The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*The right to be heard does not include the right to be taken seriously*." (Anonymous)

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ADMINISTRATIVE NOTES:

Miranda and the Fifth Amendment: I've just finished updating a 416-page training outline on the law of *Miranda* and Fifth Amendment Self-Incrimination rules, with a separate table of contents, and putting it out as the Third Edition. The Second Edition ("*Miranda and the Law*") was published by the California District Attorneys' Association (CDAA) a few months ago, but was distributed to a very limited audience. The First Edition was published by CDAA some 28 years ago. This third updated edition contains almost a year's worth of new statutes and case law, and is available via e-mail to anyone who wishes to have it (with the stipulation that it not be used for personal profit). Just let me know and I'll send it to you. No extra charge.

***Second Amendment Update; Concealed Carry*:** In 2016, the Ninth Circuit Court of Appeal ruled in *Peruta v. County of San Diego* (9th Cir. June 9, 2016) 824 F.3rd 919, that the Second Amendment does *not* protect a private citizen's right to carry a concealed firearm in public. As such, any prohibition or restriction a state might choose to impose on concealed carry, including a requirement that an applicant for a CCW permit show "*good cause*" "*however that term may be defined*," is lawful and enforceable. This means that a California County Sheriff has the power to impose whatever "*good cause*" restrictions he or she so chooses upon anyone seeking to obtain a CCW permit. On June 26th of this year, a 7-to-2 majority of the U.S. Supreme Court (Justices Thomas and Gorsuch dissenting) declined to grant certiorari in this case. (*Peruta v. California* (June 26, 2017) 2017 U.S. LEXIS 4063.) In other words, the Ninth Circuit gets the last word on this issue; i.e., *Peruta v. County of San Diego*, *supra*, is now the law, at least for the states covered by the Ninth Circuit, which includes California. Note, however, that the Court, in *Peruta*, did say that the constitutionality of California's "*Open Carry*" restrictions (e.g., P.C. §§ 25850 [prohibiting carry of a loaded firearm], and § 26350 [prohibiting open carry of an unloaded firearm]) has yet to be decided. (pg. 927) So we'll have to wait and see on that issue.

CASES:

***Miranda Invocations*:**
***Consent Searches of a Residence*:**
***Inevitable Discovery*:**
***Protective Orders per Family Code §§ 6218 & 6389*:**
***Search Warrants*; *Redacting Illegally Obtained Information*:**

***People v. Superior Court (Corbett)* (Feb. 14, 2017) 8 Cal.App.5th 670**

Rule: (1) An in-custody suspect's repeated refusals to discuss the circumstances of his crime is an invocation of his *Miranda* rights, rendering his subsequent responses to a continued interrogation inadmissible. (2) For a consent search of one's residence to be lawful, the consent must have been freely and voluntarily obtained. (3) The fact that a search warrant could have been obtained, or was in fact obtained prior to a second search, does not excuse an earlier illegal warrantless search of a residence under the inevitable discovery doctrine. (4) The inevitable discovery doctrine is also not triggered by the fact that P.C. § 1524(a)(11) allows for a search warrant to seize firearms and ammunition subject to a protective order when the suspect is not properly advised of his obligations for surrendering his firearms, he did not refuse to do so, and/or is not given the opportunity to do so. (5) After redacting illegally obtained information from a search warrant affidavit and reevaluating the remaining information, a search warrant will be upheld only if the redacted affidavit continues to support a finding of probable cause.

Facts: In response to a 9-1-1 call, police found defendant wandering around inside actress Sandra Bullock's house at 6:45 a.m. on June 8, 2014, without permission. On his person were found writings (along with photographs of Bullock) indicating his obsession with the actress. He also had a Utah concealed weapons permit. Later that day, the arresting officer obtained an emergency protective order notifying him that he could no longer own or possess firearms, and served it on the in-custody defendant. However, the order that was used was outdated and incomplete, failing to specify the procedures for relinquishing his firearms. LAPD Detective Jeffrey Dunn and two other detectives questioned defendant in jail the following day. Before the interrogation, however, it was discovered via the California Law Enforcement Telecommunication System (CLETS) that defendant had eight firearms registered to him. Pursuant to the emergency protective order just served on him, he was restricted from possessing, owning, or having access to any firearms. Upon being advised of his *Miranda* rights, defendant was asked if he wanted "*to talk about what happened with—with Sandy*?" Defendant responded; "*Not—not really. I don't want to talk about it. No*." When asked if he didn't want to help the detectives understand why he was there, defendant said: "*Right, I don't want to talk about it*." Despite (as later conceded by the prosecution) this obvious invocation of his right to remain silent, the detectives persisted. In response to Detective Dunn's question; "*Okay. Well, how about off the record*? *Do you want to talk about it off the record*? *We can't use anything that we've discussed*," defendant invoked again. Despite Detective Dunn's continued attempts to get him to change his mind, defendant repeatedly indicated that he did not want to talk. Detective Dunn therefore changed the subject to the guns, asking for permission to enter defendant's residence to retrieve the guns they knew he owned. To this request, defendant responded with an ambiguous "*Mmnh-mmnh.*" Despite repeated requests for a permissive search of his residence, threatening also to search his parents' residence if he didn't tell them where his guns were located, the best response the detectives could get was: "*You guys do what you have to do*." Asked if he lived with his parents, defendant responded; "*Uh, no. I don't—I don't want to talk about it*." A frustrated Detective Dunn asked; "*You don't want to talk about anything*?" Defendant told him "*No*." But Detective Dunn continued anyway. The detective's persistence finally resulted in defendant admitting to being in Bullock's house, answering questions about why he was there, what he intended to do in the house, how he was able to enter the house, and

