The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*It takes considerable knowledge just to realize the extent of your own ignorance*." (Thomas Sowell)

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ADMINISTRATIVE NOTES:

Pre-Trial Bail and an Accused's Ability to Pay: On January 25, 2018, California's First District Court of Appeal (Div. 2) decided the case of ***In re Humphrey*** (2018) 19 Cal.App.4th 1006, holding that a trial court must consider a pre-trial defendant's *ability to pay* along with other nonmonetary alternatives when setting bail, and that failing to do so violated the defendant's **Fourteenth Amendment** due process and equal protection rights. However, on May 23rd, the California Supreme Court granted review of ***Humphrey*** on its own motion. San Francisco's District Attorney has been "deemed" to be the petitioner, California's liberal Attorney General having rolled over on the issue, leaving no one (other than the D.A.) to challenge the Court of Appeal's decision. The Supreme Court limited the issues to be briefed and argued, however, to the following:

> (1) Did the Court of Appeal err in holding that principles of constitutional due process and equal protection require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail?
> (2) In setting the amount of monetary bail, may a trial court consider public and victim safety? Must it do so?
> (3) Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is the question of what constitutional provision governs the denial of bail in noncapital cases—**article I, section 12, subdivisions (b)** and **(c)**, *or* **article I, section 28, subdivision (f)(3)** of the California Constitution—or, in the alternative, whether these provisions may be reconciled.

Art. I, § 12 provides that a judge or magistrate is to consider the following when setting bail:

> "**(b)** Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; *or*
> **(c)** Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.
> Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.
> A person may be released on his or her own recognizance in the court's discretion."

Art. I, § 28(f)(3) provides:

> "In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the

defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary consideration."

See also **P.C. §§ 1268–1276.5** for the statutes implementing the above.

None of these provisions provide for a court to consider the accused's ability to pay upon setting bail. That's the issue: *Does the U.S. Constitution (Fourteenth Amendment) require it*? We'll now have to await the Supreme Court's decision on this issue to find out the answer.

CASE LAW:

***Animal Abuse and Exigent Circumstances*:**
***Warrantless Searches Within the Curtilage of a Home*:**
***Search Warrants; Excising Illegal Observations*:**
***Search Warrants; Staleness*:**

People v. Williams **(Sep. 8, 2017) 15 Cal.App.5th 111**

Rule: Entry into the curtilage of a home while attempting to secure a loose horse is lawful. The exigent circumstances exception to the Fourth Amendment is properly invoked when an officer reasonably believes that an animal on the property is in immediate need of aid due to injury or mistreatment, making lawful the looking into windows and walking through the backyard. Excising illegal observations from a search warrant affidavit does not compromise the validity of the warrant if probable cause still exists. Similar incidents over the last four years are not considered "stale" where it appears to be an on-going problem.

Facts: In the afternoon of October 29, 2014, Los Angeles Animal Control Officer Ed Callaway responded to a report of a loose horse in an unincorporated area of Los Angeles near Lancaster. Officer Callaway found the horse wandering in traffic. Approaching the horse slowly so as to not spook it, Officer Callaway followed it to the property at 7038 West Avenue A-14, later determined to be the residence of defendants Kevin R. Williams and Pauline R. Winbush. As the horse unsuccessfully attempted to get back into defendants' yard through broken and loose boards in the fence, Officer Callaway, who had followed the horse into the unfenced front yard, heard several dogs begin to bark. Concerned that the barking dogs might frighten, injure, or chase the horse back into the street, Officer Callaway walked along the outside of the fence in an attempt to determine whether the dogs were loose. He found that the dogs were confined in "makeshift" kennels of chain link fencing and plywood inside the yard. As the dogs continued barking, the horse moved back towards a garage attached to the residence where there was an open gate in a three-foot-high chain link fence. The horse moved through the gate but couldn't get into the backyard due to debris and weeds blocking its path. So it moved back out to the front of the garage and began feeding on some weeds and spilled hay on the ground. Officer Callaway walked through the open gate into the backyard to see if there was a suitable corral without broken fencing in which to safely secure the horse. Not finding a corral, he returned to the front of the house and called Animal Control Sergeant Rachel Montez-Kemp, asking for a trailer in which to secure the horse. While he waited for her to arrive, he yelled into the backyard announcing his presence in case the property owner was out back. He also honked the

