The California Legal Update

Remember 9/11/2001; Support Our Troops

Vol. 20 June 2, 2015 No. 6

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

"*Political correctness is a doctrine, recently fostered by a delusional, illogical minority and promoted by a sick mainstream media, which holds forth the proposition that it is entirely possible to pick up a piece of shit by the clean end.*" (Harry S Truman)

IN THIS ISSUE:

CASES:

***Residential Entries*; *The Emergency Aid Doctrine*:**
***Use of Deadly Force*:**
***The Americans with Disabilities Act*:**

City & County of San Francisco v. Sheehan **(May 18, 2015) __ U.S.__ [2015 U.S. LEXIS 3200]**

Rule: Law enforcement officers may enter a residence without a warrant to check the welfare of a mentally ill and potentially violent occupant. Whether or not a second warrantless entry may be made without waiting for additional assistance is (and remains) an undecided issue, entitling officers to qualified immunity from civil liability. Once entry is made, however, the use of deadly force against a knife-wielding and threatening occupant is justifiable.

Facts: Teresa Sheehan, a woman in her mid-50's and suffering from a mental illness (a "schizoaffective disorder"), lived in a San Francisco group home for persons dealing with mental illness. Her social worker, Heath Hodge, became concerned when she quit taking her medications and her condition started to deteriorate. He therefore did a welfare check on her in her room, entering without permission. She flipped out and threatened to kill him with a knife she claimed to have but did not exhibit. Hodge left the room and cleared the building of other residents. Believing Sheehan to be "gravely disabled" and a "danger to others," Hodge called police for assistance in moving her to a mental health facility for a 72-hour W&I § 5150 involuntary commitment for evaluation. San Francisco Police Sergeant Kimberly Reynolds and Officer Katherine Holder responded to the call. Hodge met the officers outside and explained to them the situation. He also told them that the only way out of her second-floor room was the door to the hallway. A window in her apartment couldn't be used without a ladder although it was not discussed whether a fire escape led to that window. Although Hodge indicated to the officers that he believed Sheehan was gravely disabled and a danger to others, he did *not* tell them that she might be suicidal or a danger to herself. The officers decided to enter Sheehan's room to confirm the social worker's assessment and to take her into custody. Accompanied by Hodge, they knocked on the door and announced that they were police officers. When she didn't respond, they used a key to open the door. Once inside, the officers saw Sheehan lying on her bed. Sheehan got up and picked up a large knife with a 5-inch blade from a table, approaching the officers in an aggressive, threatening manner. She demanded that the officers get out while threatening to kill them. She shoved the knife out in front of her with blade pointed towards them, making "jabbing motion(s)." The officers retreated and Sheehan closed the door. The officers called for backup. But rather than waiting for help to arrive, they decided to forcibly reenter Sheehan's room because with the door closed, it was unknown whether she might try to escape or retrieve other weapons. With their firearms drawn and pepper spray in hand, Officer Holder used her feet and shoulder in an attempt to gain entry. Once they got the door open, Sheehan emerged from the room brandishing her knife while advancing towards the officers. Sgt. Reynolds pepper sprayed Sheehan, but without effect. As Sheehan continued to advance on the officers, getting within two to four feet ("so close that Holder was forced to fire from the hip to prevent Sheehan from cutting her arm"), Officer Holder, and then Sgt. Reynolds, began shooting, hitting Sheehan five or six times. The evidence was in dispute as to whether Sgt. Reynolds may have shot Sheehan one extra time after Sheehan was on the floor. But even though Sheehan fell to the ground, she continued to swing the knife at the officers until a backup officer who had just arrived kicked the knife from her hand. Sheehan survived the shooting, later filing a 42 U.S.C. § 1983 civil action in federal court against the officers and the city. In her suit, she asserted violations of her rights under the Fourth Amendment as well as the Americans with Disabilities Act of 1990 (ADA) (42 U. S. C. §§ 12101 et seq.), alleging that the officers subdued her in a manner that did not reasonably accommodate her disability. The federal trial court judge granted the police officer defendants' motion for summary judgment, dismissing the lawsuit. Sheehan appealed. On appeal, the Ninth Circuit vacated in part, holding that because the ADA covers public "services, programs, or activities" (§ 12132), the ADA's accommodation requirement should be read to to encompass "anything a public entity does." The Ninth Circuit agreed "that exigent circumstances inform the reasonableness analysis under the ADA," but concluded that it was for a jury to decide whether San Francisco should have accommodated Sheehan by, for instance, "respect[ing] her comfort zone, engag[ing] in non-threatening communications and us[ing] the passage of time to defuse the situation rather than

