# The California Legal Update

***Remember 9/11/2001; Remember 12/7/1941***
***Support Our Troops***

Vol. 21 February 23, 2016 No. 3

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

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

**THIS EDITION'S WORDS OF WISDOM**

> "*You may not be able to change a situation, but with humor you can change your attitude about it.*" (Allen Klein)

**IN THIS ISSUE:**



**CASES:**

***Miranda and Implied Waivers*:**
***Confessions and Coerced Statements*:**
***Offers of Leniency Made to Third Parties*:**
***Miranda; Ambiguous Attempts at an Invocation*:**
***Sixth Amendment Right to Counsel*:**

***People v. Cunningham*** **(July 2, 2015) 61 Cal.4th 609**

**Rule:** (1) An express waiver of the *Miranda* rights is not necessarily required in order for a subsequent confession to be admissible. (2) The test for the voluntariness of a custodial confession is whether the statement is the product of the suspect's free will, or whether his will was overborn. (3) In order for an "offer of leniency" to affect the admissibility of a defendant's

confession, it must be proved that the benefit offered was the proximate cause of the confession. (4) To be legally effective, an invocation of one's *Miranda* rights, after a prior wavier, but be clear and unambiguous. (5) Until a suspect is formally charged with a criminal offense, his Sixth Amendment right to counsel does not apply. A parole violation based upon the same offense does not trigger his Sixth Amendment protections.

**Facts:** On June 27, 1992, defendant went to the Ontario, California, Surplus Office Sales ("SOS") store around closing time with a sawed off rifle, intending to rob it. Defendant had worked there some years earlier and had unsuccessfully sought reemployment from the owner, Michael Ray, the month before. On this date, defendant first visited the store in the afternoon, talking with the three unsuspecting employees who were there at the time; Jose Silva, David Smith, and Wayne Sonke.

Defendant left, but returned shortly before closing time with the rifle. He rounded up the three victims at gunpoint and bound them with duct tape. He forced Sonke to give him the money from the cash register, and had him open a locked filing cabinet containing more money. He then herded them all into a bathroom where, after retrieving the rest of the money, he returned to execute each of them with one or more shots to the head. Defendant retrieved a gas can from his car and returned to the store. Checking on his victims, he found Smith still alive, so he shot him one more time. He then set the place on fire. Defendant fled with over $1,000, leaving the state and traveling around the country for about a month.

He was finally arrested on July 23 in Deadwood, South Dakota. Over the next two days, Ontario Police Department Detectives Gregory Nottingham and Pat Ortiz interrogated defendant four times, each of which was either video or audiotaped. In the first interrogation, occurring on July 24, the first six minutes were spent making preliminary introductions and asking perfunctory questions. Defendant was then read his rights under *Miranda v. Arizona* which he said he understood. Without getting an express waiver of those rights, he was then asked about his relationships with various girlfriends with whom he had had contact after the murders (one of whom rode with him to South Dakota), about his military service, a prior robbery arrest, and his former boss at SOS.

Finally, defendant himself cut to the chase and told detectives: "*I know what you guys are getting at. . . . I also want you to know that the reason why I'm so calm is because I'm where I belong. . . . I know why you're here in my dreams and that's all*." When asked to clarify, defendant replied, "*You know as well as I do that I committed an armed robbery in Ontario*" at "*Mike's company*." When asked for further clarification, defendant reiterated, "*I committed an armed robbery*." Defendant then asked, "*Should I have somebody here talking for me, is this the way it's supposed to be done*?"

Detective Nottingham reread defendant his *Miranda* rights and asked if he understood them. Defendant stated: "*I do understand*." In response to further questioning, defendant gave an "occasionally rambling" confession to the robbery and the murders, expressing his relief at being caught. The detectives talked to defendant two more times that day, and then again on the morning of July 25th, for a total of around four hours. No additional *Miranda* advisements were given. In these follow-up interviews, defendant supplied further details about his crimes and his

escape in the month afterwards. At the suggestion of prosecutors, mainly because the recordings of defendant's interviews were of such poor quality, the detectives set up a video reenactment of the crimes. They purposely did this before an arrest warrant was filed (defendant being held at that point on a parole violation only). A correctional officer, Sgt. Lewis, at Folsom State Prison where defendant was held upon his return to California for the parole violation, asked defendant if he would be willing to participate in the reenactment. Defendant said he'd be "*happy*" to cooperate "*if it would get me out of here any sooner and quicker*."

