The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops; Stand Up For Our Country

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Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

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THIS EDITION'S WORDS OF WISDOM:

"*Don't piss off old people. The older we get, the less "life in prison" is a deterrent*." (Unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

*The Prosecution of 14- and 15-Year-Old Minors and **SB 1391***: **Proposition 57**, enacted by the voters in November of 2016, amended **Welf. & Insti. Code §§ 602** and **707**, requiring prosecutors to commence all cases involving minors in Juvenile Court, but allowed the People to request the transfer of some minors as young as 14 years of age—when alleged to have committed specified serious or violent felonies (see **W&I § 707(b)**—from Juvenile Court to Adult Criminal Court where they faced the full brunt of the criminal justice system. This was in an era when the prevailing belief was that criminals should be treated more and more like criminals, no matter what their age (at least down to the age of 14), while victims' rights were respected and emphasized. But then along came **Senate Bill 1391**, enacted by the Legislature in 2018 and effective January 1, 2019, amending **Proposition 57** by prohibiting altogether the prosecution of 14- and 15-year-old minors in adult court. (See **W&I § 707(a)(1)-(2)**.) Believing that **SB 1391** violated the voters' wishes and was inconsistent with the requirements of **Proposition 57**, the Ventura County District Attorney filed a juvenile petition against a 15-year old gang member referred to as "O.G.", alleging multiple murders and other violent crimes. At the same time, the D.A. moved to transfer O.G.'s case from Juvenile to Adult Court, ignoring the prohibition for doing so as provided in **Senate Bill 1391**. The D.A.'s argument was that **SB 1391** was unconstitutional in that it violated the People's will as expressed in **Proposition 57**. The Juvenile Court, and later the Second District Court of Appeal (Div. 6), agreed. (See ***O.G. v. Superior Court*** (2019) 40 Cal.App.5th 626.) However, five (and later seven) other Court of Appeal panels all disagreed, pushing the issue up before the California Supreme Court for resolution. The California Supreme Court ruled on February 25th (in ***O.G. v. Superior Court*** (Feb. 25, 2021) __ Cal.5th __ [2021 Cal. LEXIS 1411]) that the Ventura D.A. was wrong and that **SB 1391** prevailed, requiring that O.G. remain under the jurisdiction of the Juvenile Court. In so ruling, California's High Court pointed out that while an Initiative-imposed statute (such as with **Proposition 57**) may not generally be amended or repealed by the Legislature, the California Constitution provides an exception; i.e., when the Initiative itself allows for its repeal or amendment. (See **Cal. Const. art. II, § 10, subd. (c)**.) In this case, in an uncodified amendment clause, **Proposition 57** specifically provides that its provisions concerning the treatment of juveniles "may be amended so long as such amendments are consistent with and further the intent of this act by a statute that is passed by a majority vote of the members of each house of the Legislature and signed by the Governor." The California Supreme Court found this exception to apply in this situation, mandating that **SB 1391** take precedence over **Prop. 57**. So much for the will of the People. One can only wonder now whether **SB 1391**'s principal author, then State Senator Ricardo Lara (now Insurance Commissioner, presumably elevated as a reward for all his good work), is going to take the gangster O.G. (described by the Second District Court of Appeal as a person who, "despite his age, is deeply enmeshed in youth gang culture." ***Id***. at p. 628.) into his household when the little fart is released at the age of 25 (see **W&I Code § 607(c)**), sometime within the next eight years, and when he otherwise wouldn't have been back out on the streets for at least another 50 years when he would be too old to murder anyone again.

CASE LAW:

***Detentions for Investigation*:**
***Contacts in High Crime Areas*:**
***Furtive Acts and Their Value in Showing a Reasonable Suspicion*:**

People v. Flores **(Feb 16, 2021) __ Cal.App.5th __ [2021 Cal.App. LEXIS 130]**

Rule: A person may be lawfully detained if, in view of all the circumstances, a reasonable person would have believed that he or she was not free to leave. One's furtive act of an apparent attempt to hide from approaching police officers, at least in a high crime area, may be sufficient to justify a lawful detention.

