San Diego District Attorney

LEGAL UPDATE

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Remember 9/11/01*: *Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*There are two ways to conquer and enslave a nation. One is by the sword. The other is by debt*." (John Adams)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

The Stolen Valor Act: In the last *Legal Update* (Vol. 17, #5. May 24), I briefed *United States v. Perelman* (9th Cir. Sep. 26, 2011) 658 F.3rd 1134, where the Ninth Circuit Court of Appeal upheld the federal statute making the unauthorized and fraudulent wearing of military medals illegal (18 U.S.C. § 704(a)). In the body of that brief, I mentioned the prior Ninth Circuit's decision in *United States v. Alvarez*, where that same Court found that subdivision (b) of section 704, which purports to criminalize *false statements* about the receipt of military decorations

or medals (as opposed to just wearing them), to be an unconstitutional violation of the First Amendment's free speech protections. (See 671 F.3rd 1198 (9th Cir. 2010)). On June 28, the United States Supreme Court, in a 6-to-3 decision, upheld the Ninth Circuit's decision in *Alvarez*. (*United States v. Alvarez* (June 28, 2012) __ U.S. __ [2012 U.S. LEXIS 4879].) So the rule as it applies today is as follows: You have a First Amendment constitutional right to make a fool of yourself and an embarrassment to your veteran friends, and falsely claim you have received military awards and decorations, but it's illegal to wear them, at least when the wearing is accompanied by a fraudulent intent (i.e., an "*intent to deceive*"). And remember California's Stolen Valor statutes (P.C. § 532b, Gov't Code § 3003 and Mil. & Vet. Code § 1821), which have yet to be tested.

CASE LAW:

***Consent Searches*:**

People v. Valencia **(Dec. 8, 2011) 201 Cal.App.4th 922**

Rule: Depending upon the circumstances, a single consent to search may be used to justify a second, successive search of the same thing.

Facts: Los Angeles Police Officer Ruben Banuelos and his partner, Officer Scott Costa, observed defendant driving with a broken tail light. Making a traffic stop, Officer Banuelos asked defendant for consent to search his vehicle. Although defendant gave his consent, a "cursory search" failed to result in the recovery of anything illegal. Meanwhile, Officer Costa discovered that defendant might have some outstanding arrest warrants. Defendant was transported to the police station for the purpose of determining whether such warrants actually existed. Officer Scott drove defendant's vehicle to the station so that if he were released from the station, he'd have his vehicle readily available. (Absent any evidence to the contrary, it was assumed by the Court that defendant consented to being taken to the station and that his vehicle be driven there by the Officer Costa.) Upon arrival at the station, a third officer, Michael Hofmeyer, was told that defendant had consented to the search of his vehicle. Officer Hofmeyer therefore conducted a second, more thorough search and found a bindle containing about three grams of cocaine. Charged with possession of cocaine for purpose of sale (H&S § 11351) in state court, defendant's motion to suppress was denied. Defendant therefore pled guilty to a lesser charge and appealed.

Held: The Second District Court of Appeal (Div. 7) affirmed. After first determining that a "single grant of consent" does not, as a matter of law, prohibit more than one search depending upon the facts and circumstances, the Court went onto the main issue of whether Officer Hofmeyer's search (the second search) of defendant's vehicle was objectively reasonable under the circumstances. Defendant's argument, of course, was that although he consented to Officer Banuelos' search of his car, he did not consent to Officer Hofmeyer's subsequent search. In rejecting defendant's argument, the Court held that the test under the Fourth Amendment is whether the subsequent search was

reasonable under the circumstances. Although the general rule is that "a consent to search usually involves an 'understanding that the search will be conducted forthwith, and that only a single search will be made,'" the circumstances may dictate a different result. The non-exclusive list of factors to consider when assessing the reasonableness of conducting more than one search based upon a single grant of consent include, but is not limited to, the following: (1) Whether the defendant place any limitations on the scope of the initial consent; (2) the amount of time that passed between the grant of consent and the contested search; (3) whether police remained in control of the area being searched prior to conducting the second search; (4) whether the officers were searching a residence or other area that is entitled to a heightened expectation of privacy; (5) whether the suspect was arrested between the initial search and the subsequent search; (6) whether the searches were part of a continuous criminal investigation having a single objective; and (7) whether the defendant had advance knowledge of, and an opportunity to object to, a subsequent search. In this case, the second search did not cause any diminution in defendant's expectation of privacy with respect to his vehicle (a factor not listed above). The contents of defendant's vehicle could not have been any different than upon the first search. Secondly, it was defendant's vehicle, and not his residence, that was searched. A vehicle carries a lower expectation of privacy than does one's home. Third, there was no evidence that defendant was arrested, or even detained, between the two searches. Absent such evidence, it was assumed by the Court that defendant consented to being transported to the police station between searches. Fourth, the time period between searches was very minimal. And fifth, defendant did not limit his consent to a particular time or place. Based upon these circumstances, the Court held that it was reasonable for the officers to conclude that the second search was authorized by defendant's earlier consent.