Defendant thereafter cooperated thoroughly in a visit to the SOS store, describing to detectives, step by step in a videotaped reenactment, what occurred during the murders. Before he did this, however, defendant was readvised of his *Miranda* rights. He was subsequently charged in state court with three counts of first degree murder (P.C. § 187(a)) with special circumstance allegations (multiple murder, and in the commission of a burglary and a robbery; P.C. § 190.2(a)(3), 17(A), & (G)), along with other associated crimes and allegations. Defendant was found guilty in a court trial, with special circumstances. In a penalty phase tried before a jury, a verdict of death was returned. Defendant's appeal to the California Supreme Court was automatic.

**Held:** The California Supreme Court unanimously affirmed. Among the many issues on appeal, defendant argued that his initial waiver of his *Miranda* rights, accomplished after the first six minutes of questioning on July 24th, the day after his arrest, was coerced.

(1) *Implied Waivers*: In this regard, defendant first argued that because the detectives failed to seek and obtain an express waiver of his rights when he was first admonished, anything he said after that was in violation of his *Miranda* rights and should not have been admitted into evidence. In pretrial testimony, the detectives testified that they purposely did not seek an express waiver of rights in that at the time, it was an Ontario Police Department policy not seek express waivers; that merely advising a suspect of his rights and verifying that he understood them was legally sufficient (a policy that has since been reversed).

The general rule on this is that if an in-custody suspect, having heard and understood a full explanation of his or her *Miranda* rights, then makes an uncompelled and uncoerced decision to talk, he or she has thereby knowingly, voluntarily, and intelligently waived his rights (often referred to as an "*implied waiver*"). Law enforcement officers are not required to obtain an express waiver of a suspect's *Miranda* rights prior to a custodial interview. Rather, a valid waiver of *Miranda* rights may, as here, be inferred from the defendant's subsequent words and actions, depending upon the circumstances. As the detectives who interrogated defendant were not required to obtain defendant's express waiver, the intentional failure to do so was not a deliberate *Miranda* violation requiring the suppression of his subsequent statements.

(2) *Voluntariness*: Defendant argued also that his statements were the product of his compromised mental state, the detectives' use of deception, and an implied promise to help his girlfriend. The Court rejected each of these arguments. The test for the voluntariness of a custodial statement is whether the statement is "the product of an essentially free and unconstrained choice," or whether the defendant's "will has been overborne and his capacity for self-determination critically impaired" by coercion. The "totality of the circumstances" must be

considered. Only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable, are prohibited.

(3) *Offers of Leniency*: An example of a coerced confession includes when there are inducements offered to a suspect, such as promises of leniency, either to the benefit of the suspect himself or the suspect's loved ones. But even if a police interrogator steps over the bounds, a confession is involuntary only if the coercive police conduct at issue—such as an offer of leniency—and the defendant's resulting statements are "causally related." In other words, the police misconduct "must be . . . the 'proximate cause' of the statement in question, and not merely a cause in fact." In this case, even assuming that the detectives engaged in improper "softening up" by hinting that defendant's companion would only be exonerated if he'd talk to them, the totality of the circumstances of the interrogation support the conclusion that defendant's statements given after he was advised of his *Miranda* rights were voluntary and not the product of psychological inducement. The detectives' comments about releasing his girlfriend were immediately followed by the first of two *Miranda* advisements given to defendant, following both of which defendant stated unequivocally that he understood the rights, while continuing to answer questions.

During the interview, defendant indicated several times that, for various personal reasons, he'd decided beforehand to talk to the detectives about the case. It thus does not appear that the detectives' alleged attempts at softening up defendant overcame his will to resist or his ability to freely determine whether he wanted to talk to the detectives. The Court also noted that the relatively short duration of the interrogation (spread over a four-hour period), the detectives' relatively low-key tone in asking questions, and the fact that defendant was offered food and drink, all tend to show the lack of any coercive tactics or that the detectives were "harsh or accusatory" in their questioning. And lastly, defendant was what might be called criminally sophisticated, having been to prison twice and county jail once, and having been advised of his rights twice before, waiving them each time. Finally, with respect to defendant's mental state (i.e., his alleged "PTSD"), it did not appear from the record that the detectives exploited any psychiatric problems defendant might have had in order to produce the incriminating statements. "(T)here (was) no evidence his 'abilities to reason or comprehend or resist were in fact so disabled that he was incapable of free or rational choice."

