The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*Meddle not in the affairs of dragons, for you are crunchy and good with ketchup*." (Unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

The ShotSpotter Surveillance System: If you're not already familiar with it, "ShotSpotter" is a surveillance system that uses strategically placed microphones to record gunshots in a specific geographical area; e.g., within a town or city. (See ***People v. Rubio*** (2019) 43 Cal.App.5th 342, 345.). Google defines it as "(a) patented system of sensors, algorithms and artificial intelligence (that) accurately detects, locates and alerts police to gunfire. As I understand it, it works like this: When some idiot comes outside and starts shooting into the air, for instance, a ShotSpotter microphone will pick up the noise, generating an audio file. A ShotSpotter employee confirms the sound as a gunshot and sends an alert to the local law enforcement agency, telling them they have had shots fired in their jurisdiction, and where. Apparently, through triangulation, they can narrow it right down to a specific spot, such as out in front of a given address. (***United States v. Rickmon*** (7th Cir. 2020) 952 F.3rd 876.) But this relatively new law enforcement tool has its limitations, both in the field and in the courtroom, and that you need to know. First, it's been held that a ShotSpotter report, by itself, does not justify a warrantless entry into a residence. The "emergency aid exception" to the warrant requirement does not apply because a ShotSpotter report, by itself, doesn't provide the necessary "reasonable basis to conclude" that there's anyone inside a nearby residence who might be in danger or distress. Similarly, the "exigent circumstances exception" doesn't apply absent some reason to believe the shooter is hiding in the residence or that evidence of criminal conduct will be destroyed before there is a chance to obtain a warrant. (***People v. Rubio***, *supra*, at pp. 348-355.) More recently, the federal Seventh Circuit Court of Appeals has held that a ShotSpotter report is the equivalent of no more than an anonymous tip, not amounting, by itself, to even a reasonable suspicion. (***United States v. Rickmon***, *supra*.) And then just within the last month, California's First District Court of Appeal (Div. 2) ruled that a trial court erred when it admitted into evidence a ShotSpotter audio recording without first conducting an evidentiary hearing to assess the evidence's scientific reliability pursuant to the ***Kelly/Frye*** standard. (The "***Kelly/Frye***" test for evidence admissibility refers to the standards for the admission into evidence of new scientific techniques, per ***People v. Kelly*** (1976) 17 Cal.3rd 24, and ***Frye v. United States*** (D.C. Cir. 1923) 293 F. 1013. It requires testimony from experts attesting to the technique being something that has been accepted in the scientific community as accurate.) The error was held to be prejudicial and required reversal of defendant's conviction for assault with a semi-automatic firearm. (***People v. Hardy*** (Feb. 24, 2021) __ Cal.App.5th __ [2021 Cal.App. LEXIS 160].) So just know it'll take a while before the courts become comfortable with ShotSpotter evidence. Also, know that the more you use a ShotSpotter surveillance system, the sooner the courts will develop that necessary comfort level.

CASE LAW:

***Fourth Amendment Excessive Force Allegations*:**
***California State Negligence Allegations*:**
***The Use of Deadly Force in Handling Mentally Ill Persons*:**

Tabares v. City of Huntington Beach **(9th Cir. Feb. 17, 2021) 988 F.3rd 1119**

Rule: California negligence law regarding the use of deadly force is broader than federal Fourth Amendment law in that the former includes in the totality of the circumstances the officer's tactical conduct and decisions that precede, and lead up to, the actual use of force. Such pre-use-of-force conduct and decisions are irrelevant in a federal Fourth Amendment use of force case.

