The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops

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THIS EDITION'S WORDS OF WISDOM:

"*You know you're getting old when everything hurts. And what doesn't hurt doesn't work.*" (Hy Gardner)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Battery Upon an Unrelated Roommate: The Issue of "Cohabitating:" I've been asked whether it qualifies as a "*domestic violence*" incident when two unrelated, *not* romantically nor intimately involved roommates get into an argument with one committing a battery on the other. My answer is "*no*," . . . or at least, I don't think so. Looking at the limited case law, the relevant statutes, and the various (albeit similar) statutory definitions of "*domestic violence*," here's what I found. The potentially chargeable crimes are as follows: **Penal Code § 243(e)(1)**, which provides an enhanced misdemeanor punishment (i.e., up to one year in jail and a $2,000 fine) when the battery is committed against a victim who, among other listed "intimate" relationships, is "*cohabiting*" with the suspect. The term "*cohabiting*" is not defined. **Penal Code § 273.5** elevates a battery to a felony offense (up to four years in prison and a $6,000 fine) when the battery causes "corporal injury resulting in a traumatic condition" to a person with whom the suspect is cohabitating. "*Cohabiting*," although listed as one of the alternate (but necessary) elements, is again not defined. The "domestic violence statute," however, (i.e., **Pen. Code § 13700(b)**), which uses a similar description for those who are eligible for domestic violence victim protections, specifically defines "*cohabiting*" as when the victim and suspect are "two unrelated adult persons living together for a substantial period of time, resulting in some *permanency of relationship*." (Italics added) In determining that this means, **section 13700(b)** notes the following: "Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as spouses, (5) the continuity of the relationship, and (6) the length of the relationship." In my mind, this all hints strongly that there must be some sort of romantic or intimate relationship between the two. Where roommates are *not* intimately involved in some manner, the only factors that arguably apply are the sharing of expenses and the joint use of property. This does not appear to me to be enough, by themselves, to qualify as what the Legislature intended to be cohabitation. What little case law there is in this area seems to support this conclusion. For instance: In discussing the scope of **P.C. § 13700**, California's First District Court of Appeal noted that: "This provision of the legislation known as '*Law Enforcement Response to Domestic Violence*' is of particular interest because it promotes the same goal as the provision under consideration—the protection of persons from violence committed by *their domestic partners or others with whom they have a significant relationship*." (Italics added) (***People v. Ballard*** (1988) 203 Cal. App. 3rd 311, 318.) In ***Ballard***, in upholding defendant's conviction for a felony violation of **P.C. § 273.5**, the Court noted that it is obvious what "*to cohabit*" means; i.e., "the living together of a man and woman ostensibly as husband and wife." (***Id.***, at pp.

317-318.) Defendant and the victim, being described as "boyfriend-girlfriend" and sleeping "together in one bed," were held to be cohabitants. (pg. 315.) The **Family Code**, which *does* define "*cohabitant*," also supports this conclusion, noting in **section 6209** that: "'Cohabitant' (or '(f)ormer cohabitant') means a person who regularly resides (or 'resided') in the household." (See also **Subd. (b)** of **Fam. Code § 6211**, defining "*domestic violence*" to include when the parties are "(a) cohabitant or former cohabitant, as defined in **Section 6209**," and **P.C. § 836(d)**, which allows an officer to make a misdemeanor arrest for "an assault or battery upon a current or former spouse, fiancé, fiancée, a current or former cohabitant as defined in **Section 6209** of the **Family Code**," even though the offense occurred outside the officer's presence.) Using a little common sense, "*Resid*(*ing*) *in the household*" seems to infer something more than just renting a room down the hallway; "*household*" commonly referring to the family unit. In fact, this **Family Code** section has been interpreted in the case law to require more than just merely living in the same house. (See ***O'Kane v. Irvine*** (1996), 47 Cal.App.4th 207; where "(t)here was no romantic or friendly relationship between" the parties [pg. 209], thus no "*cohabitation*.") All this leads to the inescapable conclusion that simple roommates, without any romantic, intimate, or at least familial relationship involved, are *not* "cohabitating." I was also asked (just to confuse the issue even more) whether a parent-child relationship applies, such as when a daughter batters her mother. To this question, I believe the answer has to be "*yes*." **Family Code § 6211**, defining what is required to constitute "*domestic violence*," (in addition to when the victim is the child of the perpetrator; **subd. (e)**), specifically includes (at **subd. (f)**) when the parties involved include "(a)ny other person related by consanguinity or affinity within the second degree." Consanguinity to the second degree ranges all the way to grandparents and grandchildren. (See also ***People v. Dallas*** (2008), 165 Cal.App.4th 940, where it was held that defendant's baby regularly resided in defendant's household, and was therefore a "*cohabitant*" within the meaning of **Fam. Code § 6209**.) The only way we will be able to determine whether I'm right or wrong on the above issues, however, is to test these conclusions in a directly-on-point published case. That, of course, requires you to make the appropriate arrests and for a prosecutor to charge the appropriate offenses. . . . . *I'm waiting.*

