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Remember 9/11/01: Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"Those are my principles. If you don't like them I have others." (Groucho Marx)

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ADMINISTRATIVE NOTES:

Arizona v. Gant: Searches of Vehicles Incident to Arrest: In the previous *Legal Update* (Vol. 14, No. 5), it was noted in the brief for *Arizona v. Gant* (Apr. 21, 2009) 556 U.S. __ [129 S.Ct. 1710] that as "*an alternative legal theory*" justifying the warrantless search of a vehicle, such a search is lawful whenever, incident to arrest, it is "*reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.*" While expressing to you my belief that the Court was intending to describe something other than the standard *Chimel*-style "*search incident to arrest,*" I told you that "*reasonable to believe*" actually requires you to have full "*probable cause*" as a prerequisite to conducting such a search. I also stated that this was nothing more than a restatement of the long-existing rule

allowing for searches of vehicles with probable cause to believe it contains seizeable evidence, whether or not it relates to the “crime of arrest” and whether or not it was incident to anyone’s arrest. *I was wrong*. Upon the urgings of people smarter than me, I researched the issue a bit more and discovered the following: In *Gant*, the Supreme Court cites the concurring opinion in *Thornton v. United States* (2004) 541 U.S. 615, at page 632, as authority for the “reasonable to believe evidence relevant to the crime of arrest might be found in the car” theory. As the dissenting justices in *Gant* complained, there was no other attempt by the majority justices to explain what they were talking about or where this bombshell came from. Well, this “bombshell” is thoroughly explained in the concurring opinion in *Thornton*, at pages 629 to 632. In these pages, two justices (hardly a majority) in the concurring (as opposed to majority) opinion, cite a 69-year-old case (*United States v. Rabinowitz* (1950) 339 U.S. 56.) involving the warrantless search of an office (as opposed to a vehicle) where there was probable cause (as opposed to just a reasonable suspicion), and which was later severely criticized in *Chimel v. California* (1969) 395 U.S. 752, at pages 759-768, if not completely overruled. But despite its shaky genesis, *Gant*, by listing it as an alternative justification for a warrantless search incident to arrest, has resurrected this long forgotten (if not totally dead) theory which, apparently, we may now use when appropriate. Under this theory, even if *Chimel* (a search incident to arrest done for the purpose of preventing the arrestee from lunging for weapons and/or evidence) doesn’t apply, the vehicle may still be searched if (1) someone is arrested out of a vehicle, and (2) incident to that arrest, it is, under the circumstances, “reasonable to believe evidence relevant to the crime of arrest might be found in the car.” The two justices in *Thornton* opined that this theory should be limited to vehicle searches, given a vehicle’s lesser expectation of privacy. Still, however, neither the *Gant* nor the *Thornton* Courts tell us what “reasonable to believe” means. As I indicated in the Note to my *Gant* brief, there is a pile of authority, albeit in different contexts, for interpreting the same or similar language as imposing a “probable cause” standard. (See *United States v. Gorman* (9th Cir. 2002) 314 F.3rd 1105; *People v. Jacobs* (1987) 43 Cal.3rd 472.) But as was also correctly pointed out to me by those challenging my conclusions, it is already lawful for a police officer to conduct a warrantless search of a vehicle found on the street anytime he or she has probable cause to believe it contains seizeable evidence, whether or not someone is arrested, and whether or not the suspected evidence is “relevant to the crime of arrest.” (See *United States v. Ross* (1982) 456 U.S. 798; *People v. Chavers* (1983) 33 Cal.3rd 462, 466-467.) Also, I’ve found other circumstances, again in different contexts, where “reasonable to believe” and similar language has been interpreted to require no more than a “reasonable suspicion.” (E.g., see *Michigan v. Long* (1983) 463 U.S. 1032, 1049; and *Haynie v. County of Los Angeles* (9th Cir. 2003) 339 F.3rd 1071.) So while the burden of proof is still somewhat subject to debate, I have to modify my initial opinion and tell you that a “reasonable suspicion” is *probably* (no guarantees) enough. But either way, I suspect we will be hearing a lot more about this whole theory in the near future.