(4) *Equivocal Invocations*: Defendant also argued that when he asked the detectives; "*Should I have somebody here talking for me, is this the way it's supposed to be done*?", that this comment constituted an invocation under *Miranda*, and that his interrogation should have ceased. Again, the Court disagreed. Once an in-custody has waived his or her right to counsel, as this defendant impliedly did at the outset of the interview, if that defendant has a change of heart and subsequently invokes the right to counsel during questioning, officers must cease the interrogation unless the defendant's counsel is present or the defendant himself initiates further exchanges, communications, or conversations. However, it is the defendant's obligation to make his attempted invocation clear and unambiguous so that a reasonable police officer under the circumstances would have understood the statement to be a request for an attorney or to remain silent. Merely asking for the officer's opinion whether he should "*have somebody talking for me*," or whether that's "*the way it's supposed to be done*," is clearly not a legally sufficient attempt at an invocation.

The detectives were under no legal obligation in this case to either cease questioning or seek clarification as to what defendant was trying to say. Also, later in the interview, defendant specifically confirmed his intent to waive his right to counsel when he stated he did not want to fight the case, did not need a lawyer, did not "believe in the routine of lawyers, or courts and all that," and did not feel a lawyer could do anything for him. His intent to submit to the interrogation can't get any clearer than that.

(5) *Sixth Amendment Speedy Trial Rights and Right to Counsel*: Lastly, defendant challenged the trial court's refusal to suppress the videotaped reenactment. The Court rejected defendant's argument that the reenactment occurred only because of a post-arrest delay in arraignment. When defendant did the reenactment, he was in custody on an unrelated parole violation only, not having been charged with the murders themselves. Until defendant is charged in court with the murders, which did not occur until sometime after the reenactment, there can be no delay in his arraignment. The fact that an attorney, if he'd had one, might have advised defendant not to participate in the reenactment is irrelevant. Because one's right to counsel under the Sixth Amendment, being "offense specific," is not triggered until he is formally charged with the murders, and because he again, before the reenactment, waived his Fifth Amendment right to counsel, he had no right to an attorney at the time of the reenactment. Also, just because defendant may have been the "*focus of suspicion*" in the murder investigation does not change any of these rules, such a test (which only applied to Fifth Amendment/*Miranda* issues) having long since been repudiated.

And finally, the Court rejected defendant's argument that Sgt. Lewis at Folsom State prison had improperly induced him to participate in the reenactment by promising him that he would be transferred out of Folsom Prison. To the contrary, no such promises were made. Sgt. Lewis merely asked defendant if he'd cooperate in the reenactment, telling him that if so, the detectives would be picking him up for that purpose. Also, any alleged inducement caused by whatever comments were made by the detectives about not charging defendant's girlfriend were not a factor in that she had long since been cleared of any suspected wrongdoing by that time. The reenactment, therefore, was not coerced and was properly used in evidence at defendant's trial.

**Note:** There's a lot of issues in this case, most of which defendant never really had a chance of convincing a court that they amounted to anything. The offer of leniency issue, however, is the one that officers should perhaps be most careful to avoid. The trial court in fact ruled against the People on this issue, although it felt that the taint had eventually dissipated by the time defendant confessed. And in all fairness to the detectives, it didn't appear that it was ever their intent to offer defendant's girlfriend leniency if defendant would open up to them. But that's the way it came out. Implied waivers are also a gamble. Although the law on this issue is for the most part in the prosecution's favor, an express wavier is so much easier to prove in court. Absent an express waiver, the court must consider all the other surrounding circumstances in attempting to decide whether a suspect really intended to waive. We don't always win that argument at the trial court level, and an appellate court is not likely to reverse a trial court's ruling suppressing a confession.

