The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*To succeed in life, you need three things: A wishbone, a backbone, and a funny bone*." (Reba McEntire)

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CASE LAW:

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Reese v. County of Sacramento **(9th Cir. Apr. 23, 2018) 888 F.3rd 1030**

Rule: (1) Absent sufficient legal precedent to put a reasonable law enforcement officer on notice that the force he uses violates a plaintiff's constitutional rights, the officer is entitled to qualified immunity. (2) The intentional use of unreasonable force, subjecting a person to "threat(s), intimidation, or coercion," subjects a law enforcement officer to potential civil liability under California's Bane Act. (3) A criminal conviction precludes a later federal 42 U.S.C. § 1983 civil lawsuit when the criminal conviction and the civil lawsuit are based upon the same circumstances and where a civil judgment in favor of the plaintiff would necessarily imply the invalidity of his criminal conviction or sentence.

Facts: Plaintiff Robert Reese Jr. partied hard on the evening of March 24, 2011, consuming large amounts of alcohol, marijuana, and cocaine at a neighborhood get-together. The party ended in an argument about Reese stealing a bottle of vodka belonging to someone named Nathan. When Nathan's girlfriend later went to Reese's apartment, #144, to retrieve the vodka, Reese not-so-politely greeted her at the door exhibiting a knife. At around 4:30 in morning of the 25th, Reese and Nathan exchanged nasty text messages, some containing racial epithets. (Reese apparently is African-American.) Around that time, the Sacramento Sheriff's Department received an anonymous 9-1-1 call reporting that an African-American male had come out of apartment #144 and fired an automatic weapon. The caller also stated that the male was possibly crazy, under the influence of drugs, had a knife, and had returned to apartment #144. Responding deputies arrived at apartment #144 shortly before 5:00 a.m. One deputy, standing to the side of the door with his handgun drawn and with other deputies lined up behind him, knocked on the door. A second deputy, armed with a rifle, stood about 15 feet back, coving the first deputy. The door "flew open." Reese came out of the apartment with his arm up and extended, holding a large knife. Estimating that the knife was about a foot from the first deputy's neck, the second deputy (the one with the rifle) shot at Reese, moving Reese back into the apartment. Thinking that Reese had been shot, the first deputy immediately entered the apartment only to find Reese still standing. Being about three feet from Reese and not being able to see his hands and thus unable to determine whether Reese still had the knife, the first deputy shot Reese in the chest. Reese survived, and subsequently sued the County of Sacramento and the two deputies in federal court pursuant to both 42 U.S.C. § 1983, claiming that his Fourth Amendment (seizure) rights had been violated by the deputies using excessive force. He also alleged a violation of California's statutory Bane Act (see below). A jury found the first deputy liable, but that the second deputy (i.e., the one with the rifle) was *not* liable. The jury also specifically found that Reese *did not* brandish the knife at the first deputy (i.e., that he had dropped the knife upon backing into the apartment and before being shot) and that he *did not* pose an immediate threat of death or serious physical injury to the first deputy. The jury awarded Reese $534,340.00 in compensatory damages including $150,000.00 for non-economic loss. The trial court judge, however, among other post-trial findings and despite the jury's

verdict, determined that the deputy was entitled to qualified immunity and that he was also entitled to a judgment "as a matter of law" under California's Bane Act. Notwithstanding the jury's verdict, therefore, the trial court granted the defendants' motion for summary judgment, in effect dismissing the case. (They can do that in civil cases.) Reese appealed.

Held: The Ninth Circuit Court of appeal affirmed in part and reversed in part:
(1) *Qualified Immunity from Federal Civil Liability*: On appeal, Reese first challenged the trial court judge's post-verdict ruling that the deputy was entitled to qualified immunity on his federal 42 U.S.C. § 1983 Fourth Amendment excessive force claim. A law enforcement officer who is alleged to have used unreasonable deadly force may be held civilly liable for the use of that force (i.e., a Fourth Amendment unreasonable "seizure" violation) *unless* (a) the force used was *not* unreasonable under the circumstances then known to the officer, *or* (b) the officer's conduct *did not* violate clearly established statutory or constitutional rights of which a reasonable person would (or should) have known. While it is within the jury's province to determine whether the force used under the circumstances was unreasonable or not, it is the judge's duty to determine, as a purely legal question, whether the officer's actions violated a "*clearly established*" rule. The Ninth Circuit held that despite the jury's factual finding that the force used under the circumstances (i.e., by shooting Reese—who was by then unarmed—in the chest) was unreasonable, the trial court judge was correct in finding that the deputy's use of deadly force *did not* violate any clearly established statutory or constitutional authority of which a reasonable person would have known. To put an officer on notice that the force he uses is unreasonable, it is *not* required that there be a prior case directly on point. However, the concept of there being "*clearly established law*" is not to be defined "*at a high level of generality*." The rule is that there must at least be sufficient existing legal precedent at the time of the challenged conduct so that a "reasonable official would have understood that what he is doing violates" a plaintiff's constitutional rights. In this case, the Court ruled that the trial court judge was correct in his post-trial determination that there was insufficient legal precedent to forewarn the deputy that when he is within striking distance of a suspect who had held a knife in a threatening manner a fraction of a second earlier, and it is unknown whether he is still armed (his hands not being visible to the deputy), that it was objectively unreasonable to use deadly force. The Court did not say that the use of deadly force was in fact unreasonable under these circumstances, as was held by the jury, but only that there was insufficient legal precedent to put the deputy on notice that it was unreasonable. The deputy, therefore, is entitled to qualified immunity on this issue.
(2) *The Bane Act*: The so-called "Bane Act" (under the California Civil Code § 52.1) provides a plaintiff with a state statutory right to redress alleged civil rights violations, somewhat equivalent to federal 42 U.S.C. § 1983 actions, and may be brought in federal court in conjunction with a 42 U.S.C. § 1983 lawsuit. A Bane Act violation may be found where a person (such as the sheriff's deputy here) subjects a plaintiff to "threat(s), intimidation, or coercion;" an allegation that may be satisfied through the use of excessive force. After the jury reached its verdict in Reese's favor, the trial court judge decided that he had improperly instructed the jury on the application of the Bane Act to the circumstances of this case. The judge also determined that the deputy and the county were entitled to a judgment "*as a matter of law*," thus granting their motion for summary judgment. Reese challenged the trial court's conclusions on these issues. The Ninth Circuit held that the trial court judge was correct in concluding post-trial that it had erroneously instructed the jury, but erred in granting the civil defendants' motion for summary judgment. After reviewing the history of the Bane Act and its application in civil rights cases, the Court

