community Caretaking never became an in-court issue because (1) The D.A. rejected the case and never told you, (2) no illegal contraband was found during the inventory search so no criminal case was filed as a result, (3) defense counsel was unaware of these rules and failed to litigate them, and/or (4) you were just lucky that no one wanted to expend the time and effort (not to mention the money) to sue you. But, in response to your "cards and letters," I researched the issue further and here's what I found: ***Lee's*** ruling—i.e., that the Community Caretaking requirement, being based upon **Fourth Amendment** principles, takes precedence over **V.C. § 14602.6(a)(1)**'s statutory authorization for impounding a vehicle—is consistent with prior case law, both state (see ***People v. Torres*** (2010) 188 Cal.App.4th 775, 786-792.) and federal (see ***Miranda v. City of Cornelius*** (9th Cir. 2005) 429 F.3rd 858, 862-866; and ***United States v. Cervantes*** (9th Cir. 2012) 703 F.3rd 1135, 1140-1143.). I could not find any authority authorizing an exception to the rule as announced in ***Lee*** for someone driving on a suspended or revoked license, or who never had a license. Similarly, prior case law (again, state and federal) requires compliance with the Community Caretaking Doctrine when the impoundment of a vehicle is statutorily authorized pursuant to **V.C. § 22651(h)(i)**; i.e., where the driver is subjected to a custodial arrest. (***People v. Williams*** (2006) 145 Cal.App.4th 756, 761–763; and ***United***

States v. Caseres (9th Cir. 2008) 533 F.3rd 1064, 1074-1075.) It is noted also that there are a whole host of other statutory grounds for impounding vehicles, such as (but not limited to) those listed in **V.C. § 22651(a)** through **(w)**, interwoven into some of which are various Community Caretaking factors. Most of **section 22651**'s authorizations for impounding vehicles, however, do not yet have any case law telling us whether or not the Community Caretaking Doctrine even applies. Absent such case law, we have to assume it to be the general rule that the Community Caretaking Doctrine *does* in fact apply to any statutorily authorized impoundment absent a specific appellate court decision to the contrary. (*However*, see ***Clement v. City of Glendale*** (9th Cir. 2008) 518 F.3rd 1090, where the Ninth Circuit criticized the impoundment of a vehicle per **subdivision (o)(1)(A)** of **section 22651**—when it was found in an off-street parking facility with expired registration—but as a **Fourteenth Amendment** "*due process*" violation for failing to provide the car's owner with a pre-impoundment court hearing. The ***Clement*** case never even mentions the Community Caretaking Doctrine.) It is also a reoccurring issue whether the Community Caretaking Doctrine applies when the officer's reason for impounding a vehicle is to prevent an unlicensed driver from continuing his unlicensed driving. (See ***People v. Torres***, *supra*, at p. 792; ***United States v. Caseres***, *supra*, at p. 1075; and ***Miranda v. City of Cornelius***, *supra*, at pp. 865-866.) None of these cases, however, definitively decide the issue, although they do tend to lean toward *not* allowing the impounding of a vehicle in such a circumstance. Don't forget, however, that whether or not there is *probable cause and exigent circumstances* justifying a warrantless vehicle search (i.e., under the so-called "*automobile exception*" to the warrant requirement) is a whole separate issue (see ***People v. Lee***, *supra*, at pp. 861-867) and not reliant upon either the Community Caretaking Doctrine or the inventory search rules. But as for the impoundment of a vehicle under authority of **V.C. §§ 14602.6(a)(1)** (unlicensed drivers) and/or **22651(h)(i)** (arrested drivers), and a subsequent inventory search of that vehicle, my research tells me it is a hard-and-fast rule that these violations *do not* give a police officer the right to impound the driver's vehicle and conduct an inventory search *absent compliance with the Community Caretaking Doctrine*. *Period. End of issue.*

