The California Legal Update

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THIS EDITION'S WORDS OF WISDOM

"Let no one ever come to you without leaving better." (Mother Theresa)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

***Second Amendment Rights*:** In *Friedman v. City of Highland Park* (Dec. 7, 2015) __ S.Ct. __ [2015 U.S. LEXIS 7681], the United States Supreme Court denied certiorari in a Second Amendment case that came out of Illinois (See 784 F.3rd 406 (2015).) where the federal Seventh Circuit Court of Appeal *upheld*, in a split decision, a City of Highland Park city ordinance banning "assault weapons" and "large capacity magazines" (i.e., constructed to hold more than ten rounds) within the city limits. The effect of the Supreme Court's denial of certiorari is to let stand the Seventh Circuit's anti-Second Amendment ruling. Two justices dissented from the denial of cert, arguing that Highland Park's ordinance violates the Second Amendment's protections of the right to bear arms (i.e., to private ownership and possession of firearms commonly used for lawful

purposes), as explained in *District of Columbia v. Heller* (2008) 554 U.S. 570, and made applicable to the states in *McDonald v. Chicago* (2010) 561 U.S. 742, 780. But such a dissent, and a dime, won't even get you a cup of coffee anymore, so I'm not going to take the time to brief the entire case for you here.

If you're a Second Amendment advocate, however, the dissent is worth reading in that it makes some good arguments as to why the Seventh Circuit ignored the dictates of *Heller*, and is simply wrong. The importance of the Supreme Court's majority decision *not* to grant cert, however, is that, by implication, it supports the argument that California's similar assault weapon and large capacity magazine restrictions (see P.C. §§ 30605(a), 32310(a), 16740) are also constitutional. While the Seventh Circuit's decision is not necessarily controlling in California, it is considered "persuasive," and entitled to "great weight" in the absence of any contrary local authority. More importantly, the Supreme Court's refusal to consider the Seventh Circuit's decision tells us how they might decide any similar lawsuit coming out of California on this identical issue. Not good news for Second Amendment advocates.

CASES:

***Probation Fourth Waiver Searches*:**

People v. Romeo **(Sep. 28, 2015) 240 Cal.App.4th 931**

Rule: A police officer may testify to hearsay information related to his knowledge that a probationer is subject to Fourth waiver search and seizures conditions, so long as that information is shown to be reliable. The court record must include proof of the scope of a probationer's Fourth Waiver conditions in order for the appellate court to uphold a warrantless search based upon those conditions.

Facts: On November 8, 2012, at approximately 10:00 a.m., officers from the Martinez Police Department conducted a warrantless probation search on the residence of two probationers known to be subject to a Fourth waiver, search and seizure conditions. Martinez Police Officer Dirk Miller and Sergeant Glen Walkup, and six other officers, conducted the search while the two residents were detained outside. Defendant, who was *not* on probation but who was found in the residence upon the officers' initial entry, was also detained along with several otherwise uninvolved occupants.

The officers located hypodermic needles in a bedroom that had been pointed out by one of the Fourth wavier subjects as the one she shared with the other. The search continued on into the attached garage where officers found indications that someone was living; i.e., a couch and a large desk with a TV and a computer. In plain view on top of the desk the officers found a clear Ziploc baggie containing 2.444 grams of methamphetamine and a small amount of marijuana. Six hypodermic needles were also found in a toolbox in the garage. Defendant, still being detained in front of the house, admitted (after a *Miranda* admonishment and waiver) that he lived in the garage, sleeping on the couch, and that the drugs and needles were his. It was also noted that defendant appeared to be under the influence of methamphetamine; a fact later confirmed through a blood test.

