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Remember 9/11/01; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*The sole purpose of a child's middle name is so he can tell when he's really in trouble*." (Author unknown)

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(*Connotes an important "hot-off-the-press" case.)

***ADMINISTRATIVE NOTES*:**

House for Sale: Last chance before I give my house to a real estate broker. My 2000 sq. foot home, on 2/3's of an acre in quiet, (nearly) crime-free Poway, is for sale. The house is about as close to the middle of San Diego County as you can get. It's considered to be "horse property" with many riding trails in the area, close to some of the best schools in San Diego, and includes a swimming pool and many other upgrades and amenities. For more details, give me a call or e-mail.

But know that in another week, I'm letting a real estate broker get his greedy hands on it, meaning the price will have to go up.

CASE LAW:

***Searches Incident to Arrest; Cell Phones*:**

People v. Diaz **(July 30, 2008) 165 Cal.App.4th 732**

Rule: A warrantless search incident to arrest, even though delayed until after the arrestee is transported to the police station, is still lawful so long as it is of personal property that is immediately associated with the arrestee's person. This would include a cell phone found on the defendant when arrested.

Facts: Defendant and another doper named Lorenzo Hampton were suckered into a controlled buy with a confidential informant who was working for the Ventura County Sheriff's Department. Defendant and Hampton were arrested shortly thereafter. Searched incident to arrest, a small amount of marijuana was recovered from defendant's pocket. It was also noted that he had a cell phone on his person, but it was not seized. Defendant was transported to the Sheriff's station where, an hour and 10 minutes after his arrest, his cell phone was confiscated. After waving his *Miranda* rights, defendant denied any involvement in the narcotics transaction. The interrogator retrieved defendant's cell phone during the interrogation; 93 minutes after his arrest. The cell phone was then searched in front of defendant and found to contain a recent text message to Hampton reflecting the details of the narcotics transaction for which he had just been arrested. Confronted with this information, defendant confessed. Charged with selling a controlled substance, defendant filed a motion to suppress the text message itself and his statements, alleging that the warrantless search of cell phone was illegal and that his confession was a product of that illegal search. The trial court denied his motion finding the search of the cell phone to be a lawful "search incident to arrest." Defendant pled guilty and appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. In so doing, the Court noted that while warrantless searches are "per se" illegal, a "*search incident to arrest*" is one exception. The purpose of this exception is to provide the police with the opportunity "to remove any weapons that (the arrestee) might seek to use in order to resist arrest or effect escape," and to "secure evidence" before the arrestee has an opportunity to destroy it. Defendant, however, noted that a search incident to arrest, as a rule, must be contemporaneous in time and place. Contrary to this rule, the search of his cell phone in this case occurred some 93 minutes after his arrest, and not until after being transported to the Sheriff's station. The Supreme Court, however, has recognized an exception to the contemporaneous requirement. In *United States v. Edwards* (1974) 415 U.S. 800, at p. 807, it was held that "once (an) accused is lawfully arrested and in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as

evidence, on the other." What this means is that "as long as the administrative processes incident to the arrest and custody have not been completed, a search of effects seized from the defendant's person (i.e., personal property immediately associated with his person) is still incident to the defendant's arrest." Prior cases have applied this principle to delayed searches of *wallets* (*United States v. Passaro* (9th Cir. 1980) 624 F.2nd 938, 944.), *purses* (*People v. Decker* (1986) 176 Cal.App.3rd 1247, 1252.), *address books* (*United States v. Rodriquez* (7th Cir. 1993) 995 F.3rd 776, 77-778.), *pagers* (*United States v. Chan* (N.D.Cal. 1993) 830 F.Supp. 531, 536.), and, yes, cell phones. (*United States v. Finley* (5th Cir. 2007) 477 F.3rd 250.) Lastly, the Court rejected the defendant's argument that his cell phone, containing vast amounts of personal information, is more akin to a computer that does *not* come within this rule. Just because a cell phone might contain a lot of information does not mean that it is not immediately associated with the person of the arrestee. Having been found on his person when arrested, the delayed search of defendant's cell phone was lawful.

