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Remember 9/11/01*: *Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*Eagles may soar in the clouds, but weasels never get sucked into jet engines*." (Jason Hutchison)

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(* Connotes a hot, fresh-off-the-press, case)

ADMINISTRATIVE NOTES:

Miranda Admonishments: Advising an in-custody suspect that he has a right to the assistance of counsel as a part of a *Miranda* admonishment is supposed to include telling him that this right is available "*before and during*" the intended interrogation. Case law in California has allowed us to get away with forgetting to include either one of the "*before*" or the "*during*" parts (*People v. Wash* (1993) 6 Cal.4th 215, 236-237; *People v. Kelly* (1990) 51 Cal.3rd 931, 947-949.), *but not both*. (*People v. Lujan* (2001) 92 Cal.App.4th 1389.) This having been said, there

is presently before the United States Supreme Court a case where the issue is whether failing to specifically tell an in-custody suspect that he's entitled to the assistance of counsel "*during*" the interrogation is a problem. (*Florida v. Powell*; 08-1175.) If the tone of the oral arguments before the High Court is any indication (as it typically is), then the justices appear to be on the verge of holding that an in-custody suspect must specifically be told that he's entitled to the assistance of counsel "*during*" the interrogation. So if you're not already doing this, I strongly suggest you make a point of doing so for now on.

CASE LAW:

***Child Abuse; Seizing Child Victims*:**

Greene v. Camreta **(9th Cir. Dec. 10, 2009) __ F.2nd __ [2009 DJDAR 17279; 2009 WL 4674129]**

Rule: Interviewing a child victim on a school campus without the parents' consent, a search warrant or other court order, or exigent circumstances, is a Fourth Amendment seizure and unlawful.

Facts: Nimrod Greene (I'm not making this up) was arrested for child molest after seven-year-old F.S. complained that Nimrod, while drunk, had touched his penis through his clothing. F.S.'s mother also reported to police that Sarah, Nimrod's wife, complained to her that Nimrod, when drunk, would make their two young daughters, S.G. and K.G., sleep in his bed, and that she didn't like how he acted when they would sit on his lap. F.S.'s mother further reported that Nimrod himself had commented on how Sarah had accused him of molesting their daughters. As a result, Bob Camreta, a caseworker with the Oregon Department of Human Services (DHS), began an investigation into the welfare of the Greene's daughters. After Nimrod was released from jail pending trial on the F.S. charges, Camreta, in the company of Deputy Sheriff Alford, visited S.G.'s elementary school to interview her. A school counselor retrieved S.G. from her class and took her to a private room where Camreta and Deputy Alford, who was in uniform and visibly armed, were waiting for her. Camreta interviewed S.G. over the next one to two hours during which she told him about various instances of Nimrod inappropriately touching her since she was three years old. S.G. later claimed, however, that she initially denied that Nimrod had ever inappropriately touched her, but that under pressure from Camreta she finally agreed that he did. Camreta and Alford then visited Nimrod and Sarah. Both parents denied any sexual abuse but agreed to a "safety plan" pending an investigation, including a sexual abuse examination for S.G. They also agreed that Nimrod would not have unsupervised contact with his two daughters during that time. Nimrod was later indicted and arrested on six counts of felony sexual assault of F.S and S.G. He was soon released on these charges pending trial but ordered not to have any contact with his daughters. Camreta went to the Greene's house the next day to inform Sarah of the no-contact order. According to Sarah, she agreed both to the safety plan and to insure that Nimrod would have no contact with their daughters. But according to Camreta, Sarah told him that they couldn't afford separate accommodations for Nimrod.

Sarah also refused to sign an informational release form, needed for the sexual assault exam. Fearing for the safety of the Greenes' daughters, Camreta sought and obtained a Juvenile Court order to remove them from the home. An emergency shelter hearing was held by the Juvenile Court the next day. This resulted in the children being placed in DHS's temporary custody and an order for a sexual assault examination. S.G. was examined two weeks later. Sarah attempted to participate in her S.G.'s exam, but (according to her later deposition) was ordered to leave the premises. Ultimately, the examining officials could not determine whether S.G. or K.G. had been molested. Nimrod's criminal trial resulted in a hung jury. He later accepted an "*Alford plea*" (per *North Carolina v. Alford* (1970) 400 U.S. 25; similar to a California no-contest plea). Sarah Greene later sued Camreta and Alford in federal court, alleging (1) that S.G. had been seized in violation of the Fourth Amendment when Camreta interviewed her at her school, (2) that Sarah's Fourteenth Amendment "due process" rights were violated by Camreta giving false information to the Juvenile Court in order to obtain an order for the girls' removal from their home, and (3) that Sarah's and S.G's due process rights were violated when Sarah was denied the right to be present during S.G.'s sexual assault examination. The federal trial court granted Camreta's and Alford's summary judgment motions, dismissing the law suit prior to trial. Sarah Greene appealed.

