The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*I hate when I think I'm buying organic vegetables and when I get home I discover they're just regular donuts*." (Unknown)

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ADMINISTRATIVE NOTES:

Passwords and Biometric Features for Digital/Electronic Devices*:** In the last *California Legal Update* (Vol. 24, #2, Jan. 23, 2019), I briefed the federal district court opinion of ***In re Search of a Residence in Oakland (N.D. Cal. Jan. 10, 2019) __ F.Supp.3rd __ [2019 U.S. Dist. LEXIS 5055], emphasizing a magistrate judge's conclusion that forcing a suspect to provide passwords and/or to use his or her biometric features (e.g., finger or thumbprint, facial feature recognition, etc.) to unlock cellphones and other digital or electronic devices violates the subject's Fifth Amendment self-incrimination rights. The stated reason for this rule is that both passwords *and* biometric features are considered to be "*testimonial communications*." Well, I'm told now that this is not necessarily correct, at least as to biometric features. While the magistrate judge was correct when she applied this rule to passwords (at least according to prior case law), there's a serious difference of opinion as to whether it also applies to biometric features. The magistrate judge cited only one prior case talking about biometric features being testimonial communications which itself came from another federal district court (i.e., trial court), located in Illinois. (***In re Application for a Search Warrant*** (N.D. Ill. 2017) 236 F. Supp. 3rd 1066.) But *not* cited by the magistrate judge was a case from the Minnesota Supreme Court (***Minnesota v. Diamond*** (Jan 17, 2018) 905 N.W.2nd 870.), where the issue was discussed in excruciating detail. The Minnesota Court specifically concluded that biometric features are *not* testimonial communications. Also (cited by the magistrate judge but ignoring its discussion of the issue) is a case from a circuit court in the state of Virginia (***Commonwealth v. Baust*** (Va. Cir. Ct. 2014) 89 Va. Cir. 267.), where it was similarly held that biometric features are *not* testimonial communications, and thus *not* protected by the Fifth Amendment. The bottom line is that we have a split of opinion on this issue; two federal trial level courts holding that a criminal suspect *cannot* be forced to use his or her biometric features to open cellphones or other digital or electronic devices without violating the Fifth Amendment, and a state supreme court (Minnesota) and a state circuit court (Virginia) ruling to the contrary. Such decisions, both from the federal courts and other states, are considered to be "persuasive" only, and not controlling in California. But there are neither any California cases nor cases from the U.S. Supreme Court telling us what the rule should be. *So what do we do*? In considering the appellate level of the four courts that have discussed the issue, I'd have to say that the magistrate judge's opinion in ***In re Search of a Residence in Oakland*** is a minority opinion, and one that you can safely ignore should you be confronted with the problem. But my opinion, and a dime, won't even get you a cup of coffee anymore. So we're going to have to wait until we get some California or U.S. Supreme Court (or even Ninth Circuit) case law on this issue, meaning we need at least one of you to press the envelope a bit and give us that case law. My sincere thanks to Detective James Williams of the Sacramento Sheriff Department's Internet Crimes Against Children Task Force (who apparently is already pressing the envelope) for not only turning me on to the conflict in the law on this issue, but for doing the bulk of the legal research for me.

CASE LAW:

***Miranda and Fruit of the Poisonous Tree*:**
***Miranda and Interrogations*:**
***Due Process and Involuntary Confessions*:**

People v. Orozco **(Feb. 28, 2019) __ Cal.App.5th __ [2019 Cal. App. LEXIS 166]**

Rule: The questioning of a criminal suspect by an agent of law enforcement when the suspect is unaware that the person is in fact a police agent, is not an "interrogation" for purposes of *Miranda*. A confession made to an agent of law enforcement, even if coming after an earlier invocation, is not subject to suppression unless the suspect knows the person is an agent of law enforcement *and* the confession is the product of the earlier *Miranda* violation. Due process is not violated despite an earlier intentional *Miranda* violation when the confession itself is not coerced.