Note: This is a great case, and one, I have to admit, that took me by surprise. I was aware that there were cases out there upholding searches incident to arrest even though not done until after the arrestee was transported to the police station. Recognizing that these cases seemed to ignore the usual contemporaneousness requirement for a search incident to arrest, I never really put much stock in them. Note, however, that this delayed warrantless search incident to arrest is valid only under limited circumstances: (1) When dealing with personal property immediately associated with the person (i.e., "*possession within an arrestee's immediate control*" when arrested), and (2) it must still occur before the stationhouse processing of the arrestee is completed. Also note that the Court makes a reference (without citing any authority) to the fact that a laptop computer does *not* come within this rule, and hints that if the cell phone had been in a briefcase or backpack ("property not immediately associated with the person of the arrestee to their exclusive control."), it could not have been searched without a search warrant. (See *United States v. Chadwick* (1977) 433 U.S. 1; a footlocker recovered from the defendant's car's trunk.) Make sure you understand when this rule applies before attempting to use it.

***Sandclubs and Sandbags per P.C. § 12020(a)(1)*:**

People v. Mayberry **(Feb. 15, 2008) 160 Cal.App.4th 165**

Rule: A workout glove, despite containing sand, is not a sandclub or sandbag as described in P.C. § 12020(a)(1).

Facts: Defendant hit another person in the face with his left hand on which he was wearing a borrowed workout glove, causing serious injury to the victim. The owner of the glove testified that it was a "standard workout glove" that he had purchased at Longs Drugs. It was made of neoprene with "a little weight to it." The weight was supplied by a small amount of sand sewn into the palm and/or fist area. Defendant was charged with battery with serious bodily injury (P.C. § 243(d)) and possession of a dangerous weapon (P.C. § 12020(a)(1)). At trial, the prosecutor argued that the workout glove was "no different than what the Penal Code describes as a sandbag" and that it also fit the

definition of a sandclub. The trial court instructed the jury similarly. Convicted of both counts, defendant appealed arguing that the workout glove was not one of the weapons listed under P.C. § 12020(a)(1).

Held: The Third District Court of Appeal reversed. Subdivision (a)(1) of section 12020, originally enacted in 1923 as a part of California's Dangerous Weapons Control Law, prohibits the possession of "any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag." By enacting section 12020, the Legislature intended to outlaw "weapons common to the criminal's arsenal." In doing so, the Legislature attempted to make illegal instruments that are customarily viewed as dangerous weapons based upon their physical description, not just upon their use in a particular case. Noting the Legislature's use of the phrase "*commonly known as*," the Court held that where an instrument has many of the characteristics of one of the dangerous weapons listed in section 12020, it may be so classified. How an instrument is used is relevant to the defendant's intent, but intent alone is not enough to make it a section 12020 weapon if it is not otherwise described in the section. A sandclub or a sandbag comes under what's more commonly known as a "sap." A "sap" is defined as a piece of hose loaded with sand; sometimes called a blackjack. Sandclubs and sandbags have also been described as a "tube of strong, flexible material filled with sand, by which a heavy blow may be struck which leaves little or no mark on the skin." Just because a workout glove contains a small amount of sand, without any of the other characteristics of a sap, does not bring it within the general classification of a sandclub or sandbag. The sand in a workout glove is there to fulfill an ordinary and innocent function. "Section 12020, subdivision (a)(1), does not prohibit the possession of any instrument or weapon that bears some irrelevant characteristic of the weapon listed." The workout glove, therefore, is not illegal under P.C. § 12020(a)(1).

Note: Being aware of cases that have found a number of perfectly innocent objects to come within section 12020 based upon how they were used (e.g., a baseball bat as a baton; an ice pick as a dirk or dagger, etc.), I had some difficulty with this case until I started to think about it. For instance, is your child guilty of possessing a dirk or dagger merely because he has a rubber knife that looks like a dirk or dagger, complete with a fixed yet flexible blade, concealed in his pocket, with which he intends to mercilessly poke at his younger sister? I think not. As the Court indicated, its intended use is only one factor to consider. The physical characteristics of the item, making it dangerous, is equally important.

***Consensual Searches During Prolonged Detentions*:**

United States v. Turvin et al. **(9th Cir. Feb. 26, 2008) 517 F.3rd 1097**

Rule: Prolonging a traffic stop for an extra couple of minutes, at least when motivated by some newly discovered information even though that new information is not, by itself, reasonable suspicion, is lawful.