precipitating a deadly confrontation." As for the officers' use of force, the panel held that their initial entry into Sheehan's room was lawful under the so-called "emergency aid doctrine" and that, after the officers opened the door for the second time, they reasonably used their firearms when the pepper spray failed to stop Sheehan's threatening advance. Nonetheless, the panel also held that a jury could find that the officers "provoked" Sheehan by needlessly forcing that second confrontation. The Ninth Circuit (with one justice dissenting) further found that it was clearly established in the law that an officer cannot "forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry," and that they were therefore not entitled to qualified immunity. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court reversed in part and affirmed in part. As to the question of whether or not, and if so, how the ADA might apply to an arrest-related situation of a mentally ill individual, as well as the related issue of whether a public entity can be held civilly liable for damages under the ADA for an arrest made by its police officers, the Court declined to decide these issues, describing their decision to grant certiorari on this "important question" as "improvidently granted." In so doing, it was first noted that Title II of the ADA commands that "*no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity*." (42 U.S.C. § 12132) The Court originally granted certiorari under the belief that it was to decide whether this provision "requires law enforcement officers to provide ADA accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody:" I.e., does the ADA apply to the arrest of a violent mental patient? Instead, however, the parties (both sides) assumed that the ADA does in fact apply to arrests, but argued instead to the Supreme Court the separate issue of whether or not a person who poses a direct threat or significant risk to the safety of others is even qualified in the first place to the benefits of the ADA; an issue not raised (or even "hinted at") at the Ninth Circuit level. Because this argument was not first brought before the lower court, as it should have been, the Supreme Court declined to answer it here. As to the rest of the Ninth Circuit's decision—i.e., involving the Fourth Amendment's applicability to the officers' actions—the Court affirmed the lower court's two conclusions that both the original entry into Sheehan's room, and the eventual use of deadly force when Sheehan attacked the officers with a knife, were reasonable. The original entry into Sheehan's room was necessary in order to check her welfare. "[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." As to the second entry, the Court found that *had Sheehan not been disabled*, the officers would not have been prevented from opening her door the second time "because the two entries were part of a single, continuous search or seizure." It was not necessary for the officers to have to justify a continuing emergency with respect to the second entry. In addition, Officers Reynolds and Holder knew that Sheehan had a weapon and had threatened to use it to kill three people. They also knew that any delay could have made the situation more dangerous. Police officers are often forced to make split-second judgments. The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others even if the officers make some mistakes in judgment along the way. Then, once inside, when attacked by a knife-wielding suspect, particularly after pepper spray failed to eliminate the danger, the use of deadly force by the officers was reasonable.

"Nothing in the Fourth Amendment barred Reynolds and Holder from protecting themselves, even though it meant firing multiple rounds." The ultimate issue, however, upon which the Supreme Court reversed the Ninth Circuit, is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when, *knowing that Sheehan suffered from some mental issues*, they decided to reopen her door rather than attempting to take it slower and accommodate her disability. Without deciding the actual legality of the second entry under the circumstances of this case—*where the occupant was mentally disabled* (it, again, not having been properly briefed at the Ninth Circuit level)—the Court merely determined that the Ninth Circuit was wrong in ruling that the officers were not entitled to qualified immunity on this issue. Noting that the authority cited by the Ninth Circuit does *not* support the lower court's conclusion that the issue is well-settled in the law, the Supreme Court found there to be no existing precedent clearly guiding the officers in what they were to do. Officers Reynolds and Holder could not know that reopening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test for reasonableness. Without that "fair notice," an officer is, by law, entitled to qualified immunity. San Francisco apparently trains its officers when dealing with the mentally ill to "ensure that sufficient resources are brought to the scene," "contain the subject," "respect the suspect's 'comfort zone," "use time to their advantage," and "employ non-threatening verbal communication and open-ended questions to facilitate the subject's participation in communication." It is also San Francisco's policy to use a hostage negotiator when dealing with a barricaded suspect. The fact that the officers may have ignored such training in this instance does not mean that they had any reason to understand that the Fourth Amendment might require such actions. To the contrary, "(c)onsidering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified." As such, they were entitled to qualified immunity under these circumstances.