held that a Bane Act violation requires a "a specific intent to violate the arrestee's right to freedom from unreasonable seizure." In other words, while noting that a reckless disregard for a person's constitutional rights may be evidence of a specific intent to deprive that person of those rights, it must be proven that not only did the arresting officer intend to use force, but that he or she specifically intended to use "*unreasonable force*." The trial court failed to instruct the jury on the need to prove a specific intent to use unreasonable force. Secondly, per the Ninth Circuit, the trial court granted the civil defendants' summary judgment motion under the erroneous belief that a Bane Act violation must be "*transactionally* independent from the constitutional violation alleged." The Court, after reviewing prior decisions on this issue, held that the Bane Act does *not* require proof of coercion that is independent from the constitutional violation itself; rather that the two may be one in the same. Therefore, finding that the Bane Act did apply to this case, the Court held that the trial court judge erroneously granted the civil defendants' motion for summary judgment.

(3) *Heck v. Humphry*: Prior to trial in this matter, Reese pled "no contest" in a California criminal court to exhibiting a weapon in a rude and threatening manner, per P.C. § 417(a)(1). The civil defendants here argued that by so doing, Reese was thereafter precluded from filing the instant civil lawsuit case. The U.S. Supreme Court held in *Heck v. Humphrey* (1994) 512 U.S. 477, that whenever a plaintiff has been convicted of a crime under state law, he is thereafter precluded from seeking damages in a federal 42 U.S.C. § 1983 lawsuit upon the same circumstances whenever a civil judgment in favor of the plaintiff would necessarily imply the invalidity of his criminal conviction or sentence. In this case, however, the record was devoid of any evidence showing the factual basis for defendant's criminal no contest plea. In other words, although he pled no contest to a P.C. § 417.1(a)(1) violation, the written court record did not show that this plea was based upon plaintiff pointing a knife at the civil defendants. "Without such information, this Court cannot determine that Reese's claim of excessive force in this case would call into question the validity of his misdemeanor weapon conviction." *Heck*, therefore, did not prevent the filing of the instant lawsuit or a judgment in plaintiff's favor.

Conclusion: Although entitled to qualified immunity for using unreasonable force under 42 U.S.C. § 1983, the Court ruled that the trial court erred in granting the civil defendants' summary judgment motion under the Bane Act, and remanded the case for retrial on that basis.

Note: Not being a civil attorney, I'm not sure why, if the deputy is entitled to qualified immunity in a 42 U.S.C. § 1983 action, he is not also entitled to the same under the Bane Act. This issue (if it even is one) was not discussed, so I have to assume that the doctrine of qualified immunity does not apply to Bane Act violations. But the real importance of this case to law enforcement is the fact that even when forced to make a quick deadly force decision in what was described in the case as a "millisecond," using such force may very well subject you to civil liability. The after-the-fact (Monday morning quarterbacking) scrutiny you'll receive, as to whether you constitutionally used deadly force, is going to be left up to a panel of 12 relatively naive civilians who typically don't have a clue as to the realities of police work and what's going through your mind when someone is brandishing a deadly weapon in your direction. I have long been a believer that police officers today tend to shoot too early, and that although maybe "*legally justified*," some of the shootings I read about today are not always "*factually necessary*," given the training law enforcement officers receive in disarming suspects without necessarily having to shoot them. The California Legislature has in fact played around with such a restrictive standard, debating this year's AB 931 which sought to criminalize law enforcement's

unnecessary use of deadly force while eliminating the long-enshrined standard that such force need only be "*reasonable*." Had AB 931 passed, the "reasonable force" judicial rule would have been replaced by statute requiring that deadly force be "*necessary*," while also disallowing a justifiable homicide defense if tactics prior to the shooting were found to be "*grossly negligent*" (whatever that means). I would much rather see officers impose a little restraint on themselves than have California's left-wing Legislature mandate such a rule by statute, imposing criminal sanctions on police officers. While AB 931 was not passed, its authors have promised another attempt next year.