Facts: Huntington Beach Police Officer Eric Esparza observed Dillan Tabares walking down a sidewalk on the morning of September 22, 2017. Although he was doing nothing illegal, Tabares caught Officer Esparza's attention because he was wearing a sweater on a warm day, walking abnormally, and making fidgeting, flinching movements with his hands. Tabares looked over in Officer Esparza's direction several times, but kept walking. A former police officer who happened to be standing nearby also noted that Tabares was talking to himself and making gestures with his hands. This person later testified he thought Tabares might have some mental health issues, but did not appear to be dangerous or threatening. Officer Esparza decided to talk to Tabares, pulling his patrol car into a 7-Eleven convenience store parking lot and intercepting him in front of the store. When Officer Esparza asked Tabares to stop and talk to him, Tabares told him "no," and to leave him alone. He continued to walk away as Officer Esparza told him "multiple times" to stop walking. At this point, others in the area took notice of the situation, one person later testifying that Tabares had a "crazed look on his face" and "looked completely out of it." Another testified that Tabares looked "intimidating" and "intoxicated," possible under the influence of drugs. Yet a third witness also believed that Tabares might be under the influence of drugs, having "glazed over eyes." Finally, Tabares turned towards Officer Esparza and walked towards him in a confrontational manner with his fists clenched. Tabares spoke to Officer Esparza loudly and aggressively. No doubt sensing an impending confrontation, witnesses pulled out their cellphones and began recording Officer Esparza and Tabares. With Tabares coming at him, Officer Esparza backed up and told Tabares to stop where he was. Tabares ignored the officer's commands, continuing to aggressively walk towards him. Officer Esparza attempted to fend Tabares off by tasing him. The Taser had no visible effect other than to cause Tabares to punch Officer Esparza in the face. And so the fight was on; both of them ending up wrestling on the ground. Rather than help, observers continued to record the show on their cellphones. With Officer Esparza sitting on Tabares and punching him, Tabares tugged at the officer's belt, causing him to believe Tabares was going for his gun. Tabares took the officer's flashlight instead and stood up as Officer Esparza, also standing, backed away and pulled out his firearm. Officer Esparza's body camera turned on at this point. (It is unexplained why it was not functioning before.) With the two of them standing some 15 feet apart, and with Tabares' left side facing the officer while holding the flashlight out of sight in his right hand, and after a three-second hesitation, Officer Esparza began shooting. No warning was given. Tabares started to stumble after the first six shots were fired. Officer Esparza shouted twice to "get down," and then shot Tabares a seventh time. Tabares fell to the ground, . . . and died. Dillan

Tabares' mother, Tiffany, later sued the officer and the City of Huntington Beach in federal court, alleging that Officer Esparza used excessive force under the Fourth Amendment. Also alleged were state claims of battery, negligence, and a Bane Act violation (i.e., Civil Code § 52.1: California's equivalent to a federal 42 U.S.C. § 1983 civil suit). The federal district court judge granted the civil defendant's (i.e., the officer and the City of Huntington Beach) motion for summary judgment on all claims in a published decision (see *Tabares v. City of Huntington Beach* (C.D. Cal. July 30, 2019) 2019 U.S. Dist. LEXIS 163176.) Plaintiff appealed *on the state negligence claim only*.

Held: The Ninth Circuit Court of Appeal reversed, remanding the case back to the trial court for further proceedings. Finding that the district court committed three reversible errors, the bulk of the Court's discussion involves the most important of the three; i.e., the fact that the trial court "conflated" (i.e., confused) the rules for showing "negligence" under California law with those for proving a Fourth Amendment excessive force claim under federal law. It was undisputed that granting summary judgment in favor of the civil defendants on the Fourth Amendment excessive force claim was proper under the rules for establishing "qualified immunity;" i.e., that Officer Esparza either did not use excessive force under the circumstances or, at the very least, prior case law dictating that the force used was excessive was not yet clearly established at the time. But the rules for proving negligence under California law are different. "California negligence law regarding the use of deadly force overall is broader than federal Fourth Amendment law." Under California negligence law, "a plaintiff must show that the defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury." Also, however, and of particular significance, is the rule that an officer's "tactical conduct *and decisions leading up to the use of deadly force* . . . , (are relevant) as part of the totality of circumstances, (in a civil plaintiff's attempt to prove) that the use of deadly force was unreasonable." (*Hayes v. County of San Diego* (2013) 57 Cal. 4th 622.) Thus, under California law, the officer's pre-shooting decisions can render his behavior unreasonable under the totality of the circumstances, even if his use of deadly force at the moment of a shooting might have been reasonable when considered in isolation. In contrast, in evaluating the reasonableness of the force used under the Fourth Amendment, federal law generally focuses on the officer's conduct at the time the force is used, with the officer's earlier tactical conduct and decisions leading up to the use of force—whether good or bad—being irrelevant. The Ninth Circuit therefore held that that Officer Sanchez's pre-shooting decisions were relevant to the issue of negligence, but not to the Fourth Amendment excessive force claim. In using California's negligence rules, the Court found that Officer Sanchez's pre-shooting decisions were such that a jury could very well find that they constituted culpable negligence. Because the trial court erred by not recognizing the difference, using the federal Fourth Amendment standards for both, the Court reversed on this issue, remanding the case back to the trial court for a civil trial on the state negligence claims only.