horn of his vehicle. He got no response. Sergeant Montez-Kemp arrived about 20 minutes later with a horse trailer. She remembered defendants' property from having been there in February, 2008, on a report of excessive dogs on the property and "possible dog fighting." Although some 30 pit bull dogs were there at the time, no further action was taken. Another Animal Control officer had also been called to the property in 2010 to investigate a report of horses in poor physical condition. That officer also noted the presence of numerous pit bulls kept in kennels filled with excrement and with water bowls containing mold and algae. On this occasion, the officers attempted again to determine if the owner of the horse was at home before impounding it, a procedure that was in accord with their established procedures. Noting that the horse looked thin, they placed it in the trailer with some feed while they knocked on the front door, the front window, and the garage door. No one answered. But they could hear the distinctive sound of puppies barking from inside the house. The phone number listed for that address was called, again without success. As they were doing all this, they could hear several dogs barking in the backyard, as well as barking and "whining" from inside the garage. They could also smell the strong odor of "excessive" fecal matter. Officer Callaway, who is six feet one inch tall plus a couple more inches in his work boots, was able to look through a broken window in the upper corner of the garage door. He could see a dog inside in conditions that appeared "unhealthful." Officer Callaway also saw a treadmill and a "slat mill" (a device used in the training of fighting dogs) partially covered by a tarp. Both officers then went to the backyard still looking for the owner. None could be found. But they did see that there was a corral with broken boards that was not suitable for containing a horse. They also saw makeshift kennels containing a number of pit bulls. Sergeant Montez-Kemp later testified that she was experienced in the so-called "blood sports" and had investigated dozens of animal fighting cases in her career. In her experience, she knew that pit bulls were a breed most often used for dogfighting. Substantiating this opinion, it was noted that one of the observed dogs had a missing lip while another had multiple scars on her body. Another kennel contained a dog with a litter of puppies. However, they saw no one in the backyard. Officer Callaway took photographs of what he saw. Finally, around 5:00 p.m., defendant Williams showed up, admitting to the officers that he could not keep the horse secured. He was cited and the horse was impounded. With the help of Deputy Robert Ferrell of the Los Angeles County Sheriff's Department (a 26-year veteran of the department and a certified court expert in the field of "bloodsports" and illegal animal fighting), a search warrant was obtained for defendants' property. The affidavit included information and photographs provided by the Animal Control officers as well as Deputy Ferrell's own observations and photographs taken from outside the perimeter of the property. The search warrant issued November 24, 2014, and was served and executed on November 26, 2014. The officers recovered 19 pit bulls (11 adults and 8 puppies), many of which were emaciated or had sores or scars. They also recovered numerous other dead animals, as well as the slat mill device and three boxes of documents related to dogfighting, among other items. On February 17, defendants Williams and Winbush were charged in state court with 29 separate counts, including four felony counts of possession of fighting dogs (P.C. § 597.5(a)(1)) and 17 counts of animal cruelty (P.C. § 597(b)). Defendants filed a motion to suppress, which was denied. They subsequently pled guilty to one felony and one misdemeanor count, and appealed.

Held: The Second District Court of Appeal (Div. 8) affirmed. Defendants challenged the admissibility of the evidence recovered during the execution of the search warrant, arguing that the warrant itself was the product of illegal warrantless observations made by Animal Control Officers Callaway and Montez-Kemp. More specifically, defendants argued that as soon as the loose horse had been secured, any further need to poke around the property ended. The People argued that the officers' observations were made under exigent circumstances that existed even