what he did while in the house. Returning the discussion to defendant's guns, Detective Dunn again threatened to get a search warrant to search his parents' home (" . . . *with a pry bar and a battering ram and disrupt your mother and father's life to get your guns*.") in addition to his own residence if defendant didn't tell him where his guns were located. Defendant eventually told the detectives that his guns were in his own house, giving them the combinations to two safes where they were stored. He thereafter gave them permission to search his home for the guns, signing a written consent. Pursuant to this consent, a warrantless search of defendant's home resulted in the discovery of the two safes discussed, plus a third. Seven firearms, and "a large amount" of ammunition, were recovered from the two safes for which the officers had the combination. The weapons that were recovered were found to be fully automatic or otherwise illegal. A search warrant was then obtained asking for authorization for a second search of defendant's residence, specifically to open the third safe and to look for the eighth firearm that had not yet been found. Charged in state court with burglary, stalking, and 24 other counts related to having illegal firearms, defendant moved to suppress the statements he made during the June 9th interrogation and the evidence recovered during the initial June 10th warrantless search of his home. The prosecution did not oppose defendant's motion as to his incriminating statements. As to the search, the People argued that defendant had consented. If not, however, it was the People's argument that the guns would have been inevitably discovered anyway in the subsequent search that was authorized by a search warrant. The trial court didn't buy it and suppressed all the firearms and ammunition. The People appealed, petitioning for a writ of mandate.

Held: The Second District Court of Appeal (Div. 7) affirmed:

(1) *Miranda Violation and the Fifth Amendment*: The Court first ruled that "the police violated the Fifth Amendment by failing to honor (defendant's) unambiguous invocation during custodial interrogation of his right to remain silent." (But see *Note*, below) The People conceded this point.

Defendant's incriminatory statements were suppressed.

(2) *The Warrantless Consent Search*: The primary issue contested on appeal was the admissibility of the weapons and ammunition found in defendant's home during the first search, done without a warrant but rather with defendant's consent. A consent search, however, to be valid, must be voluntarily obtained. Here, the trial court ruled that "the officers overcame the defendant's willingness to resist and that he did not meaningfully consent." The Appellate Court agreed. Even though defendant eventually consented in writing, that consent was not obtained until after he had repeatedly asserted his rights, and only after the officers threatened to disrupt defendant's parents' lives by searching their residence as well. As ruled by the trial court, "by the time (defendant) put his name and signature on that page (i.e., the written consent form), that did not mean much."

(3) *Inevitable Discovery*: Alternatively, the People argued that because a search warrant was eventually obtained for defendant's home, the evidence recovered during the first illegal search would have been inevitably discovered anyway. In discussing this issue, the Court cited the requirements of the so-called "*inevitable discovery*" doctrine: For inevitable discovery to apply, being closely related to the "independent source doctrine," "(the) question . . . is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made

has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" "If the prosecution can establish by a preponderance of the evidence that the information (or evidence) ultimately or inevitably would have been discovered by lawful means . . . the evidence should be received." The Court ruled here that "inevitable discovery" did *not* apply. Per the Court, the People failed present sufficient evidence supporting the argument that the police had or would have developed probable cause to suspect that firearms were located at his home if no constitutional violation had occurred. Even though it was known that defendant was the registered owner of multiple firearms, and that he had at least one gun-related permit, there was no evidence aside from what was obtained unconstitutionally that law enforcement had any information concerning where defendant lived or any factual basis to suspect that the firearms registered to him would be found in his home or at any particular location (but see "*Note*," below). The People conceded that the police lacked knowledge that defendant had his own residence, and if so, where it was, prior to the interrogation. Also, it is a clear rule of law that the inevitable discovery doctrine does not apply when officers have probable cause to apply for a warrant but fail to do so. The officers' later decision to seek a search warrant after they subsequently decided that they needed to return to defendant's house to search for something they did not find during the earlier illegal search, and to search the third safe that they had seen during the first illegal search, does not alter or legitimize the earlier decision to bypass the warrant requirement, relying upon an unconstitutionally obtained consent to perform the search.

