The California Legal Update

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

Vol. 25 August 19, 2020 No. 10

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THIS EDITION'S WORDS OF WISDOM:

"*As I watch this generation try to rewrite history, one thing I'm sure of . . . it will be misspelled and have no punctuation*." (Unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Second Amendment Update; Large Capacity Magazines: Hot off the press; the Ninth Circuit Court of Appeal just affirmed the federal district court's summary judgment in favor of plaintiffs challenging California **Government Code § 32310**, which attempted to ban possession of large-capacity magazines; i.e., those that hold more than ten rounds of ammunition, ruling that the ban violated the **Second Amendment**. The case is ***Duncan v. Becerra*** (9th Cir. Aug. 14, 2020) __ F.3rd __ [2020 U.S.App. LEXIS 25836]. So you can take your large capacity magazines out of hiding now and publicly display and use them without concern.

Constitutional and Statutory Issues Raised by Delays in Criminal Proceedings; Part II*:** I noted in the last edition of the *California Legal Update* (Vol. 25, #9, July 14, 2020), citing ***Stanley v. Superior Court (2020) 50 Cal.App.5th 164, that the current pandemic establishes "*good cause*" to delay a defendant's statutory speedy trial rights. However, this is apparently not always true; a fact that prosecutors, in particular, need to know. On June 24th, the First District Court of Appeal held in ***Bullock v. Superior Court* [*People*]** (2020) 51 Cal.App.5th 134, that COVID-19's effect on the timely holding of a statutorily mandated court hearing will not be presumed; that a "*particularized showing*" must be made establishing a nexus between the COVID-19 pandemic and the superior court's purported inability to conduct a defendant's court hearings in a timely fashion. In a writ petition brought pursuant to **Pen. Code, § 871.6** and challenging the court's failure to provide petitioner Dyjuan Bullock (charged with one count of human trafficking [**P.C. § 236.1(b)**] and two counts of pimping [**P.C. § 266h(a)**] with a timely preliminary hearing, the Court concluded that good cause to delay the in-custody Bullock's preliminary hearing had not been established. In the absence of the required particularized showing, the superior court abused its discretion in finding that **Penal Code § 859b** (providing for a preliminary hearing within 10 court days of an in-custody defendant's arraignment absent a showing of "good cause" for a delay) had not been violated. To the contrary, with no justification for the delay established, Bullock was entitled to a dismissal of his case. Bullock's writ petition was dismissed as moot, however, in that while all this was pending, he and the prosecution had worked out a plea agreement. But that does not alter the fact that it must be established that the pandemic made the delay in a defendant's case necessary. Failing to do so on a case by case basis is going to result in a lot of dismissals of pending criminal cases. *Not good*.

CASE LAW:

***Spotlighting the Interior of a Vehicle*:**
***Detention of a Vehicle's Occupants*:**

People v. Tacardon **(July 22, 2020) __ Cal.App.5th __ [2020 Cal.App. LEXIS 736]**

Rule: Spotlighting an already stopped vehicle, when the vehicle is not otherwise blocked in, is not, by itself, a detention.

Facts: San Joaquin County Sheriff's Deputy Joel Grubb was on patrol in uniform and driving a marked patrol car on Fairway Drive in the City of Stockton on March 10, 2018, when he observed a gray BMW legally parked with its engine and headlights off. He could see that the vehicle contained three occupants; two wearing hooded sweatshirts and comfortably reclining in the front seats and with the third in the rear. Ominous smoke was coming out of the car's "slightly cracked" windows. Intrigued and inquisitive (as any good cop should be), Deputy Grubb decided to see what was going on. Making a U-turn, Deputy Grubb pulled his patrol car up to within 15 or 20 feet behind the BMW, without blocking it in, and turned on his spotlight to illuminate the car's interior. He got out of his patrol car and began to approach the BMW when a female (identified as "M.K.") "jumped out (of the rear seat) and closed the door behind her, moving very quickly and 'kind of abrupt[ly].'" Finding this overt reaction "unusual," causing the deputy to have some concern for his own safety (despite the lack of any indication that she might be armed or that she was threatening in any way), he stopped M.K. and asked her what she was doing. When she responded that she lived there (presumably in the house in front of which they were parked), Deputy Grubb directed her "in a 'moderate' and 'fairly calm' voice" to the sidewalk where he could watch her while he contacted the other two subjects. She readily complied. Deputy Grubb smelled for the first time the odor of marijuana during this contact with M.K. At this point, Deputy Grubb subjectively (as he later testified) considered the car's occupants to be detained. Approaching the BMW while using his flashlight to illuminate its interior (the car having tinted windows), Deputy Grubb observed in plain sight on the floor of the rear passenger area three large clear plastic bags—the largest of which was at least eight inches in diameter and "kind of tied off"—containing a green leafy substance he recognized as marijuana. He also saw a "custom-rolled" dark brown and green cigarette in the center console, containing a burnt green leafy substance. The two occupants were contacted and identified. Defendant Leon William Tacardon was identified as the driver. Told to remain in the car, Deputy Grubb then returned to his patrol car and radioed in for a records check. It was determined as a result that defendant was on searchable probation. A probation search of the car resulted in the recovery of 696.3 grams of marijuana, 76 hydrocodone pills, and (on defendant's person) $1,904. Charged in state court with possession of a controlled substance for purposes sale (H&S Code § 11351) and misdemeanor possession of marijuana for purposes of sale (H&S Code § 11359), defendant's motion to suppress the evidence (per P.C. § 1538.5) was denied. Refiling his suppression motion as a part of a motion to dismiss (pursuant to P.C. § 995) at the trial court level, the judge granted the motion. The People appealed.

