The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*I don't need anger management. I need people to stop pissing me off*." (Unknown)

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ADMINISTRATIVE NOTES:

***P.C. § 1001.36* (*AB 1810*); *Blanket Diversion Program*:** California's Legislature has sunk to a new low, enacting a broad diversion program without any public awareness, let alone debate, by hiding it in what was supposed to be a clean-up budget bill. Signed by the Governor on June 27th, new P.C. § 1001.36 is effective as of its filing with the Secretary of State; also June 27th. In a nutshell, here is what the new statute provides: A trial court is now empowered with the right to suspend *any* criminal case alleging *any* criminal offense—from the lowest misdemeanors to the most serious felonies—and put the defendant into a two-year pre-trial diversion program. Such a program will be available to any defendant who can provide evidence, including from mental health experts, that he or she suffers from a mental disorder "*including, but not limited to,* bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia." There's no provision for the prosecution to rebut such evidence via their own mental health expert. The fact that the defendant may have understood the consequences of his act, or the difference between right and wrong (the standard insanity elements), are irrelevant. There's also no consideration given to the defendant's victims, or to allow them any input. The trial court need only find that the "mental disorder played a *significant role* in (or '*substantially contributed to*') the commission of the charged offense" to make diversion, instead of prosecution, available to the defendant. A defendant is disqualified if the court finds that the defendant "pose(s) an unreasonable risk of danger to public safety." But otherwise, the court may put him (or her) into a diversion program and then, upon finding that the defendant performs "*satisfactorily*" and "*has substantially complied with* the requirements of diversion" within two years, the case is to be dismissed. The terms "*satisfactorily*" and "*substantially complied with*" are not defined. Thereafter, "the arrest upon which the diversion was based shall be deemed never to have occurred." For a copy of this new legislation in its disturbing entirety, along with the Los Angeles D.A. Association's opinion of it, let me know and I'll send both to you.

***Sanctuary State Statutes Put on Hold*:** On July 4, 2018, Federal District Judge John A. Mendez granted a preliminarily injunction enjoining the State of California, Governor Brown, and Attorney General Becerra from enforcing parts of **AB 450**, the controversial new law that limited employer conduct when dealing with federal immigration enforcement. Specifically, **Gov't. Code § 7285.1** makes it illegal for public and private employers to give consent to an immigration enforcement agent to enter any nonpublic areas of a place of labor, absent a warrant. **Gov't. Code § 7285.2** makes it illegal for public and private employers to give immigration officials access to, or letting them review, or to otherwise obtain, without a subpoena or warrant, employee records. Both statutes provide for civil penalties of up to $10,000. Both statues, at least for the time-being, are now unenforceable.

DNA Mouth Swab Collection Upon Arrest for Felonies*:** The constitutionality of **P.C. § 296(a)(2)(C)**, allowing for the collection of a DNA sample via a mouth swab from all post-arrest, pre-conviction felony suspects, even before a judicial determination of probable cause (i.e., at booking), was upheld in ***People v. Buza (2018) 4 Cal.5th 658; finding (in a narrow 4-3 decision) that taking such a sample violated neither the U.S. nor the California Constitutions, at least for "serious offenses" such as the offense in issue here; i.e., arson. Per the Court, taking a DNA sample for identification purposes is really no different than taking fingerprints at booking. The Court also approved the immediate testing of the DNA sample. Note, however, that although the Court in ***Buza*** recognized that all felonies are "serious," it specifically declined to decide the "reasonableness" of taking a DNA sample at booking for any felony offense of less seriousness than an arson. The defendant's misdemeanor conviction for refusing to provide a DNA sample, as required pursuant to **P.C. § 298.1(a)**, was upheld, reversing the appellate court's ruling on this issue.

