San Diego District Attorney

D.A. LIAISON LEGAL UPDATE

(COPY - - DISTRIBUTE - - POST)

Vol. 11 March 3, 2006 No. 3
Subscribers: 2,047 www.sdsheriff.net/legalupdates/

Remember 9/11/01; Support our Troops

Robert C. Phillips
Deputy District Attorney
Law Enforcement Liaison Deputy

(W) (858) 974-2421
(C) (858) 395-0302
(E) Robert.Phillips@SDSheriff.org
(E) RCPhill808@AOL.com

THIS EDITION'S WORDS OF WISDOM:

"*When I die, I want to die like my grandfather, who died peacefully in his sleep; not screaming like all the passengers in his car.*" (Anonymous)

IN THIS ISSUE: Page:

ADMINISTRATIVE NOTES:

***Identity Theft, per P.C. § 530.5; Amended*:** Effective February 25, 2006, P.C. § 530.5, the "*identify theft*" section, has been amended with two significant changes. (1) Under the definition of "*personal identifying information*" (subd. (b)), the phrase; "*or the equivalent form of identification*" has been added at the end of the paragraph, thus broadening what constitutes "*personal identifying*

information." (2) Also added is a new subdivision (g) which reads: "*For purposes of this section, 'person' means a natural person, firm, association, organization, partnership, business trust, company, corporation, limited liability company, or public entity*." At the same time, the word "*individual*," at the end of subdivision (b) where it used to refer to an "*individual person*," has also been deleted. The net effect of these two changes is that it is now clear that the victim of identity theft is not limited to a natural person or human being.

CASE LAW:

***Pretext Traffic Stops*:**

United States v. Willis **(9th Cir. Dec. 19, 2005) 431 F.3rd 709**

Rule: Stopping and detaining a person for a traffic offense is lawful even though the officer is really interested in some suspected non-traffic-related criminal activity.

Facts: Las Vegas Metropolitan Police Department Officer Carl Boehmer observed defendant making a couple of "rapid" turns in his car at about 2:00 a.m., described by the officer as being "a more excessive turn than a citizen should [make]." Officer Boehmer followed him to an apartment complex in a gang-infested area. Defendant parked his car and sprinted across the street into an apartment complex, leaving his windows open which, given the nature of the neighborhood, the officer thought was unusual. Defendant entered a second floor apartment. Running a check on the vehicle's Colorado license plate, Officer Boehmer was told that the car was listed as a "suspicious vehicle," and that there was an NCIC missing person's report, or "hit," associated with the license plate. (The "missing person" was later determined to be defendant's girlfriend who was no longer missing.) Defendant came out of the apartment shortly thereafter, got back into his car and made an illegal U-turn. He was stopped and detained about a block or two away after driving to another apartment complex. With his car blocked in, defendant got out of his car and furtively looked around as if he was thinking about running. Officer Boehmer detained him and ordered him to take his hands out of his pockets. He complied. When asked if he had anything on his person that the officer should know about, defendant responded that he had a gun. Officer Boehmer asked for, and received, permission to look into his pockets. A fully loaded .25 caliber handgun was recovered from his jacket pocket. Defendant was charged in federal court with being a felon in possession of a firearm. In response to defendant's motion to suppress, the federal magistrate ruled that Officer Boehmer did not have sufficient reasonable suspicion to stop and detain him. However, the magistrate also found that under the officer's so-called "*community caretaking function*," defendant was lawfully detained and questioned about the missing person associated with his car. Defendant pled guilty and appealed from his prison sentence.

Held: The Ninth Circuit Court of Appeal, in a split two-to-one decision affirmed. Challenging the legality of his detention, defendant argued on appeal that neither the "*community caretaking function*" nor the related "*emergency aid doctrine*" applied. The

Court declined to decide these questions, ruling instead that under *Whren v. United States* (1996) 517 U.S. 806, the stop of the defendant was legally justified after he made a couple of rapid turns and an illegal U-turn. Officer Boehmer had at the very least the necessary "*reasonable suspicion*" to believe that defendant had committed one or more traffic violations. Under *Whren*, these traffic offenses supplied the necessary legal justification for defendant's detention even though, subjectively, the officer may have actually been interested in some other totally unrelated criminal activity.