***The Fourth Amendment Seizure of Personal Property*:**
***Fourteenth Amendment Due Process; Pre-Seizure Hearings and P.C. § 597.1(a)(1)*:**
***Gov't. Code § 820.2 Immunity from State Tort Civil Liability*:**

Recchia v. City of Los Angeles Department of Animal Services **(9th Cir. May 1, 2018) 889 F.3rd 553**

Rule: (1) The Fourth Amendment's prohibition against unreasonable government seizure of personal property protects the homeless as well. Whether or not apparently healthy birds were subject to an immediate warrantless seizure by animal control officers is an issue for a jury to decide. (2) The owner of apparently healthy birds, potentially subject to seizure pursuant to P.C. § 597.1(a)(1), has a right to a pre-seizure hearing absent exigent circumstances. The government's interest in protecting public safety is a strong factor in allowing for a pre-hearing seizure of birds that have the potential of carrying harmful pathogens. (3) Gov't. Code § 820.2 provides immunity from state tort civil liability for government employees in the performance of discretionary acts or omissions, whether or not such discretion is abused.

Facts: Plaintiff Martino Recchia was a homeless man, living on the streets of Los Angeles. He was also the collector of birds, carrying with him some 18 pigeons, a crow, and a seagull. Recchia kept his birds in 12 to 14 cardboard boxes and cages. In November of 2011, in response to citizen complaints about Recchia and his menagerie, Los Angeles County Animal Control Officer Robert Weekley, assisted by Animal Control Officer Yvonne Rodriguez, came to investigate Recchia's campsite. (*Note*; the decision refers to these two officers as being "county" animal control officers, while it is the "city" of Los Angeles Department of Animal Services that is sued in this lawsuit. It's unknown if that is a typo, or if I'm missing something.) Recchia agreed to let Officer Weekly inspect his birds. While eight of the pigeons appeared to be healthy, the rest of them were found to be deformed, distressed, or diseased. And while all of the birds had food and water, they were maintained in areas too small for them to be able to fly around, with wet and soiled newspapers lining the floors, in cages and boxes covered with feces. Determining that Recchia had nowhere to take the healthy birds, and that if not impounded, the birds would have to remain in the squalor of their dirty boxes and cages on the public sidewalk, and that Recchia could not adequately care for the birds, Officer Weekley decided to impound all of them. Given a "Post-Seizure Hearing Notice," which informed him that he had ten days to request a post-seizure hearing, a reluctant Recchia gave up his birds. A city veterinarian examined the birds the next day. Sending the crow and the seagull to a wildlife rescue organization, the veterinarian determined that all the pigeons needed to be euthanized. Although no blood tests were done on the birds, his decision was based upon his opinion that many of the

birds had serious and incurable illnesses, including symptoms of various bacterial or viral diseases, and that it was likely that even the birds without outward signs of illness carried pathogens. No blood tests were performed because the City has a policy of not testing birds for illness unless it was a matter of public health importance. The veterinarian determined that the present circumstances did not rise to that threshold. Four days later, and after all his pigeons had been euthanized, Recchia filed a request for a post-seizure hearing. The hearing officer found that the seizure was justified under P.C. § 597.1(a)(1), which requires officers to seize animals kept in public spaces without proper care and attention if the officers have a "reasonable" belief that "very prompt" action is required to protect the health and safety of the animal or others. So Recchia sued the Animal Control Officers and the Los Angeles Department of Animal Services in federal court under 42 U.S.C. § 1983, alleging Fourth (seizure) and Fourteenth (due process) Amendment violations. He included in his lawsuit state tort law claims for conversion, negligent infliction of emotional distress, and intentional infliction of emotional distress. The federal district court granted the civil defendants' motion for summary judgment, thus dismissing the lawsuit. Recchia appealed.

Held: The Ninth Circuit Court of Appeal affirmed in part, and reversed in part:
(1) *The Fourth Amendment*: The Fourth Amendment protects, among other things, a person's right *not* to have his or her personal property unreasonably seized by the government. Homeless people living on the street enjoy the same protections. Although noting in a footnote (fn. 4) that it is an issue whether a person can have a property interest in wild animals, which includes birds, the parties stipulated for purposes of this appeal that Recchia did in fact have a property interest in his birds, thus raising a Fourth Amendment issue. Recchia argued on appeal that the warrantless seizure of his birds violated his Fourth Amendment rights. It is a rule that properly trained government officials who come across obviously diseased or ill animals living in foul conditions, where those conditions may be causing or compounding the animal's suffering, may seize such animals without taking the time to obtain a search warrant. But the rule is not so clear when it comes to other animals who are not diseased, ill, or suffering. Here, at least eight of Recchia's birds appeared to be healthy. The Court, therefore, while upholding the immediate, warrantless seizure of the birds which showed signs of illness or disease, found there to be a factual issue left to be determined concerning whether exigent circumstances allowed for the seizure of Recchia's healthy-looking birds. A civil jury should be allowed to determine whether the evidence tending to indicate that there was no cause for immediate concern outweighed the possibility that the healthy-looking birds were in fact sick, and, given the speed at which such illnesses can spread, might make the rest of them sick. Other factors a jury should be allowed to consider include the fact that all the birds were being kept in cramped, dirty conditions (i.e.: Were they suffering?), and whether Recchia was equipped to properly care (or could arrange proper care) for the birds under these conditions. The trial court erred in granting the civil defendant's summary judgment motion on this issue. The matter, therefore, was remanded to the trial court for a determination of these issues. (The trial court was also instructed to first consider whether the civil defendants were entitled to "*qualified immunity*" under the theory that the rules in such a situation were not yet "*clearly established*" by prior case law.)
(2) *Fourteenth Amendment Due Process*: Recchia argued that the officers violated his Fourteenth Amendment procedural due process rights by denying him an evidentiary hearing before taking and destroying his outwardly healthy-looking birds. The Court first held that summary judgment was properly granted on the issue of the propriety of causing the birds to be