***Criminal Street Gang Allegations, per P.C. 186.22(b)*:**

***People v. Prunty* (Aug. 27, 2015) 62 Cal.4th 59**

**Rule:** In a gang prosecution, when the People's case positing the existence of a single "criminal street gang" for purposes of P.C. § 186.22(f),turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets with the "umbrella (or parent) gang."

**Facts:** On the evening of November 26, 2010, 21-year-old Gustovo Manzo, his girlfriend, and his girlfriend's two younger brothers, all went to a Sacramento shopping plaza fast-food restaurant to eat. Manzo was wearing a Los Angeles Dodger baseball cap, which is attire typically associated with the Sureño street gangs. Defendant, an admitted member of the Detroit Boulevard subset of the Norteños street gang, describing himself as a "Norte" and a "Northerner," was in the shopping center with his companion, Chacon, who is a member of the Varrio Franklin Boulevard Norteños, based out of South Sacramento. Defendant, wearing a red jacket, and Chacon approached Manzo and asked him where he was from, emphasizing his distaste for the Dodger hat by adding; "f__k a Skrap, 916." "Skrap" and "Scrap" are derogatory terms that Norteño gang members use for Sureño gangsters, while "916" refers to the Sacramento area code. But whatever, this is apparently not a nice thing to say to a member of the Sureño gang because Manzo returned the insult by calling defendant and Chacon "Busters," which is a derogatory term for Norteños.

With everyone having expressed their irrational and nonsensical feelings for each other, the confrontation was escalated by defendant "throwing" a few gang signs and telling Manzo that "this is Norte (territory), f__k a Skrap, 916." Manzo and his girlfriend, growing tired of this game and apparently still hungry for a cholesterol-laden Big Mac, told defendant and Chacon to "keep walking," attempting to get in the last say by again referring to them as "Busters." But defendant and Chacon, by now, were too far into this exercise in futility to just walk away.

With everyone on both sides sufficiently insulted (or "disrespected"), Manzo, having run out of clever insults to add, finally advanced on defendant, prompting defendant to pull out his obligatory concealed firearm and spray six bullets in the direction of the interlopers. Fortunately, defendant was no better of a shot than he was an intellectual icon, only wounding Manzo and his girlfriend's 10-year-old brother. Defendant was charged in state court with the attempted murder of Manzo (P.C. §§ 664/187(a)) and an assault with a firearm (P.C. § 245(a)(2)) for shooting the girlfriend's 10-year-old brother. The prosecution alleged that each of these offenses was committed "for the benefit of, at the direction of, or in association with [a] criminal street gang," and was thus subject to a sentence enhancement under the *California Street Terrorism Enforcement and Prevention Act* (or "*STEP Act*," per P.C. § 186.22(b)(1)).

At trial, as proof that defendant qualified for this gang enhancement, the prosecution introduced evidence from a gang expert, Detective John Sample, a veteran officer with the Sacramento Police Department. Detective Sample, having interviewed defendant shortly after his arrest, testified that defendant admitted to being a "Northerner," or a Norteño gang member, and described his membership in the Detroit Boulevard Norteño "set." Detective Sample also

testified that defendant's clothing and hairstyle, his previous contacts with law enforcement, and his possession of Norteño graffiti, images, clothing, and other paraphernalia, were all consistent with Norteño gang membership.

As background, Detective Sample provided testimony describing the criminal street gang nature of the Norteños in general, including their history, their "turf," their gang graffiti and gang signs, and how their primary unlawful activities consist of crimes like murder, attempted murder, assault, firearms offenses, and weapons violations. Detective Sample explained that Sacramento-area Norteños are not associated with any particular "turf," but are instead "all over Sacramento" with "a lot of subsets based on different neighborhoods." He further testified about how Norteños share common names, signs, and symbols, including names derived from "the north, Norteños, (and) northerner," the letter N, the number 14, and the color red. His testimony also covered the Sureño street gang, whose members identify with the color blue, the letters S and M, and the number 13, and how the Sureños and Norteños are enemies.