CASE LAW:

Sixth Amendment; After-Arrestment Contacts with Defendants:

Montejo v. Louisiana (May 26 2009) __ U.S. __ [2009 WL 1443049]

Rule: An in-custody defendant may be contacted by law enforcement and, after a free and voluntary waiver of his Fifth and Sixth Amendment rights, questioned, even if he has already been arraigned and even if, at arraignment, he has asserted his right to the assistance of counsel.

Facts: Lewis Ferrari was found murdered in his own home. Investigators immediately focused on a disgruntled former employee of Ferrari's dry cleaning business. This led to defendant, a known associate of the employee. Defendant was soon taken into custody as a possible co-suspect. In a custodial interrogation, after waiving his *Miranda* rights, defendant eventually admitted to shooting and killing Ferrari in a botched burglary. Three days later, while still in custody, defendant was brought before a judge for what is known under Louisiana law as a "72-hour hearing," for arraignment and "for the purpose of appointment of counsel." (La. Code Crim. Proc. Ann., Art. 230.1(A)) Defendant was formally charged with first degree murder and the judge appointed "the Office of Indigent Defender" to represent him. Throughout this proceeding, defendant stood mute, at least as far as could be determined by the Court minutes (there being no transcription of the proceedings), neither requesting nor agreeing to the appointment of counsel. Defendant was then taken back to jail. Later that same day, before defendant had yet to meet with his newly appointed attorney, two police detectives visited him in jail and asked him to help them locate the murder weapon which he had indicated earlier he'd tossed into a lake. After some "back-and-forth, the substance of which remains in dispute," defendant was again read his *Miranda* rights which he waived for the second time. He thereafter agreed to go along with the detectives. During this trip, apparently upon the detectives' suggestion, defendant composed an inculpatory letter of apology to the victim's widow. With the letter being used against him at trial, defendant was eventually convicted of first degree murder and sentenced to death. At issue on appeal was whether the detectives violated defendant's Sixth Amendment right to counsel by contacting and questioning him after his "72-hour hearing" (hereinafter referred to as "arraignment," as it would be called under California law). The defendant argued that his letter to the victim's widow should have been suppressed as the product of a Sixth Amendment violation, the detectives having contacted and questioned him without his newly appointed attorney's participation. The Louisiana Supreme Court, in upholding his conviction and sentence (974 So.2nd 1238.), ruled that because defendant had stood mute at his arraignment and did not affirmatively request the assistance of counsel or otherwise "assert" his Sixth Amendment rights, the officers were not prohibited from initiating a contact with him out of the presence of his appointed counsel. And then, with a *Miranda* admonishment and waiver (which had the legal effect of waiving his Sixth Amendment right to counsel as well), questioning him further about the murder was lawful. On defendant's petition, the United States Supreme Court granted certiorari.

