The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*I walk around like everything is fine, but deep down, inside my shoe, by sock is sliding off.*" (Anonymous)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

DNA Swabs Obtained From Arrestees for Serious Felonies*:** The long-waited case of ***People v. Buza has finally been decided by the California Supreme Court, which ruled that the collection of a DNA sample from all arrestees, at least when the arrest involves a "*serious offense*," is lawful, even before a judicial determination of probable cause. In ***People v. Buza*** (2014) 231 Cal.App.4th 1446, the First District Court of Appeal reversed defendant's conviction for a misdemeanor violation of **P.C. § 296.1**, for refusing to provide a DNA specimen as required by the **DNA Fingerprint, Unsolved Crime and Innocence Protection Act** (**DNA Act**), upon his arrest (i.e., during booking), for a felony arson violation. The lower court held that to require a person to provide a DNA sample upon arrest, and before any judicial determination of probable cause, violated the California Constitution's prohibition on unreasonable searches and seizures, per **Cal. Const. art. 1, § 13**. The California Supreme Court in ***People v. Buza*** (Apr. 2, 2018) __ Cal.5th __ [2018 Cal. LEXIS 2245], a 4-to-3 decision, citing ***Maryland v. King*** (2013) 569 U.S. 435, reversed this ruling, concluding that the **DNA Act's** collection requirement is a valid part of a routine booking procedure, at least when applied to any individual who, like defendant, was validly arrested on probable cause for a serious (or violent) felony. Here, the felony arson charge for which defendant was arrested (and ultimately convicted) qualified as a serious offense (see **P.C. § 1192.7(c)(14)**.) Ruling that the DNA sample requirement was reasonable as applied to this defendant, and as to this situation, he was validly subject to the statutory penalties as prescribed in **P.C. § 298.1** for failure to comply. Note, however, that **P.C. § 296(a)(2)(C)** allows for the taking of a DNA swab in *any* felony post-arrest, pre-judicial probable cause determination situation. The **Buza** decision is specifically limited to "*serious*" (and/or "*violent*") felony offenses only. So it is still up in the air as to whether non-serious felony arrests qualify. But see ***Haskell v. Harris*** (9th Cir. 2014) 745 F.3rd 1269, where the Ninth Circuit upheld the constitutionality of California's statutory requirement that *all* persons arrested for, or charged with, *any* felony offense, whether statutorily defined as serious or not, submit to a mouth swab DNA test. An en banc panel (11 justices) of the Court in ***Haskell*** unanimously held that while ***Maryland v. King*** involved an offense classified under Maryland law as "serious" (i.e., burglary), in the 9th Circuit's opinion, *all* felonies are considered to be serious, or they wouldn't be felonies. (pp. 1272-1273.) Now that's refreshing, coming out of the 9th Circuit.

CASE LAW:

***Conflicts of Interest When the Parent of a Questioned Suspect is also the Parent of the Victim*:**
***Miranda and Custodial Interrogations*:**
***Beheler Admonishments and Interrogations*:**
***Interrogating Juvenile Suspects*:**

In re I.F. **(Feb. 22, 2018) 20 Cal.App.5th 735**

Rule: *Miranda* is applicable only when the person being questioned is in custody. Custody occurs whenever a reasonable person would interpret the restraints used by the police as tantamount to a formal arrest. Telling a suspect that he is not under arrest and is free to leave will often render questioning as non-custodial. However, such an admonishment, being but one factor to consider, is not always successful in taking the custody out of an interrogation.