Charged in state court with possession of methamphetamine (H&S § 11377(a)) and being under the influence of a controlled substance (H&S § 11550(a)), defendant filed a motion to suppress, alleging that the search of the garage was illegal and, aside from the drugs and paraphernalia being illegally seized, his admissions to their ownership should also be suppressed. The motion was denied. A renewed motion to suppress, filed with the superior court along with a P.C. § 995 motion to set aside the information (based, again, on the alleged unlawfulness of the search), was denied on substantially the same grounds and based on the same record. Defendant thereafter pled guilty to the possession charge and appealed.

Held: The First District Court of Appeal (Div. 4) reversed. The Court first, however, dealt with the issue of the sufficiency of the evidence, as presented at the preliminary examination, to show that the officers were aware of the two residents' status as probationers subject to search and seizure conditions. It is a rule of law that in order for a Fourth waiver search to be lawful, the officers must possess information *before* the search that the persons searched were in fact subject to a waiver of their Fourth Amendment search and seizure rights. Finding out afterwards won't save an otherwise illegal search.

In this case, the lead officer, Officer Miller, testified that he had prior knowledge of the subjects' Fourth waiver status which he updated and corroborated by searching a local computerized system's database; i.e., the Automated Regional Information Exchange System, or "ARIES." The defendant, on appeal, challenged the admissibility of this testimony, both under the theory that it violated the so-called "*Harvey/Madden Rule*," and that it was based upon inadmissible hearsay. The *Harvey/Madden* rule (per *People v. Harvey* (1958) 156 Cal.App.2nd 516, and *People v. Madden* (1970) 2 Cal.3rd 1017.), however, merely precludes the prosecution from relying on hearsay information communicated to the arresting officer that is not sufficiently specific and fact based to be considered reliable. The preliminary hearing magistrate overruled defendant's objection as to the admissibility of the officer's testimony concerning his prior knowledge of the two probationer's Fourth waiver status.

The Appellate Court upheld this ruling, finding that the "state-of-mind" exception (E.C. § 1250(a)(1)) to the hearsay rule makes admissible the officer's testimony that he obtained information concerning the two residents' Fourth wavier status from the computerized database; i.e., "ARIES." So long as the officer's testimony had sufficient "indicia of reliability," as can be inferred by the fact that the preliminary hearing magistrate overruled defendant's objections on this issue, it was admissible. However, the primary issue in this case was the lawfulness of the search of the residence, which included the probationers' attached garage in which defendant, a non-probationer, was living. It was on this issue that the Court reversed the prelim magistrate's denial of the defendant's motion to suppress, as well as the trial court's upholding of that ruling.

The problem in this case was due to an incomplete record. The Court detailed four general principles that relate to probationary Fourth wavier searches: (1) Whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted. (2) The rationale for warrantless probation searches is consent based. (3) Because probation searches are undertaken to deter further offenses by the probationer and to ascertain whether he is complying with the terms of his probation, the scope of a permitted search must be reasonably related to the purposes of probation. (4) Whether the purpose of the search is to

monitor the probationer or to serve some other law enforcement purpose, or both, the search in any case remains limited in scope to the terms articulated in the probationer's search clause. In this case, the record was devoid of any evidence defining the terms (i.e., the scope) of the two probationers' search and seizure conditions. Other than the fact that the residents of the house searched were subject to probationary search and seizure conditions, there was no evidence presented as to what those conditions were, or if the searching officers were even aware of where they were allowed to search or what they were allowed to search for. Because a probationer's search conditions must be limited in scope to that particular probationer's crime, what rights the probationer surrenders upon waiving his Fourth Amendment rights will vary with the circumstances. The degree to which he or she has suffered a reduction in his or her expectation of privacy depends upon the scope of that advance consent.

