

# San Diego District Attorney

## LEGAL UPDATE

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Vol. 15

August 2, 2010

No. 6

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

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#### **THIS EDITION'S WORDS OF WISDOM:**

*"Nearly all men can stand adversity. But if you want to test his character, give him power."* (Abraham Lincoln)

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#### **ADMINISTRATIVE NOTES:**

*Second Amendment Right to Bear Arms:* Of interest to many of you, but of little consequence in your day-to-day jobs (thus this brief note instead of an extensive summary) are the recent United States Supreme Court decisions of *District of Columbia v. Heller* (2009) 554 U.S. \_\_\_, and *McDonald v. City of Chicago* (2010) 561 U.S. \_\_\_. These two cases, upsetting long-standing precedent, (1) uphold the Second Amendment right a private citizen to keep and bear arms and, (2) establish the applicability of this right in restricting a state's (as opposed to only

the federal government's) efforts to regulate the possession of firearms. More specifically, prior to *Heller*, the rule was that the Second Amendment did *not* provide private citizens, not associated with a "well-regulated militia," the right to keep and bear arms as an individual. The federal government, if it wished, could have outlawed the possession of firearms altogether. Reversing this rule, the Court in *Heller* found that it is not necessary that a person who wishes to own or possess a firearm be associated with any state militia; i.e., that it is a personal right to do so, at least in his or her own home. However, with *Heller* being a resident of Washington D.C., this did not resolve the issue of whether the individual states (as opposed to the federal government) still had the authority to outlaw such possession outright. Prior to *McDonald*, the majority rule on this second issue has always been that the Second Amendment did not apply to the states. In other words, a state or local government, if it so chose, could outlaw the possession of firearms altogether. Chicago (as well as the neighboring village of Oak Park) had a local ordinance that did just that. *McDonald* struck down these state and local statutes, holding that despite prior case law to the contrary, the Second Amendment, by being "incorporated" into the 14 Amendment's "due process" clause (i.e., that the *states* may not deprive a person of his or her right to life, liberty, or property without due process of law), is in fact applicable to the states. In this case, it was held that the citizens of Chicago (as well as Oak Park) have the same right to keep and possess firearms in their own homes as does Mr. Heller in his Washington D.C. home. But don't take these decisions as authority for negating all federal and state statutes regulating the possession or ownership of firearms. It does not. Federal, state, and local governments are still free to impose reasonable restrictions on the possession, use, sale, transportation, etc., of firearms. These two cases really do little more than ensure your (assuming you aren't a convicted felon or a mental patient) right to keep and bear arms, for self-defense, in your own home. For firearms beyond your front door, however, expect individual statutes to be tested one by one under these new rules, with the reasonable statutes being upheld.

*Requesting Legal Update Notifications:* The San Diego Sheriff has included on its *Legal Update* webpage (i.e., [www.sdsheriff.net/legalupdates/](http://www.sdsheriff.net/legalupdates/)) a link providing an easy way to request inclusion onto the *Legal Update* notification list. Those requests come directly to me. Within days (or sometimes hours), as I add each address onto the permanent notification list, I respond to the applicant acknowledging receipt of his or her request. Every once in a while, however, my response to you bounces back to me because the applicant failed to correctly type in his or her own e-mail address. So if you've requested inclusion on the *Legal Update* notification list and didn't hear back from me, or are still not getting them, try again, and double check the accuracy of your address. And if you don't want to take a chance on that system, you can e-mail me direct at my address listed above. That way I'll be sure to have your correct e-mail address.

## CASE LAW:

### *Coerced Confessions:*

#### *Crowe v. County of San Diego* (9<sup>th</sup> Cir. Jan. 27, 2010) 593 F.3<sup>rd</sup> 841

**Rule:** Use of a coerced confession in certain pretrial hearings triggers a Fifth Amendment violation. Coerced confessions might also be a 14<sup>th</sup> Amendment Due Process violation.