Note: *Well, darn*: We were all hoping to get some idea whether we must take into account the Americans with Disabilities Act when arresting mentally ill (or other disabled) suspects. I, for one, would have liked to know how the ADA might be applied in such a situation. But because of the Government's "bait and switch" appellate tactics (as it was referred to by one irate justice) in changing the specific issue mid-appeal, that question will have to await another day. It's not a good idea to piss off the Supreme Court. Also, although told that the second entry would have been lawful had Sheehan not been mentally disabled, we aren't told whether the officers actually violated the Fourth Amendment by forcing a second entry into Sheehan's room rather than taking it slower and awaiting some expert help in dealing with an obviously violent mental patient. I listed San Francisco's polices for such a situation above because, quite frankly, I tend to agree that that might have been the better route for Officers Reynolds and Holder to take, even if they'd been able to subdue Sheehan without shooting her. But despite declining to decide whether the second entry into Sheehan's room was actually a Fourth Amendment violation, the Court seemed to hint very strongly that it was not. ("*Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified.*") And while I'm of the school of thought that it is sometimes better to take it slow and easy, as dictated by SFPD's written policies, I also can't say that, under the heat of the moment, the officers did anything wrong.

***Carjacking, per P.C. § 215*:**

People v. Johnson **(Feb. 26, 2015) 60 Cal.4th 966**

Rule: To prove a carjacking per P.C. § 215(a), it need only be proved that the vehicle taken was in the victim's immediate control when force or fear is applied, which may include while located in a separate building on the premises.

Facts: In December, 1998, defendant, a parolee, lived with his girlfriend, Starlene Parenteau, in Clearlake Oaks in Lake County. On the morning of December 18th, defendant was working on a friend's car when he left in his van for the stated purpose of retrieving a tool he needed. Lake County Deputy Sheriff Mike Morshed, on patrol in a marked police vehicle, observed defendant driving his van and recognized him as someone who was wanted for a parole violation. An attempt to effect a traffic stop resulted in a high speed chase. Defendant eventually crashed his van and escaped into thick vegetation despite an expansive search. Seventy-six-year-old Ellen Salling lived alone some five miles away in Lucerne. Defendant was familiar with the area, having delivered newspapers there, including to Salling. At some point on the morning of the 19th, defendant entered Salling's home carrying a tree branch as Salling was baking Christmas cookies, and beat and stomped her to death. Her body was discovered at about 5:20 p.m. on the 19th by a neighbor. Her red 1999 Mercury Sable, which was typically parked in her garage that was connected to the house by a breezeway, was found to be missing. Also missing was her purse and the keys to her car, both which she normally kept on the kitchen counter. A neighbor saw a man driving her car from the area at between 8:00 a.m. and 8:30 a.m. that morning. Salling's home had been ransacked. Several pieces of her jewelry worth over $13,000 were missing. Over the next two days, defendant was observed in possession of Salling's red Mercury by a number of people. He also used her credit card to buy gas and attempted to sell some of her jewelry, or trade it for methamphetamine. At around 3:50 a.m. on the morning of December 21, Lake County Deputy Sheriff Robert Zehrung observed defendant driving Salling's Mercury. Another high-speed chase ensued, culminating in defendant again crashing and fleeing on foot. This time, however, he was found some five hours later and arrested. Blood later identified to be Salling's was found in the Mercury and on defendant's clothing recovered from his residence. Some of Salling's jewelry was recovered from Parenteau who told investigators that defendant had left it in their home. More of the victim's jewelry was recovered from their residence, along with one of her credit cards. Defendant was charged in state court with first degree murder (P.C. § 187), with the special circumstances of robbery murder, burglary murder, and carjacking murder (P.C. § 190.2(a)(17)(A), (G), (L)), as well as separate counts of first degree burglary, first degree robbery, and carjacking (P.C. §§ 211, 215(a), 459), along with certain allegations and prior convictions. Defendant was convicted of all charges and allegations, including the special circumstances. The jury returned a verdict of death. Appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed (with one dissenting opinion on the carjacking count). Defendant, having testified at the penalty phase of his trial, did not dispute