Held: The Third District Court of Appeal reversed. Defendant argued on appeal (as he did in the trial court) that the contraband recovered from his car was the product of an illegal detention. Specifically, defendant's contention was that he was detained at the moment his female

passenger, M.K., had been confronted and told to wait on the sidewalk, before there was any reasonable suspicion that there was contraband in the car. The People, in contrast, contended that defendant was not detained until sometime after Deputy Grubb smelled the marijuana and observed the three baggies of the stuff on the vehicle's backseat floor. In determining whether a person has been detained, the test is whether a reasonable person in the suspect's shoes would feel free to disregard the police and go about his or her business. The officer's subjective intent, so long as not communicated to the suspect, is irrelevant. Up until that point when a reasonable person would no longer free to leave, the encounter is consensual; no reasonable suspicion justifying the contact is required. While defendant's case was on appeal, the case of *People v. Kidd* (2019) 36 Cal.App.5th 12, was decided. (See *California Legal Update*, Vol. 24, #10, dated Sept. 21, 2019.) In *Kidd*, under nearly identical circumstances as in the instant case, the Fourth District Court of Appeal (Div. 2) held that an officer's overt actions of making a U-turn, immediately parking behind a person's vehicle while turning on his spotlights, thus illuminating the interior of the person's car, constitutes a detention of the occupants of that car. It is irrelevant, per the *Kidd* Court, that the suspect's vehicle was not otherwise blocked in. If *Kidd* is controlling, then the defendant in the instant case was detained at the moment Deputy Grubb made a U-turn and turned on his spotlight, illuminating the interior of defendant's car (a theory not proposed by defendant). Under such a circumstance, with the detention being made before Deputy Grubb smelled marijuana or observed the three baggies on the floor of defendant's car, then defendant's detention would in fact have been illegal. However, the Court here disagreed with the decision in *Kidd*. Agreeing instead with the People, the Court found that defendant in this case was not detained until he had been contacted in his car and told to wait there while a records check was made. Noting that M.K. had in fact been detained when she was told to wait on the sidewalk, there was no evidence that defendant himself had even been aware of this interaction between M.K. and Deputy Grubb. By the time defendant was in fact detained, the deputy—having smelled marijuana and observed the contraband in the car—had sufficient reasonable suspicion to justify a detention for further investigation. As to whether spotlighting a person's vehicle constitutes a detention, as held in *Kidd*, the Court here ruled that "although a person whose vehicle is illuminated by police spotlights at night may well feel he or she is 'the object of official scrutiny, such directed scrutiny *does not amount to a detention*.'" (Italics added) Therefore, with defendant's detention not occurring until after a reasonable suspicion had been developed, the resulting probationary search of defendant's car was not the product of an illegal detention, and was lawful.

Note: I moved this case up to the front of the line for briefing because a number of you have complained to me about the *Kidd* decision preventing you from illuminating an already stopped (i.e., parked) vehicle even though such illumination is an important "officer safety" tactic, and not done with the intent to detain anyone. Cited as authority by this Court, but not even mentioned in the *Kidd* decision, is the now three-decades-old case of *People v. Perez* (1989) 211 Cal.App.3rd 1492; a decision out of the Sixth District Court of Appeal. In *Perez*, the officer pulled up in front of the defendant's car, leaving "plenty of room" for Perez to drive away had he chosen to do so, and then illuminated his car just as was done in both this new case and in *Kidd*. The officer then walked up to Perez's car, tapping on the window to get him to open it, and asked him for I.D. The *Perez* Court found this set of circumstances to be nothing more than a consensual encounter, and thus needed no suspicion to do so. The *Perez* case is from where the "*official* (or '*directed*') *scrutiny*" language, used in the instant case, comes; i.e., "*While the use of high beams and spotlights might cause a reasonable person to feel himself* [*or herself*] *the object*

