The California Legal Update

Remember 9/11/2001; Support Our Troops

Vol. 20 July 5, 2015 No. 7

Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

www.legalupdateonline.com
www.cacrimenews.com
www.sdsheriff.net/legalupdates

THIS EDITION'S WORDS OF WISDOM

"*Some bring happiness wherever they go. Others whenever they go.*" (Oscar Wilde)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

***DUI and Implied Consent under V.C. § 23612*:** Last year I briefed *People v. Harris* (Apr. 11, 2014) 225 Cal. App. 4th Supp. 1 (*Cal. Legal Update*; June 29, 2014; Vol 19, #7), where the Appellate Department of the Superior Court (Riverside) found that California's "implied consent law," V.C. § 23612, is sufficient to allow for a warrantless blood draw absent a withdrawal of that consent (i.e., a "refusal") by an arrested DUI suspect. That case, however, was heard again, this time by the Fourth District Court of Appeal (Div. 2) in a decision that supersedes the Superior Court's ruling. Although the defendant's conviction was again affirmed in *People v. Harris* (Feb. 19, 2015) 234 Cal.App.4th 671, the Appellate Court did not go so far as to say that California's implied consent law may be used as a substitute for actual consent, as was held by the Superior Court in the first *Harris* decision. Rather, it is an issue as to whether, in considering the totality of the circumstances, the arrestee's "*actual consent*" was obtained at the time of

his arrest. "(W)e conclude free and voluntary submission to a blood test, after receiving an advisement under the implied consent law, constitutes actual consent to a blood draw under the Fourth Amendment." But what "*free and voluntary submission*" means will depend upon an evaluation of the totality of the circumstances, including both his words and his actions. In other words, when you arrest someone for DUI and you read him the implied consent admonition pursuant to V.C. § 23612, what you are telling him, per the Fourth District Court, is that he must now make a choice whether to reaffirm his previous implied consent, or retract it by refusing to provide a blood sample. "The implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions (i.e., suspension of his license and the use of his refusal against him at trial)." Absent an actual consent at that time, a blood draw is lawful only pursuant to a warrant or articulable exigent circumstances. The mere lack of the defendant's refusal *may* not be enough by itself to allow for a blood draw despite the arrestee's so-called implied consent under section 23612. But rather, "*the totality of the circumstances*" must be evaluated in determining whether or not an actual consent has been obtained. To put this rule into its simplest form: *Implied consent per V.C. § 23612 + circumstances consistent with consent = actual consent*. In *Harris*, for instance, defendant replied with an "*okay*" after being read the section 23612 admonition. After that, he submitted to a blood test without objection or resistance. This, the Court held, was sufficient to constitute an actual consent; i.e., an affirmation of the statutorily imposed implied consent. Recognizing, therefore, that whether or not a DUI arrestee is actually consenting to a blood draw is going to be the issue, it would benefit the prosecution greatly if you, as the arresting officer, would merely ask him if he consents to providing a blood sample. Sounds obvious, but that was not done in the *Harris* case.

***Use of Deadly Force; Lawful vs. Necessary*:** I briefed yet another "deadly force" case in the previous *Update* (Vol. 20, #6; *City & County of San Francisco v. Sheehan*), avoiding any discussion of the elephant in the room—i.e., the actual *necessity* of shooting the suspect—other than to note the U.S. Supreme Court's easily-reached conclusion that under the circumstances, shooting the "mid-50's" year-old knife-wielding female mental patient was legally justifiable. I have no issue with that conclusion, as far as the law goes. But in reading *Sheehan*, and while recognizing that I wasn't there, I again (as I so often do) questioned in the back of my mind whether using deadly force was really "*necessary*" from a *common sense*, "*what-are-my-options*?" standpoint. Many may argue that whether or not using deadly force was "*legally justified*" is the same as it being "*necessary*" to do so. I disagree. It often troubles me in particular when I read cases where officers are summoned by family members or caregivers to help a person burdened with mental issues, only to shoot and kill that person in the process. I'm not sure that was the help the family contemplated. While most such killings are legally justifiable, I also know (as a graduate of SDPD's Police Academy some 4½ decades ago) that officers are given training in how to physically, but not necessarily lethally, subdue a potentially dangerous suspect, even when he's armed with a knife, stick, or most any other weapon short of a firearm. More importantly, I know that officers are also taught how to accomplish this goal without unnecessarily exposing him or herself, or anyone else, to