(4) *Family Code §§ 6218 & 6389*: The People further argued, however, that P.C. § 1524(a)(11) entitled them to search defendant's residence for firearms, he having been served with an emergency restraining order, and that such a search would have inevitably resulted in the recovery of everything found in the first, warrantless search. The Court rejected this argument as well. Family Code section 6389(a) makes it illegal for a person subject to a protective order to own, possess, purchase, or receive a firearm or ammunition while the protective order is in effect. P.C. § 1524(a)(11) provides for the issuance of a search warrant when the property or things to be seized include a firearm that is owned by, or in possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms pursuant to Fam. Code § 6389, if a prohibited firearm is possessed, owned, in the custody of, or controlled by a person against whom a protective order has been issued pursuant to Fam. Code § 6218, the person has been lawfully served with that order, and the person has failed to relinquish the firearm as required by law. However, in this case, although defendant was undisputedly served with an emergency protective order while in custody, the officer used an outdated form that failed to give him notice of any firearms relinquishment obligations as is required by Fam. Code § 6389. Also, the search warrant that was eventually obtained was not sought on this basis. The affidavit submitted in support of the search warrant application mentioned that defendant had been served with a protective order but did not assert that he had refused or failed to comply with his obligations pursuant to the protective order. The search warrant affidavit also did not describe any requirement that defendant surrender his firearms, that he had refused to do so, or that he had even been given the opportunity to do so. Therefore, because P.C. § 1524(a)(11) was not used as the basis for obtaining this warrant, nor were the relinquishment requirements of Family Code §

6389 met, the inevitable discovery doctrine cannot be used justify the earlier warrantless search of defendant's home on his basis.
(5) *Validity of the Search Warrant*: Lastly, the People argued that the search warrant that was eventually obtained at least justified the recovery of the evidence found in the third safe. The Court, again, disagreed. The rule is that when an affidavit supporting a search warrant contains information derived from unlawful conduct as well as other untainted information, the reviewing court must excise or redact all the tainted information, and may then uphold the warrant if the remaining information establishes probable cause. Here, the Court found that without the redacted, illegally obtained information, there was not sufficient information left that would support a finding of probable cause. The evidence recovered as a result of the execution of the search warrant on defendant's home must therefore also be suppressed.

Note: All this (at least as to the search issues) could have been avoided had the detectives merely errored on the side of caution and obtained a search warrant in the first place. If there was insufficient probable cause to do so, then the authority of P.C. § 1524(a)(11), after insuring that all the legal hoops required by Family Code §§ 6218 & 6389 were complied with, should have been used to get a warrant. Although it is apparent that the officers did not know at the time where defendant lived, it is likely that a little investigation (the identity of defendant's parents, appearing on the TV news, was known and could have been interviewed) would have likely resulted in the discovery of that information. As for the *Miranda* violation, the Court here erroneously identifies the officer's act of intentionally ignoring defendant's invocation to remain silent with a constitutional Fifth Amendment self-incrimination violation. *Wrong*! The Fifth Amendment self-incrimination privilege is a "*trial right*;" not one that is implicated during a pre-trial interrogation. (See *Chavez v. Martinez* (2003) 538 U.S. 760; *United States v. Patane* (2004) 542 U.S. 630; and *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 727; "(T)he right against self-incrimination is not itself violated until statements obtained by compulsion are used in criminal proceedings against the person from whom the statements were obtained.") *Miranda* was violated. But the *Miranda* rule, although based upon constitutional principles, is but a "*prophylactic*" procedure used to insure that an in-custody suspect's Fifth Amendment self-incrimination privilege is respected. (*Dickerson v. United States* (2000) 530 U.S. 428.) Repeatedly ignoring defendant's attempt to invoke may have given rise to a constitutional "due process" violation. (*People v. Neal* (2003) 31 Cal.4th 63.), thus implicating the Constitution anyway. But this theory was not discussed. Lastly, the Court also held that there was no evidence that defendant's firearms might be found in his home. This ignores prior authority to the effect that "(*I*)*t is no great leap to infer that the most likely place to keep a firearm is in one's home*." (*People v. Lee* (2015) 242 Cal.App.4th 161.)