Can Federal Officers be Prosecuted Under the New California Use-of-Force Statute*?** California's progressive Legislature passed an amendment to **Penal Code § 835a** (**AB 392**), effective as of January 1, 2020, tightening up the standards for an officer's use of deadly force. (See *California Legal Update*, Vol. 24, #9, dated Aug. 30, 2019, Admin. Notes.) In effect, to use deadly force in California today, an officer's use of that force must be "*necessary*" under the circumstances, as opposed to merely "*reasonable*." (See **P.C. § 835a(a)(2)** and **(c)(1)**.) The federal standard, however, not being bound by California's views on the issue, remain one of "*objective reasonableness under the circumstances*." (See ***Graham v. Connor (1989) 490 U.S. 386; ***Tennessee v. Garner*** (1985) 471 U.S. 1.) I have an interesting article lifted from a publication by the Homeland Security's Federal Law Enforcement Training Center (i.e., "*The Informer*") which argues that federal law enforcement officers are not bound by California's stricter standards, at least in federal court. This is because, per the author, when obliged to use deadly force, there is statutory authority (**28 U.S.C. § 1442**) for "removing" any attempt

by the state to prosecute the involved federal officer(s) into federal court where the case would presumably be dismissed (assuming the force used meets the traditional "*objective reasonableness*" standards). The same theory may apply to civil suits as well. I have the full article that I have received permission from the author to pass onto you should you like to see it. You need merely ask. Particularly if you are a federal officer, it's an article with which you might want to be familiar.

CASE LAW:

***Warrantless Seizure of Evidence Observed in Plain View*:**
***Sixth Amendment Ineffective Assistance of Counsel*:**
***Evidence Collection by Non-Law Enforcement*:**
***Photographing a Defendant/Patient in a Hospital Setting*:**
***Warrantless Entries of a Hospital Room*:**
***Miranda*-Custody and the Hospital Patient:**
***Questioning a Hospital Patient as a Due Process "Coercion" Issue*:**

People v. Caro **(June 13, 2019) 7 Cal.5th 463**

Rule: The "*plain view*" doctrine allows for the warrantless seizure of evidence so long as the officer seizing the evidence was lawfully in a place where the object could be viewed, the officer had a lawful right of access to the seized item, and the item's evidentiary value was immediately apparent. Physical evidence removed from a defendant's body during surgery by a hospital's surgical staff, unless instructed to do so by a law enforcement officer, is admissible at trial in that the Fourth Amendment protects only against governmental intrusions. A defendant loses her property interest (i.e., "expectation of privacy") in evidence removed from her body during surgery. Questioning of an overtly injured hospital patient will generally require a waiver of rights in that he/she, not feeling free to terminate the questioning, is in custody for purposes of *Miranda*. Questioning a hospital patient who is in pain and encumbered by on-going medical treatment is also likely to be a Fourteenth Amendment due process/coercion issue.

Facts: Up until November, 1999, defendant Socorro Susan Caro lived with her husband, Dr. Xavier Caro (a rheumatologist), and four male children (ages 11, 8, 5 and 1), in Camarillo, California. Married since 1989, defendant eventually began working in Xavier's office as his office manager. Their relationship soured, however, with divorce being discussed at various times. In August of 1999, Xavier fired Caro from her officer manager job, allegedly because she had been mishandling the office's income and expenses. Defendant later contended, however, that she was fired in order to make it easier for Xavier to carry on an affair with someone else who worked in his office. But their relationship seemed to improve with marriage counseling and defendant taking Prozac (an antidepressant). On the evening of November 22, 1999, Xavier and defendant enjoyed a nice dinner at home, consuming a fair amount of margaritas in the process (defendant later having a blood-alcohol level of 0.138%, while also testing positive for Prozac and Xanax. (Xanax is a medication meant to treat anxiety and panic disorders). Spoiling the evening, however, their eldest son (Joey) made an unsolicited comment about his parents' excessive drinking. An argument ensued between Xavier and defendant as to whether their smart-mouthed son should be disciplined. This all led to an emotional (and inebriated) defendant