any more danger than already exists. I can remember one instance in particular when my partner and I were confronted by a knife-wielding, drug-crazed 17-year old female. Rather than shoot her, as we would have been legally justified in doing, we physically disarmed and subdued her. While we broke her arm in the process, we didn't have to kill her. And this was in an era when we didn't have bullet-proof vests, pepper spray (as opposed to "Mace"), or Tasers. Although I was later severely criticized by my superiors for not having shot her (particularly since the situation was complicated by a punch-throwing teenage brother and a potted plant-throwing mother), I have always been comfortable with that decision knowing that I didn't take a life (as useless as hers may have been) on that evening. In *Sheehan*, SFPD has procedures set up for just such a situation (as described in my brief) which, had they been followed, shooting Sheehan would likely have been unnecessary. And even then, taking a knife away from a 50-something-year-old mentally ill woman should not have been any more difficult or dangerous than my partner and I disarming a 17-year-old psycho female. I'm not suggesting you do anything stupid out there on the streets, or that you hesitate for a second when deadly force is really necessary. I'm just asking you to think about it (if the circumstances permit) and consider not only whether it's legally justifiable to shoot that suspect, but more importantly, in light of the training you've been given, whether it's really *necessary* to do so. If you aren't comfortable in meeting *both* criteria, then I don't think you should be pulling the trigger. . . . (I look forward to your cards and letters.)

CASES:

***Miranda; Booking Questions*:**

People v. Elizalde et al. **(June 25, 2105) __ Cal.4th __ [2015 Cal. LEXIS 4518]**

Rule: An inmate's responses to being asked about his gang affiliation when processed into jail are inadmissible against him at trial in that such questions are those that an officer should know are reasonably likely to elicit an incriminating response.

Facts: Co-defendants Jose Mota-Avendano and Gamaliel Elizalde were convicted in state court of three counts of first degree murder, along with other related charges and enhancements. Co-defendant Javier Gomez was also convicted of one count of first degree murder plus enhancements. Their respective convictions, based largely on conspiracy and aiding and abetting theories, stemmed from confrontations between the defendants' gang, the Varrio Frontero Loco (VFL), a subgroup of the Sureno criminal street gang, and the Norteno street gang, both active in Contra Costa County. Co-defendant Elizalde took over the VFL's leadership in 2007 when its prior leader went into hiding after committing another murder. Under Elizalde, however, the gang began to deteriorate. So to reestablish its power, Elizalde ordered VFL members to "put in more work" by assaulting Nortenos, letting them "know we around, we ain't gone." Mota was among those put in charge of the gang's efforts. Based upon directives from Elizalde and Mota, gang members made incursions into Norteno territory, looking for and confronting Norteno gang members. Between December 22, 2007, and April 25, 2008, three Norteno gang members were killed in three separate incidents instigated by Elizalde and Moto, and in one case, by Gomez personally. All three defendants were eventually arrested and booked into the Contra Costa

County jail. Upon booking, a review and interview of each new inmate is routinely conducted by jail personnel concerning an inmate's pending charges, gang affiliation, and need for protective custody. The purpose of this procedure is to maximize the safety of all inmates and jail employees by segregating rival gang members from each other. Upon Mota's booking (co-defendant Mota being the sole issue on this appeal), Contra Costa Deputy Sheriff Bryan Zaiser, using a standard questionnaire, and without a *Miranda* admonishment, asked him about his gang affiliation. Mota told Deputy Zaiser that he was "affiliated with the Sureno street gang," specifically VFL, and that he was an active gang member. Deputy Zaiser, who knew only that Mota had been charged with murder but was unaware of any of the details or whether it was gang-related, later testified that his sole purpose in asking this question was to ensure the safety of jail inmates and personnel and *not* to investigate the charges. Mota's admissions concerning his gang affiliation were admitted into evidence against him at trial over his objection, the trial court ruling that as a part of a "booking interview," *Miranda* was inapplicable. Upon Mota's conviction (and 100-years-to-life prison sentence), the First District Court of Appeal (Div. 2) affirmed his conviction, but ruled that the trial court erred when it admitted into evidence Mota's statements about his gang affiliation (although the error was harmless under the circumstances). (*People v. Elizalde et al.* (2013) 222 Cal.App.4th 351; review granted.) Mota appealed.