Facts: B.F. (husband) and C.W. (wife), living in California's Calaveras County with their blended family of six children, ages one to 15, all headed out to attend a Little League game early in the morning of April 27, 2013, leaving only defendant I.F. and his 8-year-old sister, L.F., home alone. Just after noon, C.W. received a panicked call on her cellphone from defendant, telling her that an intruder had come into their home and "hit" L.F., and then ran out. B.F and C.W. immediately hurried home, calling 911 on the way. The 911 operator called the distraught defendant who told her that while he was in the bathroom, he heard a door slam. He then heard someone yelling and banging on the bathroom door. He emerged from the bathroom and saw a "Mexican" man running out the sliding glass back door, defendant providing a detailed description of the man. Defendant told the 911 operator that the man "stabbed (L.F.) a bunch of times," adding; "She's like dead." When B.F. and C.W. arrived, they found L.F. dead on the floor in her bedroom, but did not realize that she'd been stabbed until lifting her shirt revealed the stab wounds. When paramedics arrived, they found L.F. already cold to the touch with no pulse and not breathing. An autopsy later revealed that L.F. had 22 stab wounds, mainly in the chest area. Interviewed immediately by the first officer on the scene, defendant said that he came out of the bathroom in time to see a man running towards the sliding glass back door. Defendant claimed that he chased the man to the back door and then, upon hearing L.F. call out, turned around and went to check on her. As they talked, the deputy noticed there was blood smeared across defendant's right forearm. A subsequent investigation, including a neighborhood check, failed to reveal any evidence that the suspect defendant had described actually existed. The investigation also revealed some of L.F.'s blood on a tee shirt found in defendant's room, on a knife found in the kitchen, and on some sneakers defendant wore while doing yardwork around the house. In the ensuing two weeks, defendant was interviewed four more times while never receiving a *Miranda* admonishment. The admissibility of his statements at those interviews later became an issue at a Juvenile Court jurisdictional hearing as well as on appeal. The substance of those interviews and legal issues they generated are discussed below. On May 14, 2013 (two

days after the final interview), a W&I Code 602 petition was filed in Juvenile Court, alleging that defendant committed murder (P.C. § 187(a)) and that he personally used a knife in the commission of the offense (P.C. § 12022(b)(1)). At a contested jurisdictional hearing, the magistrate admitted defendant's statements from all four interviews into evidence, finding that despite the lack of a *Miranda* admonishment and waiver, defendant was not in custody for any of the interviews. The section 602 petition was sustained with a true finding on the knife-use allegation. Made a ward of the court and committed to the Department of Corrections and Rehabilitation, Division of Juvenile Justice, for a maximum of 16 years to life, defendant appealed.

Held: California's Third District Court of Appeal reversed. At issue on appeal was the admissibility of defendant's statements (providing the prosecution with a number of relevant and damaging inconsistencies) made at each of the four interviews. Defendant argued on appeal that because he had never been advised of his rights under *Miranda v. Arizona*, nothing he said during any of the four interviews was admissible; i.e., that the Juvenile Court magistrate erred by using his statements against him. The law is well settled that *Miranda* is applicable only when the person being questioned is in custody. It was the People's argument that defendant was not in custody during any of the interviews. The test for determining custody can be simply summarized as follows: "*Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest*?" In evaluating this rule, the "*totality of the circumstances*" must be considered. The circumstances to be considered include, but are not limited to, whether the contact with law enforcement was initiated by the police or the person interrogated; whether the person voluntarily agreed to an interview; the express purpose of the interview; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. In the case of a juvenile suspect, the child's age is also to be considered, at least where his age was known to the officer at the time of police questioning or would have been objectively apparent to a reasonable officer. Defendant also argued that B.F., as defendant's father who had also lost a daughter in this case, had a conflict of interest which itself was a circumstance that should be factored in. Such a conflict, per defendant's argument, might cause the parent to unwittingly interfere with the thoughtful exercise of the child's constitutional rights, or even contribute to a false confession. In this case, defendant argued that his father's conflict of interest must be considered in determining whether a reasonable child in defendant's position would have felt free to leave the interviews; i.e., whether he was legally "in custody." The Court agreed, at least where the conflict is shown to have had some bearing on how a reasonable child would perceive the interrogation. Should the parent participate in the interrogation, as B.F. did here in the fourth

interview (see below), he or she might even be considered, depending upon the circumstances, a "de facto police agent." Defendant also argued that B.F.'s conflict of interest rendered him incapable of providing "conflict-free advice and protection," resulting in a violation of defendant's rights under the Fifth, Sixth and Fourteenth Amendments. The Court declined, however, to rule that B.F.'s conflict of interest required the Juvenile Court to suppress all of the interviews as a matter of constitutional law. In the end, the Court found that although a parent's conflict of interest may be a factor among others to consider in evaluating the issue of custody for *Miranda* purposes, there is no authority for an exclusionary rule based upon this factor alone. In this case, the Court found that B.F.'s conflict of interest was not uniformly coercive, but rather assumed a coercive character as the investigative focus on defendant intensified in the fourth interview. Having resolved that issue, the Court then moved on to evaluate each of the four interviews, considering them separately. (*Note*: The admissibility of defendant's statements to the 911 operator, and his later statements to the first officer on the scene, were not in issue.)