Held: The Ninth Circuit Court of Appeal affirmed in part and reversed in part. The primary issue was the propriety of governmental officials "seizing" and "interrogating" a child at school, without the child's parents' permission, a court order, a search warrant, or exigent circumstances. Sarah argued that this constituted a Fourth Amendment violation. Camreta and Alford did not argue that pulling S.G. out of her classroom and interviewing her for two hours was not a seizure, but rather that under the circumstances, no court order or parental permission was necessary. The Ninth Circuit agreed with Sarah. The Court justified this conclusion by noting that the traditional Fourth Amendment protections apply to child abuse investigations whether the investigation occurs in a residence or a school. Camreta argued that a relaxed standard of "*reasonableness*" (i.e., no warrants or probable cause are necessary) applies to searches and seizures at schools. The Court ruled, however, that the relaxed standards applicable at schools apply only when there exists a "*special need*," based upon "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." Camreta and Alford, of course, are not school administrators and S.G. was questioned about something that had nothing to do with discipline in the classroom or on school grounds. Even so, Camreta argued that the relaxed "special needs" standards should apply to child abuse investigations in general, in order to help protect children from sexual abuse. In reviewing the legal standards for classifying searches as involving special needs, the Court noted that, "(n)one of the (Court's) special needs cases have . . . upheld the collection of evidence for criminal law enforcement purposes." This investigation, as opposed to a school-orientated administrative search, was clearly done for law enforcement purposes. As such, probable cause and a search warrant, or other court order, or the parents' permission, was necessary to lawfully seize and interrogate S.G. Camreta and Alford therefore violated the Fourth Amendment. However, because this particular area of the law is yet to be clearly established, the Court ruled that they are entitled to qualified immunity from civil liability. The trial court's dismissal of this

allegation, therefore, was proper. The Court, however, reversed the trial court on the issue of whether Camreta submitted false evidence to the Juvenile Court in order to obtain a court order removing S.G. and K.G. from the Greenes' home. There being conflicting allegations made on this point, it is an issue that must be resolved by a jury. Lastly, the Court held that excluding Sarah from her daughter's sexual examination did indeed, if true, constitute a Fourteenth due process violation. "(P)arents and children maintain clearly established familial rights to be with each other during potentially traumatic medical examinations. . . . (T)his right may be limited in certain circumstances to presence nearby the examination, if there is some 'valid reason' to exclude family members from the exam room during a medical procedure." This allegation, therefore, should not have been dismissed.

Note: Maybe I'm missing the point, but I have a hard time accepting the idea that removing a student from class and interviewing her about possibly being the victim of a crime qualifies as a "*seizure*," implicating the Fourth Amendment. Since when do we need a search warrant to interview a crime victim? Unfortunately, the Oregon Attorney General's Office, representing Camreta and Alford, conceded this issue, making moot any need for the Court to discuss it and probably eliminating the officers' right to test it on further appeal (i.e., you can't argue on appeal issues waived in the trial court). The Ninth Circuit cited a case (*Doe v. Heck* (7th Cir. 2003) 327 F.3rd 492, 509) to the effect that interviewing a victim/student on a campus constitutes a Fourth Amendment seizure. I looked it up to make sure it wasn't taken out of context and found that although the circumstances were a little different (it was the school's employees who were being investigated for abuse), the holding is consistent with this case. But "*two federal circuit court of appeal decisions does not a legal rule make*." (I just made this up.) However, until the issue gets retested, it appears that if you want to interview a minor victim you will need either the parents' permission, exigent circumstances, or some form of a court order. While federal circuit court decisions are not binding on a state case, they are entitled to "*great weight*" and will definitely provide the parents with grounds to sue you. But how far does this decision go? Does it extend to a contact on the street, or any other circumstance away from a school campus? Is it necessarily limited to victims who are minors? Who knows? I don't. Also note, by the way, that Penal Code § 1524 doesn't include the seizure of a crime victim as one of the grounds for the issuance of a search warrant. So using a warrant is not really an option you can use. But the Court noted a couple of times that any court order will do although they never discuss whether a court, prior to the issuance of a criminal case, has the lawful authority to issue such an order. Check with your local prosecutor's office to see if they've researched this issue and if so, whether they've developed a format you can use. Lastly, Camreta's interview of S.G. was not recorded. Had this been done, it would have eliminated a lot of issues in both the criminal and the civil cases. Failure to at least audiotape, if not videotape, an interview of a victim, at least where that victim is a minor or anyone else who might be easily swayed by others, or a suspect, in a felony case, is inexcusable.