of official scrutiny, such directed scrutiny does not amount to a detention. [Citations.]" (*Id.* at p. 1496.) The California Supreme Court declined to review the *Kidd* decision when it was decided. But there now being such a stark contrast between *Kidd* and this new case (along with *Perez*), the issue is ripe for review. Note also other authority pointing out how tenuous the spotlighting issue really is. Not surprisingly, for instance, an officer turning on his colored (red and blue) emergency lights upon pulling up to an already stopped vehicle automatically elevates the contact into a detention. (*People v. Bailey* (1985) 176 Cal.App.3rd 402.) Not so obviously, however, spotlighting or flashlighting a pedestrian on the street has been determined by a number of courts *not* to constitute a detention. (See *People v. Franklin* (1987) 192 Cal.App.3rd 935; and *People v. Rico* (1979) 97 Cal.App.3rd 124.) However, doing so while "*briskly*" and aggressively walking up to the suspect *is* a detention. (*People v. Garry* (2007) 156 Cal.App.4th 1100.) It should also be noted that if defendant in this new case had *not* been on searchable probation, a search of his vehicle based upon the odor of marijuana and the deputy's plain sight observation of an obviously illegal amount of marijuana in the car supplied the necessary probable cause to support a warrantless search of the car, with or without the defendant being subject to search and seizure conditions. (See *People v. Fews* (2018) 27 Cal.App.5th 553.) So either way, this defendant was toast.

***Miranda and Equivocal Attempts to Invoke*:**
***The U.S./Mexico Treaty on Cooperation for Mutual Legal Assistance*:**
***Preservation of Potentially Exculpatory Evidence*:**
***Evid. Code § 351.1 Polygraph Examinations*:**

People v. Flores **(May 4, 2020) 9 Cal.5th 371**

Rule: (1) To be legally effective, an *invocation of rights* must be clear and unequivocal so that a reasonable officer under the circumstances would have known that the suspect was in fact trying to invoke his rights. After an attempt to invoke one's *Miranda* rights, a limited number of neutral follow-up questions are allowed in order to render more apparent the true intent of the defendant. (2) In retrieving physical evidence from Mexico, it not required that officers use the *Treaty on Cooperation for Mutual Legal Assistance* to do so. Law enforcement officers have a constitutional duty to preserve evidence, but only when the evidence is expected to play a significant role in a suspect's defense. For this rule to apply, the evidence must both possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant is unable to obtain comparable evidence by other reasonably available means. However, unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. (3) Pursuant to Evid. Code § 351.1(a)), both the fact of a polygraph examination and the results are, as a general rule, inadmissible at trial. However, otherwise admissible statements made during such an examination remain admissible in evidence. (Subd. b.)

Facts: Defendant Alfred Flores was a member of the El Monte Trece criminal street gang. In mid-November, 2000, defendant had a confrontation with Mark Jaimes outside a Los Angeles motel where defendant and his mother lived. Jaimes had apparently solicited defendant's mother as a prostitute and then refused to promptly leave the motel. While defendant's mother was currently in their room servicing another customer—Rick Milam—defendant and Jaimes had a verbal altercation in front of the motel. As a result, defendant shot Jaimes multiple times in the