First Interview; April 27, 2013: The first interview took place at the hospital where L.F.'s body had been taken, in the airlock vestibule between the emergency room and the ambulance bay. Detective Wade Whitney of the Calaveras County Sheriff's Department, upon receiving permission from B.F. to talk with defendant, sought additional information about the intruder defendant had described and who was already the subject of an intensive manhunt. While a combination lock prevented people from entering the vestibule from the ambulance bay, a person could leave the vestibule, either to the ambulance bay or into the emergency room, by just opening the door. In fact, as Detective Whitney (who wore plain clothes with a visible gun and badge) talked to defendant, emergency personnel came and went through the vestibule. Defendant was not handcuffed. Although his movements were not directed, there was no discussion concerning whether he was under arrest or free to leave. He also was not *Mirandized*. In a 16-minute interview, with defendant's father, B.F., present, defendant was asked to reiterate what had happened when L.F. was stabbed. Defendant claimed that after he and L.F. had breakfast and watched a movie on T.V., he went to the bathroom and L.F. went to her room. While in the bathroom, defendant claimed to have heard someone yelling in heavily accented English; "*Hey, I know you're in here, come out*." He then heard L.F. scream. Although defendant told the 911 operator that the intruder had banged on the bathroom door, he did not mention this detail during his conversation with Detective Whitney. Defendant said that he opened the door to the bathroom in time to see a man running toward the sliding glass back door. He told Detective Whitney he followed the man to the door but that he then realized that L.F. might need help. So he stopped, turned around, and ran towards his sister's bedroom, grabbing a knife from the kitchen counter, "just in case there's anyone else." This was the first mention by defendant that he had used a knife. When he reached the bedroom, defendant said he saw L.F. lying on the floor with her shirt covered in blood. Dropping the knife and then picking it up, he then went back to the kitchen, returned the knife to the counter, and called C.W., his step-mother. Defendant was shown photos of possible suspects, but said that none of them resembled the alleged intruder. At this point, Detective Whitney told defendant that he was not under arrest or in any trouble, and that he did not have to answer the following question: "*Did you do anything to harm your sister*." Defendant unequivocally answered; "*No*." With evidence of this encounter introduced into evidence against him (its relevance being to contradict later

statements), defendant argued that absent a *Miranda* admonishment and waiver, the Juvenile Court magistrate erred. The Appellate Court disagreed, finding that under these circumstances, defendant was *not* in custody. Even though never told he was free to leave, all the other circumstances dictate that a reasonable person—even a 12-year-old juvenile—would have known that he was free to just walk away from this encounter. Of primary importance was the location; the hospital's airlock vestibule, a transitional space that necessarily connotes ingress and egress, and where others were in fact coming and going. If B.F.'s conduct was to be considered at all (see the "conflict of interest" discussion, above), he did not appear to have pressured defendant to participate in this interview or otherwise conduct himself in a manner that contributed to the creation of a coercive atmosphere. In all, this interview was only 16 minutes long with the overall tone of the questioning being low key and conversational. Considering these factors, defendant was not in custody at this time, so no *Miranda* admonishment was required.