***Residential Burglary; An Apartment Carport*:**

People v. Thorn **(July 31, 2009) 176 Cal.App.4th 255)**

Rule: A three-sided carport attached to an apartment complex is part of the residential units for purposes of first degree, residential burglary.

Facts: Luis Arias lived in an apartment complex at 50 Hillcrest Dr., in Daly City, which was comprised of three stories of apartment units over a carport. The entire ground floor under the apartment units was comprised of five carports with three parking spaces in each. Each carport was surrounded on three sides by solid brick walls, but with the fronts completely open and facing a paved courtyard in front of the building. Residents parked their cars by driving from the street, through the courtyard, and into their assigned carport. On an evening in October, 2007, Arias parked his red Volkswagen Jetta in the carport at some time after 5:00 p.m., locked the doors, and went to his apartment unit. Arias left his daughter's backpack in the back seat. A short time later, another resident, Jose Hernandez, observed defendant getting in and out of Arias' vehicle. Another neighbor told Hernandez that she'd seen defendant looking into other cars in the carports. Hernandez called the police, continuing to watch defendant until he saw police contact him as he attempted to walk away. When defendant was detained, he dropped a screwdriver on the ground. Arias' car was checked and found that the stereo had been removed from the dashboard and, along with an amplifier that had been under the seat, stuffed into Arias' daughter's backpack that was now on the driver's seat. A white plastic bag containing some beers that didn't belong to Arias was found in the car. One of the responding officers recalled having seen defendant earlier in the evening a couple of blocks away carrying a similar plastic bag. Defendant was charged with a number of offenses including first degree, residential burglary. The residential burglary charge was based upon him entering the carport with the intent to steal. Defendant appealed, arguing that entering an apartment building carport is not a residential burglary.

Held: The First District Court of Appeal affirmed. The residential burglary statutes (P.C. §§ 459, 460) designate the burglary of an "*inhabited dwelling house*" with the intent to steal (or to commit a felony) as a first degree burglary. "*Inhabited*" is defined as currently being used for dwelling purposes. Defendant, of course, entered only the carport under an apartment complex. This, according to defendant, cannot be a burglary of an inhabited dwelling. The Court disagreed. An "*inhabited dwelling house*" has been given a broad interpretation by the courts. In this case, the carport was held by the Court to be a part of the inhabited dwelling, i.e., the apartment complex. The essential inquiry is whether the structure is "functionally interconnected with, and immediately contiguous to, other portions of the house." "*Functionally interconnected*" means "used in related or complimentary ways." "*Contiguous*" means "adjacent, adjoining, nearby, or close." The carports at issue here are situated immediately underneath the occupied apartments themselves. Defendant also argued that there is no "functional interconnection between the apartments and the carports." His argument was based upon the fact that the carports are separated by common areas that are open to members of the general public; i.e., the stairwells and the walkways leading to the apartments. The Court responded, in effect; *so*

what? The question really is whether the carports are used for "residential activities," not whether the carport is part of the living space itself. It is irrelevant that the structure is accessible from a common area. Here, the residents can drive directly into the carport from where they can easily access their respective apartments. As such, the carports are functionally interconnected with the inhabited dwelling. That's all that's necessary for the carport to be a part of the inhabited dwelling house for purposes of the first degree burglary statute. Defendant also argued, however, that the carports do not carry with them the same "expectation of protection from intrusions" accorded one's home. In a carport, such as the one in issue here, the car is no more protected from unauthorized intrusion than if it were parked on the street. The Court agreed with this premise, but reached a different conclusion than did defendant. The purpose of an enhanced punishment for entering a structure with the intent to commit a theft or a felony is to address the danger caused by the unauthorized entry itself. The open entrance to the carport marks the outer boundary of the apartment building for purposes of the burglary statute. Per the California Supreme Court (see *People v. Valencia* (2002) 28 Cal.4th 1.), where "the outer boundary of a building for purpose of burglary is *not* self evident, . . . a reasonable belief test generally may be useful in defining a building's outer boundary." A reasonable person "certainly" would believe that the carport "enclosed an area into which a member of the general public could not pass without authorization." The carport is closed on three sides and therefore cannot be mistaken as a pathway for someone merely walking through. Defendant had no business entering the carport. "It constitutes a private, individually designated parking space in which its occupant has a possessory interest for purposes of parking his or her vehicle as well as storing personal possessions." Defendant's entry into the carport, therefore, violated both Arias' "possessory interest" and his "personal freedom from violence that might ensue from unauthorized intrusion." The lack of a barrier to defendant's entry into the carport was also held to be irrelevant. No "breaking" is required under California's statutes; merely an entry. Defendant therefore committed a first degree, residential burglary.