Note: The other two errors made by the trial court—although mentioned, neither of which was discussed in any detail—involved (1) the trial judge's failure to note that there was in fact evidence probative of the fact that Tabares exhibited symptoms of mental illness that would (or should) have been apparent to Officer Esparza, and (2) misinterpreting Ninth Circuit precedent on the issue of negligence in assessing the reasonableness of Officer Esparza's conduct at the time of the shooting. If I were writing this case decision, I would have put more emphasis on the

mental illness issue. It seems to be more and more common nowadays for police officers to respond to calls for assistance in handling the reporting party's mentally disturbed spouse, parent, or child, only to have the mentally ill person grab a potential weapon and get himself shot. A reporting party in such a case does not typically call for police assistance thinking that responding officers are going to solve the problem by killing the person with the mental issues. The Ninth Circuit in this case does in fact make note of the importance of an officer recognizing mental illness when it is a factor, and in tailoring his or her use of force accordingly, at least when it is practical to do so. Specifically, The Court ruled that a reasonable jury in this case—in evaluating Officer Esparza's possible negligence—could find that the officer failed to "deescalate" the situation by not following P.O.S.T. (Peace Officers Standards and Training) recommendations for the handling of mentally disturbed individuals: I.e., "request backup, calm the situation, avoid physical contact, determine if the person is taking medication, acknowledge the person's feelings, and not to make threats." Courts (or at least the Ninth Circuit) are beginning to hold officers to a higher standard when dealing with mentally ill subjects. (See *Deorle v. Rutherford* (9th Cir. 2001) 272 F.3rd 1272; and *Glenn v. Washington County* (9th Cir. 2011) 673 F.3rd 864.) I'm not saying that Officer Esparza had the opportunity to do this here in this case; I wasn't there. But it's something a jury will likely be evaluating when deciding Officer Esparza's possible civil liability.

***Consensual Encounters vs. Detentions*:**
***A Show of Authority as a Detention*:**
***Citizen Information and Reasonable Suspicion*:**

In re Edgerrin J. **(Nov. 20, 2020) 57 Cal.App.5th 752**

Rule: The use of a patrol vehicle's emergency lights and four officers surrounding a suspect's vehicle constitutes a detention which, if not supported by at least a reasonable suspicion, is illegal. Information from a private citizen, as reported to the police, that persons are engaged in "shady activity," without further explanation, is insufficient to constitute the reasonable suspicion necessary to justify a detention.

Facts: On March 13th, 2019, at around 6:00 p.m. four San Diego patrol officers were handling an unspecified issue in the Encanto neighborhood of southeast San Diego when they were approached by a woman who drove up in her car and stopped to talk to them. She told one of the officers (as recorded [without audio] on the officer's body worn camera in a short 40 second conversation) that she lived nearby, and provided her address. She complained to the officer that there were some black males in a parked black Mercedes on her street who were "acting shady." There was no explanation as to specifically what these individuals were doing that she considered to be "shady," and the officer apparently didn't think to ask her to elaborate. All four officers, in two marked patrol vehicles, drove to that location and found the Mercedes where she said it would be, legally parked, and with three young black males sitting inside. Two of the officers pulled up directly behind the Mercedes, activating their vehicle's emergency lights as they did so. The other two officers parked immediately behind the first patrol car without activating their lights. All four officers approached the Mercedes at once, positioning themselves at each of the car's four doors. The three teenage occupants were contacted, "directed to roll down their windows, hand over proof of identification, and provide their names,