Note: This case covers a topic not directly discussed in any prior California case. Its importance, therefore, speaks for itself. The Court did note, however, that this case "should not be construed as giving police broad authority to regularly engage in such conduct." (pg. 937.) So when in doubt, it is always best to either ask for a second consent or, if probable cause has since been established, seek a search warrant. For prosecutors, this case contains a significant amount of authority (albeit out-of-state) upholding successive searches, including some with several days intervening between the consent and the second search.

***Burglary by Use of an Acetylene Torch* (*P.C. § 464*):**

***People v. Cardwell* (Feb. 22, 2012) 203 Cal.App.4th 876**

Rule: Burglary by use of an acetylene torch, per P.C. § 464, is not committed by using the acetylene torch to break into a structure containing a vault, safe or other secure place, but rather must be used on the vault, safe, or other secure place inside the structure.

Facts: Murrieta police responded to a burglary alarm at a Best Buy store in the early morning hours. They found a large hole cut in a side steel door leading into the store that appeared to have been made by a torch. While investigating, defendant was noticed in a

dirt wash area next to the store, pushing a shopping cart loaded with items from the store. When ordered to stop, defendant began to flee, pushing the cart over the edge of a cement flood control channel. When an officer looked into the flood control channel, he could see defendant running towards a nearby I-15 freeway overpass, abandoning his overturned shopping cart. When ordered to stop a second time, defendant yelled back that he had a gun and threatened to shoot the officer. Defendant escaped, but a U-Haul van, rented by defendant, was found nearby. In the van was found a variety of burglary tools and an acetylene base cutting torch, complete with two gas canister tanks. At sunrise, another officer found defendant near the freeway watching the crime scene with a pair of binoculars. He was arrested after a struggle. In the store, a locked camera cabinet had been pried open with two shopping carts full of cameras and video recorders totaling $24,600 in value. A whole bunch of evidence connecting defendant to the burglary was found in the store, the flood control channel (including a wallet with defendant's ID), and the van. He was charged in state court with a number of crimes including commercial burglary with a prior strike conviction. Later, count 1 was amended from second degree burglary to burglary by use of an acetylene torch. He was convicted by a jury of all counts and sentenced to over 16 years in prison. Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed the burglary by acetylene torch conviction, remanding the case for resentencing, but otherwise confirmed defendant's conviction. The prosecution's theory for charging burglary by an acetylene torch, per P.C. § 464, was that defendant used such an instrument to break into the Best Buy store, cutting a hole in an exterior steel door. Such an interpretation of section 464 is supported by prior case law; *People v. Collins* (1969) 273 Cal.App.2nd 1. Penal Code § 464 provides, in part, that it is a felony when "(a)ny person who, with the intent to commit crime, enters, . . . , any building . . . , and opens or attempts to open any vault, safe, or other secure place by use of acetylene torch or electric arc, burning bar, thermal lance, oxygen lance, or any other similar device capable of burning through steel, concrete, or any other solid substance, or by use of (a listed explosive) . . ." *Collins* held that the use of an acetylene torch for the purpose of breaking into the building itself, and thereafter opening or attempting to open a "vault, safe, or other secure place" found therein, is sufficient to violate section 464. Per *Collins*, it matters not whether the acetylene torch was used to break into the building, or the vault, safe, or other secure place, or any combination thereof. The Fourth District Court, however, disagreed. Per this court, it is obvious that the Legislature intended that the burglar must already be inside the building before the acetylene torch is used on a vault, safe, or other secure place. The vault, safe or other secure place must be something other than the building in which one of these secure containers is found. In this case, defendant used an acetylene torch to get into the Best Buy before he pried open a cabinet from which he stole cameras and video recorders. There was no evidence that he used or attempted to use the acetylene torch to get into any secure containers within the store. While this is a commercial burglary, it is not a burglary by an acetylene torch as the crime is defined in section 464. The conviction on this count, therefore, must be reversed.

