IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

The People of the State of California, Plaintiff and Respondent, v. GAMALIEL ELIZALDE, et al., Defendants and Appellants.	Case no. S~~215620~~ S215260 (Court of Appeal Case no. A132071)

Contra Costa County Superior Court Case No. 05-08-0903-8
John Kennedy, Judge

* * *

ANSWER TO PETITION FOR REVIEW by Appellant JOSE MOTA-AVENDANO

STEPHEN B. BEDRICK
SBN 058787
Attorney at Law
1970 Broadway, Suite 1200
Oakland, CA 94612
(510) 452-1900

Attorney for Defendant and Appellant
JOSE MOTA-AVENDANO
(by appointment of the Court of Appeal under the FDAP's independent case system)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

I

REVIEW IS NOT WARRANTED BECAUSE THE POSTURE OF THIS CASE MAKES IT UNSUITABLE FOR REVIEW

1. This case is not suitable for review, because no relief can be granted on Respondent's petition. The People already won this case at the Court of Appeal. That court affirmed the murder convictions of all three defendants. That court affirmed the life sentences of all three defendants. The Court of Appeal rejected all of the defendants' arguments except one. It did find one error under Miranda,[1] but deemed that error harmless. Thus, there is no relief which Respondent can obtain at this Court. This Court need not waste its limited resources in granting a review in a case like this, when the results will not change the case one iota.[2]

2. The Court of Appeal initially designated its entire opinion "not for publication." Appellant Mota timely submitted a letter requesting publication of one portion of the opinion, namely the Miranda issue. The Attorney General did not oppose publication at the Court of Appeal. Having failed to do so, the Attorney General has waived and forfeited its right to challenge that publication here. See, e.g., People v. Hines (1997) 15 Cal.4th 997, 1034, n.4; Lorenzana v. Superior Court (1973) 9 Cal.4th 626, 640 (waiver doctrine applies to Respondent).

3. Alternatively, the Attorney General had the opportunity to ask this Court to depublish the opinion. (California Rules of Court, Rule 8.1125(a)) However, that rule provides that a request for depublication

---

[1]Miranda v. Arizona (1966) 384 U.S. 436.

[2]Counsel has never seen, or heard of, a party petitioning for review in a case it has already won. To use a sports analogy, this is like a team which has won a game 10-0 complaining about, and asking to change, an umpire's or referee's call, which prevented it from winning 11-0.

must be "delivered to the Supreme Court within 30 days after the decision is final in the Court of Appeal." Rule 8.1125(a)(4). The Court of Appeal opinion was filed November 19, 2013. It became final 30 days after filing, namely, December 19, 2013. Rule 8.366(b)(1). Under Rule 8.1125 any request for depublication should have been submitted to this Court by January 18, 2014. The Attorney General did not submit any depublication request by that time. Its time has passed to do that. Accordingly, Respondent has waived, and forfeited, the right to request depublication here. People v. Hines, *supra.*

4. Because Respondent, having won the appeal, cannot obtain any relief on its petition for review, this petition for review appears to be a thinly concealed attempt to present an untimely request for depublication to this Court. That stratagem should not be sanctioned. This Court's workload is heavy enough, without taking on extra cases to relieve the Attorney General from its failure to file a timely depublication request.

5. For all these reasons, this petition for review should be denied, because the posture of this case renders it unsuitable for review. This Court should not grant review merely to write an advisory opinion.[3]

[3]If this Court deems the issue intellectually worthy of review, it should at least wait for a case where review would make a difference.