***Novel Defense Theory of the Year*:** Benjamin Schreiber was convicted in 1997 of murder in an Iowa state court and sentenced to life in prison. (Source: *The Rapid City Journal, Nov. 8, 2018; South Dakota.*) On March 30, 2015, suffering from an undisclosed ailment, Schreiber was transferred from prison to a local hospital where, while on an operating table, he suffered five separate heart stoppages, effectively dying and being brought back to life each time. Thanks to the wonders of modern medical science, Schreiber ultimately survived the surgery and fully recovered. Returned to his prison cell, Schreiber filed a writ of habeas corpus arguing that when he died, he had completed his life sentence and was therefore entitled to be released. Makes sense, if you put your brain in neutral, turn off your common sense, and limit your analysis to a strict interpretation of the letter of the law. However, an Iowa district judge found little merit in Schreiber's argument, noting that the very act of filing the writ confirmed he was still among the living. An appeals court affirmed the trial court's decision on November 6th, ruling that "Schreiber is either alive, in which case he must remain in prison, or he is dead, in which case this appeal is moot." "*Writ denied.*"

Personal Note: One has to wonder whether a California court, with the current trend of finding any conceivable excuse available to release prison inmates back onto the streets, would have been more open to Schreiber's arguments. It's just ridiculous enough to have piqued some California court's interest.

CASE LAW:

***Warrantless Blood Draws in DUI Cases*:**
***Blood Draws from an Unconscious DUI Arrestee*:**

Mitchell v. Wisconsin **(June 27, 2019) __ U.S.__ [139 S.Ct. 2525; 204 L.Ed.2nd 1040]**

Rule: When an arrested DUI suspect is unconscious and therefore unable to submit to a breath test, the exigent-circumstance exception to the search warrant requirement will almost always permit a warrantless blood draw in that unconsciousness itself is an exigent circumstance.

Facts: Officer Alexander Jaeger of the Sheboygan, Wisconsin, Police Department responded to a radio call of a "very drunk" person getting into and driving a van. Officer Jaeger eventually found that person (defendant) wandering around near a lake. Stumbling and slurring his words, defendant could hardly stand without support. Skipping the field sobriety test altogether, a preliminary alcohol screening ("PAS") field test was administered showing a blood/alcohol level of 0.24%. Defendant was arrested and transported to the police station for a breath test. But by the time they got to the station, defendant was too wasted to blow into any machines. So Officer Jaeger drove him to the local hospital for a blood test. However, defendant lost consciousness altogether during that ride and had to be wheeled into the hospital's emergency room. Officer Jaeger read aloud the standard pre-blood test statement to a "slumped" (unconscious?) defendant. Not getting a response (*duh*), consent was assumed and blood was drawn. Officer Jaeger never attempted to get a warrant. The total time span between defendant's arrest and the blood draw was from 4:26 p.m. to 5:59 p.m. (93 minutes). When tested, defendant's blood/alcohol level was found to be 0.222%, well over the 0.08% presumption of intoxication. Charged in state court with several drunk-driving provisions, defendant's motion to suppress the blood/alcohol results was denied. Convicted by a jury, defendant appealed. His conviction was affirmed by Wisconsin's appellate (intermediate and supreme) courts. The U.S. Supreme Court granted certiorari.

Held: A plurality of the United States Supreme Court affirmed (four justices forming the "plurality," with a fifth justice concurring in the result but not the reasoning, and four other justices dissenting, thus resulting in a 5-to-4 affirmance). The issue before the Supreme Court was "[w]hether . . . a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement." Wisconsin, like the other 49 states, has an "implied consent" statute. (California's is contained in Vehicle Code § 23612.) Such statutes generally provide that a person is deemed to have given consent to submit to a test of one's blood/alcohol level as a condition of obtaining a license to drive a motor vehicle, should he or she ever be arrested for a DUI-related offense. The U.S. Supreme Court has upheld such implied consent statutes so long as their enforcement is restricted to imposing civil penalties and evidentiary consequences only (as opposed to "penal" consequences). (*Birchfield v. North Dakota* (2016)

