The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*My goal this weekend is to move only enough so people know I'm not dead.*" (Anonymous)

IN THIS ISSUE:

CASE LAW:

***Arrests and Probable Cause*:**
***Qualified Immunity and Clearly Established Precedent*:**

District of Columbia v. Wesby et al. **(Jan. 22, 2018) __ U.S. __ [__ S.Ct. __; 199 L.Ed.2nd 453]**

Rule: (1) The existence of probable cause to arrest is determined by considering the totality of the circumstances. All suspicious factors are to be considered in their totality. Also, individual factors are not to be discounted merely because they might have some innocent explanation.
(2) A police officer is entitled to qualified immunity from civil liability *unless* it is determined that he or she violated a federal statutory or constitutional right, *and* the unlawfulness of his or her conduct was "clearly established" at the time.

Facts: Washington D.C. Metropolitan Police responded to a loud party call at 1:00 a.m. in the morning of March 16, 2008, at what, according to the caller and neighbors at the scene, was supposed to be a vacant house. Making entry, the officers did indeed find a party going on at full steam, complete with strippers, group sex, alcohol, marijuana, and loud music. Aside from the on-going party, the house was obviously vacant with no furniture except for a few padded metal chairs and a bare mattress. The rest of the house was empty, save for some fixtures and large appliances. The house had a few signs of inhabitance; working electricity and plumbing, blinds on the windows, toiletries in the bathroom, and food in the refrigerator. But there were no boxes or other moving supplies in the house, nor were there other possessions, such as clothes in the closets, suggesting that someone might live there. Upon the officers' arrival, many of the occupants scattered with several of them attempting to hide. In all, the officers detained twenty-one people in the house. Questioned at the scene, some of the partygoers claimed that the event was a bachelor party, but no one could identify the bachelor. The partygoers answers to questions tended to be "vague and implausible." Two of them, however, told the officers that someone named "Peaches" had invited them. One person told the officers that Peaches actually lived there, although there were no signs to indicate that that was true. Peaches, although not at the scene, was contacted at a phone number supplied by the partygoers. Refusing to come to the scene out of a fear of being arrested, Peaches at first claimed to be renting the house from its

owner and to have the permission of the owner to stage the party; assertions she soon admitted were not true. The owner was also contacted. He told the officers that although he had been trying to negotiate a lease with Peaches, they had yet to reach an agreement. He confirmed that he had not given Peaches (or anyone else) permission to be in the house, let alone permission to use it for a bachelor party. At that point, the officers arrested the 21 partygoers for unlawful entry, per D. C. Code § 22-3302 (2008). After transporting everyone to the police station, they were all subsequently released. The charges were eventually dropped. Alleging that they had been arrested without probable cause—a Fourth Amendment violation—16 of the 21 partygoers filed a federal lawsuit against the District and the five officers who were at the scene. With three of the officers later dismissed from the lawsuit, the trial court denied the remaining two officers' summary judgment motion, holding that there was no evidence of a necessary element of the charged offense; i.e., that the partygoers either knew, or should have known, that they were in the house without permission (i.e., trespassing). The Court also denied the officers' claim of qualified immunity from civil liability. A jury awarded the plaintiffs a total of $680,000 in compensatory damages. With the trial court adding nearly $1 million in attorneys' fees, the defendant officers appealed. The case was upheld by a split (2-to-1) decision by the federal Circuit Court of Appeals. (*Wesby v. District of Columbia* (D.C. Cir. 2014) 765 F. 3rd 13.). The officers appealed that decision. The U.S. Supreme Court granted certiorari in order to resolve two questions; i.e., (1) whether the officers had probable cause to arrest the partygoers, and (2) whether the officers were entitled to qualified immunity.

Held: The U.S. Supreme Court, in a unanimous decision (with two concurring opinions, questioning the majority's probable cause findings), reversed.