addresses, and birthdays." Defendant Edgerrin J., sitting in the driver's seat, initially gave a false name, but was quickly identified and found to be subject to a Fourth waiver condition of probation. Co-defendant Jamar D. was a passenger. (The third occupant, referred to only in a footnote as "D.W.," is not further mentioned in this written decision and was not a party to this appeal.) Upon searching the Mercedes pursuant to defendant's Fourth waiver, a loaded firearm was found under the driver's seat. Also recovered was a pair of sneakers, determined to be connected to a robbery, and a canister containing marijuana. All three minors were arrested. The San Diego County District Attorney filed W&I Code 602 petitions in Juvenile Court, accusing defendant Edgerrin and co-defendant Jamar of robbery, receiving stolen property, and various weapons-related charges, along with associated enhancements. Defendant Edgerrin was additionally charged with providing false information to a police officer. Defendants' joint motions to suppress the evidence obtained from the Mercedes was denied by the Juvenile Court magistrate, he finding that the contact constituted a consensual encounter only and rejecting the defendants' arguments that they had been unlawfully detained. Both defendants (after admitting to selected allegations in a plea bargained disposition) appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed. Defendants Edgerrin J. and Jamar D. argued on appeal that the officers' actions (i.e., turning on a police vehicle's emergency lights and physically surrounding the occupants of a legally parked motor vehicle) constituted a detention. Also, they argued that the citizen's information concerning "shady" activity, without more, was insufficient to provide the officers with the reasonable suspicion needed to justify a detention. Per the defendants, the discovery of defendant Edgerrin's probation Fourth waiver and the evidence recovered from the vehicle, all being the products of an unlawful detention, should have been suppressed. The Court agreed with both arguments.

(1) *The Contact as a Consensual Encounter*: It goes without argument that officers may approach a person on the street and talk to them. If the person voluntarily answers, those responses, and the officer's observations, are admissible in a criminal prosecution. Such a contact is categorized as a "consensual encounter." "Such consensual encounters present no constitutional concerns and do not require justification." (*People v. Brown* (2015) 61 Cal.4th 968.) The People argued in this case that the initial contact between the four San Diego P.D. officers and the defendants was a lawful consensual encounter. However, case law tells us that such a contact can easily degenerate into a detention if not handled properly. In this case, the Court held that defendants were in fact detained upon the initial contact in that by turning on the one patrol car's emergency lights, and then surrounding the defendants' vehicle, such a "show of authority" put the defendants into a position where no reasonable person would have felt that they were free to ignore the officers and leave. One of the officers testified that the emergency lights were used for safety purposes; i.e., to "warn on-coming traffic of officers on foot." This may very well have been true. The officers' intentions, however, are not the issue. The issue is the effect the use of a patrol vehicle's emergency lights are likely to have on a reasonable person in the defendants' shoes under the circumstances. "(A) seizure occurs if 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave . . . '" (*Brendlin v. California* (2007) 551 U.S. 249, 255.) While California's Supreme Court has previously noted that there is no "bright-line" rule in support of the argument that the use of a patrol vehicle's emergency lights necessarily constitutes a detention (See *People v. Brown, supra*, at pp. 978, 980.), it is certainly a strong factor for the proposition that such a "*show of authority*" would lead a reasonable person to believe that he or she is not free to leave.