Permits for the Open Carry of Firearms and the Second Amendment*:** Hawaii has a statute (**Haw. Rev. Stat. § 134-9**) that restricts the right to carry a firearm openly in public (loaded or unloaded) to persons engaged in the protection of life and property (i.e., law enforcement), or to others who can demonstrate "good cause." (California has a similar "good cause" requirement for one who wishes to obtain a permit to carry a firearm "capable of being concealed upon the person" (i.e., a pistol), whether concealed or not. (See **P.C. § 26150(a)(2)**) George Young, a resident of Hawaii, wished to carry a firearm publicly (i.e., openly) for no other reason than the general need for personal self-defense. Twice in 2011, Young applied for a license to carry a handgun, either concealed or openly. Young's application was denied each time by the County of Hawaii's Chief of Police because he was unable to demonstrate a "good cause" for doing so. Hawaii's statutes fail to provide for any administrative or state judicial review. So Young filed suit in federal court where his case was promptly thrown out. A three-judge panel of the Ninth Circuit Court of Appeal, however, reversed in a split, 2-to-1 decision, holding that such a complete restriction on one's right to "bear arms" violates the core of the Second Amendment. (Young v. Hawaii*** (9th Cir. July 24, 2018) __ F.3rd __ [2018 U.S. App. LEXIS 20525].) Note that the Court did not disagree with its earlier decision in ***Peruta v. County of San Diego*** (9th Cir. 2016) 824 F.3rd 919, where it held that a state may impose a "good cause" requirement for the issuance of a permit to carry a firearm *concealed* on the person (**P.C. § 25400**; loaded or unloaded). This new case deals only with the right to carry *unconcealed* firearms, which puts at risk California's permit requirements as they might pertain to the "open carry" restrictions as contained in **P.C. § 26350** (unloaded) and **P.C. § 25850** (loaded), at least to the extent that one must demonstrate "good cause" to get such a permit for openly carrying a concealable firearm. However, all that having been said, let's wait to see if this new ***Young*** decision isn't set aside by the Ninth Circuit for reconsideration by an 11-justice en banc panel.

***Miranda and the Law*:** The Fourth Edition of my comprehensive *Miranda and the Law* (Fifth Amendment) Outline (all 445 pages of it), with a separate Table of Contents, is now available via e-mail, upon request. No extra charge.

CASE LAW:

***Search Warrants*:**
***Federal Law Enforcement and State Search Warrants*:**

United States v. Artis et al. **(July 3, 2018) __ F.Supp.3rd __ [2018 U.S. Dist. LEXIS 112697]**

Rule: Under California law, federal law enforcement officers are not permitted to execute state search warrants.

Facts: FBI Special Agent Stonie Carlson was a member of a law enforcement task force, headed by the U.S. Marshals Service, and comprised of federal, state, and local law enforcement officers. As a member of this task force, Agent Carlson was deputized as a member of the U.S. Marshals Service. In this capacity, Agent Carlson was assigned to investigate defendants Donnell Artis and Chanta Hopkins, who were suspected engaging in credit card fraud crimes. Both subjects also had outstanding state arrest warrants. Information from the Oakland Police Department lead Agent Carlson and his partner to a particular street corner where they found defendant Artis. Upon seeing the agents approach, defendant ran, dropping his cellphone in the process. Over the next two days, Agent Carlson sought two search warrants, obtaining them from different Alameda County Superior Court judges. One warrant was to allow a forensic search or defendant's cellphone. That warrant, after identifying Agent Carlson as a member of the task force, specified that the purpose of the task force was "to combine the efforts of federal, state, and local law enforcement agencies to locate and apprehend dangerous fugitives and assist in high profile investigations." In addition, the affidavit included the following language: "It is requested that any federal, state, and/or local law enforcement officers be allowed to conduct the search of Artis' cellular telephone." The other warrant sought permission to use a cell-site simulator to determine the location of co-defendant Hopkins's cell phone, hoping to determine the location of Hopkins himself. (A cell-site simulator is a device that simulates a cell tower, thus "tricking" nearby cell phones into thinking that it's a cell tower, thereby causing nearby cell phones to send signals to the device. This allows the operator of the device to locate the phone being sought.) The affidavit to this warrant specified that Agent Carlson was seeking authority to use the cell-site simulator on behalf of the United States Marshals Service and the Oakland Police Department, as a member of the task force. The first warrant was executed by one of Agent Carlson's federal law enforcement colleagues and resulted in the recovery of evidence of criminal activity. The second warrant was executed with a federal officer operating the cell-site simulator. The simulator resulted in finding Hopkins at his apartment in San Francisco. Hopkins was arrested outside his apartment and evidence of credit card fraud was seized from him. With both defendants charged in federal court with various (unspecified) federal crimes, defendants filed concurrent motions to suppress.