The problem is even more acute, per the court, when the rights of a third party, non-probationer, are at issue. In this case, there was no evidence presented as to whether the two residents' home itself was subject to search, and if so, what officers were allowed to look for. In order to uphold the search here, a court requires some form of objective proof from which at least an inference may logically be drawn as to what the officers are allowed to search and what they are allowed to search for. The searching officers' subjective belief is not enough. As a third party in the probationer's house, who is now the subject of criminal charges that stemmed from the Fourth Waiver search conducted here, defendant is allowed to "demand adherence to the proper scope of (his) host's search conditions, despite the usual rule prohibiting the assertion of someone else's Fourth Amendment rights in search and seizure cases." Because no evidence was presented as to the allowable scope of the search conducted under the specific terms of the two residents' search and seizure conditions in this case, defendant's motion to suppress should have been granted.

Note: So how does a prosecutor fix this? The answer is simple. Both issues discussed in this case would have easily been resolved had the prosecutor merely introduced into evidence, as a public record, a "properly authenticated" copy of the two probationer's search and seizure conditions as ordered by the court in their criminal case. (See E.C. § 1280; the official records exception to the hearsay rule.) Or, other evidence as to what those search conditions were could have been used, such as the searching officer's detailed testimony as to the specifics of the search conditions that they were enforcing. I think we get lax in the knowledge that in most counties, probationary search and seizure conditions are pretty standard. But that doesn't absolve a prosecutor of the responsibility of producing proof of those conditions on the record in a later prosecution based upon a Fourth waiver search. That was not done here. Note also that all prison parolees are subject to the same conditions (see P.C. § 3067), as are those on probation under the "Post-Release Community Supervision Act of 2011" (see P.C. § 3453(f)). Officers should know these conditions by heart so that when searching, you know where you can search and what you can search for, and when testifying, you can describe in detail those specific conditions. As for all other probationers, the suspect's Fourth wavier must be researched so that the officer knows what limitations may have been imposed by the sentencing court.

***Detentions of PRCS Probationers*:**

People v. Douglas **(Sep. 28, 2015) 240 Cal.App.4th 855** (as modified at 2015 Cal.App. LEXIS 915 (Oct. 19, 2015))

Rule: If a police officer knows an individual is on PRCS probation, he may lawfully detain that person for the purpose of searching him or her, so long as the detention and search are not arbitrary, capricious or harassing. An officer "knows" a subject is subject to PRCS search conditions if his belief is objectively reasonable.

Facts: On May 19, 2013, Richmond Police Detective Miles Bailey, working a special investigation division parole unit, was in uniform and riding in a marked patrol car. At about 9:30 p.m., Detective Bailey spotted defendant sitting in a car on Nevin Avenue near 21st Street. The detective recognized defendant from having arrested him in 2011 for a firearms-related offense and from contacting him on a few occasions since then. Detective Baily later testified that he "knew" defendant was on post-release community supervision ("PRCS") probation because part of his job was to "regularly monitor" his county's "Automated Regional Information Exchange System" ("ARIES"), keeping up on who is on probation and parole.

As for defendant, Detective Bailey testified that he did not recall when he had last checked on his status in ARIES, but he did remember having seen defendant's name sometime within the preceding two months on a list issued by the probation department of active probationers. He did not consult ARIES on the spot before initiating contact with defendant, however, because there was no time. As Detective Bailey approached him on foot, defendant apparently saw him coming because he attempted to pull his car away from the curb, moving a few feet. The detective ordered him to stop, which he did. But defendant then put the car in reverse, causing Detective Bailey to tell him to stop again. Detective Bailey ordered defendant out of the car and then, for safety purposes, pinned him between the car's door and frame. A short scuffle ensued before Bailey was able to handcuff him. As he did so, a .380-caliber semiautomatic handgun fell from defendant's hand or arm area to the floorboard of the car.

After being subdued, defendant admitted he was on probation. Charged in state court with being a felon in possession of a firearm (P.C. § 29800) with a prior prison commitment (P.C. § 667.5(b)), defendant filed a motion to suppress, arguing that he had been illegally detained under the theory that Detective Bailey had insufficient information on whether he was, at the time of the contact, subject to Fourth waiver search and seizure conditions. The trial court denied his motion. Defendant pled guilty and appealed.