euthanized prior to a hearing in that the officers had nothing to do with this decision, and the veterinarian himself was not sued. The only issue to be decided was the legality of the officers' pre-hearing seizure of the eight healthy-looking pigeons. While noting that P.C. § 597.1, on its face, allows for such a pre-hearing seizure, the issue is whether this statute, "in light of the interests it serves," provides for adequate protection of a property-owners due process rights. The U.S. Supreme Court has already set out the factors that must be considered in determining whether the Fourteenth Amendment due process clause has been violated by seizing property prior to a court hearing on the propriety of such a seizure: I.e.; (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the potential value of additional procedural safeguards; *and* (3) the government's interest involved, including the burdens of additional procedural requirements. (*Mathews v. Eldridge* (1979) 424 U.S. 319.) (1) The plaintiff's interest at stake here is a pet owner's property interest in their animals, and in having their pets or animals with them. "Given the emotional attachment between an owner and his or her pet, a pet owner's possessory interest in a pet is stronger than a person's interest in an inanimate object." (2) But the Court found the risk of an erroneous deprivation to be very low, given the expertise a properly trained animal welfare officer has in recognizing sick or injured animals. Given this expertise, the Court found no need for additional safeguards. (3) Lastly, and most importantly, the Court found the government's interest in being able to seize animals that may be in imminent danger of harm due to their living conditions, that may carry pathogens harmful to humans or other animals or may otherwise threaten public safety without first needing to have a hearing on the propriety of an immediate seizure, to be very strong. Weighing these factors, the Court ruled here that the trial court did not err in finding that the pre-hearing seizure of Recchia's birds under authority of P.C. § 597.1 *did not* violate the due process clause.

(3) *State Civil Tort Liability*: Recchia included in his lawsuit allegations that defendants were liable under state tort law claims for conversion, negligent infliction of emotional distress, and intentional infliction of emotional distress. The civil defendants claimed immunity from any such tort issues under the California Government Code. Specifically, Gov't. Code § 820.2 grants a state employee immunity from liability for state law violations when an injury results "from [the employee's] act or omission where the act or omission was the result of the exercise of the discretion vested in [the employee], whether or not such discretion be abused." This immunity from civil liability applies no matter how "*lousy*" the employee's discretionary act might have been. In this case, acting under the authority granted to them under P.C. § 597.1(a)(1), Animal Control Officers Weekley and Rodriguez had to make a discretionary decision whether "*reasonable grounds*" existed for them to take prompt action in seizing the birds in order to protect the health and safety of the birds, or of others. The statutory immunity provided for in Gov't. Code § 820.2 clearly protects the officers from civil liability in this situation. The trial court, therefore, properly granted the civil defendants' motion for summary judgment on this issue.

Conclusion: The matter was remanded for a determination as to whether the officers were entitled to qualified immunity under the theory that whether or not it was a violation of the Fourth Amendment to seize the healthy-looking birds under these circumstances was not yet "*clearly established*" by prior case law. If not entitled to such immunity, then a civil jury should be allowed to determine whether the officers did in fact violate the Fourth Amendment by seizing the plaintiff's healthy-appearing birds. Otherwise, the trial judge's granting of summary judgment in favor of the civil defendants was upheld with one exception: The trial court was instructed to give Recchia the opportunity to attempt to amend his complaint to include an

allegation that the City of Los Angeles might also be civilly liable under the theory that the City had an "official municipal policy of some nature" (per *Monell v. Department of Social Services of the City of New York* (1978) 436 U.S. 658.) related to the seizure of the plaintiff's birds.

Note: The Ninth Circuit emphasized in conclusion that they "take seriously the health and safety interests raised by (the civil) Defendants here," noting that animals "can carry dangerous pathogens that in some cases can be harmful to humans or to other species of animals." But the Court also made clear that it is going to continue to protect the homeless from government intrusions that interfere in any way with their right to live in any manner they so choose, no matter how disturbing their appearance, living habits, and propensity for collecting discarded goods and (as in this case) animals, might be to others. I get inquiries on a regular basis from law enforcement officers asking for advice on how to respond to store owners and other "normal" citizens who complain about the problems caused by the mere presence of the homeless, given their often less-than-sanitary appearance and living habits in general. My answer always has to be; "*live with it*." Since *Martin v. City of Boise* (9th Cir. Sept. 4, 2018) 902 F.3rd 1031 (See Administrative Note; "*The Homeless Camping in Public Places*," *California Legal Update* (Vol. 23, #12; Oct. 25, 2018).), it can't be any clearer that the courts are going to stringently uphold the homeless' right to live on the street if they so choose, and there's very little (if anything) you can do about it. If you're interested, my lengthy memo on the First Amendment and trespassers soliciting signatures, etc., on private property, I've expanded the article to include a section on "*Loiterers and Vagrants*" (page 23), briefly describing the law on the rights of the homeless. I will e-mail it to you upon request.