Facts: Officers Michael Marino and Daniel Guy were patrolling in a "high crime area" at about 10:00 p.m. in a marked patrol car. They drove into a cul-de-sac which was known as a "gang haunt" and a "narcotics hangout," and where fresh graffiti was a daily occurrence. Officer Guy had in fact made a drug-related arrest at that location the night before. As the officers entered the cul-de-sac, they observed defendant Marlon Flores standing in the street next to a car at the end of the street. Defendant looked in the officers' direction and immediately walked around to the opposite rear side of the car and crouched down out of sight. In the sequence of events (as recorded by Officer Guy's body camera and as described in his later testimony), Officer Guy approached defendant with his flashlight directed at him. Defendant was shown by the body camera as he crouched down behind the car. The camera then showed that defendant looked up about four seconds later in Officer Guy's direction, and then crouched down again with his back to the officer. Defendant later claimed to be tying one of his shoes at this time. As Officer Guy approached defendant while shinning his flashlight at him, defendant was twice told to stand up. Both commands were ignored as defendant continued to "toy" with his right foot. With defendant in the crouching position for some 20 seconds, Officer Guy believed he was merely pretending to tie his shoe while actually attempting to hide drugs from view, and "that he was there loitering for the use or sales of narcotics." Defendant finally stood up upon Officer Guy's third command and was told to put his hands behind his head where he was handcuffed for the officers' safety. Upon patting defendant down for weapons, Officer Guy set off an electronic car key in his pocket which activated the lights on the parked car. Looking into the car through the car's window, the officer could see in plain sight a methamphetamine bong. Upon receiving permission to retrieve defendant's identification from the vehicle, some methamphetamine and a loaded unregistered pistol were recovered. Charged in state court with a number of drug and illegal firearm-related offenses, defendant's motion to suppress the items recovered from his car was denied. He therefore plead "no contest" to carrying a loaded, unregistered handgun (Pen. Code § 25850(a)) and received probation. Defendant appealed.

Held: The Second District Court of Appeal (Div. 8), in a split 2-to-1 decision, affirmed. The primary issue on appeal (as it was in the trial court) was when, in the sequence of events, defendant was actually detained, and whether there was at that point in time sufficient reasonable suspicion to justify a detention. Defendant argued that he was detained when the officers first approached him and that at that point there was insufficient reasonable suspicion to justify a

detention. Being illegally detained—as argued by defendant—the resulting evidence should have been suppressed. The People, on the other hand, argued that defendant was not detained until he was told to put his hands behind his head and handcuffed. At that point—as argued by the People—his suspicious actions of ducking down behind his car and ignoring commands to stand up, in conjunction with the nature of the area (i.e., a "high crime," "gang haunt," "narcotics hangout"), supplied the necessary "reasonable suspicion" to justify his detention. The majority of the Court agreed with the People. The general rules are well established. "The Fourth Amendment permits police to initiate a brief investigative stop when they have a particularized and objective basis for suspecting the person of criminal activity. A mere hunch is too little. This standard requires considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than what is necessary for a finding of probable cause. The standard depends on the practical considerations of everyday life on which reasonable and prudent people act. Courts must permit officers to make commonsense judgments and inferences about human behavior." The trial court judge listed three factors in determining when defendant was in fact detained and how such a detention was justified by the facts: (1) Defendant saw the police coming and tried to avoid contact with them by ducking down behind the parked car. (2) As the officers approached, with the police radios making noise and a flashlight trained on him, defendant continued to pretend he didn't notice, "toying" with his shoes. (3) Defendant stayed crouched down "far too long a period of time" while ignoring the officer's command to stand up. The Appellate Court found this reasoning to be sound, agreeing with the trial court that defendant's detention did not occur until he finally stood up and complied with the officer's order to put his hands behind his head. The Court also agreed with the trial court that these circumstances, although not sufficient to justify an arrest, certainly established sufficient reasonable suspicion to detain him; or, as the Court put it, perform a "*Terry* stop" (referring to *Terry v. Ohio* (1968) 392 U.S. 1.). Lastly, noting that although there may have been "innocent possibilities" explaining defendant's actions (e.g., tying his shoes), "in combination with the other factors, a reasonable officer had a reasonable basis for investigating further to resolve this ambiguity, because nervous and evasive behavior is a pertinent factor in determining whether suspicion is reasonable." The majority of the Court, therefore, affirmed.