accusing Xavier of not loving her and not respecting her. When Xavier threatened to leave. Caro held his ankles as he tried to pull away. Defendant's mother (Juanita) arrived just in time to view this spectacle. Feeling the need to get involved, Juanita yelled at Xavier to "get out, you brute," which he obediently did. The time was 9:00 p.m. Still upset, defendant vented to her mother for a while, complaining about having no money, how she and her kids were going to starve, and how she must be "crazy like he says I am." After calming defendant down, Juanita left. For the next hour, defendant made "multiple" calls to Xavier's car phone and then to his office. Xavier eventually answered and a repentant defendant asking him to return home. He eventually did, arriving home at some time shortly after 11:00 p.m., unawares of the carnage he was returning to. Upon checking the then-quiet house, Xavier found defendant unconscious on the floor of their master bedroom with bloodstained froth around her mouth. Thinking she had overdosed, and while calling 911, Xavier rolled defendant over, discovering a .38-caliber revolver underneath her with several expended shell casings. Asked by the 911 operator if there were any children in the house, Xavier ran to check on their sons. He found 11-year-old Joey in his bed, covered with blood, and dead from a single gunshot wound to the head. Eight and five-year-old Michael and Christopher were also dead with one and two (respectively) gunshot wounds to their heads, lying together on the bottom bunk of their bunkbed. One-year-old G.C. was found unharmed in his crib. Reporting to the 911 operator that three of his sons were dead, an angry Xavier returned to his comatose yet-still breathing wife, yelling and kicking. Transported to the hospital, defendant survived (obviously, or she wouldn't be the defendant here). Her injuries included a single (self-inflicted) gunshot wound to the head, bruising on her right bicep, bruising on the inside of her thighs, and a severely fractured, swollen, and bruised foot that, in addition to the head wound, required surgery to fix. (Which, if any, of these injuries were caused by Xavier kicking her is unexplained.) She was immediately taken into surgery where bullet fragments were removed from her brain (leaving the foot injury for another day). Detective Rivera viewed the surgery, photographing the process and collecting the bullet fragments as they were removed from her head. Detective Cheryl Wade was in defendant's Intensive Care hospital room waiting for her when she eventually woke up from the surgery. Detective Wade recorded the next two-and-a-half to three hours of a disjointed discussion about the murders, interrupted occasionally by the hospital staff as they worked to minimize her discomfort. During this time, defendant was in constant pain, intermittently unconscious, under the influence of medication, encumbered by tubes, monitors, and intravenous lines, and suffering from the foot fracture that had yet to be treated. Despite these less-than-ideal circumstances, defendant made a number of incriminatory statements that were later used against her at trial. It wasn't until after this three hours that defendant was finally read her *Miranda* rights. She promptly invoked her right to the assistance of counsel, thus terminating the interview. Defendant was charged by the Ventura County District Attorney with three counts of murder (P.C. § 187(a)) while personally using a firearm (P.C. § 12022.53(d)), with a multiple murder special circumstances (P.C. § 190.2(a)(3)). Her defense at trial was that it was her husband, Xavier, who killed the boys, and then shot her in the head; a story the physical evidence, including "blood spatter," did not support and the jury did not believe. She was found guilty of all counts with all allegations and the special circumstance found to be true. After a penalty phase at which the jury determined she deserved the death penalty, defendant appealed directly to the California Supreme Court.

Held: The California Supreme Court unanimously affirmed, with one concurring (and very instructive) opinion being written by Justice Goodwin Liu.

(1) *Fourth Amendment Seizure and the Plain View Doctrine*: Upon defendant's arrival at the hospital emergency room, hospital personnel immediately cut off the bloody clothing (i.e., defendant's shirt, pajama shorts, and underwear) she was wearing and left it all on one of the backboards used to transport her. Sheriff's Deputy Jeffrey Miller arrived at the hospital shortly after defendant. He observed defendant's clothing on the backboard and, recognizing its potential evidentiary significance, seized it and gave it to a field evidence technician. The clothing was in fact used by the prosecution during trial; the pattern of blood distribution being significant via an expert's testimony in reconstructing the murders and to disprove defendant's claim that Xavier was the assailant. Defendant argued on appeal that seizing the clothing without a search warrant violated the Fourth Amendment. The Court disagreed. First, defendant failed to raise this issue at trial, thus forfeiting it. Defendant therefore argued that her lawyer was legally ineffective (i.e., "*incompetent*;" a Sixth Amendment issue) for having failed to file a motion to suppress the clothing. The Court ruled, however, that even if he had, such a motion would have been unsuccessful. Under the "*plain view*" doctrine, an officer may seize an item of evidence without a warrant if (1) the officer was lawfully in a place where the object could be viewed; (2) the officer had a lawful right of access to the seized item; and (3) the item's evidentiary value was immediately apparent. "The doctrine does not amount to a full exception to the warrant requirement, but merely allows a warrantless seizure where an officer lawfully views, and can lawfully access (e.g., does not have to make a warrantless—illegal—entry into a residence, for instance), contraband or incriminating evidence." Here, Deputy Miller was in a place he had a right to be (the hospital's emergency room) when he observed the defendant's bloody clothing in plain sight, the significance of which was immediately apparent. The fact that the deputy could not ascertain at that moment whether or not the blood was defendant's did not eliminate the strong likelihood that at least some of the stains would link her or some as-of-yet-unidentified assailant to her or her sons' injuries. The warrantless seizure of the clothing was therefore lawful.