Second Interview; *April 27, 2013*: While still at the hospital, Detective Whitney asked B.F. for permission to interview defendant a second time. B.F. agreed. Defendant was never asked. Defendant was driven to the nearby District Attorney's office by his father where Detective Whitney and DA Investigator Gary Sims took him to a portable trailer near the office. In the trailer was an interview room and an adjoining observation room. The interview room had two doors, both of which were open during this second interview. B.F. watched the questioning from the observation room via closed circuit television. Both detectives were in plain clothes, but with visible badges and guns. Defendant was not handcuffed nor placed under arrest. To the contrary, he was specifically told that he was there as a witness only; that the doors were open; that he was not under arrest or being detained; that he could take a break whenever he wished; and that he could "*get up, walk out anytime you need to, if you don't want to talk to us*." He was also told that his father was in the next room and that he could take a break to speak with him if he wished. In response to the detectives' questions, defendant reiterated his story of hearing a door open, the man with an accent yelling at defendant to come out of the bathroom, hearing his sister scream, and then opening the door in time to see the man running towards the sliding glass back door. Consistent with what he'd said before, defendant said he chased the man to the sliding glass back door, then turned and ran towards L.F.'s room, grabbing a recently washed knife from the kitchen counter as he passed. This time, defendant emphasized that he did not enter L.F.'s bedroom, but merely observed her prone body from the doorway. He then went back to the kitchen, returned the knife to the counter, and called C.W. Defendant's description of the intruder was consistent with the description he offered during the first interview. As before, defendant omitted what he had told the 911 operator about the intruder banging on the bathroom door. Sixty-eight minutes into the interview, B.F. interrupted and asked the detectives to "*wrap it up*." The interview was concluded some nine to ten minutes later with defendant and B.F. leaving shortly thereafter. Defendant similarly argued that this interview required a *Miranda* admonishment and waiver, which didn't happen, in order for it to be admitted into evidence. The Court was sympathetic to the argument that a child, delivered to detectives for the purpose of being interviewed, would not feel like he had a choice. However, in this case, defendant was immediately informed that he was free to leave. Specifically, before questioning even began, he was told that "*both of these doors are open, you are not under arrest, you're not being detained,*

you're here on your [*own*] *free will*." He was also told that he could "*get up*" and "*walk out anytime*." Defendant, despite his young age, appeared to have heard and understood these admonitions. Such an admonition (sometimes referred to as a "*Beheler* admonishment;" *California v. Beheler* (1983) 463 U.S. 1121.) would have alerted any reasonable 12 year old that he was free to terminate the interview and leave if he so chose. Being temporarily separated from his father did not alter this conclusion, particularly in light of the fact that defendant was told that B.F. was watching from the next room and that he could take a break to speak with him if he wished. The Court further rejected defendant's argument that the nature of the questioning was relevant, finding that although pressing for some details, the detectives' tone was professional and appropriate. Lastly, the Court held that taking another nine to ten minutes to end the questioning after B.F.'s request to "*wrap it up*" was reasonable, and did not convert the interview into a custodial interrogation.

Third Interview; April 29, 2013: Reporting to the DA's Office ostensibly to fill out some victim/witness paper work two days later, B.F. was asked for permission to take defendant to the family home for a walk-through of the crime scene. Defendant declined when asked by B.F. whether he wanted to go. While waiting for the victim/witness coordinator to show up, the whole family provided cheek DNA swabs. Detective Whitney then told B.F. that they wanted to do some more interviews, including another with defendant. B.F. consented. This third interview, conducted by Sergeant Tim Sturm and Detective Josh Crabtree, took place in the same interview room as before, but with the doors shut although apparently unlocked. B.F. was not invited to watch this interview. Both detectives were in plain clothes and neither was visibly armed. Defendant was not handcuffed nor placed under arrest. However, he was also *not* told that he was free to leave, nor was he *Mirandized*. Over the next 84 minutes, defendant largely repeated the sequence of events as described above with two significant variations. First, he reintroduced the idea that the alleged intruder had been banging on the bathroom door, a detail, although told to the 911 operator, was omitted from the first and second interviews. Second, he made no mention of the knife he previously claimed to have grabbed from the kitchen counter. While the first half of this interview was non-confrontational, the second half consisted of the detectives confronting defendant with the inconsistencies in his story and how the forensic evidence didn't support what he was telling them. Parts of the interview had the detectives sympathizing with defendant, telling him that they all made mistakes and that it was "*therapeutic*" to "*unburden* (*his*) *conscience*." While never told that the was not in custody, the detectives eventually did tell him that no matter what he said, he would be going home with his parents that day. Getting more confrontational, however, defendant was specifically told; "*There is no man that ran out of that house, is there*?" Defendant insisted that the man was there. Detective Sturm also asked defendant how he knew L.F. had been stabbed, as he told the 911 operator, when he later claimed to have not known that she'd been stabbed until he later examined her closely. Defendant could only answer; "*I don't know I . . . I could have seen it I guess*." The detectives intimated that they already had DNA evidence establishing defendant as the killer, and then pressed for an "*explanation*" or "*reason*" for the crime. The record did not reflect a response. Telling him again that the evidence didn't support his story, the detectives urged defendant to admit his "*mistake*" so that he could "*move on*" and "*feel better*." He was also confronted with the fact that L.F.'s blood was seen on his forearm. Returning to sounding