***Miranda Admonishments*:**

***United States v. Loucious* (9th Cir. Feb. 7, 2017) 847 F.3rd 1146**

Rule: A *Miranda* admonishment need only reasonably convey to a suspect his rights as required by *Miranda*.

Facts: Defendant was a passenger in a vehicle stopped for speeding by Officer Sherwood of the Las Vegas Metropolitan Police Department. A radio check revealed that both the driver and defendant had outstanding warrants for their arrest. So both were taken from the car and arrested. A search of the vehicle resulted in the recovery of a revolver in the back seat near where defendant had been seating. A search warrant was obtained and the gun was seized. After his arrest, another officer at the scene (Officer Costello) advised defendant of his *Miranda* rights, reading to him the following: "*You understand you have the right to remain silent. You understand that anything you say can be used against you in a court of law. You have the right to the presence of an attorney during questioning and if you cannot afford an attorney, one will be appointed before questioning. Do you understand those rights*?" In reading this admonishment, Officer Costello failed to specifically tell defendant that he had the right to consult with an attorney "*prior*" to being questioned. Defendant made an incriminating statement (admitting to having "touched" the gun on an earlier occasion) that the U.S. Attorney sought to use at his federal trial for being a felon in possession of a firearm (per 18 U.S.C. §§ 922(g)(1) & 924(a)(2)). Prior to trial, defendant filed a motion to suppress both the gun and his statements, arguing the car was searched illegally (see "Note #2," below) and that the *Miranda* admonishment failed to include his right to *consult* with an attorney *prior* to questioning. His motion to suppress the gun was denied, it being ruled that defendant did not have standing (being a mere passenger in the vehicle) to challenge the legality of the search. But the motion to suppress his incriminating statement was granted, the trial court ruling that the admonishment was defective. The People appealed this latter ruling.

Held: The Ninth Circuit Court of Appeal reversed. The issue on appeal was whether, for a *Miranda* admonishment to be legally sufficient, an in-custody suspect must specifically be told that he has the right to consult with an attorney prior to questioning. Defendant argued that inclusion in of this right in the admonishment is important so that a suspect may make an informed decision as to whether he wants to subject himself to questioning. But the Supreme Court has not required any "precise formulation of the warnings given" to a suspect, noting that a "talismanic incantation" is not necessary to satisfy *Miranda*'s "strictures." (*California v. Prysock* (1981) 453 U.S. 355, 359.) Instead, "(t)he inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*." . . . Reviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." (*Duckworth v. Eagan* (1989) 492 U.S. 195, 203.) Based upon this, along with the Ninth Circuit's own precedent (e.g., *United States v. Noa* (9th Cir. 1971) 443 F.2nd 144; *People of the Territory of Guam v. Snaer* (9th Cir. 1985) 758 F.2nd 1341.), the Court here ruled that by telling defendant that he had the right to the presence of an attorney "*during*" questioning, and that an attorney would be appointed for him prior to questioning if he could not afford to hire his own, it was inferred that he also had the right to consult with such an appointed attorney prior to questioning. "It makes no sense to think that a suspect who is appointed counsel before questioning would not be permitted to consult with that attorney before questioning began. Instead, the warnings reasonably conveyed the inference that (defendant) could consult with an

attorney prior to and during questioning." The admonishment defendant received, although not perfectly described, was legally sufficient to convey to him his rights as required by *Miranda*.

Note #1: I have long advised officers to swallow their pride and use the *Miranda* admonishment card supplied by their employing agency and *read* the damn thing to the suspect! It may not be near as cool to have to read it, but it saves a lot of time and expense testing on appeal the legal sufficiency of some altered version that commonly occurs when an officer attempts to do it without reading it verbatim. The Court here makes the same point: "(T)he police can always be certain that *Miranda* has been satisfied if they simply read the defendant his rights from a prepared card . . . . A verbatim reading would, in all instances, preclude claims such as [Loucious's]." (pg. 1151) Also, when you read from the card, and are later asked to testify with a verbatim account of the rights you provided to your defendant, you will be allowed to read from the card to the jury as you did to the defendant. There won't be any issue as to what you told him. If you didn't use the card in your interrogation, you won't be allowed to read it to the jury. You will be testifying from your not-always infallible memory as to what exactly you told the defendant. Using the card thus eliminates the likelihood of the inevitable embarrassing brain fart when you leave something out as you attempt to recall what exactly it was you told the defendant.