after the horse was secured. The Court recognized that one's land and structures immediately adjacent to and intimately associated with that person's home, referred to as the "curtilage," are ordinarily considered part of the home itself for Fourth Amendment purposes. Those areas around the defendants' home that Officers Callaway and Montez-Kemp walked through were therefore indeed protected by the Fourth Amendment. However, not every warrantless entry into the curtilage of a home violates the Fourth Amendment. The police, just as any other private citizen, may enter into areas of the curtilage which are impliedly open to the public, such as access routes to the house itself. Officer Callaway's initial entry into the area at the unfenced front of the house where he followed the loose horse, and in seeking to find its owner, was clearly lawful. The Court further found that Officer Callaway's actions of briefly walking through the open gate to see if there was a safe corral were reasonable attempts to secure the horse by attempting to determine if there was a suitable corral on the property. Such conduct, justified by the circumstances, did not constitute a search under the Fourth Amendment. Once Sergeant Montez-Kemp arrived with the horse trailer and secured the horse inside, she and Officer Callaway made further efforts to make contact with defendants before hauling the horse away. The Court found that making genuine efforts to contact the property owner before formally impounding the horse were reasonable. Knocking on the front door, a front window to the home, and the front garage door, while calling out to see if anyone was home, were reasonable tactics in that regard and did not offend the Fourth Amendment. The primary issue raised by defendants on appeal was the officers' subsequent actions of looking into the windows of the attached garage and walking into, and inspecting, the fenced backyard. The Court, however, found these actions to be justified by exigent circumstances. "[T]he exigent circumstances doctrine constitutes an exception to the warrant requirement when an emergency situation requires swift action to prevent imminent danger to life." In an animal abuse case, the exigent circumstances exception is properly invoked when "an officer reasonably believes an animal on the property is in immediate need of aid due to injury or mistreatment." Here, the officers knew that a horse, which itself appeared to be thin and under-nourished, had escaped from a property where there had been prior calls concerning the condition of horses and pit bulls. While lawfully on the property, dogs, both in the backyard and the garage, could be heard barking and whining. Strong odors of excessive fecal matter, reasonably associated with unhealthful housing conditions, were noted. Under these circumstances, it was reasonable for the officers to look into the windows of the garage, looking for the source of the whining, and to check the kennels in the backyard. The fact that the officers waited several weeks to return with a warrant did not make it any less of an exigency, or unreasonable, to look into the garage through a window. And even if walking into the backyard was unlawful (not conceding that it was), the resulting observations there could be excised from the warrant affidavit without diminishing the probable cause necessary for the issuance of the warrant. Lastly, the Court rejected defendants' argument that the information concerning prior law enforcement animal abuse-related contacts at the property, being "stale," should not have been included in the warrant affidavit. Despite spanning some four years, it was reasonable to consider these prior incidents where it appeared that these animal-related incidents were on-going problem. The resulting search warrant, therefore, was supported by probable cause. The evidence recovered as a result of that warrant was therefore admissible.

Note: Good job done by these Animal Control officers. And not working in a position where search and seizure is an everyday issue, their concern with putting together this case properly was accented by them seeking the assistance of an LA Sheriff's detective with an expertise in animal abuse cases—the so-called "bloodsports"—to assist in writing the search warrant. "Reasonableness" being the key to any search and seizure situation, the officers while at the

scene merely exercised a little common sense, doing what they instinctively felt was necessary for the protection of some animals, while still taking into consideration the defendants' privacy rights. Their efforts in walking this sometimes fine line were rewarded by the Court with a good decision that we can now use as precedent for similar situations.

***Miranda; Offers of Leniency*:**

People v. Wall **(Nov. 13, 2017) 3 Cal.5th 1048**

Rule: An express or clearly implied offer of leniency will make any resulting confession inadmissible in evidence. However, an exception to this rule applies to confessions that are not "causally" connected to the alleged offer of leniency.

