The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

> "*My dream is of a place and a time where America will once again be seen as the last best hope of earth*." (Abraham Lincoln)

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***Cases*:**

CASES:

***Confessions and Offers of Leniency*:**

People v. Falaniko **(July 29, 2016) 1 Cal.App.5th 1234**

Rule: Exhortations to a suspect to tell the truth and to cooperate, or even that a judge will take his cooperation into account, without more, do not constitute an illegal offer of leniency.

Facts: On the evening of April 17, 2012, defendant, along with a fellow Crips Westside Sons of Samoa (SOS) gang member, known as "Sonic," appeared in front of a Long Beach South Street home occupied by members of the a rival Bloods gang, the Westside Pirus. Defendant and Sonic opened fire on three individuals sitting on the front porch, wounding two of them. Defendant later admitted in a police interrogation that he fired about 30 rounds from an AK-47 with a 32-round magazine.

Three months later, on July 21, 2012, defendant and another gang member known as "Infant" were at Cherry Park in Long Beach where family members of some Bloods gangsters were having a family picnic. Defendant and Infant started shooting at people at random, wounding two and killing one. Defendant later made admissions that he was one of the two shooters. Finally, three and a half months later on November 3, 2012, defendant went to a bar named the Fantasy Gold Club in Harbor City around midnight and shot numerous rounds into the business. Two employees—a deejay and a security guard—were wounded.

Defendant later told police in an interview that he had earlier been chased and "beat up" by Westside Pirus gang members. When he heard two Samoans in the club "saying Blood stuff," indicting that they were Westside Pirus, he decided to retaliate. Defendant was arrested later in November and interrogated by investigators from the Long Beach Police Department gang detail and homicide unit, and later by an officer of the Los Angeles Police Department harbor gang division, making the above statements. With his statements used against him at trial, defendant was convicted and sentenced to prison. He appealed.

Held: The Second District Court of Appeal (Div. 1) affirmed in part and reversed in part (the reversed counts relating to improper jury instructions and not relevant to the issues discussed here). Among the issues defendant raised on appeal was the voluntariness of his incriminating statements to police, arguing that at least some of his statements were the product of an offer of leniency, and therefore coerced and inadmissible. As noted above, defendant was subjected to a series of interviews; some recorded and some not. He was first interviewed by detectives from the Long Beach Police Department gang and homicide units. He was first advised of his *Miranda* rights, waived them, and signed a written waiver form. He thereafter answered questions concerning the South Street and Cherry Park shootings.

Later, when asked, defendant confirmed that the police had made no promises or threats to him, and that all the detectives and officers with whom he had spoken had been respectful toward him and had treated him fairly. However, the second interview was conducted by an officer of the Los Angeles Police Department harbor gang division, among others, who asked him about the

Fantasy Gold Club shooting. During this interview, after noting that defendant, so far, had been cooperative, the officer added: "*From my experience, it's in your best interest to be cooperative with us today here, okay*?" Then, after rereading the *Miranda* rights to him, defendant was told: "*Remember, I told you it's in your best interest to be cooperative, all right*?" Shortly thereafter, defendant was asked if he wanted to tell the officers about anything in which he may have been involved. After defendant responded that he may have seen "some stuff," the officer responded: "*I have a feeling you know what I'm talking about, and I'm just hoping that you'll be honest with me, because it shows that you're being cooperative with our investigation. And with everything you got going on, the judge is going to look at that and say, you know, that you're being cooperative*." One of the Long Beach officers then added that they wanted defendant to be "*honest about exactly what happened*," but they were not going to tell him what to say.

Questioned in detail about the Fantasy Gold Club shooting, defendant admitted to being the shooter. On appeal, defendant argued this this type of questioning, inferring that a confession will somehow benefit him, constitutes an "offer of leniency." The Court disagreed. The law is well-settled that an involuntary confession may not be introduced into evidence at trial. 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 is voluntary, the question is whether or not defendant's choice to confess was "essentially free," or, to the contrary, was his "will overborne." In considering the totality of the circumstances, it is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency, whether express or implied. When the benefit pointed out by the police is merely that which flows naturally from a truthful and honest course of conduct, the subsequent statement will not be considered involuntarily made.