(See *People v. Bailey* (1985) 176 Cal.App.3rd 402.) And even if the use of the officers' emergency lights was not a detention, the Court held that a detention "plainly occurred" immediately thereafter when four uniformed police officers all stepped out of their respective vehicles after having parked immediately behind the defendants' Mercedes, walked up to the Mercedes so as to block each of the four doors, and direct the occupants to roll down their windows, hand over proof of identification, and provide their names, addresses, and birthdays. Such a "show of authority" constitutes a situation where no reasonable person would have felt like he had the option of just ignoring the officers and walking (or driving) away. As such, defendants were detained.

(2) *Reasonable Suspicion Justifying the Detention*: The People made the alternative argument on appeal that if the contact between defendants and the four officers constituted a detention, then such a detention was legally justified under the circumstances. Specifically, the People argued that information from an identified citizen (i.e.; a "citizen informant") which, when combined with the officers' prior knowledge that defendant Edgerrin was a gang member, and that he was present in rival gang territory during a "gang holiday," and being in an area of the city known for its "gang violence" where "violent crime (is) a fact of life," along with the fact that "it was significant that the tipster 'felt the conduct she saw rose to the level of needing to flag down and tell the police,'" all constituted when combined sufficient information to justify the defendants' detention. (It is never explained what is meant by a "gang holiday.") On the issue of the officers' prior knowledge concerning defendant Edgerrin's probationary status and that he was known gang member, the Court found the record unclear, necessitating a remand to the Juvenile Court for an expanded evidentiary hearing. So that issue was left unresolved. But as for the argument that a detention could be based upon the citizen's report to the officers alone, i.e., that she had observed defendants engaging in "shady" activity, without any other information, the Court found this information, when considered in insolation, was clearly insufficient justification for a detention. "The 'reasonable suspicion' necessary to justify a stop (i.e., a "detention") 'is dependent upon both the content of information possessed by the police and its degree of reliability.'" (*Navarette v. California* (2014) 572 U.S. 393, 397.) While information coming from a so-called "citizen informant" may be considered reliable all by itself, the nature of that information must also be determined. "Where officers rely on a citizen's tip, that tip must be 'reliable in its assertion of illegality, not just in its tendency to identify a determinate person.'" (*People v. Dolly* (2007) 40 Cal.4th 458, 471.) A tip's reliability depends upon an assessment of "the totality of the circumstances in a given case." To put this rule in the context relevant here, the Court held that the fact that someone might be engaged in "shady activity," without any explanation as to what "shady" means, is not enough by itself to base a detention. The citizen's assertion that defendants were engaged in shady activity is just too vague—at least when left unexplained—to justify a detention. "In isolation, an allegation of "shady" behavior is far too vague to suggest criminal activity." As such, unless, on remand, the People can supplement this information with additional facts about defendant Edgerrin's probationary and gang status that the officers might have known before the contact, the detention in this case must be considered unlawful. Any fruits of such a detention may very well be suppressed as a result, dependent upon the results of the further proceedings to be held in the Juvenile Court.

Note: So (while recognizing that hindsight is always 20-20), what could the officers have done differently to eliminate (or at least minimize) the issues in this case? First, and most obvious, the

officers should have taken an extra 60 seconds and asked the woman what the suspects were doing that she considered to be "shaky." Just as a matter of officer safety, you would have thought that this question would have been obvious. Secondly (and as suggested by the Court), the officers should have avoided going in like gang busters ("*shock and awe*?"), taking it a little slower, and planning their response. Sitting back in the shadows and observing the suspects' actions for a few minutes could have led to some observations that the officers themselves might have also considered "shaky," and been ready to testify to. As a patrol officer in the '70's (admittedly aging myself), and having worked the Encanto area of San Diego, I used to carry some very expensive binoculars just for this very purpose, and found them to be exceedingly useful on more than one occasion. Thirdly, when making contact, the officers could have kept it a lot more low key. It was acknowledged in court that the officers intentionally descended upon the defendants' Mercedes, utilizing a tactic referred to as "contact and cover," and which is "designed to let people know there is more than one police vehicle present." That's all very important from an officer safety standpoint, and I don't mean to discourage that tactic when it might be necessary. But going in en masse doesn't help when it's an issue whether a detention, as opposed to a consensual encounter, is legally justified. So where there is not yet enough information upon which to justify a detention, the wisdom of minimizing the initial contact to one or two officers (assuming this can be done safely), as the others standby ready to jump in should it become necessary, might be considered. In the alternative, holding back and delaying any contact even longer has to be considered. Waiting until the suspects drive off and then watching for a traffic violation (i.e., a "pretext stop") would have worked, for instance. Bottom line is that in this case, too many officers went in too soon, making it hard to argue in court that the contact was nothing but a consensual encounter.