**Facts:** Sometime during the night of January 20, 1998, someone entered the residence of Stephen and Cheryl Crowe in Escondido, California, and brutally stabbed to death their 12-year-old daughter, Stephanie, in her own bedroom. The murder weapon, determined to be a 5 to 6 inch knife, was not found. The subsequent investigation by detectives of the Escondido Police Department centered on Stephanie's 14-year-old brother, Michael. It eventually included as well Michael's friend, 15-year old Aaron Houser, and a third juvenile, Joshua Treadway. All three juveniles were individually interrogated at various times over the next few days. All three boys were subjected to long, exhaustive interrogations that included a number of interrogation techniques. Such techniques included falsely telling them that the police had evidence connecting them to the murders. It also included the supposed use of a "computer voice stress analyzer" which indicated when they were lying. They were also told to explain the existence of certain evidence, but that "I don't know" was not an acceptable response. Lastly, they were asked: "If you did kill Stephanie, how would you have done it." At least initially, all three boys adamantly denied any complicity in Stephanie's death. After a *Miranda* admonition and four separate interrogations, Michael eventually admitted that; "I think I did it," although he continued to claim that he really couldn't remember. After two short interrogations, Aaron was eventually arrested at school and interrogated a third time for 9½ hours. Although making some admissions, Aaron continued to maintain his innocence despite the use of the same interrogation techniques that were used with Michael. He wasn't advised of his *Miranda* rights until the end of this last interrogation. Joshua was interrogated three times, the second one lasting 13½ hours and the third another 12 hours. Joshua eventually confessed to being involved in the murder, telling detectives that Aaron had given him the knife used to kill Stephanie. A knife, fitting the description of the murder weapon, was found under Joshua's bed. Joshua's confession, however, was contradictory and inconsistent with other information the police had. He also was not advised of his *Miranda* rights until the end of the final interrogation. Incriminating statements from each of the boys were used in court at three separate pre-trial hearing; i.e., at a "*Dennis H.* hearing" (a hearing within the first 48 hours of custody to determine whether a minor should be declared a ward of the court; *In re Dennis H.* (1971) 19 Cal.App.3<sup>rd</sup> 350.), during grand jury proceedings, and at a W&I 707 hearing, to determine whether the boys should be tried as adults. Prior to trial in adult court, a motion to suppress was held. The trial court suppressed most of Michael's statements on the grounds that by telling him that if he confessed, he would receive treatment rather than punishment; i.e., an "offer of leniency." Aaron's and Joshua's statements were suppressed due to coercion and the lack of a timely *Miranda* admonishment. Then, on

the eve of trial, traces of Stephanie's blood was forensically found on a shirt seized from a transient, Richard Tuite, who had been seen acting erratically the night of the murder in the Crowes' neighborhood, and later detained and released by the police. Charges were dismissed as to each of the boys. Tuite was later tried and convicted of voluntary manslaughter. The Crowe family sued the Escondido Police Department as well as the County of San Diego, and all those who were involved, in state court. The matter was later moved to federal court where the district court judge granted summary judgments (i.e., dismissal without trial) in favor of various civil defendants, dismissing these defendants from the suit on qualified immunity grounds. The Crowes and the Housers appealed. (Treadway did not.)