Facts: Defendant Randall Clark Wall, and his buddy, John Richard Rosenquist, entered the San Diego home of victims John and Katherine Oren during the evening of March 1, 1992, and murdered them both by beating them with heavy metal bars and stabbing them to death. Rosenquist also sexually assaulted the Orens' 10-year old great-grandson, J.D. Defendant had met the Orens through their granddaughter, Tammy, whom he had met that spring. Tammy and defendant stayed in a tent in the Orens' backyard for several weeks until Katherine Oren, suspecting that defendant had stolen from her, told him to leave. On March 1st, after murdering the Orens and assaulting J.D., the defendants ransacked the victims' home, stealing John Oren's wallet and credit cards, a small amount of loose change, and the victims' distinctive green and yellow Mercury. Heading north, defendant used one of John's credit cards in Los Angeles to buy gas. Upon reaching San Luis Obispo County, defendants were contacted by an employee of the federal Bureau of Land Management, and then later by a San Luis Obispo Sheriff's Deputy. The Owens' Mercury (containing John Oren's wallet) was later found abandoned nearby where it had been set on fire. Defendants apparently hitchhiked from there all the way to San Francisco. On March 17, defendant was contacted by San Francisco detectives who took him, voluntarily, to San Francisco's Hall of Justice. He was put into an open interview room for about five hours while they awaited the arrival of two San Diego Police Department homicide detectives. During this time, defendant was provided with food and drink, allowed to smoke and make phone calls, and to leave the room unescorted to use the bathroom. Eventually, San Diego Police Detectives Carl Smith and Terry Lange arrived. The detectives told defendant that he was not under arrest, suggesting only that he might be a "witness" in a "fairly serious crime." But he was read his *Miranda* rights prior to commencing a two-hour interview. Defendant initially denied any knowledge of the murders. He also denied even knowing Rosenquist or that he had been in San Diego. Eventually, however, after being told that they knew he and Rosenquist had been contacted in San Luis Obispo near the Orens' burnt out car, and suggesting that he "start out clean again," defendant admitted to having met Rosenquist in Salt Lake City and then traveling with him to San Francisco, to Mexico, and then, in early March, through San Diego and back up to San Francisco. But he denied having seen him in over a week; an assertion that was later disproven when Rosenquist was found in defendant's San Francisco apartment upon execution of a search warrant. Questioned about the inconsistencies in his stories, defendant told the officers that he was scared, and that he had a wife and kid in Salt Lake City that he wanted to get back to. Upon suggesting that he may have been faced with a situation that got out of control, and asking him if something had happened with Rosenquist, defendant responded; "*Yeah he kind of pressured me into it*." Upon hearing this admission, one of the detectives encouraged defendant to continue talking and provide more detail, suggesting that he "*put this behind us okay*?" Defendant was then told: "(*Y*)*ou're at a crossroad in your life. . . . If you go this way, tell*

us what happened . . . then you can go on with your life. You can be with your wife and your child and start fresh." It was shortly after this that defendant stated; "*He sort of ah, pressured me into this. Um, I didn't want to do it, but him* [sic] *and I both killed the grandma and grandpa of that household*." Although continuing to claim that Rosenquist "threatened" him into committing the murders, and after expressing a concern that Rosenquist may have him killed, defendant finally provided a detailed description of the events of March 1st including the beating and stabbing of the Orens and the sexual assault of J.D. Both defendants were subsequently charged in state court with two counts of first degree murder with special circumstances, plus other related charges. Prior to the beginning of the guilt phase in a joint trial, defendant pled guilty and admitted the special circumstances. (Rosenquist pled guilty *after* the guilt phase but before a verdict in exchange for a stipulated sentence of life without parole.) A contested penalty phase for defendant followed, where his taped confession was admitted into evidence over his objection. The jury returned a verdict of death. Defendant's appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. Among the issues on appeal, defendant argued that his confession was the product of an offer of leniency and that it should not have been admitted into evidence against him. The rules are simple (even if not always easy to apply): Involuntary confessions are inadmissible as evidence at trial. "A confession is involuntary if the influences brought to bear upon the accused were such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made. A court, in evaluating the voluntariness of a confession, must consider the "totality of the circumstances." One of the factors the court will consider is when a defendant is promised some benefit, such as an offer of leniency, whether express or implied, in exchange for his statements. The rule boils down to this: "[W]here a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law." (*People v. Boyde* (1988) 46 Cal.3rd 212, 238.) The theory is that any resulting statements are not necessarily reliable, and may have been given up by the accused, telling an interrogator what he wants to hear, only because he or she felt the need to take advantage of what appears at the time to be a hopeless situation. In this case, defendant argued that the detectives provided an improper promise of leniency when they told him he was at a crossroads and if he took one path—i.e., if he told the truth—he could "go on with [his] life" and "be with [his] wife and . . . child and start fresh." While it is recognized that simple "exhortations to tell the truth" are not improper, suggesting to a criminal suspect that confessing will result in his escaping punishment can lead only to an involuntary, inadmissible, statement. Without deciding whether in this case the detectives' promise that by confessing defendant could go back to his wife and child was an improper offer of leniency, the Court noted an exception to this rule. In order for a promise of leniency to poison a resulting confession, it must be shown that there is a "*causal connection*" between the two. In other words, the alleged promise of leniency must have been the motivating cause of the resulting confession. Here, the Court noted that before the point in the interrogation when the detective suggested to defendant that by telling the truth he might be able to go back to his wife and child, defendant had already begun to confess. It was specifically noted that before and then after the alleged offer of leniency, defendant used almost exactly the same opening sentence when he began describing the events at the Orens' house: "*He kind of pressured me into it*" and "[*h*]*e sort of ah, pressured me into this*." From this, the Court was able to conclude that the detectives' alleged offer of leniency was not the motivating cause of the defendant's confession. As such, absent the necessary "causal connection," defendant's