Note #2: It being found that defendant, as a passenger in someone else's car, did not have standing to challenge the warrantless search of the vehicle, the legality of the vehicle search was not discussed. As a result, the legal theory justifying the search of the vehicle, and the possible applicability *Arizona v. Gant* (2009) 556 U.S. 332 (searches of a vehicle incident to arrest are illegal when the suspect has been secured [e.g., handcuffed and put into a patrol car] absent some "reason to believe" that evidence relevant to the crime of arrest might be found in the car), was not discussed. If it *was* a search incident to arrest (as opposed to a consent search), and unless the driver and/or defendant had not yet been secured (very unlikely), it would no doubt have been ruled to be in violation of *Gant*, and illegal. It was noted, however, that the gun was not seized until after a search warrant was obtained. But if *Gant* applied to the initial warrantless search, the later-obtained warrant would not have undone the effect of an illegal search incident to arrest (See point #3 in *People v. Superior Court* (*Corbett*), above.), unless, possibly, the car was to be lawfully impounded and an inventory search conducted. (See *United States v. Ruckes* (9th Cir. 2009) 586 F.3rd 713, 716-719.) The Court's lack-of-standing ruling avoided all these legal issues.

***Miranda*; *Implied Waivers*:**
***Miranda*; *Reinitiation of an Interrogation After an Invocation of the Right to Remain Silent*:**

People v. Parker **(June 5, 2017) 2 Cal.5th 1184**

Rule: (1) A waiver of an in-custody suspect's *Miranda* rights may be implied, depending upon the circumstances. (2) After an invocation of one's right to silence, reinitiation of an interrogation concerning other cases, with a corresponding waiver or rights, is not improper.

Facts: Defendant, while a Marine stationed in Tustin in Orange County, committed six home-invasion rape/murders in ten months between 1978 and 1979. As a result of these crimes (with defendant's identity as the murderer being unknown until 1996), he was nicknamed by the news media as the "*Bedroom Basher*" in that he beat each of his victims to death. Five of his victims died from massive head injuries caused by being struck with a blunt object with such force their skulls were fractured. One of defendant's victims survived. However, the assault resulted in the death of her unborn fetus. In chronological order: (1) *Sandra Fry*: 17-year-old Fry was discovered by her roommate in their Anaheim apartment on the evening of December 1, 1978, nude from the waist down and bleeding from head injuries. She died shortly thereafter from those head injuries, caused by an unknown number of blows to her head by a blunt instrument such as a baseball bat, two-by-four, or metal pipe. Defendant was identified as the killer in 1996 through DNA and a latent fingerprint left at the scene. When eventually interrogated, defendant admitted to this offense, telling investigators that he entered Fry's apartment intending to rape her, hit her with a two-by-four, and then ejaculated on Fry before leaving her dying on her bed. (2) *Kimberly Rawlins*: Twenty one-year-old Rawlins was found by her roommate at about 4:45 a.m. in their Costa Mesa apartment on April 1, 1979, lying half on and half off of her bed. Wearing only a robe, Rawlins' face had been severely beaten. She died later at the hospital from blunt force trauma to her head. Defendant was again matched in 1996 through DNA found on a tampon Rawlins had been wearing. When eventually interrogated, defendant admitted to this murder, entering her apartment with the intent to rape her, and using a two-by-four to beat Rawlins to death. However, he did not remember if he raped her. (3) *Marolyn Carleton*: In the early morning hours of September 15, 1979, Costa Mesa Police Officers responded to a call from 31-year-old Carlton's the nine-year-old son. She was found lying on the master bedroom floor, partially propped up against the bed and nightstand in her apartment. Her face and hair were covered with blood and there was a large wound on the top of her skull. The short nightgown she was wearing had been pulled up above her waist and her underwear was down. Transported to the hospital, she died the next day from blunt force trauma to her head. A rape kit taken from Carleton after her admission to the hospital yielded insufficient biological evidence for any type of testing or analysis. In defendant's 1996 interrogation, he admitted to hitting her in the head three or four times with what he thought might have been a two-by-four, with the intention of knocking her unconscious so he could rape her. He admitted attempting to sexually assault her but could not recall if he got an erection or ejaculated. (4) *Baby Chantal Green*: On September 30, 1979, Tustin Police responded to D. Green's husband's 9-1-1 call. They found the nine-month pregnant D., age 20, in the bedroom, unconscious, and lying nude on the bed with her legs spread apart. With injuries to her head ("a two-inch hole in the middle of her forehead," with "exposed brain tissue"), she was transported to the hospital where her fetus, named Chantal, was delivered stillborn. The pathologist later testified that the blunt force traumatic injury caused D.'s body to shift the oxygenated blood to her heart, lungs and brain, resulting in her uterus receiving less oxygenated blood. Chantal died from intrauterine anoxia caused by the marked decrease in the oxygenation of her mother's blood. D. survived, but was in a coma for 10 days before regaining consciousness. She had total amnesia and could not remember anyone or (to her husband's detriment) anything. She had to learn to talk and spell all over again, a process that