stomach, chest, and head, killing him. Defendant put Jaimes' body into the trunk of Rick Milam's car and took him for a "joy ride" before abandoning the car. Jaimes's body was later discovered by Milam when he recovered his car from an impound lot. This murder was not charged in this case (for unexplained reasons), but used instead as evidence in aggravation at the penalty phase of defendant's later capital murder case. In 2001, defendant hung out at an apartment on Linden Avenue in Rialto belonging to Carmen Alvarez and her husband, Abraham Pasillas. Eventual victims (but not gang members) 15-year-old Ricardo Torres, 18-year-old Jason Van Kleef, and 17-year-old Alexander Ayala, also hung out at the Alvarez/Pasillas' apartment. Defendant hoped to recruit Torres into his gang; Van Kleef and Ayala having no interest in joining a gang. Torres agreed to join, but failed to attend his own "jumping-in" ceremony, much to defendant's disappointment. Subsequently, on the evening of March 19, 2001, defendant (in the company of fellow gang member Andrew Mosqueda, Van Kleef, and Alvarez) lured Torres out to a dirt pull-off area on Lytle Creek Road where defendant shot him numerous times, killing him. Later that same night at some time after midnight, Van Kleef's body, with a bullet wound to the back of his head, was found at a nearby trucking yard where it appeared that he had been dumped. And then, in the early morning hours of March 21st, Ayala's body was found on Lytle Creek Road about two-tenths of a mile from where Torres' body had been found. Ayala had been shot five times; twice to the head. After the homicides of Torres, Van Kleef, and Ayala, defendant decided it might be a great time to vacation in Mexico while things cooled off. Detectives Chris Elvert and Robert Acevedo of the San Bernardino County Sheriff's Office made two trips to Mexico, the first time in an unsuccessful attempt to locate defendant. The second trip was for the purpose of retrieving the murder weapon from defendant's cousin. Forgoing the retrieval of the gun via "the *Treaty on Cooperation for Mutual Legal Assistance*" (Dec. 9, 1987, T.I.A.S. No. 91-503 (eff. May 3, 1991) ("MLAT")), and the paperwork that entailed, they decided to get the gun by informal means. They took Alvarez's mother, Maria Jackson, with them, who negotiated for them the retrieval of the gun from defendant's cousin. While there, the detectives enlisted the aid of a Mexican detective, Trini Cambreros. Upon obtaining the gun (paying the cousin $100 for it), Detective Cambreros unwisely handled it, wiping it down with a towel afterward, destroying any fingerprints that may have been on it. (In fact, while shell casings expended while test firing the gun were matched to the Torres and Ayala crime scenes, no usable prints were found on the gun. DNA testing was positive for Pasillas and Van Kleef only.) Defendant was later arrested on September 6, 2001, (almost seven months after the murders) as he attempted to reenter the United States. Taken to the San Bernardino Sheriff's Department, defendant was interrogated by Detective Elvert. After being advised of his rights and waiving them, defendant was questioned for about an hour about the Torres-Van Kleef-Ayala homicides. Defendant declined to admit any involvement. From there, however, he was turned over to a polygraph examiner, Robert Heard. In a videotaped polygraph examination, defendant admitted to being present during all three murders. The next day, Lt. Roderick Kusch of the Los Angeles Police Department, investigating the Jaimes murder, conducted an interview with defendant during which defendant fully confessed to shooting and killing Jaimes. Defendant was charged in state court with three counts of first degree murder (Torres, Van Kleef, and Ayala) with a "multiple murder" special circumstance, plus other enhancements. The prosecution's theory of the case was that Torres was murdered in retaliation for having reneged on his promise to join defendant's gang, and that Van Kleef and Ayala were killed to prevent them from ratting defendant out. He was *not* charged with the Jaimes murder; evidence relating to that murder being used instead at the penalty phase as a factor in aggravation. Prior to the jury hearing defendant's confession to murdering Jaimes, his motion to

suppress the confession—arguing that he had invoked his right to remain silent, and that any further questioning was done in violation of *Miranda*—was denied by the trial court. Convicted of all three murders with the special circumstance, defendant was sentenced to death. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously upheld defendant's conviction while voting 7-to-2 to uphold his death sentence. On appeal, defendant raised a number of issues:
(1) *Defendant's Confession Concerning the Jaimes Murder and His Equivocal Attempt to Invoke*: Defendant was arrested in September, 2001, and questioned by Detective Chris Elvert of the San Bernardino County Sheriff's Department about the Torres, Van Kleef, and Ayala homicides. Although defendant waived his *Miranda* rights, he refused to admit any involvement. Shortly thereafter, however, he did admit during a polygraph examination that he was present at each of these murders. (See "(3) *Admissibility of Defendant's Polygraph Admissions*," below.) The next day, Lt. Roderick Kusch of the Los Angeles Police Department questioned defendant about the Jaimes murder in a videotaped interview. After what might best be described as a convoluted introduction, including the fact that he (Lt. Kusch) was interested only in the Mark Jaimes murder, defendant was readvised of his rights. He responded that he understood his rights. But then before seeking an express waiver, Lt. Kusch, after rambling on for a while, explained to defendant the following: "*Basically what I'd like to do is talk about the . . . case that we investigated that we got called out on back on November 17th, 2000. Uh, I'll tell you how we got called out on it in a minute, but, uh, do you want to take a few minutes to talk a little bit about that*?" To this, defendant responded with either "*No*," or something that sounded on the videotape more like "*Nah*." Lt. Kusch either did not take this as an invocation, or chose to ignore it. Either way, he continued on by telling defendant that he wanted "*to take a minute and kind of explain to you what, uh, what we got called out on and what the investigation entailed . . .* ." Reiterating that whether he chose to answer questions or not was "*completely up to* (*him*)", and that "*you know you don't have to answer any questions*," Lt. Kusch told defendant that he "*just wanted to at least give* (*him*) *the thumbnail sketch of what we investigated, what we . . . did and talk a little bit about that*." Lt. Kusch also told defendant that "*some of the stuff*" he wanted to ask defendant was his name, date of birth, "*and stuff like that . . . .*" He finally got down to his point, and asked defendant; "*So. Do you want to take a few minutes and talk to me about that stuff*?" An arguably bewildered defendant simply responded: "*Oh yeah, well, whatever*." Finally getting the response he wanted, Lt. Kusch quickly succeeded in obtaining a full confession from defendant concerning the Jaimes murder; defendant actually boasting about shooting and killing Jaimes because he had "disrespect(ed)" his mother. At trial, the People chose to use defendant's confession at the penalty phase of the trial as aggravating evidence. Defendant moved to suppress this confession, arguing that his *Miranda* rights were violated when Lt. Kusch ignored his obvious invocation of his rights. The trial court held that in this context, defendant's attempted invocation was ambiguous, and, as such, legally ineffective. The Supreme Court, with a dissenting opinion from two justices, agreed. A valid *waiver of rights* (requiring evidence that the suspect knowingly and voluntarily waived his rights and necessitating an evaluation of the defendant's state of mind) involves a different analysis than when analyzing whether an *invocation of rights* is legally effective. To be legally effective, an *invocation of rights* must be clear and unequivocal; the test being whether a reasonable officer under the circumstances would have known that the suspect was in fact trying to invoke his rights. The "totality of the circumstances" must be considered. When an in-custody suspect answers with a clear "*no*" upon being asked if he waives his rights, this "generally constitutes an unambiguous invocation." But

