The California Legal Update

Remember 9/11/2001, 12/7/1941; Support Our Troops; Support Our Cops

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THIS EDITION'S WORDS OF WISDOM:

> "*The problem with getting quotes from the Internet is you never know whether they're authentic*." (Abraham Lincoln)

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ADMINISTRATIVE NOTES:

Fourth Amendment Search & Seizure Outline; 18th Edition: The annual Fourth Amendment Search & Seizure training and reference Outline (with a separate Table of Contents) was made available to all *Update* subscribers on March 5th. If you didn't get it, or simply want it in "Word" format, I'll send it to you upon request. However, because it is quite lengthy (1,175 pages, plus a 93-page Table of Contents), I must caution you if you intend to print it out. In the interest of saving a few trees, it is perhaps best to merely save it to your computer and use it as a reference and/or to do word searches. Also, you have my advance permission to distribute it to others, and to use the contents of the Outline for any purpose you like short making a personal financial profit from it. Lastly, please report back to me any errors, depublished cases you might see, or suggestions for improvement. My goal is to make this Outline as complete, as accurate, and as useful as possible.

Correction to the Eighteenth Edition of the Fourth Amendment Outline: For those of you who received the March 5th notice of the availability of the Fourth Amendment Search and Seizure Outline (18th Edition), please note a correction on page 725 where I cite the case of *Kirkpatrick v. County of Washoe* (9th Cir. 2015) 792 F.3rd 1184. Not reflected in the initial copy of this Outline is that a rehearing was granted in that matter with a revised published en banc (11 justice) decision being issued at (9th Cir. 2016) 843 F.3rd 784. In the new decision, which is in fact briefed below beginning on page 6, the Ninth Circuit partially reverses the trial court's granting of summary judgment. For those of you who intend to ask me for an e-mail copy of the 18th Edition, per my offer above, or otherwise receive the Outline directly from me after March 5th, I've already made this correction in the updated copy.

Fifth Amendment/Miranda Outline; 4th Edition: I've also been asked about the annual Fifth Amendment, "*Miranda and the Law*" Outline I produce. I have the 3rd Edition of that Outline, published last June, still available if you don't already have it. The 4th Edition will be out in the Spring; around June of 2018. Although I try to keep the up-coming outlines up-to-date as new cases come out, it still takes me up to a month of concentrated effort to update the cites and reorganize the Outline itself. So I try to spread out the workload over the year.

CASES:

***Fourth Amendment Seizures of a Child*:**
***Fourteenth Amendment Deprivation of a Family Relationship*:**
***A Government Entity's Civil Liability for Failure to Train*:**

Kirkpatrick v. County of Washoe **(9th Cir. Dec. 9, 2016) 843 F.3rd 784**

Rule: (1) A parent's Fourteenth Amendment due process rights are violated by a government entity's warrantless taking of his or her child only if the parent has exerted up until then a full commitment to the responsibilities of parenthood, participating in the rearing of the child. (2) A child's Fourth Amendment seizure protections are violated by a government entity's warrantless taking of that child from the custody of her parents, absent a warrant or exigent circumstances. (3) A government entity may be civilly liable for its employee's constitutional violation where it is proven that there is a systemic failure to properly train its employees pursuant to an official policy of some nature.

Facts: Doper and useless human being Rachel Whitworth gave birth by cesarean section to her third child, B.W. on July 15, 2008 in Reno, Nevada. With B.W. being five weeks premature, Rachel admitted to using methamphetamine up until the baby's birth. B.W. in fact tested positive for methamphetamine at birth. Rachel's two prior children were already under the control of the Washoe County Department of Social Services ("DSS") with a permanent court-approved plan to terminate Rachel's parental rights pending.

When B.W. was born, the hospital contacted Rachel's DSS social worker who had the hospital place a hold on B.W. to prevent Rachel from leaving the hospital with her. The next day, Rachel was interviewed by the social worker who informed her of the hold, telling her that a protective custody court hearing was scheduled for the next day. On July 17, the hospital discharged two-day-old B.W. into DSS's care. DSS did not attempt to obtain a warrant before assuming custody of B.W. On July 18, the family division of Nevada's Second Judicial District Court held a protective custody hearing at which Rachel participated by phone from the hospital. The court determined that B.W. should remain in protective custody due to Rachel's ongoing drug use, finding reasonable cause to believe that continuation in Rachel's care was contrary to B.W.'s welfare.