took years. D. eventually regained her memory, but at the time of defendant's trial, some 17 years later, she still had problems communicating. Meanwhile, D.'s husband was convicted of the second degree murder of Chantal and of attempting to murder D. He went to prison in November 1980 for a term of 15 years to life. However, subsequent testing of the sperm on the vaginal swab from D.'s rape kit revealed a DNA profile that matched defendants. In June 1996, D.'s husband was finally released from custody with his convictions set aside and the case against him dismissed. When interrogated in 1996, defendant admitted to entering the victim's apartment after D.'s husband left following an argument. He found D. in the bedroom where he hit her with a board and raped her. (5) *Debora Kennedy*: Twenty four-year-old Kennedy was found by her sister in their apartment in Tustin, lying in an exaggerated spread-eagle position on a blood-soaked mattress on the floor of her bedroom, and clothed only in a robe. She had massive blunt force trauma to her face and showed no signs of life. Kennedy died from blunt force trauma to the head. Subsequent testing of the sperm swabbed from Kennedy's body revealed a DNA profile that matched defendants. When later interrogated, defendant admitted to hitting Kennedy on the head with the mallet he'd found in a nearby pickup truck, rapping her, and ejaculating inside her. (6) *Debra Senior*: Seventeen-year-old Senior was found dead in her Fountain Valley apartment bedroom by her roommate at about 2:30 a.m. on October 20, 1979. Senior was lying on the floor of her bedroom, unclothed except for a pair of socks, with a torn blouse and unsnapped bra pulled up around her shoulders, and torn underwear lying nearby. She had suffered severe head trauma, which is what killed her. Subsequent testing of the sperm swabbed from Senior's body revealed a DNA profile that matched defendants. Defendant's palm print was found on the bathroom windowsill; the point of entry. When interrogated, defendant admitted to hitting Senior with a two-by-four, removing her underwear, raping her, and ejaculating inside her. Shortly after this last murder, defendant was transferred by the Marine Corps to El Toro where separated from the service. In 1996, he was in prison on an unrelated matter when the advent of DNA led Costa Mesa Police Department Detective William Redmond to defendant, obtaining DNA test results linking him to the above homicides. On June 14, 1996, Detective Redmond, Investigator Lynda Giesler, and Tustin Police Department investigator Thomas Tarpley drove to Avenal State Prison in Kings County to serve a search warrant on defendant and to interrogate him, with Redmond and Giesler going first. After advising defendant of his *Miranda* rights (but without obtaining an express waiver), defendant was told that DNA connected him with "a couple of Costa Mesa homicides back in 1979." Defendant never denied the allegations, but indicated that the heavy use of drugs and alcohol around that time left him with a lot of blank periods in his life. When told that his DNA matched that found on four of the victims, defendant responded; "*I don't know what to tell you*." After Investigator Giesler encouraged him to confess and "[g]et the monkey off your back," defendant responded with; "*the day is not today*" and "*I think I should wait until later on . . . . I just need some time to . . . to draw upon some strength. . . . To say what I have to say*." He told Redmond and Giesler to come back after he was transferred to Orange County jail in 23 days. Taking this as an invocation of his right to remain silent, at least for now, Giesler agreed. But she told defendant that another investigator, Detective Tarpley from Tustin, had come with them and wanted to talk to him. Redmond and Giesler left the interview room as Detective Tarpley entered. Tarpley readvised defendant of his *Miranda* rights. Defendant expressly waived his rights and agreed to

