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Remember 9/11/01; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*It is amazing how quickly the kids learn to drive a car, yet are unable to understand the lawnmower, snowblower or vacuum cleaner*." (Ben Bergor)

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***Case Law*:**

CASE LAW:

***Arrests in Violation of a State Statute*:**

Virginia v. Moore **(Apr. 23, 2008) ___ U.S. ___ [128 S.Ct. 1598]**

Rule: A custodial arrest for a misdemeanor offense when state law mandates that the suspect be cited and released does not violate the Fourth Amendment. Evidence recovered as a result of a search incident to such an arrest will not be suppressed.

Facts: Two City of Portsmouth, Virginia, police officers, with information that defendant's driver's license was suspended, stopped him when they saw him driving. Upon verifying that his license was indeed suspended, the officers physically arrested

him despite a Virginia statute that provides that the misdemeanor offense of driving with a suspended license is subject to citation only (except in certain circumstances not applicable here). Ignoring this statutory restriction, the officers physically arrested defendant (i.e., a "custodial arrest") and searched him incident to arrest. The search resulted in recovery of 16 grams of crack cocaine and $516 in cash. Charged in state court with possession of cocaine with the intent to distribute, defendant filed a motion to suppress the cocaine. Virginia law further provides, however, that evidence recovered by a police search, even though in violation of state law, does not require the suppression of the resulting evidence. The trial court therefore denied defendant's motion and convicted him after a court trial. Arguing that the officers also violated the Fourth Amendment when they violated his rights under Virginia law, and that the cocaine should have therefore been suppressed under the federal "exclusionary rule," defendant appealed. The Virginia appellate court agreed and reversed his conviction. The Virginia Supreme Court affirmed the appellate court. The United Supreme Court granted certiorari.

Held: The United States Supreme Court reversed in a unanimous decision. In finding ultimately that you can't bootstrap a state law restriction on arrests and searches into a federal Fourth Amendment violation, the Court analyzed the issue from several different perspectives. First, the Court noted that historically, "(n)o early case or commentary . . . (has ever) suggested the (Fourth) Amendment was intended to incorporate subsequently enacted (state) statutes." Although states are entitled to enact stricter standards than required by the Fourth Amendment, such as Virginia's restriction on custodial arrests for misdemeanor driving-on-a-suspended-license violations, there is no authority for the argument that a violation of such a state restriction on arrests somehow becomes a Fourth Amendment issue. The Court also analyzed the situation under the "traditional standards of reasonableness" by balancing the defendant's privacy rights with the need to promote legitimate governmental interest. In so doing, the Court noted the strong governmental interest in making arrests, even for minor crimes. The Supreme Court has already ruled that the Fourth Amendment is not violated by a custodial arrest in the misdemeanor situation. (*Atwater v. Lago Vista* (2001) 532 U.S. 318.) Virginia law, giving individuals more "individual privacy and dignity" than the Fourth Amendment requires, also forbids such an arrest, at least in the case of a suspended license violation. But Virginia law also provides that a violation of a state statute does not warrant the suppression of evidence. Because Virginia law does not require suppression of the cocaine, and the Fourth Amendment itself was not violated, the cocaine was properly admitted into evidence. Lastly, the Court noted that to allow Virginia to bootstrap a state law restriction on arrests and searches into a Fourth Amendment violation, the Fourth Amendment would necessarily be interpreted differently by each of the fifty states. This lack of consistency is contrary to the Court's attempts to establish a "bright line" test for when the police are overstepping constitutional bounds. The Court declined to do this. Therefore, the trial court's decision to refuse to suppress the cocaine was correct.