Facts: Alaska State Trooper Christensen stopped defendants' pickup truck for having a loud exhaust, making an unsafe turn, and speeding during snowy conditions. Also, neither defendant was wearing a seatbelt and the vehicle's registration was expired. Defendant Sean Turvin was driving with co-defendant Corina Cunningham as the passenger. After discussing the violations with defendants for three or four minutes, Trooper Christensen returned to his vehicle to check for warrants, verify defendant's license status, and write the tickets. Trooper Powell arrived while Christensen was writing out the citations, about ten minutes after the initial stop. Powell told Christensen that defendant had been arrested for having a "rolling methamphetamine laboratory" in his vehicle earlier that year. With that information, Christensen approached defendant again and asked him about the prior arrest. Defendant freely acknowledged that incident. Noting a box behind defendant's seat, which defendant identified as a stereo speaker box, Christensen thought it "looked very odd." Christensen therefore asked for consent to search his truck which Turvin granted "without equivocation." The search resulted in the recovery of a sawed-off shotgun and a small amount of methamphetamine. A search of co-defendant Cunningham resulted in recovery of $773 in cash and some more meth. Indicted in federal court for conspiracy to traffic methamphetamine, possession with the intent to distribute, and possession of the illegal firearm, defendants filed a motion to suppress. The trial court granted the motion, holding that defendant's consent to search was obtained during an illegally prolonged detention. The Government appealed.

Held: The Ninth Circuit Court of Appeal, in a two-to-one decision, reversed. First, the Court noted, contrary to prior 9th Circuit holdings, it is constitutionally permissible for a police officer, without reasonable suspicion, to ask questions on topics unrelated to the purpose of the traffic stop. (*Muehler v. Mena* (2005) 544 U.S. 93.) Therefore, it was not unlawful, at least on its face, for Trooper Christensen to ask defendant about his prior arrest and to request consent to search his truck. The real issue, however, is whether in taking the time to ask defendant for a consensual search, did Christensen unlawfully prolong the traffic stop beyond the time it would have taken to write the traffic citation? The rule has always been that during a traffic stop, an officer can hold onto the driver for no longer than it reasonably takes to deal with the traffic violation. Holding onto the driver any longer than that is generally unlawful *unless*, during the lawful detention, additional information constituting reasonable suspicion of other criminal activity is developed. The Court in this case concluded that Christensen did in fact prolong defendant's detention by taking the time to inquire about his prior arrest and then ask for consent to search. However, the Court further held that such a delay was reasonable under the circumstances. It was acknowledged that Christensen did in fact stop his ticket writing upon finding out about defendant's prior arrest, redirecting his inquires into that subject, thus prolonging the detention for at least a few minutes beyond the time it would have taken to complete the original purposes of the traffic stop. But, under the totality of the circumstances of this case, prolonging the detention in such a manner was reasonable. "*Reasonableness*" being the touchstone of a lawful detention, the Court found that it is not unreasonable for an officer to cause a brief delay in the ticket-writing process, at least when motivated by the discovery of some additional information, even though that new information by itself might not be enough to establish a reasonable suspicion. Citing another Circuit, the Court noted that "at a traffic stop, the police can occasionally pause

for a moment to take a breath, to think about what they have seen and heard, and to ask a question or so." (*United States v. Hernandez* (11th Cir. 2005) 418 F.3rd 1206, 1212, fn. 7.) In this case, Christensen's inquires and request for consent to search were motivated by the discovery of defendant's prior arrest and the plain sight observation of the "odd" speaker box behind his seat. While not reasonable suspicion of other criminal activity by itself, this new information was enough to justify a brief delay in releasing defendant. Asking for consent to search, therefore, was not done during an "unlawfully" prolonged detention. Discovery of the contraband was lawful.

Note: Great case, particularly from the Ninth Circuit. Don't think, however, that this case does away with the "*unlawfully prolonged detention*" issue. All this case says is that the courts will (or should) cut you a little slack so long as prolonging a traffic stop long enough to inquire into other possible criminal activity only takes a few minutes and there's some reason for doing so. But it is indeed a thin line between a *lawfully*, and an *unlawfully*, *prolonged* detention. The dissent vehemently argued that the detention here was unlawfully prolonged. Your trial judge may do the same, particularly if you're an envelope-pusher. So use this gift from the Ninth Circuit wisely.

