The California Legal Update

Remember 12/7/1941 & 9/11/2001: Support Our Troops; Support our Cops

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THIS EDITION'S WORDS OF WISDOM:

"*Just because it's a bad idea doesn't mean it won't be a good time*." (Unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Enlarging the Scope of a Detention*:** I've received a number of concerned inquiries asking about a new Oregon Supreme Court decision entitled ***State v. Arreola-Botello (Nov. 15, 2019) 365 Or. 695, where it was held that for purposes of **Article I, section 9** of the **Oregon Constitution**, there are both "*subject-matter and durational limitations*" to the questioning that may occur during a traffic stop, thus making it unconstitutional for Oregon law enforcement officers to question a subject stopped for a traffic violation about any other possible criminal activity not related to the purposes of the stop, whether or not it unlawfully prolongs the traffic stop. *Relax*: This is *not* the rule in California, nor even in Ninth Circuit Court of Appeal's geographical area of responsibility. Being an Oregon constitutional issue, ***Arreola-Botello*** applies only to Oregon. Oregon has the right—under the "Independent State Grounds" theory—to tighten up on the constitutional rules beyond what is already imposed by the U.S. Supreme Court. In contrast, both California and the Ninth Circuit both follow the U.S. Supreme Court's rulings on this issue. California is required do so since passage of "***Proposition 8***:" (**Cal. Const., Art I, § 28(d)**) (passed in June, 1982), doing away with the Independent State Grounds theory in California. The Ninth and other federal Circuits have no choice but to follow the U.S. Supreme Court's lead. The rule we have to follow, therefore, is quite clear: So long as a detention (traffic stop or otherwise) is not prolonged longer than the time it reasonably takes to handle the purposes of the detention itself (absent some newly developed reasonable suspicion of criminal activity justifying an extension of the detention), an officer may ask any questions he or she wants. (See ***Muehler v. Mena*** (2005) 544 U.S. 93, reversing the Ninth Circuit on this issue, which had held to the contrary.) "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." (***United States v. Drayton*** (2002) 536 U.S. 194.) As noted above, California follows this rule. (***People v. Brown*** (1998) 62 Cal.App.4th 493, 499-500; "Questioning during the routine traffic stop on a subject unrelated to the purpose of the stop is not itself a **Fourth Amendment** violation. Mere questioning is neither a search nor a seizure. [Citation.] While the traffic detainee is under no obligation to answer unrelated questions, the Constitution does not prohibit law enforcement officers from asking. [Citation.]" See also ***People v. Bell*** (1996) 43 Cal.App.4th 754, 767; ***People v. Gallardo*** (2005) 130 Cal.App.4th 234, 238; ***People v. Tully*** (2012) 54 Cal.4th 952, 981-982; and ***People v. Gallardo*** (2005) 130 Cal.App.4th 234, 239.) And while the Ninth Circuit's rule was originally to the contrary, it is also now in accord. (***United States v. Mendez*** (9th Cir. 2007) 476 F.3rd 1077, 1079-1081; and ***United States v. Basher*** (9th Cir. 2011) 629 F.3rd 1161, 1166, fn. 3.) So ***Arreola-Botello***, being based upon Oregon's stricter interpretation of its own Constitution, can (and should) be ignored by both California and federal law enforcement officers. As for local cops in other states, each state's interpretation of its own Constitution must be considered.

CASE LAW:

***Warrantless Searches of Vehicles*:**
***Vehicles Searches for a Driver's Identification*:**

People v. Lopez **(Nov. 25, 2019) 8 Cal.5th 353**

Rule: A warrantless search of a vehicle (or its contents) for the purpose of locating a driver's identification following a traffic stop and the driver's denial that he/she has a driver's license violates the Fourth Amendment absent probable cause justifying the search.

Facts: City of Woodland Police Officer Jeff Moe was dispatched on July 4, 2014, to look for a person in a particularly described vehicle who was reportedly driving erratically. The second of the two calls, coming some hours after the first, identified the driver as someone named "Marlena;" the caller stating that she had been drinking all day. Unable to find the car or Marlena, Officer Moe eventually just sat and waited at the address registered to the vehicle. Eventually, defendant (later identified as Maria Elena Lopez) drove up in the vehicle and parked in front of the house. As defendant got out of her car, she spotted the officer, "looked nervous," and started to walk away. Despite not having observed any traffic violations or erratic driving, Officer Moe made contact with defendant, later testifying that he "wanted to know what her driving status was based on the allegations earlier, plus [he] wanted to identify who she was." Asked for her driver's license, defendant stated that she did not have one. Without asking defendant for her name or other identifying information, Officer Moe detained her by placing her in a control hold. When she tried to pull away, he handcuffed her. Officer Moe then asked defendant "if she had . . . any identification possibly within the vehicle." When defendant responded that "there might be," a second officer who had arrived on the scene opened the passenger door and retrieved a small purse from the passenger seat, handing it to Officer Moe. Officer Moe searched the purse and found a baggie containing methamphetamine in a side pocket. Defendant was charged in state court with misdemeanor violations of possessing methamphetamine (H&S Code § 11377(a)) and driving with a suspended or revoked license. (V.C. § 14601.2(a)) (There was no evidence presented as to defendant possibly being DUI.) Defendant filed a motion to suppress the meth, arguing she had been unlawfully detained and her vehicle and purse unlawfully searched. The trial court granted the motion, finding the warrantless search of her vehicle to be illegal. The Third District Court of Appeal, however, reversed (See *People v. Lopez* (2016) 4 Cal.App.5th 815, petition granted). The California Supreme Court granted defendant's petition for review.