Held: First District Court of Appeal (Div. 4) affirmed. There are two different legal theories justifying the detention of an individual short of having probable cause to arrest; i.e., (1) a reasonable suspicion to believe that the individual is involved in criminal activity, and (2) advance knowledge that the individual is on searchable probation or parole. It is the People's burden to prove by a preponderance of the evidence that a search or seizure falls within one of these recognized exceptions to the warrant requirement. Defendant argued on appeal, as he did in the trial court, that the People were unable to substantiate either theory. The Court elected not to decide whether there existed a reasonable suspicion that defendant was involved in criminal

activity because it had no trouble finding instead that Detective Bailey had sufficient information to reasonably believe that defendant was subject to a Fourth waiver.

The rules are as follows: A parole detention and search does not require any suspicion at all to be lawful, so long as not done arbitrarily or as part of a pattern of harassment. The Court noted here that because all persons on a PRCS release are subject to search and seizure conditions (See P.C. §§ 3450 et seq.), the officer need only know that the individual is on parole (alternately referred to in this decision as "PRCS probation"). However, in the case of both probation and parole searches, the officer's knowledge that a suspect is on searchable probation or parole must exist *before* he is detained or searched. The primary issue discussed here was "what quantum of 'advance knowledge' must an officer have of a subject's PRCS status before conducting a PRCS detention and search?" In reviewing the case law involving similar concerns, it was determined that the officer does not need to know for sure that the person detained is on PRCS probation. It is only necessary that the officer's belief be "*objectively reasonable*," based upon the totality of the circumstances. "(T)he question becomes whether, judged against an objective standard, the facts available to Detective Bailey at the moment he detained (defendant) would have warranted an officer of reasonable caution to believe (defendant) was on PRCS."

Here, the detective remembered that he had arrested defendant on a firearms-related violation some two years earlier. He'd also had occasional contacts with him since then, and had seen his name of the ARIES probation and parole list sometime within the last two months. Add to this defendant's apparent "furtive action" of attempting to drive away as Detective Bailey approached him, indicating that he probably knew he was subject to search and that he illegally possessed a firearm, it cannot be said that Detective Bailey's belief that defendant was still subject to a warrantless detention and search wasn't objectively reasonable. Lastly, the fact that the detective didn't have an opportunity recheck ARIES immediately before contacting defendant did not detract from his reasonable belief that he was still on PRCS probation.

Note: The only element that differs here from the situation where the suspect is on regular probation (i.e., "to the court") is that aside from the fact that a regular probationer may not be subject to search and seizure conditions at all, even if he is, those conditions may not be so standardized that an officer can assume he knows what he is allowed to search and what he can legally search for, requiring that evidence of the scope of that particular suspect's search and seizure conditions be introduced into evidence in court. (See *People v. Romeo* (Sep. 28, 2015) 240 Cal.App.4th 931, above.) In the case of a parolee from prison or under PRCS, where the conditions are dictated by statute, the officer need only know that he is on parole.

***Search Warrants for Computerized Data*:**

United States v. Flores **(9th Cir. Sep. 23, 2015) 802 F.3rd 1028**

Rule: When dealing with computerized data, the mere passage of substantial amounts of time is not necessarily controlling in a question of staleness. Information in a computer, even if purposely deleted, is often recoverable after the fact. Overbreadth issues in a search warrant affidavit may be satisfied under the "doctrine of severance," where only legally admissible evidence is actually used at trial.

Facts: On the evening of June 21, 2012, defendant was caught at the Mexico/United States border by Customs and Border Protection ("CBP") Officer Benjamin Brown, trying to smuggle marijuana into the United States. Officer Brown's suspicions were originally aroused when he noticed defendant's nervousness as he checked her ID. Noting also that defendant kept looking back at a particular area in her car, Officer Brown checked that area and found several packages of marijuana. A more thorough search resulted in the recovery of 36.24 pounds of the stuff.