(2) *Admissibility of Other Evidence*: Aside from defendant's bloody clothing, she also contested the seizure and use against her in trial of other items of evidence; i.e., scrapings from her hands and feet after bags were placed over her appendages to preserve evidence (i.e., gunshot residue and other evidence); photographs taken of her during surgery; bullet fragments removed from her head during surgery; and the incriminatory statements she made to Detective Wade while in the Intensive Care Unit ("ICU"). Again, because defendant did not attempt to suppress these items at trial, her attempt to do so on appeal was waived (i.e., "forfeited"). So instead, she again argued that her attorney was legally ineffective for having failed to file a motion to suppress. The evidence indicated that Detective Rivera (with a forensic criminologist) were present during the surgery (in scrubs), taking pictures. The surgical staff placed plastic bags over defendant's hands and feet—done for the purpose of preserving any gunshot residue and other trace evidence that might be there—no doubt at the direction of Detective Rivera. A nurse gave Detective Rivera the bullet fragments as they were extracted from defendant's head. This was followed up by Detective Wade—sometimes in the company of the D.A. hired psychologist, Dr. Ashley—engaging in 2½ to three hours of sporadic and un-*Mirandized* questioning (see Part (3), below), resulting in three incriminating statements that were used against her at trial. Failing to challenge the admissibility of any of this evidence at trial was the basis for defendant's challenge to the competence of her trial attorney. With the admissibility of defendant's clothing already

resolved (Part (1), above), the Court moved onto the other evidence. Again, if the evidence would have been admissible anyway, then defendant's attorney was not legally ineffective for having failed to challenge it. The basic rule is that the Fourth Amendment only limits searches and seizures where it is shown that a defendant had a reasonable expectation of privacy in the place searched or items seized. With this rule in mind, the Court determined that its job normally was to examine what reasonable expectation of privacy defendant had, or didn't have, in her physical person and areas of the hospital such as the operating room and her ICU room. As for the bullet fragments removed from her head, the Court noted that the fragments were removed by hospital personnel. The Fourth Amendment protects only against governmental intrusions. "Thus, the removal of a bullet by medical personnel acting independently of law enforcement directives does not implicate the rights therein." The bullet fragments were not subject to suppression absent a showing that the hospital personnel were acting at the request of law enforcement (i.e., as "government agents"). There was no such evidence to support this theory. Also, once removed, defendant no longer retained whatever property interest (i.e., an expectation of privacy) she may have had in the bullet fragments. Lastly, the Court found that even if the bullet fragments should have been suppressed, defendant failed to show how she was prejudiced given the other overwhelming evidence of her guilt. Detective Rivera photographed the surgical procedures as they were performed. He also photographed defendant as she lay in the recovery room prior to being moved to the ICU. Some of these photos were later offered into evidence during her trial. Defendant argued that her attorney was incompetent for having failed to challenge the admissibility of these photos on Fourth Amendment grounds. At least one state has held that a defendant has no reasonable expectation of privacy in an operating room because a patient "traditional(ly) surrender(s) to his or her physician . . . the right to determine who may and may not be present during medical procedures." (*State v. Thompson* (1998) 222 Wis.2nd 179, 192 [585 N.W.2d 905].) On the other hand, it has also been held that the privacy rights we maintain in our bodies are heightened during medical procedures. (See, e.g., *Sanders v. American Broadcasting Companies* (1999) 20 Cal.4th 907, 917; citing cases where pictures of a patient in a hospital constituted an actionable intrusion under tort (i.e., civil) law.) The Court here, however (after waiving this interesting tidbit of legal minutia in our faces), declined to decide the issue, noting only that, given the strength of the other evidence against her, defendant failed to show that she suffered any prejudice by the admission of the contested photos. The Court similarly ducked the issues related to the admission into evidence of fingernail scrapings and gunshot residue, ruling only that again, defendant had failed to show how she might have been prejudiced by her attorney's failure to file motions to suppress. Lastly, defendant argued that Detective Rivera's mere unconsented-to presence in the recovery room and the ICU room, noting her demeanor and photographing her, violated her Fourth Amendment rights. Again, while failing to decide the legality of the detective's presence and actions in these areas, the Court only noted that defendant had failed to show any prejudice in that defendant's surgeon and nurse both testified to defendant's demeanor and how she appeared at these same times. (But see "Note," below, discussing the issues raised by an officer's unconsented-to presence in a suspect's hospital room.)

(3) *Defendant's Incriminatory Statements*: Three of defendant's statements to Detective Wade were admitted into evidence against her; i.e.: (1) That she may have broken her foot by falling down the stairs; (2) that she might have gotten hurt by "wrestling with a boy;" and (3) (after invoking her *Miranda* rights) spontaneously asking about where G.C. was located and whether he was okay (while not asking about the other three boys). Defendant argued that admission of