136 S.Ct. 2160.) It is also recognized, however, that "implied consent" is not "*actual consent*," and may be withdrawn at any time, either overtly ("*No, I do not consent*."), or simply through a lack of cooperation. It is also recognized that blood/alcohol tests constitute a search under the Fourth Amendment. As such, blood/alcohol tests, to be lawful, must have been obtained through an arrestee's actual consent, a search warrant, exigent circumstances, or through some other exception to the warrant requirement. The U.S. Supreme Court held in *Birchfield* that a warrantless *breath test* may be administered incident to an arrest: "(B)reath tests are less intrusive (than a blood draw), just as informative, and [in the case of conscious suspects] readily available." A blood draw, being more intrusive (i.e., through penetrating the arrestee's skin with a needle), require either the arrestee's actual consent, a search warrant, or exigent circumstances. Recognizing that there is always going to be the passage of a given amount of time between when a DUI arrestee is first taken into custody and the later obtaining of a breath or blood sample, and that during this time period one's blood/alcohol level is going to naturally dissipate "due to 'natural metabolic processes,'" the U.S. Supreme Court has held that such a natural dissipation is insufficient in itself to constitute an exigency. (*Missouri v. McNeely* (2013) 569 U.S. 141; i.e.: "(T)he fleeting quality of BAC evidence alone is not enough." This is where the lone concurring justice disagrees, arguing that this natural dissipation of the blood/alcohol content is an exigency in itself, disagreeing with the holding in *McNeely*.) However, in those circumstances where *other factors* can be expected to delay the obtaining of a search warrant even longer, then an exigency excusing the lack of a search warrant may exist. (See *Schmerber v. California* (1966) 384 U.S. 757; where a traffic accident investigation that had to be dealt with was such an "*other factor*.") Such circumstances may constitute an exigency justifying the taking of a blood sample without first obtaining a search warrant, even over the arrestee's objection. (Breath tests aren't included in this analysis in that it is virtually impossible to force an uncooperative [let alone an unconscious] arrestee to provide a breath sample.) The issue in this case is whether Officer Jaeger had an exigent circumstance on his hands—with defendant being unconscious and unable to provide actual consent—excusing the lack of a search warrant. In deciding that he did, a plurality (i.e., four out of nine justices, with a fifth justice agreeing with the result) held that unconsciousness of the arrestee will "*almost always*" permit a warrantless blood draw in that unconsciousness itself is an exigent circumstance. In reaching this conclusion, the Court noted that the presence of an unconscious arrestee will often be the result of a traffic accident where a warrantless blood draw was approved in *Schmerber*. "In *Schmerber*, a car accident heightened that urgency. And here, (defendant's) medical condition did just the same," and even more so. An "exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." Some of the factors the Court considered in finding an exigency include the fact that a hospital will most often draw their own blood sample immediately upon an unconscious person's admission to the hospital. Allowing law enforcement to use some of that same blood eliminates the need for a second blood draw, thus minimizing the number of intrusions into the arrestee's body. Also, the Court found that delaying law enforcement's own blood draw until after the hospital's initial treatment of the unconscious arrestee may compromise ("or otherwise distort") the integrity of the blood/alcohol result. Recognizing the importance of the strict enforcement of a state's DUI statutes, the Court found a "compelling need" for a determination of the alcohol content of defendant's blood which defendant's unconsciousness must not be allowed to thwart. A warrantless blood draw from an unconscious DUI arrestee, therefore, will most often be lawful. Defendant, however, has not yet

had the opportunity to litigate the issue of whether his particular circumstances warranted an exception to the general rule established here. The case, therefore, was remanded to the trial court for a determination of whether, under the facts of this case, unconsciousness allowed for the warrantless taking of defendant's blood.