Following this hearing, Rachel disappeared, making no further contact with her attorney or DSS. On July 28, 2008, DSS filed a petition alleging that B.W. was a child in need of protection. Hanging around during all this was Jamie Kirkpatrick, who believed that he might be B.W.'s biological father although he had no proof and did not sign an affidavit of paternity. Kirkpatrick first learned of DSS's involvement soon after they took custody of B.W. on July 17, 2008. A paternity test to determine whether he was in fact B.W.'s biological father was ordered by the court. The test later revealed that Kirkpatrick is

indeed B.W.'s biological father. He therefore petitioned the court for custody of B.W. and was subsequently reunified with the baby. Prior to that, in October, 2009, Kirkpatrick brought suit in federal court under 42 U.S.C. § 1983, as B.W.'s father and legal guardian, suing Washoe County, DSS, and the involved case workers for having removed B.W. from Rachel's custody without a warrant, alleging that "(B.W.'s) constitutional right to be with her parents was violated." The federal district court granted the defendants' (Washoe County, et al.) motion for summary judgment, in effect dismissing the lawsuit. Kirkpatrick appealed.

Held: An en banc panel (i.e., 11 justices), in a split (6-to-5) decision, reversed in part and affirmed in part. The issue centered on the legal effects of DSS, as a government entity, having taken B.W. away from Rachel without a court order. The Court found two constitutional principles to be involved: *First*, it is a "well-elaborated constitutional right" for parents to live with their children, this right being "an essential liberty interest protected by the *Fourteenth Amendment's* guarantee that parents and children will not be separated by the state without *due process* of law (e.g., by court order) except in an emergency." *Secondly*, children have a right under the *Fourth Amendment* to be secure in their persons against unreasonable seizures, absent a warrant or exigent circumstances.

(1) *Fourteenth Amendment Due Process*: With the above principles in mind, the Court first analyzed whether Kirkpatrick's 14th Amendment due process rights had been violated by DSS's warrantless seizure of B.W. Remembering that Kirkpatrick at the time of the seizure had no proof that he was B.W.'s biological father, or had yet assumed any responsibility for the care of the child, the Court held that his due process rights to a family relationship had *not* been violated. It is not necessary that the parent have full legal and physical custody of the baby, or that there necessarily be a "full-blown . . . biological connection between parent and child," for the 14th Amendment to apply. What is necessary is that the parent, including an unwed father such as Kirkpatrick, to "demonstrate a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child." It is "his interest in personal contact with his child (that) acquires substantial protection under the due process clause."

At the time D.W was taken by DSS, Kirkpatrick's due process rights concerning B.W. were "negligible." It was not until the results of the court-ordered genetic test, confirming his paternity, that Kirkpatrick knew that he was B.W.'s biological father and took steps to enforce his rights. Until that point, Kirkpatrick took no steps to take responsibility for B.W.'s welfare. Consequently, Kirkpatrick was not a parent to B.W. in her first few days of life in the constitutional sense, and his substantive rights were not violated when the social workers placed her in protective custody without a warrant. The trial court, therefore, was correct in granting DSS's summary judgment motion on this issue.

(2) *Fourth Amendment Seizure*: It was an issue whether Kirkpatrick's lawsuit was intended to enforce his own rights, or B.W.'s rights, under the Fourth Amendment. Although not well worded (i.e., a case of "*linguistic imprecision*"), the Court here ruled that it was B.W.'s Fourth Amendment rights that were in issue. It is a rule that the Fourth Amendment requires government officials to obtain prior judicial authorization before removing a child from the custody of her parent, at least absent exigent circumstances. (*Rogers v. County of San Joaquin* (9th Cir. 2007) 487 F.3rd 1288.) Exigent circumstances are at issue "if the information the (government officials) possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury."

If a warrant can reasonably be obtained without risking imminent danger to a child, the government official must do so prior to seizing the child. DSS did not obtain a warrant authorizing B.W.'s seizure while, arguably, the agency had the opportunity to do so without risking harm to the baby. The only possible danger to B.W. might be if Rachel attempted to leave the hospital with her. Under the facts of this case, however, with Racheal recovering from cesarean section surgery and not going anywhere for at least a few days, and with her fully cooperating with the DDS officials while being closely monitored by hospital staff, the Court held it was at least contestable whether an exigent circumstance existed. However, the Court found that summary judgment for DSS and its employees was appropriate in this case, as was ruled by the trial court, in that although a warrant perhaps should have been obtained, the civil defendants cannot be held liable for violating this rule without some clearly established judicial guidance as to what constitutes exigent circumstances. The Court could find no such "clear guidance" in the prior case law. Summary judgment, therefore, was appropriate.