Note: When in doubt, charge a first degree, residential burglary. The Courts continue to bend over backwards to find a place entered with the necessary intent to be part of an attached residence (e.g., see *People v. Woods* (1998) 65 Cal.App.4th 345; burglary of a laundry room attached to an apartment complex). Attached garages have long since been held to a part of a residence for purposes of the first degree burglary statute. (See *In re Edwardo V*. (1999) 70 Cal.App.4th 591.) This carport is really no different.

***Miranda*; *Implied Waviers*:**

People v. Hawthorne **(Apr. 23, 2009) 46 Cal.4th 67**

Rule: An "*implied waiver*" of one's *Miranda* rights, at least where supported by "*substantial evidence*" that the defendant intended to waive, are valid.

Facts: Sixteen-year old Kristian and her mother, Vanessa Sells, were the victims in 1996 of a residential robbery in Los Angeles. Defendant and a second suspect forced their way into the victims' home at gunpoint and tied them up while they ransacked their house for

money and other valuables. Defendant decided at the last moment before leaving that the victims would identify him and that he should kill them. He shot Sells three times before coming into Kristian's bedroom where she laid on the bed, still tied up. Telling her to turn away, he shot her twice; once in the head. However, Kristian was only wounded, pretending to be dead by keeping her eyes shut and holding her breath. Defendant and the other suspect left, taking Sells' car. When she was satisfied that they were gone, Kristian untied herself and called 911. Sells died three days later. Defendant was arrested the day after the shooting when he called the police to report that he'd found Sells' car, hoping for a reward. Taken to the police station, defendant was questioned shortly thereafter. Before the interrogation began, the detectives advised defendant of his *Miranda* rights. At the tail end of the admonition, defendant was asked: "Carlos, do you understand these rights I've explained to you?" Getting an affirmative answer (i.e.: "*Yes*."), the detective then said: "Okay. Now, uh, why don't you tell me a little bit about how—what happened tonight with this car?" Defendant was never asked whether he expressly waived his rights. He initially claimed to have found the car, seeing three "dope fiends" taking things from it, when he called the police. He eventually, however, admitted to shooting both victims although he claimed that the second suspect made him do it. Convicted of first degree murder, attempted murder, and other related charges and special circumstances, and sentenced to death, defendant's appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. One of the issues on appeal was whether defendant's admission to being the shooter should have been admitted into evidence against him, given the lack of an express wavier of his *Miranda* rights. After a defendant's conviction, when an appeal is taken, the appellate court is bound to accept the trial court's resolution of disputed facts and inferences as well as its evaluation of the credibility of witnesses, but only when "supported by substantial evidence." The trial court in this case found that despite the lack of an express waiver, defendant fully understood his rights under *Miranda* and that he confessed after freely and voluntarily, albeit impliedly, waiving those rights.. The issue here was whether this finding was supported by the necessary substantial evidence. The rule for the trial court is that in order for a defendant's statements to be admissible in evidence against him, it must be found that he knowingly and intelligently waived his rights to remain silent and to the presence and assistance of counsel. Such a wavier may be either express or implied. Absent an express waiver, a willingness to answer questions after acknowledging an understanding of one's *Miranda* rights has been held to be sufficient to constitute an implied waiver of such rights. Although there is a "threshold presumption against finding a wavier," that presumption may, upon considering the "totality of the circumstances," be rebutted. In this case, the detective who interrogated defendant was not in uniform, did not display a gun, and, as admitted by defendant, was "okay" to him. The detective's demeanor was "low key" with there being no yelling or screaming. Defendant was not scared or intimidated. The detective further provided him with food during the interview. Defendant did not even believe he was under arrest at the time, based upon his testimony. The trial court, having viewed a videotape of the interrogation, found that defendant was unbelievable when he claimed in testimony that he didn't understand his rights (there being evidence that defendant had been through the