that he killed Salling and stole her property. But he did dispute the prosecution's theory that he formed the intent to steal before he'd killed her. Specifically, he claimed to have gone to her residence, knocking at the front door in order to ask her if he could use her telephone. Salling invited him in for that purpose. In fact, Salling's body was found in the front entryway and there were no signs of a forced entry. The tree branch, according to defendant, is something he had with him to use as a walking stick. Being high on methamphetamine, defendant said that he was "edgy." Because he "looked like a mess," Salling ordered him out of the house. In a meth-induced rage, he lost control and attacked her. It wasn't until after this occurred that he decided to steal her jewelry and car. If defendant's version was true, then there was no burglary (no intent to steal or commit a felony upon making entry), no robbery, and no carjacking (no force or fear used to accomplish the taking for either offense, the victim already being dead). Also if true, this theory negates all three special circumstances necessary for the death penalty finding. The jury, however, didn't buy defendant's story. Even so, defendant made two arguments on appeal as to the carjacking; i.e.; (1) that there was insufficient evidence that he intended to take the victim's car before he killed her, i.e., before he used force or fear; and (2) that there was insufficient evidence he took the car from the victim's person or immediate presence. P.C. § 215(a) defines carjacking as "the felonious taking of a motor vehicle *in the possession of another, from his or her person or immediate presence*, . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, *accomplished by means of force or fear*." (Italics added) As to the first issue, defendant argued on appeal that even if he had intended to steal *some property* when he killed Salling, the evidence was still legally insufficient to prove that he intended to steal her car when he killed her. Had he formed the intent to take the car *after* he killed Salling, then his actions fail to satisfy the elements of a carjacking in that there was no living human being upon which to exert force or fear. To support this argument, defendant further argued that there wasn't any evidence that he even knew Salling had a car. The Court rejected these arguments. First, having just walked 5 miles from where he crashed his van, the jury could have reasonably concluded that what he needed most was some wheels to help him complete his escape. Secondly, being a residential area, and Salling's residence having a garage, defendant could well have assumed that Salling had a vehicle of some sort. "From all of this evidence, a reasonable jury could readily conclude defendant entered the house not merely to kill but to take the victim's property, including, perhaps above all, the car." As to the second issue, defendant argued that the evidence was insufficient for a reasonable jury to conclude that, with Salling in her house and the car in the garage, he took the car from her "*person or immediate presence*." For an object to be in a person's "*immediate presence*," it must be shown that it was "so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." As such, based upon prior case law, property may be found to be in a victim's immediate presence "even though it is located in another room of the house, or in another building on [the] premises." More specifically: "A vehicle is within a person's immediate presence for purposes of carjacking if it is sufficiently within his control so that he could retain possession of it if not prevented by force or fear." In this case, Salling's car had been in her garage, the garage being connected to the house by a breezeway. The keys to the car were apparently taken from the kitchen counter where Salling had been baking cookies. The jury could have reasonably found that the car keys were within the victim's immediate reach at the time defendant arrived at her door. Also, the car was under Salling's control when she was killed. All of this evidence supports a jury finding that the victim could have retained possession

of her keys and car had defendant not prevented her from doing so by force or fear—in this case, deadly force. Although this might not be a classic carjacking, such as when the perpetrator approaches a car stopped at a red light and, at gunpoint, forces the driver and any passengers out, then drives the car away, the elements of P.C. § 215(a) were met nonetheless (but see the dissent, below). Defendant was properly found to have committed a carjacking in the commission of a murder.