Held: The federal district court trial judge granted the motions for reasons contained in an unpublished decision, the warrants being "plagued by various problems." One issue, however, was deemed worthy of discussion and was published, with the trial judge ruling that "under California law, federal law enforcement officers are not permitted to execute (state) search warrants." The relevant California statutes specify that search warrants must be executed by a

"peace officer." Specifically, P.C. § 1523 defines a search warrant as a written order "signed by a magistrate, directed to a *peace officer*, commanding him or her to search for a person or persons, a thing or things, or personal property." (Italics added) Also, P.C. § 1528(a) says that when a state judge determines that a search warrant application establishes probable cause, the state judge "must issue a search warrant . . . to a *peace officer* in his or her county." (Italics added) To determine who qualifies as a peace officer, P.C. §§ 830.1 through 830.15 must be consulted. The list of peace officers contained therein include members of city police departments, the California Attorney General's office, local sheriffs' departments, and other state law enforcement officials. This list *does not* include federal law enforcement officers. Exceptions are made in the Penal Code when discussing law enforcement's power of arrest (See P.C. § 830.8). But there are no similar exceptions for executing search warrants. The Court rejected any argument that P.C. § 1530's reference to warrants being served by officers "mentioned in its directions" can be interpreted to include federal officers, noting that this does not overcome other statutory limitations to "peace officers" only. The Court also rejected the argument that federal law (e.g., 28 U.S.C. § 564), where it authorizes members of the United States Marshals Service to exercise the "same powers which a sheriff of the State may exercise in executing the laws thereof," allows federal officers to execute state search warrants. In so ruling, the Court noted that only state law can grant federal officers the power to execute warrants. The Court concluded by acknowledging that although a federal officer may act as the affiant in a state search warrant affidavit (See *People v. Bell* (1996) 45 Cal.App.4th 1030, 1054-1055.), that ends his legal involvement. A federal officer is not empowered to execute such a state search warrant.

Note: The Court, in the end, confuses the issue a little bit by noting that not only are federal officers disqualified from legally executing state search warrants (which, at least initially, seems to be the whole purpose of this decision), but they also *may not* be the one to whom the warrant is "*issued*." The basis for that conclusion is apparently P.C. § 1528(a), where (as noted above) it says that when a state judge determines that a search warrant application establishes probable cause, the state judge "must *issue* a search warrant . . . to a *peace officer* in his or her county." (Italics added) The word "*issue*" is not defined, but we have to assume that it means something. Absent a statutory definition, it seems to mean that the person who receives from the magistrate (i.e., to whom the warrant is "*issued*") must also be a state or local law enforcement officer. Unfortunately, what the federal district court judge meant here is not discussed, and I may be splitting hairs a bit. And I wouldn't have even mentioned it had the Court not closed by noting the difference between, "(i) the concept of submitting an affidavit in support of a search warrant; from (ii) the concept of *being issued and executing a search warrant*. (Italics added) The former is lawful: an affiant in support of a search warrant need not be a 'peace officer' under California law. (Citations) But the latter is not lawful, as discussed in the preceding section." So to steer clear of this potential problem, it's probably best that when a law enforcement task force, comprised of federal, state, and local law enforcement officers, is involved in obtaining a state search warrant, while the affiant in the affidavit may be one or more of the federal officers, it's best if it is the state or local officers who go to the magistrate and seek the issuance of the warrant, and then be, at the very least, the lead officers in the execution of the resulting search warrant.

***Arrests and Probable Cause*:**
***Anonymous Informants and Probable Cause*:**
***Miranda; Admonishments and Successive Interrogations*:**
***Griffin Error; Comments on a Defendant's Failure to Testify*:**

People v. Spencer **(July 12, 2018) __ Cal.5th __ [2018 Cal. LEXIS 4994]**

Rule: (1) Probable cause to arrest may be developed through a collection of facts and circumstances, including "innocent details," until sufficient to persuade a person of reasonable caution that the individual arrested committed a crime. (2) A *Miranda* admonishment and waiver will carry over to successive interrogations so long as the impact upon the defendant under the totality of the circumstances is that of a continuous period of questioning. (3) Encouraging a criminal suspect to provide "his side of the story" does not constitute coercion absent evidence that the interrogation was physically oppressive, invocations of the suspect's *Miranda* rights were flagrantly ignored, or the suspect's mental state was visibly compromised. (4) A prosecutor commenting on a defendant's failure to show any remorse is not necessarily an illegal comment on the defendant's failure to testify.