(1) *Probable Cause to Arrest*: First, the Court disagreed with the lower courts as to whether the officers had sufficient probable cause to arrest the plaintiffs. It was uncontested that the plaintiffs were in the house without the permission of its owner. The issue was whether there was sufficient evidence for the officers to reasonably believe that the trespassers knew, or should have known, that they were indeed trespassing. In determining the existence of probable cause, one has to consider the "totality of the circumstances" known to the arresting officers at the time. The Court ruled that in considering the totality of the circumstances present in this case, the officers made an "entirely reasonable inference" that the partygoers were knowingly, and without permission, taking advantage of a vacant house as a venue for their late-night party. First, the house, with no furniture (except for a few padded metal chairs, a bare mattress, some fixtures and large appliances) was obviously vacant, and had been for some time. Although the electricity and plumbing worked, there was really nothing to indicate to the partygoers that anyone lived there. Although one woman told the officers that Peaches had recently moved in, the officers had reason to doubt that was true given the lack of any personal belongings in the house. Aside from that, the place was filthy. Also, the officers could consider the actions of those at the house upon their arrival. Many of the plaintiffs scattered at the sight of the arriving uniform police officers. Two of them hid; one in a closet and one in a bathroom. As held in

previous cases, flight upon noticing the police "is certainly suggestive" of wrongdoing and can be treated as "suspicious behavior" that factors into the totality of the circumstances. In questioning the plaintiffs, they uniformly gave vague and implausible responses. Although some claimed the party was for the benefit of a bachelor, no one could identify who he might be. When Peaches herself was contacted, she sounded nervous, agitated and evasive, believing she would be arrested if she returned to the scene, and initially lying about having the owner's permission to use the house for the party. The officers could thus reasonably infer from all this that the partygoers knew their party was not authorized and that they were there without the permission of the owner. Their arrest, therefore, was supported by probable cause. The Court also noted that the courts below, in reaching a contrary conclusion, violated "two basic and well-established principles of law." First, each fact discussed above was considered in isolation, rather than as a factor relevant to the totality of the circumstances. Secondly, any factors with a possible innocent explanation were automatically discounted. "(T)he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of (otherwise) noncriminal acts." In other words, the fact that there might be an innocent explanation as to a particular factor does not mean that that factor is not to be considered when viewing the overall suspiciousness of the activity. Ultimately, the lower courts "should have asked whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a "'substantial chance of criminal activity.'" Here, the Court ruled that there was. Plaintiffs, therefore, were lawfully arrested.

(2) *Qualified Immunity*: Although finding probable cause was enough to decide this case, the Court also discussed the issue of an officer's "qualified immunity" in a civil lawsuit. When sued pursuant to 42 U.S.C. § 1983, police officers are entitled to qualified immunity *unless* (1) they violated a federal statutory or constitutional right, *and* (2) the unlawfulness of their conduct was "clearly established at the time." Upon the lower courts finding in this case that the officers did not have probable cause to arrest the plaintiffs, they also ruled that they violated the plaintiffs' constitutional rights under circumstances where the unlawfulness of their conduct was clearly established by prior appellate court authority. The Supreme Court disagreed. First, it has already been noted that the officers did in fact have probable cause to arrest the plaintiffs, so no constitutional rights were violated. But secondly, even ignoring that finding, the Court also ruled that their conduct did not violate any clearly established precedents. To be "clearly established," the legal principle at issue must have a sufficiently clear foundation in then-existing case law. The rule that is alleged to have been violated, in other words, must be based upon "settled law." This "clearly established" precedent standard requires that the legal principle at issue clearly prohibits the officer's conduct in the particular circumstances before him. In apply these standards, the Court noted that it has "repeatedly stressed that courts must not 'define clearly established law at a high level of generality.'" In other words, the precedent used must be more than just one-size-fits-all general rules. It has also been noted that the "specificity" of the rule is "especially important in the Fourth Amendment context," such as when evaluating the

lawfulness of an arrest. Under these principles, the Court readily concluded that the officers in this case were entitled to qualified immunity. In denying the officers qualified immunity, the courts below failed to identify even a single precedent, "much less a controlling case or robust consensus of cases," where it was held that circumstances such as present here constituted a Fourth Amendment violation. In effect, the officers were left to wing it, with no specific prior case law to guide them. Therefor, "(e)ven assuming the officers lacked actual probable cause to arrest the partygoers, the officers are entitled to qualified immunity because they 'reasonably but mistakenly conclude[d] that probable cause [wa]s present.'"