Held: The California Supreme Court, in split 4-to-3 decision, reversed the Appellate Court. Some seventeen years earlier (12 years before the traffic stop in issue here), the California Supreme Court decided the case of *In re Arturo D.* (2002) 27 Cal.4th 60. *Arturo D.* (itself being a 4-to-3 split decision) held that when the driver of a lawfully stopped vehicle indicates that he does not have his driver's license (or other satisfactory evidence of identification) with him, the officer may make a limited search into those areas of the vehicle where one might expect to find a person's identification; e.g., above the visor, under the front seat, in the glove compartment and/or the center console. Although *Arturo D.* did not involve a driver's purse, the Court here noted that a woman's purse is probably "the most 'traditional repository' of a driver's license . .

." The Third District Court of Appeal reversed the trial court's suppression of the meth in this case, using *Arturo D.* as its authority. (Officer Moe himself no doubt got training on the rule of *Arturo D.*, and was doing as he was trained.) The Supreme Court here decided that the rule of *Arturo D.* must now be reversed, at least as far as it allows for a warrantless search of a vehicle for a driver's identification. (The Court specifically held that it was *not* ruling upon the issue of the legality of a search for a vehicle's documentation under the same circumstances.) The Court cited two primary reasons for reversing *Arturo D.*: First; the rule of *Arturo D.* is not supported by any other case law from either California, other states, or the federal courts. What case law does exist is to the contrary; i.e., that such a search violates the Fourth Amendment. Secondly, the subsequent U.S. Supreme Court decision in *Arizona v. Gant* (2009) 556 U.S. 332, mandates that increased emphasis be placed upon the privacy rights one has in his or her vehicle. Although *Gant* is a "search-incident-to-arrest" case, and not one based upon the existence (or non-existence) of probable cause, the Court ruled here that *Gant's* analysis of a driver's privacy interest when balanced with the government's need to discover criminal wrong-doing was relevant to this case. (*Gant* held that a warrantless search of a vehicle incident to arrest is lawful *only* when the arrestee is unsecured [handcuffed and placed into a patrol car] and within reaching distance of the passenger compartment at the time of the search, *or*, in the alternative, whenever it is "reasonable to believe" that evidence relevant to the charge for which the driver has been arrested may be present in the car.) Pursuant to *Gant*, the Court here determined that even though a person has less of a privacy interest in his vehicle than he might in his home, such a privacy interest, such as it is, does in fact exists, and cannot be ignored. Also, assuming defendant here—when the only known violation was for not having her driver's license with her—was to be cited as opposed to arrested, *Arturo D.* comes dangerously close to violating the U.S. Supreme Court rule that the Fourth Amendment does not permit law enforcement to search the vehicle of a person who has been cited, but not arrested, for a traffic violation. (See *Knowles v. Iowa* (1998) 525 U.S. 113; i.e., there is no such thing as a "search incident to a citation.") Therefore, giving increased weight to a driver's privacy interests in his vehicle (i.e., his or her interest in preventing officers from "rummag[ing] at will" through their belongings; *Gant*, at p. 345.) when balanced with the government's interest in discovering evidence of potential criminal wronging, the Court held that defendant's interests outweighed the government's. This is particularly true when you consider that an officer has other means at his disposal for determining (or verifying) a driver's true identity. For instance: *(1)* The officer can require the driver to place a thumbprint on the notice to appear, accepting that thumbprint as "satisfactory evidence" of identity. (V.C. §§ 40302(a), 40500(a); see V.C. § 40504.) *(2)* The officer has the option of making a custodial arrest of the driver for failure to carry a driver's license while driving (V.C. §§ 12500, 12951, 40302; *People v. McKay* (2002) 27 Cal.4th 601, 618, 625.) and then search the person of the driver incident to that arrest. (*United States v. Robinson* (1973) 414 U.S. 218.) *(3)* The officer can "ask questions," followed up with routine inquiries via computers and the radio, comparing the driver's physical characteristics with what is available through the available governmental data bases, either verifying the fact that the driver is who she says she is or developing probable cause to believe that she is not, in which case the officer would then have the right to search the vehicle based upon that probable cause. Also in such a circumstance, where the officer determines he has been given false identification information, other exceptions may come into play. At that point, the officer is no longer solely concerned with issuing an enforceable traffic citation. The driver has also committed other jailable criminal offenses by lying to a police officer about his or her identity; i.e.; P.C. § 148.9; V.C. §§ 31, 40000.5. *(4)* The