these statements violated both her Fifth Amendment (*Miranda)* rights, and (because they were obtained while officers were in her hospital room without consent) her Fourth Amendment illegal search and seizure rights. As noted above (Part (2)), the detectives' unconsented-to presence in her room (the Fourth Amendment issue) was held (without discussing the legal issues) to be non-prejudicial, given the weight of the other evidence. The only remaining issue here (at least as to the first two statements) was whether she was in "*custody*" for purposes of *Miranda*, and whether her statements were properly admitted absent a valid *Miranda* admonishment and waiver. The majority of the Court (8 Justices), while noting only that by questioning her under these circumstances, Detective Wade "*tread on perilous ground*," then determined that they were not going to decide the Fifth Amendment issues raised here in that, again, defendant was not prejudiced by the admission into evidence of her contested statements. Justice Goodwin Liu, however, in concurring only that admission of these statements was non-prejudicial from an evidentiary standpoint, was highly critical of the interrogative tactics used by Detective Wade, launching into an 8½ page (see pages 525-536) well-articulated dissertation, arguing that not only was defendant in custody from the very beginning, but that given the callousness of the detective's acts by questioning her under such circumstances (i.e., with defendant being "bedridden, isolated from family and friends, in continuous pain, intermittently unconscious, under the influence of medication, encumbered by tubes, monitors, and intravenous lines, and suffering from a major foot fracture that had not yet been treated), questioning her at all violated her Fourteenth Amendment due process rights (therefore constituting "*coercion*"), the results of which should not have been admissible against her for any purpose (i.e., in the People's case-in-chief *or* for impeachment). (See *Mincey v. Arizona* (1978) 437 U.S. 385.) Justice Liu also noted that "throughout the interview here, Detective Wade presented herself to Caro as a supportive caregiver and advocate for Caro's medical needs and recovery," as opposed to a law enforcement officer seeking to secure incriminating evidence that could (and eventually did) lead to a death sentence for her. While Justice Liu agreed with the majority opinion that such an interrogative technique did not result in any evidence that would have made a difference in the outcome (and was thus non-prejudicial), he was highly critical of Detective Wade's tactics.

Note: *First*, I emphasized above Justice Liu's extremely critical analysis of Detective Wade's interrogation tactics (which, by the way, was *not* adopted by the other eight justices, so is of relatively little legal significant as far as its value as precedent is concerned), not to chastise the detective (Justice Liu not one who is known for being a friend of law enforcement), but to point out the danger in playing what I often refer to as "mind games" with criminal suspects, masking the interrogating officer's true intentions. In this case, I was left with the distinct impression that Detective Wade was in fact truly concerned with Caro's physical condition and discomfort, and was only trying to question her in as humane a way as possible, given the circumstances. But whatever Detective Wade's true intentions were, a police interrogator has to avoid playing around with the accepted rules as they relate to good, legal, interrogation tactics. As pointed out by Justice Liu in this case, such mind games include (but are not limited to) what the courts have recognized as a form of psychological pressure, often referred to as being a "*false friend*" (see *Spano v. New York* (1959) 360 U.S. 315.), where the officer misleads the suspect into believing that he (the officer) is protecting his or her best interests. (*State v. Rettenberger* (1999) 1999 UT 80 [984 P.2d 1009, 1016–1017].) That's a little like what Detective Wade appears to have done here when she attempted to show (feigning or not) so much concern for defendant's comfort and condition. *Secondly*, as for a suspect's privacy rights in a hospital room (the issue being skirted

in this case), note that the courts have in fact recognized that there is such a thing (i.e., the right to privacy). (See *People v. Cook* (1985) 41 Cal.3rd 373, 381; "(T)he police may not intrude into a hospital room" to see or hear the activities within "simply because hospital personnel routinely go in and out.") But not all courts agree that such a right preludes you from entering a suspect's hospital room under all circumstances. (*People v. Brown* (1979) 88 Cal.App.3rd 283, 289-292: Defendant did not have Fourth Amendment protection in his hospital room when officers did not intend to search the room, and only intended to question him. See also *In re M.S.* (2019) 32 Cal.App.5th 1177, 1186-1187, agreeing with *Brown*.) Where practical to do so (recognizing that it might not always be practical), you too can avoid this issue by merely asking the patient/suspect for permission to come in and talk to him. And then, with a consensual entry (assuming he agrees), you should also either advise the suspect of his *Miranda* rights, *or*, in the alternative (and probably the better tactic), give him a "*Beheler* admonishment" (i.e., *California v. Beheler* (1983) 463 U.S. 1121.), telling him he's not under arrest and is free to terminate the questioning at any time, thus taking the "custody" out of the questioning. *Beheler* works for jail prisoners. (*People v. Macklem* (2007) 149 Cal.App.4th 674.) There's no reason why it can't work for hospital patients as well. This should get you around the argument that a hospital patient is not free to just get up and leave, and is thus "*in custody*." Take these precautions and we *might* be able to appease even Justice Liu.

***The Warrantless Seizure of Video Evidence*:**
***A Delay in Obtaining a Search Warrant to Search Seized Property*:**

People v. Tran **(Oct. 24, 2019) 42 Cal.App.5th 1**

Rule: Seizure of a camera with probable cause to believe it contains evidence relevant to a crime is lawful, subject to a showing of exigent circumstances. A three-day delay between the seizure of a camera and the obtaining of a search warrant authorizing its search is reasonable under the circumstances of this case.