***Note*:** If you're wondering why the officers' warrantless entry into the house was not discussed, the apparent (or obvious) answer is that none of the plaintiffs, as one-time uninvited visitors, had the necessary legal "standing" to challenge the constitutionality of the entry. That's a whole different topic on which there was no issue here. The importance of this case is the detailed discussion of what it takes to find "probable cause." It is really a very low standard, when you think about it, often being described in other cases as no more than a "*fair probability*." (See *Illinois v. Gates* (1983) 462 U.S. 213.) You don't need to be right. There just has to be a "fair probability" that your right. It is also important here to note how easily it is to find "qualified immunity;" a fact that should provide some comfort to those of you who are paranoid about being sued. I severely abbreviated he Court's discussion of this issue. But it's worth noting that in discussing an officer's right to qualified immunity in a civil suit, the Court referred to a trial court's "demanding standard" in seeking to deny an officer this protection, with it being available to "all but the plainly incompetent or those who knowingly violate the law." So unless you are "plainly incompetent," or someone who "knowingly violate(s) the law," you shouldn't be so worried about being sued.

***Miranda; Waiver of Rights*:**
***Confessions and the Issue of Voluntariness*:**

In re T.F. **(Oct. 16, 2017) 16 Cal.App.5th 202**

Rule: An implied waiver of one's *Miranda* rights is invalid where the evidence shows that the suspect did not either understand those rights or failed to realize what it was that he is waiving. Confessions obtained by questionable interrogation techniques are involuntary where the evidence shows that the suspect's will to resist was overborne.

Facts: T.F. (i.e., defendant) was 12 to 15 years old between December, 2010, and April, 2013. During that time period, defendant lived with his mother, Veronica, and his two older siblings, in Antioch. On occasion during this time period, Veronica would babysit her friend Heather's daughter, E.C., and her siblings. E.C. was four years old in April, 2012, when she was at Veronica's house. A couple of the other children noticed defendant playing with E.C., chasing

her around the room. Defendant eventually caught E.C. and pulled her pants down. The other children were later able to describe other instances where it appeared that defendant was getting too familiar with E.C. Then in April or May, 2012, as Heather was getting ready to take her children to Veronica's, E.C. started screaming and crying, telling Heather that she did not want to go to Veronica's house anymore. E.C. also complained about pain in her vagina and acted abnormally; e.g., wetting her pants, refusing to go the restroom by herself, and avoiding male family members, including her father. E.C. eventually told Veronica that defendant was being "nasty" with her Although a doctor was unable to find any evidence of improper touching, Heather decided (at the doctor's suggestion) not to take E.C. to Veronica's after that. E.C. eventually told Heather that defendant had touched her "coo-coo (vagina) and her butt" with his finger. Bringing in a pastor, E.C. told him the same thing. And then again in 2014, E.C. told an interviewer from a Children's Interview Center that defendant had been touching her in the area of her vagina. With the police eventually notified, Antioch Police Detectives Hewitt and McManus went in May of 2014 to the then 15-year-old defendant's high school and had him pulled out of class. Brought to a conference room by a school security officer, the detectives began to question defendant. No *Miranda* warnings were given. Detective Hewitt, in plain clothes but with his badge and gun visible, quickly went from seeking basic background information to an interrogation about defendant's relationship with E.C. For the next 60 minutes, Detective Hewitt repeatedly "stated as a fact" that defendant had touched E.C. in a sexual manner; an accusation that defendant adamantly and continually denied. The only time defendant seemed to waiver was once when Detective Hewitt asked defendant whether it was "a one-time, isolated incident," prompting defendant to respond that it was "one time." But then defendant again quickly denied touching E.C. Throughout this questioning, defendant was very emotional, sobbing at numerous points. He repeatedly said he wanted to go back to class or to go home. Instead of being allowed to leave, the officers handcuffed him and placed him under arrest, transporting him to the police station. Following the 15-to-20 minute ride to the station and a brief detention in a holding cell, Detective Hewitt (without Detective McManus) resumed the interrogation. At the start of this session, Detective Hewitt told defendant; "I'm gonna read these to you before we talk, okay?" Detective Hewitt then read defendant his *Miranda* rights in what the Court referred to as a "rapid recitation." After each line of the warning, Detective Hewitt asked defendant if he understood. The transcript of the audio-recorded interview, however, didn't show any response from defendant until finally, after being told that he had the right to have an attorney present, and upon being asked if he understood, defendant responded; "Mm hmm." And after the next line, describing his right to a free attorney, and asked if he understood, defendant said, "Yes sir." From there, Detective Hewitt asked defendant a couple of questions about an outstanding warrant (apparently having to do with defendant bringing a knife onto the school campus on a prior occasion). But then the detective launched directly into his interrogation of the still upset and crying defendant about E.C. without ever asking if he was willing to waive his rights (i.e., an attempt at an implied waiver). "[G]oing back to what we were talking about up at the school[.] … [N]ow that you've had a little bit of time to think about

