OpJAGAF 2018/8, 25 Jul 2018,* CUSTODIAL INTERROGATION OF JUVENILES & *MIRANDA

This is in response to your question whether California's adoption of stronger *Miranda* protections for juveniles changes the procedures Security Forces should employ when detaining and/or arresting such juveniles in areas where the Air Force has some jurisdiction.

Analysis

On 22 October 2017, the Governor of California signed Senate Bill 395, which requires that law-enforcement officers provide youths under the age of 16 years old consultation with legal counsel prior to custodial interrogation and waiver of *Miranda* rights:

> (a) Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 15 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.
> (b) The court shall, in adjudicating the admissibility of statements of a youth 15 years of age or younger made during or after a custodial interrogation, consider the effect of failure to comply with subdivision (a).
> (c) This section does not apply to the admissibility of statements of a youth 15 years of age or younger if both of the following criteria are met:
>> (1) The officer who questioned the youth reasonably believed the information he or she sought was necessary to protect life or property from an imminent threat.
>> (2) The officer's questions were limited to those questions that were reasonably necessary to obtain that information.

California Welfare and Institutions Code, Section 625.6 (2017). This is not a unique provision of law; many states have laws enhancing the rights of juveniles when subjected to custodial interrogation. *See, e.g.*, Colo. Rev. Stat. § 19-2-210 (requiring a parent to be present during custodial interrogation of a juvenile or the statements obtained can be suppressed).

Federal law also provides enhanced rights for juveniles detained for violations of the criminal law. Title 18, United States Code, Section 5033 requires that the parents of a juvenile in "custody" to be informed of the detention and nature of the offense.

> Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

> The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

18 U.S.C. §5033; *see United States v. Male Juvenile*, 121 F.3d 34 (2d Cir. 1997)(though military police did not comply with §5033, interrogation was not custodial and therefore motion to suppress denied).

In 1966, the Supreme Court established the rule that when a person is subjected to custodial interrogation, he or she is entitled to advisement of rights to remain silent and to have counsel present during questioning. *Miranda v. Arizona*, 384 U.S. 436, 444-45, (1966). An officer's obligation to administer these warnings, however, attaches "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Thus, absent custodial interrogation, or being "in custody," none of the protections of *Miranda*, §5033, or §625.6 apply.

What is "in custody" will vary from case to case, making specific guidance difficult. But the court in *In re E.W.*, 114 A.3d 112, 117 (Vt. 2015) provided a good summary of the factors relevant to the "in custody" determination, particularly when dealing with juvenile offenders:

> This Court has listed several non-exhaustive factors to consider in determining whether a suspect was in custody. '[T]he most important factor is whether police told the defendant that he or she was free to leave.' … Other relevant factors that we have recognized include the location and duration of the questioning, the extent to which the suspect was confronted with evidence of his or her guilt, the use of deceptive police practices, and whether the officer was armed. … Additionally, the U.S. Supreme Court has recognized that a suspect's age, if known or apparent to a reasonable officer, is an objective factor that should be accounted for in the custody analysis. *J.D.B. [v North Carolina]*, ___ U.S. at ___, 131 S. Ct. at 2402-06. As the high court explained, a child's age 'generates commonsense conclusions about behavior and perception' which 'apply broadly to children as a class' and are 'self-evident to anyone who was a child once himself.' *Id*. at ___, 131 S. Ct. at 2403 (quotation omitted).

In fact, the Supreme Court in *J.D.B.* was even more "concerned" with custodial interrogation of juveniles than that, noting "the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. That risk is all the more troubling--and recent studies suggest, all the more acute--when the subject of custodial interrogation is a juvenile." 131 S. Ct. at 2401 (citations and internal quotation marks omitted). Thus, the Court recognized that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go," "lack the experience, perspective, and judgment" of adults, and "cannot be viewed simply as miniature adults" and therefore courts should "account for that reality" in their custody analysis. 131 S. Ct. at 2403-04.