***Towing and Impounding Vehicles*:**

Clement v. City of Glendale **(9th Cir. Mar. 11, 2008) 518 F.3rd 1090**

Rule: Towing a vehicle for illegal parking without prior notice to its owner and a pre-seizure hearing is a "*due process*" violation unless justified by a strong governmental interest in doing so.

Facts: Virginia Clement (who has since passed away; note the sympathy factor), while living in a residential hotel in Glendale, California, parked her 1981 Cadillac Eldorado Biarritz (which was probably still working on something less than 4-diget mileage) in the hotel's parking lot. Although she hadn't driven the car for some seven years (no doubt having had her license yanked due to advanced senility) and let the registration expire (thus avoiding California's exorbitant registration fees that she couldn't afford anyway living on social security), she dutifully filed a "planned non-operation ('PNO') certificate" with the state every year. She also had the hotel's permission to park her car there. A Glendale police officer noticed the expired registration tab on her car and checked its status, discovering the existence of the PNO certificate. Pursuant to V.C. § 22651(o), a PNO vehicle found parked in a "*publicly accessible parking lot*" may be impounded until it is properly registered. Assuming for the sake of argument that the hotel's parking lot was a "publicly accessible parking lot" (an issue not decided by the Court), the officer ordered poor old Virginia Clement's (perpetuating the sympathy factor) Cadillac Eldorado Biarritz towed. Discovering that her car was gone and that it was the Glendale Police Department who "stole" it (the shock probably being what eventually killed her), she sued in federal court. In her suit, she alleged that by taking her car without prior notice, her Fourteenth Amendment due process rights were violated. The trial court agreed with Ms. Clement (how could you rule against someone's grandmother), but held that the Glendale Police Department had qualified immunity from

civil suit. Ms. Clement's heirs (not satisfied with inheriting a vintage 1981 Cadillac Eldorado Biarritz) sued on her behalf.

Held: The Ninth Circuit Court of Appeal affirmed. The 14th Amendment due process clause provides that "a state may not deprive any person of life, liberty, or property, without due process of law." This has been interpreted to mean that generally, "notice," and an opportunity for a fair hearing appropriate to the nature of the case, must be given *before* the government seizes a person's property. In other words; "the government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking." The fact that the aggrieved person may sue and get her hearing *after* the taking of property is not sufficient to offset this constitutional violation. There are exceptions to this rule, however, such as in an emergency, where notice would defeat the entire point of the seizure, or where the interests at stake are small relative to the burden that giving notice would impose. Examples might be when the car is parked in the path of traffic, blocking a driveway, obstructing a fire lane, or appears to be abandoned. A tow might also be appropriate where there is no registration sticker and there's no guarantee that the owner won't move or hide the vehicle and not pay the fine. None of these exceptions apply to this case. Here, where the owner of the seized vehicle wasn't using it, her interests were minimal. Even so, "having one's car towed, even one that's not operational, imposes significant costs and burdens on the car's owner." The anxiety of having your car towed, the difficulty in getting to the tow yard, and the costs involved in getting it back, are significant. When balanced with the relative unimportance of deterring illegal parking in a hotel parking lot, towing the Cadillac in this case without prior notice to its owner cannot be justified. The officer here should have exercised other available, less intrusive options, such as attempting to make contact with Ms. Clements, or leaving her a message, warning her that the violation must be corrected or the car would be towed. Having failed to do this, Ms. Clement's due process rights were violated.

Note: There are any number of statutes in the California Vehicle Code authorizing the towing and impounding of vehicles. What a lot of officers are having a hard time accepting is that none of these statutes are worth the paper they're written on if they're in conflict with the United States Constitution. Both state (*People v. Williams* (2006) 145 Cal.App.4th 756.) and federal (*Miranda v. City of Cornelius* (9th Cir. 2005) 429 F.3rd 858.) courts have been telling us for several years now that you can't go impounding cars just because it's authorized by a statute. There has to be some articulable reason why prior notice and a pre-seizure judicial or administrative hearing is not a viable alternative under the unique circumstances of your case. Most departments are formulating policies that recognize this uncomfortable fact. If your department has not yet done so, it would be a good idea if it did. If your department has such a policy already, every officer needs to become familiar with, and abide by it. Although the qualified immunity from civil suit for the Glendale officer and his department was upheld here, it's getting harder to argue with every new case decision that this is an unsettled area of the law (a necessary prerequisite to qualified immunity). If you want my briefs on *Williams* and *Miranda*, let me know and I'll send them to you.