Note: There are a number of serious problems with this decision, primarily because of the selectivity of both the facts and the case law the majority opinion chose to cite. First, the majority decision never talks about the true test for when a person is detained. As discussed by the dissent, the law on this is quite clear: "The test to determine whether an individual has been detained is 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" (*United States v. Mendenhall* (1980) 446 U.S. 544, 554.) The majority cites *People v. Kidd* (2019) 36 Cal.App.5th 12, at page 21, for the argument that merely shinning a flashlight, without more, does not constitute a detention. But as pointed out by the dissent, the officers here did far more in approaching defendant than merely shining a flashlight at him. In facts cited by the dissent, but totally ignored by the majority, we are told that as defendant was in the process of moving around to the back side of his car, the officers drove up and parked their patrol car "a little askew to and behind" defendant's vehicle. The officers then shined their vehicle's spotlight on defendant as he bent over behind his car. *People v. Kidd* is in fact a spotlight case, where the Court there held that officers making a U-turn, parking behind defendant's vehicle, and shinning their spotlights on the suspect, was in fact a detention. The dissent also cites two cases totally ignored by the

majority: *People v. Garry* (2007) 156 Cal.App.4th 1100, and *People v. Roth* (1990) 219 Cal.App.3rd 211. Both cases are spotlight cases which are nearly identical to Flores' situation, where spotlighting the suspect while (in *Garry*) the officer "briskly" approached the suspect, and (in *Roth*) "commanding" the suspect to approach the officer, respectively, were held to constitute detentions. Also not mentioned by the majority, but covered in detail in the dissent, was the fact that while Officer Guy approached defendant (commanding him to stand up) from the rear of defendant's vehicle, Officer Marino was walking around the front of defendant's car, boxing him in between the two officers, his vehicle, and an iron spiked fence running parallel to the sidewalk, creating a situation where it is certainly arguable that defendant would have reasonably believed that with all that attention directed at him (spotlights, flashlights, being approached from both sides, with at least one officer issuing commands to stand up), he was detained before ever being told to put his hands behind his head; i.e., that he could not have reasonably felt free to just walk away. However, all this having been established, it is also arguable that even before any of this occurred, the highly suspicious act of an apparent attempt to hide from an approaching police car by moving around to the rear of a parked vehicle and ducking down out of sight, late at night in a high crime area, was all by itself sufficient reasonable suspicion upon which to base a lawful detention. The United States Supreme Court has significantly noted that while one's mere presence in a "high crime area" is insufficient on its own to justify a detention, it is also "recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." (See *Illinois v. Wardlow* (2000) 528 U.S. 119, at pg. 124.) The Supreme Court has also held that "obvious attempts to evade officers can support a reasonable suspicion." (*United States v. Brignoni-Ponce* (1975) 442 U.S. 873, 885: See also *Florida v. Rodriquez* (1984) 469 U.S. 1, 6; ". . . strange movements in his attempt to evade the officers" might even be enough to justify a detention.) Bottom line is that we can made a colorable argument with a straight face that a person purposely moving around to the far side of a vehicle, ducking down behind it as a marked patrol car is approaching, late at night in a high crime, gang infested, drug saturated, area, in an apparent attempt to hide from the approaching officers, constitutes a reasonable suspicion justifying the person's detention for further investigation. If that argument was made in this case, it is not reflected in the written opinion. Lastly, and on a whole different topic, the dissent also notes that we cannot ignore the realities of police-minority relations in today's world, where someone of Hispanic (or any other minority) background is going to naturally be fearful of contacts with the police, whether or not he or she is engaged in criminal activity. I won't get into that debate at this point, but we can expect to see that scenario raising its ugly head more and more as a factor to consider in evaluating the legality of detentions and arrests in cases involving minority suspects. So stay tuned on that hot topic.

***Public Employees, the First Amendment, and Social Media*:**

***Moser v. City of Las Vegas* (9th Cir. Jan. 12, 2021) 984 F.3rd 900**

Rule: Whether or not the First Amendment will protect a public employee from being disciplined for something published in Social Media depends upon a balancing of the nature of the statement and the circumstances of its publication with the affected public agency's right to avoid disruption and maintaining workforce discipline.