Facts: On January 24th, 1991, defendant was one of five men involved in a robbery in San Jose that included the use of a stun gun on their victim. San Jose Police Detective John Boyles and Officer Brian Hyland, by investigating this robbery and another similar one also involving the use of a stun gun, eventually identified Troy Rackley and Matthew Jennings as two of the robbers. On January 28th, Detective Boyles received a phone call from a female informant, identified only as "Cynthia," who told him that "Danny, John, Matt, Chris and Troy" were the perpetrators of the stun gun robberies, and that they drove around together in a Dodge Charger. Cynthia later called again and identified two of the suspects by their last names; "Silveria" for Danny, and "Jennings" for Matt. Cynthia also indicated that the subjects were planning another robbery for that night and that they were planning on leaving the jurisdiction afterwards. Through further investigation, Officer Hyland was able to locate relatives of several of the suspects who corroborated the fact that the suspects were planning another robbery, that "Chris" owned a Dodge Charger, and that at least a couple of them were packing their bags in preparation for leaving town. As predicted, at about 10:53 p.m. on January 28th, an alarm went off at a Leewards craft store in Santa Clara. A dispatcher from the alarm company spoke to someone at the store but did not summon the police in that the person on the other end gave the correct passcode. When Leewards employees arrived at the store the next morning (January 29th), they discovered the store's manager, James Madden's dead body inside the store. Madden had been bound hands and feet with duct tape, and with duct tape wrapped around his face. He'd been stabbed 32 times. Money had been taken from the cash register and a safe. The initial investigation revealed that Danny Silveria and John Travis were recently terminated from that Leewards store, making them suspects. Later that day an unknown male called the San Jose police to alert them that the stun gun robbery suspects were at the Oakridge Mall, describing two cars that the suspects were using. Responding officers located the two vehicles and arrested their occupants; Troy Rackley, Danny Silveria, and John Travis. A search of the vehicles yielded over $2,500 in one vehicle, $694.40 in the other, and a stun gun and a roll of duct tape. Silveria, when questioned, identified Matthew Jennings and Christopher Spencer (defendant in this case) as two of the individuals in their group. At Officer Hyland's request, Silveria paged Jennings who

called back, telling Silveria that he and defendant were at a friend's apartment. Silveria led the officers to the apartment where Jennings and defendant were arrested. At the scene was found a newly acquired 1979 Triumph Spitfire that defendant had just purchased, trading in the Dodge Charger. A search of the apartment resulted in the discovery of two packages containing more money; $282 and $721, respectively. With all the suspects in custody, defendant Spencer was taken to the San Jose Police Department for questioning. Detective George De La Rocha of the San Jose Police Department began questioning defendant around 11:30 that evening, talking to him about the January 24th San Jose stun gun robbery only. Prior to being questioned, defendant was read his *Miranda* rights, which he expressly waived. He readily admitted to have participated in the San Jose robbery. Upon discovering that Silveria and Travis had recently been terminated from the Leewards store where James Madden had been murdered on the 28th, and with defendant admitting that he, Silveria, Travis, Jennings, and Rackley were all together on that night, defendant became a suspect in Madden's murder. Therefore, detective Sergeant Ted Keech of the Santa Clara Police Department was brought in to question defendant about the murder. At about 4:00 a.m., Sgt. Keech began questioning defendant. No new *Miranda* admonishment was given, defendant being asked only if he had been read his rights earlier, that he understood them, and that he had waived his rights. Defendant answered in the affirmative to each question. In the next hour and a half, defendant was questioned about the January 28th Leewards robbery and the murder of James Madden. Although initially denying any involvement, he eventually admitted to taking part in that robbery and to stabbing Madden several times himself. All five defendants were charged in state court with capital murder, with the special circumstance of having committed the murder during the commission of a burglary and a robbery. Defendant was tried separately. Over his objection, defendant's confession was used against him at trial. The jury returned a verdict of guilty, finding the special circumstance to be true, and recommended death. Defendant's appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. Among the issues on appeal, defendant argued that he had been arrested without probable cause, that his confession had been without a *Miranda* admonishment and thus illegally obtained, and that it was also the product of coercion. Defendant also argued that the prosecutor had illegally commented on his failure to testify by noting the defendant's lack of remorse.