Held: The California Supreme Court unanimously affirmed. In the Court's decision, after citing some basic *Miranda* rules (e.g.: "(T)he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."), the Court went on to note the long-standing exception for "*booking questions*." To trigger the protections under *Miranda v. Arizona*, an in-custody suspect must be subjected to an interrogation. An "interrogation" is defined as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." An exception is provided for questioning that involve questions "normally attendant to arrest and custody," more often referred to as "booking questions." It is only when the questioning results in the in-custody suspect providing "testimonial evidence" that *Miranda* is implicated. "Biographical data," provided upon a suspect's booking and necessary to complete booking or pretrial services, is not generally considered to be testimonial. In the instant case, the issue was whether a prisoner's assertion of gang affiliation upon booking is testimonial or merely biographical data. In discussing this issue, the Court noted the prior decision of *People v Gomez* (2011) 192 Cal.App.4th 609, where the Fourth District Court of Appeal (Div. 2) allowed an inmate's admission of gang affiliation obtained under very similar circumstances to be used in evidence against him, finding that booking deputy's questions to be "reasonably related to the police's administrative concerns." The Court here declined to follow *Gomez*, noting that merely because booking questions may have an administrative purpose does not automatically make the responses admissible against the defendant at trial. Nor is it dispositive that the booking deputy asked the questions for a non-investigatory purpose, or that it was not done as a pretext for eliciting incriminating information. In fact, the intake deputy's subjective state of mind is irrelevant. The only question is, at least when asking about one's gang affiliation: *Were the questions asked ones that an officer should have known are reasonably likely to elicit an incriminating response*? Given California's enhanced punishments for gang-related criminal offenses, including murder, Mota's admission to being an active member of a criminal street gang had significant penal consequences for him. As such, questions about his gang affiliation

are something that an officer should have known are reasonably likely to elicit an incriminating response. Therefore, for his responses to be admissible in evidence against him, the questioning on this issue should have been preceded by a *Miranda* admonishment and wavier. However, the Court found that in light of other properly admitted evidence of Mota's gang affiliation, use of his jail responses to these questions was harmless beyond a reasonable doubt. His conviction, therefore, was affirmed.

Note: The Court further rejected the argument that the so-called "public safety exception," where un-*Mirandized* incriminatory statements are solicited when necessary for the public's safety (e.g., location of a missing firearm), did not apply despite the People's argument that information about an inmate's gang affiliation is necessary to avoid gang violence in the jail, protecting both the inmate and jail officers. Too bad. I thought that was a pretty good argument. But lastly, the Court also noted that there's nothing wrong with asking about an inmate's gang affiliation. No error occurred here until the prosecution sought to use Mota's responses to these questions at trial. So the rule of this case is more important for prosecutors to know, when seeking the admission of evidence, than for jail deputies, when processing new inmates.

***Hotel/Motel Registration Records; Inspection Thereof*:**

City of Los Angeles v. Patel **(June 22, 2015) __ U.S. __ [2015 U.S. LEXIS 4065]**

Rule: A request for a non-consensual inspection of a hotel or motel's guest registry records requires a pre-inspection review by a neutral decision-maker.