Note: *What a great case for the good guys*! Note, however, that the Court here only establishes a general rule—i.e. a *rebuttal presumption*—that's subject to yet-to-be established exceptions. It is incumbent, therefore, for arresting officers to be ready to document what other circumstances existed (other than the natural dissipation of the arrestee's blood/alcohol content) that prevented the obtaining of a search warrant for an unconscious arrestee's blood draw. While it appears from this case that it will be the defendant's burden to establish an exception to the general rule that we can take a warrantless blood sample from an unconscious DUI suspect, the prosecution must be ready to rebut any such evidence a defendant might bring forth on this issue. Officers might also still consider getting a search warrant, when time allows, despite the holding in this case, thus eliminating the issue altogether. No one will ever fault you for erring on the side of caution and getting a warrant where feasible. Lastly, not mentioned in my brief above (although mentioned—almost in passing—by the court) is the issue of whether the availability of the telephonic search warrant procedure makes a difference. The plurality decision poopoo'd this argument, saying: "(W)ith better technology, the time required has shrunk, but it has not disappeared." The dissent vehemently disagreed with this conclusion. You can expect the defense in your case to bring up—and for a trial court to consider—this issue as a factor to consider in justifying an exception to the general rule established in this case. So be ready to testify as to why you didn't think a telephonic warrant would have helped to sufficiently speed up the process.

***Miranda; Waiver of Rights*:**
***Use of a Ruse in Obtaining a Miranda Waiver*:**
***Miranda*; *Reinitiation of an Interrogation after an Invocation*:**
***Honeycutt, Clever Softening Up*:**

People v. Molano **(June 27, 2019) 7 Cal.5th 620**

Rule: Failing to inform an in-custody suspect of the intended subject matter of a pending interrogation, and even misrepresenting the subject matter that is to be discussed, does not invalidate that suspect's waiver of his *Miranda* rights. A criminal suspect may himself reinitiate an interrogation on his own initiative despite an earlier invocation of his right to the assistance of counsel. An invocation to one's right to counsel must be clear and unequivocal to be legally effective. Police interrogators do not "cleverly soften up" a criminal suspect absent evidence that they encouraged a waiver of rights by purposely putting him into a more cooperative frame of mind.

Facts: Forty-year-old defendant Carl Edward Molano lived with his wife and two children in Hayward, California. Suzanne McKenna lived alone in a nearby cottage. On June 15, 1995, defendant visited Suzanne. High on drugs and alcohol, defendant raped and choked Suzanne (who had also been taking drugs) to death. The next day, defendant returned to Suzanne's house to make sure he hadn't left anything that could lead to himself. While there, friends of

Suzanne's came to the house to find out why they could not get ahold of her. After being observed in the house, defendant fled out the back and disappeared into the residential area. Alameda County Sheriff's deputies, responding to the friends' 911 call, found Suzanne's body on the bathroom floor. Inspecting the scene, it was noted that Suzanne's face was purple and rigor mortis had set in. A bra, panties, and a shoe lace were wrapped around her neck. Strands of hair were found on the shoe lace. One breast bore abrasions that could have come from a blow or a bite. There were no signs of forced entry. A Reebok shoe print was on the floor. Various items of Suzanne's property, along with a pair of Reebok shoes, were discovered nearby in the surrounding neighborhood. An autopsy revealed that Suzanne had been strangled to death. Although neither her vagina nor anus showed signs of trauma, sperm was detected on a vaginal swab. Suzanne's blood revealed a blood/alcohol level of 0.15% and 40 micrograms per liter of methamphetamine, determined to reflect an illicit rather than prescribed usage. Biological samples were preserved although the crime lab found the sperm samples insufficient to conduct DNA testing. When no leads developed, the investigation was put on hold. Despite having a criminal record for rape and living nearby, defendant was never contacted by investigators. Six years later, in May, 2001, defendant's former wife, Brenda, brought their then 13-year-old son (Robert) to the sheriff's station. Defendant by then was serving a term in prison for having physically assaulted Brenda while they were married, choking her into unconsciousness. Robert told the sheriff's deputies that on the day Suzanne's murder was discovered, he saw defendant—his father—running from the direction of Suzanne's cottage. Defendant later confronted Robert in a shed on the property, telling him he would kill him if he told anyone where he was. Brenda also told investigators that on that same day, she noticed that defendant was not wearing his shoes. He appeared to be nervous. Defendant told her that he had been partying with a couple in one of the cottages the night before when the other man got into an argument with the female resident and choked her to death. Defendant told her that he had gone back hours later to wipe away his fingerprints when the dead woman's friends caught him inside. Defendant refused to report the incident to the police because he felt he would be suspected of the murder given his criminal history (i.e., two prior rape convictions). Defendant cut his hair and shaved off his mustache and Brenda helped him get rid of the shirt he had been wearing. Reopening the investigation, one of Suzanne's friends identified defendant in a photographic lineup. The Reebok shoes found near the cottage tested positive for Brenda's DNA. Defendant's DNA was detected on the shoe lace found around Suzanne's neck. On March 21 and 31, 2003 (eight years after the murder), armed with all this evidence connecting defendant with Suzanne McKenna's murder, Alameda County Sheriff's Department Sergeant Scott Dudek and Detective Edward Chicoine conducted a series of interviews with defendant, beginning when defendant still had two weeks to serve in San Quentin for the spousal abuse of Brenda. (The relevant details of each interview are described below.) Defendant was charged in state court with first degree murder and rape, plus a special circumstance that the murder was committed during the commission of a rape. Defendant's incriminatory statements from the first and third interviews (the prosecution electing not to use the results of the second interview) were admitted into evidence. Convicted on all charges—with the special circumstance and various prior convictions found to be true—defendant was sentenced to death. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. Among the issues on appeal was the admissibility of defendant's incriminatory statements made in the first and third interviews.