(3) *Monell Liability*: Pursuant to *Monell v. Department of Social Services of the City of New York* (1978) 436 U.S. 658, a government entity may be civilly liable when the plaintiff's constitutional injury (i.e., the warrantless seizure in this case), committed by an employee, was the result of a "systemic failure to train" its officers, "pursuant 'to (an) official . . . policy of some nature.'" Liability exists only where the failure to properly train its employees reflects a "conscious choice" by the government. "In other words, the government's omission must amount to a 'policy' of deliberate indifference to constitutional rights." In proving such a "deliberate indifference," a "showing of 'obviousness' can substitute for the pattern of violations ordinarily necessary to establish municipal culpability."

Kirkpatrick alleged here that Washoe County did not properly train its people that absent an exigency, a warrant was necessary. In fact, several of the DSS case workers involved in this case testified that they were unaware, and were never trained, that a warrant was necessary. There was also testimony that a child would likely be removed despite the lack of a warrant even though no exigency existed at the time. Also, the County admitted

that it does not have a formal policy or set procedures for obtaining warrants to remove children from their parents. And while the lack of a formal policy does not necessarily mean that a constitutional issue exists, in this case, with evidence that the Fourth Amendment was in fact violated, along with testimony that there was no policy for obtaining warrants before removing children from parental custody, and that it was the regular practice of the DSS employees to effect such removals regardless of whether there was a risk of imminent bodily harm, the circumstances raise "more than a spectre of deliberate indifference by Washoe County."

Accordingly, the Court ruled that a question of material fact existed regarding whether Washoe County maintained an unconstitutional, albeit unofficial, policy of conducting warrant seizures even in the absence of exigent circumstances. The Court therefore reversed the trial court on this issue, finding the granting Washoe County's summary judgment motion to be "inappropriate."

Note: The dissenting opinions are all over the place, some arguing that summary judgment was appropriate as to all issues, some the opposite, and some in between. That tells you that there is little, if any, real consensus among the Ninth Circuit Appellate Court justices on the issues raised here. But the bottom line ruling from the court majority makes for a good general rule to attempt to abide by: If you intend to take a child from the custody of his or her parents or legal guardian (whether you represent a DDS-type agency, or as a patrol officer responding to a radio call), thus potentially interfering with someone's "*parental custody*," it is best to first obtain a search warrant (to look for and/or seize the child, perhaps along with evidence of an alleged child abuse or child neglect that's the source of the problem) unless you can clearly articulate an exigency; i.e., that a failure to effect an immediate seizure puts the child's welfare at serious risk because there exists "reasonable cause to believe that the child is in imminent danger of serious bodily injury."

Note, however, that "imminent" is the operative word here. The typical "dirty house" anyone in law enforcement has the occasional misfortune of running across is *not* likely enough to constitute an exigency excusing the lack of a warrant. As the Court noted at page 791, citing *Rogers*, *supra*, at pp. 1294-1295; "(b)ottle rot, malnourishment, and disorderly home conditions *do not* present an imminent risk of serious bodily harm" (emphasis added), while the possibility of renewed beatings or child molestation might. So while your instincts may cry out to rescue a child from a despicable home situation, based upon your own personal standards, it may not be enough of an exigency to allow for a warrantless seizure. For myself, given the lack of appellate consensus (thus providing a qualified immunity argument), I would tend to err on the side of caution in close cases and just take the child. The fallout from acting too soon will be minimal compared to not acting at all and finding out the child died or suffered serious injury later.

***Threats of the Death Penalty and Offers of Leniency*:**
***Youth and Length of an Interrogation as Related to Voluntariness of a Confession*:**

People v. Winbush **(Jan. 26, 2017) 2 Cal.5th 402**

Rule: Promising a murder suspect leniency, telling him that he can avoid the death penalty by cooperating, will make a resulting confession involuntary and subject to being suppressed. Defendant's youth, given his criminal history, and the length of the interrogation, with numerous breaks and all defendant's personal needs being met, were not sufficient in this case to render his confession involuntary.