Held: In a five-to-four decision, the United States Supreme Court overruled its prior decision of *Michigan v. Jackson* (1986) 475 U.S. 625, 636, and, without reversing defendant’s conviction, remanded the case back to the trial court for further proceedings. Under the rule of *Jackson*, police are prohibited by the Sixth Amendment from initiating a contact with, and interrogating a criminal suspect once that suspect has “*asserted*” his right to counsel at his first court appearance (usually his arraignment). Or more correctly, any waiver obtained in such a circumstance is “*presumed to be involuntary.*” In analyzing the applicability of the *Jackson* rule in this case, the majority of the Supreme Court first noted that Louisiana’s interpretation of *Jackson*, requiring an in-court affirmative assertion of his right to counsel, was either unworkable or would lead to “arbitrary and anomalous distinctions between defendants in different States.” With different procedures being used in different states for the appointment of counsel, some states requiring an affirmative assertion of the right and others just automatically appointing counsel for the defendant, Louisiana’s interpretation would result in some defendants being protected from post-arraignment police-initiated contacts where others would not. On the other hand, defendant’s argument—that once a defendant is represented by counsel, no matter what the circumstances, police may not initiate any further contacts—is broader than prior case law and the Constitution require. The Court therefore rejected both theories. In seeking a workable solution to this dilemma, the Court took a hard look at the *Jackson* rule itself. In so doing, the Court noted that *Edwards v. Arizona*, at 451 U.S. 477 (1981), dictates that once a suspect has invoked his rights under *Miranda*, at least while he remains in custody, any later attempts to interrogate him are presumed to be invalid unless and until counsel has been made available, except where the defendant initiates the contact himself. The primary purpose of this “prophylactic” rule under *Edwards* is to prevent law enforcement from badgering a defendant into waiving his previously invoked *Miranda* rights. Any post-invocation waiver and interrogation are presumed to be unlawful even though they *may not* have been involuntary (or “*coerced*”) in the traditional sense. *Jackson*, also a prophylactic rule meant to prevent police from badgering a defendant after he has made an in-court assertion of his right to counsel, is really nothing more than a “wholesale importation of the (Fifth Amendment) *Edwards* rule into the Sixth Amendment.” The rule is triggered whether or not a post-arraignment waiver of rights is involuntary or not. But as a “prophylactic rule,” intended to set out a “bright-line,” easy-to-follow standard, the value of the rule must be weighed against its costs. Per the Court: “We think that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering ‘society’s compelling interest in finding, convicting, and punishing those who violate the law.’)” With *Edwards* serving to protect a defendant who chooses to deal with law enforcement only through his attorney, *Jackson* is not really needed. “Under *Miranda*, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present. [Citation] Under *Edwards*, once such a defendant ‘has invoked his [*Miranda*] right,’ interrogation must stop. [Citation] And under *Minnick v. Mississippi* (1990) 498 U.S. 146 . . . , no subsequent interrogation may take place until counsel is present. [Citation] These three layers of prophylaxis are sufficient.” Because the purpose of *Jackson*’s bright-line rule is to prevent police from badgering a defendant into waiving his previously asserted rights, and because *Edwards*

already does this, the need for *Jackson* is severely diminished. The Court therefore overruled *Jackson*, leaving *Miranda*, *Edwards*, and *Minnick* to serve as a defendant's protection against any possible unlawful attempts by law enforcement to subvert his wish to deal with them only through an attorney. In this case, therefore, with *Jackson* overruled, it is irrelevant whether defendant asserted his Sixth Amendment right to counsel at his arraignment. Such an assertion is *not* a *Miranda* invocation triggering the rule of *Edwards*. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3; anticipatory invocations are legally ineffective.) So even if defendant did affirmatively assert his right to counsel at his arraignment, the police could still lawfully contact him after his arraignment and seek a waiver of his rights which, if he chooses to do so, he may still waive. Also, the fact defendant was already represented by counsel when he did so is irrelevant to his making this choice. "In determining whether a Sixth Amendment waiver was knowing and voluntary, there is no reason categorically to distinguish an unrepresented defendant from a represented one." It is only necessary to show that a defendant's waiver, if he chooses to give it, was "voluntary, knowing, and intelligent." In attempting to question a defendant at this point, it was further noted that a standard *Miranda* admonishment and waiver, which includes a waiver of his right to the assistance of an attorney, "*as a general matter*" serves as a waiver of the person's Sixth Amendment right to counsel as well. Lastly, defendant argued that the *Edwards* rule deals only with in-custody defendants, while *Jackson* could be violated by questioning a defendant who is out of custody pending trial. In response to this, the Court noted that neither *Jackson* nor *Edwards* is necessary to protect an out-of-custody defendant because he "is in control, and need only shut his door or walk away to avoid police badgering." Similarly, other "non-interrogative interactions with the State" (e.g., police lineups) do not involve the "inherently compelling pressures" that typically necessitate the need for a rule protecting a defendant from police badgering. In sum, the Louisiana Supreme Court correctly rejected defendant's *Jackson* argument, even though for the wrong reasons. But defendant has not yet had the opportunity to litigate whether, in agreeing to write the letter of apology that was the subject of this appeal, his waiver was involuntary pursuant to the rule of *Edwards*. So the case was remanded for consideration of this issue.