Finally, Detective Sample described various other aspects of Norteño and Sureño gang culture generally, including the appearance of gang graffiti and gang signs as well as each gang's use of common derogatory statements about its rivals. In order to satisfy the elements of the STEP enhancement, the prosecution had Detective Sample testify to the required two or more "predicate offenses" that an "organization, association, or group" must commit to coincide with the STEP Act's definition of a criminal street gang. (P.C. § 186.22(f)) To satisfy this "predicate offense" element, he talked about specific crimes committed by various subsets of the Norteño gang. However, the prosecution neglected to introduce any specific evidence showing how these subsets of the Norteño gang, such as the subset defendant belonged to, identified with the larger Norteño group. Nor did Detective Sample testify that the Norteño subsets (that committed the predicate offenses which he described in his testimony) shared a connection with each other, or with any other Norteño-identified subset.

The jury convicted defendant of a lesser included offense of attempted voluntary manslaughter. (P.C. §§ 664/192(a)) It also convicted him of assault with a firearm (P.C. § 245(a)(2)) on the 10-year-old victim and found true an allegations that he personally used a firearm (former P.C. § 12022.5(a)) and committed the offenses at the direction of, in association with, or for the benefit of, a criminal street gang (P.C. § 186.22(b)). The trial court sentenced defendant to an aggregate term of 32 years in prison. On appeal, defendant challenged the prosecution's theory that the relevant "ongoing organization, association, or group" (P.C. § 186.22(f)) in this case was the "criminal street gang known as the Norteños" in general, when the only evidence of the underlying predicate offenses related to crimes committed by subsets of the Norteños without any evidence to show that these subsets were connected with the parent Norteños organization. He argued that this improperly conflated multiple separate street gangs into a single Norteño gang without evidence of "collaborative activities or collective organizational structure" to warrant treating those subsets as a single entity. According to defendant, the prosecution's theory did not satisfy the STEP Act's "criminal street gang" definition.

The Third District Court of Appeal rejected defendant's arguments and upheld his conviction. The California Supreme Court granted review to address the issue of what type of evidence is

required, if any, to support the prosecution's theory that various alleged gang subsets constitute a single "criminal street gang" under section 186.22(f).

**Held:** The California Supreme Court, in a split 4-to-3 decision, reversed, finding insufficient evidence to support the jury's true finding on the P.C. §186.22(b) gang allegation. First, it must be noted that P.C. § 186.22(f), under the STEP Act, defines a "criminal street gang" as an "ongoing organization, association, or group." That "group," by definition, must have "three or more persons," with its "primary activities" consisting of certain listed crimes. The same "group" must also have "a common name or common identifying sign or symbol," and its members must be proven to have engaged in a "pattern of criminal gang activity" by committing "predicate offenses." At issue on appeal was, under this definition, what the relationship must be between a street gang and its various local subsets in order to attribute the gang activities of one group to the other.

Looking at the wording of the statute and the Legislature's intent in enacting the gang enhancement provisions of section 186.22, the majority of the Court found here that where the prosecution's case positing the existence of a single "criminal street gang," as defined in subdivision (f) above, turns on the existence and conduct of one or more of the gang's subsets, then the prosecution must prove some associational or organizational connection uniting those subsets with the parent organization. This connection need not be formal, such as with the stereotypical organized crime syndicate's hierarchical, tightly organized framework. The Legislature evidently wanted the STEP Act to apply to groups with looser associations than traditional criminal conspiracies. But the lower Court of Appeal's conclusion that "smaller neighborhood subsets" may be treated as a single "criminal street gang" based simply on evidence that the subsets share a "common name . . . [or] common identifying signs and symbols" is not consistent with the STEP Act's intent. The prosecution's case must present more evidence than this, proving the organizational relationship between the subsets and the gang itself.

Evidence proving such a relationship may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets with the larger group. Alternatively, it may be shown that the subsets are in fact a part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. In other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization. However, it is not enough that the various subset groups simply share a common name, common identifying symbols, and a common enemy. It is not permissible for the prosecution to introduce evidence of a different subset's conduct in attempting to satisfy the "primary activities" and "predicate offense" requirements without demonstrating that those subsets are somehow connected to each other and to the parent organization.