system before) and that he was offered leniency (the right to go home) if he cooperated. Defendant's later statements during the interview showed that he clearly understood the significance of his presence with the victim's car and that he was eager to give his side. Also, the fact that defendant was initially contacted in relation to the victim's car does not mean that he did not know that the police were interested in more than just the car. On this issue, it was further noted that "the Constitution does not require 'that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.'" In other words, it was not necessary to specifically tell him that they intended to question him about a murder and not just the victim's car. Lastly, defendant never indicated an interest in consulting with an attorney or in terminating the interrogation. Based upon these circumstances, there was substantial evidence to support the trial court's findings that defendant impliedly waived his rights under *Miranda* and that his resulting statements were voluntary.

Note: For those of you who've read or heard my beliefs before, you know I've never been a big fan of the "*implied waiver*." I've always suggested that under almost all circumstances you ask the all-important "second question;" e.g.: "*Having in mind and understanding your rights, are you willing to answer my questions*." The suspect's affirmative response; e.g.; "*Yes*," constitutes an "*express waiver*." End of issue; the resulting statements are admissible. While the law is clear that when a trial judge's decision that a waiver is valid is supported by "*substantial evidence*," whether the waiver is "implied" or "express," admission of his resulting statements in evidence will be upheld by the an appellate court. The problem is that trial judges don't always so find. It is not unusual for a defendant *not* to be "eager to give his side of the story," as occurred in this case. Where so found, or in the face of other facts showing a defendant's reluctance to talk, the resulting statements will likely be suppressed. But because the vast majority of implied waivers are upheld on appeal, many of you are of the opinion that "there is never any reason to get an express waiver." (I've heard instructors actually say this.) *WRONG*! This misguided belief does not take into account the simple fact that without an express waiver, the trial judge must make a specific finding that, under all the *other* combined circumstances of your case, your suspect actually intended to waive. It is only when the trial court finds that an in-custody suspect actually intended to waive his rights does the appellate court get the chance to agree, based upon a showing of "*substantial evidence*." In those cases where the trial court finds that the defendant *did not* intend to waive his rights, and thus suppresses the resulting statements, the issue never gets tested on appeal. This is because when the defendant is convicted despite the suppression of his statements, he has no reason to complain on appeal that the trial judge agreed with him on this issue. Where the statements are suppressed and the defendant is acquitted, the People, due to "double jeopardy" principles, have no appeal, so again, the issue cannot be tested on appeal. The bottom line is that appellate courts seldom if ever get to consider all those cases (of which there are many) where an attempt to get an implied waiver results in the suppression of the defendant's statements by the trial judge. Therefore, my strong suggestion continues to be to eliminate the issue altogether: Get an express waiver except when there's a real reason for not doing so. If he really intends to waive, he will give you the all-important express wavier and end the issue.

***Searches Incident to Arrest in a Residence*:**

People v. Leal **(Oct. 29, 2009) 178 Cal.App.4th 1051**

Rule: Searches incident to arrest in a residence, after the arrestee has been fully secured and there are no other third parties in the residence, are unlawful.

Facts: Salinas Police Officers Shaw and Schwaner, and two others, went to defendant's home for the purpose of serving a misdemeanor arrest warrant on him. The officers had prior knowledge that defendant, a gang member, might be armed and was using drugs. With the house surrounded, Officer Schwaner knocked at the front door. When someone inside responded; "*Who's there*?", Schwaner identified himself as a Salinas police officer. This was followed by some 45 minutes of silence while the officers patiently continued to knock at the door. Finally, defendant opened the door. As he stood in the threshold, Officer Schwaner had him turn around and handcuffed him. He was led away to a police car some 30 to 38 feet away. Meanwhile, a protective sweep was done of the house. Finding no one else inside, Sergeant Shaw searched the area immediately around where defendant had been standing when he was arrested. Picking up a sweatshirt from a small rocking recliner that sat about a foot from the door, Sgt. Shaw found a loaded semiautomatic pistol tucked between the arm and the cushion of the recliner. Upon recovering this weapon, it was noted that the serial number had been removed. The recovery of the gun occurred within 2 to 3 minutes of defendant's arrest. Charged in state court with obliteration of the identification numbers of a firearm (P.C. § 12090) and various gang allegations, defendant's motion to suppress the gun was denied. After pleading guilty, defendant appealed. The Sixth District Court of Appeal reversed, but a petition to the California Supreme Court was granted. The Supreme Court then sent the case back to the Sixth District Court for rehearing in light of the recently decided U.S. Supreme Court decision of *Arizona v. Gant* (2009) 129 S.Ct. 1710.