Investigating officers may freely encourage honesty, discussing any "naturally accru(ing)" benefit, advantage or other consequence of the suspect's truthful statement. Absent improper threats or promises, law enforcement officers are permitted to tell a suspect that it would be better to tell the truth. In this case, the Court found no implicit threats or promises of leniency in the officers' exhortations for honesty and cooperation from defendant. Nor did the statement that a judge would consider defendant's cooperation with the investigation constitute a promise of leniency. In short, such "brief and bland references upon which [defendant] has seized do not push this case over the forbidden line of promised threats or vowed leniency" which would render his confession to police involuntary.

Note: You would think that by telling a suspect that being truthful is to his benefit, when in reality it's going to make it that much tougher for him to escape liability for his misdeeds, is at least inferring leniency in exchange for his confession. But it is a fact that an early admission of guilt is considered to be a "mitigating factor" a judge may consider at a defendant's sentencing. And cases consistently hold that there's nothing wrong with this type of interrogation tactic. An officer just needs to be aware that somewhere in there is a line between "exhortations for honesty and cooperation" and an improper guarantee that he will get a lighter sentence if he's cooperative and talks. Where that line is, is a matter of degree, and varies with the circumstances.

***Postrelease Community Supervision and Fourth Amendment Waivers pursuant to P.C. 3456(a)*:**

People v. Young **(Apr. 27, 2016) 247 Cal.App.4th 972**

Rule: Pursuant to the terms of P.C. § 3456(a)(3), a PRCS parolee with no new violations is subject to county supervision, including warrantless search and seizure conditions, for one year plus an additional 30 days as needed to process him out of the system.

Facts: Defendant was released from prison on May 14, 2012, and placed on "Postrelease Community Supervision" (i.e., "PRCS"). His assigned probation officer was Contra Costa County deputy probation officer Alex Concepcion. As a condition of defendant's supervision, he was subject to one year of warrantless searches of his residence, person, and possessions, and prohibited from possessing pornographic material. Approximately two weeks before defendant's PRCS supervision was due to expire, Concord Police Department Detective Tamra Roberts contacted Deputy P.O. Concepcion and requested permission to conduct a warrantless search of defendant's home pursuant to the conditions of his postrelease community supervision. Detective Roberts had received information that defendant was chatting online with teenage girls about sexual matters. Deputy P.O. Concepcion approved the search. However, because of scheduling conflicts, the search of defendant's home was not conducted until May 15, 2013, a year and one day after he had been placed on postrelease community supervision. When finally conducted, a video depicting underage girls performing sexual acts was found on his computer.

Defendant was arrested and taken to the police station where, after being advised of his constitutional rights, he admitted receiving pictures via e-mail depicting girls five to eight years of age posing naked and in lewd positions, and that some of the pictures also depicted adult penises. A search warrant was subsequently obtained authorizing a forensic search of the laptop and tower computer. This search resulted in the recovery of the previously discovered video as well as what appeared to be images of child pornography. Defendant was charged in state court with possession of child pornography with a prior conviction (P.C. § 311.11(b)). After his motion to suppress the evidence was denied, he pled no contest and was sentenced to two years in state prison. Defendant appealed.

Held: The First District Court of Appeal (Div. 2) affirmed. On appeal, defendant argued that the trial court should have granted his suppression motion because the warrantless search of his home was conducted one day after the termination of the state's authority to do so, as provided for under P.C. § 3456. Section 3456, at subdivision (a), provides that the termination of postrelease supervision shall occur after either six months, one year, or three years, as follows: "(1) The person has been subject to postrelease supervision pursuant to this title for three years at which time the offender shall be immediately discharged from postrelease supervision. (2) Any person on postrelease supervision for six consecutive months with no violations of his or her conditions of postrelease supervision that result in a custodial sanction may be considered for immediate discharge by the supervising county. (3) The person who has been on postrelease supervision continuously for one year with no violations of his or her conditions of postrelease supervision that result in a custodial sanction shall be discharged from supervision within 30 days."