Note: This looks to be, on its face, a clear cut, *Whren*-style, traffic stop, as the majority opinion indicates. But that's not the way it was presented to the judge in the trial court. As noted by the dissenting opinion, this case was not presented as a "traffic stop" issue at all, but rather a detention based upon the suspicion that defendant might have been involved in some non-traffic-related criminal activity. That fact, however, is irrelevant in that that's what *Whren* is all about; i.e., justifying a detention based upon some lesser, even traffic-related, offense, without having to consider the officer's real subjective reasons for stopping a suspect. But either way, this is why it is important for a prosecutor to present evidence of, and be ready to argue to the trial court, all viable legal theories so that a trial judge, and then the appellate court, need only agree with one of them to deny a suppression motion. It does not appear that this was done here.

***Aranda/Bruton Sixth Amendment Confrontation and Spontaneous Statements*:**

People v. Smith & Taffola **(Dec. 27, 2005) 135 Cal.App.4th 914**

Rule: Spontaneous declarations made to a non-law enforcement witness, implicating a co-defendant, are admissible against the non-confessing co-defendant over a Sixth Amendment objection.

Facts: In September, 1998, defendant Jeffrey Smith, co-defendant Mark Taffola, Mark's girlfriend Jessica Robledo and a fourth person (Vincent Felix), were all at Taffola and Robeldo's residence; a motel room. After Robledo went to bed, Smith, Taffola and Felix discussed a plan to rob April Star who lived in another motel room one floor below. As Felix went to get his car, Smith and Taffola went to Star's motel room. While Taffola waited outside as a lookout, Smith entered Star's room to rob her. However, Star resisted, resulting in Smith suffering a severe laceration to his hand. Star, however, got the worst of it, being beaten and stabbed to death. Taffola called Robledo about six hours later, at 3:00 a.m., and told her that Star had been killed. He returned to their motel room at about 6:00 a.m. When she saw him, Robledo observed that Taffola was very "distraught." He was "very anxious, not knowing what to do with himself." He had "a very distinctive look in his face, in his eyebrows and his eyes, and he had a completely blank look on his face." While in this condition, Taffola told Robledo that Smith had killed Star. Star's murder went unsolved until Robledo gave this information to an Orange County Sheriff's Department investigator years later in April, 2002, As a result, Taffola and Smith were arrested and charged with Star's murder. At trial, Robledo testified over Smith's objection to what Taffola had told her, including the fact that Smith had done the actual murder. Both defendants were convicted of first degree murder with

special circumstances and sentenced to life without parole. Smith appealed, arguing that admitting Robledo's testimony as to what Taffola had told her about Smith's involvement deprived him (Smith) of his Sixth Amendment right to confront and cross-examine his accuser (Taffola); an "*Aranda/Bruton*" violation. (See *People v. Aranda* (1965) 63 Cal.2nd 518, and *Bruton v. United States* (1968) 391 U.S. 123.)

Held: The Fourth District Court of Appeal (Div. 3) affirmed. Taffola's statements made to Robledo, when offered into evidence through Robledo's testimony, are hearsay. Such statements are admissible against a confessing defendant as a "*party admission*" exception to the hearsay rule. (E.C. § 1220) Pursuant to *People v. Aranda* and *Bruton v. United States*, however, the hearsay admissions of one defendant are *not* admissible at trial against a non-confessing co-defendant, at least where the confessing defendant does not testify. Allowing a jury to hear the confessing defendant's admissions when they implicate a non-confessing co-defendant deprives the co-defendant of his Sixth Amendment right to confront and cross-examine the source of those statements. However, where there is another hearsay exception that *does* apply to those same hearsay statements, sought to be admitted into evidence against the non-confessing defendant, such statements, at least if reliable, may be used as evidence implicating both defendants. In this case, the "*spontaneous declaration*" exception (E.C. § 1240) does apply. A "*spontaneous declaration*" is a statement "made under the stress of excitement and while the reflective powers are still in abeyance." The lack of an opportunity to fabricate a story makes such a statement inherently reliable. Defendant Taffola's statements made to Robledo, implicating Smith, fit this criteria. The Court further rejected Smith's argument that admitting Taffola's statements to Robledo into evidence violated his Sixth Amendment right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36. *Crawford* held that it is a Sixth Amendment confrontation violation to admit "*testimonial*" statements into evidence, despite the applicability of a statutory hearsay exception, unless the declarant (Taffola, in this case) is unavailable and the defendant (Smith) has had an opportunity to cross-examine him. But, by definition, statements made to a non-law enforcement witness under circumstances such as in this case are not "*testimonial*." Therefore, *Crawford* does not apply. So long as the statements "*bear adequate indicia of reliability*" by either falling "*within a firmly rooted hearsay exception*," or otherwise "*are cloaked with particularized guarantees of trustworthiness*," they are admissible. The "*spontaneous declaration*" exception to the hearsay rule is "*firmly rooted*." Robledo's testimony concerning what Taffola told her about Smith's involvement was therefore properly admitted into evidence.