One last thing: Given what's going in in this country today, as it relates to how law enforcement deals with various minorities, Justice William Dato, in a concurring opinion (at pgs. 770-772), felt it necessary to make certain observations that we have to expect to see more and more. In fact, the issues discussed here can be expected to become (if they aren't already) factors to consider when evaluating the existence of a reasonable suspicion or probable cause, etc., in any given case. I will quote here only Justice Dato's main points without further comment:

> "We have resolved this appeal without delving into complex issue of race and policing, but I submit that as judges we must remain mindful of the broader context in which this case arose. . . . In situations like this, law enforcement officers must be sensitive to how implicit biases might influence what passersby perceive as a threat, just as judges must appreciate how officers on the receiving end of a vague, subjective tip might interpret the information they obtain. . . . Ultimately, there are myriad ways in which racial perceptions and biases might surface in a given criminal case, as in everyday life. And while the police officers here never inquired further to find out what exactly the tipster saw that concerned her, our opinion appropriately emphasizes the perils of relying solely on this *type* of report as a basis to detain. To that end, the objective standard of reasonable suspicion, which has always required more than a mere hunch to justify a detention, remains a vital safeguard for protecting our important Fourth Amendment rights."

"*Implicit bias*." Expect to see that term more and more.

***Miranda and the Fifth Amendment*:**
***Civil Liability for Intentional Miranda Violations*:**

Tekoh v. County of Los Angeles **(9th Cir. Jan. 15, 2021) 985 F.3rd 713**

Rule: When an incriminating statement obtained during a custodial interrogation in violation of *Miranda* is used against a defendant in the prosecution's case-in-chief, the defendant's constitutional Fifth Amendment right against self-incrimination is violated. Such a violation, even if not involving coercive interrogation techniques, may serve as a basis for a federal 42 U.S.C. § 1983 civil suit for which the offending officer is responsible.

Facts: Plaintiff Terence Tekoh worked at a Los Angeles medical center, his job being to move patients between their hospital rooms and the MRI section. On one such occasion, he was accused by a female patient of having lifted her cover sheets and touching her vaginal area. Hospital staff reported the allegation to the Los Angeles Sheriff's Department. Deputy Carlos Vega responded to investigate. In contacting plaintiff, Deputy Vega asked if there was somewhere private that they could talk. It was suggested that they use the MRI "reading room;" a small, windowless, and soundproof room used by doctors to read MRIs. They were later joined by Deputy Vega's supervisor, Sgt. Strangeland. What happened in that room before Sgt. Strangelove's arrival became the point of contention. Per Deputy Vega, plaintiff immediately admitted that he had "made a mistake." Asked to write on paper what had occurred, plaintiff put in writing what he himself referred to as an "honest and regrettable apology," admitting in a brief account to "spreading (the patient's) vagina lip for a quick view." Sgt. Strangeland arrived afterwards, somewhat corroborating Deputy Vega's account when he later testified that by the time he got there, plaintiff's "demeanor (appeared to be) 'that of a man who was contrite, who truly . . . regretted what he had done.'" Plaintiff, on the other hand, claimed that he continually denied touching the patient, but wrote out his mini-confession only after having been threatened by Deputy Vega. Specifically, plaintiff alleged that Deputy Vega refused to allow a third person to accompany them into the MRI room, would not let him leave the room once they were in there, ignored his request for an attorney, falsely claimed that the assault had been captured on video, used racial slurs, and threatened him with deportation, all triggering flashbacks to his experiences with police brutality in Cameroon where he was from. According to plaintiff, Deputy Vega put a pen and paper in front of him, telling him to "write what the patient said [he] did." When plaintiff hesitated, Deputy Vega put his hand on his gun and said he was not joking. According to plaintiff, Deputy Vega then dictated the contents of the written confession. Plaintiff testified that he was so scared that he was "ready to write whatever [Vega] wanted," acquiescing to writing the statement as dictated to him. Both parties agreed, however, that plaintiff was never read his *Miranda* rights. Arrested and charged in state court with unlawful sexual penetration, per P.C. § 289(d), plaintiff's confession was admitted into evidence at trial. With a mistrial being declared mid-trial (due to evidence being used that had not previously been disclosed to the defense; i.e., a *Brady v. Maryland* violation), defendant was retried, and acquitted. (It is unknown why. It's tough to lose a trial with a full written confession. It can only be assumed that the jury disbelieved both the victim and Deputy Vega, while discounting the veracity of Tekoh's alleged confession.) After his acquittal on the criminal charge, plaintiff filed this civil action in federal court under 42 U.S.C. § 1983, seeking damages for allegedly violating his Fifth Amendment right against self-incrimination. The main issues at trial were (1)