Facts: Released in December, 1995, after having served four years in the California Youth Authority (i.e., "CYA," since renamed the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, per W&I Code § 1000) for auto theft, 19-year-old defendant Grayland Winbush, along with co-defendant Norman Patterson, visited long-time acquaintance Mario Botello at Botello's Oakland apartment. Being released from custody only ten days earlier, and thus on parole, defendant had to break off an electronic monitoring ankle bracelet to leave his own residence. Botello was a small-time marijuana dealer who lived with his girlfriend, 20-year-old Erika Beeson.

Sitting around smoking marijuana, defendant noticed Botello's shotgun in the living room. He asked Botello if he couldn't find him a gun so he could rob drug dealers. Botello instead gave defendant $40 and offered to help him find a job. Not wanting any part of this plan, defendant continued to pester Botello over the next couple of days to get him a gun while also asking him if he knew any drug dealers he could rob. Finally, on December 22, defendant and Patterson went to Botello's apartment ostensibly to obtain a firearm but actually intending to rob Botello. Having been warned that they were coming, Botello left the apartment, leaving Beeson to tell defendant that he wasn't available. Beeson inadvisably let defendant and Patterson into the apartment where they started ransacking the place, stealing money, marijuana, stereo equipment, and Botello's shotgun.

Becoming irritated because Beeson apparently did not take the robbery seriously, both defendant and Patterson used defendant's belt to choke her into near unconsciousness. At some point, Patterson struck Beeson in the face with the barrel of Botello's shotgun. Using a butcher knife Patterson retrieved from the kitchen, defendant then stabbed the still-breathing Beeson some nine times about the face, shoulder, and neck until she was dead. Upon returning later, Botello found Beeson's dead body in their apartment and called the police. He told them that he suspected defendant and Patterson were responsible. A parole search was done at defendant's residence where they found that his ankle bracelet had been disabled on the day of the murder. But no other evidence was found connecting defendant to the murder and not yet ready to question him, he was released.

On April 4, 1996 (inexplicably still not questioned about the murder), defendant was arrested for robbing a gas station. He subsequently pled guilty to that charge and remained in custody. Three weeks later, Patterson was also arrested following another gas station robbery. A search of his residence resulted in the recovery of Botello's stereo equipment and his shotgun. After Patterson confessed to the robbery, he was turned over to the homicide detectives. Waiving his *Miranda* rights, Patterson admitted to being involved in Beeson's murder, claiming that defendant had bullied him into it. With this information, the detectives *finally* (on May 2nd, almost 4½ months after the murder) decided to question the still-in custody defendant about Erika Beeson's murder.

In preparation for what turned out to be a 15-hour interrogation, defendant was placed in an interview room without handcuffs. About an hour later, the investigators began the interview which, at least initially, was unrecorded. Defendant was immediately advised of his *Miranda* rights and waived them, both orally and in writing. Altogether, defendant spoke to the investigators from 11:07 a.m. until 2:00 a.m. the next morning, when he finished giving his final recorded statement about the crimes. Although overall lengthy, the interview was conducted in relatively short sessions, typically about an hour to an hour and a half each, with lengthy breaks between each session; i.e., 60, 40, 45, 10, and 90 minutes, respectively. Defendant was given food, drink, and access to a bathroom. No physical force was used during the interview and no threats or promises were made to induce cooperation.

Defendant initially denied any involvement in Beeson's murder. However, after showing defendant a picture of the in-custody Patterson and playing four or five minutes of the recording of Patterson's statements (which did not include any details of the homicide), "defendant's countenance changed noticeably," and he began to weaken. Cussing at Patterson for having talked, and lamenting that he might get the death penalty for what he did, defendant began to incriminate himself (e.g., "*I admit I was there*"; "*If I get the death penalty, I get it*"; "*Once I got there, it all went sour*"; "*I have to play it out*"; and "*I'm f----d*."). It wasn't until this point during a 90-minute break that a tape recorder was finally set up, although surreptitiously. Defendant thereafter confessed to murdering Beeson, giving the details of the homicide and commenting afterwards; "*Man, I get this off my chest, man*."

After another short break, defendant was readmonished, waived his rights again, and fully confessed a second time with a tape recorder set out on the table. In a monitored phone call to his mother, defendant told her that he had murdered a woman. He then confessed two more times to a deputy district attorney, with each recorded confession being preceded by a new *Miranda* admonishment and wavier. Defendant later admitted in testimony that he was not harmed or threatened during the interview, and his physical needs were provided for. Although, he claimed in testimony that the detectives threatened him with the death penalty, the trial court judge believed the detectives' testimony that they never discussed potential penalties with him and that it was defendant

himself who brought up the subject of the death penalty. Both defendant and Patterson were found guilty of all charges and allegations in a joint trial. Patterson was sentenced to life without parole. Defendant was sentenced to death. Defendant's case was automatically appealed to the California Supreme Court.