(1) *Probable Cause to Arrest*: Defendant argued that the police lacked probable cause to arrest him and, as such, the trial court erred in refusing to suppress his confession as the unlawful "fruit" of his purportedly illegal arrest. The law on what it takes to justify an arrest is well-settled: "Probable cause to arrest exists where facts known to the arresting officer would be sufficient to persuade a person of 'reasonable caution' that the individual arrested committed a crime." Assuming for the sake of argument that "Cynthia" (the female who had provided the San Jose officers with the suspects' names) was an "anonymous informant," it was conceded that such information, by itself, is not sufficient to establish probable cause. But in this case, Cynthia's information was corroborated by other facts developed during the investigation which led up to defendant's arrest. Cynthia had initially provided the first names of all five suspects, including defendant. The initial investigation occurring before James Madden's murder had already identified Troy Rackley and Matthew Jennings as two of the stun gun robbers. When Madden was murdered, it was quickly determined that Danny Silveria and John Travis had recently been terminated from that Leewards store, thus making them possible suspects. After

Cynthia called back with the last names of two of the suspects, relatives of the suspects were located, information from whom further corroborated Cynthia's information. Specifically, it was determined that defendant, whose first name was "Chris," and who drove a Dodge Charger as Cynthia had said, hung around with the other four identified suspects, at least some of whom were making plans to flee the jurisdiction. When Silveria and Travis were arrested, large sums of cash, duct tape, and a stun gun were found in their vehicles. Silveria led the officers to the other suspects, including defendant, who, it was determined, had recently acquired enough money to trade his Charger in on a 1979 Triumph Spitfire. While much of the information the officers were acting upon can be considered "innocent details," it was noted that such information, when considered in context, may still be used to connect a suspect to an alleged crime. The Court therefore determined that, in its totality, the information the officers had at the time of defendant's arrest was sufficient to provide them with the necessary corroboration of Cynthia's information, thus giving the officers the necessary probable cause.

(2) *Failure to Administer a New Miranda Admonishment*: Defendant argued that because Sgt. Keech failed to read him his *Miranda* rights and obtain a new waiver before questioning him, his confession should have been suppressed. Defendant conceded, however, that Detective De La Rocha had in fact read him his rights five hours earlier, and that he had in fact waived his rights before confessing to the January 24th stun gun robbery. The issue here, therefore, is whether an earlier valid waiver of rights carries over to a subsequent interrogation by another officer, about another crime; i.e., is "a subsequent interrogation . . . 'reasonably contemporaneous' with (a) prior waiver(?)" In answering this question, a court is to consider the totality of the circumstances including, but not limited to; (a) the amount of time that has passed since the initial waiver, (b) any change in the identity of the interrogator or location of the interrogation, (c) an official reminder of the prior advisement, (d) the suspect's sophistication or past experience with law enforcement, and (e) further indicia that the defendant subjectively understands and waives his rights." (*Note*: Other courts have added a sixth factor to consider: "Any misconduct by the police in reinstituting the interrogation.") Here, the Court ruled that although different officers were involved in the two interrogations about different crimes, and defendant, being only 21 years of age and having a relatively insignificant criminal history (i.e., four prior misdemeanor convictions and three jail sentences), and therefore was not particularly criminally sophisticated,—both factors weighing in defendant's favor—the other factors outweighed these two factors. Specifically: Only five hours had passed between the time of the waiver and the interrogation; there was no change in the location of the interrogation and defendant remained in custody in the interim; Sgt. Keech officially reminded defendant of his prior advisement; and defendant unambiguously indicated that he understood the advisement and had waived his rights. Most importantly, Sgt. Keech, at the beginning of the interrogation, not only reminded defendant of his prior *Miranda* warnings, but also confirmed that he understood and had waived his rights. Defendant also told the Sgt. Keech, in response to the detective's questions immediately following his confession, that he had not been coerced into admitting his guilt. Comparing these facts with prior case decisions, the Court ruled that under these circumstances, defendant was well aware of his rights at the time of Sgt. Keech's interrogation, inferably choosing to continue his waiver of those rights when he confessed. In effect, "the impact on him was that of a continuous period of questioning." No new admonishment and waiver, therefore, was necessary under these circumstances.

(3) *Voluntariness of the Confession*: Defendant also argued that he was, in effect, "coerced," or "brainwashed," into confessing; i.e., that "his will was overborne." This argument was based