Note: There is plenty of case law upholding this principle, although some courts (e.g., the Ninth Circuit) have occasionally argued to the contrary. California has followed this rule for some time. (e.g., *People v. McKay* (2002) 27 Cal.4th 601.) *But* (and this is a big *BUTT*), don't take this case as your ticket to ignore California's statutory and case law

restrictions on making custodial arrests for stale misdemeanors (*People v. Hampton* (1985) 164 Cal.App.3rd 27.) misdemeanors that did not occur in your presence (e.g., P.C. §§ 836(a)(1), 837.1; *Jackson v. Superior Court* (1950) 98 Cal.App.2nd 183; see also V.C. § 40300.), or any other time when a statute requires a cite and release. While there may not be an exclusionary rule attached to violations of these rules, purposely ignoring a state statutory restriction on arrests or searches, or violating the judge-made rule on stale misdemeanors, is simply unprofessional, unethical, and poor police work. I know some legal scholars are teaching you otherwise. But I would ask you to ask yourself: *Is this one crook worth your ethical and professional obligations to uphold the law, both statutory and constitutional*? I would hope not.

***Burglary; Breaking and Entering*:**

People v. Calderon **(Dec. 19, 2007) 158 Cal.App.4th 137**

Rule: Kicking in a door, causing the door to swing into a residence, is sufficient to constitute an "entry" for purposes of the burglary statute.

Facts: Defendant and a friend, Robert Cruz Vasquez (Cruz), split the $1,200 cost of a down payment on a used car. The deal was that the car would be purchased in Cruz's name but defendant would make the rest of the payments in exchange for the right to use it when needed. But within two weeks, defendant managed to damage the car and get it impounded. It cost Cruz $1,314 to get the car out of impound, and even more to get it running again. Cruz therefore cut off defendant's access to the car, not letting him drive it any more. Some months later, defendant and two friends, all armed with knives, went to Cruz's home at 3:15 in the morning and tried to break in. When Cruz told them to go away, that he was calling the police, one of defendant's friends kicked in the locked front door with his foot, causing the door to swing into Cruz's house. Cruz ran out of the house and fended off a knife-attack which caused lacerations to his hand. Cruz managed to escape. Defendant was arrested for first degree residential burglary and assault with a deadly weapon. At trial, the prosecutor argued that when defendant's accomplice kicked in the front door, causing the door to swing into the residence, such an "entry" was sufficient to constitute a completed residential burglary and not just an attempt. The jury bought that argument and convicted defendant of all charges. Defendant appealed, arguing that at the worst, he committed an attempted residential burglary only.

Held: The Fourth District Court of Appeal (Div. 2) affirmed. The issue, of course, was whether the defendant (via his accomplice) had completed an entry into the residence by causing the kicked-in front door to swing into the residence. The law is clear that for a completed (as opposed to an attempted) burglary to be committed, it is not necessary that any part of the defendant's body actually make entry. It is sufficient that the entry be made by an instrument, where the instrument is inserted for the purpose of facilitating the commission of a felony or a theft. The California Supreme Court has further held that "(t)he crucial issue . . . is whether [the] insertion . . . was the type of entry the burglary statute was intended to prevent." The intent of the burglary statute is to protect a building occupant's possessory interest in his home. "Surely, kicking in the door to a home

invades the possessory interests in that home!" While the Court recognized that the kicked-in door did exactly what it was designed to do when it opened into the house, when someone kicks it in, it is "under the control of the invader, not the householder." Thus, per the Court, "kicking in the door of a home (with the intent to commit a felony or a theft) is a sufficient entry to constitute a (completed) burglary."

Note: I have to say that I was a little surprised by this decision. The California Supreme Court has previously ruled that sticking a credit card into an ATM attached to the side of a bank, or even putting a forged check into a chute in the side of a building, is *not* an entry of an instrument of a theft sufficient to constitute a burglary. (*People v. Davis* (1998) 18 Cal.4th 712.) But this Court uses *Davis*, while discussing the "intent of the burglary statute," as authority for holding that a kicked-in door swinging into a residence *is* a completed burglary. The California Supreme Court has already denied review on this case, which is some indication that they don't disagree. So what can I say? This is now the law. Agree with it or not, you can use it when appropriate.