officer may simply seek consent to search the vehicle for identification. (All good points for further training.) While the above options may not always resolve the issue, the Court held them to be sufficient to provide a police officer with other alternatives to conducting an *Arturo D.*-approved search for identification. Based upon this analysis, the Court determined that the Fourth Amendment "does not contain an exception to the warrant requirement for searches to locate a driver's identification following a traffic stop." *Arturo D.*, to the extent that it holds otherwise, is overturned. The case was therefore remanded for further proceedings consistent with this ruling.

Note: I understand this decision is very upsetting to law enforcement officers, having already received some angry (or at least concerned) e-mails about it. But I have to admit I've always wondered about the validity of the *Arturo D.* decision; allowing for warrantless, suspicionless searches of vehicles just because the driver claims he doesn't have his driver's license with him. Absent an articulable reason for believing that he's hiding his license (or other "satisfactory evidence of identification") in his car, or that he has an ulterior motive for preventing an officer from discovering his true identity (e.g., outstanding warrants), it is really hard to justify a search of his car (whether limited or not) under the standard search and seizure rules. The Court here cites a pile of cases from other jurisdictions, federal and state, that agree. So to me, this decision is really no surprise. The Court did not rule out the possibility, by the way, that Officer Moe's "good faith" in relying upon the rule of *Arthur D.* might still save the search in this case; the issue being one that must be considered upon remand. Also note that whether such a limited warrantless search may be conducted for the vehicle's identification documents (e.g., registration, VIN number, etc.) was pointedly *not* decided here. And there is case law (e.g., see *New York v. Class* (1986) 475 U.S. 106; *People v. Webster* (1991) 54 Cal.3rd 411, 430-431.) supporting *Arturo D's* conclusions (see the argument and cases cited in *Arturo D.*, pgs. 69-71.) on this issue. So the constitutionality of such a search (at least if limited in its scope) is still the rule. Note, however, that *New York v. Class* was an *extremely limited* search, where the officers did no more than push aside some papers off the dash to view the VIN as printed there. Also, the Ninth Circuit has disapproved VIN searches in a couple of older decisions. E.g.: Looking under the hood of a car for the vehicle's VIN has been held to be an illegal search absent probable cause. (*United States v. Soto* (9th Cir. 1979) 598 F.2nd 545.) Also, lifting an opaque car cover and opening the car's door while looking for a VIN on the door post was held to be illegal. (*United States v. $277,000.00 U.S. Currency* (9th Cir. 1991) 941 F.2nd 898.) So we can expect to see this issue come up again. It is certainly ripe for reconsideration.

***Gang Expert Opinion Testimony*:**
***Sanchez Error*:**
***Miranda Violations and Voluntariness*:**
***Evid. Code § 1221; Adoptive Admissions*:**

People v. Mendez **(July 1, 2019) 7 Cal.5th 680**

Rule: (1) Per *People v. Sanchez*, as a general rule, a gang expert may not testify to hearsay facts and circumstances concerning defendant's prior contacts with law enforcement. However, it is within a defense attorney's discretion to allow such testimony when done to the defendant's advantage. In so exercising such discretion, defendant cannot complain later that the rule of

People v. Sanchez was violated. (2) Ignoring a defendant's invocation of his right to counsel does not automatically prevent the admission into evidence of defendant's later statements made to non-law enforcement absent evidence of coercion. (3) The adoptive admission exception to the hearsay rule (Evid. Code § 1221) allows for the admission into evidence of another's incriminatory accusation against the defendant.