Facts: The City of Los Angeles enacted a Municipal Code provision regulating the collection, maintaining, and inspection of some very specific and detailed identification information on hotel residents as they register. (Los Angeles Municipal Code §41.49) Among the Code's provisions is a requirement that these records be kept upon the premises "in the guest reception or guest check-in area or in an office adjacent" thereto for a period of 90 days. The Code goes on to provide that the hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection" so long done at a time and in a manner, if possible, "that minimizes any interference with the operation of the business." (Section 41.49(3)(a)) A hotel operator's failure to make his or her guest records available for police inspection is a misdemeanor punishable by up to six months in jail and a $1,000 fine. (Section 11.00(m)) These requirements were understood to apply to motel records as well. Respondents (i.e.; "*Patel*"), a group of motel operators and a lodging association, sued the city of Los Angeles in federal court challenging the constitutionality of §41.49(3)(a), seeking declaratory and injunctive relief. Specifically, Patel argued that allowing such a warrantless inspection of their guest register records, absent their (the hotel or motel management's) consent, constituted a violation of the Fourth Amendment and was therefore "facially unconstitutional." In a bench trial, the federal District Court judge found for the City of Los Angeles, ruling that the hotel and motel operators lacked a reasonable expectation of privacy in such records. The Ninth Circuit Court of Appeal initially affirmed. However, upon rehearing by an en banc (11 justice) panel of the Ninth Circuit, the trial court's decision was reversed, with the Court finding that the challenged registry inspections constituted a search requiring a warrant or consent, and that absent a pre-inspection judicial review, was illegal. (*Patel v. City of Los Angeles* (9th Cir. 2013) 738 F.3rd 1058; cert granted.) The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a split (5-to-4) decision, affirmed the Ninth Circuit's ruling, thus reversing the decision of the trial court. After expending a great amount of ink finding that a "facial challenge" to the constitutionality of a statute itself (as opposed to a more limited challenge to its application under certain circumstances) is permissible, the Court went on to consider the constitutionality of section 41.49(3)(a)'s provisions that allow police officers to inspect hotel and motel guest registration records without a court order, consent, or an exigency. No one argued that such an inspection did not constitute a search. Law enforcement searches are "per se unreasonable" absent prior approval by a judge or magistrate, "subject only to a few specifically established and well-delineated exceptions." This rule "applies to commercial premises as well as to homes." One of these limited exceptions is when the search falls into the general category of a "special needs" administrative search; i.e., a search done for a purpose other than conducting a criminal investigation. The Court here made the assumption that searches authorized by §41.49 serve just such a "special need;" i.e., to ensure compliance with the statute's recordkeeping requirements, which in turn deters criminals from operating on the hotels' premises. But only a very small category of such searches are lawful absent some sort of pre-search review by a neutral decision-maker, such as when the commercial establishment searched constitutes a "pervasively" or "closely regulated" business. Such a business is limited to those that "have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise" (e.g., businesses involving the sales of liquor or firearms, automobile junkyards, and mining). The Court found that hotels and motels do *not* fall into this category. Thus, to be lawful, some sort of pre-inspection review before a neutral decision-maker is necessary. This, however, does not necessarily have to be a search warrant. As an administrative search, the Court found that an administrative subpoena, with the hotel/motel management given the opportunity to bring a motion to quash prior to having to reveal the records, suffices. "(A)n administrative search may proceed with only a subpoena where the subpoenaed party is sufficiently protected by the opportunity to 'question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court'" Or, an "administrative warrant," including one that is issued ex parte (as is a normal search warrant), may be sought, compelling the hotel/motel management to turn over the requested records. Because section 41.49(3)(a), on its face, does not provide for any such pre-inspection review by a neutral decision-maker (i.e., a judge or magistrate), it is unconstitutional and unenforceable.

Note: I'm totally inexperienced in the field of obtaining administrative warrants or subpoenas (a common tool used for building or safety inspections), and haven't been able to find any specific regulations for guidance. And the Court here wasn't of much help, noting at one point only that, "(t)hese subpoenas, which are typically a simple form, can be issued by the individual seeking the record—here, officers in the field—without probable cause that a regulation is being infringed." So unless someone knowledgeable in this area can direct me otherwise, I'm assuming you would go through the normal procedures for obtaining a subpoena or search warrant, with the exception that it isn't required that you establish probable cause. Also note that the Court ruled that other standard exceptions to the search warrant requirement apply, such as consent or an articulable exigency. So it's okay to ask, knowing that the vast majority of hotel and motel managers are going to be cooperative. Should an administrative subpoena have to be used, the Court further okays the securing of the records pending a court's review, if necessary to prevent a hotel or motel employee from altering them. And lastly, note that the guest's interests

in the privacy of such records are not at all discussed in this case. However, prior case law has held that a hotel or motel guest has absolutely no privacy interests in such records. (*United States v. Cormier* (9th Cir. 2000) 220 F.3rd 1103, 1107-1108.)

***Probable Cause to Arrest*:**

***Yousefian v. City of Glendale* (9th Cir. Mar. 5, 2015) 779 F.3rd 1010**

Rule: A jury's acquittal of a criminal defendant at trial is not relevant to the civil issue of whether there was probable cause to arrest him in the first place.