what's going … I just wanted to give you the opportunity to talk to me again." For the next 45 minutes, Detective Hewitt continued the interrogation tactic of stating as a fact that defendant had touched E.C.'s vagina, ignoring defendant's denials. For the bulk of this period, defendant continued to adamantly deny touching E.C. inappropriately at any time. Finally, when Detective Hewitt suggested that defendant might have touched "her vagina over her pants a little bit," defendant responded, "Yeah." When Hewitt pressed for further details, defendant replied: "I said it. I said it . . . I said it, I did it." When Detective Hewitt asked defendant why he stopped touching E.C., defendant replied: "I was thinking to myself that it was wrong to do this. I was, it was like, while I was doing it I was like, it's wrong, it's wrong. And then I stopped myself." With Detective Hewitt having gotten his confession, the Contra Costa County District Attorney filed a wardship petition alleging that defendant had committed a lewd and lascivious act (P.C. § 288(a)) on E.C. Before, and again at the jurisdictional hearing, defense counsel moved to exclude defendant's statements to Detective Hewitt on the grounds that he did not voluntarily waive his *Miranda* rights. The court granted the motion as to the statements made at the school, but denied it as to the statements defendant made at the police station where he was in fact read his *Miranda* rights. At the close of the jurisdictional hearing, the Juvenile Court Magistrate found "beyond a reasonable doubt" that defendant committed a violation of P.C. § 288(a), and that he knew it was wrong at the time he did it. At the disposition hearing, evidence was introduced that defendant had been diagnosed with an "intellectual disability" in elementary school. Defendant remained a "special-ed" student from that time on. Defendant's special education teacher reported that, although a freshman in high school, he read and wrote at a fourth grade level. At the close of the hearing the court declared defendant a ward of the court and placed him on probation at his mother's home, subject to numerous conditions. Defendant appealed.

Held: The First District Court of Appeal (Div. 4) reversed. On appeal, defendant argued both that (1) he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights, and (2) that his confession was involuntary. The Court agreed on both issues.

(1) *The Miranda Waiver*: Under *Miranda v. Arizona* (1966) 384 U.S. 436, it is now clear that in order to protect an in-custody suspects Fifth Amendment privilege against self-incrimination, he must be warned prior to any questioning that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Once properly advised of his *Miranda* rights, a suspect may waive them provided the waiver is voluntarily, knowingly and intelligently made. It is the People's burden to prove by a preponderance of the evidence that the defendant was so advised and that a valid waiver of those rights was obtained. The waiver of *Miranda* rights must be voluntary in the sense that it was the product of a free and deliberate choice, and was made with a full awareness of the nature of the rights being abandoned and the consequences of the decision to abandon them. The issue is even more sensitive when a minor is the suspect. In determining the voluntariness of a purported *Miranda* waiver from a minor, the minor's age, experience, education, background,