***Miranda*; *Jail Inmates and* "*Cat Out of the Bag*:"**

***Saleh v. Fleming* (9th Cir. Jan. 3, 2008) 512 F.3rd 548**

Rule: A jail inmate who telephones a police officer is not "*in custody*" for purposes of *Miranda*. So long as a statement made to police is not involuntary, a prior invocation and "technical" *Miranda* violation does not prevent the admissibility of the later statement.

Facts: Elizabeth Edwards was found unconscious on the floor of her Seattle, Washington, apartment, severely beaten with injuries to her head and face. She died a week later. After a year and a half of investigation, the police focused on Edward's ex-husband, Habib Saleh, the defendant in this case. The detective went to the King County Jail to interview defendant where he was serving a sentence for assaulting his son-in-law (an offense that occurred within an hour of Edward's murder). Defendant was interviewed a second time three weeks later. Both times, defendant was advised of and waived his *Miranda* rights. At the end of the second interview, defendant said that he wanted an attorney. After this invocation, broke down and, although denying that he killed Edwards, told the detective that he wanted the electric chair so he could join her. The next day defendant telephoned the detective from jail. Without a new *Miranda* advisal, after discussing the Edwards case some more, and while still denying that he killed her, defendant again told the detective that he wanted the electric chair so that he could be with her. With defendant's blood being found at the scene and an abundance of other circumstantial evidence connecting him to Edward's death, he was charged in state court with murder. Suppressing all earlier statements, the trial court admitted into evidence defendant's second statement that he wanted to be executed so that he could join Edwards, made to the detective during the un-Mirandized telephone conversation, despite his invocation made the day before. Defendant was convicted of first degree murder and sentenced to prison. His conviction was affirmed by the state appellate court. He then filed this writ of habeas corpus in federal court which was also denied. Defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. Although the specific crime for which defendant was in jail is irrelevant when determining whether or not he was "in custody" for purposes of *Miranda*, it is also true that "incarceration does not *ipso facto* render an interrogation custodial." When defendant called the detective, seeking to continue the interview, he was free to end the conversation at any time. A jail inmate is only considered to be in custody when there is "some restriction on his freedom of action in connection with the interrogation itself." When defendant telephoned the detective, seeking to continue the interview, he was not in custody despite still being incarcerated. Defendant further argued that his first statement about wanting to be executed, made the day before his telephone conversation with the detective and ruled inadmissible by the trial court, poisoned the later repeating of that statement over the telephone. The Court rejected this argument, noting that the old "*cat-out-of-the-bag*" argument was disapproved years ago. (*Oregon v. Elstad* (1985) 470 U.S. 298.) The rule now is that so long as the second statement is not involuntary, the fact that there was a "technical violation" of *Miranda* making a prior statement inadmissible, is irrelevant. The second, voluntarily made statement is admissible. Here, there was nothing egregious about the taking of defendant's statement after his invocation when he was interviewed in the jail. His subsequent repeating of that statement, over the telephone the next day, was voluntary. The trial court, therefore, properly admitted into evidence defendant's comments to the detective made over the telephone.

Note: So why did the prior invocation to his right to counsel not automatically make his second statement, while still in jail, inadmissible? The Court didn't really get into this aspect of the potential effects of the prior *Miranda* invocation on any later statements. However, I can see at least two reasons why this wasn't a problem. First, defendant was found to be *not* "*in custody*," at least for purposes of *Miranda*, at the time of the telephone conversation. Taking the custody out of the situation negates any prior *Miranda* invocation. Secondly, it was defendant who reinitiated the conversation after his invocation, without any prodding by the detective. So long as it's his idea, a suspect is always free to change his mind and reinitiate a conversation with the officer despite the prior invocation (at least until arraigned on that charge). Also, remember that just because the so-called "*cat out of the bag*" theory is no longer a viable argument for suppressing a second voluntarily made statement when it follows a prior "technical" *Miranda* violation, this does not mean that it's lawful to engage in what has become known as the "*two-step interrogation tactic*." This occurs when the prior *Miranda* violation involves a police officer getting such a thorough un-Mirandized statement from the suspect that when asked to confess a second time, after a proper advisal, the suspect fails to understand what he is giving up my waiving his rights and making a second incriminating statement. (*Missouri v. Seibert* (2004) 542 U.S. 600.) This is improper.