***Vehicle Inventory Searches*; *the Rules*:**
***Vehicle Inventory Searches*; *The Officer's Subjective Intent*:**

United States v. Johnson **(9th Cir. May 14, 2018) 889 F.3rd 1120**

Rule: The purpose of an inventory search of an impounded vehicle is to produce an inventory of the items in the car and not to look for incriminating evidence. An administrative searches, such as a vehicle inventory search, is an exception to the general rule that an officer's subjective intent in conducting such a search is irrelevant (but see Note, below).

Facts: On April 10, 2018, Mark Johnson (defendant) had an outstanding warrant for his arrest based upon a post-prison supervision (i.e. *parole*?) violation. Multnomah County (State of Oregon) Sheriff's deputies located defendant in a town just south of Portland. The deputies surreptitiously followed defendant to a residence in nearby Gladstone while calling for backup from the Portland Police Bureau. The officers waited about 20 minutes outside the residence until defendant emerged and got into his car and drove away. They finally conducted a traffic stop, boxing him in with one police vehicle in front and another to his rear. As a result, defendant stopped in the traffic lane although, per later testimony, there was enough room left for him to pull to the side of the road had he wanted to. Upon contacting defendant, it was determined that he did not have any proof of insurance (the car being borrowed), only knew the first name of the car's owner, and did not know how to contact the owner. Defendant was arrested on the outstanding warrant. Searching his person incident to the arrest, the officers recovered a folding knife from his front pocket, $7,100 cash in $20 and $100 bills from his rear

pants pocket, and $150 cash from his wallet. With his vehicle blocking traffic and no way to contact the owner, the officers decided to tow and impound the car pursuant to Portland Police Bureau policy. Prior to the tow, the officers conducted an inventory search of the car, again pursuant to local policy. From the interior of the vehicle, the officers recovered a combination stun gun and flashlight, a glass pipe with white residue, a jacket, and two cellphones. From the trunk, the officers collected a backpack and a duffel bag. One of the officers later testified that when he moved the backpack and duffel bag in order to search for other items in the trunk, the bags felt heavy and the backpack made a metallic "clink" sound when he set it down on the pavement. Neither the backpack nor the duffle bag were searched at the scene but rather impounded with the rest of defendant's property. A search warrant was subsequently obtained for the backpack, duffle bag, and cellphones, the warrant affidavit including information from a 2009 police report (not read until after his current arrest) where defendant was found to have been in possession of cash, weapons, and drugs in a safe concealed in his vehicle. It was noted in the affidavit that based on the circumstances of defendant's current arrest, when considered with the information from the 2009 report, the affiant believed there to be probable cause that the bags seized from the trunk would contain similar drug-related items and that the phones would contain evidence of drug dealing. Executing this warrant, the search of the backpack revealed a small safe containing two bags of methamphetamine, drug-packaging materials, syringes, and a digital scale. The backpack also contained paperwork with notes on court cases that corresponded to several of defendant's criminal prosecutions. One of the cellphones contained text messages regarding drug trafficking. The duffel bag contained defendant's personal items only. Charged in federal court with the intent to distribute methamphetamine in an amount of 50 grams or more (21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii)), defendant's motion to suppress the evidence recovered from his person and his car was denied. With the above evidence used against him at trial, defendant was convicted and sentenced to 15½ years in prison. Defendant appealed.

Held: The Ninth Circuit Court of Appeal reversed in a "per curiam" (i.e., unanimous) decision. The issue on appeal was the legality of the inventory search of defendant's vehicle. Defendant's argument was that the officers used the inventory search theory as a mere ruse to look for incriminating evidence. The Government's response was that the officers' subjective intent is irrelevant. The basic rules on this issue are simple: Police may, without a warrant, impound and search a motor vehicle so long as they do so in conformance with the standardized procedures of their police agency and in furtherance of a "community caretaking" purpose, such as promoting public safety or the efficient flow of traffic. Defendant's vehicle was parked in a traffic lane, interfering with the flow of traffic, with no way to find an owner to come and retrieve it. The Court first rejected defendant's argument that it was blocking traffic only because the officers stopped him there, the Court noting that even if this was an issue, there was evidence to the effect that he could have pulled to the side of the road and parked it legally had he so chosen. The Court also noted that it is irrelevant that the police could have stopped and detained him earlier. But turning to the issue of the inventory search, the Court pointed out that the purpose of such a search is to "produce an inventory" of the items in the car, in order "to protect an owner's property while it is in the custody of the police, to insure against (false) claims of lost, stolen, or vandalized property, and to guard the police from danger." The purpose of the search, however, must be "non-investigative." It must be "conducted on the basis of something other than suspicion of evidence of criminal activity." The search cannot be used as "a ruse for a general