Facts: Officer Charles Moser was a former Navy Seal and current Las Vegas Metropolitan Police Department officer. Beginning in 2006, Officer Moser was a SWAT team sniper and assistant team leader. However, on December 17, 2015, Officer Moser made the unfortunate (as it turned out) decision to post on his Facebook account a comment about a shooting and wounding of a fellow officer. Officer Moser's Facebook comment read: "*Thanks to a Former Action Guy (FAG) and his team we caught that asshole. . . It's a shame he didn't have a few holes in him. . .*" (The "FAG" comment was not used in a derogatory sense, and was not an issue in this case.) Officer Moser posted this comment while off duty, leaving it up for about two months before deleting it. However, someone read it and "anonymously" (of course) filed a complaint with Metro's Internal Affairs Department, prompting an internal investigation. Admitting to Internal Affairs the inappropriateness of his comment, Officer Moser explained that he only intended to express his frustration that the suspect had "basically ambushed one of our officers" and that "the officer didn't have a chance to defendant himself" by shooting back. Despite his claim of an innocent intent, Officer Moser was transferred out of SWAT and put back on patrol; an action that resulted in a pay cut. His supervisors' concern was that his comment showed that he had become "a little callous to killing." It was also noted that the department's snipers "are held to a higher standard," being faced with difficult and stressful situations, and that his comment could be used against him as in-court impeachment evidence should he ever have to use deadly force in the future. It was therefore believed to be necessary to relieve him of his SWAT responsibilities. Officer Moser filed a grievance with the Labor Management Board, which was denied. He therefore filed a civil action in federal court, seeking to get his SWAT job back. After an evidentiary hearing, the district court granted summary judgment in favor of the defendant City of Las Vegas. Officer Moser appealed.

Held: The Ninth Circuit Court of Appeal reversed, remanding the case back to the district trial court for further hearings. The issue, of course, is where (and how) to draw the line between the free speech rights of government employees with the government's interest in avoiding disruption and maintaining workforce discipline. The United States Supreme Court has dealt with this problem before and has set out the factors that must be considered, establishing a "balancing test." (See *Pickering v. Board of Education* (1968) 391 U.S. 563.) Under *Pickering*, a plaintiff (such as Officer Moser in this case) must first establish that (1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. If the plaintiff is able to establish this prima facie case, then the burden of proof shifts to the government to show that (4) it had an adequate justification for treating its employee differently than other members of the general public, *or* (in the disjunctive) (5) it would have taken the adverse employment action even absent the protected speech. If the government does not meet its burden, then the First Amendment protects the plaintiff's speech as a matter of law. (See *Barone v. City of Springfield* (9th Cir. 2018) 902 F.3rd 1091, 1098.) In reviewing these factors as they apply here, the Ninth Circuit reversed the district court's summary judgment ruling only because there existed factual disputes which had not yet been resolved.

(1) *A Matter of Public Concern*: The parties did not dispute that Officer Moser's comment addressed an issue of "public concern." An issue is of "public concern" if it "relates to any matter of political, social or other concern to the community, . . . (or) is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Police shootings tend to fall into this category.

(2) *Speaking as a Private Citizen*: The parties also did not dispute the fact that Officer Moser spoke as a private citizen, and not as a representative of the Las Vegas Metropolitan Police Department. "Statements are made in the speaker's capacity as citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform." In this case, Officer Moser was home and off duty, using his personal Facebook account.
(3) *Officer Moser's Comment as a Motivating Factor in his Demotion*: It was similarly stipulated between the parties that Officer Moser's Facebook posting was the reason he was removed from the SWAT team, with his supervisors concerned that his comment was evidence of Officer Moser "grow(ing) callous(ness) to killing." It was also recognized that his comment could be used against him in court should he ever need to use deadly force as a sniper.
Factors (4) & (5): With factors (1), (2), and (3) out of the way, the burden shifted to the Metro Police Department to produce evidence supporting factors (4) *or* (5). Metro argued only that factor (4) applied; i.e., that it had adequate justification for treating Officer Moser as they did. (Factor (5), therefore, was assumed not to apply.) In evaluating factor (4), the *Pickering* balancing test recognizes that a government employer has "broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." On this issue, the Court held that the district Court failed to recognize that several factual disputes remained unresolved. First, the meaning of Officer Moser's comment was not determined. Officer Moser argued that he only intended to say that the wounded officer should have had the opportunity to get off some defensive shots. The Metro Police Department, on the other hand, argued that Officer Moser's comment was meant to advocate the unlawful use of deadly force; i.e., that the officers who captured the suspect would have shot him in retaliation for his earlier shooting of a police officer. Under the *Pickering* balancing test, the former (Officer Moser's version) is entitled to stronger First Amendment freedom of speech protections than that latter; i.e., when an officer advocates the unlawful use of deadly force. So it is important for the trial court to make a factual determination of what Officer Moser was intending to say in his Facebook comment. Secondly, there remains an unresolved factual dispute as to whether the Metro Police Department provided any evidence of predicted disruption to its operations. This issue is relevant to the strength of Metro's interest in efficiency and employee discipline. The impact of an employee's speech on the government agency's operations cannot be resolved until it is determined whether the statement in issue in fact impairs discipline by the agency's superiors or harmony among its co-workers, whether it has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, whether it impedes the performance of the speaker's own duties, and/or interferes with the regular operation of the law enforcement agency. The district court failed to make any findings relative to these potential factual disputes. "In sum, material questions of fact remain as to whether (Officer) Moser's comment would likely disrupt Metro's workforce or its reputation. . . . Put differently, Metro has produced no evidence to establish that its interests in workplace efficiency outweigh Moser's First Amendment interests." For these reasons, the case had to be remanded for further evidentiary hearings.