Deputy Probation Officer Conception testified that defendant did not qualify for release after six months because as a registered sex offender (per P.C. § 290), pursuant to his agency's policies, he was not eligible. But he was eligible for release after a year (per subparagraph (3)) because, as defendant contended, he did not have any new violations within that year. Defendant argued that because the search leading to the new charges occurred one day after the year had expired, the warrantless search of his home was illegal and his motion to suppress the resulting evidence should have been granted. However, P.C. § 3456 specifically provides that a person in defendant's situation shall be discharged 30 days after he or she successfully completes the required one-year term on postrelease community supervision. By its terms, therefore, the statute gives the Probation Department an additional 30 days of continued supervision during which time the parole terms and conditions, including being subject to search and seizure conditions, apply.

The statute does not require the agency to discharge the person on any particular date prior to the expiration of this 30-day period, requiring only that discharge occur sometime within that period. Deputy P.O. Concepcion testified that they had not yet started processing defendant out of the system at the time of the search in issue here. The Court further noted that that additional 30 days was not limited to administrative processing only; i.e., that all the conditions of his postrelease supervision continued to apply. Defendant's conviction, therefore, was upheld.

Note: When you look at the wording of P.C. § 3456, the result seems to be inevitable. When a parolee qualifies for termination of parole after one year, the Probation Department gets an extra 30 days of supervision before a defendant is free and clear of his Fourth waiver restrictions. If you're wondering where the authority is for holding that defendant was not eligible for release after expiration of the statutory 6-month period, note that 3456(a)(2) says that he is only to be "*considered* for immediate discharge by the supervising county" (italics added); not that he is entitled to it. This seems to say that each individual county may make its own rules for determining who is eligible for a six-month release date. Apparently, Contra Costa County has a policy that registered sex offenders aren't eligible until after at least one year. Good rule.

***P.C. § 148(a)(1) and a Defendant's Refusal to Cooperate*:**

In re Amanda A. **(Nov. 20, 2015) 242 Cal.App.4th 537**

Rule: A verbal statement of intent to refuse to cooperate at some point in the future does not amount to actual refusal, and is not a violation of obstructing a peace officer, per P.C. § 148(a)(1).

Facts: Defendant minor, at the tender age of 16, had already accumulated a criminal (or, excuse me, "delinquent") history rivaling that of most adult career criminals. Coming from a dysfunctional, abusive, and drug-addled family—itself having had 36 child welfare referrals in four counties—defendant was destined to have a difficult life. In what took the Appellate Court some five pages to describe, defendant touted an existence dominated by drug and alcohol abuse, drug sales, prostitution, reoccurring runaway charges, vandalism, brandishing a firearm, theft, trespassing, and falsely identifying herself to a police officer, with her offenses spanning four California counties and two states. Attempts by the Juvenile Court to place her into group

homes, or with her mother, or her grandmother, inevitably and invariably resulted in her taking off and going back to the streets.

Finally, in February, 2015, with defendant in the custody of Solano County, Probation Officer Shannon West met with her and told her that, pursuant to court order, she was going to be picked up by representatives from the Solano County Juvenile Institutions "New Foundations" program. Defendant told P.O. West, however, that she was going to refuse to go with the group home staff because she had everything she needed right there while in custody. Also, she'd been told by her attorney that the maximum time she could be held in custody was about to expire, and that if she waited until April, she would automatically go to child welfare and be able to return home.

Attempts to convince defendant of the wisdom of trying the New Foundations program were to no avail. Seeing that she was getting nowhere, P.O. West told defendant that she (defendant) was preventing her from being able to comply with the court's order and that she would therefore have to ask the court to violate her probation. Defendant's unsympathetic response was: "Do what you've got to do." P.O. West therefore called the group home to cancel the scheduled transportation. She did not want to let them come out and attempt to get defendant into the car because she was concerned that defendant would "outright refuse," or even if not, run away as soon as she got a chance, as she was prone to do. P.O. West testified that she did not want to create a situation where defendant would have to be "dragged out" to the car. So they never got to that point where defendant actually disobeyed the court's order to physically go with the group home staff. As a result, however, P.O. West alleged a probation violation.