Facts: Nathaly Martinez and her boyfriend, defendant Edward Orozco, had a child who they named "Mia." Martinez left Mia in defendant's sole care one day. A few hours later, defendant called Martinez, telling her that Mia was not breathing. Rushing back home, Martinez found Mia's body to be cold to the touch. Attempts at CPR failed to resuscitate her. Emergency personnel called to the scene were no more successful. Mia was dead. The later autopsy showed that Mia had died from blunt force trauma with 29 bruises, seven rib fractures, bruised lungs with the right lung punctured, and a lacerated liver. Defendant voluntarily accompanied the police to the police station. Interviewed by three officers in an interview room, he was told that he was not in custody and that he was free to leave. Nonetheless, defendant was read his *Miranda* rights which he indicated that he understood. In response to the officers' questions, defendant denied hurting Mia although he had no explanation for her injuries. Not believing him, the officers pressed for an explanation. Asked if he would submit to a polygraph test, defendant responded by asking; "*Can I have an attorney*?" The officer responded, "*Sure you can have an attorney*." But instead of ending the interview, the officers proceeded to ask defendant at least four times; "*Why would you need an attorney*?" In the midst of the continued questioning, defendant requested an attorney four more times, all the while maintaining that he had not hurt Mia. Finally giving up, the officers formally arrested defendant for Mia's murder. Upon doing so, however, one of the officers told defendant: "(*Y*)*ou ask for your attorney . . . but we're asking for your honesty*." Giving it one more shot, the officer then told defendant: "*If you're willing to talk to us right now . . .* (*w*)*ithout your attorney present . . . and* (*to*) *explain what happened*(,) *I'm not going to take you to jail*." Not fooled, defendant repeated his request for an attorney. The frustrated officer responded with; "*All right. Go to jail. Done*." At this point the interview finally ended without any incriminating statements from defendant. Several hour later, however, the police put defendant and his girlfriend, Nathaly Martinez, together in an interview room. Although it is not clear who (Martinez or the officers) suggested that the two be allowed to talk together, there was testimony to the effect that one of the police officers told Martinez that maybe she could get a full explanation out of defendant as to what had happened to Mia. But otherwise, even though Martinez felt like she was expected to report back to the police, she was not told what to ask or what particular information she should try to get from defendant. With

the two of them alone together in an interview room, and with a tape recorder surreptitiously recording their conversation, Martinez asked defendant what had happened. He gave her the same explanation that he had previously provided to the police. Perhaps intending to jumpstart the conversation a bit, one of the officers then entered the interview room and told the couple that the autopsy report had come back indicating that Mia had "died at the hands of another," and that she had been beaten. The officer then told defendant in Martinez's presence: "(*Y*)*ou were the last one with your daughter and there's* (*no*) *doubt* (*about*) *it. She suffered major injuries. This may be the last time you guys get to talk to each other in person, okay*?" The officer then added that "*right now both of you are looking at going to jail for child neglect; causing the death of that baby*." He then asked, "*Did either of you have anything you want to say to me*?" Martinez said "*No*;" defendant was silent. Left alone again with defendant, Martinez asked him one more time what had happened? Defendant responded only by telling her that he did not want her to be arrested. The same officer returned once more and asked Martinez to step outside with him. Asking her if she would take a polygraph test (her response was not given), he told her that defendant had refused to do so, inferring, perhaps, that defendant was lying. He then put Martinez back into the interview room and listened to how the two would process this information. Sure enough, Martinez asked defendant why he didn't want to take a lie detector test, reminding him that she was Mia's mother and that she needed to know what had happened to her. Upon adding: "*If you love me, you need to tell me the truth*," a sobbing defendant eventually broke down and admitted to having killed Mia. Charged in state court with murder (P.C. § 187(a) and assault on a child causing death (P.C. § 273ab(a)), defendant's motion to suppress his confession was denied. With his tape-recorded confession to Martinez admitted into evidence, he was convicted by a jury and sentenced to prison for 25-years-to-life. Defendant appealed.