Held: The California Supreme Court unanimously upheld defendant's conviction and sentence. Among the issues on appeal was the admissibility of defendant's confession. Specifically, defendant argued that his statements to investigators were involuntary because they were induced by "the intentional application of psychological pressure" and a promise of leniency to avoid the death penalty. The basic legal principles are well settled: "State and federal constitutional principles prohibit a conviction based on an involuntary confession. 'The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made.' In determining whether a confession was voluntary, '"[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne."' 'To be considered involuntary, a confession must have resulted from coercive police conduct rather than outside influences." "A confession's voluntariness depends upon the totality of the circumstances in which it was made.

Relevant factors include: 'the crucial element of police coercion; the length of the interrogation; its location; its continuity' as well as 'the defendant's maturity; education; physical condition; and mental health.'" (Citations omitted) Defendant's primary contention was that he had been threatened with the death penalty with the suggestion that he could avoid this extreme punishment by confessing. Even though mere references to the death penalty do not necessarily render a statement involuntary, confessions that are procured by such threats have been held to be inadmissible. But a constitutional violation arises "only where the confession results directly from the threat [capital] punishment will be imposed if the suspect is uncooperative, coupled with a 'promise [of] leniency in exchange for the suspect's cooperation,'" In this case, evidence related to whether the death penalty was discussed were conflicting. Defendant testified that the investigators offered to take the death penalty off the table if he cooperated.

The investigators both testified that it was defendant himself who first mentioned the death penalty, and that they themselves never discussed with him the potential punishments. The trial court specifically ruled that the investigators' account was to be believed. The Supreme Court found that the trial court's conclusions on this issue were supported by substantial evidence. The Court therefore ruled that defendant's statements were not coerced by express or implied promises of leniency. The Court also considered defendant's youth, noting that he had extensive experience with the criminal justice system, having been in trouble beginning in his early teens. The Court lastly rejected defendant's argument that the length of the interrogation (15 to 16 hours) resulted in an involuntary confession. Noting that defendant was accorded numerous breaks with all his personal needs (food and access to a bathroom) being met, and that there was no

evidence that the breaks were used to "exploit any 'slowly mounting fatigue,' the Court found no coercion. Defendant's conviction and sentence, therefore, was upheld.

Note: Some of this defendant's arguments, such as those related to the offer-of-leniency/death penalty issue, would have been non-issues had the detectives recorded defendant's interrogation from the beginning. Now, however (as of January 1, 2017), a murder suspect's interrogation, at least when it occurs in any "fixed place of detention," *must*, by statute, be electronically recorded. (P.C. § 859.5) The importance of this case centers on what was said before the tape recorder was turned on, specifically in relation to the death penalty. The death penalty is a subject best not even mentioned in any homicide interrogation. In fact, police interrogators should not be engaging in anything that even sounds like a plea bargain. But otherwise, except perhaps the length of time between the murder and the two defendants' eventual questioning (i.e., four and a half months), the investigators in this case handled everything appropriately.

As to how long it took to do this interrogation, it should be noted that the longer it takes to get a suspect into custody and questioned, the more difficult it will be to find all the relevant evidence (e.g., the shotgun and other fruits of the robbery in this case) and get a conviction. Also in this case, given the cold-bloodiness of this murder and defendant's eagerness to commit more robberies, we're lucky there weren't more homicide victims during that time span between Erika Beeson's murder and defendant's eventual interrogation. If there was a reason for the investigators' four-and-a-half month inaction in this case—and there may well have been (e.g., building probable cause)—it is not evident in the case decision.

***Dissuading Witnesses*:**

***Soo Park v. Thompson* (9th Cir. Mar. 14, 2017) 851 F.3rd 910**

Rule: Law enforcement officers encouraging witnesses not to testify for a defendant violates that defendant's Sixth (compulsory process) and Fourteenth (due process) Amendment rights.