talk to him "about why I'm here today." After going through some background information, Detective Tarpley showed defendant a picture of Debora Kennedy (Victim # 5). Defendant denied knowing anything about her. Tarpley also described the Green case (Victims #4; D. and Baby Chantal Green). Defendant recalled reading about this case, and then asked if D.'s husband (a fellow-Marine), who defendant knew had been convicted of this offense, was on death row. Tarpley said he didn't know. Defendant then admitted that it was "*possible*" he had killed someone while under the influence of drugs because sometimes he "*black*[*ed*] out" and would do and say things he did not remember. Detective Tarpley urged defendant: "*Today's the day that you take control and you say . . . I'm going to do the right thing, and that's what we're here for . . . And that's what I'm asking you to do. . . . Can you do that for me*?" In response, defendant asked: "*Is Costa Mesa still here*?" Tarpley replied affirmatively. Defendant asked to use the bathroom, stating, "*then we can . . . get this over with*." Detective Redmond and Investigator Giesler joined Tarpley in the interview room shortly thereafter. Defendant then proceeded to confess to the Costa Mesa and Tustin homicides. Defendant was subsequently interrogated by Anaheim Police Detective Richard Raulston and Sergeant Steven Rodig regarding Sandra Fry's (Victim #1) case. Detective Raulston interviewed defendant a second time (when it was discovered that a portion of the first taped interview had been accidentally erased), as did Detective Redmond and Investigator Giesler who wanted defendant's confession on videotape. Defendant was readvised of his *Miranda* rights before these interviews, expressly waiving them each time. Each interview resulted in more detail being provided by defendant. Charged in state court with six homicides and special circumstances (multiple murder and murder during the attempted commission or commission of the crimes of rape and burglary), defendant was convicted of all counts and allegations and was sentenced to death. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court affirmed. One of the issues on appeal was the admissibility of his various confessions. Specifically, defendant argued that his incriminating statements were obtained without a valid waiver of his *Miranda* rights, and that he had repeatedly invoked his right to silence during the initial interrogation.

(1) *Implied Waiver*: Defendant was interviewed five times, expressly waiving his rights in every interview except the first. Defendant argued that he never waived his rights in the first interview, invalidating every interview that followed. To be valid, a waiver under *Miranda* must be "knowingly, intelligently, and voluntarily made." These crimes having occurred prior to passage of Proposition 8 (June 9, 1982), the rule effective at that time applied, making it the prosecution's burden to prove the voluntariness of a Miranda waiver "*beyond a reasonable doubt.*" (Post Proposition 8, the federal rule of "*by a preponderance of the evidence*" is to be used in California: "'(T)he date of the crime, and not the date of the confession, is the controlling benchmark' for the proper burden of proof.") In defendant's first interview, Detective Redmond advised defendant of his *Miranda* rights. Although defendant indicated that he understood his rights, he was never formally asked to waive those rights, and he did not volunteer to do so. Instead, defendant was asked: "*Do you want to talk to us about . . . anything that might have occurred back, '79, '80*[?]" To this, defendant responded: "'*79, '80, why, why would I want to talk to you about something that occurred back then*?" Detective Redmond then said: "*Well,*

some things have come up and . . . we need to talk to you about them, you can stop talking at any time.", to which defendant responded: "*I can't . . . imagine why I would want to talk with the Costa Mesa Police Department.*" So Detective Redmond explained to defendant how DNA had linked him with some murders, telling defendant: "[*W*]*e are going to be just right up front with you . . ., your DNA came up on a couple of Costa Mesa homicides back in 1979, . . .*" After this, defendant proceeded to answer all questions that were asked of him, sometimes asking clarifying questions, and often volunteering additional information. The Court classified this exchange as an "*implied waiver*." On appeal, defendant argued that his statements should have been excluded from evidence at his trial because he never expressly waived his right to silence and nothing about his actions demonstrated an intent to waive that right. The Court rejected this argument noting that it is well settled that law enforcement officers are not required to obtain an express waiver of a suspect's *Miranda* rights prior to a custodial interview and that a valid waiver of such rights may be implied from the defendant's words and actions. In this case, after defendant confirmed that he understood his rights, he proceeded to actively participate in the conversation with the detectives, at least initially, answering questions, asking for clarification, and generally contributing to a discussion he knew was being tape-recorded. There was no evidence to the effect that defendant had been physically or psychologically pressured into talking with the investigators. Also, defendant had extensive prior experience with the criminal justice system, having been arrested and pleaded guilty to felonies in three previous cases before being interrogated in this case. The Court therefore ruled that under these circumstances, the evidence was sufficient to permit an inference beyond a reasonable doubt that defendant understood he had a choice whether or not to talk to the detectives, with or without an attorney present, and knowingly and voluntarily chose not to exercise his right to remain silent, at least until he later asked to delay the interrogation to a later date (see point #2, below). The fact that defendant had questioned why he would want to talk to the detectives, taken in context, was not an indication of a reluctance to waive his rights, but rather merely seeking to clarify why the Costa Mesa detective and investigator wished to speak with him.