In this case, the Court held that the prosecution failed to prove the existence of a single "criminal street gang," within the STEP Act's meaning, that fit the prosecution's theory of why the P.C. § 186.22(b) gang enhancement applied. The critical shortcoming in the prosecution's evidence was the lack of an associational or organizational connection between the two alleged Norteño subsets that committed the requisite predicate offenses, as testified to by the gang expert, and the

larger Norteño gang that defendant allegedly benefited when he assaulted a perceived rival gang. The gang expert's testimony failed to demonstrate that the subsets that committed the predicate offenses, or any of their members, self-identified as members of the larger Norteño association that defendant sought to benefit. Because these requirements were not met, defendant's conviction had to be reversed and the case remanded to the trial court for further proceedings.

**Note:** If you disagree, you're in good company. The dissent would have ruled that when you look at all the evidence in this case, there was enough to sustain the trial court's (and Third District Court of Appeal's) conclusion that the relationship between defendant, the Norteño gang itself, and the subsets whose criminal activities supplied the required "predicate offenses," was sufficiently proved. Never having tried a gang case myself, I have to plead ignorance as to the wisdom of the majority's decision. But because the majority rules, whether we like the result here or not, this case tells us what you need in order to put together a complete gang case when there's evidence that a gang's subset's groups are involved, or used to prove the necessary "predicate offenses." Also, it must be noted that two new cases since this one (one out of the same Third District Court of Appeal and the other from the Fourth District Court of Appeal (Div. 3)), have since reached the same conclusion, citing this case as their authority; *People v. Cornejo* (Jan. 20, 2016) 243 Cal.App.4th 1453 and *People v. Ramirez and Villareal* (Feb. 5, 2016) __ Cal.App.4th __ [2016 Cal.App. LEXIS 87], respectively.

***Interrogation Techniques and Minors*:**

***In re Elias V.*** **(2015) 237 Cal.App.4th 568**

**Rule:** Many otherwise lawful interrogation tactics used to encourage confessions are not appropriate when the suspect is a minor and criminally unsophisticated.

**Facts:** Thirteen-year-old defendant Elias V. lived with his parents in an apartment complex in Santa Rosa. His friend, nine-year-old Hector T. and Hector's three-year-old sister, A.T, lived across the hall. On October 6, 2012, the three of them were in a bedroom in Hector's apartment playing video games. Hector was sitting on the floor while defendant and A.T. were on the bed. At one point, Hector's mother, Aurora, entered the room just in time to see A.T with her pants pulled down to the middle of her legs. When Aurora asked what was going on, a "surprised" and "scared" defendant responded that A.T. had asked him for help taking her pants off so that she could go to the bathroom. Neither Aurora nor Hector saw, and no one claimed, any "touching" was going on. But later, A.T. told Aurora and others that defendant had "touched me."

Aurora did not contact the Sonoma County Sheriff's Department, however, until October 23, some 17 days after the incident. During that 17 days, Hector and defendant's respective fathers were involved in some arguments. Also, the landlord got reports that Aurora's friends and relatives were drinking and partying too much, causing disturbances and other problems in the apartment building. So Aurora and her family were told on October 22 that they were being evicted. The next day Aurora reported the incident between defendant and A.T. to the sheriff. Defendant's attorney later argued that Aurora had concocted the charge against defendant and contacted the sheriff only because she had just learned that the landlord intended to evict her family, and believed that defendant's father had put the landlord up to this.

A deputy sheriff took an incident report from Aurora on October 23rd, but did not interview A.T. herself. A.T. was finally interviewed on February 1, 2013 (three months after the incident) at the Redwood Children's Center by someone trained in interviewing very young children. In a ten-minute recorded interview, A.T. reiterated that defendant had touched her, pointing to the vaginal area on a doll. The video recording of this interview, however, was not introduced into evidence and the interviewer did not testify. The gist of A.T.'s accusations made against defendant were testified to by the assigned detective who, although not personally interviewing A.T., had observed the videotaped Child Center's interview.

Five days after this interview (Feb. 6), the assigned detective went to defendant's elementary school to interrogate defendant. Brought to a small office by the school principal, where he was surrounded by the principal, two detectives (and with another uniformed deputy sheriff outside the door), defendant was read his *Miranda* rights. After noting that defendant didn't have any previous contacts with law enforcement, he was told (i.e., not "asked") that they knew he'd touched A.T. in a sexual manner and that he needed help for his problem. Over the majority of the next 20 to 30 minutes, defendant adamantly denied any assertions that he'd touched A.T. in an improper manner, telling the detectives that he'd merely unzipped A.T.'s pants at her request, consistent with what he'd told Aurora the day of the incident.