Held: The Second District Court of Appeal (Div. 2) affirmed. The issue on appeal was whether the trial court had erroneously admitted into evidence defendant's incriminating statements he made to Martinez. Specifically, defendant argued that the use of his confession violated both his *Miranda* rights as well as the Fourteenth Amendment "due process" clause.
Miranda: The so-called "*Miranda Rule*"—dictating that a criminal suspect cannot be questioned until he has been advised of his self-incrimination and attorney rights and then, understanding those rights, agrees (either expressly or implicitly) to waive those rights and answer questions—is limited to those situations where the suspect is both in custody and is interrogated by law enforcement or its agents. Although defendant in this case was assumed to be in custody (despite being told that he was not; an issue not discussed by the Court), the issue was whether at the point in time when he finally confessed, was he being "*interrogated*," as this term is defined by the courts. In deciding this issue, it is important to note that the whole purpose of the *Miranda* rule is to offset psychological pressures inherent in an incommunicado interrogation by the police. It is also a rule that once an in-custody suspect clearly and unequivocally invokes his right to the assistance of counsel under *Miranda*, the questioning must cease until he or she is either released or counsel is provided. (*Edwards v. Arizona* (1981) 451 U.S. 477.) Defendant in this case invoked his right to counsel during his interrogation, and did so repeatedly. The officers thereafter, inappropriately albeit unsuccessfully, attempted to get him to change his mind. Had he confessed at this point, his confession would have been inadmissible (at least for purposes of the People's case-in-chief) as a product of this clear *Miranda/Edwards* violation. But the questioning was eventually ended without a confession having been obtained. So there

was nothing to suppress at this point. Putting defendant into a room with his girlfriend (i.e., Martinez), however, was held to be a continuation of the questioning, although at this point by an agent (i.e., the girlfriend) of law enforcement. Although the People argued that Martinez was not a police agent under these circumstances, the trial judge ruled that she was and the Court of Appeal found substantial evidence to support the trial court's ruling on this issue. But the Court also held that even so, defendant's eventual confession to Martinez was properly admitted into evidence. That's because defendant did not know that Martinez was a police agent, and as such, no "*interrogation*," as the term is legally defined, occurred. For purposes of *Miranda*, "*interrogation*" means "*express questioning*" or "*words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response*." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300–301.) Whether the police action is "reasonably likely to elicit an incriminating response" is judged by what the suspect perceives, not what the police intend. (*Id.* at p. 301.) Implicit in the definition of "*interrogation*" is that (1) the suspect is talking to the police or an agent of the police, *and* (2) the suspect *is aware* that he is talking to the police or one of their agents. Because talking with one's girlfriend does not involve the same "*inherent coerciveness*" of a police-dominated interrogation, the rules of *Miranda* are inapplicable to such a situation. (*Illinois v. Perkins* (1990) 496 U.S. 292; *People v. Williams* (1988) 44 Cal.3rd 1127, 1141–1142.) Therefore not only must Martinez have been a police agent, but defendant had to have known this fact for her questioning of him to have been an "*interrogation*," as the term is defined. Absent there being an interrogation by someone defendant knew was a police agent, his incriminating statements to her were not subject to being suppressed. Defendant further argued, however, that his eventual confession to Martinez, as "the fruit of the poisonous tree," should have been held to be inadmissible as a product of the earlier *Miranda*/*Edwards* violation. The Court disagreed, noting that the officers' violation of *Miranda* failed to achieve the results the officers had hoped for; i.e., a confession. Defendant remained steadfast in his denials of any criminal culpability in his daughter's death. It wasn't until sometime later that defendant admitted to Martinez, not knowing that she was acting as a police agent and therefore not under the pressure of a police-dominated questioning, that he had killed Mia. It was not the *Miranda* violation that prompted this confession, but rather Martinez's questions. As such, defendant's eventual confession was not the product of (i.e., was attenuated from) the earlier *Miranda* violation.

Due Process: Under the Fourteenth (and Fifth) Amendment, the government cannot constitutionally deprive a person of his "life, liberty or property" without first according him "due process" of law. This is commonly interpreted to mean that a criminal defendant must be accorded "*fundamental fairness*." A violation of one's due process rights may result in the suppression of any resulting evidence, including an involuntary confession. A confession will be held to be involuntary, and thus subject to suppression, only if official coercion caused the defendant's will to be overborn such that the resulting statement is not the product of "a rational intellect and free will." The "totality of the circumstances" must be considered. Defendant argued that his due process rights were violated in this case—thus resulting in a coerced confession—because the police officers (1) deliberately ignored his repeated requests for counsel during the first interview and thereafter sent Martinez in to "get the full explanation" from him; and (2) highlighted the seriousness of the crime, threatened to arrest him and put him in jail if he did not "explain what happened" and stated that he and Martinez were "looking at going to jail for child neglect." The officers also attempted to talk defendant out of invoking his right to counsel (a fact not mentioned by the Court; see *People v. Peracchi* (2001) 86 Cal.App.4th 353.).