and intelligence, as well as whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights, must all be considered. "When a confession by a minor is involved and counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary." In this case, the Court determined that the record did not show that defendant understood all of his *Miranda* rights and voluntarily, knowingly and intelligently waived them, despite the trial court's ruling to the contrary. First, it was noted that the detective "rapidly rattled off" the *Miranda* admonition without taking time, after each line of the admonition, to determine whether defendant understood the specific right that was just read to him. The Court also failed to find substantial evidence that defendant was not "cajoled or tricked." The Court made this determination by noting that before being advised of his rights, defendant was told; "I'm gonna read these to you before we talk, okay?", inferring that it was a forgone conclusion that defendant would in fact submit to the continuing interrogation. In this context, the *Miranda* admonishment that he had a right to silence had to be "contradictory and confusing" to an already "sobbing and clearly distraught" defendant. Then, after telling defendant they were going to "talk," and quickly dispensing with the *Miranda* warning without attempting to obtain and express waiver of his rights, the detective immediately launched into questioning him about an unrelated outstanding warrant. From listening to the recorded interview, it was apparent that defendant was confused about the warrant. Once that confusion was established, Detective Hewitt then told defendant; "(L)ets forget about the warrant for right now. . . . That doesn't really have anything to do with this case. I was just curious if you remembered." In the Court's words; "After befuddling (defendant) by mixing up the *Miranda* rights with the warrant, Hewitt smoothly transitioned to questioning (defendant), referring him 'back to what we were talking about up at the school.'" Under these circumstances, it was clear that defendant really had no way of understanding that he was not required to submit to any further interrogation, despite the *Miranda* warning to the contrary. In reaching this conclusion, the Court took into account defendant's emotional state at the time, his age, and his lack of experience with the criminal justice system, as well as his diagnosed "intellectual disability." Based upon this, the Court concluded that defendant did not voluntarily, knowingly, and intelligently waive his right to counsel or to remain silent.

(2) *Voluntariness of the Confession*: Defendant also argued that his confession was involuntary under the due process clause of the Fourteenth Amendment, in that it was the product of the type of coercive techniques condemned in *Miranda*, and which had "overborne his will." Again, the Court agreed. The basic rule, again, is well established: The use of an involuntary confession for any purpose in a criminal or delinquency proceeding violates a defendant's or minor's rights under the Fourteenth Amendment. Whether or not a confession is voluntary depends upon an evaluation of the totality of the circumstances, taking into account both the characteristics of the accused and the circumstances of the interrogation itself. While a determination that a confession is involuntary requires a finding of coercive police conduct, the exertion of any improper influence by the police will suffice. In this case, the Court agreed with defendant's

argument that taking into account his age, documented learning disability, lack of sophistication, minimal experience with law enforcement, his emotional state, as well as the coercive police interrogation tactics that were used, all served to "overbear his will." In particular, the Court found that the detective relentlessly interrogated him for nearly an hour and a half (between the school and the police station). In addition to the length of this interrogation, defendant was isolated in two small rooms, first at his school and then at the station, as the detective "buffeted" him "with accusations of guilt, assertions bolstered by evidence, and refused to accept his denials." It was noted that Detective Hewitt utilized a particular interrogation technique called "maximization/minimization" that has been criticized by experts for causing false or unreliable confessions, particularly when employed against young unsophisticated suspects, "particularly adolescents." This interrogation technique involves a "cluster of tactics" designed to convey two things. The first is the interrogator's rock-solid belief that the suspect is guilty and that all denials will fail. Such a tactic includes making an accusation, overriding objections, and citing evidence, real or manufactured, to shift the suspect's mental state from confident to hopeless. In contrast, "minimization" tactics are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question; a tactic that communicates by implication that leniency in punishment is forthcoming upon confession. In discussing this interrogation technique, the Court noted that "(a) convincing body of evidence demonstrates that implicit promises can put vulnerable innocents at risk to confess by encouraging them to think that the only way to lessen or escape punishment is compliance with the interrogator's demand for confession, especially when minimization is used on suspects who are also led to believe that their continued denial is futile and prosecution inevitable." But this is exactly what Detective Hewitt did in this case. Specifically, Detective Hewitt told defendant up front that his guilt was a forgone conclusion, and that they only needed to fill in the details. Protestations of innocence were brushed aside as having no relevance. The court ruled that; "the aggressive nature and persistence of Hewitt's questioning was designed to create a sense of hopelessness." It was also noted that Detective Hewitt employed during his accusative questioning a threat to subject defendant to a lie detector test that would definitively reveal the falsity of his denials, referred to in the literature as "the lie detector ploy." This technique has been touted in the literature "as among the most common interrogation techniques that result in false confessions." Towards the end of the interrogation, however, Detective Hewett "minimized" the nature of the offense, giving defendant a face-saving escape by asking if he might have only touched "her vagina over her pants a little bit." This was enough to trigger defendant's eventual confession. In sum, the Court ruled that defendant's confession was involuntarily obtained, and should have been suppressed.