Note: While I don't usually brief cases on courtroom evidentiary issues (this being a publication more for cops than for prosecutors), the *Aranda/Bruton* issue is one with which investigators really need to be familiar. We get so used to convicting defendants based upon their confessions and admissions that we sometimes forget that one defendant's confession is generally going to be inadmissible against a non-confessing co-defendant. This case is one, however, where the court found an exception, but only because the "*spontaneous declaration*" exception (rather than the "*party admission*" exception) happened to apply, and the *Crawford v. Washington*'s testimonial-statement

rule did not. I have a Sixth Amendment training outline that covers both these areas of the law if you're interested. Just let me know and I'll e-mail it to you.

***Robbery and Grand Theft Person*:**

In re Jesus O. **(Dec. 28, 2005) 135 Cal.App.4th 237**

Rule: An intent to rob may be proven circumstantially. Taking property from a victim's immediate presence is not sufficient to prove a "*grand theft person*," per P.C. § 487(c).

Facts: Defendant and Roberto were eating at a Van Nuys McDonalds when four other juveniles (Mario, Alex, George and Juan) came in and sat at another table. Per Roberto in later testimony, the four juveniles were making fun of his (Roberto's) nose and defendant's disfigured eyelids. Per Mario's testimony, it was defendant and Roberto who initiated a confrontation by claiming "*A.K.*", or "*Assassin Kings*;" a local street gang. Roberto escalated the situation by asking Mario what he was staring at and whether he "*had a problem*?" Defendant and Roberto followed Mario and his friends out of the McDonalds, confronting them in an ally behind the business. Defendant and Roberto, after reiterating their gang affiliation, asked Mario whether he had any money, to which Mario responded in the negative. As both factions performed the usual gangster-style, male-macho, I'm-tougher-than-you posturing, defendant "sucker punched" Alex in the mouth. And then the fight was on. Eventually Roberto pulled a folding knife with a three-to-four inch blade, threatening to "shank" them all, at which time Mario and his compatriots ran. Escaping over a fence, Mario discovered that his cell phone was missing. Juan saw Roberto pick it up off the ground and put it in his pocket. Roberto later testified that he picked up the cell phone from the alley and threw it in the trash. He later retrieved it at defendant's request and gave it to him, who eventually gave it back to Roberto, who gave it to a girlfriend, who gave it to Roberto's father, who gave it to police. Defendant was later arrested and charged by petition in Juvenile Court. (Roberto's disposition is not discussed.) A Juvenile Court temporary judge sustained the petition on one count of grand theft from the person (P.C. § 487(c)) and attempted second degree robbery (P.C. §§ 664/211/212.5(c)). Defendant appealed.

Held: The Second District Court of Appeal (Div. 7) affirmed, with some modifications. On appeal, defendant argued that the evidence was insufficient to support a true finding for either the attempted robbery or the grand theft person. As for the robbery, this offense is defined by statute as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." To hold defendant liable for an "attempted" robbery, it must be proved that he had the specific intent to rob someone. Where a defendant throws his gang affiliation around and purposely attempts to intimidate his intended victim ("*What're you staring at*," and; "*What's your problem*."), any reasonable person would recognize that a follow-up request for money implies an intent to steal whatever money the victim might admit to having. Defendant's request for money was also immediately followed up by him throwing the first punch. "*Fear*" for purposes of establishing the crime of robbery includes "[t]he fear of an immediate and unlawful

injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (P.C. § 212) The Court had no trouble finding that defendant, as an aider and abettor if not the actual instigator, purposely used intimidation to instill such fear for the purpose of taking money or other property from Mario. However, as to the grand theft person, it was undisputed that Mario's cell phone was picked up off the ground in the alleyway. To constitute a "*grand theft from the person*," it must be proved that the item taken was taken from the person of the victim. For the victim to merely have constructive possession of the item, even if it is within his immediate reach or under his control, is not enough. It must be on, or attached to, the victim in some way when stolen. Had the Legislature intended to say something like "from the immediate presence" of the victim, it could have. Defendant, therefore, did not commit any more than a petty theft when he and Roberto took Mario's cell phone. The Court, in affirming the true finding, therefore reduced this offense to a petty theft.