***Miranda*; *Functional Equivalent of an Interrogation*:**

People v. Jefferson et al. **(Jan. 7, 2008) 158 Cal.App.4th 830**

Rule: Allowing two suspects to talk about their crimes while surreptitiously tape recording them is not an interrogation even though the police encouraged the

conversation. The Sixth Amendment right to cross-examine witnesses is not violated by the use at trial of the resulting tape recording.

Facts: The murder of a member of the Compton Fruit Town Piru street gang predictably led to calls for retribution by fellow gang members. A rival Compton gang, the Varrio Tortilla Flats gang, was suspected. The next day, Anthony Staniforth and his girlfriend, Dalinda Penaloza, were parked near her house in his Jeep at 11:00 p.m. after a day of celebrating Staniforth's 24th birthday. Staniforth and Penaloza, neither of whom belonged to a gang, were talking about their plans to marry. Staniforth had a tattoo, "V.H.", visible on his arm. The "V.H." stood for Staniforth's favorite band, Van Halen. Defendants Kevin Jefferson, Curtis Staten, and probably a third person, drove by just then. Jefferson was a member of the Compton Fruit Town Piru, a "blood" gang. Staten was a member of a Crips gang, but the two associated because Jefferson was dating Staten's cousin. Apparently seeing Staniforth's tattoo, and thinking that it said "V.F.," for "Varrio Flats," Jefferson shot at least 15 rounds through his own passenger side window. Staniforth was hit seven times, dying at the scene. Penaloza was hit with flying glass only. Police later found the suspect vehicle with a broken right side passenger window and shell casings on the back seat. The car was registered to Staten. Staten and Jefferson were arrested four days later. Talking first to Staten, investigators told him that they had evidence connecting him to the murder. But when Mirandized, Staten invoked his right to silence. The same ploy was used with Jefferson. After about 20 minutes of telling Jefferson how they knew he was involved, he was Mirandized and also invoked his right to silence. The two defendants were then put into a bugged holding cell together with a tape recorder turned on. An hour-long tape recording was made with defendants, thinking that there had to be a snitch for the officers to have so much inside information, making a number of damaging admissions. The police also surreptitiously recorded a meeting Staten had with his aunt during which he made further admissions. Defendants were charged with murder (Staniforth) and premeditated attempted murder (Penaloza), along with various gun and gang allegations. After a first hung jury, both defendants were convicted and sentenced to prison. Both appealed.

Held: The Second District Court of Appeal (Div. 7) affirmed. The primary contention on appeal was with the tape-recorded statements, defendants arguing that its use at trial violated their Fourteenth Amendment right to due process, Fifth Amendment self-incrimination, and Sixth Amendment rights to confrontation and cross-examination. The first issue tackled by the Court was whether the investigators participated in the "*functional equivalent*" of an interrogation by telling defendants about certain known or suspected incriminating facts and then, after each defendant invoked, putting them together into a bugged holding cell where it was expected that they would discuss the circumstances of the case. The "*functional equivalent of an interrogation*" includes any circumstance where the officers use "any words *or actions* . . . that the police should know are reasonably likely to elicit an incriminating response . . . ." (Italics added) Here, after telling both defendants about certain details of the murder (a couple of which the officers just made up; e.g., that they had prints and gunshot residue in the suspect vehicle), the officers placed them together in a holding cell with a microphone, knowing all the while that such a tactic was "reasonably likely to elicit an incriminating response."