The Solano County District Attorney therefore filed a W&I Code § 602 petition alleging one count of misdemeanor obstructing a peace officer violation, per P.C. § 148(a)(1), based on her conduct with the probation officer. The Juvenile Court sustained the section 602 petition as well as the probation violation. Defendant appealed.

Held: The First District Court of Appeal (Div. 2) reversed, at least as to the 602 petition. On appeal, defendant argued that her verbal refusal to go to the group home was legally insufficient to support the Juvenile Court's finding that she had violated P.C. § 148(a)(1) (while admitting that that same refusal was in fact a probation violation). Specifically, defendant contended that the "act of stating a preference regarding [her] own placement" did not rise to the level of the criminal offense of resisting or obstructing a peace officer. The Appellate Court agreed.

Penal Code § 148(a)(1) provides in part: "Every person who willfully resists, delays, or obstructs any public officer (or) peace officer, . . . in the discharge or attempt to discharge any duty of his or her office or employment, (is guilty of a misdemeanor)" It was not an issue that West was a probation officer and that a probation officer is a peace under P.C. § 830.5(a), and that defendant knew West was a probation officer engaged in the performance of her duties. But defendant here was not directly refusing to get into a waiting vehicle. Her verbal indication that she did not want to go to the group home, before they were at that point in time when she actually had to go, was only an indication of what might occur in the future. It did not actually obstruct or delay P.O. West in the performance of her duties even if it clearly threatened to do so in the future. *If* defendant had actually refused to get into waiting vehicle, such an action would have in fact been a violation of P.C. § 148(a). But that had not yet occurred.

Per the Court: "The difference is significant because there is no way to know (as opposed to assume) that (defendant) in fact would have refused to get into the vehicle when it arrived." While rejecting defendant's alternate argument that her verbal refusal was somehow protected by the First Amendment's freedom of speech, the Court held that "a statement of intent to refuse does not amount to actual refusal." The Juvenile Court's order relative to sustaining the 602 petition for violating P.C. § 148(a)(1) was therefore reversed.

Note: On the First Amendment, freedom of expression issue, there is an interesting discussion by the Court on the law relative to a person's right to express his or her dissatisfaction with what a police officer may be doing, but that such a lack of cooperation is not by itself a P.C. § 148 violation. Specifically, it is noted that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." But that was not the issue in this case and must be reserved for discussion when the issue is ripe. (See *In re Chase C.* (Dec. 18, 2015) 243 Cal.App.4th 107, briefed in California Legal Update; Vol. 21, #2, January 21, 2016, where this issue *is* discussed.) More important to this case, the Court here expresses a great deal of sympathy with the difficult situation in which Probation Officer West found herself, not wanting to precipitate a violent confrontation, and knowing full well that it was unwise to try to physically force defendant into the New Foundations' vehicle, especially since defendant was not likely stick around long enough to benefit from the program anyway. Even so, absent an actual obstruction or delay in the performance of P.O. West's duties, the elements of a P.C. § 148 simply are not there.

***Miranda*; *Unequivocal Invocations to Remain Silent*:**

***Jones v. Harrington* (9th Cir. July 22, 2016) 829 F.3rd 1128**

Rule: When an in-custody suspect indicates unequivocally at any time during an interrogation that he wishes to remain silent, the interrogation must cease. Post-invocation responses to a continued interrogation may not be used to make the invocation equivocal.

Facts: In August, 2003, three teenage members of the Eight Treys Gangster Crips were stopped at a gas station that bordered on territory ruled over by the rival gang Westside Rolling 90s Crips. As they were filling up their gas tank, a black Ford pulled up. An African-American male leaned out of the passenger window and shouted an obscenity, and that "(t)his is Westside Rolling Crips." After the Ford left, the Eight Treys finished pumping gas and drove out onto the street. Moments later, the black Ford reappeared on their right. The driver—a light skinned Africa-American male—made a Rolling 90s gang sign, and then turned to a passenger and said something to him. The passenger then lifted himself onto the window frame of his door, leveled a semi-automatic weapon at the Eight Treys, and opened fire. Two of the Eight Treys were struck with one dying later that evening. An uninvolved driver of another car was also wounded.