**Held:** The Ninth Circuit Court of Appeal reversed in part and affirmed in part. On appeal, various issues were decided. (1) *Fifth Amendment self-incrimination*: Michael and Aaron argued that the interrogating officers violated their Fifth Amendment right against self-incrimination. In response, the civil defendants noted that the U.S. Supreme Court has ruled that mere coercion does not constitute a Fifth Amendment violation absent the actual use of the coerced statements in a "criminal case." (*Chavez v. Martinez* (2003) 538 U.S. 760.) Some courts have interpreted this to mean that the statements must actually be used in trial. However, the Ninth Circuit had previously ruled that certain pretrial proceedings qualify as a part of the "criminal case." (See *Stoot v. City of Everett* (9<sup>th</sup> Cir. 2009) 582 F.3<sup>rd</sup> 910.) In this case, any one of the three pretrial hearings in which the plaintiffs' statements were used (i.e., the *Dennis H.* hearing, grand jury proceedings, and W&I § 707 hearing) qualify. Further, the officers are not entitled to qualified immunity for this Fifth Amendment violation, the rule against coercive statements being clearly established. (2) *Due Process*: Michael and Aaron further argued that their 14<sup>th</sup> Amendment substantive "due process" (i.e., being deprived of "life, liberty or property without due process of law") were violated by the coercive interrogations. Here, the Court noted that physical violence is not required before a court may find a due process violation in a coercive interrogation. Further, the constitutionality of interrogation techniques is to be judged by a higher standard when the victim is a minor. In pretrial motions on this issue, the plaintiffs presented expert testimony to the effect that Michael's interrogation was "the most psychologically brutal interrogation and tortured confession that I have ever observed," and an "extreme form of emotional child abuse." Per the Court: "One need only read the transcripts of the boys' interrogations, or watch the videotapes to understand how thoroughly the (civil) defendants' conduct in this case 'shocks the conscience.'" Finding the interrogations to have been coercive, and in violation of the 14<sup>th</sup> Amendment due process protections, the Court further found that the civil defendants were not entitled to qualified immunity on this violation as well. The trial court's grants of summary judgment on these two issues in favor of the civil defendants were reversed, and remanded for further proceedings.

**Note:** The Court made other rulings of lesser importance, upholding some of the trial judge's rulings and reversing on others (e.g., legality of the arrests made, search warrants issued, strip searches performed, whether the Crowe family had freely and voluntarily consented to strip searches, and whether the plaintiffs were defamed). None of these issues are really all that important, at least for our purposes here. The importance of this

case, obviously, is the degree of pressure put on the three juvenile suspects, as well as at what point “coercion,” or a *Miranda* violation, becomes a Fifth Amendment violation warranting the imposition of sanctions on the officers involved. The Ninth Circuit’s *Stoot* decision found a “criminal case” to include those pretrial hearings where coerced statements have been relied upon (1) to file formal charges against the declarant, (2) to determine judicially that the prosecution may proceed, and/or (3) to determine pretrial custody status. As for whether the officers in this case did in fact overstep the bounds of good interrogative technique, neither the Court, nor I, have included all the details of what these boys were subjected to. I’ve seen the tapes and read most of the transcripts. But I must reserve comment on this issue so long as this civil suit is still pending. Let’s just leave it at this final piece of advice: *Our goal is not necessarily to obtain a confession. It’s to determine where the truth lies.*

***Anonymous Tips by In-Person Informants:***

**United States v. Palos-Marquez, (9<sup>th</sup> Cir. Jan. 19, 2010) 591 F.3<sup>rd</sup> 1272**

**Rule:** An in-person informant, even though unidentified, provides the necessary indicia of reliability justifying an investigatory stop, particularly when corroborated by other circumstances.

**Facts:** U.S. Border Patrol Agent Staunton was eastbound on Otay Lakes Road, an east-west road that parallels the U.S./Mexican border, and about five miles north of it. Staunton knew this road to be in an area where alien smuggling was common. As Staunton rounded a corner, a westbound dark Dodge Ram pickup truck came at him in his lane while attempting to pass a UPS delivery truck. Staunton swerved to avoid hitting the pickup. As he did so, the UPS truck driver gestured to get Staunton’s attention regarding the pickup. Given the pickup’s atypical speed, coupled with the UPS driver’s gestures, Staunton believed that the pickup might be carrying contraband. Staunton radioed to Border Patrol intern agents Simon and Martinez, who were driving further west, to watch for the pickup. Within seconds, Simon radioed back that he had the pickup in sight. A minute later, the UPS driver pulled over at Simon’s location and told him that he’d observed the pickup load up with several suspected illegal aliens. Simon reported this information to Staunton, but failed to obtain the UPS driver’s name or license number. With the above information put out to other agents, Agent Padron observed the pickup traveling westbound, still at a high rate of speed. Plain clothes agents in an unmarked car also observed the pickup, pulling up to it at a red light. These agents reported that its occupants appeared “nervous and shaky.” Agent Padron then initiated a traffic stop of the pickup. Defendant was found to be driving with four illegal aliens inside. Charged in federal court with transporting illegal aliens, defendant moved to suppress, arguing that he was stopped and detained without sufficient reasonable suspicion. After the trial court denied his motion, defendant pled guilty and appealed.