Note: The Court's conclusions as to both counts are consistent with the majority of prior cases on these issues, so I have no real problem with the decision. But I think the "temporary" Juvenile Court judge could have done a better job of making a record. The decision notes that he dismissed other allegations of robbery and attempted robbery despite evidence that one victim had his necklace snatched from his neck during the fight and that there were *four* victims in this case; not just Mario. The temporary judge also reduced the second degree robbery to a misdemeanor, which you can't do because the offense is a straight felony. (P.C. § 213(b))

***Attempted Murder with Multiple Victims*:**

People v. Smith **(Dec. 29, 2006) 37 Cal.4th 733**

Rule: A single gunshot with two victims in the line of fire can support convictions for two counts of attempted murder.

Facts: Karen drove her boyfriend, Renell, to a friend's house. In the back seat of the car immediately behind Karen, in a rear-facing baby's car seat, was their three-month-old son, Renell Jr. Defendant was hanging around the area with some friends. Karen and defendant had had a previous relationship that apparently went sour, with defendant threatening to hurt her the next time he saw her. After Renell got out of the car and was walking up to his friend's house, defendant approached Karen's car and asked her; "*Don't I know you*, *bitch*?" Renell heard the comment and told defendant; "*Well*, *you don't know me*." Defendant lifted his shirt and placed his hand on a handgun in his waistband. Renell, having second thoughts, backed up to the car while telling defendant; "*its cool, its cool*." Defendant and his friends started beating on Renell as he attempted to get into the car and as Karen tried to drive away. As she pulled away from the curb, Karen looked into her rearview mirror in time to see defendant directly behind the car holding his gun. He fired once, shattering the rear window and spraying the baby with broken glass. The bullet, narrowly missing both Karen and the baby, went through the driver's headrest and lodged in the door of the car. Although the defendant denied the shooting in his trial testimony, he admitted knowing that the baby was in the line of fire.

Karen drove to a friend's house and called police. Defendant was convicted of two counts of attempted murder (Karen and the baby). He appealed, arguing that the evidence was insufficient to support the attempted murder of the baby. Defendant's conviction was upheld on appeal to the Third District Court of Appeal (115 Cal.App.4th 567, *Legal Update*, Vol. 9, #5). He petitioned to the California Supreme Court.

Held: The California Supreme Court, in a split 5-to-2 decision, affirmed. To prove an attempted murder, it must be shown that defendant had the specific intent to kill and that he committed a direct, but ineffectual act, toward accomplishing the intended killing. This intent to kill requirement is the same as "*express malice*." "Express malice," in turn, requires a showing that the assailant either desired the intended result (i.e., death) or that he knew, to a substantial certainly, that that result would occur. It need not be shown that the attempted murder was "willful, deliberate, and premeditated" unless the prosecution is going for the enhanced attempted-murder punishment (i.e., life with the possibility of parole) provided for in P.C. § 664(a). The defendant's motive, although admissible in evidence, is not a necessary element that must be proved. Also, it is a well-settled principle that the defendant's intent to kill, or express malice, may be inferred from the defendant's acts and the circumstances of the crime. "The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill.'" In this case, the jury did not believe defendant when he denied being the shooter. Based upon the evidence, the jury was justified in finding that under these circumstances, defendant "either desired the intended result or that he knew, to a substantial certainly, that that result would occur." This is sufficient to uphold his conviction for the attempted murders of both victims despite the fact that only one bullet was fired.

Note: The lower Appellate Court used a so-called "*kill-zone*" (or "*zone of harm*") theory to uphold defendant's conviction for both counts, holding him responsible for the attempt to murder anyone who happened to be within the "*kill zone*" he created by shooting at a group of people. But the Supreme Court here held that a single bullet/multiple victim case does not necessarily need to be analyzed under this kill-zone theory. It is enough that it is proved that defendant knew, to a substantial certainty, that taking even a single shot might kill more than one person who is in the line of fire. Note also, by the way, that the Court here is *not* saying that they necessarily disagree with defendant when he argued that his ire was directed at Karen only, and had no motive to shoot the baby. The two dissenting justices agreed with defendant that this argument should preclude his conviction on the second count of attempted murder. All the majority opinion is saying is that the jury was not unreasonable in reaching its conclusions on this issue. So don't expect that we're always going to be as successful in similar prosecutions. The jury could have just as easily gone the other way on this issue, letting defendant slide on the second count of attempted murder. And had the defendant admitted his intent to kill Karen while denying any intent to kill the victim, instead of denying that he was even the shooter (which was his defense at trial), the jury might well have found him guilty of only one count. But that was the gamble he took, and lost.