(1) *March 21, 2003, Interview at San Quentin*: While en route to interview defendant at San Quentin, Detectives Dudek and Chicoine concocted a ruse to the effect that they would pretend to be "290 investigators" (i.e., for persons subject to mandatory sex registration), looking into defendant's past sexual offenses and explaining to him his sex registration requirements. Detective Chicoine was in fact tasked with monitoring P.C. § 290 sex registrants, but was also a homicide investigator. His true (undisclosed) goal was to talk with defendant about the Suzanne McKenna murder case. This first interview was tape-recorded. After telling defendant that they wanted to talk to him about "*some of your past crimes and some of the sex registration laws and things like that*," he was read his *Miranda* rights. Defendant stated that he understood his rights and was willing to talk, signing a written wavier form to that effect. Defendant asked if his parole would be affected if he chose not to answer questions. Detective Chicoine told him: "*No, absolutely not*." For the next hour, after telling defendant that it would not be wise for him to violate any of his sex registrant requirements, they discussed defendant's job prospects, family background, substance abuse issues, and prior convictions. Finally, Detective Chicoine broke the ice, telling defendant that they "want(ed) to look at other things, such as the "incident where there was a girl that died." Defendant admitted knowing that girl as "Sue," and that he did in fact have a drink at her house and that they "got high . . . together." Asked if he had sex with her, defendant admitted to a single "hit and run . . . spontaneous sex" with her a day or two before her death. After telling the detectives that his ex-wife, Brenda, had suspected that he had killed Suzanne, and that he had told her that he knew what had happened, defendant was pressed for the details of what he had told her. Claiming that he couldn't remember, defendant finally told the detectives: "*I understand where this is leading to, this conversation and I would rather not say anything else until I have a public defender of mine*," thus invoking his *Miranda* rights. The interrogation was stopped. A search warrant for blood and buccal swabs, dental casts, and his shoes was executed. Before leaving, the detectives told defendant that if he wanted to talk to them again, he would have to initiate the contact. Asked for business cards, both detectives gave him one, repeating that he needed to initiate any further contacts if he wished to change his mind, and telling him to "get ahold of the guards here" and say "I want to talk." Defendant responded; "*or my counselor or my captain or something*." Detective Chicoine later testified that defendant told him (after the tape recorder was turned off) that he wanted to tell them what happened, but would like to talk to a counselor first, which Chicoine understood to mean a religious counselor. Defendant told the detectives that he would call them after he had that opportunity. Based on these facts, defendant argued on appeal that his *Miranda* waiver was invalid (i.e., not "knowing, intelligent, and voluntary") because he was deceived into waiving his rights. Specifically, he complained that he was tricked into waiving his rights when the detectives gave him the impression that they were there to talk about his P.C. § 290 sex registration requirements. The Court rejected this argument. The U.S. Supreme Court has clearly established the rule that merely withholding certain information from a defendant does not invalidate a *Miranda* waiver. (*Moran v. Burbine* (1986) 475 U.S. 412.) The High Court has also held that failing to tell a suspect what it is they intend to question him about is irrelevant to the issue of the voluntariness of a *Miranda* waiver. (*Colorado v. Spring* (1987) 479 U.S. 564.) "(A) valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might . . . [affect] his decision to confess.'" (*Id*., at p. 576.) In this case, defendant was aware that he was speaking with law enforcement officers and that the scope of the interview would include "*some of his past crimes*." Having received a full and complete *Miranda* warning, defendant was also aware that anything he said during the interview could be