Charged in federal court with one count of importation of marijuana in violation of 21 U.S.C. §§ 952 and 960, her defense was that the ever-elusive "Juan," while fixing the air conditioner in her car in Tijuana, must have hidden all that dope in the doors and other places of her car. While awaiting trial, jail deputies recorded several telephone calls, one of which was with her cousin asking him to log into her Facebook account, change the password, and "take off whatever you feel needs to be taken off." She also warned her cousin that the call was being recorded. This prompted the issuance of a search warrant to Facebook for the contents of her account, although it wasn't issued until October 2nd; almost 3½ months after her arrest. Mixed in with five to six years' worth of information, comprised of some 11,000 pages, two Facebook messages were recovered that defendant had sent on the same day she was arrested, referencing her "carrying" or "bringing" marijuana. Defendant's motion to suppress the Facebook evidence was denied by the trial court. She was eventually convicted (after the first trial resulted in a hung jury) and was sentenced to prison for a year and a day. She appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, among the arguments defendant made was that the trial court erred in denying her motion to suppress the evidence obtained from her Facebook account. In upholding the trial court's ruling on this issue, the Court had no difficulty finding that the warrant affidavit clearly reflected probable cause to search her Facebook account. "(The Agent's) affidavit supporting the warrant established probable cause to search (defendant's) Facebook account, at least for some period of time, considering defendant called (her cousin) from jail and asked him to purge her account. That request, along with (defendant's) warning that the call was being recorded and the close proximity of the call to her arrest, supported more than a 'fair probability' that agents would find evidence of drug smuggling or a smuggling conspiracy in (defendant's) account."

Defendant argued, however, that because the warrant wasn't obtained until more than three months after the phone call, that the information was by then "stale." The Court, however, found "many good reasons to believe that there remained a 'fair probability' of finding evidence of drug smuggling in her account when the warrant issued." Noting that the "mere passage 'of substantial amounts of time is not controlling in a question of staleness,'" particularly when dealing with electronic evidence, it was likely that anything on defendant's computer would still be there even if someone had attempted to delete it.

Experts are capable of recovering information from computers even when deleted. There remained, therefore, a "fair probability" that, "thanks to the long memory of computers," whatever it was that defendant was referring to in her phone call was still in her computer even after a substantial amount of time. Also of some value on this issue, the special agent who wrote the warrant submitted a "preservation request" with Facebook in late August that was honored.

Defendant also argued that the warrant was overbroad in that it asked for all her Facebook entries from some five to six years, authorizing the seizure and searching of some 11,000 pages of data in her account when, as it turned out, only approximately 100 pages were truly responsive to the warrant.

In finding no error here, the Court listed three factors in analyzing "breadth" issues; "(1) whether probable cause existed to seize all items of a category described in the warrant; (2) whether the warrant set forth objective standards by which executing officers could differentiate items subject to seizure from those which were not; and (3) whether the government could have described the items more particularly in light of the information available." The Court found that the first two factors were satisfied in this case because the warrant allowed the government to search only the Facebook account associated with defendant's name and email address, and authorized the government to seize only evidence of violations of 18 U.S.C. § 371 (Conspiracy) and 21 U.S.C. §§ 952 and 960 (Importation of a Controlled Substance).

The warrant also specifically set out "Procedures For Electronically Stored Information," providing executing officers with sufficient "objective standards" for segregating responsive material from the rest of defendant's account. Noting the difficulty in such a "pinpointed computer search, restricting the search to an email program or to specified search terms," the Court found "over-seizing" to be an accepted reality in electronic searching because "[t]here is no way to be sure exactly what an electronic file contains without somehow examining its contents." Some ways to prevent or limit this is to specify the particular crimes for which evidence is sought, as was done here. Also in this warrant, the seized data was not used for any broader investigative purposes, and Facebook, rather than government agents, segregated defendant's account to protect third parties' rights.