subsequent confession was held to be voluntary. After further holding that there was nothing coercive about the over-all "interview," or that the detectives had exploited defendant's alleged fear of Rosenquist, the Court held that defendant's confession was properly admitted into evidence.

Note: So was the detective's comment about defendant's cooperation being a factor in the likelihood of him ever rejoining his wife and child an improper offer of leniency? *You're darn tooten it was*! Whatever motivated the detective to tell defendant that by "*tell*(*ing*) *us what happened . . .*" he would then be allowed to "*go on with* (*his*) *life*" and be free to "*be with* (*his*) *wife and . . . child and start fresh*," one can only speculate. Clearly, by telling the detectives what happened in the Oren house that night, far from providing him with the ability to "go on with his life" and rejoining his wife and child, defendant instead sealed his fate. You simply cannot tell a suspect that by implicating himself in a crime he will secure his freedom and then expect to be able to use against him anything he says after that point. But for the timely and convenient circumstance of defendant already having indicated an intent to confess, we would have undoubtedly lost his confession. The only issue then would have been (assuming the trial court didn't suppress his statements) whether it was harmless error to use his confession against him, given the abundance of other evidence (not described above) the prosecution had connecting defendant to the murders.

***Arrests; Mistaken Identity*:**
***Detentions During Execution of an Arrest Warrant*:**
***Excessive Force and Qualified Immunity*:**
***Search of the Person as a Product of an Illegal Arrest*:**
***Search of a Residence for an Absconding Parolee*:**
***Retaliatory Police Conduct as a First Amendment Violation*:**

Sharp v. County of Orange **(9th Cir. Sep. 19, 2017) 871 F.3rd 901**

Rule: (1) Handcuffing a person and putting him into a patrol car is an arrest. Doing so when he fails to match the physical description of the person being sought is a false arrest, lacking the necessary probable cause. (2) Detaining the occupants of a residence during the execution of an arrest warrant is illegal absent an articulable reason for being concerned about officers' safety. (3) An officer using excessive force in making an arrest may be protected from civil liability by qualified immunity, depending upon the circumstances. (4) The search of a person during an illegal arrest (i.e., without probable cause) is also illegal. (5) A warrantless search of the residence of a parolee is lawful. (6) Retaliating against an argumentative person by illegally holding him in custody is a First Amendment (freedom of speech) violation.