more sympathetic, the detectives assured defendant that his parents would love him "*no matter what*." Defendant's responses—to the extent he responded at all—were short and frequently inaudible. Meanwhile, outside, an agitated B.F. banged on the locked door of the observation room, asking what was going on. After being put off several times, B.F. eventually demanded that he be allowed to take his son home. The interview was ended with the detectives, by then, convinced that defendant had killed his sister. Again, defendant argued that under these circumstances, the interview was custodial and, without a *Miranda* admonition and waiver, should not have been admitted into evidence. This time the Court agreed. For this interview, defendant was in fact separated from his father. After having been offered a choice as to whether he wanted to participate in a walk-through of the crime scene (which he declined), he was *not* offered any choice about whether he would submit to another interrogation. Also different this time was the fact that defendant was *not* told at the beginning of the interview that he was free to leave; an important oversight if the detectives wanted to keep the questioning non-custodial. Further, the doors to the interview room were closed. Being told during the interview that he would be allowed to leave with his family when the interview was over would *not* have led a reasonable 12 year old, in the Court's opinion, to believe he had the right to terminate the questioning. Perhaps most importantly, the second half of the interview became very confrontational with the detectives hinting that they had forensic evidence that disproved defendant's story. Employing a variation of an interview tactic known as the "Reid Technique," where "minimization-maximization" is used to offer a suspect a face-saving out such as by suggesting that a homicide might have been accidental or perhaps justified, and then in the next breath telling the suspect that denying the crime is hopeless because the officers have conclusive proof, the detectives here leaned on defendant to confess. Overall, although Detectives Crabtree and Sturm were courteous and polite, and even at times sympathetic, their questions clearly manifested a belief in defendant's guilt and that they had the evidence to prove it. A reasonable 12 year old, confronted with the possibility that police viewed him as a suspect, would not have felt free to terminate the interview and leave. Defendant should have been *Mirandized* under these circumstances as a prerequisite to having his contradictory statements used against him in evidence.

The Fourth Interview; May 9, 2013: About ten days later, Captain Jim Macedo telephoned C.W. and told her that they wanted to conduct separate interviews of each of the family's surviving children. B.F. and C.W. agreed to the interviews on the condition that they be allowed to observe. Bringing the children (including defendant) to the Sheriff's station on May 9th, Captain Macedo and FBI Special Agent Chris Campion attempted to renege on whether the parents would be present for the interviews. It was only when B.F. started to leave with his children that the officers again agreed that they could watch. C.W. was to observe defendant's interview in the same trailer as used before. However, she was made uncomfortable right off the bat when officers took him into the trailer through a separate door and began the interview before she could get to the observation room. This interview, broken down into two parts, was conducted by Detective Crabtree and Special Agent Sam Dilland (a female) of the FBI. Both officers were dressed in civilian clothes with no visible badge or gun. The doors were unlocked, apparently open at some points and closed at others. The first half of the interview (lasting 97 minutes) began with Agent Dilland telling defendant that if he didn't want to answer any specific