Recognizing, however, that seizing five or six years' worth of data may have been excessive, the "doctrine of severance," allowing a court to strike from a warrant those portions that are invalid and preserve those portions that satisfy the Fourth Amendment, made it unnecessary to decide whether the warrant in this case was in fact overbroad. Under this theory, only that information seized pursuant to the invalid portions need be suppressed. In this case, only the Facebook entries from the day of defendant's arrest were used in evidence. Seizing those entries pursuant to this warrant was clearly lawful.

No evidence was introduced at trial that should have been suppressed, regardless of the warrant's potential overbreadth. Therefore, overbreadth was found to be a non-issue. Defendant also complained that the agents exceeded the scope of the warrant by seizing all 11,000 pages of data in her Facebook account. However, the Court found that the warrant allowed for such a broad seizure. Also, the agents segregated some 100 pages of responsive material from the entire account into a separate file. And then, as dictated by the affidavit, the original copy of Defendant's account was sealed in an evidence bag and made inaccessible absent a new warrant. This procedure was all provided for in the warrant and was "executed . . . exactly as it was written." And again, with only two messages from the day of defendant's arrest being used in evidence, it was not necessary for the Court to determine whether the 100 pages of segregated data exceeded the scope of the warrant.

After ruling that the two Facebook messages that were used at trial were in fact admissible evidence corroborating defendant's commission of the alleged offenses, the Court upheld the lawfulness of the warrant and affirmed defendant's conviction.

Note: Despite there being some viable staleness and overbreadth issues, it is clear that the affiant in this case did everything he could (except for inexplicably waiting 3 months to get a warrant) to comply with the dictates of the Ninth Circuit's previous decision in *United States v. Comprehensive Drug Testing, Inc.* (9th Cir. 2010) 621 F.3rd 1162 ("*CDT*"). In *CDT*, the Court severely chastised the government for seizing and inspecting an excessive amount of computerized data while attempting to use the "plain sight" doctrine to justify seizing even more data not included in the original "evidence to be seized" list. Here, the affiant described in the affidavit procedures to be followed specifically for the purpose of preventing a "dragnet" effect, thus limiting the wholesale rummaging through irrelevant and perhaps personal data contained in defendant's Facebook account.

The decision did not include a copy of the affidavit itself, and wasn't real specific as to what was included, so I can't tell you exactly what it was the affiant put into his warrant. But this Court was obviously pleased with the affiant's attempts to limit the scope of the warrant. But even though the result in this decision is favorable to the government, the affiant here could have eliminated some issues by seeking the warrant immediately after the defendant's phone call, and then limiting the information sought to the day of the call and perhaps "for some time before her arrest," as suggested by the Court.

***First Degree Murder*:**
***Miranda; Ambiguous Attempts to Invoke*:**
***Miranda and Booking Questions*:**

People v. Shamblin **(Apr. 21, 2015) 236 Cal.App.4th 1**

Rule: (1) Strangulation as a manner of killing is sufficient evidence of premeditation and deliberation to support a first degree murder verdict because its prolonged nature provides ample time for the killer to consider his actions. Also, a rape or attempted rape during the commission of a homicide is a felony first degree murder. (2) Ambiguous attempts to invoke one's *Miranda* rights, after a prior waiver, are legally ineffective. (3) Incriminating statements unintentionally elicited through routine booking questions are admissible in evidence.

Facts: Defendant Shelby Glenn Shamblin entered the home of Elizabeth and Frank Crossman on the afternoon of January 17, 1980, while Frank was at work, sexually assaulting and choking to death 67-year-old Elizabeth. Frank came home at about 5:30 and found her nude body, with legs spread wide apart, lying on her back under a blanket on the bedroom floor. She had bruises on her throat, both thighs, and on the backs of her hands. There was semen oozing from her vagina onto the floor. Although an autopsy showed blunt force trauma to the back of her head, asphyxiation was determined to be the cause of death. Vaginal swabs were collected and frozen, it being before the days of DNA analysis. With no suspects, the case quickly went "cold."