However, although questioning defendant in a manner that was described as "gentle" and "calm," with questions that were "short," and not "convoluted," the detective began using tried and true interrogative techniques to get defendant to admit to what he no doubt perceived as a less culpable alternative as suggested by the detective, e.g., that he'd touched A.T. out of curiosity rather than a sexual interest. Also, agreeing to facts as suggested by the detective, defendant eventually admitted that he'd touched the bare skin of A.T.'s vagina for three to four seconds. Defendant was later charged in Juvenile Court pursuant to W&I § 602 for having committed a lewd and lascivious act upon a child under the age of 14 years. (P.C. § 288(a)) His motion to suppress his statements to the detective was denied. Immediately after the hearing, however, in talking to an officer of the Sonoma County Juvenile Probation Department, defendant recanted his "confession," again denying any inappropriate touching. Declared to be a ward of the court and placed on probation in this parents' home, defendant appealed.

**Held:** The First District Court of Appeal (Div. 1) reversed. Defendant argued on appeal that his confession was involuntary under the "due process" clause of the Fourteenth Amendment as the product of certain coercive interrogation tactics that were condemned years ago by the United States Supreme Court in *Miranda v. Arizona* (1966) 384 U.S. 436, and as such, had "overborne his will." Although a minor is capable of legally and effectively waiving his own *Miranda* rights, whether or not his resulting statements are to be deemed voluntary under the Fourteenth Amendment due process clause requires an evaluation of the totality of the circumstances including, but not limited to, his age, intelligence, education, and ability to comprehend the meaning and effect of his confession.

The issue is whether a confession was a product of both the minor's free will and an intelligent waiver of his or her Fifth Amendment self-incrimination rights. It is the prosecution's burden to prove the voluntariness of a confession by a preponderance of the evidence. The Court further

noted that the underlying purpose of the *Miranda* decision was to offset the psychological, rather than physical, effects of an in-custody interrogation, which often include techniques employed by police interrogators who may "trade on the weakness of individuals," potentially "giv(ing) rise to a false confession." In evaluating the applicability of these rules to this case, the Court launched into a discussion of various studies done since the *Miranda* decision which estimate that of those cases where it is determined that a defendant was wrongly convicted, somewhere between 14 to 25 percent involved false confessions. And of those cases, about 35% of the proven false confessions were obtained from suspects under the age of 18. This, the court believes, and as demonstrated in an "extensive body of literature," is because juveniles are "more suggestible than adults, may easily be influenced by questioning from authority figures, and may provide inaccurate reports when questioned in a leading, repeated, and suggestive fashion."

Police interrogators today receive training from various sources in interrogation techniques that are intended, ostensibly, to motivate criminal suspects to open up to their interrogators and admit culpability where culpability exists. But taken too far, such techniques can also generate false confessions, particularly from the young and less criminally sophisticated. The detective in this case, whether intentionally or not, used many of the interrogative techniques suggested by the experts to break a suspect's will and obtain a confession.

For instance: (1) Choosing defendant's school, and using a small, private room to conduct the interrogation, where he was surrounded by authority figures, as opposed to interviewing him at home where he would have had access to supportive family members, tends to generate anxiety in a suspect. The mere fact of police questioning of a minor in the schoolhouse setting may also have a coercive effect because the child's presence at school is compulsory and his disobedience at school is cause for disciplinary action.

(2) Confronting the suspect with accusations of guilt, real or manufactured, assertions that may or may not be supported by evidence, and refusing to accept alibis and denials. Defendant here was told right up front that the detectives knew he had touched A.T. inappropriately, that they did not what to hear any denials, and that they only needed to find out why he did the crime.

(3) Offering sympathy and moral justification for the defendant's alleged acts, introducing themes that minimize the crime and lead a suspect to see a confession as an expedient means of escaping further interrogation. The initial aggressive nature and persistence of the detective's questioning in this case, followed up by inferring to defendant that it might not be as serious as it appeared, was part of an overall approach referred to in the literature on interrogation as "*maximization/minimization*." This involves a "*cluster of tactics*" designed to convey two things. The first is that the interrogator has a "rock-solid belief" in the suspect's guilt, making all denials unbelievable and useless.