To constitute a due process violation, however, there must be evidence of "*coercion*." As noted above, defendant's incriminating statements to Martinez were not coerced because, as far as he knew, he was merely talking to his girlfriend at the point in time when he confessed. The officers' behind-the-scenes manipulation was held to be, at most, a form of deception. But "police trickery . . . does not, by itself, render a confession involuntary." The "trickery" in this case consisted of merely placing defendant into a room with someone he trusted, to see if he would talk to her. Because the proximate cause of his ensuing confession was the conversation—and not the deceptive act of orchestrating its occurrence—the requisite causal link between the police stratagem and defendant's confession is missing. The Court also held that the officers' reminders to defendant that the penalty for causing Mia's death was severe, their threat to arrest him immediately if he did not "explain what happened" (by promising *not* to immediately arrest him if he did), and their reminder that he (and Martinez) were "looking at going to jail" for Mia's death, did not violate due process. "(I)nforming a suspect of the likely consequences of the suspected crimes or of pointing out the benefits that are likely to flow from cooperating with an investigation" not improper. Although referring to the officers' tactics, including ignoring defendant's repeated attempts to invoke his right counsel, as "*deplorable*," the Court held that none of this was what caused defendant to eventually confess. Absent a causal link between the officers' actions and defendant's eventual confession, there are no grounds to cause the suppression of his incriminating statements.

Note: I'm not sure what the officers (who were not named in the decision) thought they were doing by repeatedly ignoring defendant's attempts to invoke, and then compounding this error by actively trying to talk him into changing his mind, all of which is blatantly illegal. Although such tactics may be approved by some legal advisors, as well as various television cop shows, the Court here referred to the officers' interrogation tactics as "*deplorable*." It has long been my position (as well as that of some California appellate courts) that police officers who are concerned with their professionalism as law enforcement officers in doing their job (which should be all of them) should not be engaging in intentional *Miranda* violations despite the known fact that we might be able to get some impeachment evidence out of such questionable tactics. Had the officers in this case been successful in talking defendant out of his invocation, his resulting statements would have been suppressed. And although not mentioned in this decision, there is both U.S. and California Supreme Court authority for the argument that such blatant tactics do in fact constitute a due process violation, and could have resulted in the suppression of defendant's statements in both the People's case-in-chief *and* for the purposes of impeachment (see *Spano v. New York* (1959) 360 U.S. 315; *People v Neal* (2003) 31 Cal.4th 63.). The only thing that avoided suppression in this case was the saving factor of "*attenuation*" between the objectionable police tactics and the eventual confession, and the fact that questioning by Martinez did not fit into the legal definition of an "*interrogation*." Bad facts make for bad case law. Someday, interrogation tactics such as used in this case are going to result in a new rule of suppression.

***Burglary of a Bank ATM*:**
***Shoplifting, per P.C. § 459.5*:**

People v. Osotonu **(Sep. 4, 2018) 26 Cal.App.5th 973**

Rule: Making an "entry by instrument" of an ATM attached to a bank building, when done with the intent to steal, including through the use of explosives, constitutes a burglary and a "shoplifting," per P.C. § 459.5. But inserting a financial instrument, such as a stolen credit card, into the same ATM, even with the intent to steal, is not a burglary nor a shoplifting.