II

REVIEW IS NOT WARRANTED BECAUSE THE COURT OF APPEAL GOT IT RIGHT

A. The Court of Appeal's Decision on the Miranda issue was correct.

In People v. Elizalde, et al., case A132071, the Court of Appeal, First District, Division 2 (opinion by Haerle, J.) affirmed all of Appellant Mota's convictions. It found one error, but deemed that error harmless. The error was as follows: when booking Appellant Mota into jail, the booking officer asked Mota if he was a gang member. He asked that question without giving Miranda warnings. Mota answered that he was a member of the Sureno gang. Mota contended at trial that such an answer should have been excluded for the lack of Miranda warnings. The trial court disagreed, and admitted the answer. The Court of Appeal held that the answer should have been suppressed under Miranda, but it ultimately deemed the error harmless. (typed opinion, pp. 38-51)

The Court of Appeal explained:

> In *Rhode Island v. Innis* (1980) 446 U.S. 291 (*Innis*), the United States Supreme Court clarified what sort of police action constitutes a "custodial interrogation" that must be preceded by a *Miranda* warning. The *Innis* court held that "'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Innis, supra*, 446 U.S. at p. 301.) [footnote omitted] Accordingly, "[a] practice that the police should know is reasonably likely to

evoke an incriminating response from a suspect. . . amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known wee reasonably likely to elicit an incriminating response." (*Innis, supra*, 446 U.S. at pp. 301-302.)

Ten years later, in *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600-602 (*Muniz*), the court considered whether the *Miranda* safeguards came into play when a police officer asked a suspect in custody for -- among other things -- his "name, address, height, weight, eye color, date of birth, and current age. . . .

In considering this question, the court began with the general rule set out in *Miranda* that "[c]ustodial interrogation for purposes of *Miranda* includes both express questioning and words or action that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to 'have . . . the force of a question on the accused,' [citation] and therefore be reasonably likely to elicit an incriminating response." The court then concluded that questioning a suspect about his name, address, height, weight, eye color, date of birth and current age fell "within a 'routine booking question' exception" to *Miranda*, an exception that applies to questions asked in order to secure the ""'biographical data necessary to complete booking or pretrial services."'" (People v. Elizalde, typed opinion, pp.41-42)

The Court of Appeal explained in Elizalde that asking a jailed inmate if he was a gang member was a question which a jail officer knew, or reasonably should have known, was likely to lead to incriminating information, in light of the street gang crime, Penal Code §186.22 (a), and the numerous street gang enhancements in Penal Code §186.22(b).

The Court of Appeal noted that this Court previously decided exactly this question in People v. Rucker (1980) 26 Cal.3d 368, 387. In Rucker this Court held simple biographical information did not have to be preceded by Miranda warnings. However, this Court noted that answers with "potential for incrimination" could not be admitted without Miranda warnings.

Cases following Rucker have held that, under Proposition 8, such a jail booking statement could only be suppressed if mandated by federal law. See, e.g., People v. Herbst (1986) 186 Cal.App.3d 793, 797; People v. Hall (1988) 199 Cal.App.3d 914, 921. That does not present any problem to Appellant Mota's position. There is a long line of federal authority which holds that answers to booking questions which go beyond basic biographical inquiry are not admissible without Miranda advisements. See, e.g., United States v. Henley (9th Cir. 1993) 984 F.2d 1040,1042; United States v. Gonzales-Sandoval (9th Cir. 1990) 894 F.2d 1043, 1046.

The Court of Appeal acknowledged that in People v. Williams (2013) 56 Cal.4th 165, 184 this Court admitted a defendant's statement, made during his jail intake interview, that he needed protection in his housing assignment, because an inmate had threatened to stab him, because he killed two Hispanics. In Williams, this Court upheld the admission of that answer. It found the officers' questions which led to those admissions did not constitute "words or actions on the part of police officers that they *should have known* were likely to elicit an incriminating response." (italics in original) The Court of Appeal deemed Williams inapplicable here. This

is because, unlike in Williams, asking Appellant if he was a gang member was a question which the officer "should have known [was] likely to elicit an incriminating response." (typed opinion p. 44)

Review is not warranted here, because on this point Justice Haerle and the Court of Appeal got it right. Review is not warranted, because asking an inmate, especially one charged with murder, if he is a gang member, is a question that police, especially in California, should know is reasonably "likely to elicit an incriminating response from the suspect." Rhode Island v.Innis (1980) 446 U.S. 291, 301.