Facts: In November, 2016, defendant Robert Kien Tran felt the need to show off his "souped up" vehicle, with "a lot of aftermarket parts on it" including a dashboard camera. While so doing, he attempted a "very sharp" right-hand turn at an estimated speed of 35 to 40 miles per hour, swerving into the opposing lanes and hitting a motorcyclist head-on. The motorcyclist was airlifted to a trauma center with life-threatening injuries (although he apparently survived). Upon arrival at the scene some 30 to 45 minutes after the collision, California Highway Patrol Sergeant Brad Palmer received a briefing from Officer Gilbert Ontiveros who was already there. Sgt. Palmer noted tire friction marks on the pavement and scuffing on the exterior sidewalls of the tires on defendant's vehicle's, all corroborating witness statements that defendant had taken the corner at excessive speed. Officer Ontiveros told Sgt. Palmer that defendant had removed a dashboard camera from his vehicle. Sgt. Palmer knew from his experience that dashboard cameras are breakable and easily hidden. Upon contacting defendant, Sgt. Palmer noted that he had a backpack on the ground near him. Defendant admitted to having a dashboard camera and that he had already removed it from his car. Suspecting that the dash-cam likely showed evidence of defendant's driving at the time of the collision, Sgt. Palmer wanted to immediately retrieve it because he "was concerned with the little SD cards that could be in it," knowing that it "could be destroyed by putting your fingers in your pockets. It could be chucked. It could be

stepped on." Defendant told Sgt. Palmer that the camera was in his backpack, but that he did not want to give it to him, asking about his authority to take it. Sgt. Palmer told defendant he would be "obstructing the investigation" if he did not voluntarily turn it over. Although defendant "kind of hemmed and hawed about it," he eventually retrieved the camera from his backpack and gave it to Sgt. Palmer. Asked later in testimony why he didn't get a warrant authorizing the seizure and search of the backpack, Sgt. Palmer explained that if the camera turned out not to have been in the backpack, defendant could have easily destroyed the SD card while the warrant was being obtained, and that having been lied to in the past, he didn't feel that he could trust defendant when told that the camera was in his backpack. Having seized the camera, a search warrant was obtained three days later, authorizing the viewing of the dash-cam's video. Later charged with reckless driving (Veh. Code § 23103(a)), defendant brought a pre-trial motion to suppress the dash-cam video, which was denied by the trial court. Defendant was tried before a jury and convicted. Sentenced to three years of probation and 30 days in jail, defendant appealed.

Held: The Fourth District Court of Appeal affirmed. The primary issue on appeal was the legality of the warrantless seizure of the dashboard camera. Recognizing that "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" and that the totality of the circumstances must be considered in determining the existence of probable cause, the Court here held that Sgt. Palmer's action in seizing the dash-cam was indeed reasonable. It was first noted that the issue wasn't the search of the dash-cam, but rather its seizure. "A search is 'far less intrusive than a search,'" (*United States v. Payton* (9th Cir. 2009) 573 F.3rd 859, 863.) "Whereas a search implicates a person's right to keep the contents of his or her belongings private, a seizure only affects their right to possess the particular item in question." (*Segura v. United States* (1984) 468 U.S. 796, 806.) The courts are therefore likely to give a police officer "greater leeway" when it is merely the seizure of property that is in issue, as opposed to its search. A dashboard camera is a type of a container; one that contains digital images. Finding that under the facts of this case, Sgt. Palmer had probable cause to believe that defendant's dash-cam contained evidence of his reckless driving, and that "exigent circumstances" existed in that if not immediately seized, that evidence could easily be destroyed pending the obtaining of a search warrant, the Court upheld the immediate seizure of the dash-cam pending the obtaining of a search warrant. Sgt. Palmer's training and experience, his testimony as to his reasoning in deciding to seize the dash-cam, plus defendant's reluctance to turn over the dash-cam, were all relevant to the Court's findings on this issue. Defendant, however, also argued that the three-day delay in obtaining a search warrant for his dashboard camera was unreasonable, warranting the suppression of its contents. Citing the U.S. Supreme Court's decision in *United States v. Place* (1983) 462 U.S. 696, where a 90-minute delay between the seizure of the appellant's luggage and its eventual search was held to be unreasonable and in violation of the Fourth Amendment, defendant argued that three days should have the same result. The Court disagreed. In *Place*, it was noted that the seized property was the defendant's luggage, and at an airport, preventing the defendant from continuing on with his travels until he could get his luggage back; an interference with his "right to travel," i.e., "his liberty interest in proceeding with his itinerary." In the instant case, so such "liberty interest" was involved. And because the dash-cam was not searched until the warrant was obtained, defendant's privacy rights were not violated by the delay. The 3-day delay, therefore, did not prejudice defendant's rights in any way.