Facts: Merritt L. Sharp IV, having served a term in prison for various violent crimes including kidnapping, assault with a deadly weapon, and felony domestic violence, was released on parole in August, 2013. As a parolee, he was subject to search and seizure conditions which required him to "[s]ubmit [his] person and property . . . to search and seizure at any time of the day or night by any law enforcement officer . . . with or without a warrant, probable cause or reasonable suspicion." (See P.C. § 3067(a)) His parents, Merritt L. Sharp III and Carol Sharp (plaintiffs in this lawsuit), agreed to let him live in their home at 408 Camino Bandera. Sharp IV reported to the parole office that this address was his place of residence. Within a month, however, plaintiffs allegedly kicked Sharp IV out of their house. Carol then called Sharp's parole officer and informed him that Sharp IV "no longer lived in [their] home." In September 2013, a

California criminal court issued two arrest warrants for Sharp IV. (The reasons for these arrest warrants are not described and are not relevant to the issues in this case.) Orange County Deputy sheriffs (defendants in this civil suit) decided to execute the warrants on the evening of October 2, 2013. By coincidence (at least according to the plaintiffs), Sharp IV happened to be at the Camino Bandera residence that evening picking up some of his belongings. Three deputies went to the house at about 11:00 p.m., knowing Sharp IV's physical description (i.e., male, white, fifty-one years old, 180 pounds, between 5'11" and 6' tall) and having a picture of him. As two of the deputies knocked on the front door, one went to the rear. Someone appearing to be plaintiff Sharp III peered out the window to see who was there. As he did so, someone else fitting Sharp IV's physical description came running out the back into some dense brush. Alerted by the deputy at the rear of the house, the two deputies at the front of house ran to the back looking for Sharp IV. As they did so, one of the deputies radioed for additional officers in the vicinity to respond to the house in case Sharp IV attempted to double back. Two deputies responded. They were advised that Sharp IV was "prone to violence (with a) violent history toward law enforcement." Someone matching Sharp IV's general description was then seen by one of the original deputies re-entering the house through the backdoor. All the deputies were advised of this and headed back to the house. The two responding deputies, never having seen a photo of Sharp IV and being told only that he was a white male wearing a black shirt and tan pants, arrived at the front of house at about 11:13. As they did so, Sharp III, wearing a light blue shirt and blue jeans, came out of the front of the house. Despite the mismatched clothing and a demeanor inconsistent with that of a fleeing suspect, the two deputies, with their weapons drawn, shouted commands to "(g)et down on the ground!" and "put your hands up!" Sharp III later testified that he was calm at the time although the deputies testified that he was acting belligerently and yelling. Either way, Sharp III was handcuffed, using enough force in pulling his arms up behind him to injure his shoulder (later requiring rotator cuff surgery), and with the cuffs so tight that the skin on his wrists was broken resulting in permanent scaring. Sharp III was searched and placed into the back of a patrol car where he was questioned. He identified himself as Merritt Llewellyn Sharp the Third with a birth date of August 6, 1940 (thus making him 73 years old at that time). He was held there while radio attempts to check him for warrants were made. Meanwhile, plaintiff Carol Sharp was contacted at the house. She told the officers that they had the wrong man and that their son, Merritt Llewellyn Sharp the Fourth, did not live there anymore. Despite determining that they had the wrong man, the deputies continued to hold Sharp III, still handcuffed, in the back seat of the patrol car while they questioned him about the whereabouts of his son. Sharp III told the deputies that Sharp IV had left the house some 20 minutes earlier. Sharp III was "furious, . . . adamantly protest(ing) his detention (and) loudly swearing at the deputies and threatening to sue them." In response, one of the deputies told him: "If you weren't being so argumentative, I'd probably just put you on the curb." With Carol Sharp being forced to wait on the front porch, a search of their home was begun at 11:28 p.m. Per the plaintiffs, noting that cabinets, pantries, and drawers were opened, the search appeared to encompass more than just looking for Sharp IV. Finding nothing, Sharp III was finally released at 11:39 after a 20-minute detention. Plaintiffs later sued Orange County and the individual deputies pursuant to 42 U.S.C. § 1983 in federal court, alleging violations of their Fourth Amendment rights based upon the seizure of Sharp III's person and the search of their home. Plaintiff Sharp III also alleged a First Amendment retaliation claim based upon the deputies' alleged refusal to release him on account of his "argumentative" demeanor. The civil defendants filed a motion for summary judgment, arguing that they had qualified immunity from any civil liability. The federal trial court denied this motion. Defendants appealed.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, affirmed in part and reversed in part.