Note: The sole dissenting opinion (although concurring in defendant's conviction as to all other charges) argued that a carjacking should be restricted to the "classic" scenario where one's car is taken from him, on the street, by force or fear. The difference is in what constitutes "immediate presence." The definition of "immediate presence" used by the majority was lifted from the standard robbery situation. The dissenting justice argued that this was error in that given the stiffer sentence imposed for a carjacking, its elements should be more restrictive. But because a majority opinion takes precedence over any dissent, the rule now is that any taking of a vehicle by force or fear, no matter what the circumstances, is both a robbery and a carjacking so long as robbery's expansive definition of "immediate presence" is satisfied.

***Execution of Search Warrants and Prolonged Detentions*:**

Guillory v. Hill **(Jan. 16, 2015) 233 Cal.App.4th 240**

Rule: Occupants of a residence may be detained during the duration of the execution of a search warrant. But upon completion of the search, absent at least a reasonable suspicion to believe the person detained is involved in criminal activity, any further detention is illegal. The questioning of an occupant is not part of the search and does not justify the extension of the detention beyond the time it takes to execute a search warrant.

Facts: LeRoy Guillory was one of 13 plaintiffs in a civil suit against Orange County Sheriff's Investigator Michelle Hill (and others), stemming from the early morning execution of a search warrant during the aftermath of an all-night Halloween party. The warrant was served on a 21,000-square foot mansion located in the hills above Santa Ana and belonging to co-plaintiff Carl Vini Bergeman. The party was an annual event attended by hundreds of costumed party-goers, historically generating a number of noise complaints from neighbors. Based upon a written flyer which announced the presence of a "Casino Room," and informant information, Investigator Hill was able to obtain a search warrant seeking evidence related to illegal gaming. Bergeman was known to have a lengthy criminal history including numerous arrests for serious and violent felonies, including a felony conviction for arson for which he spent time in prison. Hill's investigation also revealed that Bergeman was associated with members of the Hells' Angels and Mongols outlaw motorcycle gangs. Because of this, Investigator Hill sought the assistance of her department's special weapons and tactics (SWAT) team in securing the scene prior to commencing the actual search. At its height, the party that night swelled to some 1,000 guests. But by the time the warrant was executed at between 4:00 and 5:00 a.m., only 20 people remained, some sleeping in the various bedrooms while others were found on the lower levels of the three story house cleaning up from the party. A total of 100 SWAT officers made the initial entry in a manner described as "shock and awe." The occupants, in various states of dress, were all secured with zip ties and herded into a large living room. Once the house was secured, which

took about 45 minutes, Investigator Hill and her search team of 40 officers were called in. While the estimates varied, it appears that the house was searched for at least the next two (and maybe up to seven) hours from the time of the SWAT team's initial entry. Two slot machines and three grams of marijuana (from a party-goer's purse) were recovered as a result of the search. The occupants were all questioned by Investigator Hill and her team before being allowed to leave. This process lasted for up to fourteen hours before the last of the plaintiffs were finally released. No arrests were made or citations issued at the scene, although Bergeman was later charged with three misdemeanors (P.C. §§ 330a, 330b, & 330.1) for the two slot machines that were seized in the search. He pled no contest to the misdemeanor charges. Plaintiffs subsequently sued Orange County, Investigator Hill, and a number of other officers in state court, alleging that their Fourth Amendment right to be free from unlawful seizure was violated by prolonging their detention beyond the conclusion of the search of the residence. During the course of the proceedings, everyone other than Investigator Hill were dropped from, or settled, their aspect of the lawsuit. A six-week jury trial culminated in the trial judge granting Hill's motion for a directed verdict in her favor (meaning the judge took the decision out of the hands of the jury and determined that as a matter of law, Hill had no civil liability). The plaintiffs appealed.