Note: So why is it important to know when we can use section 464? This section provides for a prison sentence of 3, 5 or 7 years, where a regular commercial second degree burglary is a wobbler with a maximum 3 year sentence. The noted purpose for 464's stiffer penalty is to discourage the use of highly dangerous torches and explosives. The Court also took some time to define "other secure place," as did the *Collins* court. On this issue, the two courts agree. "*Other secure place*" is "intended to embrace some place different from a vault or safe, which place, like a vault or safe, (is) designed or used for the purpose of keeping therein valuables, but which lacks the substantial impenetrability characteristic of the commonly known, heavily protected and other armored vault or safe." Per the Court, what fits into this definition is a question of fact for a jury to decide.

***Probation Searches and the Standard of Proof*:**

United States v. Bolivar **(9th Cir. Feb. 29, 2012) 670 F.3rd 1091**

Rule: An officer need have only a reasonable suspicion to believe that a container to be opened and searched either belongs to, or is under the control of, a Fourth wavier suspect.

Facts: Defendant lived in a one-bedroom apartment with another male named Philine Black. Black was on probation and, as a condition of his probation, was subject to search and seizure conditions. Police came to the apartment with a probation violation warrant for Black's arrest. Black submitted to the arrest. Defendant, who was not subject to search and seizure conditions, was not home. The police then conducted a Fourth-waiver search of the apartment. In the single bedroom, the police found a closet with two doors. The interior closet space was not divided, although there was a distinct break or space between clothing hanging on the two sides. Only men's clothing was found in the closet. Hanging on a hanger in the middle of the closet was a purple backpack. Upon opening the backpack, the officers found a 12-gauge sawed-off shotgun with a ten-inch barrel. It was later determined that the shotgun belonged to defendant. Charged in federal court with being a felon in illegal possession of a firearm, defendant filed a motion to suppress the shotgun. He argued that the officers didn't have sufficient probable cause to believe that the backpack belonged to Black, and therefore wasn't subject to being searched. The trial court denied defendant's motion, holding that the officers needed only a reasonable suspicion to believe the backpack belonged to Black. Defendant therefore pled guilty, and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, defendant didn't contest the legality of the Fourth waiver search of the apartment, or even that the officers had a "reasonable suspicion" to believe that the backpack belonged to Black. His argument was that the officers needed full "probable cause" (as opposed to the lesser standard of a reasonable suspicion) to believe that Black owned or had control over the backpack in order to lawfully subject it to a warrantless Fourth waiver search. As authority for his argument, defendant cited the prior Ninth Circuit decision of *Motley v. Parks* (9th Cir. 2005) 432 F.3rd 1072. The Court, however, pointed out that *Motley* dealt with the issue of whether a parolee (who is also subject to search and seizure without a warrant or

probable cause) lived in the place to be searched. The Court in *Motley* found that the correct standard of proof was that the officers must have probable cause to believe that the parolee lived in the place to be searched. But the purpose of the rule of *Motley* was to protect a potential third party's heightened expectation of privacy in his or her own home from a warrantless governmental intrusion. The same reasoning is not applicable to an officer's decision to search a particular container in the Fourth waiver subject's home. As previously decided by the Court (see *United States v. Davis* (9th Cir. 1991) 932 F.2nd 752), only a reasonable suspicion to believe that the Fourth waiver subject owns or controls the item to be searched is necessary. Here, defendant conceded that the officers had a reasonable suspicion to believe that the backpack either belonged to, or was under the control of, Philine Black. As such, it was properly searched as a part of the Fourth waiver search.

Note: What the Court does not tell you is that even *Motley* is a minority opinion. Five other federal circuits, and California, have held that the correct standard of proof relevant to whether or not a person who is the target of either an arrest warrant or a Fourth waiver lives in the residence to be entered and/or searched is a "*reasonable suspicion*." (See *People v. Downey* (2011) 198 Cal.App.4th 652, 657-662.) But the correctness of *Motley* is not the issue in this new case. Everyone (apparently) is in accord with the ruling in this case, i.e., that an officer need have only a reasonable suspicion to believe that a container to be opened and searched either belongs to, or is under the control of, a Fourth wavier suspect. So even if *Motley* is someday held by the Supreme Court to be correct (which hasn't yet happened), the rule of this case will stand.