question, he didn't have to. After some 27 minutes of "small talk," defendant was then told; "*You know there's a door there and you know that door's open so … [¶] … [¶] if you want, bam, you just* [¶] … [¶] *leave you alone*." But as before, no *Miranda* admonishment was given. This time, in reiterating the events of the morning of April 27th (i.e., the murder), defendant specifically denied that the man in their house had banged on the bathroom door. He also failed to say anything about having retrieved a knife from the kitchen. With the interview turning confrontational, defendant was told that there was no evidence supporting his claim that there was a man in his house. He was also confronted with the fact that a t-shirt with L.F.'s blood on it had been retrieved from the clothes hamper in his room, a fact for which that defendant could not offer a logical explanation (saying, for instance; "*I could have changed I guess, I don't remember*."). At this point, defendant was finally told that he was free to leave if he so chose. Taking her cue, C.W. interrupted the interview by entering the interview room and telling defendant to leave with her. C.W. later testified that she had become "*very alarmed*" at what was going on, and that defendant seemed "*very stressed*" and "*nervous*," as though "*he was going to crawl out of his chair*." Finally realizing that defendant was considered to be a suspect as opposed to just a witness, and noting that despite being told he could leave when he wanted, C.W. felt that in reality; "[*H*]*e's not free to go, he's a 12-year-old child in a room with closed doors and officers, he doesn't understand that point*." She therefore decided to stop the interview. She told officers that because she was only defendant's step-mother, and not his guardian, she wanted B.F. involved. Taken to another location where B.F. and the other children were, the officers pointblank finally admitted to B.F. that defendant was in fact a suspect in L.F.'s murder and requested his permission to allow the interview to continue. B.F. agreed on the condition that he himself be allowed to confront defendant, noting that he also wanted answers and that he could tell when defendant was lying. Reconvening at the interview trailer, B.F. asked defendant if he wanted to go back in and talk about the murder. Defendant answered with an unambiguous "*no*." But B.F. insisted, telling defendant; "*We need to get to the bottom of this, we need to find out what happened.*" B.F., C.W., and defendant then all joined Agent Dilland and Detective Crabtree in the interview room, commencing the second half (consisting of 43 minutes) of the fourth interview. Detective Crabtree began by reiterating, twice, that "*no matter what happens . . . (y)ou guys are gonna leave this building" and that they were all "free to go at any point*." B.F. indicated that he understood. Defendant did not respond. After Detective Crabtree outlined the evidence against him, B.F. started the questioning by telling defendant that if he had in fact hurt his sister, he needed to admit it. Failing for the first time to deny his guilt, defendant told them that he could not remember anything. Not buying it, a tearful B.F. attempted to impress upon defendant the need to tell the truth; that if he had in fact killed L.F., he would still love him no matter what, but only if he told the truth. "*If it's something you did, you have to talk to um. If you lie to me, and hide s--t, you know that's when I don't support you, right*? Defendant responded that he did not do it. After Detective Crabtree and Agent Dilland reiterated to defendant that B.F. would love him no matter what, a sobbing defendant eventually responded, "*I can't remember*, . . ." and then; "*I don't remember doing it. But I guess I did, I don't know*." Confronting him again with the evidence pointing to his guilt, after fifteen more minutes of everyone attempting to get defendant to talk about the murder, and with defendant repeatedly either denying guilt or saying that he did not remember, the interview

was finally ended. All parties were allowed to leave as promised. As with the third interview, The Court found this one to be also custodial, requiring a *Miranda* admonition and wavier as a precondition to the admissibility of defendant's statements. "A reasonable 12 year old in (defendant's) position would have experienced both parts of the fourth interview as a restraint on his liberty, albeit for different reasons." As for the first part, although B.F. clearly understood that they were free to leave, nothing in the record indicates that defendant also knew this. And no one asked him whether he was willing to submit to another round of questions. Then, with his father taken off to be with his other children, and with defendant abruptly separated from his mother as he was led to the interrogation trailer by two law enforcement officers, it is safe to assume that any reasonable 12 year old in defendant's position would have interpreted this unexpected separation from an adult ally as a restraint on his freedom. Once inside the trailer, although told that he didn't have to answer any specific question put to him, he was *not* told that he could terminate the questioning altogether and leave. After some 27 minutes of "small talk," defendant was in fact told; "*You know there's a door there and you know that door's open so … [¶] … [¶] if you want, bam, you just* [¶] . . . [¶] *leave you alone*." But the Court found this statement to be somewhat ambiguous, and would certainly have left a 12 year old confused as to what his alternatives were. At that point, the questioning began in earnest, challenging defendant's story while pointing out that they had "a lot of evidence pointing to another story," and listing some of it (e.g., defendant's bloody shirt). In fact, it became so accusatory that C.W., apparently realizing for the first time that defendant, her step-son, might be responsible for L.F.'s murder, and knowing instinctively that defendant did not understand that he was free to leave despite being told that, took her cue and stopped the questioning. Based upon this, the Court agreed with C.W.'s assessment of the situation and concluded that no reasonable 12 year old in defendant's position would have felt free to terminate the first part of the fourth interview and leave. The second part of this fourth interview began with B.F. participating in the questioning. When asked if he wanted to resume the questioning, but with his father involved, defendant very clearly and specifically responded that he did not. ("*No.*") He was ignored and returned to the interrogation room anyway, albeit in the company of both B.F., C.W., and two officers, where he was again told by the detectives that he would be going home with his parents at the end of the interview no matter what was said. Although interlaced with a comment that he could leave "at any point," the Court wasn't convinced that defendant understood that that meant he did not have to submit to questioning. Before B.F. began his questioning, the detectives listed a "thumbnail sketch of the evidence" against him. B.F. then told his son that they needed to get to the truth of the matter, but that he loved him no matter what had happened, and that the only thing that might make him mad was if defendant lied about it. With this pressure being applied, defendant eventually waivered a bit saying: "*I can't remember*, . . ." and then; "*I don't remember doing it. But I guess I did, I don't know*." The Court ruled that given these circumstances, defendant was in fact in custody at the time of this questioning and that due the lack of a *Miranda* admonishment and wavier, his responses should not have been admitted into evidence. As for B.F.'s participation, the Court—falling short of classifying him as a "de facto police agent" due to the overall control of the questioning by law enforcement officers, but also rejecting the People's argument that his questioning of his son was nothing more than a "private conversation" without the participation of law enforcement—noted that pressure from B.F. did in