Held: The Fourth District Court of Appeal (Div. 3) reversed. On appeal, plaintiffs argued that because Investigator Hill's detention and questioning of the plaintiffs extended beyond the completion of the actual search, such a detention was illegal under the Fourth Amendment. Hill, on the other hand, argued that the questioning was a part of (i.e., "*part and parcel*" with) the search, and that any detentions during that time were therefore lawful. "According to Hill, a warrant search is incomplete and remains legitimately 'in progress' until all occupants are interviewed." The Court disagreed. The purpose of a search warrant is to seek out and collect certain evidence; not to provide an opportunity to interrogate the occupants of the place being searched. "(A) magistrate's search warrant is directed at places to search, not people to interrogate." The law is clear that, for reasons of safety and to allow officers to maintain control of the situation, the occupants of a residence may be detained for the duration of the execution of a search warrant. And while the questioning of such occupants during the search, should those people agree to talk with officers, is permissible, once the search is complete, the occupants must either be arrested (if probable cause exists for such an arrest) or allowed to leave. Detaining them further for purposes of questioning them, absent at least a reasonable suspicion to believe that the person detained is him or herself involved in criminal activity, is a Fourth Amendment violation. The Court ruled here held that, as a factual matter, the jury reasonably could have decided that the search had ended before Investigator Hill's questioning had begun. The Court further rejected Investigator Hill's argument that she was, at the very least, entitled to qualified immunity. The illegality of prolonging a detention beyond the time it takes to execute a search warrant is a rule of which a reasonable officer should have been aware. The trial court therefore erred in granting the civil defendant's motion for a directed verdict.

Note: The Court spent some time discussing other cases, from the U.S. Supreme Court on down, that have at least inferred, if not outright ruled, that you can't detain the occupants of a residence for longer than it takes to execute a search warrant, at least without probable cause to arrest them or some reasonable suspicion to believe that they are involved in criminal activity sufficient for a continued detention. It has specifically been held that you *cannot* detain persons (absent the necessary reasonable suspicion) while conditioning their release upon submitting to

an interview. (*Ganwich v. Knapp* (9th Cir. 2003) 319 F.3rd 1115.) In this case, the existence of a couple of illegal slot machines in the house and a baggie of marijuana found in a purse didn't justify holding onto anyone other than the one responsible for the slot machines and whoever possessed the marijuana. The occupants should have either been interviewed (assuming they consented to answering questions) during the execution of the warrant, or, once the search was completed, told that they had the choice of hanging around for a voluntary interview or merely leaving. Contrary to the impression left by the many cop shows on TV nowadays, it is not an "obstruction of justice" (or any other criminal offense) for a potential witness to decline an interview. No one, be he a suspect or a witness, is required to talk to you.

***Miranda and Non-Custodial Interrogations*:**

People v. Kopatz **(Apr. 30, 2015) 61 Cal.4th 62**

Rule: The test for *Miranda* custody is whether a reasonable person would have felt, under the circumstances, that he or she was not at liberty to terminate the interrogation and leave.

Facts: Defendant Kim Raymond Kopatz was deeply in debt. Although his wife, Mary, worked as the manager of a Jenny Craig weight loss center in Riverside, defendant was unable to help with the family finances himself due to injuries he'd suffered in a workplace accident. Defendant had 13 maxed-out credit card accounts with a total debt of $117,883. With a monthly income of $4,259, the faimily's monthly expenses, including minimum credit card payments, were $8,620. However, defendant had life insurance policies on his wife and his 3-year-old daughter, Carley, totaling more than $800,000 in value, as well as $13,628 in policies on his wife's wedding and anniversary rings. On April 22, 1999, Mary, who was always punctual, failed to show up at work. The couple's eight-year-old daughter, Ashley, who defendant had taken to school that morning, was experiencing a diabetes-related problem requiring the school officials to get permission to administer an insulin shot. Efforts by both the school officials and Mary's co-workers to get ahold of either Mary or defendant during the morning hours were unsuccessful, with neither person answering their cell phones nor their home phone. At about 12:30 that afternoon, one of Mary's co-workers drove by their home. She saw Mary's car, a Chrysler sedan, parked in the driveway. The family van, which normally would be in the driveway, was not there. Defendant was also not observed. The co-worker did not stop but called their home phone several more times, still with no answer. A half hour later, however, at 1:00 p.m., defendant was observed by neighbors working on his sprinklers in the front yard. At 1:15, defendant called Mary's work and "calmly" asked if Mary had brought Carley to work with her. He explained that Mary was going to run some errands that morning before going to work and that she was going to take Carley to work with her for "take your daughter to work day;" an assertion that seemed odd in that Mary had instructed office personnel weeks earlier that no one was to bring their kids to work due to liability issues. Defendant also claimed to have been in the backyard working all morning and didn't hear either the house phone or his cell phone. The husband of one of Mary's co-workers stopped at defendant's home at after 2:00 p.m., and was told by defendant that he'd been working in the backyard all morning, digging and installing sprinkler pipe. This looked suspicious to him in that defendant was dressed in all white and was neither sweaty nor dirty. He did have, however, blue pipe glue on the tops of both hands and forearms. Two rings, similar to Mary's wedding and anniversary rings, were seen on a bathroom