***Undercover Police Agents and the Fifth and Sixth Amendments*:**

People v. Gonzales and Soliz **(July 28, 2011) 52 Cal.App.4th 254**

Rule: Use of an undercover police agent to question an in-custody, but uncharged suspect, is lawful, not requiring a *Miranda* admonishment or wavier. The suspect's Sixth Amendment right to counsel is also not involved, even if he has an attorney in another case.

Facts: On the evening of January 27, 1996, defendants John Gonzales and Michael Soliz entered the Hillgrove Market in Hacienda Heights, near La Puente, and accosted the owners, Betty and Lester Eaton, with firearms. When defendant's demanded money, Lester responded with his own Colt revolver that he wore on his hip, only to be pistol-whipped for his efforts. When Lester fell to the ground, Gonzales shot him five times before he and Soliz escaped with the cash register drawer and about $100. About 2½ months later, on April 14, defendants and several others encountered Elijah Skyles and Gary Price in a Shell gas station parking lot in the City of Covina. Skyles and Price were member of the Bloods street gang who were suspected of having been involved in the murder of a Puente gang member several weeks earlier. Gonzales and Soliz were members of the Puente gang. Gonzales and Soliz confronted Skyles and Price and got into an argument. Soliz pulled out his pistol and shot both of them. Skyles received nine gunshot wounds; Price seven. Both died at the scene. An extensive investigation,

involving many witnesses to the murders and friends of the defendants and physical evidence, led to their identification as the killers. In September, former Puente gang member Salvador Berber was in custody on robbery charges. Gonzales, who had not yet been charged with the murders, was in custody on a dope charge. Berber knew from prior contacts that Gonzales had been bragging about being involved in both shootings. Looking at up to 17 years in prison, Berber contacted a detective and, hoping for a more lenient sentence, volunteered to wear a wire and pump Gonzales for information about the murders. It was arranged for the two of them to be transported to court together in a sheriff's van with Berber wearing a wire. During this ride, Gonzales admitted to having been involved in all three murders. (Gonzales actually took credit for being the shooter in all three murders, although witnesses and physical evidence proved that Soliz was the shooter in the Skyles and Price murders.) With both Gonzales and Soliz charged with three counts of murder with special circumstances, the jury was allowed to hear the tape of the Berber-Gonzales conversation. Gonzales was eventually convicted of all three murders (two as an aider and abettor) and related charges with the special circumstances. Based upon the jury's determination, Gonzales was sentenced to death in the Lester Eaton murder and life without parole in the Skyles and Price murders. (Soliz received a death sentence for killing Skyles and Price, and life without parole for Eaton's murder.) The appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed both convictions and death sentences. As to Gonzales, one of the issues on appeal was the admissibility of his tape-recorded statements to Berber in the sheriff's van. When tape-recorded, defendant was in custody on a drug charge for which he was represented by counsel. He was not yet charged with any of the murders or related crimes. His arguments on appeal (as they were in the trial court) were (1) that he was subjected to a custodial interrogation by Berber, who was acting as a police agent, without first being advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, and (2) that he was questioned in the absence of his appointed attorney, a violation of his Sixth Amendment rights under *Massiah v. United States* (1964) 377 U.S. 201. The Court rejected both arguments. As for defendant's first argument, the Court assumed for the sake of argument that Berber was in fact acting as a police agent (which he apparently was). Even so, however, the U.S. and California Supreme Courts have previously "rejected 'the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent.'" (*People v. Webb* (1993) 6 Cal.4th 494; *Illinois v. Perkins* (1990) 496 U.S. 292.) The purpose of *Miranda* is to negate the coercive effects of an interrogation conducted by law enforcement. But *Miranda* was *not* intended to prohibit the "mere strategic deception" of "taking advantage of a suspect's misplaced trust in one he supposed to be a fellow prisoner." The deception used in having Berber, as a police agent, pump defendant for answers did not prevent defendant's responses from being "voluntary and free of compulsion." No *Miranda* warnings, therefore, were necessary. As for defendant's second argument, it has long since been the rule that questioning a suspect about an offense for which the person being questioned has not yet been charged does not violate the person's Sixth Amendment right to counsel. (*Texas v. Cobb* (2001) 532 U.S. 162.) The Sixth Amendment is "offense specific." Defendant here was in custody on other charges, not yet having been charged

with the murders of Eaton, Skyles and Price. The fact that defendant had an attorney in the other case was irrelevant to the murder cases. There was therefore no violation of defendant's Sixth Amendment rights.