Note: While all very complicated, the simple explanation of the above is that if you choose to express your personal opinions, emotions, anger, and/or prejudices via social media, which under the First Amendment you have the right to do, know that your relationship to a law enforcment

(or any other governmental) agency, and your comments' effects on the operation and discipline within that agency, is a factor to consider when determining whether the First Amendment will in fact protect you from being disciplined as a result. None of your rights under the Bill of Rights (i.e., the first ten amendments) are absolute. E.g., your freedom-of-speech rights do not protect you from the legal consequences of screaming "*FIRE*!" in a crowded theater just for the thrill of watching the bodies pile up at the exit. I don't know if Officer Moser will ultimately prevail in his quest to regain his coveted SWAT position. I tend to think he's got the laboring oar. But what you need to get out of all this is that the next time you're sitting down at your computer keyboard all pissed off at something or someone (including, but not limited to, when it's work related), it's probably to your benefit to just turn off the computer, walk away, have a beer if it helps, and wait until you're calm, cool, and collected before publicizing your thoughts on the issue at hand via social media for all to read. You can also read an article on this topic at: https://www.police1.com/legal/articles/theres-no-such-thing-as-a-free-lunch-but-what-about-free-speech-for-officers-UYTVPwoXqISK1yyx/, if you cut and paste it into your browser.

***P.C. § 136.1(b)(1): Dissuading a Victim or Witness from Reporting a Crime*:**
***P.C. § 137(b): Inducing a Witness to Withhold Information*:**
***Witness Tampering*:**
***The Rule of Lenity*:**
***Due Process and Notice of Criminal Conduct*:**

People v. Reyes **(Oct. 30, 2020) 56 Cal.App.5th 972**

Rule: A defense attorney misrepresenting himself to be a deputy district attorney, while telling a person to contact him instead of the police should she be victimized by the attorney's client in the future, may or may not be a violation of P.C. § 136(b)(1); Dissuading a Victim or Witness from Reporting a Crime. Therefore, due to the ambiguity of whether P.C. § 136(b)(1) applies to crimes that have not yet occurred, the Rule of Lenity dictates that the defendant be given the benefit of the doubt, protecting him from being criminally charged. Such an act, however, is a crime under P.C. § 137(b); Inducing a Witness by Fraud to Withhold Information.

Facts: Defendant Octavio Joseph Reyes was a Solano County Public Defendant with less than three years on the job when he was assigned to represent one Jacques Olivas. Olivas was charged with abusing his mother and resisting arrest. Defendant negotiated a plea deal on June 13, 2018, where Jacques Olivas pled "no contest" to the resisting arrest charge (per P.C. § 148(a)(1)), with all other charges dismissed. Put on probation, Olivas was ordered as a condition of his probation not to annoy, harass, or threaten his mother (Evelyn Olivas) and not to have any uninvited contact with her. It took less than two weeks (June 26) for Olivas to be returned to court with new charges filed and an allegation that he had violated his probation. On July 3rd, defendant worked another plea deal for Olivas where he admitted to the probation violation with the new charges being dismissed. Probation was reinstated with a new and revised protective order. Under this order, Olivas was to stay 100 yards away from his mother, and to stay away from her home. He was also not to have any personal, electronic, telephonic or written contact with her, or any contact through a third party "except any attorney of record." This worked until August 28th, when new charges were filed (see below). In the meantime, DA Investigator Jerry Sanchez interviewed Olivas' mother, Evelyn. She told him that on July 3, 2018, she received a