During the ensuing police investigation an informant told investigators that it was defendant's black Ford Escort that was involved, and that defendant was a member of the Rolling 90s. Defendant was brought in by the police shortly thereafter and interrogated. After waiving his

Miranda rights, defendant admitted that he owned a black Ford Escort and that no one else drove it but him. But he also claimed not to know anything about the shooting. The detectives used a ruse, falsely telling him that witnesses had identified his car as the one used in the shooting and that the car appeared on surveillance video from the gas station. Changing his story several times, defendant eventually claimed that he drove straight home from work the night of the shooting, but that later that evening he discovered that someone had taken his car from his home. He just assumed that whoever took it would return it later. And sure enough, his car soon magically reappeared.

Questioning the plausibility of such a happening, the detectives accused him of driving his car the night of the shooting. Backed against the wall, defendant finally responded: "*I don't want to talk no more, man*." One of the detectives told defendant: "*I understand that, but the bottom line is . . . .*" Defendant interrupted: "*You don't want to hear what I'm telling you*." From there, the questioning continued on as normal until defendant finally made incriminating statements, admitting that he had been the driver at the time of the shooting (although he claimed that some "stranger" had jumped into his car, shot at the victims, and then disappeared). At trial, defendant's admissions were used against him over his objection. Convicted of first degree murder and related charges and allegations, defendant appealed from his five-years-plus-75-years-to-life sentence. The California Court of Appeal affirmed, holding that defendant's comment about not wanting to talk anymore was equivocal when considered in context. The California Supreme Court summarily denied review. Defendant filed a petition for writ of habeas corpus in federal court, which was denied. He appealed to the Ninth Circuit Court of Appeal.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, reversed. Considering the issue "de novo" under federal appellate rules, the Court can overturn the state court decision only if that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or, in the alternative, the state court's holding "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The majority of the three-judge Ninth Circuit panel ruled here that California's decision on the issue—i.e., whether defendant had effectively invoked his right to remain silent—met both the above tests and must be reversed.

Specifically, United States Supreme Court authority, beginning with *Miranda v. Arizona* itself, has consistently held that an in-custody suspect invokes his right to remain silent when he indicates in any manner or at any point in an interrogation that he does not want to talk. Such an invocation must be "scrupulously honored" by the officers, with the interrogation being terminated immediately. While it is true that such an invocation (according to more recent authority) must be clear and unequivocal to be legally effective, the Court ruled here that defendant's comment; "*I don't want to talk no more, man*," could not be any clearer. His interrogation should have stopped at that point.

California state courts, contrary to how the Ninth Circuit interprets the relevant federal cases, inappropriately ruled that subsequent statements by the defendant, after he invoked, may be used to show that defendant's attempt to invoke was in fact equivocal. In other words, his attempt to invoke "was made ambiguous by statements he made later in the interrogation." This, per the

Ninth Circuit, is clearly contrary to U.S. Supreme Court's authority on this issue. "By continuing to interrogate (defendant) after he had invoked his right to remain silent, officers violated *Miranda*—which means the government cannot use against (defendant) anything he said after his invocation. This includes using (defendant's) subsequent statements to police to 'cast retrospective doubt on the clarity of the initial request itself.'" His admissions relative to being the driver of the vehicle from which the fatal shots were fired should have been suppressed. Because his admissions constituted the bulk of the evidence used to convict him, the error was not harmless. His conviction, therefore, was reversed.

Note: The Attorney General's petition for an en banc rehearing on this issue has been denied, I'm told. It is unknown whether certiorari to the U.S. Supreme Court will be sought. So until, or unless, this case is reconsidered, we're kind of stuck with it. If, as an interrogator, you choose to continue questioning a suspect who has told you, without equivocation, that he does not want to talk (or that he wants the assistance of an attorney), a practice this author does not recommend, anything he might tell you can still be used for purposes of impeachment (*Harris v. New York* (1971) 401 U.S. 222). However, it cannot be used in the People's case-in-chief, or, according to this case, to cast doubt on whether he really intended to invoke in the first place. I've written an article on the California Supreme Court's distaste for the practice of continuing an interrogation after an invocation, even if done for the purposes of obtaining impeachment evidence; a practice, despite my misgivings, that is encouraged by some local legal scholars. If you'd like to see it, let me know and I'll send it to you. No extra charge.