upon Sgt. Keech employing an interrogation tactic of first (but after defendant had already waived; see *Note*, below) laying out a long description of what he believed happened the night defendant and his cohorts killed Madden. Keech ended this review of the facts with an encouragement to give his side of the story, telling him: "(If) (y)ou don't take this chance right now, you may never get it again. And if you don't think I can't prove this case, if you don't think I can't fry you, you're sadly mistaken, Chris. Now, don't let these guys lay it all on you 'cause that's what's happening. You get a chance to lay some back and say exactly what happened. Whose idea was it?" After Sgt. Keech declined to negotiate with defendant, telling him again; "All I can tell you is that I'll put this down as accurately as you tell me what, what really happened, and that'll be your story," defendant proceeded to confess to robbing and stabbing Madden. The Court found nothing wrong with this interrogation tactic. Noting that the Court has invalidated confessions that were found *not* to be "essentially free," such as where "a suspect's confinement was physically oppressive, invocations of his or her *Miranda* rights were flagrantly ignored, or the suspect's mental state was visibly compromised," the Court found no such problems here. The record in this case failed to show any indications "that the officer made vituperative (i.e., bitter or abusive) statements . . . , (that he) engaged in . . . name-calling, . . . obvious strong-arm tactics, (or) base appeals to (defendant's) deeply held beliefs." Also, telling defendant that he could "fry" was not an improper reference to the death penalty in that the statement was made in isolation and did not seem to bother defendant at the time. For an officer to invoke the death penalty is only improper when it is done in the context of inferring that cooperation may win him a lesser penalty; i.e., an "offer of leniency." To the contrary, here Sgt. Keech expressly told defendant that he "can't make [him] any promises." At some point during the interrogation, defendant was falsely told that his fingerprints had been found at the murder scene. On appeal, defendant argued that this tactic was improper. The Court disagreed, pointing out that the case law is very clear that such a deception is lawful so long as it is "not of a type reasonably likely to procure an untrue statement." Lastly, the Court rejected defendant's argument that his "physical state" and "personal characteristics" made him more susceptible to the detective's interrogation tactics, noting that although suffering from bronchitis at the time, there was no evidence that this fact somehow diminished his mental faculties or made him especially vulnerable. In all, the Court found his confession to be voluntary.

(4) *Griffin Error*: Defendant further argued that the prosecutor had committed "*Griffin error*," by commenting in closing argument on the defendant's failure to testify. (*Griffin v. California* (1965) 380 U.S. 609.) In this case, the prosecutor told the jury that defendant never showed any remorse. The Court ruled that such a comment does *not*, by itself, constitute an "oblique reference" to the defendant's decision not to testify, but rather only to the lack of any remorse being expressed at any point prior to trial. The failure of a criminal defendant to show remorse is relevant in that had he shown remorse, it would have "mitigate(d) against the death penalty." The Court ruled that the prosecutor had not said anything in this case that could be inferred as a reference to defendant's decision not to testify, which, if he had, would have been improper under the *Griffin* case.

Note: The detective's interrogation tactic of telling defendant that this might be his only opportunity to provide a record of his side of the story, as noted above, is not improper in itself. But note that this tactic was employed only *after* defendant had been admonished and a waiver was obtained. There is case law to the effect that telling a suspect that when he gets a lawyer, the lawyer will likely prevent him from discussing his version of the facts with anyone (not necessarily an untrue statement), and that right now might be his only opportunity to have his

version of the facts recorded, when the suspect is told this *before* a *Miranda* admonishment and waiver, may constitute an illegal attempt to discourage a suspect from invoking his rights. (See *Collazo v. Estelle* (9th Cir. 1991) 940 F.2nd 411, 414; *Lujan v. Garcia* (9th Cir. 2013) 734 F.3rd 917, 932.) So when, in the sequence of events, you use such a tactic is important.

***Miranda*; *The Beheler Admonishment*:**
***Miranda*; *Custodial Interrogations*:**

People v. Torres **(July 12, 2018) __ Cal.App.5th __ [2018 Cal. App. LEXIS 623]**

Rule: Telling a criminal suspect who is to be questioned that he is not under arrest and is free to terminate the questioning does not necessarily end the need for a *Miranda* admonishment and wavier. Custody, for purposes of *Miranda*, depends upon the totality of the circumstances.