**Held:** The Ninth Circuit Court of Appeal affirmed. An investigatory stop and detention is lawful so long as the officer acts with “a reasonable suspicion supported by articulable facts that criminal activity is afoot.” As a general rule, anonymous tips, by themselves,

do not supply the necessary reasonable suspicion. However, when the tip is provided in a face-to-face encounter, even though the informant is unidentified, there is something more than a mere anonymous tip. The in-person nature of such a tip gives it a substantial indicia of reliability for two reasons: (1) An in-person informant risks losing anonymity and being held accountable for a false tip. (2) An officer can observe the informant's demeanor and determine whether the informant seems credible enough to justify immediate police action without further questioning. In this case, we have such an in-person tip combined with Agent Staunton's observations which, based upon his training, experience, and knowledge of the area, were sufficient to justify his conclusion that the occupants of the pickup truck were involved in criminal activity. The UPS driver's information merely explained what the nature of that criminal activity might be. Under these circumstances, the investigative stop of defendant's vehicle was legally justified.

**Note:** The Court falls a little short of telling us that the UPS driver's information, being relayed to the agents in a face-to-face contact, would have been sufficient *by itself* to justify an investigative stop. But they do say that the in-person nature of the contact provides a "*substantial indicia of reliability*." And I could argue in court with a straight face that that means "*reasonable suspicion*." But in this case itself, there was a significant amount of corroboration for the UPS driver's information. So don't take this as legal authority for allowing detentions when based upon an anonymous informant's uncorroborated information even though provided to law enforcement in a face-to-face contact. It's always better for the field officer to take the extra couple of seconds, if at all possible, to get the informant's identification information. That way we can bring him into court and argue that he qualifies as a "*citizen informant*" whose uncorroborated information generally *is* enough to establish a reasonable suspicion.

***DNA Arrest Warrants:***

***People v. Robinson* (Jan. 25, 2010) 47 Cal.4<sup>th</sup> 1104**

**Rule:** Arrest warrants describing the suspect by his DNA, when his identity is otherwise unknown, are lawful. A good faith violation of the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (P.C. §§ 295 et seq.), by collecting a sample from a prisoner who does not qualify for inclusion in the DNA database, does not necessarily require suppression of the result.

**Facts:** Deborah L. was sexually assaulted (i.e., rape, rape by foreign object, oral copulation) at knife-point in her own bedroom in 1994. The assailant left semen on the victim and at the scene. The assault was reported immediately to the police and a standard "rape kit" was prepared, but the crime went unsolved for years. Six years later, the preserved semen was used to generate a genetic profile of the unknown male suspect, determined by the presence or absence of markers at 13 distinct DNA loci. Four days before the six-year statute of limitations (P.C. § 800) was to expire, a felony complaint was filed in this case against "John Doe, unknown male," describing him by his 13-loci DNA profile. A trial court found probable cause in the complaint and an arrest warrant was issued for "John Doe," incorporating by reference that DNA profile. It was noted