Note: We've covered these issues before, making it surprising that questionable interrogation mind-games are still being used, particularly when interrogating minors or other suspects of limited intellect. Getting a confession should not be the ultimate goal of an interrogation. Getting to the truth is what police interrogators should be striving to achieve. But even finding

the truth is irrelevant it you do it by questionable interrogation tactics. The end does not justify the means in this regard. History has taught us (or should have taught us) that obtaining a confession through the use of a technique that has been proven in the past to sometimes secure a confession of questionable veracity obscures the ultimate issue of whether the person confessing is in fact guilty or innocent.

***Miranda; Honoring a Suspect's Invocation of his Right to Counsel*:**
***Miranda; Waiver of a Suspect's Right to Counsel Upon his Attempted Reinitiation of an Interrogation*:**

Rodriguez v. McDonald **(9th Cir. Sep. 29, 2017) 872 F.3rd 908**

Rule: Officers talking about the facts of a case after a defendant's invocation of his right to counsel under *Miranda* is improper and taints the later attempt by the suspect to reinitiate the interrogation. The validity of an attempted reinitiation of an interrogation after an invocation of a suspect's right to counsel depends upon an evaluation of the totality of the circumstances.

Facts: On the evening of February 23, 2005, as Manuel Penaloza and Cynthia Portillo were walking near Garvanza Park in Los Angeles, a brown minivan slowed and approached them. Asked by the occupants; "Where are you from?", Penaloza understood this to mean that they were inquiring as to his gang affiliation. Penaloza responded honestly (and perhaps fool-heartedly) that he was from the Drifters gang. This brought on an immediate barrage of gunfire from the van. Wounded in the shoulder, Penaloza panicked and fled. Cynthia Portillo was hit in the head and died shortly thereafter. The van sped off. Two hours later, the van was stopped by Los Angeles Police Department Officers in Highland Park with its occupants detained. Two fully loaded handguns were recovered from the van. The occupants of the van claimed that defendant was the shooter. A month later, the 14-year-old defendant was arrested at a juvenile probation camp and brought to the police station for questioning. Defendant was first asked by Detective Luis Rivera for basic background information during which he admitted being a Highland Park gang member. He showed the detectives a relatively new (within the last month?) "HIP" tattoo on his shoulder which the detectives believed was one he probably got in recognition for having shot someone. Detective Rivera then read to defendant his *Miranda* rights. Defendant was asked after every line of the admonishment whether he understood that particular right, to which he answered "yes" each time. Without getting an express waiver of those rights, defendant was then questioned about his involvement in the shooting and murder of Cynthia Portillo. Defendant denied being in the van during the shooting. At some point in the interrogation, the detectives told defendant that they would take "what you tell us" to the district attorney "and say; Hey man, you know what, this guy — we think — he's — you know, he's 14 maybe there was a little bit of influence from the other guys the older guys, you know, he still — we can still save him he's not an entirely bad dude." Even more explicitly, they suggested that cooperating was