B. Respondent's Arguments Are without Merit.

Respondent relies on People v. Gomez (2011) 192 Cal.App.4th 609, 625, which allowed an unwarned gang membership answer to be admitted. Gomez is well researched, but, as the Elizalde court concluded, it was wrongly decided. This Court should not follow or credit it.

Gomez acknowledges that an unwarned gang membership question does not literally satisfy Miranda. The officer in Gomez did not supply the necessary warnings before asking the defendant if he were a gang member. Gomez, supra, 192 Cal.App.4th at 626-627. Then Gomez discusses Rhode Island v. Innis (1980) 446 U.S. 291, 300-301 which holds:

> [T]he term interrogation under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attended to arrest and custody) *that the police should know are reasonably likely to elicit an incriminating response* from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. (emphasis added)

Gomez acknowledged that if Rhode Island v. Innis were the last word, then the answer to the gang membership question should be excluded, because "the police should know [such questions] are reasonably likely to elicit an incriminating response from a suspect."

Gomez discussed Pennsylvania v. Muniz (1990) 496 U.S. 582, 608-611, in which a four-justice plurality held that answers to "routine [jail] booking questions" may be admitted, even if obtained without Miranda warnings. However, the questions deemed by Muniz to be "routine booking questions" only asked about name, address, age, birth date, height, and weight. They did not ask about gang membership. In Muniz the Supreme Court stated, "without obtaining a waiver of the suspect's Miranda rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." 496 U.S. at p. 602, n. 14 (Plur. opn. of Brennan, J.).

Gomez claimed that the phrase "designed to elicit incriminatory admissions" contained in a footnote in Muniz, which test focused on the intent of the officers, overruled the test in Rhode Island v. Innis, namely, that a question should be excluded under Miranda if it was "reasonably likely to elicit an incriminating response," which test focused on the mental state of the arrestee. Gomez implicitly acknowledged that under Rhode Island v. Innis the gang membership question was one "that the police should know [is] reasonably likely to elicit an incriminating response from a suspect." However, Gomez held that was longer the test, because it believed that the phrase "designed to elicit incriminatory admissions," contained in a footnote in Muniz, effectively overruled that prior test in Innis. Gomez, 192 Cal.App.4th at 629.

There are at least four critical defects in the Gomez opinion, which caused it to be wrongly decided. Thus, this Court should accept the First District's opinion in Elizalde, declining to follow Gomez. First, Gomez improperly disregarded the principle that one decision from the United States Supreme Court should not be deemed to overrule another decision by the Supreme Court merely by implication. Repeals by implication are

disfavored. One opinion should only be deemed to overrule a second opinion when it explicitly says so. Muniz did not claim to overrule Rhode Island v. Innis. Indeed, the Muniz opinion repeatedly cited Innis with approval. Pennsylvania v. Muniz, 496 U.S. at 600-601.

Second, Gomez acknowledged, but failed to credit, the fact that the Muniz opinion was only a four-justice plurality. The opinion of a four-justice plurality constitutes law of the case, but it does not constitute binding precedent. The opinion only stands for the narrowest principle with which any concurring justices agreed. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds. . . ." Marks v. United States (1977) 430 U.S. 188, 193; Del Monte v. Wilson (1992) 1 Cal.4th 1009, 1023; People v. Lopez (2012) 55 Cal.4th 569, 590 (dissenting opinion of Liu, J.). Thus, even if, *arguendo*, the four-justice plurality in Muniz wanted its test to overrule Innis, the four-justice plurality in Muniz lacked the legal authority to do so.

Third, the supposed new test which Gomez finds in Muniz, namely, excluding under Miranda only "questions . . . that are *designed* to elicit incriminatory admissions," merely appears in a footnote. Pennsylvania v. Muniz, supra, 496 U.S. at 602, n. 14, emphasis added. This footnote does not control for two reasons. First, it cannot fairly be argued that the U.S. Supreme Court intended to overrule a significant portion of Rhode Island v. Innis by a mere reference in a footnote. If the Court intended to overrule Innis, it would have explicitly said so, and it certainly would have said so in the main body of the opinion, not in a footnote. Second, and in any event, this footnote was part of the four-justice plurality opinion, section III(C), which only commanded four votes. (See Rehnquist, J. concurring and

dissenting, 496 U.S. at 606.)