In July 2002, Hemet Police Detective Jeff Dill pulled the case off the shelf, sending the vaginal swabs to the Department of Justice (DOJ) Crime Lab for DNA analysis. A DOJ criminalist was able to extract a single male DNA profile from one of the vaginal swabs, but no matches could be found. The case went "cold" again until October, 2010, when defendant was arrested on a drug charge. A DNA sample was taken from him upon his arrest and sent to DOJ to be entered into CODIS. Two months later, a DOJ criminalist notified Detective Dill that defendant's DNA had produced a hit in CODIS. Detective Dill arrested defendant on February 2, 2011, and the police took another DNA sample from him. This second DNA sample matched defendant's 2010 DNA sample as well as the DNA recovered from the victim's vaginal swab.

Upon his arrest, defendant was taken to the Hemet police station where an interrogation was attempted, resulting in an incriminating statement that, over a defense objection, was used against him at trial. Also used at trial was an admission defendant made during the booking process. Defendant was convicted of first degree murder (P.C. § 187(a)) and sentenced to 25 years to life in state prison. Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 2) affirmed. On appeal, the defendant raised a number of issues. (1) *First Degree Murder*: He first challenged the sufficiency of the evidence to support a conviction for first degree murder. The prosecution had argued for a first degree conviction under two alternate theories; i.e., that the murder was premeditated and deliberate, and/or that the "felony murder" rule applied, the murder having been committed during the commission of a rape or attempted rape.

The Court found that there was sufficient evidence to support defendant's conviction under either theory. As for the first theory (a premeditated and deliberate murder), it was noted that "premeditation" means only that the crime was "considered beforehand." "Deliberation" means a "careful weighing of considerations in forming a course of action." Neither element requires a lot of time and is something that can occur during the act of strangling a person. With expert testimony here that to choke Mrs. Crossman to death, defendant would have had to have his hands on her throat for between one to five minutes, this was plenty of time for him to premeditate and deliberate. Prior case law has upheld this argument, concluding that "strangulation as a manner of killing is sufficient evidence of premeditation and deliberation because its prolonged nature provides ample time for the killer to consider his actions."

As for the felony murder theory, defense counsel, without contending that defendant didn't have sexual intercourse with the victim, argued that the sexual penetration could have occurred after her death which, legally, is not a rape. The jury, however, could have found, based upon the evidence, that defendant raped the victim before killing her, or at least attempted to do so as he strangled her to death. Either scenario supports a felony first degree murder conviction.

(2) *Miranda Invocation*: When first arrested, defendant was questioned at the police station by Detective Dill and another officer. After indicating that he understood his rights (an "implied waiver"), and telling the detectives that he didn't know the victim (although he admitted knowing the victim's husband), defendant was confronted with the fact that the detectives had "overwhelming evidence, including DNA," connecting him with Mrs. Crossman's murder. At that point, defendant said: *"I think I probably should change my mind about the lawyer now. I, I*

need advice here. Don't you guys think I need some advice here? *I think I need some advice here*." Telling defendant that they would therefore take a break to let him think about it, the detectives prepared to leave him alone when defendant agreed that that was "fair," and then stated: "(*F*)*orty-eight*[*-year-old*] *Shelby* (defendant's first name) *doesn't want to have to take care of anything that seventeen*[*-year-old*] *Shelby did."*

After the break, the detectives asked defendant if he wanted to know what evidence they had against him and he replied that he did not. He then stated: "*I really don't want to continue the interview without at least seeking some advice. You guys understand right*? *And I understand what you have to do and let's just do it, I don't want to talk about it anymore. Not without some advice*." The trial court ruled that defendant's second comment, made after the break, about not wanting "to talk about it anymore" was a clear and unambiguous invocation, making anything said in response to the detective's further questioning inadmissible. However, defendant first reference to an attorney, made before the break, was not clear enough to constitute an invocation, making his subsequent comment about what the 17-year-old Shelby did admissible. That statement, therefore, was introduced into evidence against him.