The Court found nothing wrong with such a tactic. Settled law dictates the conclusion that when two suspects are talking amongst themselves, despite whatever motivations to talk officers may have previously put into their dense brains, there is no "*interrogation*." Under these circumstances, the defendants' statements were "*spontaneous*, . . . *volunteered statements*," and not the product of any police-induced pressure. "(I)t is clear that defendant's conversations with his own visitors (or cell-mates) are not the constitutional equivalent of police interrogation." Defendants also argued that the use of the tape recording, as a form of "hearsay," violated their Sixth Amendment rights to confront and cross-examine their accuser as prohibited by the U.S. Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36. The restrictions on the use of hearsay under *Crawford*, however, are limited to statements that are considered to be "*testimonial*" (i.e., "pretrial statements that declarants would reasonably expect to be used prosecutorially" [i.e., at trial].). Statements made between two in-custody suspects and recorded surreptitiously, however, are hardly statements that the declarants (i.e., the two defendants) expected to be used at trial. As such they are not "*testimonial*" and therefore not forbidden by *Crawford*." Lastly, defendant Jefferson complained that defendant Staten's tape-recorded statements to his aunt, those statements referring a number of times to "*the other dude*," impliedly implicated Jefferson. Because Staten did not testify at trial, and was therefore not available to be cross-examined by Jefferson, Jefferson was deprived of his right to "confront and cross-examine his accuser" as guaranteed by the Sixth Amendment. (*People v. Aranda* (1965) 63 Cal.2nd 518; *Bruton v. United States* (1968) 391 U.S. 123.) The Court didn't disagree. However, the Court noted that there was a possible uncharged third suspect involved, and *Aranda* is not violated when defendant is but one of a "*large group*" of possible people who might be the "other dude." And even if two people are not a "large group," the evidence against Jefferson was so strong that allowing the tape recording of Staten's conversation with his aunt into evidence was "harmless error" anyway. Both defendants, therefore, were properly convicted.

Note: This is a ruse (i.e., putting two suspects together after piquing their motivation to talk about their crimes by telling them about the evidence the police have against them) that has been approved by the California Supreme Court in the past (*People v. Davis* (2005) 36 Cal.4th 510; *People v. Thornton* (2007) 41 Cal.4th 391.). This is despite the fact that everyone knows that under these circumstances, crooks being crooks (i.e., stupid, typically), they are going to talk about their crimes. This isn't too much different than what we used to do years ago when I was a cop; putting two arrestees in the back seat of a patrol car and leaving them alone after turning on the tape recorder. I would even tell them not to talk while I left the alone, knowing that this would prompt them to do just the opposite. So go for it. But also note that the U.S. Supreme Court has yet to rule on this ploy, and your's may be the case in which they do. Also note that plying a defendant with a lot of pre-admonishment detail about his case may cause a court to find that a waiver, if one is obtained, may not be valid as the product of a "*clever softening up*." (*People v. Honeycutt* (1977) 20 Cal.3rd 150.) So think twice about experimenting with this tactic too much. It may just come back to bite you.

***Residential Entries for a Non-Bookable Misdemeanor*:**

People v. Hua **(Jan. 11, 2008) 158 Cal.App.4th 1027**

Rule: A warrantless, non-consensual entry into a residence with probable cause to believe a non-bookable offense is then occurring is a Fourth Amendment violation.

Facts: Two Pacifica patrol officers, responding to a noise complaint at a particular apartment, smelled the "distinct odor" of burning marijuana coming from the apartment. As one officer knocked on the door, the other could see people through the window. The people inside were "socializing" and smoking what appeared to be marijuana. Defendant finally answered the door. Defendant admitted to making noise earlier, but denied that he was smoking marijuana. He implied, however, that there might be others in the apartment who were. The officers asked for consent to enter. Defendant said no. He then told the officers that he did not have a marijuana card, when asked. Asked again for consent to enter, defendant stood aside, allowing them in. (This, apparently, was never argued as a valid consensual entry.) Inside, five other people were found in the living room in a "cloud of smoke." Some marijuana butts were on the table. A protective sweep of the apartment resulted in the discovery of 46 marijuana plants in defendant's bedroom, along with some packaging paraphernalia. Charged in state court with possession of marijuana for purposes of sale and other related charges, defendant's motion to suppress was denied. He pled no contest and appealed.