Such a tactic includes making a direct accusation of guilt, overriding objections, and citing evidence, real or manufactured, to shift the suspect's mental state from confident to hopeless. In contrast, "*minimization tactics*," sometimes referred to as the "*false choice*" strategy, are designed to provide the suspect with a moral justification and face-saving excuse for having committed the crime in question; a tactic that communicates by implication that leniency in punishment is forthcoming upon confession. Here, the detective came at defendant with

unequivocal accusations of guilt, followed up by offers of a face-saving alternative when it was suggested to him that by touching A.T., he was only attempting to satisfy his curiosity as opposed to feed some sick sexual desire.

(4) Using false and non-existing evidence is legally acceptable in some circumstances. However, it is also known to lead to false confessions. Here, the detective told defendant that A.T. had "explained it perfectly," and that Aurora "walked in and saw" him touch A.T.'s vagina, neither of which was true.

(5) The "lie detector ploy:" In this case, the detective at one point threatened to subject defendant, against his will, to a lie detector test that would definitively reveal the falsity of his denials. Studies have shown this tactic as being among the most common interrogation techniques that result in false confessions. Overall, while the detective's interrogation style may have been "gentle" and "calm," with questions that were appropriately "short," and not "convoluted," some of the ploys used to wrangle a confession from the 13-year-old suspect constituted what the Court referred to as "*dominating*, *unyielding*, and *intimidating*."

The Court therefore found defendant's statements to have been obtained involuntarily, based upon a combination of three major factors: (1) His youth, which rendered him "most susceptible to influence and outside pressures;" (2) the absence of any evidence corroborating his inculpatory statements, A.T.'s accusations being as vague as they were, and with no witnesses or physical evidence; and (3) the likelihood that the detective's use of deception and overbearing tactics would induce involuntary and untrustworthy incriminating admissions. The Court, therefore, reversed his conviction.

**Note:** Prosecutors, as well as police, have no stake in convicting the innocent. To the contrary, our legal and moral obligation to help exonerate those who might be falsely accused is stronger, in my mind, than even that of a defense attorney. The advent of DNA in the courtroom, with its corresponding after-the-fact use in old pre-DNA "cold cases" to verify (or negate) the guilt of those tried and convicted years ago, should be a wakeup call for all of us, turning us onto the distinct possibility that we're good enough, if we really try, to actually convict innocent people. This, of course, we must not do. The Court here ends this decision with an extra thirteen pages (pp. 587-600) of perhaps gratuitous, yet enlightening, lecture, telling us that while many of the interrogation techniques discussed here may be of some value when used on adults and criminally sophisticated suspects, they are totally inappropriate when dealing with juveniles, the weak-willed, and perhaps the criminally unsophisticated.

I often refer to such interrogation tactics as playing "*mind games*" with an accused, and have never been a big fan of their use in any interrogation. While using such tactics may help in our case clearance or conviction rates, they don't necessarily result in justice being done. Interestingly enough, I no sooner got this case briefed than I happened to watch the T.V. news show "*Dateline*," presenting a two-hour review of a case where a teenager with "learning disabilities" was convicted of murder, based entirely upon his confession. The show depicted parts of the actual videotaped interrogation where, after hours of repeated denials, the detective finally led him to confess by violating most of the rules discussed above, most notably (but not limited to) feeding him the details concerning the manner by which the victim was murdered and

the weapon used. It became evident that the minor never would have admitted to such facts had he not been totally exhausted after a six-hour interrogation, beginning in the middle of the night, and convinced that the only way he was going to end his anguish was to admit to whatever the detective wanted to hear. That defendant, tried as an adult, was finally released from prison after six years of confinement and a gubernatorial pardon. I might also recommend a thorough reading of the case briefed above for anyone who is seriously interested in boning up on the science of interrogations.

The written decision lists a seemingly endless number of studies, training manuals, and articles that you can use, if you have the time and the inclination, to make yourself a true expert in this field. The Court also provides some helpful tactical suggestions on how to obtain a more convincing, and more truthful, confession.