sink. Defendant's brother later stopped by the house after learning that Mary was missing. In searching the neighborhood, he soon found defendant's locked van parked on the street about a mile away. Mary and Carley's bodies were found inside the van by responding paramedics. It was later determined that both Mary and Carley died from asphyxia due to ligature compression of the neck. The ligature marks indicated that they had been strangled from behind with a smooth cord, such as a nylon rope or electrical cord. Mary also had two broken ribs and blunt force trauma to her face and the back of her head, along with contusions from her shoulders to her hands, as well as on her knees. It was also apparent that she'd been lying face down at some point, contrary to the face up position in which she was found in the van, indicating that she'd been moved postmortem. And although Mary's pants were found to be unbuttoned, unzipped, and spread open, exposing her underwear, with her bra "protruding" from under her shirt, the autopsy revealed no indications of a sexual assault. Mary's wedding and anniversary rings were missing. Riverside police, with an evidence technician, responded to defendant's home. In checking defendant, the evidence tech noted red marks on defendant's eyelid and wrist, scratches on his forehead and hands, cuts on his hands, bruises around his elbows, and "blue glue" on his hands covering some of his wounds. Defendant became uncooperative when efforts were made to take photographs of, and swabs from, his hands, refusing to answer any questions put to him by the evidence tech. Throughout the evening at the defendant's house, defendant repeatedly complained of severe back and head pain, but never asked about the progress of the investigation relating to his wife or daughter. Although paramedics could not find anything wrong with him, they eventually took him to the hospital, followed by a Riverside P.D. officer. Later, at the request of detectives, and after defendant was examined by the medical staff and determined to be healthy, the officer told defendant that he was taking him to the detective bureau for an interview. Although defendant continued to complain about head and neck pain, he still failed to inquire about the investigation. At the police station, detectives took defendant's statement in an interview lasting less than an hour. He was not advised of his *Miranda* rights. He was then driven to his brother's house and released. Four days later, defendant filed an insurance claim for his wife's missing wedding and anniversary rings. In a consensual search of defendant's home, blood was found on a doorframe that was later determined through DNA testing to likely be Mary's (one in 4.2 million Caucasians, one in 7.6 million Hispanics, and one in 95 million African-Americans). Blood found on a carpet in the house had been compromised by an "inhibitor," such as a cleaning solution. However, fibers found on Mary's body were consistent with fibers from the carpet. And lastly, defendant had been seen by a neighbor walking away from the area where the van was later found. Based upon the above (and other post-murder consciousness-of-guilt activity), defendant was eventually arrested and charged in state court with two counts of murder (P.C. § 187) with the special circumstances of murder for financial gain (P.C. § 190.2(a)(1)) and multiple murder (P.C. § 190.2(a)(3)). At trial, and over his objection, the videotaped one hour interview by detectives was played for the jury. Upon his conviction and death sentence, appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. Among the issues on appeal was the admissibility of defendant's one-hour videotaped interview with detectives. Although defendant never admitted to killing his wife and daughter, the interview was important in that it contained a number of inconsistent and improbable statements relevant to defendant's consciousness of guilt. Defendant's argument on appeal was that he was in custody at the time of the interview, having been unlawfully seized in violation of the Fourth Amendment, and that