Facts: Plaintiff Robert Yousefian called the Glendale Police Department to report that he had been attacked by his father-in-law, Matavos Moradian, in his home. Officer Michael Lizarraga and three other officers responded. When they got there, they found Moradian, an elderly and "infirm" man, lying on the floor, bleeding profusely from a head wound. Plaintiff himself had no significant injuries. Plaintiff's story was that he'd asked Moradian and his wife to come to his house to discuss the whereabouts of plaintiff's wife, Nora. But they'd gotten into an argument which resulted in Moradian attacking plaintiff with a cane. Plaintiff admitted to striking Moradian in the head with a glass candle-holder, but said that he did so in self-defense. Moradian, backed up by his wife, denied any such assault on plaintiff. Believing Moradian and his wife, Officer Lizarraga arrested plaintiff, booking him into jail on ADW and elder abuse charges while documenting the circumstances in his reports. Moradian was transported to the hospital where Officer Lizarraga was met by the missing Nora. She told Officer Lizarraga that plaintiff (her husband) had drugs in his car and home. Officer Lizarraga declined to go looking for the drugs, but told Nora to contact him if she found them. Nora did this, claiming to have recovered drugs from plaintiff's car. Officer Lizarraga met with her and retrieved the drugs, booking them into evidence. He did not, however, re-arrest plaintiff. Soon thereafter, Officer Lizarraga began a sexual relationship with Nora which lasted about a year, eventually ending before the trial of this matter. Officer Lizarraga told neither his supervisors nor the prosecution about the affair until shortly before trial. Detective Petros Kmbikyan conducted a follow-up investigation of the criminal charges. In interviewing plaintiff, he denied any knowledge of the drugs, claiming that Nora had planted them in his car. At the preliminary examination, after the prosecution had established its case, plaintiff presented evidence of voicemail messages left by Nora threatening retribution if plaintiff called the police which, of course, he did after his altercation with Moradian. The magistrate held plaintiff to answer on the assault and elder abuse charges, but dismissed the drug possession charges for lack of probable cause, concluding that Nora had fabricated evidence. By the time the case came to trial, Officer Lizarraga's affair with Nora had come to light. At trial, Officer Lizarraga acknowledged his relationship with Nora which he characterized as "friends with benefits." A jury acquitted plaintiff of the remaining assault and elder abuse charges. After an internal investigation, Officer Lizarraga's was terminated for conduct inconsistent with the proper administration of the department and conduct unbecoming of an officer. Plaintiff sued Lizarraga and the city of Glendale in federal court for false arrest and malicious prosecution. The district court granted summary judgment in favor of the civil defendants, dismissing the case. Plaintiff Yousefian appealed.

Held: The Ninth Circuit Court of Appeal affirmed. *The Assault and Elder Abuse Charges*: The absence of probable cause is a necessary element of false arrest and malicious prosecution

claims. The Court found that "there was indisputably probable cause to arrest and prosecute (plaintiff) for assault and elder abuse." Finding an elderly man bleeding profusely from a head wound which was admittedly inflicted by a younger man who, himself, did not have any significant injuries, particularly when the victim's account is supported by a witness, clearly constitutes probable cause. The officer's later romantic relationship with the wife of the arrestee is irrelevant to whether or not there was probable cause to arrest him at the time of the event. And the fact that it was the plaintiff himself who called the police to the scene is irrelevant. "(P)robable cause requires only that those facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe that the suspect has committed . . . an offense." And while exculpatory evidence may not be ignored, it wasn't in this case. Officer Lizarraga took plaintiff's version of the facts into account, fully documenting this evidence in his reports. He simply chose to believe the victim's version which was not unreasonable given the circumstances. The fact that a jury later determines that there was insufficient evidence to establish guilt beyond a reasonable doubt does not mean there wasn't sufficient probable cause to arrest. The federal district court's granting of the civil defendant's summary judgment motion was therefore proper. *The Drug Charges*: As for the drug charges, in alleging a "malicious prosecution," plaintiff must demonstrate a Fourth Amendment seizure or the violation of some other "explicit textual source of constitutional protection." Here, plaintiff was never arrested on the drug charges. Those charges were merely added to the complaint, only to be dismissed by the preliminary examination magistrate. The Court could find no prejudice to the plaintiff under these circumstances. The district court's dismissal of plaintiff's lawsuit as it related to the drug charges was therefore also justified.