Facts: 73-year-old Antonio Torres (defendant in this case) rented a room from a couple with a five-year-old daughter; "Y.C." Defendant was a Mexican immigrant with no formal education. Defendant and Y.C. would occasionally watch T.V. together in the family's living room. In February, 2017, Y.C. complained to her mother that defendant had been "touch(ing) her butt." In complaining to her mother, Y.C. used the term "colita," or "cola," meaning buttocks and private parts, including her vagina. Y.C.'s mother reported this to the San Diego Sheriff's Department (SDSD). SDSD Detective David Brannan, assigned to investigate these allegations, arranged for Y.C. to submit to a forensic examination. Although the physical exam failed to show any physical evidence of a touching, the doctor later testified that this did not necessarily mean that a molest had not occurred. During the forensic interview, Y.C. continued to complain that defendant had touched her "cola" with his hand, over her panties, when they were in the living room watching TV together. She also complained that defendant had touched the inside of her "cola," and that he told her to not tell her mother. About two weeks later, SDSD Detectives Brannan and Cabrera (a Spanish-speaking officer) visited defendant where he was living after being forced to leave Y.C.'s home. (Allegedly) believing that the detectives only wanted to talk to him about his habit of urinating in the yard, and after being told that he was not under arrest, was free to leave, and did not need to speak to them, he agreed to answer questions. Defendant was *not* advised of his *Miranda* rights. The interview was conducted in the detectives' unmarked car, with the doors shut and the engine running so that they could use the air conditioner. Both detectives wore plain clothes and no weapons were visible. With detective Cabrera translating in a recorded interview, the questioning was initiated by the detectives asking defendant to provide a saliva sample for testing. Defendant agreed. The detectives explained that DNA could be used to test if a person had touched another person, that defendant's DNA was being tested in the car's trunk against other evidence as they spoke, and that they would know the results in a couple of minutes. When asked why he thought the detectives were conducting a DNA test, defendant responded, "No, to know if—if I touched the little girl or what?" When asked if he knew what Y.C. had said, defendant replied that the girl told her mom that he had grabbed her in her private parts, meaning her vagina. Defendant protested, however, that this allegation was not true. For the next 45 minutes, the detectives laid out for defendant all the evidence (some true, some not) they had to the effect that on at least two occasions, defendant had touched Y.C.'s vagina and anus areas. For instance, defendant was falsely told that a doctor had examined Y.C.'s vagina and found DNA that belonged to an adult male, and that DNA was found in her underwear.

Defendant was further told that with them running a test of defendant's DNA in the trunk of their car, they would know shortly if it was defendant's DNA that had been recovered. During the interview, the detectives also engaged in an interrogation tactic sometimes called "*minimization*;" i.e., telling defendant that what he had done to Y.C., was relatively unimportant, and not much more than a "mistake." The detectives encouraged defendant to muster up the courage to admit his mistake. He was further told that although they knew defendant did not want to admit to what had happened, they already knew what happened and would soon be able to prove it scientifically. Throughout all this, defendant vehemently denied the accusation. However, he eventually began to weaken, attempting to explain away what the detectives described as the inevitable determination that his DNA would be matched to what was found in Y.C.'s vaginal area. Defendant finally admitted that he may have touched Y.C.'s shorts when he grabbed her to give her a hug. When told that the problem with this story was that DNA was recovered from inside Y.C.'s shorts, defendant then confessed that he might have put his hands inside her shorts when he went to grab her "because her shorts were wide." To add to defendant's consternation, he was falsely told that Y.C. had been given a lie detector test which proved that she was telling the truth. Again minimalizing the seriousness of defendant's crime, he was reminded once more that they were not there to arrest him, but rather to get to the truth, and that they would leave as soon as defendant told them the truth. At that point, defendant finally admitted to touching Y.C.'s vaginal area at least two times, with "skin to skin" contact. The detectives then left, as promised, arresting him two weeks later. Charged in state court with two counts of committing a lewd act with a minor under 14 years old (P.C. § 288(a)), with allegations that he had substantial sexual conduct with the minor (P.C. § 1203.066(a)(8)), defendant's incriminating statements were admitted into evidence against him without objection. Tried and convicted, defendant was sentenced to eight years in prison, and appealed.

Held: The Fourth District Court of Appeal reversed. On appeal, defendant argued that his confession should not have been admitted into evidence because of the lack of a *Miranda* advisal and waiver, and that he had received ineffective assistance from his trial attorney for having failed to challenge the admissibility of his confession. *Miranda v. Arizona* (1966) 384 U.S. 436, requires that a person questioned by police after being "taken into custody or otherwise deprived of his freedom of action in any significant way . . . [must first] be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Defendant never received this advisal. The People's argument was that defendant was *not* in custody at the time he was questioned, and thus no advisal of rights was necessary. The rules on the issue are well-established: Absent a formal arrest, the issue of custody requires an evaluation of the "totality of the circumstances" and a determination of how a "*reasonable person*"—not necessarily the defendant and not the officers—in the suspect's position would have understood his or her situation. It was first determined that defendant was in fact "interrogated," and not just interviewed. It is an interrogation when the words or actions on the part of the police (other than those normally attendant to arrest and custody) are such that the police should have known are reasonably likely to elicit an incriminating response from the suspect. The detectives here were certainly attempting to elicit incriminating responses from the defendant. So the only issue is whether the interrogation occurred while defendant was in custody. Some of the factors present during the interrogation that tend to indicate a *lack of custody* include the fact that defendant was first contacted in his home rather than at a police station. Defendant voluntarily agreed to be