that this particular genetic profile was unique to the point where it would occur in approximately one in 21 sextillion of the Caucasian population, one in 650 quadrillion of the African American population, or one in 420 sextillion of the Hispanic population. The issuance of this arrest warrant served to toll the statute of limitations (i.e., it stopped it from expiring; see P.C. § 804(d)). After the statute of limitations would have run except for the issuance of the arrest warrant, a criminalist searching the state's DNA database, made a "cold hit" match between the 13-loci DNA profile in the John Doe arrest warrant and defendant's DNA, as determined in by a blood test collected from him in March, 1999. The DNA sample was collected from defendant pursuant to the newly enacted DNA and Forensic Identification Data Base and Data Bank Act of 1998 (P.C. §§ 295 et seq.). Pursuant to this act, as originally enacted (having been amended since then), any person convicted of a crime as specified by the Act (i.e., a "qualifying offense") was required to provide, among other samples and impressions, two specimens of blood. (Former P.C. § 296(a)(1)) Defendant, having just been convicted of two non-qualifying misdemeanors, and scheduled to return to prison for a parole violation, was mistakenly believed to have had a qualifying prior conviction. As a result, he was required to provide two blood samples. Defendant's DNA samples were added to California's DNA data bank. Based upon the matching of this mistakenly collected DNA sample with the DNA left at the scene of the assault on Deborah L, an amended arrest warrant with defendant's real name was issued and executed by arresting him. Defendant was thereafter charged with the 1994 sexual assault of Deborah L. He filed a motion to suppress his 1999 blood samples and the resulting DNA test evidence. His motion was denied and he was tried and convicted. Sentenced to 65 years in prison, he appealed.

**Held:** The California Supreme Court, in a 5-to-2 decision, affirmed. Among the arguments raised by defendant on appeal was that the taking of blood samples from him pursuant to authority of the DNA and Forensic Identification Data Base and Data Bank Act of 1998, when he did not have any of the necessary qualifying prior convictions to make him subject to the Act, constituted a Fourth Amendment violation. Per defendant, his blood test results and the matching of his DNA to the crime scene should have been suppressed. The Court disagreed on two grounds. First, the mistaken collection of a blood sample from defendant, under the circumstances, was not a Fourth Amendment violation. Although nonconsensual blood extractions are searches entitled to Fourth Amendment protection, whether or not they violate the Constitution depends upon whether the search in question is reasonable under the circumstances. Blood tests are commonplace today. And defendant, as a convict, had a reduced expectation of privacy. As such, defendant did not have a Fourth Amendment constitutional right to prevent state authorities from collecting a blood sample even though it was taken in violation of a state statute as it existed at the time. Secondly, even if it were a Fourth Amendment violation, the rule today is that a constitutional violation does not always require the suppression of evidence. The Exclusionary Rule applies only "where its deterrence benefits outweighs its 'substantial social costs.'" The extreme sanction of suppressing evidence should be used only when the government's illegal acts are deliberate, reckless, or grossly negligent, or in some circumstances, involves recurring or systematic negligence. In this case, evidence was presented to the effect that the government officials who mistakenly collected defendant's blood samples were trying their best to

correctly and effectively implement a new and confusing set of statutes. Safeguards were set up to prevent the mistaken collection of blood samples and/or their inclusion in the DNA data base. In defendant's case, his prior criminal history was merely misinterpreted by those tasked with enforcing the new statutes. There was no deliberate, reckless or grossly negligent acts on their part, nor was it shown that the problem is recurring or a part of some systematic negligence. As such, use of the Exclusionary Rule is not called for in this case. Therefore, defendant's DNA was properly used by the trial court to connect him to the sexual assault of Deborah L. Defendant, however, also challenged the legality of using one's DNA profile in an arrest warrant for the admitted purpose of stopping the running of the statute of limitations on his crimes. Specifically, defendant argued that using nothing more than a DNA profile fails to satisfy the "particularity" requirement of the Fourth Amendment. An arrest warrant may only issue upon the magistrate being satisfied that an offense has been committed and that there is reasonable grounds to believe that the defendant has committed it. (P.C. § 813(a)) Further, an arrest warrant "shall specify the name of the defendant or, if it is unknown, . . . the defendant may be designated therein by any name." (P.C. § 815) Elsewhere it is provided that a "fictitious name" may be used if his true name is unknown. (P.C. § 959) And, of course, the Fourth Amendment requires that no warrants may issue except upon probable cause, "particularly describing . . . the persons to be seized." In other words, there has to be some "meaningful restriction" upon who may be seized under the authority of the warrant. Here, the warrant was initially issued in the name of "John Doe," as allowed for under the above statutes. To meet the "*particularity*" requirement, defendant's DNA profile was specifically listed. There was no more particular, accurate, or reliable means of identification of the suspect at the time the warrant was issued. And in fact, use of the DNA profile, given the uniqueness of one's DNA, is far more precise than using a person's physical description or even his name. Further, the use of a fictitious name and description is further authorized by California statutes (see P.C. §§ 959, 960.) And, per P.C. 804(d), the issuance of an arrest warrant that meets the requirements of these statutes is enough to stop the running of the statute of limitations. For purposes of the Fourth Amendment, therefore, use of a DNA profile in an arrest warrant, at least until the suspect is identified, is lawful. Lastly, the Court found that such a DNA arrest warrant does not violated defendant's "due process" rights.