Facts: Defendant Julian Alejandro "Midget" Mendez was a member of the North Side Colton criminal street gang, in Colton, California. On February 4, 2000, he and co-defendants (and co-gangsters) Daniel "Huero" Lopez and Samuel "Devil" Redmond had been drinking alcohol and smoking methamphetamine. Driving Redmond's black Nissan Pathfinder, the three of them picked up co-defendant Joe "Gato" Rodriguez, and drove to another co-gangster's home on Michigan Street in Colton where they met up with other Colton street gang members. While there, the four defendants got into a "*where you from*" gang-challenge confrontation with a group of 15 and 16-year old "bunch of kids" on the street in front of the house. Among this group were Michael Faria, Jessica Salazar, and Sergio Lizarraga. Faria told the Colton gang members; "*I back up the West*," referring to a rival gang; the West Side Verdugo gang. Profanities began to fly. Lizarraga, wary of the direction this was all heading, attempted to defuse the situation by getting Faria to break it off: "*It's cool. Just chill out, walk away*." He got punched in the face by a Colton gang member for his efforts. From there, the fight was on. Eventually, someone from defendant's group introduced a gun into the fray, shooting Faria, killing him. Lopez and Redmond jumped into Redmond's Nissan Pathfinder and fled the scene, picking up Mendez and Rodriguez on the way. Mendez had possession of the gun by that time. Leaving the scene, the four defendants saw Jessica Salazar (who had been in the group of 15 and 16 year olds) "going hysterical," "crying," and "not knowing where to go." Salazar and Rodriguez knew each other from prior contacts. Because Rodriguez knew her personally, they decided to pick her up. As the five of them drove away from the scene, Salazar, was "going nuts," crying, and asking repeatedly, "Why did you do that?" Knowing that Salazar and could identify Rodriguez, Mendez decided that "she's gotta die." They drove around for 20 or 30 minutes before coming to a dirt road. Mendez attempted to get Rodriguez to shoot Salazar, telling him; "You know her" and "[s]he's going to identify you." but he wouldn't do it. But he helped drag a crying and resisting Salazar out of the car where Mendez shot and killed her. A police investigation eventually led to the four defendants. (These geniuses switched the tires from Redmond's Nissan Pathfinder to an Isuzu Rodeo, only to have Mendez get caught driving the Isuzu, the tires on which—due to the switch—matched tire prints left at the Salazar murder scene.) The four defendants were charged jointly in state court with two counts of murder plus special circumstances and various gang and gun-related enhancements. Mendez was tried along with Rodriguez and Lopez (but with a separate jury). Redmond pled guilty to first degree murder prior to trial and testified against the remaining co-defendants, thus avoiding the possibility of a death sentence under the terms of his plea bargain. At trial, a gang expert testified for the prosecution (the details of which are described below). Also, a recording of a jailhouse conversation between Mendez and a friend—Nicole Bakotich—was admitted into evidence. Mendez was convicted on all counts, including both murders, with all the special circumstances and allegations found to be true. He was sentenced to death (along with another 56-years-to-life). His appeal to the California Supreme Court was automatic. (The results of the trial of Rodriguez and Lopez was not discussed. Neither was a part of this appeal.)

Held: The California Supreme Court unanimously affirmed. Among the issues on appeal was the admissibility of the gang expert's testimony, admissibility of Mendez's jailhouse conversation with Nicole Bakotich, and the adoptive admission of a co-defendant's incriminatory remark.

(1) *Sanchez Error*; *Admissibility of a Gang Expert's Opinions:* Among the witnesses who testified against the defendant was a law enforcement gang expert named Jack Underhill; a ten-year veteran of the Colton Police Department with extensive gang enforcement experience. Through his testimony, Officer Underhill explained to the jury the nature of the gang culture in general along with the specifics of the rivalry between the two gangs involved in this case; the North Side Colton gang and the West Side Verdugo gang. As to this case, Officer Underhill testified that the Faria's comment, "(*w*)*here are you from*," set off an escalating situation where, in the gang culture, killing Faria was an expected result, building the one gang's reputation in the gang world in the hopes that other gangs would then fear them. For this reason, Underhill testified that the Faria shooting was "committed for the benefit of, at the direction of, [and/or] in association with . . . members of North Side Colton," relevant to prove the charged gang allegations (i.e., that defendant personally discharged a firearm causing the deaths of both Faria and Salazar for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of P.C. §§ 12022.53(e) and 186.22 (b)(1); and that he committed both murders for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of P.C. § 186.22(b)(1)). Officer Underhill also testified to the details behind five of defendant's prior contacts with law enforcement and that—based upon reports that he had read from these contacts—it was his opinion that defendant was in fact a member of the North Side Colton gang. Subsequent to both the murders in this case, as well as the trial, the California Supreme Court decided the case of *People v. Sanchez* (2016) 63 Cal.4th 665. *Sanchez* held that a gang expert such as Officer Underhill may *not* testify to case-specific facts from another's reports (i.e., hearsay statements) unless they are independently proven by competent evidence or are covered by a hearsay exception. Per *Sanchez*, it is a constitutional Sixth Amendment Confrontation Cause violation if, in a criminal case, a prosecution expert seeks to relate such testimonial hearsay *unless* (1) there is a showing that the original declarant (i.e., the officer who had first-hand knowledge of the facts testified to) is unavailable to testify *and* (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing (e.g., he did something to make that witness unavailable). Defense counsel in this case (despite not having the advantage of the *Sanchez* decision—it not coming down until afterwards—did in fact object to Officer Underhill's testimony concerning defendant's prior contacts with law enforcement, arguing that it constituted inadmissible hearsay. In response, the prosecutor informed the trial court and defense counsel that the officers involved in the five prior contacts were under subpoena and available to testify, but that if defendant wished to avoid "a parade of uniforms com(ing) in here one after the other," he could allow Officer Underhill to summarize the prior contacts before offering his expert opinion. Defense counsel elected to do so, agreeing not to make a hearsay or confrontation clause objection. After ruling that the trial court did not abuse its discretion in finding Officer Underhill's testimony concerning the five prior contacts to be relevant in helping to prove the charged gang enhancements (an Evid. Code § 352 relevance-vs-prejudice issue), as well as to explain defendant's motive for the murders, the Supreme Court held defense counsel's election to allow Officer Underhill to testify to the facts underlying defendant's five prior law enforcement contacts was a "tactical decision," done to avoid the "(risk of) intensifying the focus of these encounters and eliciting more damaging details about