follow-up questions may, in some circumstances, show that that was not really the suspect's intent, at least as objectively interpreted by a reasonable officer under the circumstances. And while it is improper to try to talk a defendant out of what is otherwise a clear and unequivocal invocation, the courts allow a "limited number of ('neutral') followup questions to render more apparent the true intent of the defendant." In this case, the nature of Lt. Kusch's initial question was unclear, appearing to be talking about how he had gotten involved in the current investigation (along with inquiring as to defendant's identification information) when he asked him; "*Do you want to take a few minutes and talk to me about that stuff*?" It was at that point defendant said "*no*" (or "*nah*"). The Court held that given the nature of the questioning at that point and the context of Lt. Kusch's comments, it was not unreasonable for the lieutenant to interpret defendant's response to mean that he'd rather just get to the point of the interrogation; i.e., the murder of Mark Jaimes. Defendant's overt cooperation, and his readiness to take full responsibility for Jaimes' death, supports this conclusion. At the very least, the Court held that the trial court judge's conclusion on this issue was not unreasonable and was supported by the evidence. The Court also rejected defendant's related argument that he provided only a "limited waiver," agreeing to provide his identification information only. The Court noted how defendant responded to questions about Jaimes' murder, and how he readily declined to answer certain questions unrelated to the Jaimes case, finding a dearth of evidence to support the theory that defendant's waiver concerning Jaimes was intended to be limited in scope. Lastly, the Court found that the record did not support defendant's argument that his confession concerning the Jaimes' murder was coerced. After being told that whether or not he chose to answer questions was completely up to him, defendant "actively engaged in the interview" with a calm demeanor. He showed no reluctance in acting out the shooting, explaining how the incident unfolded. Defendant also showed a clear understanding of his right to remain silent as evidenced by his selective refusal to answer other specific questions throughout the interview; a choice Lt. Kusch respected.

(2) *Preservation of Evidence*: Defendant filed a motion with the trial court to suppress the handgun, any testimony as to its use and recovery, and the ballistics evidence comparing the handgun and the casings recovered from the crime scenes. The trial court denied defendant's motion. The Supreme Court upheld this ruling. There is in fact a formal procedure, set out by treaty ("MLAT;" see above), for obtaining assistance in the recovery of physical evidence from Mexico. Defendant's argument was that had the detectives complied with the dictates of the treaty, Mexican Detective Trini Cambreros would never have had the opportunity to wipe the gun clean of fingerprints, thus destroying any evidence that someone other than defendant may have handled the gun. Law enforcement agents do in fact have a constitutional duty to preserve evidence. However, that duty is limited to "evidence that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488.) To reach this standard of "constitutional materiality," the "evidence must both possess an exculpatory value that was apparent before [it] was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id.* at p. 489; see also *People v. Carter* (2005) 36 Cal.4th 1215, 1246.) Under *Trombetta*, however, the fact that had evidence not been destroyed, it "*might*" have exonerated the defendant, is not enough to establish a constitutional violation. In such cases, "unless a criminal defendant can show *bad faith* on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (Italics added; *Arizona v. Youngblood* (1988) 488 U.S. 51, 58; see also *People v. Duff* (2014) 58 Cal.4th 527, 549.) Defendant failed to show the necessary "*bad faith*" in this case. Detective Cambreros wiping his prints off the gun, done for the purported