Facts: On January 26, 1997, at 2:50 a.m., defendant and others, in one incident of an on-going crime spree, stuck dynamite into an ATM machine attached to the outside wall of a Vallejo Wells Fargo bank building, blowing the whole machine apart to the extent that a "crater" was left in the cement wall and the steel frame to the ATM was blown into a nearby parking lot. This event was charged as a second degree commercial burglary in Count 10 of a 20-count information. In July of 2000, Defendant pled "no contest" to 17 of the 20 counts, including Count 10, and sentenced to 26 years in prison. In November 2014, California voters approved Proposition 47, the so-called "Safe Neighborhoods and Schools Act," or "Proposition 47." Among other provisions, Proposition 47 added P.C. § 1170.18, a resentencing provision, and P.C. § 459.5, describing the new crime of "shoplifting." Pursuant to subdivision (a) of P.C. § 1170.18, any defendant currently "serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [it] been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing." Pursuant to these provisions, defendant filed a petition in October, 2015, asking that his felony burglary conviction as alleged in Count 10 be reduced to a misdemeanor "shoplifting," as described in P.C. § 459.5. In considering defendant's petition, the trial court concluded that defendant's second degree burglary conviction for using explosives to blow open an ATM while the bank itself was closed, could not be recast as the lesser offense of shoplifting. The judge therefore denied defendant's petition. Defendant appealed.

Held: First District Court of Appeal (Div. 4) reversed. Subdivision (a) of section 459.5 defines "*shoplifting*" as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." The purpose of this new offense was to displace the crime of burglary for many commercial thefts that do not exceed the $950 statutory ceiling. (See subd. (b) of P.C. § 459.5). The issues in this case were whether (1) placing an explosive in an ATM that is attached to the outside wall of a bank is a "burglary," and if so, (2) is an ATM on an exterior wall of a bank building a "commercial establishment," *and* (3) is an ATM considered to be "open during regular business hours" when the bank itself is closed. Applying the standard "principles that govern statutory construction" (i.e., "to effectuate the intent of the enacting body, . . . whether enacted by the Legislature or by initiative"), the Court answered all three questions in the affirmative.
(1) *Burglary and Shoplifting*: Subdivision (a) of P.C. § 459.5 lists among the elements of the misdemeanor crime of "*shoplifting*" that there be an "entering (of) a commercial establishment with the intent to commit a larceny . . . ." The dual question here is whether the act of entering into an ATM attached to an outer wall of a bank building (with the necessary intent to steal) is a sufficient "*entry*" into a building to support a conviction for second degree burglary, and, by analogy, the new crime of shoplifting as defined by section 459.5. And if it is, then does using dynamite as the means by which to make that entry suffice? In answering both questions in the affirmative, the Court cited the U.S. Supreme Court case of *People v. Davis* (1998)18 Cal.4th

712. *Davis* stands for the theory that an entry into a building, which includes the entry of an ATM attached to the outer wall of that building, while using a tool (such as a crowbar) which itself breaks the exterior plane of the ATM, so long as done with the intent to commit a larceny, is sufficient to constitute a completed burglary. Using a tool of any sort to make the entry, per the Supreme Court—referred to as an "entry by instrument"—"breaches the occupant's possessory interest in the building." The *Davis* Court, however, differentiated this kind of entry—breaking the exterior perimeter/plane of a building (or attached ATM) through the use of a tool—from the act of sliding a stolen credit card into an ATM, or a forged check into the cashier's window of a check-cashing business, noting that these latter acts are really no different than mailing a forged check to a bank or check-cashing facility. Using these financial instruments—the stolen credit card or forged check—is *not* the same as using a tool, such as a crowbar, to make an entry, in that attempting to pass such a monetary instrument does not violate the occupant's possessory interest in the building. (*Id.*, at p. 722.) In this case, the Court found the use of dynamite to blow up the ATM, where it can be presumed that residue from the dynamite penetrated the ATM's outer boundary, falls into the category of using a crowbar or similar instrument, violating the occupant's possessory interest in the building. Using dynamite in such a manner is *not* the same as attempting to use a stolen or forged financial instrument to illegally obtain money from the victim business. Blowing up the ATM, with the necessary intent to steal, therefore, constitutes a completed burglary, and thus a completed act of "shoplifting" as well.
(2) *Commercial Establishment*: Prior case law has found a "*commercial establishment*," at least for purposes of section 459.5, to be "a business that is primarily engaged in the buying and selling of goods or services." (*People v. Holm* (2016) 3 Cal.App.5th 141.) This includes the conducting of financial transactions. The bank itself clearly qualifies as a commercial establishment for purposes of section 459.5. By extending this analysis, the Court found that patrons who use an ATM are also "clearly engaged in commerce;" i.e., financial transactions, in a way that is indistinguishable from the commercial activities of those patrons who choose to go inside of the bank building and approach a bank teller or. Also, the Court found an ATM to be an important adjunct to the bank, being a place where specific services are provided when the main facility is closed and not open for banking business. The Court, therefore, had "little difficulty" holding that an ATM is a commercial establishment for purposes of the shoplifting statute.
(3) *Business Hours*: Lastly, the Court rejected the argument that an ATM's "regular business hours," for purposes of the shoplifting statute, are necessarily the same as the "banker's hours" associated with its affiliated financial institution. Upon proof that the outside blown-up ATM was "open for business" 24 hours a day, even when the bank itself might be closed, section 459.5's "regular business hours" element is met.
Conclusion: The decision of the trial court was reversed and the case was remanded for further hearings, applying the law as indicated above.