used against him. It was clear that defendant understood his rights, invoking them when he began to feel uncomfortable with the direction the questioning was going. Under these circumstances, defendant's wavier of his rights was knowingly and intelligently made.

(2) *March 31st Statements When Picked up at San Quentin and in the Police Car*: A complaint was filed in state court on March 27, 2003, charging defendant with murder, and an arrest warrant was issued. On March 31st, Detectives Dudek and Chicoine picked defendant up at San Quentin, arrested him on the warrant, and drove him to the Alameda Sheriff's Station for booking. Upon their initial contact while picking him up at San Quentin, defendant told the detectives "*that he had been meaning to call us, that he had already talked to a counselor and that he intended to call us*." Detective Chicoine later testified that he understood defendant's statements as a reinitiation of the interrogation when he told them "*he did want to talk to us, he wanted to explain what was going on*." Defendant was told to wait until they got to the Sheriff's Station, at which point they could talk. While en route to the Station, some back-and-forth discussions were had concerning whether defendant wanted to reinitiate the questioning despite his earlier invocation. Defendant alleged on appeal that the detectives illegally reinitiated the questioning. The Court held to the contrary, ruling that it was defendant who reinitiated the questioning, and that he did so when first picked up at San Quentin. The U.S. Supreme Court in *Edwards v. Arizona* (1981) 451 U.S. 477, established a "bright-line rule" that all questioning must cease after an accused requests the assistance of counsel, at least for the next 14 days (*Maryland v. Shatzer* (2010) 559 U.S. 98.). The detectives' transportation of defendant to Alameda, and the discussions that occurred at that time, all took place before *Shatzer's* 14-day time limit expired, meaning that any attempts to reinitiate the interrogation instigated by the detectives would be illegal. The reason for such a bright-line prohibition is to prevent the authorities (through "badgering" or "overreaching," whether explicit or subtle, deliberate or unintentional) from attempting to wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. An exception to this rule is when the accused himself reinitiates the questioning. The issue in this case is who it was—defendant or the detectives—who reinitiated the questioning. "[I]t is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of . . . 'inherently compelling pressures' and not the purely voluntary choice of the suspect." (*Arizona v. Roberson* (1988) 486 U.S. 675, 681.) It is the People's burden to overcome this presumption by showing both that the defendant himself reinitiated discussions, and that in so doing, he knowingly and intelligently waived the right he had previously invoked. "An accused 'initiates'" further communication, when his words or conduct "can be 'fairly said to represent a desire' on his part 'to open up a more generalized discussion relating directly or indirectly to the investigation.'" (*People v. Mickey* (1991) 54 Cal.3rd 612, 648, quoting *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045.) Under the circumstances of this case, the Court found that it was defendant who expressed the wish to reinitiate the questioning, based upon his initial statements to Detective Chicoine when picked up at San Quentin, and as substantiated by subsequent statements he made while in the car en route to the Station. The Supreme Court found no reason to discredit the trial court's conclusions as to the detective's credibility on this issue. Once at the station, it was also discussed (on tape, and in response to a deputy district attorney's questioning; see below) whose idea it was to reinitiate the interrogation. (E.g.; DDA Sweet: "*What changed from before to now*?" defendant said, "*I just . . . I'm ... I'm tired*." DDA Sweet: "*It was your decision to start talking*." Defendant agreed, saying: "*It was my decision. I'm tired now*." Also, defendant reaffirmed: "*They made me no*