(1) *Seizure of Sharp III*; *The Arrest*: Plaintiff Sharp III initially argued that he was unlawfully arrested—a violation of his Fourth Amendment rights—when initially taken into custody, handcuffed, searched, and put into the backseat of a police car. Although defendants argued that this constituted a detention only, the Court (without discussing the issue) considered it to be an arrest. To be lawful, an arrest need only be supported by "probable cause," whether or not it later turns out that the wrong person had been arrested. "The legality of the initial mistaken arrest—when the deputies mistakenly believed they had correctly apprehended the subject of the warrant—turns on the objective reasonableness of their belief that the man they arrested was in fact the warrant subject." In this case, it was noted that Sharp III did not match the physical or clothing description of the suspect they were looking for. Also, he was taken into custody as he "calmly" (as testified to by Sharp III) walked out of the house and up to the officers; an action not consistent with someone who was supposedly fleeing from the officers at the time. Based upon this, the Court agreed with defendant that he had been unlawfully arrested; i.e., without probable cause. However, on this issue at least, the officers were held to have qualified immunity due to the lack of clear precedent sufficient to put the officers on notice that to arrest him under such circumstances violated the Fourth Amendment.

(2) *Seizure of Sharp III*; *The Continued Detention*: After discovering that they had the wrong man, the deputies continued to hold Sharp III, handcuffed, in the back seat of the patrol car for another 20 minutes. The U.S. Supreme Court (in *Michigan v. Summers* (1981) 452 U.S. 692) has allowed police to detain the occupants of a residence while executing a search warrant within the residence. The Court here, however, specifically ruled that the rule of *Summers* does not apply to arrest warrants. In looking at the legal justifications for detaining the occupants of a residence during execution of a search warrant (i.e., the minimal "incremental" intrusion on the rights of the occupants of a residence, the implication under a search warrant that the occupants have committed a crime, preventing flight, insuring the orderly execution of the search warrant, and officers' safety issues), the Court found these not to apply when an arrest warrant is being executed (with the possible exception of the officer safety factor, the Court holding that, by itself, and without evidence that someone would have interfered with the officers, was not enough to justify the detention of the occupants). The deputies argued that in this particular case, the continued detention of an irate Sharp III was necessary in order to prevent him from interfering in the search of the house for his son, Sharp IV. The Court, however, held that there is was no evidence to support the speculative conclusion that Sharp III would have interfered. Sharp III, therefore, was unconstitutionally detained. However, once again, the Court found that detaining Sharp III under these circumstances did not violate clearly established law because of the legal ambiguity existing at the time as to whether the "categorical *Summers*" rule applied to arrest warrants. Thus, qualified immunity should have been granted.

(3) *The Use of Excessive Force*: After first noting that the "false arrest" issue is completely separate from whether excessive force was used in the arrest, even though both are Fourth Amendment "seizure" issues, and both occurred during the commission of the same acts, the Court failed to decide whether the force used in this case (resulting in rotator cuff injury and scaring of the wrists) was excessive. Rather, the Court merely held that there exists insufficient judicial precedent to alert the deputies as to whether the degree of force used in these circumstances was unreasonable. Therefore, the deputies were entitled to qualified immunity whether such force was excessive or not.

(4) *The Search of Sharp III's Person*: Because it was already ruled that Sharp III's arrest was illegal, the concurrent search of his person was (under the "fruit of the poisonous tree" doctrine)

also illegal. But as with the arrest, the deputies are entitled to qualified immunity from civil liability.