the only way to "save [his] life": "I mean, that's it what's done is done, but this is like the rest of your life now, this is the difference, you['re] only 14, man. It's not like you['re] 18, 19 and you know, you're 14 years old, man, you can still save your life. You still have a lifetime." Further: "You got a chance to set things right, take responsibility for what you did, and then whatever happens, happens, but be assured that what we would like to do is talk to the district attorney tell him that you were cooperative and being truthful and [accept] the responsibility." Later in the interrogation, upon Detective Rivera telling defendant that others had said he was in the van, defendant asked to speak to an attorney. ("Can I speak to an attorney? . . . That is what I want.") Defendant was told that since he wanted an attorney, "we can't talk to you anymore." When also told; "(y)ou're going to be charged with murder today." Defendant asked "Why?" The officers responded that they'd already told him that they were investigating a murder and that they wanted to ask him questions so that "we can put your story on paper." The detectives also told him that if he wanted to talk to an attorney instead, that was his right. However, "I just want you to remember that I tried to give you the opportunity. I tried to give you the opportunity to straighten things out." Immediately after this comment, one of the detectives asked defendant; "Do you know Easy from Highland Park? You don't know him?" Defendant responded that he did not. So the detective showed defendant a photograph, telling him "You don't know him? This one here? You don't know him? When defendant again responded that he did not, the detective said: "The girl that died, that's his girlfriend." Defendant was then told again, apparently to his continuing surprise, that they were going to transport him to "East Lake" (apparently a juvenile detention center) where they were going to charge him with murder. Eventually, defendant was taken to a juvenile facility where, while in an intake area, defendant asked Detective Rivera, "What's going to happen?" Told that the case would be presented to the prosecutor's office, defendant asked the detective for a business card, explaining that he might want "to talk" to the detective. Detective Rivera explained that because defendant had invoked his right to counsel, the detective could not speak to him until he had spoken to an attorney, that is unless he "changed his mind" about exercising his right to counsel. Defendant replied that he wanted to talk to the detective. Detective Rivera therefore took defendant into an interview room. Defendant proceeded to confess. At the detective's request, defendant wrote out his own statement. That written confession was later admitted into evidence at defendant's trial. At a pretrial fitness hearing to determine whether defendant should be tried as a juvenile or an adult, a psychologist who had interviewed defendant testified that defendant had "border-line intelligence functioning" which rendered him particularly "susceptible to the influence of others." The psychologist reported that defendant had an I.Q. of seventy-seven, meaning that he was "quite limited intellectually," and that he tested at a fourth or fifth-grade academic level even though he had completed ninth grade. The report predicted that this intellectual limitation "will prevent him from making good decisions as he is likely to be more concrete than abstract in his problem solving capacity." The report further noted that defendant exhibited "symptoms related to [Attention Deficit Hyperactivity Disorder] (i.e., "ADHD") and that he had been "placed on medication . . . to help him concentrate" while residing at the juvenile camp. According to the

report; "[t]he literature shows that individuals who suffer from the disorder tend to not do well with respect to making good decisions." At the end of the hearing, the court concluded that defendant was not fit for adjudication in juvenile court and referred the matter for prosecution as an adult. Charged in state court with murder and attempted murder, plus other related charges, with weapons and gang enhancements, defendant filed a pretrial motion to suppress his written confession. The motion was denied. He was thereafter convicted of second degree murder and attempted murder, with the enhancements found to be true. He appealed from his eighty-four-years-to-life prison sentence. The California District Court of Appeal affirmed and the California Supreme Court declined to hear the case. After unsuccessfully seeking collateral (i.e., habeas corpus) relief in the state courts, defendant filed a petition for writ of habeas corpus in the federal district court, which was also denied. Defendant appealed to the Ninth Circuit Court of Appeal.

Held: The Ninth Circuit Court of Appeal reversed, remanding the case back for retrial *or*, in the alternative, the granting of defendant's habeas corpus petition and release. Defendant's argument was that his written confession was obtained in violation of *Miranda*. In agreeing with defendant in a rambling and often disjointed decision, the Ninth Circuit ruled (1) that the detectives had failed to honor defendant's invocation of his right to the assistance of counsel, under *Miranda*, and (2) that his subsequent reinitiation of the interrogation and implied waiver of his right to counsel was not "knowing, intelligent, and voluntary."