Held: On rehearing, the Sixth District Court of Appeal again reversed defendant's conviction, finding that the motion to suppress the gun should have been granted. The Court first noted that, in its opinion (recognizing the contrary authority), even prior to *Gant*, searching the area immediately surrounding where defendant had been physically arrested was unlawful. "Searches incident to arrest" are lawful according to the rule set out in *Chimel v. California* (1969) 395 U.S. 752. Pursuant to *Chimel*, "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape . . . (and to) search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel* further recognized that "a like rule" allowed for the search of "the area into which an arrestee might reach in order to grab a weapon or evidentiary items," i.e., "the area within his immediate control." This rule, however, contrary to subsequent authority, is limited to the situation where the arrestee is physically able to lunge for weapons or destroy evidence. Once the arrestee has been removed from the area and secured, *Chimel* is no longer applicable. The Court recognized that handcuffing the suspect alone, before he has been removed and secured, may not be sufficient to thwart the applicability of *Chimel*. It also recognized that where there are other unsecured

persons at the scene, or another person whose whereabouts is unknown, *Chimel* may still apply. (*People v. Summers* (1999) 73 Cal.App.4th 288.) But in the instant case, after the protective sweep of defendant's home prior to the search, along with defendant being handcuffed and placed into a nearby patrol car, there was no longer any exigency justifying a *Chimel* search. Also, the Court rejected the People's argument that the police shouldn't lose the right to do a search incident to arrest merely because they chose to make the situation safer by handcuffing and securing the arrestee. This argument makes the erroneous assumption that the police have a "right" to do a search incident to arrest. This is not the case. To the contrary, searches incident to arrest are an exception to the general rule that warrantless searches are illegal absent an exigent circumstance. The police do not have the right to do such a search. "Only if the situation remains unstable, i.e., police officers must arrest someone but by doing so unavoidably place themselves in personal peril or incur the risk of losing evidence, may the police conduct a warrantless search in the suspect's immediate vicinity during the arrest." With the decision by the U.S. Supreme Court in *Arizona v. Gant*, the People conceded that the search following Leal's arrest was illegal. However it was also argued that because the Supreme Court recognized in *Gant* that the prior rule was "muddled," providing the officers with qualified immunity from civil liability, the officer's good faith should preclude the suppression of the gun in this case. This argument is based upon the recognition that the exclusionary rule is to be applied only when there is a "sufficient likelihood that the remedy (of exclusion) will deter future particularly undesirable conduct by the state, but only then." (*Herring v. United States* (2009) 172 L.Ed.2nd 496.) The Court here, however, found that the rule of *Chimel*, at least as applied to residences (*Gant* being a vehicle search case), despite some contrary federal court of appeal decisions, has never been in doubt under California authority. Absent an exigency (or consent), a search incident to arrest has always been unlawful. The officers' claimed "good faith" reliance upon some prior rule, therefore, does not save the search here.

Note: I question whether it has generally been understood that searches incident to arrest in a residence are illegal once the arrestee has been already been secured. Had it been understood that that was the rule, this new case wouldn't have been such a shock. While I don't see any specific California cases that have specifically authorized such a search, at least as far as in a residence is concerned (the closet being *People v. Summers*), searches incident to arrest *in a vehicle* have been approved for years by the U.S. Supreme Court (*New York v. Belton* (1981) 453 U.S. 454.). While we all know that a residence has a higher expectation of privacy than does a vehicle, I don't remember any case ever telling us that the standards for searches incident to arrest differ between vehicles and residences. *Arizona v. Gant* overruled *Belton*, reversing some 28 years of rulings that, in theory, would have upheld the search in *Leal*. But anyway, now we all know. The Court here, by the way, differentiated *Summers* (where a search incident to arrest in a residence was approved) by the fact that defendant, although handcuffed, was merely *in the process* of being led away, there was one other resident still in defendant's residence (i.e., a trailer), and a third resident was still unaccounted for. Because the police didn't have full control of the scene yet, the warrantless search for weapons and evidence was allowed. That distinction is important. Keep it in mind when making the decision whether to search or not.