Note: If this all confuses you, you're not alone. I had a hard time believing that the Court really intended to open up charged and arraigned defendants to police questioning, so I kept looking for what I was missing. After sweating over this decision for several days, I'm now convinced that that's exactly what they're doing. Anyway, here's how I interpret the present state of the rule: A defendant's Sixth Amendment right to counsel first kicks in upon the filing of a "formal charge, preliminary hearing, indictment, information, or arraignment." (*Fellers v. United States* (2004) 540 U.S. 519.) In California state practice, this includes the filing of a complaint. (*People v. Viray* (2005) 134 Cal.App.4th 1186.) But the happening of one of these events, and the fact that the defendant's Sixth Amendment rights have thus been triggered, does not prevent a law enforcement officer from initiating an interview with the suspect. With a "voluntary, knowing, and intelligent" waiver of the defendant's Fifth (*Miranda*) and Sixth (*Attorney*) Amendment rights—a simple *Miranda* admonishment and waiver accomplishing both these goals—the defendant may be questioned. (*Patterson v. Illinois* (1988) 487 U.S. 285.) Prior to this case, the defendant's arraignment terminated an officer's right to initiate such a

contact and interrogation. That was the rule of *Jackson*. *Jackson* is now gone. Now, as a result of this new case, the window of opportunity during which a police officer may initiate a contact with a suspect has been blown wide open to include any time until the in-custody defendant invokes his right to counsel under *Miranda* (if he ever does), even if he's already been to court and, as a part of the arraignment process, even if he's already asserted his right to the assistance of counsel. If he's out of custody, it's apparently okay to ask the suspect if he wishes to submit to an interview whenever the officer chooses, whether he's been arraigned or not, and despite any prior invocations under *Miranda*. (This case didn't say this. I'm just applying the standard *Miranda/Edwards* rules here.) The only limitation for the out-of-custody suspect situation would be that the suspect not be "badgered" and that the officer first obtain a waiver of the suspect's Sixth Amendment right to counsel (the format for which no court has yet to suggest). Assuming I'm interpreting all this correctly, I see this opening up a whole new can of worms with a pile of unanswered questions. I thought the dissent, which voted to reverse defendant's conviction while upholding the rule of *Jackson*, made a lot more sense and is an easier theory to follow even if not as good for law enforcement. Also note that the Court made a point of the fact that a prosecutor's ethical standards concerning the contacting of represented defendants are not applicable to police officers (at least so long as they're not acting as an agent of a prosecutor). But even so, I would counsel officers to exercise a little care in taking advantage of these new rules, seeking the advice of a prosecutor first. It's not really clear what other limitations the Court may impose in future cases and, given the strong dissent, how long this new theory may even last. In other words, be careful not to abuse it, or we may lose it.

Interrogations; Use of a Ruse:

***People v. Mays* (May 8, 2009) __ Cal.App.4th __ [92 Cal.Rptr.3rd 911]**

Rule: A police officer's use of a deception during an interrogation that is not of a kind likely to produce a false confession is lawful.

Facts: Sheppard Scott and his girl friend, Yalandria Narcisse, were at a Jack In The Box drive-through, buying food, when Scott told Narcisse that one of two guys standing in front of an adjacent AM/PM mini mart had insulted him with a racial slur when they drove in. Scott walked over and confronted the two men, engaging them in an "animated conversation" during which Scott unwisely chose to flaunt his gang affiliation. As Scott walked back to his car, Narcisse saw one of the men, wearing an orange Orioles jacket, pass something to the other man who was dressed in a hooded gray sweatshirt. After Scott and Narcisse collected their ordered food and drove to the exit, someone yelled; "Hey, homie." The man in the gray sweatshirt walked toward Scott and Narcisse as Scott stopped his car, telling him he wished to apologize. The man extended his hand as if to shake hands. When Scott did the same, the man pulled a gun and shot Scott six times at close range, killing him. The man and his companion both fled on foot. Although the witness identifications were less than positive and somewhat conflicting, defendant was at least tentatively identified as the man in the gray sweatshirt; i.e., the shooter. He was eventually arrested and questioned by a detective. During the interrogation, defendant denied being the person in the gray sweatshirt, being at the scene, or otherwise knowing

