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TRAINING BULLETIN: LEGAL UPDATE

“I Take the Fifth”

By Charles Gillingham

Can any of you really say that you don't know what that phrase means? Well, the Ninth Circuit Court of Appeals said no as well. Remember that law enforcement officers in the western states work under the watchful eyes of the Ninth Circuit Court of Appeals. Consequently, it is important to monitor the body of case law disseminated by those judges. Last month, the Ninth Circuit Court of Appeals reversed a Shasta County judge, a California Court of Appeals, federal District Court judge, and a three judge panel of their own Court, finding that those courts unreasonably applied federal law in evaluating a confession of convicted murderer Jerome Anderson. Anderson said, “I take the Fifth,” after two hours of an interview that continued at Anderson's request for nearly another three hours. The court reversed Anderson's murder conviction.

Good interrogation practice should now consider “I take the Fifth” an invocation of the right to remain silent.

Facts

Anderson and the victim Clark were acquaintances. Anderson suspected that Clark was involved in stealing another of his friend's car. There was a confrontation involving Anderson and Clark. Clark left the house and Anderson followed him. That was the last time anyone saw Clark alive. Clark's body was found later that afternoon. Investigators found a methamphetamine pipe lying near Clark as well as a fresh cigarette butt. Anderson, a parolee, was asked by police to come in for a voluntary interview two days later. Anderson was arrested for a parole violation during the course of his interview.

Two hours into the interview Anderson said “I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more.” The officers continued questioning him about his drug use and his use of pipes. A short time later Anderson said “I am through with this” and “I plead the Fifth.” The officer then asked Anderson “what's that?” referring to the “Fifth.” The questioning continued until Anderson asked for an attorney. At that point questioning ceased. At some point after Anderson requested an attorney, the officers determined that Anderson did not want an attorney and resumed questioning. Anderson subsequently confessed to shooting and killing Clark.

Invocation

The California courts held that the Anderson's statement "I plead the Fifth" was ambiguous and that the officer asked a legitimate clarifying question. Those courts found that Anderson could have been referring to drug use and not the homicide when he invoked.

The Ninth Circuit Court of Appeals found that each of the above references were unambiguous invocations of the right to remain silent and the questions asked by the officers were not legitimate clarifying questions. The court found that the officers did not scrupulously honor Anderson's right to remain silent by immediately ceasing questioning, so they reversed his conviction. (*Arizona v. Roberson*, 486 U.S. 675, 683 (1988))

WHAT DOES THIS CASE MEAN?

At first blush this case seems pretty obvious---the words, "I plead the Fifth" should be considered an invocation. The facts of this case, however, are a bit more complicated. The interview in this case went on for approximately five hours. Anderson's invocation came during questioning about drug use, not direct questioning about the murder. The problem was the officers asked no clarifying questions to Anderson other than what did pleading the Fifth mean.

It is well settled that you may ask clarifying questions when you are unclear about a defendant's response. The court here thought the officer's knew what the Fifth Amendment was and were not legitimately questioning for clarification. At no time did the officers ask what the defendant meant, whether he wanted to continue speaking, or whether in the case of an invocation, about what subject the defendant was invoking.

The officers might have been better off had they asked what Anderson was pleading the Fifth about if they were unclear about his invocation of the right to remain silent. It is doubtful, however, that the case would have had a different result. "I plead the Fifth" from this point forward indicates a defendant's right to remain silent.

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