Fourth, Gomez failed properly to analyze what the decision as a whole did in Muniz. The Muniz plurality allowed as "routine booking questions" the name, address, date of birth, age, height, and weight of the arrestee. Those were all questions seeking personal, biographic information needed to book a prisoner. However, the combination of the four justice Muniz plurality, plus Justice Marshall concurring, barred the question "What the date was of your sixth birthday?" because that question went beyond simple biographical data.

In the same way, asking the gang membership question here did not merely seek biographical information to "book" Appellant. Instead, it sought information so jail guards could decide where to house him after he had been booked and admitted to the jail. Thus, the gang membership question went beyond simple biographical data. It was a question about Appellant's past behavior. It was a question about his associations. It was a question about his friendships. It was a question about criminal alliances. It was a question seeking to predict how he would act in jail. No such question was approved in Muniz, because, under the combination of the four-justice plurality, plus Justice Marshall's concurrence, in Muniz, questions about the defendant's past behavior, past associations, and likely future actions in jail, are far outside the scope of "routine booking questions."

Thus, Gomez erred when it determined it was bound by the four-justice plurality opinion in Muniz, rather than by the test stated by the majority opinion in Rhode Island v. Innis. Contrary to Gomez, the Rhode Island v. Innis test is still good law regarding questions like the gang membership question. Under that test, such an unwarned question violates Miranda if "the police should know [that it is] reasonably likely to elicit an

incriminating response." That is what the combination of the four-justice plurality, plus Justice Marshall, held in Muniz, as to questions beyond name, address, age, height, and weight.

It was clear that the police should reasonably have known in this case that a question about gang membership was likely to elicit an incriminating response from a suspect, within the meaning of Rhode Island v. Innis. Admission that one is a gang member is incriminating in numerous ways. It admits a major element of the crime of participating in a street gang under Penal Code §186.22(a). It admits a major element of numerous gang enhancements stated in Penal Code §186.22(b). A significant number of prisoners entering jail have gang backgrounds which could present a safety risk in jail. That is why officers inquire about gang membership. Under those circumstances, jail officers know, or reasonably should know, that a significant number of jail admittees will answer "yes" to the question about gang membership, and thus, that such question is reasonably likely to lead to an incriminating response.

Gomez acknowledges that this Court held in Rucker, 26 Cal.3d at 387, that it is proper for jail guards to ask an incoming prisoner for gang information, but that the state "cannot use the arrestee's responses in any manner in a subsequent criminal proceeding" under Miranda. Gomez, 192 Cal.App.4th at 630, n. 11. This Court got it right in Rucker, regardless of whether the specific holding in Rucker survived the enactment of Calif. Const. Art. I, §28(d) ("Proposition 8").

Gomez states that it has not found any published post-Proposition 8 California case which squarely addresses the issue of a gang membership question. 192 Cal.App.4th at 632. Although the trial Court here relied on People v. Morris (1987) 192 Cal.App.3rd 380, 388 as one basis for its decision, Gomez correctly acknowledges that the subject language in

Morris was merely dictum, which it was not obligated to follow. Gomez, 192 Cal.App.4th at 632.

Gomez analyzed United States v. Washington (9th Cir. 2006) 462 F.3d 1124, 1132 in which the court held that asking the defendant for his nickname or "moniker" qualified as a "routine booking question" because it merely went to the defendant's identity. Gomez, 192 Cal.App.4th at 631-632. However, Gomez acknowledged that Washington did not address the issue of whether a gang membership question so qualified. Asking a defendant to state his nickname only goes to identity. It does not require him to state whether or not he is a gang member.