them, that was within his discretion to make." Agreeing to allow Officer Underhill's testimony on this issue precludes his complaining about it on appeal. Also, the trial court instructed the jury on the limited purposes for which it was admitting Officer Underhill's testimony, minimizing any possible prejudice. Such circumstances constitute an exception to the rule of *Sanchez*.

(2) *Defendant's Jailhouse Statements*; *Legal Effects of a Prior Invocation*: Defendant was arrested on February 24, 2000, and questioned by Detective Christopher Brown. After initially waiving his *Miranda* rights and denying any involvement with either murder, defendant eventually changed his mind and stated; "*I'll just have my attorney present sir*." Detective Brown ignored this apparent invocation and continued the interrogation. However, defendant later commented that he could not talk any more because he was "*not even thinking straight*" and was "*tired*." The interrogation was terminated at this point without defendant having made any incriminatory statements. Six weeks later, however, Sheriff's Investigator John Del Valle initiated another interrogation. Defendant again waived his *Miranda* rights. During this three hour interrogation, defendant admitted to having been at the Faria murder scene and to being within six feet of Salazar when she was killed. At one point, however, defendant said: "*I think I should do this with an attorney*;" a comment that was ignored. And then later, defendant said: "*If I had an attorney right here right now I would answer your question*;" which was also ignored although the interrogation was ended shortly thereafter. Defendant later admitted that during this interrogation, Detective Del Valle had not yelled at, disrespected, or been mean to him in any way. Del Valle also allowed Mendez to use the restroom and offered him food. The next morning, Nicole Bakotich visited defendant in jail and had a conversation with him that was surreptitiously recorded. During their conversation, defendant made a number of comments that could be interpreted as admissions of having some involvement with both murders, including having told Detective Del Valle that he had been within six feet of Salazar when she was killed. At trial, the prosecution decided not to use either of the officers' interrogations in evidence, agreeing ("as a tactical consideration") that Detective Del Valle had in fact violated defendant's *Miranda* rights. However, the trial court allowed the prosecution to use the taped conversation between defendant and Bakotich, admitting the tape recording of that conversation into evidence. On appeal, defendant argued that Detective Del Valle's previous *Miranda* violation had so poisoned his discussion with Bakotich the next day that defendant's admissions made to Bakotich ("parroting" his statements to Del Valle) were "involuntary" and, at the very least, obtained in violation of the *Edwards v. Arizona's* ((1966) 384 U.S. 436) "prophylactic rule" that once a subject invokes his right to counsel, he is off limits as to all questioning. The Supreme Court held, however, that the *Miranda* violation committed by Detective Del Valle (assuming, without deciding, that there was any such *Miranda* violation) were irrelevant in determining the admissibility of defendant's later statements made to Bakotich. The due process clause of the Fourteenth Amendment to the United States Constitution bars the admission of "any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion." (*People v. Neal* (2003) 31 Cal.4th 63, 79.) Assuming that defendant's incriminatory admissions made to Detective Del Valle were obtained in violation of the *Edwards* rule, however, does not mean that the due process clause was also violated. The Court has previously held that continuing an interrogation after a defendant has invoked his right to counsel (an "*Edwards* violation"), does not "inherently constitute coercion." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1039.) Rather, a "voluntariness determination" requires a review of the entire record, "including the characteristics of the accused and the details of the encounter." (*People v. Benson* (1990) 52