Defendant argued on appeal that contrary to the trial judge's ruling, his first reference to needing advice from a lawyer was in fact an invocation of his rights under *Miranda*, making the follow-up comment about "17-year-old Shelby" inadmissible. It is a rule of law, however, that for a post-waiver attempt to invoke one's *Miranda* rights to be legally effective, such an attempted invocation must be sufficiently clear and unambiguous that a reasonable officer, under the circumstances, would have understood that the suspect was invoking. Using words like "*probably*" and "*I think*," as defendant did here, indicate to an objective listener that defendant did not have a clear intention to invoke his right to counsel, but was only considering the possibility of doing so. Defendant's statement—"*I think I probably should change my mind about the lawyer now. . . . I think I need some advice here*"—contains language that is conditional ("*should*") and equivocal ("*I think*" and "*probably*").

The trial court's ruling that this was not sufficiently clear to constitute an invocation, therefore, was upheld. The Court also rejected defendant's argument that under the circumstances, the detectives had an obligation to seek clarification in order to determine what defendant meant when he said he should "probably" change his mind. The case law is quite clear that officers are not required to ask clarifying questions when a suspect makes such an ambiguous or equivocal statement.

(3) *Booking Questions*: After defendant's invocation, he was taken to the Southwest Detention Center for booking. A Riverside County Sheriff's deputy, as a part of the booking process, took defendant's fingerprints. As he was doing so, he asked defendant when he had last been booked. Defendant told him that he was booked in October, 2010, and added that "*he knew he was caught when they took his DNA sample last time he was booked in*." The deputy asked him "*why*?" Defendant responded: "*Well, how do you get away with leaving DNA inside her*? *I knew eventually I'd be—I knew I'd be caught sooner or later*." The trial court ruled that these statements were admissible, finding that the deputy did not intend to elicit incriminating information from defendant and that the situation did not amount to a custodial interrogation.

On appeal, defendant renewed his argument, asserting that the deputy's questions did not fall under the "*routine booking question exception*" to *Miranda's* requirements. The Ninth Circuit disagreed. Whether custodial questioning falls under *Miranda's* booking exception depends on "whether the questions are legitimate booking questions or a pretext for eliciting incriminating information." Booking questions that do not rise to the level of an interrogation are those questions "normally attendant to arrest and custody," i.e., questions police ask in the conduct of their "normal administrative duties." The fact that information gathered from these routine questions or casual conversations turns out to be incriminating does not alone render the statements inadmissible.

The routine booking question exception applies "even when a defendant has already received *Miranda* warnings and invoked his or her rights." In this case, the jail deputy didn't have any prior knowledge about defendant's crime, and was not seeking to elicit any incriminating statements. His question about the last time defendant had been booked was innocuous and common to the booking process. His response to defendant's seemingly incriminating response (i.e., "why" did he know he was "caught") was a neutral follow-up question. Such questions do not constitute an "interrogation" and do not require a prior *Miranda* admonishment or waiver. The trial court, therefore, properly admitted defendant's statement to the jail deputy into evidence.

Note: On the issue of booking questions, however, we have to be careful in that the California Supreme Court has held that whether or not an inmate's responses to booking question are admissible isn't always as easy to determine as it appears by this case. In *People v. Elizalde et al.* (June 25, 2105) 61 Cal.4th 523, for instance, questions related to the defendant's gang affiliation, needed for purposes of classification, housing, and safety, were held to be inadmissible, the Court holding that; "(i)n-custody defendants generally retain their Fifth Amendment protections even if the police have good reasons for asking un-*Mirandized* questions." So while it is always helpful for booking officers to note, memorialize, and refer incriminating comments to the prosecution, the admissibility of such statements is not always a slam dunk, and needs to be researched before using them.