***Coercive Interrogations*:**

People v. Peoples **(Feb. 4, 2016) 62 Cal.4th 718**

Rule: Based upon an evaluation of the totality of the circumstances, absent proof that defendant's wife was threatened with prosecution or that defendant had been offered leniency, defendant's confession was not unconstitutionally coerced.

Facts: Defendant went on a one-man crime spree between June and November, 1997, during which time he committed four murders and other related crimes. He started on June 21st when he burglarized an off-duty Alameda County Deputy Sheriff's van and stole the deputy's loaded .40-caliber Glock service pistol. Three months later, on September 16th, defendant was caught by employees in a secured parking lot belonging to the California Spray Dry Company in Stockton, where defendant had worked in 1994 until he was fired. Caught in the act of vandalizing the company's cars, and while attempting to escape, he shot at two employees with the stolen Glock, seriously wounding one of them.

On October 24th, defendant robbed a Bank of the West in Stockton at gunpoint, making off with $900. On October 29th, posing as a potential customer, defendant called the Charter Way Tow Company and, using a fake name, requested that a tow truck be sent to Eight Mile Road, west of Interstate 5. Defendant had worked for the tow company earlier that summer, but was suspended when a blood test turned up methamphetamine in his system. Tow company driver James Loper was dispatched to Eight Mile Road. Later that morning, Loper's body was found under his tow

truck with ten gunshot wounds. The weapon used was later determined to be the Glock defendant had stolen on June 21st.

On November 4th, defendant robbed a Mayfair Liquors store in Stockton. While committing this robbery, and still using the stolen Glock, defendant shot customer Stephen Chacko five times, killing him. On November 11th, defendant robbed the Village Oaks Market in Stockton, shooting and killing two employees; Besun Yu and Jun Gao. Again, the same stolen Glock was the murder weapon. This time, however, someone got a description of defendant's vehicle. This led to his arrest on November 12th and resulted in the recovery of piles of evidence connecting him with each of the above crimes. Defendant was taken to the Stockton Police Department and interrogated.

After advising defendant of his *Miranda* rights, he was subjected to a 12-hour interview with him protesting his innocence for the first 10 hours. Finally, defendant weakened and confessed, even showing the officers where the stolen Glock was hidden. During the interrogation, although defendant appeared to be tired at times, his interrogators testified that while he may have been in drug withdrawals, he did not appear to be under the influence. Defendant was convicted of each of the above crimes (except for an attempted murder charge stemming from the California Spray Dry Company shooting, on which the jury hung), and sentenced to death. Appeal to the California Supreme Court was automatic.

Held: The California Supreme Court affirmed. Among the issues on appeal was whether defendant's confession should have been suppressed. Defendant argued that his confession had been the product of unconstitutional coercion. The Fourteenth Amendment to the federal Constitution and article I, section 7 of the California Constitution make inadmissible any coerced, involuntary statement obtained by a law enforcement officer from a criminal suspect. It is the prosecution that has the burden of proving by a preponderance of the evidence that a defendant freely and voluntarily gave police statements before those statements will be admitted into evidence.

In evaluating this issue, the "totality of the circumstances" must be considered. Several factors are be considered, including any element of police coercion, the length of the interrogation, its location and continuity, and the defendant's maturity, education, and physical and mental health**.** The determinative issue is whether or not defendant's choice to confess was "essentially free," or whether his "will was overborne." With these considerations in mind, the Supreme Court ruled that defendant's confession in this case was not coerced. The Court did note that the duration of the interrogation was substantial (i.e., 12 hours), and at times defendant showed some signs of fatigue, including physical and mental exhaustion; i.e., sweating, pulling out his hair, rubbing his skin, twitching his facial muscles, grinding his teeth, and at times appearing to fall asleep.