rummaging in order to discover incriminating evidence." The People argued, however, that so long as the impoundment of the vehicle was lawful (in accordance with the "community caretaking" rules, which, because it was not legally parked, it was), and the officers followed the impounding agency's polices (which the Court conceded they did), the officers' subjective intent is irrelevant (under *Whren v. United States* (1996) 517 U.S. 806.). The Court, however, noted that so-called "administrative searches" conducted without individualized suspicion—such as drunk-driving checkpoints or vehicular inventory searches—are an exception to the general rule as announced in *Whren*. In such a case, the officers' subjective intent in doing what is purported to be an inventory search is in fact relevant, citing its own prior decision in *United States v. Orozco* (9th Cir. 2017) 858 F.3rd 1204, as authority for this theory. Under *Orozco*, if the officers use an inventory search as merely a ruse to look for incriminating evidence, then the products of that search are subject to suppression under the Fourth Amendment. In such circumstances, "actual motivations do matter." Here, the Court found plenty of evidence to the effect that the officers' search of defendant's car was done with the subjective intent to look for evidence of drug trafficking, and thus, under *Orozco*, illegal. Specifically, in the arrest report, it was admitted that the officers "believed it likely that the bags [seized from the trunk] contained evidence of restricted weapons and drug possession/sales," that the arresting officers believed the seized cell phones may have been "used to facilitate criminal activity and evidence [may] be found stored on the phones," and that all of the seized items "were placed into evidence." Further, the affidavit submitted in support of the search warrant confirmed that the items had been "seized pending further investigation," rather than for safekeeping. And at the suppression hearing, the warrant affiant specifically testified that he seized the two bags from the car's trunk to hold onto them until he could secure a search warrant, because he "believe[d] that likely there was evidence of a crime inside the two bags." Also, the officer who impounded the evidence, and the prosecuting attorney in his written and oral arguments, admitted that the money, the bags, and the cell phones were all seized from the car as "evidence" of a suspected crime. It was held, therefore, that "the officers' statements directly admitting that they searched and seized items from (defendant's) car specifically to gather evidence of a suspected crime (and not to further such permissible caretaking motives) are 'sufficient to conclude that the warrantless search of the car was unreasonable.' . . . In the face of such evidence, it is clear to us that the officers' decision to seize the money, bags, and cellphones from (defendant) and his car would not have occurred without an improper motivation to gather evidence of crime." The evidence, therefore, should have been suppressed.

Note: This case is so wrong on so many levels that, for those of you in state practice (cops and prosecutors, not to mention defense attorneys), as opposed to federal officers and attorneys who are under the thump of the Ninth Circuit, it should merely be ignored (state authority taking precedence over federal circuit court opinions). Specifically, the doctrine of "*plain sight*," allowing for the seizure of the items in defendant's car that are observed during a lawful inventory search, is not even mentioned. The officers here are not required to ignore items indicative of criminal activity when viewed during an otherwise lawful search. The only issue might be—also never analyzed here—whether upon viewing such incriminating items there existed sufficient "probable cause" to justify their seizure and holding as evidence. (*Skelton v. Superior Court* (1969) 1 Cal.3rd 144, 157; *People v. Curley* (1970) 12 Cal.App.3rd 732.) It depends upon what the arresting officers knew about defendant ahead of time, which was also not discussed. It *is* mentioned that there existed a police report concerning defendant's earlier

(2009) conviction for drug-related offenses, the Court telling us that such report was not read until after this current arrest. But it is inconceivable to me that these officers, who were actively searching for defendant as a parolee-at-large, did not first research his prior criminal history or know what his prior conviction was for (i.e., drugs). Secondly, it was not discussed whether the Multnomah County Sheriff's Department or the Portland Police Bureau's inventory policies included the right to look into containers found in a vehicle during an inventory search. If it did include that right (and to my knowledge, most agency's polices do), then a search warrant was not even necessary. Lastly, and perhaps most importantly, two of the three justices here (while concurring in this ruling only because they are bound by the *United States v. Orozco* decision) note that *Orozco* is wrongly decided and needs to be "revisited." (See the decision at pages 1129-1133. See also my brief of *Orozco* at *California Legal Update*; Vol. 22, #12; Nov. 21, 1017.) Specifically, citing the U.S. Supreme Court in *Brigham City v. Stuart* (2006) 547 U.S. 398, the justices note that the High Court has differentiated between the purpose behind conducting what the Court refers to as a "*progromatic search*" on the one hand, and the individual officers' subjective motivations on the other. In discussing this issue, the Supreme Court notes that while the former (i.e., the purpose of a specific administrative "program," such as inventory searches in general) has to be done for a lawful non-investigatory purpose, the latter (i.e., the individual officers' subjective motivation) is irrelevant to the legality of the search. In discussing this issue, the Supreme Court points out that; "this inquiry is directed at ensuring that the purpose behind the program (such as inventory searches) is not 'ultimately indistinguishable from the general interest in crime control.' . . . The Court underscored that such an inquiry 'has nothing to do with discerning what is in the mind of the individual officer conducting the search.'" (Citing *Brigham City v. Stuart*, *supra*, at p. 405.) In other words, as in this case, whether or not the officers subjectively were hoping to find evidence of criminal activity is irrelevant so long as the inventory search itself was done for a non-investigatory purpose. Per *Brigham*, *Orozco* and this new case are both simply wrong.

***Arrests and Probable Cause*:**
***Prolonged Detentions*:**
***Miranda; Custody*:**
***Missouri v. Seibert and Voluntariness*:**

People v. Delgado **(Oct. 1, 2018) 27 Cal.App.5th 1092**

Rule: (1) Information from a suspect himself, known to be on probation, that there is an outstanding arrest warrant, constitutes probable cause to arrest despite it later being discovered that no such warrant exists. (2) Telling a criminal suspect that he is not free to leave until after certain information is obtained can convert what might have been a non-custodial interrogation into *Miranda* custody. (3) A *Seibert* two-step interrogation tactic renders a subsequent confession inadmissible only when police interrogators purposely obtain unwarned admissions for the intended purpose of causing the suspect to subsequently waive his rights and confess.