whether or not plaintiff's constitutional rights had been violated by Deputy Vega's failure to *Mirandize* him, and (2) whether to constitute a violation, the confession had to have been obtained by coercion, with a *Miranda* violation but being one factor to consider on this issue. The trial court judge granted a retrial after admittedly mis-instructing the jury in the first trial. In the second trial, the district court judge instructed the jury that in determining whether plaintiff's Fifth Amendment rights had been violated, they were to consider the "objective totality of all the surrounding circumstances (in determining) (w)hether a confession (was) improperly coerced or compelled . . . .", followed by a non-exclusive list of the circumstances that may be considered. The jury returned a verdict for the civil defendants (i.e., Deputy Vega and the County of Los Angeles.). Plaintiff appealed.

Held: The Ninth Circuit Court of Appeal reversed. The issue on appeal was whether the failure to advise an in-custody suspect of his Fifth Amendment right against self-incrimination pursuant to the dictates of *Miranda v. Arizona* (1966) 384 U.S. 436, constitutes a Fifth Amendment constitutional violation which can be the subject of a federal 42 U.S.C. § 1983 civil suit. It was also an issue whether a *Miranda* violation must be accompanied by coercive interrogation techniques in order to implicate the Fifth Amendment. (Note that the Court assumes, without discussing the issue, that plaintiff was in custody and should have been read his *Miranda* rights before being questioned. See Note, below.) The confusion on these issues stem from U.S. Supreme Court decisions decided prior to the year 2000, which referred to the warnings described in *Miranda* as mere "prophylactic rules," or "procedural safeguards," that were (at the time) "not themselves rights protected by the Constitution." (E.g., see *New York v. Quarles* (1984) 467 U.S. 649, 653-655; and *Michigan v. Tucker* (1974) 417 U.S. 433, 444.) Civil suits pursuant to 42 U.S.C. § 1983 are permitted only when necessary to vindicate "rights, privileges, or immunities secured by the Constitution." Because a simple *Miranda* violation (absent evidence or coercion) was not considered a violation of the Fifth Amendment, there was no federal redress available to a criminal defendant pursuant to 42 U.S.C. § 1983 absent a showing that he or she had been coerced into confessing. The only way a plaintiff could show that his constitutional rights had been violated was by proving that any statements he gave to police were involuntarily coerced. The trial court in this case erroneously believed that this was still the rule when it instructed the jury they could hold Deputy Vega civilly liable if it was proved that plaintiff's "confession (was) improperly coerced or compelled." The trial court, however, erred in not considering the Supreme Court's decision in the landmark case of *Dickerson v. United States* (2000) 530 U.S. 428. In *Dickerson*, the High Court struck down Congress's attempt to blunt the effects of the *Miranda* decision by enacting a statute (i.e., 18 U.S.C. § 3501) which provided that confessions were admissible as long as they were voluntarily made, regardless of whether *Miranda* warnings had been provided, and that a *Miranda* advisal was but one factor to consider in evaluating the voluntariness of a criminal defendant's incriminating statements. Describing the *Miranda* decision as "*constitutionally based*," and as having "*constitutional underpinnings*." the *Dickerson* Court (at 440 & fn. 5) ultimately concluded that *Miranda* was "*a constitutional decision*" that Congress could not overrule by merely enacting a contrary statute. This significant turnaround from prior decisions generated all sorts of confusion, even among the individual justices of the Supreme Court. Two fractured (i.e., plurality, as opposed to majority) decisions from the Supreme Court (see *Chavez v. Martinez* (2003) 538 U.S. 760, and *United States v. Patane* (2004) 542 U.S. 630.) ultimately concluded that what the Court meant was that *Miranda* was intended to impose a "*trial right*" only. In other words, the Fifth