anything about the murder. Adding emphasis to his denials, defendant repeatedly volunteered to submit to a polygraph examination. Because there was no polygraph examiner available, the detective set up a mock polygraph test. With patches attached to parts of his body and wires running to a polygraph machine, a pretend test was administered. The police then fabricated a written report with fake results, telling defendant that his responses to the exam “showed deception.” Confronted with this information, defendant changed his story and admitted to being the person in the gray sweatshirt and that he was at the scene when Scott was killed. But he continued to deny being the shooter and claimed that he didn’t know it was going to happen. Defendant also claimed that the person in orange—someone he’d just met that day—was the shooter. At trial, defendant changed his story back to not even being present at the scene of the murder. He testified to telling the detective that he was there when Scott was murdered only because he felt trapped as a result of the fake polygraph test and figured it was best to tell the detective what he wanted to hear. Following a jury trial, defendant was convicted of first-degree murder (P.C. § 187), with a special circumstance of lying-in-wait (P.C. § 190.2(a)(15)), and with an enhancement for the personal discharge of a firearm causing death (P.C. § 12022.53(b)-(d)). Defendant's age (17) precluded the death penalty. (P.C. § 190.5) Defendant appealed.

Held: The Third District (Sacramento) Court of Appeal affirmed. Among defendant’s contentions on appeal was that the police engaged in “*coercion*” (i.e., “*shocking and outrageous misconduct*”) when they pretended to conduct a polygraph test and fabricated fake documentary results. Acknowledging the general rule that “a confession is involuntary if it is the result of coercive police activity,” the Court held here that faking a polygraph test and its results *did not* rise to the level of being coercion. “Police deception during a custodial interrogation may, but does not necessarily, invalidate incriminating statements. A psychological ploy is prohibited only when, in light of all the circumstances, it is so coercive that it tends to result in a statement that is both involuntary and unreliable.” The core issue is whether the defendant’s will was overborne. Using a subterfuge by itself is not necessarily coercive. “So long as a police officer’s misrepresentations or omissions are not of a kind likely to produce a false confession, confessions prompted by deception are admissible in evidence.” Applying these standards, the Court found here that “the police did not engage in a subterfuge that was of the kind likely to produce a false confession.” Had defendant not been at the scene, he would have known that the alleged polygraph test was either faked or simply wrong. His concession, after the polygraph test, to being at the scene is a relevant admission that he’d been lying. That his will was not overborne was evidenced by the fact that although admitting he was at the scene and the person in the gray sweatshirt—facts that he had denied before the faked polygraph—defendant continued to falsely deny being the shooter. Also relevant is the fact that it was defendant himself who demanded that he be allowed to take a polygraph test. Lastly, the Court declined to find that the faked written test results were more likely to constitute coercion merely because it was in writing. The results themselves, being falsified, were never admitted into evidence and therefore did not pose a risk of its presence in the record being mistaken for a true polygraph test. Defendant’s admissions, therefore, were voluntary and not the product of police coercion.

Note: For prosecutors, this written case decision contains a virtual library of federal, California, and other states' decisions on the lawfulness of police deceptions in the interrogation context. For police officers, simply knowing the rule, and its limitations, is itself important. Among those "limitations" is not to engage in a ruse that is likely to induce a false confession (e.g., "Your mother called and told us to tell you to confess."). Police officers also need to know that although deceptions such as the one used in this case are relatively harmless, and maybe even a little humorous, some deceptions can actually hurt the prosecution's case. For instance, use of a deception as a means of encouraging a suspect to waive his *Miranda* rights will not be upheld. *Miranda* waivers, to be valid, must be "*the product of a free and deliberate choice, rather than intimidation, coercion or deception.*" (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) Secondly, even after a valid waiver, falsely telling a suspect that you have evidence you don't really have, while lawful (*People v. Farnam* (2002) 28 Cal.4th 107, 182.), can be expected to be portrayed by the defense as you "*lying*" to the suspect. While you may describe such a tactic as nothing more than a "*ruse*," "*deception*," or "*subterfuge*," a good defense attorney will loudly and repeatedly label the tactic as you simply telling lies. Jurors expect the police to be above lying, and may very well hold it against you and the prosecution's case. So my suggestion is to use a ruse only as a last resort.