***Suspicionless Fourth Wavier Searches and Civil Liability*:**

Motley v. Parks **(9th Cir. Dec. 30, 2005) 432 F.3rd 1072**

Rule: The evidentiary standard for a Fourth Wavier search is not a settled issue in the law. As such, officers who conduct a suspicionless search have qualified immunity from civil liability. Also, a Fourth Wavier search of a particular residence is lawful so long as the officers have "*probable cause*" to believe that the target of the search lives there.

Facts: Janae Jamerson, a member of the "Four Trey Crips" street gang in Los Angeles, was released on parole in Februrary, 1998. As a parolee, he was subject to the "*Fourth Waiver*" search and seizure conditions as specified in Penal Code, § 3067. At some point in the next year, Jamerson moved in with his girlfriend, Darla Motley. In February, 1999, Jamerson's parole was revoked and he was sent back to prison. Six weeks later, the "Newton Street Taskforce," comprised of L.A.P.D. officers, State Parole and federal officers, planned to conduct a parole sweep targeting gang-related violence and criminal activity. Jamerson was among the list of parolees targeted for this operation despite the lack of any reason to believe he might again be involved in illegal activity. The officers were apparently unaware that Jamerson had already been violated and sent back to prison. In March, 1999, the parole sweep was conducted with an L.A.P.D. officer, two ATF agents and a California parole agent going to Motley's apartment; Jamerson's last known address. Despite Motley's protestations that Jamerson no longer lived there, she eventually allowed them to search her apartment because the officers (falsely) claimed to have a warrant. Motley also alleged that the L.A.P.D. officer who searched her bedroom "trained" his firearm at her five-week-old son who was lying on the bed. Finding nothing, the officers eventually left. Motley later filed a 42 U.S.C. § 1983 civil rights civil suit in federal District Court. The federal judge granted the officers' motion for summary judgment, finding that they all had qualified immunity. Motley appealed.

Held: Except for reversing the trial court's dismissal as to the allegation that the L.A.P.D. officer had used excessive force on Motley's infant son by unnecessarily pointing his gun at him, an en banc panel of the Ninth Circuit Court of Appeal affirmed the trial court's dismissal of the law suit (reversing its earlier ruling to the contrary at 383 F.3rd 1058). First, the Court specifically declined to decide whether the officers needed a reasonable suspicion of criminal activity, or no suspicion at all, to justify conducting a Fourth Waiver search on a parolee. That issue is presently before the United States Supreme Court in another case (*Samson v. California*; see 126 S.Ct. 34.). Also, until the rule on that issue is "*clearly decided*," officers who violate it are entitled to qualified immunity from civil liability. As of the present, the appellate court rulings on this issue are in such disarray that the officers cannot be held to have known what the rule is supposed to be. The second issue is whether the officers had sufficient information to believe that Jamerson lived at Motley's residence at the time of the search. Prior decisions have required that before an officer can make a non-consensual entry into a residence to do a parole (or probation) Fourth Waiver search (or to arrest someone on an arrest warrant), the officers must have at least a "*reasonable grounds for believing*" that the parolee (or probationer, or target of an arrest warrant) resides at the residence they

want to search. The phrase "*reasonable grounds for believing*" has been interpreted to mean that there must be full-blown "*probable cause*" to justify the entry. Here, the officers relied upon information from their supervisor. The supervisor testified to having delegated the responsibility for determining where Jamerson lived to his subordinates, but that he himself had contacted Jamerson at Motley's residence on prior occasions. Also, the officers were not required to accept Motley's assertions that Jamerson did not live there in that Motley was certainly less than a disinterested party. Based upon these circumstances, the officers had probable cause to believe that Jamerson did in fact reside there at the time. The Court did find, however, that it must be determined by a civil jury whether Motley's allegations are true that the L.A.P.D. officer pointed his gun at her five-week old son (a Fourth Amendment, excessive force, violation) while searching her bedroom. But except for this allegation, the rest of Motley's civil case was properly dismissed by the District Court judge.