call on her cellphone from defendant Reyes. Defendant identified himself as "Jacques's district attorney." He provided Evelyn with his e-mail address and telephone number, and told her that her son (Jacques Olivas) was going to be released that day. Evelyn told Investigator Sanchez that defendant told her that "if (Jacques) was near her home or at her home, not to call the police," but instead "to call (defendant Reyes)." As a result of these instructions, Evelyn sent an e-mail to defendant on July 11th, to which she attached a letter to her son, Jacques. (Other than this, the record on appeal did not reflect what was in the e-mail or the letter, or any other information Evelyn might have passed onto defendant.) Defendant responded, saying he would "review these documents and get back to you." Defendant also asked Evelyn for the phone number of Jacques' former girlfriend, Darla Estes, with whom he had a child. Evelyn responded with an e-mail providing defendant with Estes's phone number. Darla Estes was also interviewed by Investigator Sanchez, who told him that defendant "told her to tell Evelyn not to call the police if the restraining order was violated, to call him." On July 12th, Evelyn sent defendant another e-mail with an attached letter, the letter being addressed to "Joseph Reyes, district attorney." There was no evidence indicating whether or not defendant had read this e-mail or whether he ever responded to it. Despite defendant's instructions not to call the police, Evelyn called them anyway shortly after midnight on August 26th as her son (Jacques) attempted to get into her mobile home. Jacques Olivas was arrested by responding police at the scene, and after a struggle. Evelyn reported to the police that the trailer park manager told her several days earlier that Jacques had been "lingering in the trailer park that day." After Jacques' arrest on the 16th, Evelyn told the officers that she had not called the police on August 24th, when the trailer park manager told her about her son "lingering" at the trailer park, because "the district attorney had told her not to call the police if (he) violated the restraining order, but to call him instead." Evelyn later repeated this allegation to Investigator Sanchez, adding the fact that she had tried to call defendant after hearing that her son was seen lingering in the trailer park, but was unable to reach him. After her son's arrest on the 26th, she send defendant another e-mail, again attaching a letter which was addressed to "Joseph Reyes, district attorney." Defendant did not respond to this e-mail, and there was no evidence that he'd received or read it. Defendant was later charged in state court with what was collectively referred to as "witness tampering;" i.e., P.C. § 136.1(b)(1); attempting to dissuade a victim or witness to a crime from reporting that victimization to law enforcement, and P.C. § 137(b); attempting to induce a person "by the use of fraud" to "withhold . . . true information pertaining to a crime" from law enforcement (this latter charge being added to the information filed in Superior Court after defendant had been held to answer to the P.C. § 136.1(b)(1) charge by the magistrate following a preliminary examination). Defendant filed a P.C. § 995 motion in Superior Court, moving to dismiss both charges. The Superior Court judge granted defendant's motion as to both counts. The People appealed.

Held: The First District Court of Appeal (Div. Four) upheld the Superior Court's ruling as to the dissuading count (i.e., P.C. § 136(b)(1)), but reversed as to the use of fraud to withhold information charge (i.e., P.C. § 137(b)). On appeal, defendant defended the order of dismissal arguing that (1) his alleged conduct did not constitute a crime under either of the statutory provisions at issue, and (2) prosecuting him for a violation of these two statutes violates his due process rights.

(1) *Penal Code § 136.1(b)(1)*: This section provides in part: "(b) . . . (E)very person who attempts to prevent or dissuade another person who has been the victim of a crime or who is

witness to a crime from doing any of the following is guilty of a public offense . . . : [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge." The section, being a "wobbler" (i.e., with both felony and misdemeanor punishments), it was charged against defendant as a felony. In order to prove such an offense against defendant, the People must be able to prove "(1) the defendant . . . attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making any report of his or her victimization to any peace officer or other designated officials." The issue before the Court was whether, by its terms, this offense was intended by the Legislature to apply only to completed crimes. With it being alleged here that defendant told Evelyn Olivas not to report any future offenses committed by her son, Jacques, to the police, the People argued that section 136(b)(1) should be interpreted to apply to future crimes as well. In an attempt to resolve this issue, the Court had to engage in a long discussion of statutory interpretation. In so doing, the Court was unable to determine from the statute's wording, nor find any prior case authority as well as any hint from the Legislature, which way to go (eating up some six pages of text in reaching this non-conclusion, a discussion of with which I need not bore you). Therefore, because the issue could not be resolved, the Court held that it would be unfair to expect defendant to know that what he did (or was alleged to have done) violated P.C. § 136(b)(1). This results in "one of those rare cases where the rule of lenity applies." Under the "*rule of lenity*," any "ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of interpretation. . . . '[The] rule applies "only if two reasonable interpretations of the statute stand in relative equipoise."'" (See *People v. Nuckles* (2013) 56 Cal.4th 601, 611.) ("*Equipoise*," by the way, means to counterbalance, or a state of equilibrium. I had to look it up.) Therefore, giving defendant the benefit of the doubt, the Court sustained the trial court's dismissal of the P.C. § 136(b)(1) charge.