***Miranda; Minimizing the Importance of the Admonishment:
Interrogation Tactics and Voluntariness:***

***Doody v. Schriro* (9th Cir. Nov. 20, 2008) 548 F.3rd 847**

Rule: Minimizing the importance of a *Miranda* admonishment is improper. High pressure interrogation tactics, demanding that a 17-year-old, criminally unsophisticated suspect talk and that the interrogation won't end until he does, is a due process violation.

Facts: In August, 1991, nine bodies were found in a Thai Buddhist temple near Phoenix, Arizona. The victims—monks and other temple residents—had been arranged into a circle and summarily executed by shooting each in the head. Their living quarters were ransacked and some property was taken. A law enforcement task force, involving local, state and federal law enforcement officers, launched a massive investigation. With ballistics showing that a .22 Marlin rifle had been one of the murder weapons, the task force was on the lookout for such a rifle. Several weeks after the murders, a security guard found a .22 Marlin rifle in the vehicle of a high school student, Rolando Caratachea. Caratachea voluntarily allowed investigators to borrow the rifle for testing. While talking to Caratachea, it was discovered that 17-year-old Jonathan Doody, petitioner in this case, was one of Caratachea's roommates. Doody, a junior in high school, was born in Thailand, moving to the United States with his parents. Doody's brother had lived in the temple for awhile before the murders, where Doody frequently visited him. Meanwhile, four men from Tucson (known as the "Tucson Four") were arrested for the murders. All four confessed. But then ballistics came back identifying Caratachea's .22 Marlin rifle as the murder weapon. Contacted again, Caratachea told investigators that Doody and another friend, Alessandro Garcia, had borrowed the rifle

shortly before the murders. Doody was therefore contacted at school and asked to come to the police station for an interview. He agreed. The interview was initially begun with two investigators. Doody was first asked if he had ever heard of the *Miranda* warnings. He said that he had not. So they told him that the *Miranda* warnings were “not meant to scare you” and to “don’t take it out of context, okay.” He was also told; “I don’t want you to feel that because I’m reading this to you that we necessarily feel that you’re responsible for anything. It’s for your benefit. It’s for your protection and for ours as well.” While reading Doody his rights, one of the investigators decided to elaborate on his right to an attorney, telling him that a lawyer will “help you concerning the crime or any kind of offense that we might think that you or somebody else is involved in, if you were involved in it, okay. Again, it [does] not necessarily mean that you are involved, but if you were, then that’s what that would apply to, okay.” Doody told the investigators that he understood his rights and agreed to speak with them, and that he didn’t need an attorney to be present. What followed was a 12½ hour interrogation, lasting all night. Doody initially, and repeatedly, denied being involved in the murders. But the more he denied, the harder the investigators pushed, lecturing him on the need to tell the truth. Accusing Doody of lying, they told him that “you have to tell us. You have to.” Doody eventually admitted to borrowing Caratachea’s rifle but claimed that he had returned it before the murders. Eventually a third investigator, and at times a fourth, joined them in the interrogation. He was “barrage(d)” with questions. Doody soon quit answering altogether, sitting in silence as the same questions were asked over and over. At one or more points, he was told that they were “gonna stay here until I get an answer. . . . You’ve got to answer me. . . . Jon, answer me. . . . Now, you—start talking to me. . . . Tell me Jon. Talk to me, Jon. Jon—no, no, it’s not gonna—you’re not gonna cut it that way, man. You’re gonna be a man about it. You’re gonna talk to me Jon. . . . [S]tart talking some, Jon. Don’t sit there like that, talk to me.” More than six hours into the interrogation, Doody finally responded with a “yes” when asked again if he’d been involved. Doody then remained silent again for the next half hour as more questions were asked. Finally, after 6½ hours into the interrogation, Doody started talking about the murders in a narration, saying that he, Caratachea, Garcia, and another person named George, did the murders. When asked about the “Tucson Four,” Doody denied that they were involved. However, when pressed on this for another two hours, Doody finally agreed that ten people participated, including the Tucson Four. The interrogation finally ended at 10:00 a.m. with Doody sobbing. He was later charged, along with Garcia, with nine counts of murder. Garcia pled guilty and testified against Doody. The “Tucson Four” were eventually cleared of any wrongdoing. Doody’s motion to exclude his confession was denied by the trial court. He was convicted on all counts and appealed. His conviction was upheld through Arizona’s appellate court system. He filed a petition for a writ of habeas corpus in federal court, which was also denied. He appealed to the Ninth Circuit Court of Appeal.