Cal.3rd 754, 779.) In this case, the Court noted that defendant was 21 years old when interrogated, had prior experience with the criminal justice system, and had been interrogated before. Although not the sharpest tool in the shed, there was no evidence that he was intellectually disabled or of low intelligence. The Del Valle interrogation itself was only three hours long during which defendant was allowed bathroom breaks and offered food. It was also agreed that Detective Del Valle had not yelled at, disrespected, been mean to, or threatened defendant in anyway. While the death penalty had been mentioned, and the issue of retaliation from others had been discussed, neither topic had been dwelt upon or used by the detective as a reason for discussing the details of this case. Defendant's statements made to Detective Del Valle, therefore, were not the product of any coercion despite the detective ignoring defendant's attempt to invoke. As such, defendant's admissions made to Bakotich cannot be the fruit of the poisonous tree when there is no poisonous tree in the first place. Also, it is undisputed that there is no legal requirement for defendant to have received a *Miranda* warning before talking to Bakotich (she not being an agent of law enforcement). (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1401–1402.)

(3) *Evid. Code § 1221; Adoptive Admissions*: Defendant also complained that a part of his taped discussions with Bakotich was defendant's own comment that co-defendant Rodriguez had accused him of shooting Faria. Defendant argued that admitting this accusatory statement made by Rodriguez into evidence violated defendant's Sixth Amendment right to confront and cross-examine Rodriguez about that accusation. The Court ruled, however, that defendant's statements about this were admissible under the "*adoptive admission*" exception to the hearsay rule. (Evid. Code § 1221.) So long as a defendant knows the content of a codefendant's hearsay statement and there is evidence that suggests defendant believes the codefendant's statement to be true, it becomes a question for the jury to decide whether defendant adopts such an admission as his own. In this case, this standard was met, allowing the jury to attribute Rodriguez's incriminatory statement to defendant.

Conclusion: Upon finding no merit in defendant's other contentions on appeal, his conviction and sentence were therefore upheld.

Note: I briefed this case more for the benefit of prosecutors and defense attorneys than cops, it largely being an issue of the in-court evidentiary rules as were discussed. I briefed *People v. Sanchez* when it first came out (See *California Legal Update*, Vol. 21, #8, July 24, 2016) over three years ago, but haven't touched any "*Sanchez Error*" cases since, there being so many of them. So I thought it was time to remind criminal trial attorneys (prosecution and defense alike) that the rule is alive and well, and one that must be considered any time a gang (or other) expert purports to testify from another's written reports. If you're interested in all the "*Sanchez Error*" cases, I've collected them in my "*Sixth Amendment Right to an Attorney and Confrontation*" Outline, which I can send to you upon request. Also of interest here to both cops and prosecutors is Detective Del Valle's alleged *Miranda* violation by ignoring Mendez's attempted invocation of his right to an attorney. During Del Valle's interrogation, defendant commented at one point, "*I think I should do this with an attorney*," and then later, "*If I had an attorney right here right now I would answer your question*." The People conceded that one or both of these comments constituted an invocation; a concession that was probably way too generous. An invocation to one's right to the assistance of counsel made after a prior waiver has to be "*clear and unequivocal*" to be legally effective. Based upon a comparison of these comments with those of prior cases where similar attempted invocations made by defendants mid-interrogation were held

not to be clear and unequivocal, there is a strong argument that defendant here did not effectively invoke his right to counsel. (E.g., "*I think I need a lawyer*." No invocation. *Burket v. Angelone* (4th Cir. 2000) 208 F.3rd 172, 198. "*Okay. I'll tell you. I think it's about time for me to stop talking*," held not to be a sufficient invocation. *People v. Stitely* (2005) 35 Cal.4th 514, 534-536. Also, defendant's statement; "*I think I would like to talk to a lawyer*," held to be equivocal, and ineffective as an invocation. *Clark v. Murphy* (9th Cir. 2003) 317 F.3rd 1038.) Note also that defendant's much clearer invocation made six weeks earlier to Detective Brown (i.e., "*I'll just have my attorney present sir*.") is irrelevant to the issues here in that there was more than 14 days between that attempt to invoke and Detective Del Valle's interrogation, which, under the U.S. Supreme Court rule of *Maryland v. Shatzer* (2010) 559 U.S. 98, makes defendant available for another attempt at an interrogation. If you want to see the law on these issues (ineffective invocations and the *Shatzer* rule), I have all that in my "*Miranda and the Law*" Outline, also available to you upon request.