Note: Don't confuse the rule of this case with the situation where a defendant has already been formally charged; i.e., after the filing of a "*formal charge, preliminary hearing, indictment, information, or arraignment*." (*Massiah v. United States* (1964) 377 U.S. 201.) It is generally accepted that this includes the filing of a "*complaint*." (*People v. Viray* (2005) 134 Cal.App.4th 1186.) Such a defendant is off limits to all questioning, including by an undercover police agent, whether he is in or out of custody, absent the participation of his attorney (*Massiah*) or upon the defendant's formal waiver of his right to an attorney under the Sixth Amendment. (*Montejo v. Louisiana* (2009) 556 U.S. 778.) The defendant Gonzales in this case had not yet been charged with the murders in issue, opening him up for using a fellow inmate with a body wire. Had he already been charged with the murders, law enforcement could not have done this. But where your suspect has not yet been charged, you might be surprised with how far the law allows you to go in using an undercover police agent to pump a suspect for information. If you want all the law on this interesting issue, you need merely ask and I'll be glad to send it to you.

***Miranda*; *DUI Drivers and Custody*:**

People v. Bejasa **(Apr. 19, 2012) 205 Cal.App.4th 26**

Rule: Whether or not a DUI suspect is in custody for purposes of *Miranda*, even before a field sobriety test and the general initiation of on-the-scene questioning, is dependent upon the totality of the circumstances.

Facts: Defendant, a parolee, was driving in Hemet on the evening of September 19, 2008, with his girlfriend, Stasha Lewellyn, in the front passenger seat. Being under the influence of methamphetamine, defendant lost control, swerved into on-coming traffic, and crashed head on into another car. Lewellyn, who was not wearing a seatbelt, went through the windshield and sustained major injuries. Hemet Police Officer Derek Maddox was called to the scene and, after checking on the injured, contacted defendant. Upon determining that defendant was the driver, and noticing that defendant's eyes were bloodshot, he had defendant sit on a curb. Traffic officers were called to continue the investigation. Upon their arrival, Officer Maddox resumed questioning defendant. Defendant admitted to being on parole and consented to being searched. The search of his person resulted in the recovery of two syringes, one of which contained a small amount of liquid that was later determined to be methamphetamine. Defendant admitted to "shoot(ing) up methamphetamine." Defendant was handcuffed and put into the back seat of a police car while being told that "he was being detained for a possible parole violation." No *Miranda* admonishment was given. Twenty-three minutes after the crash, Officer Tony Spates and four other traffic officers arrived at the scene. After being briefed on the facts, Officer Spates took defendant out of the police car and removed the handcuffs. Using a form provided by the police department, Officer Spates interviewed defendant concerning his state of sobriety (or lack thereof). Defendant made

incriminating statements in response, admitting to his use of drugs. A field sobriety test (FST) was administered with mixed results. At the conclusion of the FSTs, Officer Spates advised defendant that he was under arrest. He was then transported to the police station where he was read his *Miranda* rights for the first time. Defendant's blood subsequently tested positive for methamphetamine. He was eventually charged in state court with driving under the influence of a drug while causing great bodily injury to another (V.C. § 23153(a)), transporting a controlled substance (H&S § 11379(a)), and other related charges, along with two prior strike convictions. His motion to suppress his statements was denied by the trial court. Convicted after a jury trial, defendant appealed.