In spite of this "concern," however, most public interactions (*e.g.*, traffic stops, responding to call and questioning in public of suspects), even of juveniles, are not custodial:

> Nearly twenty years [after *Miranda*], the Court explained that an "ordinary traffic stop mitigates the danger that a person questioned will be induced 'to speak where he would not otherwise do so freely.'" *Berkemer v. McCarty*, 468 U.S. 420, 437, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984) (quoting *Miranda*, 384 U.S. at 467). The limited duration, public location, often one-on-one nature of a traffic stop along with the driver's knowledge that he will soon be allowed to continue his journey distinguish traffic stops from other, more formal interrogations. *Id.*

United States v. Cravens, 2000 CCA LEXIS 230, *5-6 (A.F.C.C.A. 31 Oct 2000); *United States v. Curtis*, 44 M.J. 106, 144 (C.A.A.F. 1996).

But the line between essentially a *Terry* stop[1] and custodial interrogation is impossible to draw in the abstract. In a particular case, a reviewing court will look to a number of factors to make that determination:

> 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.' *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). '[T]he ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (internal quotation marks omitted) (citation omitted). Courts evaluate:
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> > (1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred ...[;] (3) the length of the questioning ...[;] [(4)] the number of law enforcement officers present at the scene[;] and [(5)] the degree of physical restraint placed upon the suspect.

United States v. Mitchell, 76 M.J. 413, 417 (C.A.A.F. 2017)(*citing United States v. Chatfield*, 67 M.J. 432, 438 (C.A.A.F. 2009) (internal quotation marks omitted) (citing *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); *United States v. Mittel-Carey*, 493 F.3d 36, 39 (1st Cir. 2007)); *see, e.g., In re L.I.*, 695 S.E.2d 793, 798 (N.C.App. 2010)("Corporal Aleem's uncontradicted testimony indicates that, at the time of juvenile's statements, he had 'placed her in investigative detention,' had handcuffed her, and had placed her in the backseat of his patrol car. Considering the totality of the circumstances, juvenile was in custody at the time of her statement.")

On a day-to-day basis, it is difficult to foresee a circumstance where a juvenile needs to be subjected to custodial interrogation in order for Security Forces members to maintain the security and safety of a military installation. Traffic stops, identification of suspects (*Terry* stops), and investigations of typical juvenile hooliganism (*e.g.*, minor vandalism, thefts), do not require "custodial interrogation" and military law-enforcement officials should avoid the same whenever possible.

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

When detention is necessary to pursue an investigation (*e.g.*, juvenile murder suspect detained at the scene of the crime), compliance with California Welfare and Institutional Code §625.6 will only be required when the offense under investigation will be prosecuted by the State of California. Federal law applies in federal courts and there is no federal law or federal court interpretation of *Miranda* that has applied a legal-consultation prerequisite for waiver during custodial interrogations of juveniles. Thus, in an area of exclusive federal or concurrent jurisdiction, for which United States district courts have original jurisdiction,[2] law-enforcement investigator do not need to comply with §625.6.

A Federal district court, however, might consider the failure to provide pre-interrogation legal consultation to a juvenile consistent with California law as a factor in the totality of circumstances test for whether the questioning is "in custody" or in a determination under the reasonable-person standard whether the juvenile knowingly, voluntarily, or intelligently waived his or her *Miranda* rights.[3] But even then that would be one of many factors the court would consider, and unlikely one that is determinative given the lack of a stand-alone requirement under Federal law or prior Federal court precedents. Thus, this possibility is not enough to suggest that military law-enforcement officials should routinely apply §625.6 requirements.

The harder question arises when the offense occurs in a location where California and the federal governments share jurisdiction and there is a possibility that prosecution will be turned over to state authorities (concurrent) or only the state can prosecute non-federal offenses (proprietary). In such cases, military law-enforcement officials interrogating an in-custody juvenile under the age of 16 who do not provide pre-questioning legal consultation (except in situations falling under the emergency exception of (§625.6(c)), violate §625.6 and place the admissibility of any incriminating statements obtained from the juvenile in jeopardy.

Conclusion

These general principles suggest a broad course of action: (1) reminding military law-enforcement officials to avoid custodial interrogation/in-custody questioning when feasible; and (2) quickly advise and consult with legal counsel regarding any instances of custodial interrogation of a civilian (juvenile or adult), particularly when the offense occurs in areas of concurrent or proprietary jurisdiction.

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[2] Air Force Instruction 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians*, 30 Sep 14, paragraph 3.1; 18 U.S.C. §3231.

[3] See cases catalogued at footnotes 5 and 6 of *Alvarado v. Hickman*, 316 F.3d 841 (9 Cir. 2002), *overruled by Yarborough v. Alvarado*, 541 U.S. 652 (2004).