LEGAL DEFENSE TRUST TRAINING BULLETIN

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"NINTH CIRCUIT HOLDS POLICE MAY BE SUED FOR INTENTIONALLY VIOLATING *MIRANDA*"

Interrogation Technique Disapproved As Violative Of Civil Rights

In a closely-watched case focusing on the trained interrogation technique of intentionally pressing a suspect for a statement *after* the suspect has invoked silence and right to counsel, the Ninth Circuit Court of Appeals held, on November 8, 1999, that police may be liable in damages for violation of the suspect's civil rights under *42 USC §1983*.

We all know that a *non-Mirandized* statement (*see*: *Miranda v. Arizona, 384 U.S. 436 [1966]*) taken from a suspect during a custodial interrogation cannot be used by the prosecution against the suspect in the People's case in chief. But, if the suspect decides to testify at trial, and does so inconsistently with his *non-Mirandized* statement, the prosecution may then use the statement to *impeach* the suspect-defendant at trial. This is the rule of *Harris v. New York, 401 U.S. 222 (1971)*, on the principle that nothing in the *Miranda* rule equips the defendant with a license to commit perjury, free of impeachment.

However, the mere failure to properly advise a suspect of his *Miranda* rights is to be distinguished from the case of a suspect who *affirmatively* invokes his right to silence and counsel, followed by continued questioning of the suspect "outside Miranda" in an effort to get a statement which will effectively *keep the suspect off the stand* at his trial because of the threat of impeachment from the after-invocation statement.

This case highlights on the *trained* interrogation tactic of pressing the suspect after he invokes his right to silence and counsel. The typical scenario, goes something like this: In a custodial setting, a suspect says he wants a lawyer and does not want to talk. The interrogators expressly acknowledge that he has invoked his rights, and specifically note that, because of this invocation of rights, nothing that he says thereafter can be used against him, with or without the clarification, "...in the case in chief". The interrogators go on to say that even though the suspect's statements "will not be used" against him, they are still interested in hearing what he has to say *before* he talks to a lawyer, because after consultation with a lawyer, they "won't trust or believe anything" he has to say. They may even offer to put it in writing that his statements "won't be used against" him.

The technique has been used successfully to obtain statements that, to some degree, guarantee that the suspect will never be able to testify in his own defense for fear of being impeached.

These consolidated cases hone in on the interrogation policies of the Santa Monica and Los Angeles Police Departments. At issue is whether, having intentionally taken statements after invocation of rights to silence and to counsel, the interrogators may be sued for the conduct. The principal question at this stage of the litigation is whether the officers are entitled to immunity because: (1) a *Miranda* warning and respect for it is a prophylactic rule, not a constitutional right; (2) taking of "outside *Miranda* statements" is not a constitutional violation; and (3) even if there is a constitutional right violated, the officers should be immune if they followed the policies and training of their own departments in using the technique.

A long line of U.S. Supreme Court precedents hold that officers are immune from liability if their conduct does not violate clearly established constitutional rights of which a reasonable police officer would have known. Here, since the "right" is not clearly established, the officers should be immune.

In a dramatic step forward on these issues, a partially-divided panel of the Ninth Circuit held that (1) *Miranda* is, in the circumstances of these cases, a constitutional right; (2) intentionally violating *Miranda* by questioning a suspect who has invoked his rights, violates that right; (3) the right violated has been clearly established for years; (4) a reasonable police officer would know this; and (5) the fact that the officers were following their training and department policy is *no defense.*

Remember though, these cases arise during an interlocutory appeal, solely focused on the question of whether the officers should be immune from suit. The Court answers "no immunity", so the case goes back to the trial court for trial to see if the officers are indeed liable (which is different from the immunity question).

Be that as it may, this case is a blockbuster. It is bound to get further judicial attention, but from here, the outlook is not good, because any officer who continues to utilize the technique is risking personal exposure and liability given this holding.

So, the recommendation would be: (1) do not continue to press a suspect for a statement *after* he has invoked his rights to silence and counsel, absent a clear, unequivocal, coercion-free decision to waive his rights; (2) do not encourage a person who has invoked, to speak by persuading him that his statement cannot be used against him, when you know it can be used for impeachment, because the court will likely deem such a statement to be *involuntary*--the product of deception--and therefore inadmissible *for any purpose.* Finally, seek the advice of your department legal advisor and the prosecutor, on how to proceed until this issue is finally resolved. The case is: *California Attorneys For Criminal Justice v. Butts (9th Cir. 1999) ___ Fed. 3d ___, 1999 DAR 11373.*

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Stay Safe!

--Michael P. Stone