Held: The First District Court of Appeal reversed, ruling that the evidence should have been suppressed because the entry of the apartment was illegal. Starting out with the oft-repeated Supreme Court rule; "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,'" it was noted that warrantless searches and seizures in a home are presumptively illegal, even when "probable cause" exists. Only in limited circumstances (i.e., ". . . one of the few 'specifically established and well-delineated exceptions'") will an exception be found. Defendant, in this case, acknowledged that the officers had probable cause to believe a crime was occurring in their presence, and that immediate action was needed in order to preserve the evidence. But, citing the U.S. Supreme Court case of *Welsh v. Wisconsin* (1984) 466 U.S. 740, the defendant argued that the Fourth Amendment does not allow the police to make a non-consensual entry into a residence when the officers had probable cause only of a non-bookable misdemeanor offense. Here, at least at that point in time when they made their entry, the officers only had probable cause to believe that a violation of H&S § 11357(b), possession of less than an ounce of marijuana, was occurring. This is a citable offense only with a maximum penalty of a $100 fine. *Welsh* held it to be a Fourth Amendment violation to make a residential entry in a "driving while under the influence" case, even when necessary to preserve evidence (the defendant's blood/alcohol level). In Wisconsin in 1984, a first time DUI offense was a civil offense only and not subject to any criminal penalties. On the other end of the spectrum is *People v. Thompson* (2006) 38 Cal.4th 811, where the California Supreme Court allowed a warrantless residential entry in a DUI case, where the officers testified to the need to preserve the blood/alcohol evidence. *Thompson*, however, recognized that a DUI charge

today, in California, albeit a misdemeanor, is a serious offense subject to significant jail time and other criminal sanctions. Possession of less than an ounce of marijuana, however, is closer to the *Welsh* situation. When you balance the privacy interest in one's home, as protected by the Fourth Amendment, with the importance of preserving evidence in a "less-than-an-ounce" case, and the Fourth Amendment privacy rights win out. The Pacific officers' entry into defendant's apartment was a Fourth Amendment violation.

Note: Well, there it is. Despite having probable cause and exigent circumstances (e.g., potential destruction of evidence), with the crime occurring in your presence, you still *cannot* make a warrantless, non-consensual entry into a residence, at least when the crime is a non-bookable offense. A number of other recent cases have also found that making arrests and/or recovering evidence in minor offenses might not pass constitutional muster even with the necessary probable cause and/or reasonable suspicion. (See *United States v. Grigg* (9th Cir. 2007) 498 F.3rd 1070, where stopping the defendant's vehicle to identify him as a suspect in a misdemeanor noise violation offense was held to be illegal.) The next issue: Can you make a warrantless entry into a residence when you respond to a P.C. § 415 (disturbing the peace) loud party, occurring in your presence, and the occupants refuse to cooperate? I've always said "yes," but I have to tell you, this is not a slam-dunk issue any more. We could very well lose that issue when it gets tested.

***Miranda*; *Invocation*:**

Anderson v. Terhune **(Feb. 15, 2008) 516 F.3rd 781**

Rule: An in-custody suspect saying that he wants to "*plead the Fifth*" is an invocation of his *Miranda* rights.