Facts: On March 15, 2008, Juliana Redding was strangled to death in her home in Santa Monica. Santa Monica Police Department (SMPD) Detective Karen Thompson was assigned as the lead investigator in this murder. Kelly Soo Park's DNA was eventually discovered on Redding's body. Although apparently very little, if any, other evidence of Park's guilt existed, the Los Angeles County District Attorney's Office charged Park with Redding's murder. With trial set for May, 2013, the defense gave notice to the District Attorney that as a part of a "third party culpability" defense, they intended to call as a witness a woman named Melissa Ayala.

In interviews conducted by a defense investigator, Ayala had claimed that she was a former girlfriend of a man named John Gilmore. Gilmore was also victim Redding's

boyfriend at the time of Redding's death. Ayala told the defense investigator that on at least three occasions after Redding's murder, upon Ayala accusing Gilmore of killing Redding, he had choked Ayala, telling her as he did so on two of those occasions that he was "(g)oing to show (Ayala) how (Redding) felt." As a result of those incidents, Gilmore was in fact convicted of domestic violence-related charges. Ayala indicated to the defense investigator that although she was afraid of Gilmore, she was willing to testify to the above in Park's murder trial.

Subsequently, Detective Thompson contacted Ayala for an admittedly "non-investigatory purpose." It was alleged (but not yet proved) in this subsequent civil suit that Thompson attempted to dissuade Ayala from testifying for the defense, telling her that Gilmore was "really upset" about her proposed testimony. According to Park's allegations in the civil suit, Thompson also made false representations to Ayala about the nature of the evidence against Park. She also allegedly informed Ayala that she was not obligated to talk to the defense investigators if she did not want to. After speaking with Detective Thompson, Ayala refused any further contact with Park's investigators. She also reneged on her commitment to testify as a witness on Park's behalf. It was further alleged that Thompson and/or other Santa Monica police officers contacted the El Segundo Police Department and urged them to file charges against Ayala for an assault and criminal threats she allegedly made against Gilmore, based on an incident that had occurred the previous year. As a result, Ayala was in fact charged by the L.A. District Attorney's Office a few weeks before Park's scheduled murder trial with felony conspiracy, assault, and making criminal threats.

Ayala subsequently appeared in court pursuant to Park's subpoena. The Deputy District Attorney assigned to try Park for murder allegedly informed Ayala's defense attorney at that time that if he did not instruct Ayala to invoke her Fifth Amendment right against self-incrimination, that she would move to "recuse" him. Ayala therefore invoked her Fifth Amendment right and declined to testify. After Ayala refused to testify, the judge presiding over the criminal case precluded the defense from presenting any other evidence relating to Park's third-party culpability theory. Despite all this, however, Park was acquitted of all charges by the jury, her defense counsel having convinced the jury that Park's DNA could have been transferred to Redding's body by the actual killer when he wiped down the apartment to eliminate fingerprints or DNA evidence.

Despite being acquitted, Park thereafter sued Detective Thompson in federal court pursuant to 42 U.S.C. § 1983, for violating her civil rights by dissuading a defense witness from testifying in her defense. Specifically, Park alleged a violation of her Sixth Amendment right to compulsory process and Fourteenth Amendment due process right to a fair trial. She also alleged that Detective Thompson and other unknown SMPD officers conspired to violate her civil rights by causing the El Segundo incident to be filed against Ayala, resulting in Ayala's refusal to testify under the Fifth Amendment self-incrimination privilege. The federal district court judge granted the civil defendants' motion to dismiss the complaint as to both allegations. Park appealed.

Held: The Ninth Circuit Court of Appeal reversed, reinstating the lawsuit and remanding the case back to the federal trial court for further proceedings. In order to make out a cause of action under 42 U.S.C. § 1983, a plaintiff must plead and prove that (1) the civil defendant acted under color of state law, (2) thereby depriving the plaintiff of rights secured by the Constitution or federal statutes.

In the present case, it was undisputed that Detective Thompson acted under color of state law when she contacted Ayala. The only issue was whether Park had pleaded sufficient facts to state a claim for violation of her constitutional rights under the Sixth (compulsory process) and Fourteenth (due process) Amendments. The Compulsory Process Clause of the Sixth Amendment provides in part that, "(i)n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his (or her) favor." The right to compulsory process encompasses the right to offer the testimony of witnesses, and to compel their attendance, if necessary. As a fundamental element of due process of law, the right to compulsory process is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. The government violates due process when its conduct effectively drives a witness off the stand.