However, he was also provided with bathroom breaks, coffee, water, sodas, and pizza. The detectives also asked defendant several times if he wanted to speak with a lawyer, which he declined. Defendant was also offered the opportunity to speak with his wife, declining this offer as well. Other interrogation tactics used included attempting to secure his trust by offering various face-saving reconstructions of his crimes, such as "you didn't mean to [shoot anyone]." Toward the end of the interrogation, the police confronted him with his wife's statements made

to police after his arrest and threatened to "drag" her into the case, as well as "lean on" his stepson. They also showed him pictures of his family, pleading with him not to make his family's life any more difficult than he already had. But contrary to defendant's assertions, defendant's wife was never threatened with prosecution. Rather, the detectives told defendant that his wife had implicated him in the crimes and that they would have to "drag" her further into the case if he did not confess. Also, the Court found that the record did not support defendant's argument that the detectives negotiated with him by offering "inducements" for his confession; i.e., "offers of leniency."

As memorialized in the taped interview, the detectives merely asked defendant questions designed to build rapport, but never offered him leniency for his confession and never threatened a harsher penalty if he remained silent. Further, the detectives made clear to defendant that they had no influence over how he would be treated in court or in prison. On the whole, balancing all these factors, the Court concluded that the prosecution met its burden of establishing by a preponderance of the evidence that defendant's statement was not coerced.

Note: I've never been a big fan of some of the interrogation tactics (which I sometimes refer to as "mind games") used by some police interrogators. At some point, such tactics will cross the line between proper procedure and a Fourteenth Amendment due process violation as a coercive interrogation. But it's hard to blame police interrogators for trying these ploys after ten hours with no results. When all else has failed, you don't lose anything by pushing the envelope a bit, at least so long as the interrogator doesn't start threatening to charge close relatives or loved ones, or offer leniency in exchange for a confession, both of which were alleged here. Either ploy, where it does happen, is a dead-bang loss for the prosecution when tested in court. Note that a big factor in the Court's conclusion that these detectives didn't do anything wrong (or at least wrong enough to out-weigh the positive factors) was the existence of a videotape of the interrogation that the justices were able to watch and judge for themselves. That's a very important lesson learned.

***Curbstone and Photographic Lineup Procedures*:**

People v. Garcia **(Feb. 22, 2016) 244 Cal.App.4th 1349**

Rule: Curbstone and photographic lineups must be conducted in a manner that avoids any undue suggestiveness.

Facts: Six Escondido teenage youths were enjoying a May afternoon, skateboarding in the parking lot of an abandoned Mi Pueblo Market in an Escondido shopping center. While skateboarding, defendants Jerson H. Garcia, Fransisco Mendoza, and Irwin Alejandro Guzman, jumped over a fence from a nearby flood control channel and approached the teenagers. Garcia was a member of the Eastside gang in San Diego. Mendoza and Guzman were members of the Diablos gang in Escondido. The trio immediately began picking through the skaters' backpacks and personal belongings that were left laying up against a nearby wall.

Guzman pulled a hammer from his waistband and held it in a threatening manner as he did so, preventing the victims from rescuing their property. Guzman also wielded the hammer as he

demanded that one of the victims turn over his cellphone. All three defendants took other personal items from the victims before fleeing. The victims immediately reported the robbery to the police. Shortly thereafter, defendants confronted two more teenagers who were skateboarding down a sidewalk on Mission Avenue, two miles from the first robbery. With Mendoza wielding the hammer, and even swinging it once at one of the victims, defendants relieved these two victims of a cellphone and headphones. Defendants drove away in a gray Honda. The victims immediately called the police, describing the Honda and its license plate number.