Facts: Defendant was friends with Patricia Kuykendall and Robert Clark. When Kuykendall's car was stolen, she accused Clark. Although Clark denied being the thief, no one believed him. Defendant and Kuykendall's roommate followed Clark when he left Kuykendall's apartment. Clark's dead body, with four bullets in the head, was found by the side of a road later that day. The subsequent investigation leading to defendant as a suspect, he was asked to come to the police station for an interview. Defendant denied any knowledge of Clark's murder. He was taken into custody the next day for a parole violation and questioned again. During the ensuing 3½ hour interrogation, presumably after a *Miranda* advisal and waiver, defendant told the officers at least twice, "*I don't want to talk about this no more*." When the officers continued the interrogation anyway, defendant finally said, "*Uh! I'm through with this. I'm through. I wanna be taken into custody, with my parole . . .* ," and then, "*I plead the Fifth*." The officer responded, "*Plead the Fifth. What's that*?" The interrogation continued with defendant later, after viewing a video of the other suspect telling officers that defendant did the killing, saying; "*I'd like to have an attorney present*." With that, the interview was terminated and the tape recorder was turned off. But "*somewhat suspiciously*" (this is the court's language, not mine), defendant then changed his mind and asked to reinitiate the questioning. He subsequently confessed. Charged with murder in state court, defendant moved to

suppress his confession, arguing that the officers violated his *Miranda* rights when they continued the interrogation despite his attempts to invoke his right to silence. The trial court judge, however, found his alleged invocation to be "*ambiguous in context*," and that the officer asked legitimate clarifying questions. Defendant's confession was allowed into evidence and he was convicted of murder with special circumstances. Sentenced to prison for life without parole, his conviction was upheld on appeal through the state court system. Defendant then filed a writ of habeas corpus in federal court, with was also denied. The Ninth Circuit Court of Appeal affirmed, in a split two-to-one decision. But then the issue was reconsidered by an en banc panel of the Ninth Circuit.

Held: The en banc panel of the Ninth Circuit reversed in a split, 12-to-3 decision. The Court talked only of defendant's comment, "*I plead the Fifth*," considering the other surrounding comments as merely evidence of what he intended when he told officers that he wanted to "plead the Fifth" (although the Court also noted that it was "a dubious conclusion at best" to consider "I don't wanna talk about this no more" to be anything other than an invocation as well). The Court noted how "*Miranda*" has become a "household word," understood by just about everyone. In considering the meaning of "*I plead the Fifth*," the Court said that "it doesn't take a trained linguist, a Ph.D, or a lawyer to know what he means." Defendant's attempts to invoke being unequivocal, the officers had no right to ask clarifying questions let alone continue the interrogation. "Where the initial request to stop the questioning is clear, 'the police may not create ambiguity in a defendant's desire by continuing to question him or her about it." In fact, the Court referred to the officer's efforts in this regard as "*play*(*ing*) *dumb*," and "*almost comical*." Also, the Court rejected the State's argument that defendant demonstrated his willingness to continue the interrogation (as evidence that he did not intend to invoke) by the fact that he did in fact continue to answer questions. The Court noted that a suspect's purported willingness to talk cannot be used to justify the continued questioning when the officers so obviously failed to "*scrupulously honor*" defendant's attempts to invoke his right to silence. That invocation should have been honored. His confession should have been suppressed.

Note: On its face, this decision looks obvious. But when the trial court's opinion that defendant's invocation was ambiguous is upheld by the California Court of Appeal, the California Supreme Court, a federal district court, and the majority of a three-judge panel of the Ninth Circuit, you have to be suspicious when the most liberal appellate court in the country chooses to second-guess them all. It really makes you wonder whether we're getting the whole story. The trial judge's reasoning, with which the California appellate courts agreed, is that when taken in context, defendant's reluctance to talk ("*I plead the Fifth*") was possibly only in relation to his drug use, which was the topic of conversation when this statement was made. Also, the majority opinion "suspiciously" (my language, not the court's) ignores the fact that defendant reinitiated the interrogation after he asked for an attorney. One of the dissenting opinions described these circumstances, however, in detail, making it clear that "(t)he officers were careful to ask clarifying questions to discern whether Anderson was making a knowing, intelligent and voluntary" decision to change his mind. The confession didn't come until after this occurred. However, there does not appear to be an appeal pending, so we may be stuck with this decision.