Prosecutors and/or law enforcement officers may violate these rules by instigating a "substantial government interference" with a defense witness's choice to testify. This doesn't give a criminal defendant the right to secure the attendance and testimony of any and all witnesses, but rather only witnesses in his favor. Thus, to establish a violation of his Sixth Amendment compulsory process right, a plaintiff must establish "some plausible showing" of how the potential witness's testimony would have been both material and favorable to his defense. Therefore, for Park's lawsuit to be allowed to go forward, she must have adequately pleaded (1) that Thompson's alleged conduct amounted to "substantial government interference" with a defense witness; (2) that Thompson's conduct caused Ayala not to testify; and (3) that Ayala's testimony would have been favorable and material. Drawing all inferences in her favor (as the Appellate Court must do in reviewing a motion to dismiss), the Court held here that Park had satisfied these three requirements.

A "substantial interference" is shown if it is proved that Detective Thompson engaged in misconduct that was causally connected to Ayala's refusal to testify. It constitutes "substantial misconduct" for a prosecutor or a law enforcement officer to "intimidate or harass the witness to discourage the witness from testifying." Although it is permissible for law enforcement to contact potential witnesses before trial for investigatory purposes, it is pushing the envelope when that witness is told that he or she has a right not to speak with representatives of the defense. If not worded carefully, such advice might result in a court finding that the potential witness was "threatened, coerced, manipulated, and/or intimidated" into not cooperating with the defense. (But, see *Note*, below.) In this case, Detective Thompson admitted to contacting Ayala for a non-investigative purpose, but instead for the specific purpose informing her of some of the possible negative

consequences of her testifying. For instance, Thompson specifically intimated to Ayala that if she chose to testify for the defense, Gilmore might physically retaliate. Also, Detective Thompson, as alleged, tried to convince Ayala that Park was in fact guilty and "not to believe" what the defense was telling her.

This all taken together can reasonably be interpreted as adequately pleading a deliberate intent on the part of Thompson to intimidate and otherwise attempt to persuade Ayala to refuse to testify for the defense. As for "causation," the civil suit trial court ruled that because other parties were involved in convincing Ayala to not testify (i.e., the prosecutor, defense counsel, and the criminal trial judge himself), it was not shown that Detective Thompson's acts were the actual cause. The Ninth Circuit disagreed, finding sufficient causation, linking Thompson's contact with Ayala, admittedly made for a non-investigatory purpose, to Ayala's subsequent refusal to testify. It matters not whether there might have also been other factors influencing Ayala's decision not to testify.

The civil defendants lastly argued that the plaintiff Park could not show how the loss of Ayala's testimony was material when she was acquitted of the criminal charges anyway. The Court ruled here that her acquittal is irrelevant, noting that "acquittal does not erase all injury but instead speaks only to the amount of damages." By Ayala refusing to testify, Park was deprived of her principal defense (i.e., "third party culpability") because of Thompson's alleged interference. Her attorney's argument that Park's DNA might have been on the victim's body only because the real killer (e.g., possibly Gilmore) had transferred Park's DNA to the victim was speculative at best, with no guarantees of convincing a jury. Park's Sixth and Fourteenth Amendment rights were violated at that point in time when Ayala declined to testify because of Detective Thomson's interference. Given that Park's principal defense was completely suppressed, Ayala's testimony was not somehow suddenly rendered immaterial at the moment of Park's acquittal. Lastly, the Court found sufficient evidence to support a "plausible" argument that Detective Thompson and/or other SMPD officers had conspired to violate Park's civil rights when they caused the El Segundo case to be filed against Ayala, necessitating Ayala's invocation of her Fifth Amendment self-incrimination rights. So the trial court was reversed on this issue as well.

Note: First, remember that the presumed facts as described above are only as alleged by the plaintiff, Kelly Soo Park, and not yet proved. So it is conceivable that Detective Thompson did absolutely nothing wrong here. But if Park's allegations are in fact true, one has to wonder why Detective Thompson hasn't been criminally charged with dissuading a witness, under P.C. § 136.1(a)(1). When prosecuting cases myself, I often informed victims and witnesses that they were not obligated to discuss the case with defense attorneys or investigators; a practice strongly discouraged by this Court. But I also emphasized that the choice was theirs, and that no one was telling them what to do. Lastly, I advised witnesses that if they did choose to talk with the defense, it might be a good idea to openly (not surreptitiously) record the contact, or at least have a third party

observe, if for no other reason than to insure nothing they say is taken out of context. In 30 years of prosecuting and advising investigators to give potential witnesses such an admonition, it never came back to bite me.