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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **GAMALIEL ELIZALDE, et al,** **Defendants and Appellants.**	Case No. S215260

First Appellate District, Division Two, Case No. A132071
Contra Costa County Superior Court, Case No. 050809038
The Honorable John W. Kennedy, Judge

REPLY BRIEF ON THE MERITS

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ARGUMENT

I. MOTA'S ADMISSIONS OF GANG AFFILIATION FALL WITHIN THE BOOKING EXCEPTION TO *MIRANDA*

The questions asked of appellant Mota regarding his gang affiliation were legitimate and necessary booking questions asked of all prisoners to assure their safe placement in the jail. He does not contend otherwise.

Respondent has argued that *Miranda*[1] warnings are not required in this circumstance. Instead, *Miranda*'s procedural requirements only apply where the suspect is subjected to "custodial interrogation," and the Supreme Court has repeatedly defined "interrogation" to exclude words and actions on the part of the police "normally attendant to arrest and custody." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300 (*Innis*); *South Dakota v. Neville* (1983) 459 U.S. 553, 564, fn. 15 (*Neville*)) ["police words or actions 'normally attendant to arrest and custody' do not constitute interrogation"].) Furthermore, the high court has approved questions that "appear reasonably related to the police's administrative concerns." (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601-602 (*Muniz*).) That is this case.

Respondent's opening brief explained that the Supreme Court has adhered to its exclusion of colloquies attendant to arrest and custody from its definition of "interrogation," and that it has maintained that line when exploring the scope of the booking exception. This distinction subsists notwithstanding the reality that such colloquies can, and often do, produce incriminating statements by the defendant. As respondent explained in the opening brief, the reasons for the result are that booking questions share none of the coercive features of an interrogation, are not asked as part of an

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

investigation into the individual's crime, and serve an essential administrative need.

Respondent also argued, relying on the test approved and applied in *People v. Williams* (2013) 56 Cal.4th 165, 187 (*Williams*), that the questions asked of appellant clearly fall within the booking exception. As *Williams* found, the focus when determining the applicability of the booking exception to *Miranda* is whether the questions to a suspect rreasonably relate to a legitimate administrative concern, or, instead, are a pretext for eliciting incriminating information about the case. (*People v. Williams*, *supra,* 56 Cal.4th 165, 187.) This is an objective assessment that looks to the totality of the circumstances, taking into account the nature of the questions, when and where they were asked, the standardization of the question, the knowledge and intent of the officer asking the question, the administrative need for the inquiry, and any other indications that the questions were designed to elicit incriminating evidence. (*Id.* at p. 188.)

Appellant fails to respond to respondent's arguments on these points. He does not acknowledge, much less apply, the test adopted in *Williams* to his case. Instead, quoting at length from the Court of Appeal's decision, he champions that court's conclusion that any questions a police officer "'should have known [were] likely to elicit an incriminating response'" are inadmissible absent *Miranda* warnings and waivers. (ABOM 13-17.)

That might be a defensible response to a petition for review, but not to the merits of the question before this court. As respondent explained in our opening brief, the Court of Appeal's analysis erroneously engrafts *Innis*'s "should have known" test for interrogation onto the booking exception. That renders the booking exception a meaningless nullity. It reflects an approach that is contrary to *Williams* and United States Supreme Court decisions that exclude legitimate booking questions from *Miranda*.

Choosing not to engage on those points, appellant instead invokes this court's decision in *People v. Rucker* (1980) 26 Cal.3d 368, 387 (*Rucker*). *Rucker* held that booking questions need not be preceded by *Miranda* warnings, but that any answer with "potential for incrimination" is inadmissible absent warnings. (ABOM 15.) Appellant argues that *Rucker* was not abrogated by Proposition 8 because a line of lower federal court decisions hold the answers to booking questions that go beyond basic biographical inquiry are not admissible absent *Miranda* advisements.[2] (ABOM 15.)

At the outset, appellant's argument misunderstands the strictures of Proposition 8, which permits the exclusion in state courts of "relevant, but unlawfully obtained evidence" *only* if exclusion is required by the United States Constitution, "as interpreted by the United States Supreme Court." (*In re Tyrell J.* (1994) 8 Cal.4th 68, 76; accord, *People v. Camacho* (2000) 23 Cal.4th 824, 830; see Cal. Const., art. I, § 28, subd. (f).) Our state Constitution requires *Rucker*'s exclusionary rule to be judged by whether exclusion is compelled by controlling United States Supreme Court authority, not lower federal court decisions.