interviewed. Both detectives wore plain clothes and their weapons were not visible. The interview was short; only 45 minutes. The interview itself did not involve any threats or raised voices. Defendant was in fact released after the interview, as promised. Lastly, but most importantly, the detectives told defendant that he was not under arrest and was free to leave, and was not required to speak to them. Sometimes referred to as a "*Beheler admonishment*," pursuant to the U.S. Supreme Court decision in *California v. Beheler* (1983) 463 U.S. 1121, the theory is that no reasonable person would feel like he is in custody if told specifically that he is not. The Court noted, however, that this is but one factor to consider in determining whether a suspect is in custody. A *Beheler* admonishment alone is not to be considered a "*bright line rule*," as is believed by many officers, to the effect that a suspect who is told that he is not under arrest necessarily results in a non-custodial questioning. Per the Court, a "*Beheler* (admonishment) does not stand for the proposition that simple advisements, standing alone, insulate an interrogation from *Miranda*'s reach." Other factors must also be considered. For instance, in this case, despite being contacted at his home, defendant was isolated in an unmarked police car—a location controlled by the detectives—with the doors shut. The *Miranda* decision itself recognized such isolation as "the 'principal psychological factor contributing to a successful interrogation.'" (*Miranda v. Arizona, supra*, at p. 449.) Even more importantly in this case, despite starting out very low key and non-accusatory, the questioning quickly degraded into an accusatory interrogation, with the detectives dominating and controlling the course of the questioning. Various interrogation techniques were used, including minimizing the seriousness of defendant's offense while confronting him with false evidence and accusatory leading questions. As noted by the Court, "(t)he detectives used a classic two-sided interrogation process relying 'on negative incentives (i.e., tactics that suggest the suspect should confess because no other course of action is plausible, such as confronting suspects with real or invented evidence, identifying contradictions in the suspect's account, and refusing to credit his denials or alibi) and positive incentives (i.e., tactics that suggest the suspect will in some way feel better or benefit if he confesses, such as appealing to the suspect's self-interest or minimizing the seriousness of the offense)." Defendant was also falsely told that Y.C. had passed a polygraph test, to the effect that defendant had in fact molested her. More importantly, defendant was pressured into incriminating himself by telling him that DNA testing was ongoing as they spoke, in the trunk of the car, the results of which would prove Y.C.'s allegations of child molest. In general, the detectives expressed their belief that defendant was culpable, rejecting his initial denials, and that they had evidence to prove it. Such an interrogative style, all geared towards overcoming defendant's will to resist, weigh in favor of a determination that defendant was in fact in custody. No reasonable person, under such high-pressure, accusatory circumstances, would have felt free to end the questioning and leave despite the earlier admonition that that was his right. Under these circumstances, defendant should have been advised of his rights pursuant to *Miranda*, and a waiver obtained before questioning. Defendant's attorney should have raised these issues at trial, and was therefore legally ineffective for failing to have done so. Finding the lack of a *Miranda* advisal and waiver to be prejudicial, the Court reversed defendant's conviction and returned the matter to the trial court for a new trial.

Note: I was asked (presumably with a straight face) by an experienced deputy district attorney whether this case marks the demise of the *Beheler* admonition rule; i.e., that by telling a suspect he is not under arrest and is free to end the questioning and leave anytime he wants, a police interrogator no longer needs to read a suspect his *Miranda* rights and obtain a waiver of those

rights. The simple answer to this question is; "*of course not*." But this case does put *Beheler* into context and highlights its limitations. As specifically noted by this court, *Beheler* does *not* provide us with a "bright line rule" that ends the need for a *Miranda* admonishment and waiver in all cases. All the other factors surrounding an interrogation must also be considered, recognizing that high-pressure accusatory questioning can easily negate the effects of a *Beheler* admonishment. Every case must deal with this issue on its own merits. This is nothing new. I have a pile of prior cases, state and federal, that spell this out very clearly and which I will send to you upon request.