Note: This case solves a long-time dilemma for me, dealing with the issue of seizing one's camera, cellphone, iPad, or other video recording devices from defendants and witnesses at the scene of an incident of some type where the device is likely to contain relevant evidence. Until now, common sense dictated that I advise you to go ahead and seize it, but I did not have any case authority to support that conclusion. Now we do. Great case. But note that there is authority other than *U.S. v. Place* for suppressing evidence obtained from electronic and video recording devices that are held too long before a warrant is obtained. Three days of an unexplained delay is really too long even though we got away with it here. Just know that when you seize someone's camera, cellphone, iPad, or other electronic recording device with probable cause to believe it contains relevant evidence, don't drag your feet in obtaining a warrant, and be ready to explain the reasons why there was any delay at all. Because I get questions all the time on the issue of seizing video recordings from suspects and witnesses, I have an extensive memo on the topic I'll be glad to send you upon request. If you've gotten this memo before, it is now updated with the inclusion of this new case.

***Flight from a High Crime Area*:**
***Fourth Wavier Searches and Private Areas*:**
***Miranda Advisals and Dissipation of the Taint*:**

People v. Flores **(Aug. 12, 2019) 38 Cal.App.5th 617**

Rule: A known gang member's flight upon the approach of police is not necessarily sufficient cause to justify a detention, absent evidence that the flight was "headlong," and without evidence of a specific crime he may be fleeing from. A Fourth waiver search does not extend to private areas of a residence belonging to someone who is not subject to a Fourth wavier. A *Miranda* waiver does not necessarily dissipate the taint of an earlier illegal detention, search, and arrest.

Facts: Huntington Beach was having problems with a criminal street gang called the "Looney Tunes Crew," or "LTK." The LTK had, as of late, been the subject of multiple complaints regarding gang activity in the area around a particular alley where the gang members were known to congregate. Such activity included several shootings and general drug sales, typically occurring on weekends and at night. At around 1:00 p.m. on a Thursday afternoon in October (the year not being specified), a seven-member team of Huntington Beach police officers (in unmarked cars, but wearing clearly marked police raid vests or jackets) converged on the alley from both ends and the sides, hoping to contact as many gang members as possible in order to ascertain possible gang membership or association of those in the area. Despite there having been no reports of any specific crimes or gang activity in general on this particular day, it was expected that the occupants of the alley would all flee as the officers approached. So the plan was to seal off the alley and contact as many suspected LTK gang members as possible. Upon the start of this operation, Sergeant Oscar Garcia and Detective Daniel Quidort came in towards the alley down a walkway between residences as other officers sealed off both ends of the alley. As the officers approached, Sgt. Garcia and Detective Quidort saw "people . . . running from the alley" towards them. Sgt. Garcia noted that defendant, who he recognized as an LTK gang member, was leading the pack. As the officers made eye contact with defendant, he slowed to a "brisk walk" and then a "quick pace." Defendant got to within about 5 to 10 feet of the officers when he was contacted, told to stop, and directed too sit down on a nearby step. Defendant

immediately complied without incident. Although Detective Quidort did not know who defendant was at that point, Sgt. Garcia did, telling Detective Quidort that defendant was believed to be a LTK gang member. Having no reason to suspect defendant of any specific crimes at this point, he was not patted down for weapons nor handcuffed. Neither officer had their guns drawn. With defendant thus detained (the People later conceding that the contact constituted a "detention"), Sgt. Garcia left Detective Quidort with defendant as he went into the alley to check on the rest of the operation. As Detective Quidort engaged in "some small talk" with defendant, he noticed a bulge in defendant's sock. He immediately radioed for Sgt. Garcia to return, which he did. Asked what was in his sock, defendant admitted to possessing methamphetamine. At the officers' request, defendant produced four equal-sized bindles of meth. From there, defendant agreed to take the officers to his nearby apartment that he shared with his brother who was known to be on probation with a Fourth wavier. While still not handcuffed nor placed under formal arrest, the officers led defendant to his apartment where, without asking for his consent, the officers entered and searched his bedroom. Four more baggies of methamphetamine were recovered from his dresser. Defendant was formally arrested at that point. Later advised of his *Miranda* rights, defendant waived his rights and admitted to possessing the meth with the intent to sell it. Charged in state court with various drug-related offenses, defendant filed a P.C. § 1538.5 motion to suppress, contesting his initial detention, the subsequent search of his bedroom, and his confession. The trial court granted the motion, but only as to the warrantless search of defendant's bedroom (defendant himself not being on a 4th waiver and there being no other legal justification). In all other respects, defendant's motion was denied. He appealed from his plea of guilty.

Held: The Fourth District Court of Appeal (Div. 3, Orange County) reversed.