**Note:** While this decision is not a real surprise, it is good to have it in writing from our own Supreme Court. And it's consistent with what little other case law is out there, at least on the issue of whether John Doe/DNA profile arrest warrants are lawful. (see *State of Wisconsin v. Dabney* (2003) 254 Wis.2<sup>nd</sup> 43.) But on the issue of whether it is a Fourth Amendment violation to seize a DNA sample from a prisoner without an authorizing statute or a warrant, the Ninth Circuit disagrees. (See *Friedman v. Boucher* (9<sup>th</sup> Cir. 2009) 580 F.3<sup>rd</sup> 847.) In *Boucher*, however, the suspect was a pre-trial detainee while defendant here was a sentenced convict with a seriously diminished expectation of privacy. But either way, don't take this case as your authority to ignore the dictates of the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (P.C. §§ 295 et seq.) when collecting DNA samples and submitting them for inclusion in the data base. Whether or not violating the Act is a Fourth Amendment issue, we always have a professional and ethical duty to follow the statutory law whenever possible.

***Miranda; Invocation of Rights by a Juvenile Asking for a Parent:***

**People v. Lessie (Jan. 28, 2010) 47 Cal.4<sup>th</sup> 1152**

**Rule:** A minor asking to speak with his father is not a per se *Miranda* invocation. Whether or not such a request is intended to be a Fifth Amendment invocation is dependent upon a consideration of the totality of the circumstances.

**Facts:** Sixteen-year-old defendant was an admitted gang member want-to-be. A runaway from his father's home in Vista, he openly associated with Oceanside gangs affiliated with the Crips. In particular, defendant was getting his gang training from a gangster named James Turner; aka, "Black Jack." According to defendant's later confession, Turner took him to a pre-planned confrontation with Rusty Seau (former Charger/Patriot linesman Junior Seau's cousin) to settle a dispute over some sort of slight given earlier that day. On the way, Turner gave defendant a pistol, telling him he "better shoot." Defendant described this as a sort of initiation into the gang, and that he believed he would be beaten or killed if he didn't comply. Seau and a companion were located, but they declined to fight. After Seau mocked Turner's gang affiliation, Turner attacked him. As Seau attempted to run away, Turner shouted at defendant to shoot. He did so, hitting Seau in the back and killing him. Defendant was arrested at his aunt and uncle's house in Hemet two and a half months later. Oceanside Police Department Detective Kelly Deveney spoke to defendant for about a half hour later, telling him he was under arrest on a juvenile detention order and that upon arrival at the Oceanside P.D. headquarters (an hour and a half away), he could make as many phone calls as he wished. Asked if there was anyone other than his aunt and uncle that he wished to notify, defendant said that he'd like to call his father, but that he didn't know the number. At the station, defendant was given breakfast and then questioned. After some small talk, Detective Deveney told defendant that she had his father's phone number and asked whether they (the officers) should call him. Defendant answered that he wanted to call his father himself. Deveney's response: "Okay. So in the meantime, . . ." She then proceeded to give defendant his *Miranda* rights, asking him after each separate phrase whether he understood his rights. Defendant said that he did. Without an express waiver, Deveney questioned him about the murder of Rusty Seau. Defendant initially denied being involved but eventually admitted to being the shooter. Near the end of the interrogation, defendant was again asked if he wished to call his father, to which he said he did. But he was again put off ("We're charging (the phone) up so you can call your dad in privacy") while more questions were asked. He was later questioned a second time in Juvenile Hall and confessed a second time. Tried as an adult, defendant made a motion to suppress his confessions arguing that per California Supreme Court authority (i.e., *People v. Burton* (1971) 6 Cal.3<sup>rd</sup> 375.), never specifically reversed by the U.S. Supreme Court, defendant's request to call his father constituted an invocation of his rights under *Miranda*. The trial court denied defendant's motion ruling that *Burton* was no longer good law, and that under the circumstances, defendant's request to call his father was not intended to be an invocation of his Fifth Amendment rights. Convicted of second degree murder, defendant's conviction was affirmed by the Fourth District Court of Appeal. Defendant petitioned to the California Supreme Court.