***Children*; *Duty of a Parent to Protect*:**

People v. Rolon **(Mar. 11, 2008) 160 Cal.App.4th 1206**

Rule: A parent who fails to protect his or her child when that child is being abused by another may be equally liable for the resulting injuries as an "aider and abettor."

Facts: Anthony Lopez was the father of six of defendant's seven children, including one-year-old Isaac. In violation of a prior court order stemming from other instances of abuse, defendant let Lopez not only live in her apartment, but also have unmonitored contact with her children. One evening, Isaac's crying annoyed Lopez. He therefore dunked Isaac in a tub of water containing an unknown chemical and then threw him against the wall. Defendant was present but did not intervene. Isaac's renewed crying woke Lopez the next morning. When feeding didn't quiet him, Lopez punched Isaac in the chest. Defendant finally attempted to intervene but was told to shut up and not get involved, so she went to bed instead. The next door neighbor, who shared a common wall with defendant, later testified that she heard a screaming child who stopped crying only after three minutes of thumps against the wall. Lopez later woke defendant and told her that Isaac was not breathing. The two of them unsuccessfully attempted to revive Isaac. The next day, Lopez took Isaac's body into the bathroom with a can of gasoline and a bucket and, while defendant stood outside, burned him in the bucket. Lopez was later arrested with Isaac's remains in his van. An autopsy showed that Isaac had suffered 24 blunt force injuries and other indications of being beaten, then and in the past. In his blood and stomach, Isaac had varying amounts of alcohol and an antihistamine. He also had between five to twenty-five times the normal amount of a child's decongestant in his system. The pathologist opined that Isaac died from a combination of suffocation, the overdose of decongestant, and his injuries. Lopez and defendant were both charged with Isaac's death, but were tried separately. Defendant's culpability was based upon the theory that she aided and abetted Lopez by failing to perform her parental duty to protect Isaac. Defendant was convicted of one count each of assault on a child under eight years of age resulting in death (P.C. § 273ab), second degree murder (P.C. § 187), and willfully causing a child to suffer under circumstances likely to result in death (P.C. § 273a(a)) with an enhancement because death actually resulted. (P.C. § 12022.95) (Lopez's jury convicted him of he same except that his murder conviction was of the first degree during the commission of torture (P.C. §§ 187, 189, 190.2(a)(18)) Defendant appealed.

Held: The Second District Court of Appeal (Div. 4) affirmed. Defendant argued on appeal that because she didn't personally inflict any of the injuries, she should not have been convicted. In rejecting her argument, the Court discussed the law of "*aiding and abetting*" and how it applies to this type of situation. An aider and abettor is a "*principal*," and equally guilty right along with the actual perpetrator for any crimes committed that are the natural and probable consequences of the perpetrator's acts. (P.C. § 31) Aider and abettor liability requires proof of three distinct elements: (1) A crime committed by the direct perpetrator (Lopez, in this case); (2) the aider and abettor's knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends; and (3) conduct by the aider and abettor that in fact assists the

achievement of the crime. The aider and abettor's participation does not have to be an affirmative act, however. Her "*failure to act*" (i.e., an "*omission*") may generate liability, but only when she has a legal duty to act. The California rule is that parents have a legal duty to exercise reasonable care, supervision, protection, and control over their minor children. Similarly, there is a recognized common law duty to protect one's children. A parent who is present while his or her child is being attacked, and who fails to take all steps reasonably possible to protect the child, commits an "*act or omission*" showing the parent's consent and contribution to the crime being committed. The Court emphasized, however, that liability as an aider and abettor requires that the parent, by his or her inaction, be shown to have intended to aid the perpetrator in the commission of the crime, or a crime of which the act committed is a reasonable and probable consequence. As to the second degree murder charge, "an intentional omission or intentional failure to act in those situations where a person is under a legal duty to act" can supply the necessary "*implied malice*." In this case, defendant had a legal duty to protect Isaac from assault. She stood by and let Lopez abuse and, eventually, kill her son. "She made no effort to aid her son: She did not scream, call 911, ask a neighbor to help or call for help, or do anything else." Her failure to protect Isaac could reasonably be interpreted by the jury as an intent to aid and abet Lopez in his assault on her son. She was therefore properly convicted of aiding and abetting Lopez in his crimes.