Amendment is not implicated unless a statement obtained in violation of *Miranda* is used against a criminal defendant in court in a criminal prosecution, and in the prosecution's case-in-chief. It is also not necessary that the resulting incriminating statements were obtained involuntarily; any *Miranda* violation will suffice. But where "no proceedings had been brought against the plaintiff, he had not suffered a Fifth Amendment violation." Also, if a criminal defendant's statements taken in violation of *Miranda* are suppressed and not admitted into evidence, or are otherwise not used against him at trial, then the Fifth Amendment is not implicated. "(T)he exclusion of the statements themselves would be a 'complete and sufficient remedy' for the violation." In this case, plaintiff's incriminating statements obtained during Deputy Vega's un-*Mirandized* interrogation were in fact used against him at his criminal trial, even though he was eventually acquitted. Whether or not convicted, his Fifth Amendment rights were implicated. Title 18 U.S.C. § 1083 thus provided him with some civil redress for that violation. Also, it was noted that the fact that it is the prosecutor who decides whether or not to use a defendant's incriminating statements against him does not shield the law enforcement officer who conducted the offending interrogation from civil liability. When a law enforcement officer obtains incriminating statements in violation of *Miranda*, and includes those statements in his reports submitted to the prosecutor, it is foreseeable that the prosecutor may consider those statements when initiating a criminal prosecution and then attempting to use them in evidence. Based upon all this, the Court found the trial court's erroneous jury instructions, imposing upon the plaintiff the obligation to prove that his confession had been coerced, to be prejudicial error, entitling him to a new trial. The matter was therefore remanded to the trial court for that purpose.

Note: As noted above, it was just assumed that Tekoh was in custody when he was questioned. This may have been an issue before the jury in this civil case, and may have even been decided in Deputy Vega's favor (i.e., that Tekoh was *not* in custody), given the fact that the jury reached a verdict in Deputy Vega's favor. The Court does not address this issue at all, so we're left in the dark. We also have to assume that Deputy Vega failed to *Mirandize* Tekoh due to his own personal belief that his questioning of Tekoh was taking place in a non-custodial setting. I can't think of any other reason why Tekoh was not *Mirandized*. But either way, the Court does note in a footnote (fn. 11) that had it been held to be a non-custodial questioning, then there would be no civil liability for the simple reason that there was no *Miranda* violation. *Miranda* only applies when the questioned person is in custody. The other important point of this case is that a confession does not need to have been involuntarily obtained (i.e., "*coerced*") in order for it to be in violation of the Fifth Amendment. Any *Miranda* violation, whether involving coercion or not, at least where the resulting incriminating statements are used in the People's case-in-chief in a later criminal prosecution, violates the Fifth Amendment. Police officers need to note the Court's specific finding in this case; i.e.: If you violate *Miranda*, and the resulting incriminating statements are used by the prosecutor in his or her case-in-chief, *you* are the one who is risking potential civil liability; not the prosecutor. Just another reason why the *Miranda* rule needs to be respected.