Held: The Ninth Circuit Court of Appeal reversed, remanding the case back to the federal district court with directions to grant Doody’s petition. In so doing, the Court considered two issues; the validity of Doody’s *Miranda* waiver (a Fifth Amendment issue) and the voluntariness of his subsequent confession (a Fourteenth Amendment “*due process*” issue). As for the *Miranda* waiver itself, the Court found that the trial court was

not “unreasonable” in its determination that the warnings given to Doody were “adequate.” But in so doing, it also criticized the investigators’ attempts to minimize the importance of the admonishment. Telling Doody things like that the *Miranda* admonishment was “not meant to scare him” and not to “take them out of context,” and then particularly; “I don’t want you to feel that because I’m reading this to you that we necessarily feel that you’re responsible for anything,” was all meant to convince him that the warnings were a mere formality and that he need not take them seriously. Also, Doody was told, in effect, that he only needed an attorney if he was guilty of something. The Court found this type of admonishment to be “troubling,” but still “adequate” (although barely). In addition to the validity of the waiver was the issue of whether, once a waiver is obtained, the defendant’s will was overborne, thus motivating him to confess where he otherwise would not have. First, the Court noted that there was nothing wrong with exhorting Doody to tell the truth. But then later in the interrogation, Doody was pushed too hard by the investigators, “barrag(ing)” him with relentless, repeated questions despite his obvious reluctance to continue answering them. The Court took into account the fact that Doody was a 17-year-old minor who had not been involved with the law before. A 12½ hour interrogation of such a person, when peppered with demands that he answer their questions and that they were not going anywhere until he did, contradicting the prior explanation about his right to remain silent as contained in *Miranda* admonishment itself, led to a situation where Doody reasonably could have felt that he had no choice but to tell the officers whatever he thought they wanted to hear. That this is exactly what happened is evidenced by Doody’s denial at first that the “Tucson Four” were involved, only later (after two hours of pressure) to claim that they were; a fact later conceded as false by the prosecution. Under these circumstances, particularly when combined with an admonishment that included attempts to minimize the importance of the warnings, the Court found that Doody did not voluntarily confess. His confession, therefore, should not have been allowed into evidence against him.

Note: I’m always a bit wary of a Ninth Circuit reversal after a state trial court, a state’s entire appellate court system, and a federal district (trial) court, all found a confession to be voluntary. But assuming for the sake of argument that the facts haven’t been exaggerated here by the Court, the result shouldn’t be surprising. First, it’s always dangerous to elaborate on the admonishment itself. Doing so in this case resulted in the Ninth Circuit criticizing the investigators’ attempts to minimize the importance of the admonishment. *You can’t do that.* Then the officer trying to elaborate on a person’s right to the assistance of an attorney, making it sound like it’s really meant for the protection of the guilty only (which I’m sure the officer didn’t intend), is still wrong. Sticking to the language of the admonishment card avoids these problems. And last, but certainly not least, the tone of the interrogation itself, telling the suspect that he has to talk and that they aren’t going anywhere until he confesses, just isn’t going to fly. The picture painted by the Court is one of multiple officers piling on a criminally unsophisticated (even if a murderer) minor, where his “will (not to talk) was (clearly) overborne.” High pressure and a little bit of yelling is normally okay. But stretch it out for 12½ hours with threats to keep it up until a confession is obtained, particularly when the target is a relatively young and vulnerable suspect, and you have a serious “*due process*” issue.