Facts: Sixteen-year-old Ezekiel Isaiah Delgado (defendant), with a couple of buddies—Taylor Cober and Elose Brown—met with DeShawne Cannon late one night in April, 2014, to buy some marijuana. Cannon was sitting in his car with his girlfriend, Gina Elarms, when they met. Defendant, Cober, and Brown came up $15 short of the agreed upon $70 for the marijuana. So

defendant pulled out his obligatory concealed handgun and shot and killed both Cannon and Elarms, emptying his 10-round magazine into them, and then stole Elarms' purse. Investigators were led from a text in Cannon's cellphone, found at the scene, to Elose Brown. Upon executing a search warrant at Brown's residence, defendant was contacted by investigators. Although he initially gave officers a false name, it was quickly learned who he was and that he was on juvenile probation. Defendant told investigators that he thought there was an outstanding arrest warrant for him. So he was arrested and brought to the police station. At the station, he was left in an interrogation room, shackled to the floor. His cellphone and other personal belongings were confiscated. An hour and a half later, Detective Brian Meux (a 20-year police veteran), after assisting in the execution of the search warrant and talking to Brown's relatives, went to the station where he found defendant still in shackles. Believing at this time that defendant was only a witness, he unshackled him and allowed him to use the bathroom. Detective Meux assured defendant that he was not under arrest, that he was free to leave, and that he did not have to talk. He offered to secure defendant a ride or to have someone pick him up. Without waiting for a verbal response, however, and without advising defendant of his *Miranda* rights, Detective Meux began questioning him. While doing so, the detective was told that they could not find any arrest warrants for him. Questioned about his whereabouts at the time of the murders, defendant denied any involvement. Detective Meux concluded, however, that defendant was lying in that his statements conflicted with information they had already received from Cober. Detective Meux left defendant in the interrogation room to go look for other suspects, telling defendant that the door, although closed, was unlocked. Upon leaving, Detective Meux asked Detective Jason Lonteen (a 16-year veteran) to continue questioning defendant. Detective Lonteen had been interviewing other people and did not watch Meux's interview of defendant. Meux, however, told Detective Lonteen that he did not believe defendant's story, summarizing his interview with him. Lonteen noted that defendant's story did not match what he had learned from Brown's relatives. Detective Lonteen did not know that defendant had been arrested and did not recall being told about a possible warrant. About 25 minutes after Detective Meux left, Detective Lonteen entered the still unlocked interrogation room (with the door being "ajar") and confronted the unrestrained defendant. After identifying himself, Detective Lonteen told defendant; "[*H*]*ere's the thing dude. We gotta verify some stuff. We need to get in your phone. What's the passcode*? When asked why, Detective Lonteen told defendant; "*Just to go through—we've got to go through some of this stuff man to make sure you're telling us on the up and up. All right?*" Defendant asked how long he was going to be there because Detective Meux had told him he was not under arrest. Lonteen told defendant that that was true, and that; "*We're trying to figure that out right now*." When defendant reiterated that he just wanted to know how long he was going to be there, Detective Lonteen responded; "*We're gonna try to make it not too much longer. I'm gonna dump this* (cellphone) *off. I'm gonna have it—I'll be right back to talk to you and just ask you a few more questions, okay*?" Defendant agreed, giving Detective Lonteen the passcode to his cellphone. Lonteen left with this information, returning a short time later. After 35 minutes of questioning, defendant finally admitted to shooting Cannon and Elarms, claiming that he thought Cannon was reaching for a gun. About six or seven minutes later, another detective, who had been watching the interview via a one-way mirror, texted Lonteen that it was time to *Mirandize* defendant. After the *Miranda* warnings, defendant explained what happened in more detail, even (on his own initiative) demonstrating what had happened by moving chairs around to show the relative positioning of the victims in the car and where he was when he shot each one. With the interview being

videotaped, it appeared that defendant was eager to tell his story and freely did so. Charged with two counts of first degree murder (P.C. § 187(a)) with a multiple-murder special circumstances (P.C. § 190.2(a)(3)), one count of discharging a firearm at an occupied vehicle (P.C. § 246), and with an allegation that he personally used a firearm causing death (P.C. § 12022.53(a)), defendant was tried as an adult. With both his pre- and post-admonishment statements being admitted into evidence against him, defendant was convicted of all charges. Sentenced to prison for a total unstayed term of 100 years to life, defendant appealed.