Rucker is invalid authority when measured under that standard. Of course, *Rucker* predated and, therefore, did not consider, much less apply, the definition of interrogation articulated in *Innis*—which categorically excludes from *Miranda*, and thereby necessarily rendered admissible any responses by the suspect to, police words or actions normally attendant to arrest and custody. Nor did *Rucker* have the benefit of *Muniz*'s or *Neville*'s

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[2] Defendant fails to acknowledge that *Rucker*'s blanket exclusionary rule for booking questions goes beyond even these lower federal court decisions. (See *United States v. Henley* (9th Cir. 1993) 984 F.2d 1040, 1042; *United States v. Gonzalez-Sandoval* (9th Cir. 1990) 894 F.2d 1043, 1046.)

application of the booking exception. These two cases make clear that the United States Constitution as interpreted by the United States Supreme Court, does not *require* exclusion of all incriminating evidence obtained by police during booking in the absence of *Miranda* warnings. *Rucker*'s blanket exclusionary rule to the contrary cannot stand.

Moreover, the lower federal court decisions cited by appellant contain the same defect as the Court of Appeal's decision below: they assess the admissibility of a defendant's response by analyzing post hoc the likelihood an answer to a given booking question could have an incriminating effect. In other words, the federal courts in those decisions address the wrong question. The relevant inquiry is whether the questions asked at the booking in each case were categorically those "normally attendant to arrest and custody" as declared in *Innis*, which are questions "reasonably related to the police's administrative concerns" that *Muniz* omits from the stricture of *Miranda*. Only through that objective inquiry can courts determine whether the police asked legitimate booking questions exempt from *Innis*'s definition of interrogation.

Neither *Muniz* nor *Neville* endorse any approach that asks whether, viewing the case in retrospect from what followed after booking, whether otherwise legitimate booking questions had a potential to incriminate a particular suspect. To the contrary, *Muniz*'s plurality's discussion did not consider whether the questioner "should have known" that an incriminating response by the suspect was likely. Nor did the high court in *Neville* pose the question of whether the officer should have known that incriminating responses were reasonably likely. Instead, having concluded that the questions were "attendant to defendant's arrest and custody," *Neville* found that there was no interrogation within the meaning of *Innis,* and that, accordingly, *Miranda* warnings were not required. (*Neville, supra*, 459 U.S.

at p. 564, fn. 15.) Again appellant has offered no response to respondent's observations on the analysis of these high court's decisions.

Likewise, appellant does not respond to respondent's reliance on *People v. Gomez* (2011) 192 Cal.App.4th 609, 630 (*Gomez*). Instead, he attacks *Gomez* for principles not advanced by respondent. He reads *Gomez* as erroneously concluding that *Muniz* supplanted *Innis*'s "reasonably likely to elicit an incriminating response" test for interrogation, which focuses on the language of the question and the mental state of the arrestee, with a "designed to elicit incriminatory admissions" test, which focuses on the subjective intent of the officers. (ABOM 19-20.)

Although appellant's argument is beside the point, we note that he misreads *Innis* and *Muniz*. Put simply, *Innis* is not a booking case. It recognized the booking exception, but it did not articulate a particular test to determine the exception's availability. *Muniz* is a booking case. As such, it identified the parameters of the exception for legitimate booking inquiries. *Muniz* did not overrule *Innis* because the cases concern different forms of questioning, booking questions and custodial interrogation. The *Muniz* plurality concluded that some of the questions in that case were of the type it had previously held in *Innis* were outside the definition of interrogation triggering *Miranda*'s procedural requirements, i.e., even outside the booking context the questions did not require *Miranda* warnings.

As for *Muniz*'s use of the phrase "designed to elicit," that was not new Supreme Court law. The phrase appeared in both *Innis*[3] and *Quarles*.[4] It is

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[3] "[T]he intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is *designed to elicit an incriminating response* from the accused, it is unlikely that the practice will not also be

(continued...)

responsive to the concern that unbounded *Miranda* exceptions could be abused and that investigatory questions may be asked under the guise or pretext that the question is prompted by an emergency, or to save victims, or to satisfy a legitimate administrative need.