(5) *The Entry and Search of Plaintiffs' Home*: It is a well-settled rule that an arrest warrant authorizes the police to enter the warrant subject's home to execute the arrest of that subject when there is reason to believe he is within the home. A search warrant authorizing the entry of the home is only necessary when the home is that of a third person. In this case, Sharp IV's probation response form, DMV records, and arrest warrants all confirmed that he lived at the Camino Bandera residence. The officers were not obligated to believe Carol Sharp's protests to the effect that her son no longer resided there, or Sharpe III's claim that he was not there at the time. Also, although someone resembling Sharp IV was seen escaping out the back door, a similar subject was also seen doubling back and reentering the house. Under these circumstances, the Court found that the officers acted reasonably in believing that Sharp IV (a) resided there and (b) was in the residence at the time. The plaintiffs also argued, however, that the scope of the search inside the home was excessively broad because the deputies searched in areas where Sharp IV could not reasonably be found; i.e., in drawers and pantries. Whether or not the deputies did in fact look into such areas, the Court noted that Sharp IV was subject to a Fourth waiver of his search and seizure rights. As such, Sharp IV's parole condition requiring him to submit his property to suspicionless searches defeated the plaintiffs' claim that the deputies exceeded the scope of the authorized search by looking in areas where Sharp IV himself would not be found. And even if not, the Court noted that there is no established case law clearly prohibiting the deputies from relying upon Sharp IV's parole condition for their search of the Camino Bandera residence. The deputies were therefore entitled to qualified immunity on this issue as well.

(6) *First Amendment Retaliation*: Plaintiff Sharp III's final argument was that the deputies violated his First Amendment rights (freedom of speech) by retaliating against him (keeping him in cuffs and detained in the patrol car) as punishment for being argumentative. In order to maintain a cause of action under this theory, plaintiff must prove two things: I.e., that (1) the officer's conduct "would chill or silence a person of ordinary firmness from future First Amendment activities," and (2) the officer's desire to chill speech was a "but-for cause" of the adverse action. As proof supporting such a claim, it was noted that after Sharp III was arrested, he was visibly angry at the deputies, swore at them, and threatened to sue them. In response, a deputy told him: "If you weren't being so argumentative, I'd probably just put you on the curb." The deputies/civil defendants did not contest plaintiff's "chill or silence" argument. They did argue, however, that Sharp III's belligerent demeanor was not a "but-for cause" of his continued detention. The Court agreed with Sharp III, finding a prior case directly on point which held that the First Amendment was in fact violated where an officer, with the option to cite and release, booked the plaintiff while admitting that the booking was motivated by the fact that the plaintiff would not "shut up" and had "diarrhea of the mouth." (See *Ford v. City of Yakima* (9th Cir. 2013) 706 F.3rd 1188, 1191.) With such clear authority that punishing a person for being verbally uncooperative violates a First Amendment, the Court held that the civil defendants were *not* entitled to qualified immunity on this issue.

***Note*:** The U.S. Supreme Court has been in the Ninth Circuit's face in a number of cases lately for failing to uphold police/civil defendant's qualified immunity claims, the Supreme Court's rulings being based upon the fact that there was no clear prior authority sufficient to warn officers that their actions might constitute a constitutional violation. So in this case, the Ninth Circuit bent over backwards to find qualified immunity; perhaps excessively so, as argued by the sole dissenting justice. For example, to argue that making an arrest on insufficient probable cause is not a well-settled legal concept, when based upon a totally different physical description,

seems to me to be a bit of a stretch. I also find questionable the Court's decision that the *Michigan v. Summers* rule, relative to detaining the occupants of a residence while executing a search warrant, does not apply to arrest warrants as well. California authority has held that it does. (See *People v. Hannah* (1997) 51 Cal.App.4th 1335.) It's inconceivable to me to argue that you have to allow the occupants of a house wander around loose while you're looking for the subject of an arrest warrant. It's been my experience (and I'm sure yours, if you're a cop) that arresting someone in front of their friends and relatives tends to piss off those friends and relatives, often to the point where their interference is a common occurrence that you have to expect. In addition to the above, this decision includes a whole section on "state-law immunity" statutes (e.g., Civ. Code § 52.1, Gov't. Code § 820.2, Gov't. Code § 821.6, Civ. Code § 43.55(a), and P.C. § 847(b), as well as common-law claims for false imprisonment, assault and battery, negligent infliction of emotional distress, and trespass), that I didn't discuss. The Court ruled that these asserted immunities do not apply in this case, either as a matter of law or as a consequence of the Court's determination that the deputies' actions here were unreasonable. The federal trial/district court, therefore, was held to have properly denied these immunities. If this is a subject you wish to explore further, the discussion, such as it is, can be found on pages 920 to 921 of the case decision.