Note: The theory that an ATM can be the subject of a second degree commercial burglary was upheld in a decision out of the Second District Court of Appeal (Div. 6): *People v. Ravenscroft* (1988) 198 Cal.App.3rd 639, 642-643. The California Supreme Court in *Davis*, *supra*, reversed *Ravenscroft*, but only so far as to hold that sticking a stolen credit card (which is what was used in *Ravenscroft*) into an ATM, or passing a forged check through a check-cashing business's customer window (as was done in *Davis*), are *not* burglaries. *Davis does not* say that an ATM

cannot be burglarized where something like a crowbar is used to pry it open. On this point, I think I've been passing out erroneous information in the past. The bottom line here is that an outside ATM, attached to a bank building, can in fact be the subject of a burglary by physically breaking into it, *but not* by using a financial instrument like a stolen credit card or a forged check to obtain money from it. This new case takes this reasoning one step further in holding that blowing the ATM apart, when done with the intent to steal money from it, assuming something (such as the dynamite itself, or the powder from that dynamite) made entry into the ATM, is also a burglary. If the sum intended to be taken is $950 or less, then it *must*, under the terms of P.C. § 495.5(b), be charged as a shoplift instead of a burglary. Not answered here is the question whether an ATM that is a part of a separate kiosk-type structure, *not* attached to the side of a bank building, can also be the subject of a second degree burglary (or, if the elements are met, shoplifting). Looking for an answer, I had to go as far back as over 80 years and more to find anything relevant to the issue. In *People v. Burley* (1938) 26 Cal.App.2nd 213, it was held that a mobile popcorn stand can be the subject of a burglary. In so ruling, the appellate court held that "any structure which has walls on all sides and is covered by a roof" can be the subject of a burglary (citing *People* v. *Buyle* (1937) 22 Cal.App.2nd 143 [an "earthen bunker"]; *People* v. *Franco* (1926) 79 Cal.App. 682 [a store's display cases which were situated along a stairway that led to the store's entrance]; and *People* v. *Jackson* (1933) 131 Cal.App. 605 [a store's showcase, which was attached to the floor of the store's entrance]. So "*yes*," based upon this, it appears that a kiosk-type setup holding an ATM (or any other kiosk-based business) can be burglarized, so long as it has walls on all sides and is covered by a roof. Note also that if the elements of shoplifting are met, then it *must* be prosecuted as such and *not* as a burglary (P.C. § 459.5(b)), and except in the case of the defendant having certain prior convictions, the offense is a straight misdemeanor (per subd. (a)).

***Warrantless Arrests on School Grounds and the Fourth Amendment*:**
"*Reasonableness*" *as it Relates to Arrests on School Grounds*:
***The Special Needs Doctrine and Middle Schools*:**

<u>*Scott v. County of San Bernardino*</u> (9th Cir. Sept. 10, 2018) 903 F.3rd 943

Rule: The arrest of middle school students by a school resource officer cannot be justified as a scare tactic, a lesson in maturity, or a chastisement for perceived disrespect. Neither does such an arrest satisfy a school's "special need" to maintain order on the campus. Taking into account the arresting officer's subjective motivations, in order for such an arrest to be lawful, it must be shown to be reasonable under the circumstances.