purpose of attempting to avoid a subpoena to testify in the United States, was apparently *not* done to deprive defendant of potentially exonerating evidence. Also, speculating that someone else's prints *may* have been on the gun is not enough to meet the *Trombetta* test of materiality. And as for the treaty (i.e., "MLAT"), the detectives failure to avail themselves of the procedures set forth therein for the recovery of the gun from Mexico was held to be irrelevant and did not "bad faith" on the part of the detectives. The MLAT does not mandate that such procedures be used. Although the MLAT provides formal mechanisms for requesting assistance in a U.S. prosecution, it does not preempt nor otherwise impair other avenues that might be available. (*Id.*, art. 15.) The detectives' decision to opt for an informal method of retrieving the gun was within their authority.

(3) *Admissibility of Defendant's Polygraph Admissions*: After being interrogated by Detective Elvert, defendant consented to a videotaped polygraph examination, during which he admitted to being present during the three charged murders. Pursuant to statute (i.e., Evid. Code § 351.1(a)), both the fact of the examination and the results are inadmissible at trial. However, the polygraph examiner Robert Heard was allowed to testify to defendant's incriminatory statement about being present at the scene of the three murders, as is allowed under subd. (b) of E.C. § 351.1. ("Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.") This was accomplished without violating subd. (a) of E.C. 351.1 by redacting out any references to this admission being made during a polygraph examination or that Heard was, by trade, a polygraph examiner. Defendant unsuccessfully attempted at trial to suppress his admission, arguing that he was prevented from conducting a thorough cross-examination concerning his inculpatory admission without it being revealed that it occurred during a polygraph examination. The Supreme Court upheld the use of this evidence, finding that the trial court did not place any limitations on defendant's cross-examination by simply warning defense counsel that certain questions about the nature of defendant's statements "*might*" lead the court to consider admitting a redacted portion of the videotaped examination and thus allowing the jury to evaluate the issue for itself.

Conclusion: Defendant's conviction and death sentence was upheld.

Note: Generally, "*no*" means *"no*," as clearly argued in a seven-page, two-justice dissent. The prosecution was lucky here to have had a trial judge with an open mind on this issue. But Lt. Kusch might have helped to clarify the issue a bit had he recognized he had a problem when defendant told him "*no*," he didn't want to talk about LAPD's investigation. The lieutenant should have stopped right then and there and attempted to clarify what it was defendant was saying "no" to. Of course, defendant might have told him that he just did not want to talk at all, in which case the interrogation would have been over. But that's why we have the *Miranda* decision; to protect an in-custody suspect's right to not answer any questions. Looking at the questions that were asked, however, it is likely that defendant was just confused as to what the hell the lieutenant was talking about. I know I was. Defendant had waived his rights the day before, and clearly (as it turned out) had no problem talking about the Jaimes murder, being quite proud about having defended his prostitute mother's integrity. But Monday-morning quarterbacking the lieutenant's interrogation techniques solves little if anything. I can only suggest that a little better pre-interrogation planning in what is to be said to the suspect prior to administering a *Miranda* warning is probably a better way to do it. It certainly makes for a cleaner record on appeal. As for the destruction of potential evidence, I haven't seen a *Trombetta* case in a long time. So it's helpful to rehash the rules on this issue. *Trombetta*, dealing with the pretrial destruction or loss of evidence, is one area of the law that heavily favors

the prosecution, putting the onus on the defense to show that the defendant was actually prejudiced by the loss of potentially exonerating evidence and that law enforcement acted in bad faith. And then as for the polygraph issue, I only briefed that portion of the Court's decision concerning the admissibility of admissions made by a suspect during a polygraph examination because it's an issue we seldom see. So I thought mentioning the applicability of Evid. Code § 351.1, subdivisions (a) and (b), would be a good refresher for all of us, noting how it is helpful to videotape the examination in such a manner so that the jury can actually see the defendant make useful admissions during a polygraph examination without knowing it was in fact a polygraph examination that was taking place, as required by subdivision (a) of Evid. Code § 351.1.