fact add to the coerciveness of the interrogation (described as a "*conflict of interest*," above), thus being a factor to consider in determining that defendant should have been *Mirandized*.
Conclusion: Because defendant's responses to his interrogators made during the third and fourth (both parts) interviews should have been suppressed and not considered in the People's case-in-chief, and with a finding that the magistrate's admission into evidence of these statements was prejudicial, the Juvenile Court's sustaining of the petition was reversed, with the matter returned to the Juvenile Court for further proceedings.

Note: Perhaps the biggest problem this case helps to illustrate is the wholesale use of, or attempt to use, the so-called "*Beheler* admonishment;" i.e., intended to take the custody out of an interrogation by telling the suspect that he or she is not under arrest and can terminate the questioning at will, thus side-stepping the need for a *Miranda* admonishment. The *Beheler* admonishment has its uses, certainly, and is not necessarily an improper interrogation tactic even when employed against a juvenile suspect. However, it can perhaps be argued that too many officers are making this their go-to practice, seldom if ever *Mirandizing* a suspect. While *Beheler* admonishments have their place, such as when you have an uncooperative suspect or one who historically always invokes, "*Behelering*" anyone and everyone is a dangerous practice, and one, as in this case, that may backfire. *Beheler* admonishments, being but one factor to consider among any number of other relevant factors when determining whether a questioned suspect is in custody for purposes of *Miranda*, do not always work. "The mere recitation of the statement that the suspect is free to leave or terminate the interview . . . does not render an interrogation non-custodial per se." (*United States v. Craighead* (9th Cir. 2008) 539 F.3rd 1073, 1088.) This case also highlights the potential issues raised when a juvenile suspect is interrogated. Use of the so-called Reid Interrogation Technique, mentioned only in passing above, has been held before *not* to be a wise practice when dealing with juveniles, often producing false confessions. (See *In re Elias V.* (2015) 237 Cal.App.4th 568.) As a legislative fix to the problems caused by officers using the Reid Technique, and other high-pressure tactics, we now have to contend with California's new Welf. & Inst. Code § 625.6, effective as of January 1, 2018, which provides that law enforcement will no longer be allowed to attempt custodial interrogations of minors 15 years of age and younger (expect that to be raised to 17 someday), nor even seek a waiver of the minor's *Miranda* rights, until the minor has first consulted with legal counsel either in person, by telephone, or by video conference. Bad facts make for bad case law, and in California, bad legislation as well.

Billy Clubs

People v. Baugh **(Feb. 9, 2018) 20 Cal.App.5th 438**

Rule: In proving the illegal possession of a billy club per P.C. § 22210, the prosecution need only prove the defendant possessed the object as a weapon; not that he intended to so use it.