**Held:** The California Supreme Court unanimously affirmed. The Court noted that it had in fact ruled in *Burton* that a juvenile's request for a parent was presumed to be an invocation of his Fifth Amendment self-incrimination rights. The Court further noted that it was true that *Burton* had never specifically been overruled. But the Court further pointed out that eleven years after *Burton*, the California Voters passed Proposition 8, the "Truth in Evidence" initiative, amending the California's Constitution to, in effect, eliminate any exclusionary rules that are not based upon the federal Constitution. So whenever the U.S. Supreme Court interprets the 4<sup>th</sup> or 5<sup>th</sup> Amendments differently than California has, the California rule must fall. Subsequent to *Burton*, the U.S. Supreme Court decided *Fare v. Michael C.* (1979) 442 U.S. 707. In *Michael C.*, the High Court ruled that a juvenile asking for his probation officer was not an effective invocation of his Fifth Amendment rights. While *Michael C.* did not specifically overrule *Burton*, it did note that *only* a request for an attorney constitutes a "per se" (i.e., automatic) invocation of a suspect's Fifth Amendment privilege. The Court further noted, however, that whether or not a request for a probation officer, "*or his parents,*" is, in fact, an invocation of his right to remain silent depends upon an evaluation of the totality of the circumstances. This includes a consideration of the juvenile's age, experience, education, background, and intelligence, as well as his capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. In this case, defendant said that he understood each of his rights. He had been through the criminal justice system before. He was 16 years old, educated up to the 10<sup>th</sup> grade, and had worked in retail stores. Despite the lack of an express waiver, he never made any attempt to invoke his right to counsel or silence. And, consistent with the trial court's ruling, there was no indication that his various requests to talk with his father were because of any uncertainty as to what he was doing. Under the circumstances, the trial court did not abuse its discretion in determining that defendant was not attempting to invoke his Fifth Amendment rights by asking to speak with his father.

**Note:** Some legal trainers have been telling you that a juvenile asking for a parent or other adult figure, since the decision in *Michael C.*, may simply be ignored; i.e., it is not an invocation. This case notes that the rule is not nearly so blunt. You can't just ignore a juvenile's request to talk to mom, or dad, or his P.O., or Father O'Malley, or whoever. Whether or not such a request is an invocation depends upon the circumstances: *Does it appear that this particular juvenile is asking for help in understanding what is going on or what should he do?* All *Michael C.* did for us was to eliminate California's stricter rule under *Burton* which made it a "per se" rule that asking for some adult was as good as asking for an attorney. The Court (and the trial court) was also somewhat critical of the detective's failure to honor defendant's request to use the telephone. W&I § 627(b) makes it mandatory for you to advise the juvenile of his right to make two telephone calls, and for him to be allowed to make those calls. And all this has to be accomplished within one hour after he is taken into custody except where physically impossible. The hour and a half ride to the station would excuse strict compliance in this case. But postponing his right to use the telephone until after the completion of the interrogation violated the section. Willfully failing to comply with 627(b) is a misdemeanor. But fortunately for this case, as noted by the Court, there is no suppression remedy.