Note: The Ninth Circuit here makes a momentous concession, holding that whether a parole (or probation) Fourth Waiver search can be done on less than a "*reasonable suspicion*" is such an unsettled issue that an officer cannot be held civilly liable for searching with no suspicion. Up until now (although reversing itself each time upon rehearing, and then ducking the issue), the Ninth Circuit has been saying that it is settled law that a reasonable suspicion is needed for a Fourth Wavier search. Also, interestingly enough, on the issue of the need for probable cause to believe that they had the parolee's correct current residence, the Court apparently attached no significance to the fact that Jamerson's parole had been violated some 6 weeks earlier and that State Parole officers were a part of this taskforce and participated in the search of Motley's apartment. Although mentioning briefly the theory of "*collective knowledge*," and how all the officers engaged in this operation adopt the knowledge held by the others, it was not discussed why, when State Parole should have known that Jamerson was presently residing in prison, this information did not detract from their probable cause to believe he resided with Motley at the time of the search. Even when the Ninth Circuit rules in favor of law enforcement, it is sometimes difficult to figure out what the hell they're thinking.

***Searches Incident to Arrest*:**

United States v. Weaver **(9th Cir. Jan. 10, 2006) 433 F.3rd 1104**

Rule: A ten to fifteen minute delay between an arrest in a vehicle and the search of that vehicle with no intervening circumstances is still a lawful "search incident to arrest."

Facts: Riverside County Sheriff's Sergeant Hignight, in an unmarked sheriff's vehicle, observed a person he knew to have outstanding arrest warrants in the passenger seat of a vehicle that pulled up next to him. Sgt. Hignight also knew that that person was the subject of an investigation involving stolen checks. Hignight called for a marked patrol unit to stop the vehicle. Defendant, the driver, was detained after the passenger was arrested. After defendant declined to consent to the search of her car, Hignight, deciding that he was going to search it anyway, called for another unit so that he could have one deputy to watch the subjects and a second deputy to observe him as he conducted the

search; the "typical procedure" in such circumstances. It took 10 to 15 minutes for the second patrol unit to arrive during which time "nothing happened." Upon the arrival of the second patrol deputy, Sgt. Hignight searched defendant's car. A black organizer containing 46 blank personal checks, found to have been stolen days earlier from a postal customer in Rancho Mirage, was found on the floor behind the driver's seat. Defendant was a postal letter carrier assigned to the route from which the checks were stolen. Defendant and her arrested passenger were later connected to a series of some 35 stolen and forged checks. Charged in federal court with embezzlement of "mail matter" by a postal service employee (18 U.S.C. § 1709), defendant's motion to suppress the evidence recovered from her car was denied. She subsequently pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed defendant's conviction, finding the search to have been a lawful "*search incident to arrest*." To qualify as a "search incident to arrest," for which no search warrant, or even probable cause, is necessary, it need merely be shown that an occupant of the vehicle to be searched was arrested, and that the search is "*roughly contemporaneous with* (that) *arrest*." And while noting that the "*contemporaneity*" (a word they made up) of the search relative to the arrest is important, it is not the only thing to be considered. "The relevant distinction turns not upon the moment of the arrest versus the moment of the search, but upon whether the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former." Here, the sergeant waited for another deputy to assist for safety reasons. While waiting only some ten to fifteen minutes, nothing occurred that could have been considered an "intervening" act separating the arrest from the search. Under these circumstances, the eventual search is sufficiently "*roughly contemporaneous*" with the arrest to qualify as a search incident to arrest. The search, therefore, was lawful.

Note: When asked, I often suggest (at least in serious cases) that rather than taking advantage of some of the legal exceptions to the search warrant requirement, we should probably get a search warrant instead, particularly when dealing with a vehicle. This is because even though many legal scholars like to say that a warrantless search of a vehicle is justified by the co-called "*vehicle exception to the warrant requirement*," I still see this as an area of the law that is not totally settled, and one that may come back on us some day like a egg salad sandwich left in the heat. The Ninth Circuit in this case, for instance, while upholding this warrantless search, notes that searches incident to arrest have gone well beyond the "*rational underpinnings*" of the Supreme Court's original approval of such searches. (see *New York v. Belton* (1981) 453 U.S. 454.) More specifically, they note how "officer safety and preservation of evidence" (see *Chimel v. California* (1969) 395 U.S. 752.) are no longer a major concern when the arrestee is handcuffed and put into a nearby patrol car. And they quote a Supreme Court Justice (O'Conner) who is noted to have said that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel* . . . [This is] a direct consequence of *Belton's* shaky foundation." (See concurring opinion in *Thornton v. United States* (2004) 541 U.S. 615, 624.) Someday, we may see the "*search incident to arrest*" theory get seriously watered down. Don't let it be your important case that is the one to do it.