Note: This case, of course, highlights the differences between having "*probable cause*" in the field and "*beyond a reasonable doubt*" in the courtroom. These two "*standards of proof*" are distinctively different; a fact of life not understood by most civilians, and even some cops. But the Court also couldn't resist making a few comments about (former) Officer Lizarraga's inability to keep it in his pants, so to speak. Referring to his affair with Nora as "reprehensible," the Court quite correctly noted that "such conduct by police officers puts in jeopardy the integrity of legitimate prosecutions and jeopardizes defendants' right to a fair trial." The only comment from the Court with which I *disagree* is its conclusion that Officer Lizarraga's actions didn't hurt this particular case. *Sure it did!* Not to mention giving the prosecutor just one more headache with which to deal before trial, it had to have destroyed Officer Lizarraga's credibility as far as the jury in the criminal action was concerned. My personal definition of a "*jury*" is "*twelve people looking for a reason to acquit*." I've always maintained after three decades as a trial attorney that in order to obtain a conviction, a jury absolutely must *like and trust* both the victim *and* the principle cop (or cops) involved. The defendant may be guilty as hell, but if my jury dislikes and/or distrusts any of the police officers who are central to my case, they will find some justification for an acquittal. Screwing around with a defendant's wife (or a witness, or anyone else even remotely involved in a case) is inexcusable. *Period*. End of debate.

***Failure to Preserve Evidence*:**

United State v. Zaragoza-Moreira **(9th Cir. Mar. 18, 2015) 780 F.3rd 971**

Facts: On December 22, 2011, in the early morning hours, defendant attempted to enter the United States from Mexico at the San Ysidro Port of Entry via the pedestrian line. However, she

was sent to the Secondary Inspection area because of a "computer-generated referral" (whatever that is). Upon being asked by a Customs and Border Protection Officer whether she had any weapons or sharp objects on her, in preparation to being patted down, defendant "blurted out" that she had "packages" on her. A package containing .34 kilograms of heroin was taped to her lower back and another containing .42 kilograms of methamphetamine was recovered from her abdomen. Defendant had been the victim of a gang-related shooting when she was 13, some 12 years earlier, resulting in head and other injuries. As a result, she suffered from seizures, depression, and memory loss. Her overall cognitive and adaptive skills fell in the mild range of mental retardation and that she suffered from a loss of intellectual functioning capacity. Her adaptive skills resembled those of an average 8 year old. In an hour-long interview conducted by Homeland Security Investigations Agent Ashley Alvarado, defendant claimed that she'd been in Tijuana with a friend, Karen, for three days before deciding to return home. However, two men, "Hernan" and "Chino," who were allegedly connected to the "Antrax of El Mayo" drug cartel, along with Karen, pressured her into taping drugs to her body when she crossed the border. Defendant said she was not paid to smuggle the drugs and didn't want to do it, but that Hernan and Chino had threatened her daughter and mother if she didn't cooperate. Defendant repeatedly claimed that while standing in line to cross into the United States, she purposely tried to "attract attention by 'making a lot of noises so I could be noticed,' and by making herself 'obvious.'" "Yeah, I made it obvious. I was making—I wanted to be known. I didn't want to do it." She said that she and Karen had been in the pedestrian line earlier, around 4:00 a.m., but that Chino and Karen had pulled her from the line because she had purposely tried to loosen the packages of drugs that were attached to her body. She stated that when placed back into line, she had "wiggled around," "patted her stomach," and "threw her passport on the ground," to draw attention to herself. Defendant said that she did not directly alert border inspectors because she "was scared because Karen was with [her]" in the line. The plan was for them all to meet in a restaurant after crossing the border at which time Hernan and Chino would collect the packages. Defendant denied knowing what type of drugs she was transporting, stating that she did not ask Hernan or Chino because "[t]hey're going to get paranoid and they're going to kill me." On December 23rd, charges were filed in federal court. Five days later (Dec. 28), knowing that the pedestrian line awaiting entry into the United States is videotaped, defendant's attorney sent a letter to the Assistant U.S. Attorney assigned to the case requesting the preservation of evidence. The letter specifically asked "that any and all videotapes . . . that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest [of defendant] in this case be preserved." Defendant was subsequently indicted by a federal grand jury of one count each of importing heroin and methamphetamine. On February 23, 2012, defendant's counsel filed a formal motion to compel discovery and preserve evidence, specifically referencing the video recordings made at the Port of Entry. Following a hearing on February 27, 2012, the district court ordered the government to preserve the video evidence. In line with the court's order, on February 28, 2012, the U.S. Attorney's Office (for the first time) requested the Port of Entry video footage from the day of Zaragoza's arrest. However, U.S. Customs and Border Protection informed the U.S. Attorney that the video footage from December 22, 2011, had been automatically recorded over around January 21, 2012, and no longer existed. Defendant thereafter moved to dismiss the indictment due to the government's destruction of the video footage, denying her of her "due process" right to present a defense of duress. Her motion was denied. Defendant pled guilty, reserving the right to appeal the district court's denial.