(1) *Defendant's Detention*: With the People conceding that defendant was in fact detained at that point when he was told to sit down on the step, the primary issue on appeal (as it was in the trial court) was whether defendant's detention was justified by sufficient reasonable suspicion. The Appellate Court overruled the trial court on this issue, finding that defendant's detention was illegal. In arguing the issue, the People cited the landmark U.S. Supreme Court decision of *Illinois v. Wardlow* (2000) 528 U.S. 119. In *Wardlow*, the defendant was observed holding a bag in a "high crime" area of Chicago that was "known" for its "narcotics trafficking." Upon observing officers approaching, Wardlow immediately ran. When eventually caught, the bag he was holding was found to contain an illegal firearm. The Supreme Court determined that Wardlow's detention was lawful, noting that "the totality of the circumstances . . . put defendant's flight from the officers in an extremely suspicious light." Per the High Court; "[h]eadlong flight—wherever it occurs—is the consummate act of evasion." The People argued here that defendant's observed flight from the officers attempting to seal off the ally mandated that his detention was lawful. Differentiating the facts of *Wardlow* from the instant circumstances, however, the Fourth District Court of Appeal found that the rule of *Wardlow* did not apply. In *Wardlow*, for instance, the defendant was observed holding a suspicious bag in an area known for its drug trafficking. In the instant case, defendant was not holding onto anything. Nor was there anything to indicate that defendant was either then involved in, about to be involved in, or had been involved in, any specific criminal activity (as required by the U.S. Supreme Court case of *Terry v Ohio* (1968) 392 U.S. 1.) In this case, the whole operation, occurring on a Thursday afternoon, was based upon what the LTK gang was alleged to generally be involved in, on weekends and at night. Also, *Wardlow* involved what the court referred to as

"headlong flight." In this case, although defendant appeared to have run from the police officers descending upon the alley, rather than increasing the speed of his flight upon seeing Sgt. Garcia and Detective Quidort, he immediately slowed to a "brisk walk" and then a "quick pace," stopping altogether when told to. In order to lawfully detain a person, the officer must be able to articulate specific facts which reasonably caused the officer to believe that (1) some activity out of the ordinary had taken place or was occurring or about to occur; (2) the activity was related to crime; and (3) the individual under suspicion was connected to the activity. (*People v. Bower* (1979) 24 Cal.3d 638, 644.) Here, there was no evidence presented by the prosecution that met this standard. In fact, neither Sgt. Garcia nor Detective Ouidort appeared to be concerned that defendant was engaged in any criminal activity, as evidenced by their failure to handcuff him or even pat him down for weapons. The area being described as a "high crime area" was probative, but not enough by itself to justify a detention. The time of day is also relevant, "nighttime" being more conducive to criminal activity. Defendant's detention, however, occurred in the early afternoon. Based upon the "totality of (these) circumstances," the Court found defendant's detention to be unlawful.

(2) *Search of Defendant's Bedroom*: As for the subsequent search of defendant's bedroom, the People conceded that it was unlawful. Although defendant's brother, who lived in the same apartment, was on probation and subject to a "Fourth waiver" (having given up his right to contest a warrantless search or seizure), defendant was not. The bedroom searched was defendant's own private area into which his brother's Fourth waiver did not extend. Not having a search warrant, nor defendant's consent, the search of his bedroom was illegal. Defendant's subsequent arrest, being the product of both an illegal detention and an illegal search, was therefore also illegal.

(3) *Intervening Miranda Waiver*: The sole remaining issue was the admissibility of defendant's later confession. Defendant argued (and the trial court agreed) that having waived his *Miranda* rights, such a wavier was an "intervening circumstance," sufficient to dissipate the taint of the earlier illegal detention, search, and arrest. The Appellate Court disagreed. Whether or not a *Miranda* advisal and wavier dissipates the taint of an earlier illegal detention, search, and/or arrest, depends upon the circumstances. The controlling authority is the U.S. Supreme Court decision in *Brown v. Illinois* (1975) 422 U.S. 590. Per *Brown*, where the purpose of an officer's illegal actions was "*for investigation*" or "*for questioning*," then a *Miranda* waiver will not dissipate the taint. As in *Brown*, defendant's detention here (leading to the subsequent illegal search and illegal arrest) was both "*in design and in execution*," intended to be "*investigatory*." The whole operation of invading the alley was to cause panic and flight, hopefully providing the necessary reasonable suspicion to justify the detention of those who reacted accordingly. This fact, the Court held, brought the instant circumstances within the rule of *Brown*, dictating that a *Miranda* waiver was not enough to dissipate the taint. Defendant's confession, therefore, should have also been suppressed.

Note: In reading this case, at least as to the issue of whether or not the rule of *Wardlow* applies, I was left with the nagging feeling that the Court was unnecessarily splitting hairs. *Wardlow* says that flight from the police in a high crime area constitutes reasonable suspicion that the person was, is, or is about to be involved in criminal activity. Defendant here met that standard, at least on its face. But the Fourth District Court seems to say that it must be "*headlong*" flight from some specified criminal activity that is known to be then occurring. The Supreme Court in *Wardlow* uses the term "*headlong*" only once in the entire decision, and not when describing the

defendant's actual flight. It also does *not* require that the suspect must be running from a specific crime that is then-occurring, noting only that the defendant was observed holding a "suspicious bag." It's undisputed that Antonio Flores was running from the police, and only slowed his pace when coming face to face with two officers who, apparently, were blocking his intended flight in a pathway between residences. Flores did not appear to have had a choice in the matter. But either way, this case, talking about a "flight-plus" standard, certainly muddies the waters when considering the rule of *Wardlow*; i.e., that flight from a high crime area justifies a detention. Where the line might be between *Wardlow* and this new case must await further case law on the issue.