failing to advise him of his rights violated the dictates of *Miranda v. Arizona*. The People argued in response that no such *Miranda* warnings were legally necessary under the circumstances in that he was neither arrested ("seized") nor in *Miranda*-custody. The Supreme Court agreed with the People. Unless a person is "in custody" at the time of his interrogation, no *Miranda* admonishment and waiver is necessary. An interrogation is custodial only when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." The test for *Miranda* custody is whether a reasonable person would have felt, under the circumstances, that he or she was not at liberty to terminate the interrogation and leave. The objective circumstances of the interrogation are examined, not the "subjective views harbored by either the interrogating officers or the person being questioned." Per the Court, "the test for determining whether a person was seized under the Fourth Amendment or was under *Miranda* custody is essentially the same: whether a reasonable person would have felt he or she was at liberty to leave or to decline the officers' requests to go to the detective bureau and be interviewed there." Looking at the objective circumstances of this case, defendant was never treated as anything other than a mere witness (which, initially, is all that he was believed to be). He was never restrained, being free to move around his house during the initial investigation. Going to the hospital was his idea. Although he was apparently told, as opposed to asked, that he would be taken to the detective bureau from the hospital (the officer couldn't remember the details), he did not object. He was neither handcuffed nor frisked. No weapons were displayed by the officers. He walked to the officer's patrol car of his own accord. The drive to the station was only 10 minutes during which defendant's only complaint was about still being in some physical discomfort. At the station, he was told that he'd be free to go after the interview, and was in fact given a ride to this brother's house afterwards. Defendant was given a bathroom break when he asked. The interview itself took place in an unlocked interview room, lasted less than an hour, and was never accusatory. Based upon these circumstances, defendant was never "seized," for purposes of the Fourth Amendment, nor was he subjected to a custodial interrogation. "(U)nder the totality of the circumstances, a reasonable person in defendant's position would not have believed he was in custody, and thus, *Miranda* warnings were unnecessary."

Note: While the lack of custody in this case might seem obvious, there were at least two issues here where the Court was actually pushing the envelope at bit (at the least). First, and the most obvious, was the unconsented-to transporting of defendant from the hospital to the police station. The general rule has always been that any non-consensual transportation of a suspect constitutes an arrest. (See *Kaupp v. Texas* (2003) 538 U.S. 626; and *People v. Harris* (1975) 15 Cal.3rd 384.) Here, the transporting officer testified that he couldn't remember whether he'd asked defendant to come with him, or just told him, which is cop-speak for admitting that defendant wasn't given a choice. We only got a favorable ruling on this issue because defendant didn't object (telling the officer; "fine") and there were no other indications that he was under arrest; i.e., no frisks, handcuffs, nor other indicia of an arrest. This issue could have gone either way on us. Secondly, the Court held that the "the test for determining whether a person was seized under the Fourth Amendment or was under *Miranda* custody is essentially the same: whether a reasonable person would have felt he or she was at liberty to leave or to decline the officers' requests to go to the detective bureau and be interviewed there." This is contrary to what I've been teaching for years. Per *People v. Pilster* (2006) 138 Cal.App.4th 1395, "custody" for purposes of *Miranda*, under the Fifth Amendment, involves a different analysis than "custody"

for purposes of a detention or arrest under the Fourth Amendment. Per *Pilster*, the Fourth Amendment requires an analysis of the reasonableness of the officer's actions while Fifth Amendment *Miranda* custody claims instead examine whether a reasonable person in the defendant's position "would conclude the restraints used by police were tantamount to a formal arrest." (See also *People v. Bejasa* (2012) 205 Cal.App.4th 26 *United States v. Sullivan* (4th Cir. 1998) 138 F.3rd 126, 131; and *United States v. Smith* (7th Cir. 1993) 3 F.3rd 1088, 1097.) Either way, even without defendant's interview, he would still have been convicted, defendant not being the most brilliant wife-killer we've ever seen. This was a pretty strong circumstantial-evidence case.