Note: In an unpublished portion of the decision, the Court further noted that there was no basis in the evidence to support an argument that defendant was entitled to the defense of "*duress*." "*Duress*" requires that defendant had reasonable cause to believe, and did believe, that her life would be in danger if she resisted Lopez. Fear of merely being hit or injured is not enough. It was kind of inferred in the decision that defendant was afraid of Lopez, but not to the extent that she was in reasonable fear for her life. The fact that its hard to have a lot of sympathy for any person who would let another hit, or throw his or her child against a wall, or purposely abuse a one-year-old at all, might have affected the jury's, and the Court's, conclusions on this issue. But the real importance of this case is in its recognition that a parent who just stands by and lets an abusive boyfriend do harm to her child should be held equally accountable. There's just no excuse for what this defendant let Lopez do.

***Robbery; Force During Escape*:**

People v. Gomez **(Apr. 10, 2008) 43 Cal.4th 249**

Rule: Whenever the removal of stolen property from the presence of the victim, and the use of force or fear, both occur at any time between (1) when the property is originally taken and (2) when the thief has successfully escaped with the property "reach(ing) a place of temporary safety," a simple theft becomes a robbery.

Facts: Defendant broke into a closed restaurant in Anaheim and stole money from an ATM machine in the lobby. While checking the manager's office for more loot (but finding nothing), the manager, Ramon Baltazar, arrived and unlocked the front door. Baltazar realized that things were amiss when he noticed that the alarm had been

deactivated and the ATM was damaged. When he heard a noise and saw the glow of a flashlight coming from the kitchen, Baltazar wisely backed out, went to his truck, and dialed 911. While talking to the police dispatcher, Baltazar saw defendant come out of the restaurant through a side door. Having no intention of apprehending him, Baltazar followed defendant so that he could help police find him. As Baltazar followed defendant from about 100 to 150 feet, defendant turned and fired two shots at him (claiming later that he only wanted to scare him). Defendant was arrested a short time later with the ATM money in his possession. He was charged with robbery with the use of a firearm. Convicted and sentenced to 23 years (three years for the robbery and 20 for the gun enhancement), defendant appealed. With his conviction upheld by the state court of appeal, defendant petitioned the California Supreme Court.

Held: The California Supreme Court unanimously affirmed. On appeal, defendant argued that it is not a robbery when the victim is not present at that point in time when a thief initially takes property. The Court disagreed. In an extensive discussion of the elements of robbery, the Court noted that to elevate a simple theft to robbery, the taking must be accomplished by (1) force or fear and (2) the property must be taken from the victim or his immediate presence. But like theft, robbery is a continuing offense. It begins at that point in time when the thief first takes possession of the loot (i.e., "caption"), continues on through the movement of the loot from the scene (i.e., "asportation"), and does not end until he has successfully escaped, reaching "a place of temporary safety" with the loot still in his possession. It is not necessary that the victim be present when the initial caption occurs. It is taken from the victim or his immediate presence so long as at some point between (1) the initial caption and (2) when the thief reaches a place of temporary safety, the victim is close enough to exert, or re-exert, control over the stolen property if not for the force or fear used by the thief. Or, as expressed by the Court, the stolen property is in the victim's immediate presence if it "is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." The same concept applies to the defendant's use of force or fear. Where the force or fear occurs at any point between (1) caption and (2) when the defendant eventually reaches a place of temporary safety, then what is otherwise a simple theft becomes a robbery. Defendant shooting at Baltazar before having escaped with the money from the ATM converted a simple theft of the money to a robbery (often referred to an "*Estes robbery*," per *People v. Estes* (1983) 147 Cal.App.3rd 23.). Defendant, therefore, was properly convicted of robbery.

Note: The Court assumed for the sake of argument that the restaurant manager, Baltazar, had a possessory interest in the ATM money; an issue defendant failed to raise. That might have been a serious error in that there is case law to the effect that unless the victim has at least a possessory interest in the property taken, there is no robbery. The use of force or fear against a third party, such as an otherwise uninvolved good Samaritan who attempts to stop a thief, but who had no possessory interest in the property taken, is not a robbery. It might be a simple theft and an ADW, but not robbery. But the value in this new case is in applying a very broad definition to what is meant by "immediate presence" and reestablishing the "continuing offense" aspects of a robbery as they relate to the taking of stolen property and the use of force or fear in making good a thief's escape.