(2) *Invocation of the Right to Remain Silent*: Defendant also argued that at some point mid-interrogation, he invoked his right to silence. Specifically, after Investigator Giesler told defendant; "*I mean 17 years is long enough, I think it's time to talk about it, don't you*? . . . *Why don't you tell us what happened*?", defendant responded: "*The thing is, I will reserve the right to speak at another time*." Despite the investigator's encouragement to get to the truth, interspersed with questions concerning why not talk about it now, defendant continued to indicate his wish to put off the questioning to a later date: "*Yeah, the day is not today though*. . . . *I can't take it*. . . . *Yeah, but there's also a reason for wanting to wait too*. . . . *Now, this is going to be a long drawn out process, the rest of my life is going right out the door, it probably went out the door years ago, I just didn't recognize it*. . . . *Like I say, once again, . . . there's I think for me, there's a time, and a place for saying what I have to say, and, in reference to what happened, I, I, there's nothing else that I can tell you*. . . . *Like I say, I think I should wait until later on before . . . . No, no, this, this, I, I just need some time to call upon myself, to bring, to draw up on some strength. . . . To say what I have to say. . . . When they take me down there, yes, you can come back.*" In response to Investigator Giesler's question, "*I can come and talk to you at that time*? . . . *Are you serious, when you get down to Orange County, I can come see you again*?", defendant answered;

"*Right. Right . . . I'11 be there.*" So Detective Redmond and Investigator Giesler terminated their interview. But before leaving the interview room they told defendant that an investigator from Tustin also wanted to speak with him. Detective Tarpley then entered the room, informed defendant that he wished to discuss a different case, and readivsed defendant of his *Miranda* rights. Defendant expressly waived his rights and, eventually, confessed to the Tustin cases. During this interrogation, defendant also asked if Detective Redmond and Investigator Giesler were still there, subsequently confessing to their homicides to them as well. Defendant argued that because he had clearly and unequivocally invoked his right to silence, that these subsequent confessions should not have been allowed into evidence. The Court disagreed. Per the Court, although defendant made statements suggesting he did not want to talk further with Detective Redmond and Investigator Giesler, he also indicated a willingness to speak with them at a later date. As Redmond and Giesler terminated their questioning, defendant made no objection when informed that a detective from Tustin wished to speak with him about a different case. Detective Tarpley subsequently readvised defendant of his *Miranda* rights and asked whether he was willing to talk to him "about why I'm here today." Defendant responded in the affirmative. This record supports the conclusion that any asserted refusal to continue talking at that time applied only to Redmond and Giesler, and did not extend to Detective Tarpley. In considering the totality of the circumstances, and in recognizing that a defendant may selectively waive his rights, that limited invocation made to Redmond and Giesler did not bar Detective Tarpley from interrogating defendant about the Tustin offenses after readvising him of his *Miranda* rights, confirming that defendant was willing to speak to him, and thereby obtaining a waiver of those rights. It is also recognized that when a suspect invokes his right to silence only (as opposed to his right to the assistance of counsel; see "Note," below), police may later reinitiate questioning so long as no coercion is employed in obtaining a subsequent waiver. Also, it was defendant himself who reinitiated contact with Detective Redmond and Investigator Giesler by asking Detective Tarpley whether "*Costa Mesa is still here*," and stating, "*then we can . . . get this over with*." In context, defendant was asking for the Costa Mesa detectives to come back so he could confess. This reinitiation of contact with Redmond and Giesler superseded any prior invocation he may have made. Defendant's various confessions, therefore, were properly admitted into evidence against him.

Note: Those who are familiar with my rantings and ravings over the years about "*implied waivers*" (as opposed to "*express waivers*") will take this case as a reaffirmation of the rule that such waivers are valid. And I agree that they are; *as a general rule*. But I must also point out that implied waivers require a determination by a court, based upon an evaluation of the totality of the circumstances, as to their validity in the context of any particular case. We don't always win this issue. On the other hand, after insuring that an in-custody suspect understands his rights, also asking him: "*Having in mind and understanding your rights as I've explained them to you, are you willing to answer questions*?"—seeking an "*express waiver*"—ends the issue. Such a waiver is, almost invariably, going to be found to be valid. So my question is, at least when dealing with a cooperative suspect who doesn't exhibit a bad attitude, why take the gamble? Just get an express waiver and save yourself a day in court having to testify and the state some extra litigation expense. Also note that the reinitiation of an interrogation by police

after defendant said he didn't want to talk is a rule that applies only to an invocation of one's right to silence. Had he asked for an attorney, the rule is that he would have been off limits as to *all* police-initiated questioning, for *all* cases, for as long as he remains in custody, at least for an arbitrarily set time limit of 14 days (*Maryland v. Shatzer* (2010) 559 U.S. 98.). The difference is important to understand in determining whether you can come back and talk to him some more.