***Reasonableness of the Use of Deadly Force by Police Officers*:**
Fourteenth Amendment Due Process Deprivation of Companionship with One's Child:

***Nehad v. Browder* (9th Cir. July 11, 2019) 929 F.3rd 1125**

Rule: (1) When the reasonableness of the use of deadly force is at issue, and there is conflicting evidence as to what occurred, the issues must be decided by a jury. (2) The Fourteenth Amendment's Due Process Clause may be violated where a police officer uses deadly force with either (a) deliberate indifference or (b) a purpose to harm, unrelated to legitimate law enforcement objectives, as well as (c) when excessive force is used with an intent to "teach a suspect a lesson" or "get even" with him.

Facts: On April 30, 2015, shortly after midnight, Andrew Yoon called 911 to report that he had been threatened by a man with a knife. Yoon's call stemmed from an encounter outside a bookstore where Yoon worked, after a person later identified as Fridoon Nehad had "shown" Yoon an unsheathed knife while telling Yoon that he wanted to hurt people. Yoon, however, was not concerned enough with Nehad's conduct to call police until Nehad entered the bookstore (without the knife in hand) and repeated his comment about wanting to hurt people. Nehad then left the store by a side exit into an adjoining ally as Yoon called 911. A San Diego Police Department dispatcher put out a "*Priority 1*" call for a "*417*" (referring to the misdemeanor offense of drawing or exhibiting a deadly weapon, other than a firearm, "in a rude, angry, or threatening manner," pursuant to P.C. § 417(a)(1)). San Diego Police Officer Neal Browder, in uniform and driving a marked police vehicle, volunteered to respond, arriving at the scene minutes later. Turning into the ally, Officer Browder observed Nehad (who matched the suspect's physical description) walking towards him. Officer Browder switched on his bright lights (not using his cruiser's emergency lights or siren) to illuminate Nehad as he continued to walk towards the officer. The officer opened his car door while continuing to drive slowly forward, and then stopped and got out. Witnesses later testified that Nehad was walking (or "stumbling") at a "drunken pace," but "in a nonaggressive manner," "like he wasn't all there." Nehad appeared to be "fiddling with something in his midsection," although no one, including the officer, observed an actual knife. Without identifying himself but apparently holding up one hand signaling Nehad to stop, Officer Browder commanded him to "*stop*" and to "*drop it*"

(whatever "*it*" was). This command was either not said at all, said at least once, or more likely repeated two or three times (depending upon which witness, or the officer, you believed). A video surveillance camera showed Nehad slowing his forward advance a few moments after the officer exited his car, although it was unclear whether the officer, with his body camera turned off, perceived Nehad's change of pace. Less than five seconds after exiting his vehicle, Officer Browder —having at some point having drawn his sidearm—fired a single shot at Nehad, fatally striking him in the chest. Nehad was approximately seventeen feet away at the time. Although a sheath to a knife was found nearby, no knife was found. The object Nehad had been carrying was determined after the fact to be a blue ballpoint pen. When interviewed later, Officer Browder stated that he first saw Nehad when he was twenty-five to thirty feet from the officer's car and that Nehad was "aggressing" toward the car, "walking at a fast pace . . . right towards [the] car." Officer Browder also stated that although he could not say that he had seen a knife, he at least *thought* Nehad was carrying a knife (claiming days later to believing Nehad was going to stab him), and that he fired at Nehad because he thought Nehad was going to stab him. Nehad's parents and estate sued Officer Browder (and everyone up the chain to the City of San Diego) in federal court pursuant to 42 U.S.C. § 1983, alleging Fourth (unlawful seizure) and Fourteenth (due process) Amendment violations (along with other grounds). The trial court granted the civil defendants' motion for summary judgment. Plaintiffs appealed.

Held: The Ninth Circuit Court of Appeal affirmed in part and reversed in part, and remanded the case to the district court for trial. The Ninth Circuit ruled on the following issues:
(1) *Reasonableness of the Use of Force*: The primary issue on appeal was the lawfulness of Officer Browder's use of deadly force, killing Nehad; a Fourth Amendment (seizure) issue. In evaluating this issue, the test is whether an officer's use of deadly force was "reasonable," given the totality of the circumstances. In this case, the San Diego Police Department, in its own internal investigation, found the shooting in issue to be lawful. The federal district court also found Officer Browder's use of force to be reasonable, and granted his summary judgment motion, thus dismissing the lawsuit. The Ninth Circuit disagreed, at least to the extent of finding that there were triable issues for a jury to evaluate. In reaching this conclusion, it was first noted that a court must balance the nature of the intrusion upon an individual's rights against the countervailing government interests at stake, without regard for the officers' underlying intent or motivations. In so doing, the court is to look at a number of factors: (a) Whether the deceased posed a danger to the officer, (b) the severity of the crime at issue, (c) whether the decedent was resisting or seeking to evade arrest, (d) whether the officer provided the decedent appropriate warnings, and (e) whether less intrusive alternatives to deadly force were available. In looking at whether Nehad posed a danger to Officer Browder, the Court first noted that there were credibility issues the jury would have to evaluate. For instance, Officer Browder expressed a concern that he was about to be stabbed when interviewed days after the shooting, but told investigators at the scene that he did not see Nehad in possession of a knife. It was also noted that no knife was ever found. Officer Browder also claimed that Nehah was "aggressing" toward the car, "walking at a fast pace . . . right towards [the] car," a claim that was contradicted by witnesses. It should also be a jury issue as to whether it was reasonable for Officer Browder to believe that the pen Nehad had was in fact a knife. Even if Nehad had a knife, the mere fact that a suspect possesses a weapon does not always justify the use of deadly force. A civil jury should be allowed to determine whether Nehad constituted a danger to the officer, particularly in light of witness statements indicated that Nehad's actions weren't "aggressive in nature" and that he