(1) *Invocation of Right to Counsel*: It was undisputed that defendant, mid-interrogation, had clearly and unequivocally invoked his *Miranda* (i.e., Fifth Amendment) right to the assistance of counsel. The law is clear that once an in-custody suspect invokes his right to counsel, the interrogation must cease until an attorney is present. The recognized exceptions to this rule are when that suspect is released from custody (which did not happen here), or he himself reinitiates the questioning. (See (2), below.) Until one of these two events occurs, law enforcement is not allowed to question him any further. More specific to this case, law enforcement is also not allowed to purposely encourage the defendant in his decision to reinitiate the questioning by doing or saying anything to him in an attempt to cause him to change his mind. This includes the officers continuing to discuss the facts of the case itself. Here, that's exactly what the detectives did. After defendant's invocation, the detectives told defendant that he was "going to be charged with murder today," and to "remember that [they] tried to give [defendant] the opportunity . . . to straighten things out." And then, in violation of the rule about not discussing the case, one of the detectives explicitly asked defendant if he knew "Easy from Highland Park?" ("Easy" apparently being the gang moniker for either victim Manuel Penaloza or some other gangster not discussed.) When defendant responded that he did not, the detective showed him a picture of Easy and commented that; "The girl that died, that's his girlfriend." The Court here held that defendant's subsequent decision to reinitiate questioning was the predictable result (along with other factors; see (2) below) of this illegal after-invocation discussion of the facts of the case. By continuing to

discuss the case, the detectives had illegally failed to honor defendant's invocation of his right to the assistance of counsel.

(2) *Reinitiation of the Interrogation*: After the above events, as defendant was being booked into a juvenile detention center, he told Detective Rivera that he wanted to talk to him despite his earlier invocation. At this juncture, the issue was whether defendant's decision to reinitiate the questioning was a free and voluntary decision to waive his right to counsel, despite the earlier invocation, or was it the product of the officers' failure to honor defendant's invocation by unlawfully continuing the discussion of the case (See (1), above.), in combination with other improper interrogation tactics used and other relevant factors. The Court held that under the circumstances of this case, it was the latter. The People have a "heavy burden" to show that "the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." While an in-custody suspect has the right to reinitiate questioning after an invocation, the courts are careful to insure that such a decision was not the result of law enforcement "badgering" him. "(W)hen an accused has invoked his right to have counsel present during custodial interrogation, a valid (subsequent) waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." In order to uphold a change-of-mind about wanting the assistance of counsel, it must be determined whether the decision to reinitiate questioning constituted a knowing, intelligent, and voluntary waiver of his right to counsel. Here, the Court held that it was not. "The validity of a waiver depends in each case upon the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." Possibly affecting defendant's decision to reinitiate questioning, it was noted that the officers had in effect suggested to defendant that his cooperation would result in leniency when they tried to convince him that cooperating was the only way to "save [his] life." This, along with defendant's youth, his low I.Q. (close to "mental retardation"), his issues with ADHD, and his susceptibility to easily being influenced by others, plus the detectives continuing to discuss the case after his invocation, the Court held that the People had failed to meet their burden of proof on the issue of defendant's decision to reinitiate the interrogation, i.e., that it was knowingly, intelligently, and voluntarily made as opposed to being the product of the improper interrogation tactics used here. Not having shown a valid waiver of his right to the assistance of counsel, defendant's subsequent written confession should have been suppressed.

Note: Monday-morning quarterbacking the detective's decisions in this case, it might have helped had Detective Rivera given the defendant a full readmonishment at the juvenile detention center before continuing the interrogation, and then getting an "express" (as opposed to "implied") waiver of his rights, emphasizing his right to have counsel present and the fact that he had earlier asked for that to happen. Given the People's "heavy" burden of proof on this issue, it's been suggested that even though not legally required, a complete readmonishment would seem to be the *minimum* an officer should do when a subject attempts to reinitiate questioning. (See *Patterson v. Illinois* (1988) 487 U.S. 285, 293.) It sometimes helps a well to get the defendant to

acknowledge that nothing the detective had done or said up to that point was causing him reinitiate the questioning and to confess other than his own desire to do so. I'm not sure that with this particular defendant, given his youth, ADHD, and IQ issues, and the detectives' clearly inappropriate references to some of the evidence in the case after the invocation, a reinitiation of the interrogation was going ever be upheld by the Ninth Circuit (noting, however, that the trial court, the California appeals court, as well as the federal district court, had all upheld the admissibility of defendant's confession under the facts as they stood). But nothing ventured, nothing gained.