Five hours later, police observed the Honda in an area considered to be Diablos gang territory. Making a traffic stop on the car after a brief chase, the occupants abandoned the car and fled on foot. All three defendants were caught and arrested. Items belonging to several of the victims from both robberies were recovered from the Honda. Defendants were held at the scene, pending a curbstone lineup. The two victims from the Mission Avenue robbery were brought to the scene of the arrest where one of the two identified all three defendants. Both victims recognized the Honda. After the curbside lineup, police prepared three separate six-pack photo arrays to show the victims of the earlier marketplace robbery. The photos were shown to the victims the day after the robbery. Three of the victims recognized Guzman as the suspect who wielded the hammer. Two of the victims identified Mendoza as one of the robbers. One victim was unable to recognize anyone. And no one recognized Garcia. At trial, various identifications were made by several of the victims from both robberies. All three defendants were convicted of eight counts of second degree robbery and one count of assault with a deadly weapon, with various enhancements including that the crimes were committed for the benefit of a criminal street gang. Sentenced to double-digit years in prison, all three defendants appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. Among the issues on appeal was the fairness of the curbstone and the photographic lineup identifications. Specifically, defendants challenge the admissibility of the curbside lineup in which one of the two victims of the second robbery identified each of them, and where both identified the Honda. Defendants also challenged the six-pack photographic lineups. Defendants argued that in each instance, the identification procedures were unduly suggestive and prejudicial.

In order to determine whether the admission into evidence of identification evidence violates a defendant's right to due process, a court must consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances. The court is to take into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. The question is whether anything caused defendant to "stand out" from the others in a way that would suggest that the witness should select him.

On appeal, there must be a substantial likelihood of irreparable misidentification under the totality of the circumstances to warrant reversal of a conviction on this ground.

(1) *The Curbstone Lineup*: Although a one-person curbstone lineup may pose a danger of suggestiveness, such lineups are not necessarily or inherently unfair. All the surrounding circumstances must be considered. For an identification procedure to violate a defendant's due process rights, the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure. However, single-person lineups for purposes of in-field identifications are encouraged because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are still fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended.

The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. In this case, the two victims of the Mission Avenue robbery were brought to the defendants' location some six hours after the robbery. Although being told earlier by the police that "they had caught the guys," they were also advised just prior to the curbstone lineup, individually, that they should not infer any guilt just because someone had been detained, that they did not have to identify anyone, and that it was just as important to free an innocent person as identify someone involved in a crime. One of the victims later testified that it was his understanding that he was going to the curbside lineup so that he could "[n]otify the cops *if* those were *the correct* guys," inferring that they might not be. The other victim was unable to identify anyone.

Given these circumstances, where the witnesses acted independently of any suggestion or pressure that may have been expressed or inherent in the situation, the Court held that the defendants had failed to meet their burden of showing that the statements the police made to the witnesses before the lineup were unduly suggestive or that the identification the one victim made six hours after the robbery was in any way unreliable. Evidence of the curbstone lineup, therefore, was property admitted into evidence.

(2) *The Photographic Lineup*: The six victims of the Mi Pueblo Market robbery were shown three separate six-pack photo lineups; each six-pack including a picture of one of the defendants. The six-packs were prepared with the assistance of a computer program that selected photographs of individuals with physical characteristics similar to each of the defendants and organized the photographs randomly. The six-packs were shown to the six victims, individually, after being told by the police that they had recovered various items stolen from them, and that three people were in custody. However, each victim was also admonished that they did not have to identify anyone in the lineup and that they should not assume that anyone whose picture was in the lineup was in custody.

Defendant Guzman argued that because only one other person in the six-pack which included his photograph had long hair, it was unduly suggestive. However, there is no requirement that a defendant in a lineup be surrounded by people nearly identical in appearance. Prior case decisions have upheld lineup identifications despite the existence of similar or greater disparities among the lineup participants than were present in this case. As for defendant Mendoza, the fact that he was identified by only two of the six victims also strongly suggests that neither the six-

pack that included him nor the circumstances surrounding the identification were in any manner suggestive. Also, the fact that none of the six victims identified Garcia further demonstrates that the circumstances were in no sense overly suggestive. In sum, defendants failed to meet their burden with respect to the six-pack lineup identification.

Note: Good case describing the correct procedures to use in photographic and curbstone lineups. Of paramount importance was the telling of each victim/witness that just because they are being shown a detained suspect, or an array of photographs, does not mean that they are obligated to pick anyone out. This seems to be a key factor in the Court's eventual holding that there was nothing prejudicial or suggestive about the procedures used. I have a complete training outline on lineups as well, if you'd like a copy.