promises or anything. My only, my main concern was that you [the DA] were to come down here." The Court found this to "amply support . . ." the trial court's finding that it was the defendant who reinitiated the questioning, and that he did so at San Quentin before the car trip even began. Defendant also argued, however, that he had invoked his right to counsel a second time during the drive to the Station. In support of this argument, defendant noted that at some point he asked whether he would be assigned a public defender, and that: "*I can sit down and talk to my PD first, then talk with you all*?" When told that that was correct, defendant told the detectives; "*That's, I would, I would feel more comfortable*." Despite defendant's assertions that in so stating he had again invoked his right to counsel, the Court ruled that such a comment failed to "*clearly and unequivocally*" invoke his rights. An attempted invocation of one's right to counsel must be "*clear and unequivocal*" to be legally effective. (*Davis v. United States* (1994) 512 U.S. 452, 460.) "Ambiguous or equivocal references to an attorney do not require cessation of questioning." (*Id*. at pp. 458–459, 462.) Stating that one would be "*more comfortable*" with the assistance of an attorney fails to meet this standard.

(3) *March 31st; Miranda Waiver and Confession at the Station*: Upon arrival at the Alameda Sheriff's Station, defendant told Detective Chicoine that although other prisoners had told him not to talk to the police, and that he knew a public defendant would tell him the same thing, he wanted "*to get closure from this, and he just wanted to tell the story, and get it over with*." Taken to an interview room with a videotape set up, the preceding events, including defendant's prior invocation of his right to an attorney as expressed during the March 21st interview at San Quentin, were summarized by Sgt. Dudek. Defendant agreed that it was he who approached the detectives, telling them that he now wanted to discuss the murder. Defendant was then read his *Miranda* rights which he said he understood. Without obtaining an express waiver (a possible issue except that defendant later conceded it to be irrelevant), defendant was again questioned concerning the events surrounding Suzanne McKenna's murder. Part way through the discussions during which defendant admitted to having killed Suzanne (although claiming it was during consensual sex when things got "out of hand"), defendant asked; "*Can I sit down with the DA*?", meaning, of course, a deputy district attorney. After a little bit of procrastination and continued questioning, the detectives finally told defendant that they could get a DA there if he actually wanted one. Defendant responded: "*You call them now*," and "*Come back and we'll continue*." Deputy District Attorney Andrew Sweet arrived some 30 or 40 minutes later, re-*Mirandized* defendant, and obtained an express waiver. He also reaffirmed defendant's intentional relinquishment of his previous invocation of his right to counsel, stating again that he now just wanted to get it over with. Referring to the detectives' actions; "*They made me no promises or anything. My only, my main concern was that you were to come down here*." Defendant then proceeded to tell DDA Sweet essentially the same story he'd already told the detectives; i.e., that he and Suzanne had had a consensual sexual encounter while they were both "*loaded*;" he on crack cocaine and she on methamphetamine. It became "rough sex" when, during intercourse, "*she starts to like hitting me, slapping me*." He admitted to "*possibl*(*y*)" biting her. He also admitted to choking her into unconsciousness, using his own shoelace. He then admitted to having panicked when he realized she was dead, dragging her into the bathroom to try to "clean up." On appeal, defendant challenged the admissibility of these statements obtained at the Station, arguing that his waiver was not voluntary because the detectives had lied in obtaining the initial (March 21st) waiver, disregarded his invocations of the right to counsel (i.e., while in the car), and engaged in impermissible softening-up tactics. While noting that it is the prosecution that has the "heavy burden" of showing that a defendant who previously invoked