Held: The Third District Court of Appeal affirmed in part and reversed in part:
(1) *The Arrest*: Defendant first argued that his arrest was without probable cause, and that his later inculpatory statements should have been suppressed as the product of an illegal arrest. Noting that probable cause exists when the facts known to the arresting officer would persuade someone of reasonable caution that the person to be arrested has committed a crime, the Court found here that the officers did indeed have probable cause to arrest defendant. After deciphering defendant's true identity (he having first given a false name), it was determined that he was on probation. It was defendant himself who led the officers to believe that there was an outstanding warrant for his arrest. The Court found that "it was rational for the officers to believe defendant, arrest him (on the warrant), and detain him until they learned otherwise." While it was unclear how long it took to discover that there was no warrant, it is known that Detective Meux did in effect "un-arrest" defendant some 84 minutes after he was arrested by unshackling him and telling him that he was not under arrest and free to go. The Court did not find 84 minutes to be an unreasonable amount of time, thus rejecting defendant's argument that the time it took officers to discover there was no arrest warrant constituted an unlawfully "prolonged detention." His subsequent statements, therefore, were not to be suppressed under this theory.
(2) *Miranda v. Arizona*: Defendant was not *Mirandized* until after he had already admitted to Detective Lonteen that he had killed the victims. After finally receiving the required *Miranda* ((1966) 384 U.S. 436.) warnings, defendant provided a more detailed description of his involvement in the murders. Therefore, two sets of statements were in issue; pre- and post-warning. *Miranda* applies only to "*custodial interrogations*." Whether a person is in custody hinges on whether a reasonable person in his or her shoes would feel free to leave. In this case, with defendant being only 16 years old, it was noted that the age of suspect is to be taken into consideration when determining whether a reasonable person would have felt free to leave under the circumstances. Defendant argued that being under arrest from the very start, and because his post-warning statements were induced by (i.e., "the product of") his pre-warning admissions, all his statements should have been suppressed. (See #3, below, for the ruling on the post-warning statements.) The trial court had found that although initially arrested, Detective Meux had in effect "un-arrested" defendant when he unshackled him and told him he was not under arrest, was free to leave, and was not required to answer any questions; a so-called "*Beheler* admonishment." (*California v. Beheler* (1983) 463 U.S. 1121.) The Appellate Court agreed. However, the Appellate Court also found that when Detective Lonteen entered the picture by "*demanding*" the passcode to defendant's cellphone, and then telling him that he would not be released until after the cellphone information had been reviewed, defendant was effectively put back into *Miranda* custody. His subsequent pre-admonishment admissions (i.e., the *pre-warning statements*) to Lonteen, therefore, should have been ruled inadmissible by the trial court. It was error to allow testimony about defendant's initial admissions into evidence. However, given the

admissibility of the statements obtained after defendant was Mirandized (i.e., *post-warning*; see below), the Court ruled this error to be harmless.

(3) *Missouri v. Seibert and Voluntariness*: Defendant's final argument was that his post-warning confession was the product of the inadmissible pre-warning admissions (i.e., "*fruit of the poisonous tree*"), and therefore also should not have been admitted into evidence against him. The Court disagreed. The U.S. Supreme Court long ago rejected a blanket application of the so-called "*cat out of the bag*" argument, holding that unwarned statements do not necessarily poison the admissibility of subsequent warned statements. Rather, the admissibility of subsequent warned statements "turn . . . solely on whether (they are) knowingly and voluntarily made." (*Oregon v. Elstad* (1985) 470 U.S. 298.) The *cat out of the bag* theory does apply, however, where law enforcement interrogators "*purposely*" obtain unwarned admissions, and then use those inadmissible statements to encourage a post-warning waiver and confession, hoping the suspect will subjectively believe that once he or she admits culpability, there is really no reason to invoke when eventually given the *Miranda* warnings. Sometimes referred to as a "*two-step*" interrogation technique, this tactic was condemned by the Supreme Court in *Missouri v. Seibert* (2004) 542 U.S. 600. However, the rule of *Seibert* applies only when the interrogators' efforts to side-step *Miranda* are intentional. "When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, post-warning statements that are related to the substance of pre-warning statements must be excluded . . . ." (Subsequent "*curative steps*" can often fix the problem, but are not in issue here; see Note, below.) In this case, the Court (agreeing with the trial court) found no such deliberate intention on the part of defendant's interrogators. At worst, the various detectives merely failed to communicate with each other as to defendant's status as a witness or a suspect and whether he had already been *Mirandized*. Also, the Court (in viewing a video of the various interrogations) found that defendant's post-warning statements were voluntary; i.e., that his will was not overborne. "A confession is involuntary under the federal and state guaranties of due process when it has been extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence. . . . Coercive police activity is a necessary predicate to a finding that a confession was involuntary under both the federal and state Constitutions." No such "*coercive police activity*" occurred in this case. The only criticism the court had was that when Detecive Lonteen finally advised defendant of his rights, defendant was never expressly asked whether or not he waived his rights. "Although the better practice is to obtain an explicit waiver of *Miranda* rights, an explicit waiver is not required. Lonteen ensured defendant understood his rights and wanted to talk; although not ideal, that was sufficient." Defendant's post-warning confession, therefore, was legally admitted into evidence against him. This being the case, the admission into evidence of his pre-warning statements was found to be harmless error (See #2, above).

Note: Two different homicide teams were involved in this investigation, and they apparently did not compare all their notes before each took their respective turns at questioning this defendant; Detective Lonteen apparently not knowing whether Detective Meux had already *Mirandized* him. While different officers involved in an investigation are generally held to the knowledge other officers have already gained, it appears that ignorance is bliss when discussing whether a *Seibert* two-stop interrogation technique was intentionally employed in a deliberate attempt water down the importance of the eventual *Miranda* admonishment, encouraging a waiver and confession. Note also that when you think you might be treading on the edge of a potential

Seibert violation, you can take "*curative steps*" to undo the problem. (*United States v. Williams* (9th Cir. 2005) 435 F.3rd 1148, 1160; *United States v. Barnes* (9th Cir. 2013) 713 F.3rd 1200, 1206.) For instance, You can undo a *Seibert* problem by telling a suspect that he is now going to be advised of his *Miranda* rights and questioned all over again, but that he should first know that none of his statements made up to that point will be used in evidence against him; that he is starting fresh and to keep that in mind when deciding whether to waive his rights.