Gomez states, on the basis of what appears to be fairly exhaustive research, that there is no federal holding which allows the introduction of the answer to an unwarned gang membership question. 192 Cal.App.4th at 630-632. But there is more than just the absence of federal authority. The Gomez opinion fails to note the line of federal authority which holds that answers to booking questions which go beyond basic biographical inquiry (name, address, etc.) are not admissable without Miranda advisements. See, e.g., United States v. Henley (9th Cir. 1993) 984 F.2d 1040,1042; United States v. Gonzales-Sandoval (9th Cir. 1990) 894 F.2d 1043, 1046. Henley was decided three years after Pennsylvania v. Muniz. Henley discussed both Rhode Island v. Innis and Pennsylvania v. Muniz and held that the correct test was whether the officers "should have known [that the question] was reasonably likely to elicit an incriminating response." Henley, supra, 984 F.2d at 1043.

In its search for federal authority, Gomez found only one federal case which it deemed even close to being on point, namely, United States v. Willock (D.Md. 2010) 682 F.Supp.2d 512, where:

> . . . an incarcerated prisoner was interviewed and asked

questions about his gang affiliation. (Id. at pp. 528-529.) In a subsequent prosecution, he moved to suppress the statements made during the interview. In opposing the motion, the government did not argue that the booking question exception applied. (Id. at p. 532, fn. 25.) Nevertheless, the court noted: "Eliciting information from an inmate about his gang affiliation solely for prison administrative purposes does not implicate Miranda. It is only when such information is used against the inmate in a prosecution that Miranda warnings are required." (Id. at p. 533, fn. 26.) Because of the unique circumstances and the issues presented in *Willock*, it provides little guidance for us in this case.

- - People v. Gomez, supra, 192 Cal.App.4th at 632, n. 12.

Willock got it right. Just because it may be important for jail guards to ask incoming prisoners about their gang affiliation, that does not exempt their answers from the constitutional rights vindicated by Miranda. The fact that the gang membership question may be valid for one purpose does not gift the prosecution with the answer on a silver platter for another, otherwise prohibited, purpose.

For all these reasons, this Court should decline to follow Gomez, and this Court should conclude, faithful to Miranda, that an unwarned answer to a gang membership question should be excluded from evidence in a criminal trial. Justice Haerle and the Elizalde court got it right.

WHEREFORE, for all these reasons, the Attorney General's petition for review should be denied.

Dated: February 12, 2014

Respectfully submitted,

STEPHEN B. BEDRICK
Attorney for Appellant Mota-Avendano

Certification of Word Count

I certify that, according to our computer's word count, the text of this Answer to Petition for Review is 3501 words.

DATED: February 12, 2014

S L B. Bed.-

STEPHEN B. BEDRICK
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

I, Stephen B. Bedrick, hereby declare under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 1970 Broadway, Suite 1200, Oakland, CA 94612.

On the date below, I served the following documents:

ANSWER TO PETITION FOR REVIEW
by Appellant JOSE MOTA-AVENDANO

by placing a true copy thereof, enclosed in a sealed envelope, postage prepaid, in the United States mail addressed as follows:

Clerk
California Court of Appeal
First District, Division 2
350 McAllister Street
San Francisco, CA 94102

David Baskind, Esq.
Office of Attorney General
State of California
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664

First District Appellate Project
730 Harrison Street, #201
San Francisco, CA 94107

Hon. John Kennedy
c/o Clerk, Contra Costa County
P.O. Box 911
Martinez, CA 94553

John Ward, Esq.
584 Castro Street, #802
San Francisco, CA 94114

Solomon Wollack, Esq.
P. O. Box 23316
Pleasant Hill, CA 94523

Aron DeFerrari, Esq.
Office of District Attorney
Contra Costa County Courthouse
725 Court st.
Martinez, CA 94553

Laureen Bethards
P.O. Box 2556
El Cerrito, CA 94530

Jose Mota-Avendano, #AH2351
Housing B2-106
High Desert State Prison
Box 3030
Susanville, CA 96127

Dated: February 12, 2014

S. B. Bedrick

Stephen B. Bedrick