Facts: Seventh-grade female middle school student L.V. (sometimes assisted by another female student, A.J.) was apparently Etiwanda Intermediate Middle School's resident bully. In September and October of 2013, L.V. harassed and bullied several classmates, including the three daughters (L.R., S.S., and R.H.) of the plaintiffs (as "guardians ad litem") in this lawsuit. The harassment included a number of assaults on the three girls in individual confrontations, the assaults occurring both on and off the campus. Pleas to the school's administration by both the parents and the students themselves failed to end the harassment. Finally, on October 8th, Assistant Principal Balbina Kendall summoned everyone involved, including L.V. and A.J. (and two other students), to a meeting. A School Resource Officer (a San Bernardino Sheriff's

Deputy) was also invited, being told that multiple unsuccessful attempts had been made to stop the conflict and that the problem was escalating. The deputy was asked to speak to the students about what was described to him as an "ongoing feud." The deputy was also aware that there had been an unusually high number of physical fights between students since the start of the school year. At this meeting, Assistant Principal Kendall first addressed the students, telling them all that the fighting "needs to end." She also told them; "(s)o far as I know, . . . all seven of you . . . have been part of this continuous argument, on campus and off campus." The deputy then took over the meeting, quickly forming the opinion that the students were being "unresponsive" to his efforts, and were behaving "disrespectfully." He based this on their "body language and continued whispering" among themselves. The two primary aggressors—L.V. and A.J.—did make comments to the deputy at some point suggesting that they would not stop their behavior. Very quickly ("(w)ithin minutes after his arrival"), the deputy threatened to take *all* of the students to jail. His stated purpose in doing so was to "*prove a point*." In addressing the students, the deputy told them: "*And for the one lady laughing that thinks it's funny, I am not playing around. I am dead serious that we are taking you guys to jail. That might [be] . . . the most easiest thing to do . . . to wanting to prove a point . . . that I am not playing around. . . . Here is a good opportunity for me to prove a point and make you guys mature a lot faster.*" The deputy also told the students that he did not care "*who is at fault, who did what*." Still failing to get the respect he wanted, and following up on his threat, the deputy then announced that he was arresting everyone. The stated charge was for "unlawful fighting," per P.C. § 415(1). With the assistance of another deputy, six of the seven students were handcuffed, with the seventh (L.V.) being cited at the scene and released to her father. The other six (including L.R., S.S., and R.H.) were transported to the Sheriff's Station where they were separated, interviewed, and finally released to their respective parents. In the end, the school took no disciplinary action against any of the seven students, and no criminal charges were filed. As a result, however, the parents for L.R., S.S., and R.H. sued the deputy and the County of San Bernardino in federal court. The Court granted the plaintiffs' summary judgment motion, pre-trial, in effect saying that the deputy and the County of San Bernardino were civilly liable as a matter of law. The civil defendants (the deputy and San Bernardino County) appealed.

Held: The Ninth Circuit Court of Appeal affirmed. The issue on appeal was the constitutionality of the arrest of a group of 12 and 13-year-old female middle school students on a charge of unlawful fighting, per P.C. § 415(1); i.e., whether there was probable cause to do so under the facts of this case. In considering the Fourth Amendment's prohibition of unlawful searches, The United States Supreme Court has ruled that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject," giving school officials, "under certain circumstances," the right to conduct warrantless searches of students under their authority, and with something less than the traditional probable cause. Whether such a search is permissible "depend[s] simply on the *reasonableness*, under all the circumstances, of the search." (Italics added; *New Jersey v. T.L.O.* (1985) 469 U.S. 325.) Although *T.L.O.* is a "*search*" case, it has been held that the same standards apply to "*arrests*," as a "*seizure*" of the person. And while law enforcement is commonly held to stricter standards, when they are on campus and acting at a school official's request (such as a school resource officer), they adopt the same relaxed standards that apply to the school officials. When looking to the reasonableness of a search or seizure, "a twofold inquiry" is considered. *First*, "one must consider whether the search (or seizure) was justified at its inception." *Second*, it must be