***Tipster Information of an Ongoing Crime*:**
***Reliability of Information From Identified, and Unidentified, Tipster(s)*:**
***Detentions for Investigation*:**
***Detentions and the Requirement that the Suspected Offense be Serious*:**

United States v. Vandergroen **(July 7, 2020) __ F.3rd __ [2020 U.S. App. LEXIS 21150]**

Rule: For information from a tipster to justify a detention of a suspect, the tip must exhibit sufficient indicia of reliability and provide information on potential illegal activity serious enough to justify a stop.

Facts: On the evening of February 17, 2018, an employee (hereinafter referred to as the "tipster") at the "Nica Lounge" in Concord, California, called 911 to report that three different patrons of the bar told him that a man in the bar (later identified as Shane Vandergroen, the defendant) was carrying a concealed firearm. The patrons all described the man to the extent that the tipster was able to identify who they were talking about. The tipster, who later fully identified himself, was able to relate to the 911 operator what defendant was doing up until the point that he got into a particularly described vehicle and left the area. Responding officers stopped the described vehicle and detained defendant. Upon a search of the vehicle (the legality of the search—requiring more than merely a reasonable suspicion—was not challenged, and therefore was not discussed), officers found a loaded semi-automatic handgun under the center console to the right of the driver's seat. Defendant was arrested and charged in federal court with being a felon in possession of a firearm. (18 U.S.C. § 922(g)(1)) After his motion to suppress the firearm was denied, defendant was convicted in a bench trial. He appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, defendant challenged the sufficiency of the evidence, arguing that there was insufficient reasonable suspicion to stop and detain him. Specifically, defendant argued that the information from the tipster—i.e., that he was packing a pistol—was not sufficiently reliable, and therefore did not justify the detention by the officers who stopped him. The rules are undisputed: "Under the Fourth Amendment, an officer may conduct a brief investigative stop only where she (or he) has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity,' commonly referred to as 'reasonable suspicion.'" (*Navarette v. California* (2014) 572 U.S. 393, 396-397.) "While a tip such as the 911 call may generate reasonable suspicion, it can only do so when, under the 'totality-of-the-circumstances,' it possesses two features. . . . First, the tip must exhibit sufficient indicia of reliability, and second, it must provide information on potential illegal

activity serious enough to justify a stop." (*United States v. Edwards* (9th Cir. 2014) 761 F.3rd 977, 983.)

(1) *Information From a Tipster; Reliability*: In order for information from a tipster to justify a detention of a suspect, it must first be shown to be reliable. The Court here identified five factors to consider when evaluating the reliability of information from a tipster: (a) Whether the tipster is known, rather than anonymous. (*Florida v. J.L.* (2000) 529 U.S. 266, 270.); (b) Whether the tipster reveals the basis of his knowledge. (*United States v. Rowland* (9th Cir. 2006) 464 F.3rd 899, 908.); (c) Whether the tipster provides detailed predictive information indicating insider knowledge. (*Id.*); (d) Whether the tipster uses a 911 number (allowing the call to be recorded and traced) rather than a non-emergency tip line. (*Foster v. City of Indio* (9th Cir. 2018) 908 F.3rd 1204, 1214); *and* (e) Whether the tipster relays fresh, eyewitness knowledge, rather than stale, second-hand knowledge. (*United States v. Terry-Crespo* (9th Cir. 2004) 356 F.3rd 1170, 1176-1177.) Here, the tipster (a bar employee) fully identified himself, describing also where his information was coming from (i.e., three bar patrons). As defendant was moving around the area, eventually leaving in a vehicle, the tipster provided a detailed description of what defendant was doing as he did it. The tipster called the standard 911 number, which was subject to being recorded and traced. However, when evaluating the reliability of a tip such as the 911 call in this case in which a caller reported information from a third party regarding possible criminal activity, the court must also consider the reliability of both the caller himself and the third party whose tip he conveys. The Court here found the information from the patrons to be reliable despite the patrons' anonymity in that the reports were based on fresh, first-hand knowledge which they reported personally and immediately to the tipster who then called 911. Thus, their information was neither "stale" nor "second-hand." Also, the witnesses to defendant's illegal possession of a firearm were still at the bar when reporting what they saw to the bar employee, thus "narrow(ing) the likely class of informants" and making their reports more reliable. Lastly, the fact that multiple individuals reported seeing a gun also made the information more reliable. Based upon all this, the Court found the information provided by the tipster to be sufficient to provide the necessary reasonable suspicion to justify defendant's detention.