The test for determining the applicability of the booking exception is an objective one. It's availability, like that of other identified exceptions to *Miranda,* does not turn upon the intent of the individual officer. As this court recognized in *People v. Davis* (2009) 46 Cal. 4th 539, 593 (*Davis*):

> [T]he applicability of the public safety exception, which is analogous to the rescue doctrine, "does not depend upon the motivation of the individual officers involved." (*Quarles, supra*, 467 U.S. at p. 656.) A subjective test, the high court noted in *Quarles*, would be problematic because different police officers in similar situations may act out of "a host of different ... and largely unverifiable motives" (*ibid.*), and the legality of their conduct "should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer" (*ibid.*). In determining the applicability of the *Miranda* rule, the high court has generally frowned on the use of subjective tests. (See *People v. Peevy* (1998) 17 Cal. 4th 1184, 1199 [citing decisions of the United States Supreme Court demonstrating that "applications of the *Miranda* rule generally do not turn upon the individual officer's subjective state of mind...."].)

(*Davis,* supra, 46 Cal.4th at p. 593, first and third ellipses original, parallel citations omitted.)

A primary purpose of the booking exception is to permit the authorities to fulfill their administrative obligations to run a jail or prison

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(...continued)
one which the police should have known was reasonably likely to have that effect." (*Innis* at p. 301, fn. 7, emphasis added.)

[4] (See *New York v. Quarles* (1984) 467 U.S. 649, 659 (*Quarles*) [distinguishing question necessary to secure officer or public safety from "questions designed solely to elicit testimonial evidence from a suspect"].)

safely without imposing on them the nearly impossible task of gauging the potential incriminating effect of each booking question on every prisoner. Adopting a should-have-known test for interrogation, to assess the propriety of questions asked to administer in-custody housing, defeats this purpose and runs afoul of the goal of having clear, uniform rules in the *Miranda* context. (See *Berkemer v. McCarty* (1984) 468 U.S. 420, 430.) Like the public safety exception and the rescue doctrine, the need for police to ensure the safety of all prisoners, including the defendant, outweighs the need for the prophylactic rule protecting the Fifth Amendment. Having created a booking exception, its scope should be shaped by the purpose it was created to serve.

A booking question that is judged to relate to a legitimate administrative purpose does not require *Miranda* warnings. The purpose of the questions asked of appellant during his booking interview were to ensure his safe housing and were therefore within the booking exception to *Miranda*.

II. THERE CAN BE NO *EDWARD*'S VIOLATION IN THE ABSENCE OF A CUSTODIAL INTERROGATION

Defendant asserts that his statements admitting gang affiliation were also erroneously admitted in violation of *Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*). (ABM 10-12.) The claim was forfeited, is beyond the scope of review, and, in any event, proves meritless.

A. Background

When appellant arrived at the jail and was told he would be searched for contraband, he laughed nervously and told deputies, "Man I'm in here for some shit that I didn't do. They said I killed someone, but it wasn't me. I was there, but I didn't kill anyone. The guy that did it is already in jail. He confessed already, but now he is trying to bring me down too . . . ." (5 RT 1004.) Agitated, appellant continued, "I'm a gang banger, but I'm not a

murderer." (5 RT 1005.) Appellant related that he had previously "told those other cops that I didn't know anything because I thought I would be in trouble, but now I don't care . . . ." (5 RT 1005.)

In response to appellant's remarks, sheriff's deputies asked if he wanted to talk to a San Pablo Police detective. Appellant said, "Yeah, I will, but first I should talk to my lawyer. After I talk to him I will tell you guys what really went down . . . ." (5 RT 1005.) Appellant's desire to speak to his attorney and to police was noted by the intake deputy and the booking process continued. Thereafter, the jail classification interview occurred in which appellant admitted his gang affiliations.

Relying on the above described exchange, appellant argued at trial that his statements during the subsequent classification interview were inadmissible based on *Edwards*, *supra,* 451 U.S. 477. The trial court rejected the argument. It reasoned that *Edwards* only precludes a subsequent interrogation, that appellant's jail classification interview did not constitute an "interrogation," and that legitimate booking questions do not violate *Miranda* or *Edwards*. (17 RT 3079.)