his right to counsel was the one who reinitiated an interrogation, both the trial court and the Supreme Court rejected defendant's arguments. *First*, it had already been held (above) that the detectives' "ruse" used in obtaining his initial (Mar. 21st) wavier did not invalidate that waiver. Also, by the time of the second waiver (Mar. 31st), defendant was well aware that the detectives wanted to talk to him about the McKenna murder. Thus, "(t)here is no colorable claim of police deception as to defendant's second waiver." *Secondly*, the detectives never disregarded defendant's invocation of his right to counsel, immediately ceasing the interrogation when defendant initially invoked his right to counsel. When discussed during the March 31st ride to the Alameda Sheriff's Station, Sgt. Dudek told defendant that he still had a right to the assistance of counsel, explaining just how to make such a request, telling him: "(*T*)*hat's entirely up to you*." Defendant, however, failed to make an unequivocal request for counsel at that time (as noted above). *Third*, defendant claimed that the detectives coerced him into waiving his *Miranda* rights by engaging in improper softening-up techniques (See *People v. Honeycutt* (1977) 20 Cal.3rd 150.) Specifically, defendant claimed that the officers disparaged the victim while appealing to defendant's desire to mend his relationship with his children. In *Honeycutt*, a hostile homicide suspect was "*softened up*" by a detective who knew him personally, intentionally quieted him down, disparaged the victim, and put the defendant into a more conducive frame of mind before reading him his *Miranda* rights. No such tactics were used in this case. In this case, defendant was already well aware of his *Miranda* rights, having previously and successfully invoked them. It was also determined several times that defendant here, who was not hostile towards the detectives, waived his rights because he was intent on just "*getting it over with*." While Sgt. Dudek did in fact comment that Suzanne was no angel, this alone is not enough to make it a *Honeycutt* situation. *Lastly*, it was noted that while Dudek at some point made comments to defendant about mending his relationship with his children, such a comment—absent a threat to prosecute or otherwise harm his children if he failed to confess—is irrelevant to the issue of defendant's waiver of his rights. In summary, nothing was said to defendant by the detectives, either during the ride to the Sheriff's Station or at the Station, that made his waiver involuntary or otherwise coerced.

Note: While the use of a ruse by the police *during* an interrogation has long been upheld, at least so long as not something that might have caused a false confession (E.g., see *People v. Scott* (2011) 52 Cal.4th 452, 481.), using a ruse to obtain a waiver of the subject's rights *before* the interrogation is something totally different and pushing the envelope a bit, making it an issue as to whether it was a "*knowing and intelligent*" waiver. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1207.) But either way, I'm not a big fan of such a tactic. A good defense attorney will thereafter ask the officer, at trial and in front of the jury, if it is not true that he or she purposely "*lied*" to the defendant; a question the officer will have to answer in the affirmative. Officer credibility often being an issue, this fact alone may very well turn a jury off as to the issue of the officer's honesty. Also, there was an awful lot of back and forth discussion between the detectives here and the defendant, primarily during the ride to the Sheriff's Station, that I left out because I didn't want to totally bore you to death. A lot of what was said before the *Miranda* admonition and wavier done at the Station could be considered as attempts to talk defendant out of invoking his right to counsel a second time. Such pre-admonishment discussions are typically criticized by appellate courts as improper. (See *People v. Patterson* (1979) 88 Cal.App.3rd 742, 750-752; and *People v. Kyllingstad* (1978) 85 Cal.App.3rd 562, 566-567, for a discussion of the issue, allowing for "*limited*" pre-admonishment discussions.) While the Supreme Court here

didn't seem to be concerned with this issue, you can bet the Ninth Circuit Court of Appeal will be when this case gets up to that court. So we may hear about all this again. My general advice is to minimize the pre-admonition "mind games," something that was close to getting out of hand in this case.