Held: The Ninth Circuit Court of Appeal reversed. Defendant's proposed defense was to be that she committed the alleged crimes only under duress. "Duress" is an affirmative defense, requiring the defendant to establish that she wouldn't have committed the offense (1) had she not been forced to do so under an immediate threat of death or serious bodily injury, (2) that she had a well-grounded fear that the threat would be carried out, and (3) that she had no reasonable opportunity to escape. Both the trial district court and the Ninth Circuit found that the destroyed video was potentially useful evidence to support defendant's claim of duress. However, the fact that such evidence has been destroyed does not automatically establish a due process violation. An innocent destruction of evidence does not provide a defendant with grounds for dismissal. It must first be shown that the unavailable evidence (1) possessed exculpatory value that was apparent before the evidence was destroyed, (2) was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means, and (3) that the government acted in bad faith in failing to preserve the potentially useful evidence. While the trial court didn't believe that defendant had met these requirements, the Ninth Circuit disagreed. "Potentially useful evidence" is evidence that might have exonerated the defendant. Both the trial court and the Ninth Circuit agreed that the videotape constituted potentially exculpatory evidence in that it might have supported defendant's arguments that she had attempted to alert someone to her dilemma, and that Karen, standing next to her in line, was "overseeing and controlling" her. The Ninth Circuit further ruled that there was no other "comparable evidence" available. The fact that defendant herself could testify to her actions while in line, or that the Border Patrol Agent Alvarado's testimony concerning defendant's claimed actions could establish the same, was not enough to measure up to the potential value of the destroyed videotape. As to the government's "bad faith," the Ninth Circuit ruled that there was evidence that Agent Alvarado had purposely suppressed evidence of defendant's efforts to make herself known to authorities. Agent Alvarado was aware that defendant's claimed attempts to draw attention to herself would be on the videotape of the pedestrian line awaiting entry into the United States, testifying that she "overlooked" retrieving the video footage because it was "just something I didn't think about doing." Further, Agent Alvarado's probable cause statement omitted any reference to defendant's claims of duress, as did two other follow-up reports. It wasn't until the issue was brought up by the defense in a formal motion that the agent admitted to having been told by defendant that she was trying to make herself obvious, that evidence of such a claim would be on the videotape, and that she had failed to preserve it. The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. Agent Alvarado's failure to preserve the videotape in this case, or to document defendant's claimed efforts to alert authorities to herself by her actions (referred to by the Court as "*glaring omissions*"), constituted evidence that the agent made "a conscious effort to suppress exculpatory evidence," thereby acting in bad faith. As a result, defendant's due process rights were violated. The case was therefore remanded to the trial court with instructions to dismiss.

Note: The Court, when discussing the "bad faith" element of a due process violation, also commented on the U.S. Attorney's failure to act on defense counsel's "preservation of evidence" letter. Specifically, the Court found "the government's failure to take action in response to defense counsel's letter in the instant case (to be) particularly disturbing." But because bad faith had already been established via the Agent Alvarado's actions, the Court declined to rule on whether the U.S. Attorney was guilty of the same. *But the warning is clear*. While it is perhaps understandable (at least to one who has been in the trenches) that in the press of a heavy

caseload, both the border patrol agent and the Assistant U.S. Attorney might have innocently put such issues (such as the collection of a relevant videotape) on the back burner, the reality of the situation is that you cannot fall into such a habit if you expect to avoid sanctions by the Court later on down the line. Both law enforcement, and prosecutors, have a professional and ethical duty to collect and/or use in court not only *inculpatory* evidence, but *exculpatory* evidence as well. This rule should go without saying. But as evidenced by this case, it's worthy of at least a reminder.