(2) *Penal Code § 137(b)*: P.C. § 137(b) provides as follows: "Every person who attempts by force or threat of force or *by the use of fraud* to induce any person to give false testimony or withhold true testimony or to give false material information pertaining to a crime to, or *withhold true material information pertaining to a crime from, a law enforcement official* is guilty of a felony . . . ." (Italics added.) The People argued that defendant used fraud (i.e., he told Evelyn he was a district attorney) to induce her to withhold information from law enforcement. Disagreeing with the trial court, the Appellate Court held that on its face, this section applies to defendant's alleged conduct; i.e., that he allegedly lied about his profession—claiming to be a deputy district attorney—to induce Evelyn not to call the police and provide them with information about Jacques's criminal conduct. In so concluding, the Court rejected defendant's argument that section 137(b) should be interpreted to apply only to an attempt to influence the *content* of a witness or victim's testimony or reports to law enforcement, and does not prohibit an attempt to dissuade or prevent a person from testifying or reporting to police someone's illegal acts altogether. The Court found support in its conclusions from the California Supreme Court in the case of *People v. Pic'l* (1982) 31 Cal.3rd 731, at pages 735 and 742 and footnote 5, where it was held that: "It is apparent that an inducement to withhold testimony is a form of the 'influence' of testimony prohibited in [section 137,] subdivision (a)." (*Id.* at p. 742, fn. 5.) The (Supreme) (C)ourt then concluded: "The grand jury had probable cause to believe that defendant intended to influence [the victim's] testimony *by way of persuading him to withhold it altogether*, . . ." The Appellate Court here held that the same reasoning applies to subdivision (b) of section 137: "(I)n our view, the analysis employed by the *Pic'l* court applies here

to section 137, subdivision (b)'s prohibition on the use of fraud to attempt to 'induce any person to give false testimony or withhold true testimony or to give false material information pertaining to a crime to, *or withhold true material information pertaining to a crime from, a law enforcement official*.' (Italics added) Here, too, it may be said, the prohibition of an inducement to 'withhold' information encompasses both attempts to influence the substance of reports as well as to withhold reports altogether."

Due Process: The Court further rejected defendant's argument that his due process rights were violated, arguing that the both of the respective statutes failed to provide sufficient notice that what he did was illegal. As for the 136(b)(1) charge, by upholding the Superior Court's dismissal, the Appellate Court determined that they didn't really have to decide this issue despite expressing some doubts that due process applied. As for the 137(b) charge, this statute was held to be clear enough, with supporting case authority, that defendant was on notice that by misrepresenting himself to be a deputy district attorney and telling a potential victim not to go to the police (as was alleged, although denied by defendant), he was committing a crime. So "due process" was really a non-issue.

Conclusion: Finding sufficient probable cause to believe that defendant had violated P.C. § 137(b), the Court reversed the Superior Court's dismissal of this charge, remanding the case for further proceedings (i.e., trial).

Note: As for the strength of this case should it actually go to trial, it's clear that Evelyn Olivas really believed that defendant was a representative of the District Attorney's Office. But whether or not defendant *actually told her* that he was a district attorney is likely to be a serious issue. It's been my experience that people who are unfamiliar with the criminal justice system really don't listen to, and can easily misinterpret, what they are told when confronted with someone in government service like the defendant here. The distinction between being a public defender and a deputy district attorney is easily lost on someone unfamiliar with how the system works. It's arguable that she really did not understand the difference between the two. But if defendant actually did misrepresent himself to be a deputy district attorney when attempting to convince her to contact him instead of the police, *how stupid can you be*? But even if he didn't tell Evelyn Olivas that he was a deputy district attorney, why (other than to shield his client from another revocation) would he tell her to call him instead of the police? Aside from the potential criminal liability, what if Jacques had hurt or, worse yet, killed Evelyn because the police were not called? *Inexcusable*! If defendant actually told Evelyn not to call the police (which, again, he denies despite some good evidence that he did), even if not convicted criminally, he should probably be reported to the State Bar.