Facts: Officer Jonathan Colburn made a traffic stop on defendant in Brentwood, California, for driving with a burnt out headlight. The Chevy Cavalier defendant was driving belonged to a friend and neighbor, although defendant drove it on a regular basis. In talking to defendant, the officer noticed that the car's ignition switch was torn out. Suspecting that the vehicle may have been stolen, defendant was taken out of the car and detained. While removing him from the car,

a small wooden bat wedged between the driver's side door and seat was observed. In searching the car, the officer recovered the bat along with two bags of .22-caliber ammunition, found under the driver's seat. Also, a loaded .22-caliber rifle disguised as a baseball bat was recovered from the trunk. At that point, defendant was arrested and transported to jail. While on the way, defendant complained that he had been "jumped" three weeks earlier. Defendant was charged in state court with (Ct. 1) being a felon in possession of a firearm (P.C. § 29800(a)(1)), (Ct. 2) being a person prohibited from possessing a firearm in possession of ammunition (P.C. § 30305(a)), and (Ct. 3) possessing a billy club (P.C. § 22210). Defendant's prior felony conviction (thus, the felon in possession of a firearm charge) was for having assaulted a police officer with a deadly weapon (P.C. § 245(c)), which was also alleged as a prior strike. At trial, defendant testified that he was unaware of the ammunition or firearm in the vehicle, it being a borrowed car (the jury apparently bought this cock-and-bull story, acquitting him of these two counts). As for the billy club, defendant claimed that the bat was actually a "tire thumper" which was an "essential tool" in his occupation as a commercial truck driver, needed to test the air pressure in a truck's tires by thumping the tires with the bat and listening for a particular sound. He also testified that he had it in the car with him because it might get stolen if left it in a truck—the truck being shared by other drivers—and that he had it next to him by his seat so he wouldn't forget to take it with him when he was driving a truck. The prosecutor countered this argument with evidence that defendant was neither driving a commercial truck at the time nor steadily employed with a trucking company, so it made no sense that he would need a tire thumper close at hand. Defendant was convicted of the bill club charge, and appealed.

Held: The First District Court of Appeal (Div. 4) affirmed. Defendant's argument on appeal was that the trial court had erroneously instructed the jury that a charge of possessing a billy club does *not* require the prosecution to prove he intended to use it as a weapon. Specifically, the trial court instructed the jury that "the prosecution had to prove that defendant possessed the billy, he knew he possessed the billy, and the defendant possessed the object as a weapon. When deciding whether the defendant possessed the object as a weapon, consider all the surrounding circumstances relating to that question, including when and where the object was possessed, where the defendant was going, whether the object was changed from its standard form, and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless purpose. *The People do not have to prove that the defendant intended to use the object as a weapon*." (Internal punctuation deleted, italics added: CALCRIM No. 2500.) It was this last sentence to which defendant objected. The Court, however, held that section 22210 (former P.C. § 12020) criminalizes possession of dangerous weapons (e.g., items that by their very nature are dangerous as well as items that although having legitimate uses, are possessed at the time and under the circumstances as a weapon), not just their actual use or intended use. Although how an item is in fact used, or how defendant intends to use it in a particular circumstance, may be evidence of the commission of this offense, they are not elements of the offense that must be proved. As noted by the Court, a suspect's "[i]ntent to use a weapon is not an element of the crime of weapon possession. Proof of possession alone is sufficient." Here, there was evidence that defendant felt the need to be armed with a weapon in case he was to be assaulted again as he had before. If believed by the jury (as it was in this case), these "circumstance(s) of possession" are evidence that defendant carried the bat as a weapon and not necessarily as a "tire thumper," supporting his conviction. The jury was properly instructed on this issue.

Note: Although this may seem like the Court was splitting hairs, it is actually quite important to note that a suspect's intent to actually use the object as a weapon is not an element. If you pack a concealed pistol off duty, for instance, you are carrying it as the weapon it is intended to be. The fact that you hope never to have to use it as such is irrelevant to the item's intended purpose. This concept is not quite so clear when you're dealing with items that have legitimate uses other than as a weapon, such as baseball bats, kitchen knives, or table legs. While the suspect's actual intent to use such items as a weapon is indeed relevant—a part of the circumstances of possession—such an intent need not necessarily be proved to show that it is carried as a weapon and not to go play baseball, butter one's toast, or nail to the underside of a three-legged table.