(2) *Information From a Tipster re. Serious Illegal Activity*: In order for information from a tipster to justify a detention of a suspect, it must describe serious illegal activity. Even if a 911 call from a tipster is shown to be reliable, it will only support the necessary showing of a reasonable suspicion if it also "provide[d] information on potential illegal activity." (*Foster v. City of Indio* (9th Cir. 2018) 908 F.3rd 1204, 1214.) The tip must demonstrate that "criminal activity may be afoot." (*Terry v. Ohio* (1968) 392 U.S. 1, 30.) "The 'absence of any presumptively unlawful activity' from a tip will render it inadequate to support reasonable suspicion. (*United States v. Brown* (9th Cir. 2019) 925 F.3rd1150, 1153.) Furthermore, any potential criminal activity identified must be serious enough to justify the immediate detention of a suspect. (*United States v. Grigg* (9th Cir. 2007) 498 F.3rd 1070, 1080-1081.) Here, the Court held that the 911 call in issue—to the effect that defendant was carrying a gun—met the above standards. Carrying a concealed firearm is presumptively illegal in California (P.C. § 25400). The tipster's 911 call, as noted above, provided sufficient information to justify defendant's detention for investigation of whether or not he was in fact in illegal possession of a firearm, as indicated by the tipster. Also, the potential crime involved was serious enough—as well as being an "ongoing" crime—to justify defendant's immediate detention for investigation. The officers stopping defendant to investigate whether or not he was in fact in illegal possession of a firearm, therefore, was justified.

Note: It is a general rule that an anonymous tip that a person may be armed, by itself (or of any other on-going criminal activity), is legally *insufficient* to justify either a detention or a patdown for weapons. (*Alabama v. White* (1990) 496 U.S. 325, 331; *Florida v. J.L.* (2000) 529 U.S. 266; *People v. Jordan* (2004) 121 Cal.App.4th 544, 562-564.) The tipster's identity was never an issue in this case although the source of his information came from three unidentified individuals, adding an interesting twist. You can see from this case that there is nothing "black or white" about these issues, inevitably depending upon an evaluation of the "totality of the circumstances." That's why you get paid the big bucks; because you are expected to figure it all out at the spur of the moment. The only area of the law discussed in this case where it is arguable that the Ninth Circuit is just dead wrong is on the requirement that in order to justify a traffic stop and detention, the suspected offense being investigated must be classified as "serious." The Court does not discuss here where the line between a serious and a non-serious offense might be, noting only that carrying a concealed weapon is in fact a serious offense, at least under California law. The Court does intimate that misdemeanors are not serious offenses, at least absent a "likelihood for 'ongoing or repeated danger,' or 'escalation.'" (citing *Johnson v. Bay Area Rapid Transit Dist.* (9th Cir. 2013) 724 F.3rd 1159, 1175.) The Ninth Circuit also cites the case of *United States v. Grigg* (9th Cir. 2007) 498 F.3rd 1070, at pages 1080-1081, where it was ruled that whether or not an officer may stop and detain a suspect for a completed misdemeanor depends upon the nature of the misdemeanor. But where ever you might draw the line, it is interesting to note that there is absolutely no authority under California law for the argument that you cannot make a traffic stop and detain someone suspected of having committed a non-serious offense. (But see the so-called "*stale misdemeanor rule*," which limits an officer's authority to arrest for a past—or "*stale*"—misdemeanor. Also see *People v. Hua* (2008) 158 Cal.App.4th 1027, and *People v. Torres et al*. (2012) 205 Cal.App.4th 989, 993-998, holding that you cannot make a forced entry into a residence when the only offense suspected is the non-bookable offense of possession of less than an ounce of marijuana, per H&S § 11357(b).) The U.S. Supreme Court has specifically declined to rule on the issue. (See *United States v. Hensley* (1985) 469 U.S. 221, 229.) The California Supreme Court has specifically disagreed with the Ninth Circuit's reasoning (albeit in a different context) for limiting an officer's detention or arrest powers based upon whether or not the offense is a misdemeanor. (See *People v. Thompson* (2006) 38 Cal.4th 811.) The issue in *Thompson* was the legality of entering and arresting a DUI suspect in his own home, and where the Court noted that the Ninth Circuit's opinion on this issue (ruling it illegal to do so; see *Sims v. Stanton* (9th Cir. 2013) 706 F.3rd 954 [certiorari granted], and *United States v. Johnson* (9th Cir. 2001) 256 F.3rd 895, 908, fn. 6.) is a "minority opinion" (pp. 821-824.), while also intimating that the difference between a "serious" and "non-serious" offense is whether the offense in question is a "jailable" offense; pp. 821-824.) At any rate, the necessity for an offense to be "serious" in order to justify a detention is, at best, debatable, and, as noted by the California Supreme Court, a minority opinion. State (as opposed to federal) officers can probably ignore the Ninth Circuit's theory on this issue, at least until some state case comes down ruling to the contrary.