"didn't make any offensive motions." Also, in considering whether Nehad was a danger to the officer, whether or not Officer Browder did anything to cause that danger is a factor. While recognizing that police officers must often make "split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation," this fact does not preclude a consideration of whether the officer's actions contributed to the problem. "Reasonable triers of fact can, taking the totality of the circumstances into account, conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably, 'with undue haste.'" In this case, the Court questioned the wisdom of driving up on an apparently inebriated individual, blinding him with the police vehicle's high beams, and then, without ever identifying himself as a police officer or providing other warnings (see below), resort to deadly force, all within a matter of about five seconds. Given such evidence, the Court determined that "a reasonable factfinder could conclude that any sense of urgency was of Browder's own making." Moving on, the Court noted that the severity of the crime, being reported as a mere "brandishing" misdemeanor (i.e., P.C. § 417(a)(1)), was a factor to consider. Also, other than Nehad's movements towards the officer (how fast, and how aggressively, being an issue), and that he did not immediately drop the item he had in his hand, there was little if any evidence that he intended to resist the officer or to otherwise evade arrest. Next, the Court noted that the officer neither identified himself nor warned Nehad that deadly force would be used if he failed to comply. Lastly, the existence of less intrusive alternatives (i.e., pepper spray, a Taser, and/or a baton) to shooting Nehad is something a jury should be allowed to consider in determining the reasonableness of Officer Browder's use of deadly force. With all these issues to consider, granting Officer Browder's summary judgment motion was improper.

(2) *Violation of the Fourteenth Amendment's Due Process Clause*: It has been held that it may be a Fourteenth Amendment "due process" issue where a police officer's actions "shocks the conscience" by depriving a plaintiff of the companionship of his or her child, when done with either (a) deliberate indifference, or (b) a purpose to harm, unrelated to legitimate law enforcement objectives. In this case, the Court found that there was no evidence of such a deliberate indifference or intent to harm. Such a theory is typically reserved to those circumstances where a police officer uses excessive force with an intent to "teach a suspect a lesson" or "get even" with him. A due process violation may also be found where the use of force involves some additional element suggesting an improper motive on the part of the shooting officer. In this case, however, there is no evidence that Officer Browder fired on Nehad for any purpose other than self-defense, notwithstanding the evidence that the use of force may have been unreasonable. For this reason, the trial court's granting of summary judgment, dismissing this aspect of the case, was upheld.

Note: Effective in just a few short weeks (January 1, 2020), under AB 392 (amending P.C. §§ 192 and 835a), California's legal standards for officers using deadly force to effect an arrest are going to be upgraded (or downgraded, depending upon how you look at it) from one of "*reasonableness*" to proving an actual "*necessity*." A killing of a human being that is not justifiable under the new standards will result in the involved officer(s) being both civilly *and* criminally liable for the resulting death. In this particular case, with both the San Diego P.D. and a federal district court judge finding Officer Browder's killing of Fridoon Nehad to be reasonable (i.e., justifiable) under the circumstances, I have to suspect that the Ninth Circuit did not give us a totally objective (or complete) review of the facts and circumstances (noting that all the Ninth

Circuit did here is rule that there are triable issues for a jury to decide and that dismissing the case via summary judgement was inappropriate). But if Officer Browder is potentially civilly liable under 2019's standards, then he *certainly* would have been liable if this shooting occurred after January 1st. However, under either standard, and assuming we got an relatively accurate description of the circumstances of this case from the Ninth Circuit, it is my belief that Officer Browder acted a bit too quick in shooting Nehad. Easy for me to say when I wasn't there, I know. But absent the officer actually seeing a knife (which he admitted he did not) *plus* some aggressive acts on Nehad's part (beyond merely walking—or "stumbling"—towards the officer), it's hard for me to fathom any real justification for shooting him. *I'm inviting your comments and criticisms on that note.*