Held: The Fourth District Court of Appeal (Div. 2) ruled that defendant's statements should have been suppressed, but upheld his conviction anyway finding the error to be harmless. The issue on appeal was whether defendant was in custody for purposes of *Miranda* when questioned at the scene of the accident. As for the FSTs, defendant's argument was that at least part of them constituted testimonial evidence and therefore should have also been suppressed due to the alleged violation of *Miranda*. As for the issue of custody, it is a rule that a traffic stop in itself is not sufficiently intrusive to constitute custody for purposes of *Miranda*. This rule has been extended to a stop by law enforcement of a person suspected of driving while under the influence of drugs and/or alcohol. (*Pennsylvania v. Bruder* (1988) 488 U.S. 9; *People v. Milham* (1984) 159 Cal.App.3rd 487.), at least until the person is actually subjected to a custodial arrest. (*Berkemer v. McCarty* (1984) 468 U.S. 420.) The test for custody is the same as with any other contact. Whether or not a person is in custody for purposes of *Miranda* depends upon how a reasonable person in the suspect's position during an interrogation would have felt. Determining this depends upon a consideration of the totality of the circumstances. Some of the factors to consider include (but are not limited to) (1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; (5) the demeanor of the officer, including the nature of the questioning; (6) whether the suspect agreed to the interview and was informed he or she could terminate the questioning; (7) whether the police informed the person he or she was considered a witness or suspect; (8) whether there were restrictions on the suspect's freedom of movement during the interview; (9) whether police officers dominated and controlled the interrogation or were aggressive, confrontational, and/or accusatory; (10) whether they pressured the suspect; and (11) whether the suspect was arrested at the conclusion of the interview." In the instant case, factors indicating a lack of custody include the relatively brief nature of the contact and, at least at the beginning, that there were only two officers at the scene. It was also noted that when first handcuffed and put into a patrol car, Officer Maddox was in the "preliminary investigative stages." However, the Court found these factors to be more than offset by the fact that right at the beginning of the contact, defendant admitted to being a parolee. Also, two syringes, one containing methamphetamine, were found on him, plus his admission that he'd been using. He was immediately told that he was being "detained for a possible parole violation," was handcuffed, and then put into a locked patrol car. Any reasonable person under these circumstances would have known that he was going to be going to jail. The Court further commented on the fact that it was reasonable for Officer Maddox to temporarily detain defendant in the patrol car (which is

perfectly acceptable for Fourth Amendment, detention purposes), and that he was later removed from the vehicle and the handcuffs removed (which might in some circumstances undue the intrusiveness). However, in this case, these factors were "not enough to ameliorate the custodial pressures that likely remained from the initial confinement." Another element to a finding that *Miranda* warnings must be given as a prerequisite to questioning is whether the questions asked constituted an interrogation. An interrogation is defined as express questioning or "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291.) The People argued that the questions asked of defendant were sufficiently general so as to escape the requirement of a *Miranda* warning. The Court accepted the concept that general questions regarding the facts of a crime may be asked of persons temporarily detained by officers who do not yet have probable cause to arrest. Such questions are designed to enable the police to quickly ascertain whether a person should be permitted to go about his business or held to answer charges. This theory, however, did not apply to this case. Officer Maddox already had probable cause to arrest, demonstrating that level of proof by telling defendant that he was being "detained" for a parole violation, handcuffing him, and putting him into a locked patrol car. Telling him that he was only being detained wasn't sufficient to overcome the other indications that he was in fact being arrested. Also, the questions subsequently asked by Traffic Officer Spates, already knowing that defendant was a parolee and that he was in possession of methamphetamine, were not "general, on-the-scene" investigatory-type questions. They were such that the office would have reasonably known that they were likely to elicit an incriminating response. Defendant also complained that as a part of his FST, he was asked to estimate the passage of 30 seconds under the so-called "Romberg test." His guess coincided with only 25 seconds having passed. Defendant argued that his response to this part of the FST was a testimonial communication and should have been suppressed absent a *Miranda* waiver. Although an officer's observations of a suspect performing FSTs are not testimonial, and thus admissible despite the lack of a *Miranda* wavier, the Court held that defendant's verbal response to this particular question was testimonial, and thus inadmissible in that he was in custody and hadn't yet been advised of his rights. However, the Court found these errors to be harmless given the abundance of other evidence of his guilt. The case was remanded to correct some sentencing issues, but otherwise affirmed.

Note: As the Court noted, there's a thin line between non-custodial questioning during a detention for investigation in the initial stages of a DUI stop, and having full probable cause to arrest. "The 'shift from investigatory to accusatory questioning can be very subtle.'" (pg. 40.) The key, as noted by this and any number of other cases, is how a reasonable person in the suspect's shoes would have felt under the circumstances. Telling someone that he's in possible violation of his parole, where he's in admitted possession of an illegal substance, handcuffing him, and then putting him into a locked patrol car, will do it. Where you draw the line between this extreme, and merely questioning the DUI suspect after asking him to alight from his vehicle where the U.S. Supreme Court has told us there is no custody (*Berkemer v. McCarty*, *supra*.), is anybody's guess. When in doubt, it is suggested that you *Mirandize* the guy and eliminate the issue.