B. The Claim Is Forfeited and Lacks Merit

Defendant did not challenge the trial court's *Edwards* ruling on appeal, nor did he seek to expand the questions on review to encompass that ruling by the trial court. His failure to do so has forfeited the claim. (*People v. Holt* (1997) 15 Cal.4th 619, 666 [rule requiring specificity in ground for objection to admission of evidence applies to *Miranda*-based objections and motions to exclude]; see Cal. Rules of Court, rule 8.520(b)(3) [briefs must be confined to issues on review absent court order].)

Considered on the merits, the claim fails as well. First, *Miranda* rights cannot be invoked anticipatorily. They must be invoked during the custodial interrogation against which they are being asserted. (*People v. Calderon* (1997) 54 Cal.App.4th 766, 770 [invocation of the right to

counsel is ineffective if asserted outside the custodial interrogation setting as there can be no "anticipatory invocation" of *Miranda* for purposes of custodial interrogation that takes place in the future]; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3 ["that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect."].) As the facts above make clear, Mota was not being "interrogated" when he expressed his willingness to talk to police after consulting with his attorney.

Second, there can be no *Edwards* violation in the absence of a custodial interrogation within the meaning of *Miranda*. As the Supreme Court expressly held in *Edwards*: "The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that [the accused] invoked. . . ." (*Edwards, supra,* 451 U.S. at pp. 485-486.) That *Edwards*, like *Miranda*, is subject to a booking exception is also implicitly recognized in *Oregon v. Bradshaw* (1983) 462 U.S. 1039, where the Supreme Court made clear that after an arrestee has invoked his right to counsel, "inquires or statements, by either an accused or a police officer *relating to the routine incidents of the custodial relationship*, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*." (*Id.* at pp. 1045-1046, emphasis added.) (See also *People v. Johnson* (1971) 20 Cal.App.3d 168, 173-175 [the rights enumerated in *Miranda*, specifically the right to remain silent and the right to counsel, are not implicated by questions relating only to booking information].)

For the reasons we have argued, the classification interview was not an interrogation.

III. THE ADMISSION OF MOTA'S STATEMENTS WAS HARMLESS

Admission in evidence of statements obtained in violation of *Miranda* are subject to the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310; *People v. Neal* (2003) 31 Cal. 4th 63, 86.)

Under the *Chapman* test, error is harmless when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, at p. 24.) "'To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*People v. Neal, supra,* 31 Cal.4th at p. 86, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403.) "Thus, the focus is what the jury actually decided and whether the error might have tainted its decision." (*People v. Neal, supra*, 31 Cal.4th at p. 86.)

Respondent has argued that if this court concludes appellant's admissions of gang membership were received in evidence in violation of *Miranda,* the error was harmless beyond doubt. Most importantly, appellant's gang membership was convincingly established by many other sources. Specifically, three witnesses testified, based on their familiarity with appellant as fellow gang members and/or friends that he was a member of Varrio Frontero Lobo (VFL). In addition, the jury heard the People's gang expert opine that appellant was a VFL member based on information other than his admissions. The jury also heard evidence that appellant had committed an earlier robbery in which he wore colors associated with the gang, and was throwing hand signs to his codefendant signifying his gang status. Last, the jury was presented with photos take of appellant with other VFL gang members in which he was making similar gang signs.

Appellant challenges the Court of Appeal's finding of harmlessness, arguing that most of this other evidence came by way of accomplice testimony that was not sufficiently corroborated to render it reliable. (ABOM 26-49.) In so doing, appellant reargues other claims of error rejected by the appellate court and outside the scope of the petition for review.

His prejudice argument not only exceeds the scope of the question on review before this court, it is based on a misapplication of *Chapman*. Under that decision, the reviewing court asks whether the complained of error (here, the erroneous admission of the challenged evidence) contributed to the verdict. In making this assessment, the reviewing court looks at "everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt*, *supra*, 500 U.S. 391, 403.) Here, the jury considered all of the testimony described above, which as previously discussed, amply supports the conclusion that appellant's admission was proved overwhelmingly by other evidence. Thus, any error was harmless beyond a reasonable doubt.

CONCLUSION

Accordingly, the Court of Appeal's conclusion that the evidence was erroneously admitted should be reversed and the judgment otherwise affirmed.

Dated: September 11, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,238 words.

Dated: September 11, 2014

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Gamalied Elizalde, et al**

No.: **S215260**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 11, 2014, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 11 2014, at San Francisco, California.

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