determined "whether the search (or seizure) as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." This two-part test, when considered in the school setting, operates as a limited "*special needs*" exception to the standard warrant and probable cause requirements of the Fourth Amendment. With these standards in mind, the Court ruled here that the arrests of L.R., S.S., and R.H. were constitutionally *unreasonable* because they were not "*justified at their inception*." With only generalized allegations of group bickering and fighting, with no specific information about L.R., S.S., or R.H. being the instigators of any of the assaults, there was no legal justification for their arrests, even under *T.L.O.'s* relaxed standards. In applying the "*special needs*" doctrine, the officers' "*actual motivations*" may be considered. The deputy's expressed reasons for arresting the plaintiffs' daughters here were to "*prove a point*" and to "*teach them a lesson*," and not because he had any specific information about them instigating fights. The deputy clearly stated that his justification for the arrests was not the commission of a crime, since he did not "care who is at fault," nor the school's "special need" to maintain campus safety, but rather his own desire to "*prove a point*" and "*make* (the students) *mature a lot faster*." Per the Court; "(t)he arrest of a middle schooler . . . cannot be justified as a scare tactic, a lesson in maturity, or a chastisement for perceived disrespect." The Court further ruled that even if the arrests had been justified at their inception, the requirements of *T.L.O's* second prong—that the arrests were reasonably related in scope to the circumstances which justified the interference in the first place—also was not met. To meet this test it must be shown that "the measures adopted were reasonably related to the objectives of the search (or seizure) and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Under the facts of this case, the Court found that "(t)he summary arrest, handcuffing, and police transport to the station of middle school girls was a disproportionate response to the school's need, which was dissipation of what Vice Principal Kendall characterized as an 'ongoing feud' and 'continuous argument' between the students." As summarized by the Court; "the full-scale arrests of all seven students, without further inquiry, was both excessively intrusive in light of the girls' young ages and not reasonably related to the school's expressed need." In other words, merely counseling the plaintiffs and notifying their parents would have been more appropriate to the circumstances, absent specific information of the girls' actual involvement in some specific criminal offense. After finding that the deputy should have been aware of these standards, the Court ruled that he was not entitled to qualified immunity. "No reasonable officer could have reasonably believed that the law authorizes the arrest of a group of middle schoolers in order to prove a point." The trial court's granting of the plaintiffs' summary judgment motion was therefore affirmed.

Note: Despite this ruling (where you cannot disagree with the Court's conclusion that it just isn't within a law enforcement officer's power or responsibility to impose punishments on suspects by making unlawful arrests), you have to appreciate the deputy's frustration in having to deal with a bunch of smart-mouthed, disrespectful, little buttheads. In the Court's final—somewhat patronizing—conclusion, the Justices note that they "do not diminish the seriousness of potential violence between students, or the need for conflict resolution in the educational setting." But they then water down this brilliant observation by adding: "Society expects that children will make mistakes in school—and yes, even occasionally fight," as if this somehow excuses the bullying and unprovoked assaults that were going on. There was a time when a child's parents were expected to impose discipline at home, teaching their own children to have

respect for authority and not be involved in bullying or physical assaults. School officials, as temporary guardians, had the power to continue the same while the student was at school, including, when necessary, the administration of corporal punishment. At my school (Glendale High School; Class of ’63), Coach Roy Vujovich (a man you didn’t want to cross) would simply take you out behind the gym and correct the problem then and there. The police were not expected to get involved. But in today’s politically correct, over-sensitive, and lawsuit-happy society, school officials can’t do that anymore, and parents don’t seem to want to do it. The deputy in this case is the victim of this lapse of parental responsibility exercised by at least L.V. and A.J.’s parents; feeling like he had to impose discipline on these “children” where the parents so obviously failed to do so. Lastly, the Court points out that P.C. § 415.5(1), fighting on school grounds (at least for the on-campus assaults), might have been the more appropriate charge had the deputy taken the time to find out exactly what had been going on and who among the seven girls should have been charged (L.R., S.S., and R.H. apparently being victims and not instigators). Unfortunately, the deputy failed to do this; his oversight leading to a lawsuit.