The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*I didn't climb to the top of the food chain to become a vegetarian*." (Unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Pen. Code. § 991*: *Judicial Determination of Probable Cause in Misdemeanor In-Custody Cases: Need-to-know stuff for judges and prosecutors (as well as defense attorneys): Pursuant to **paragraph (a)** of **section 991**: "If the defendant is in custody at the time he appears before the magistrate for arraignment and, if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate, on motion of counsel for the defendant or the defendant, shall determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty thereof." The rest of **section 991** (**paragraphs (b)** through **(e)**) describes what's admissible in the way of evidence and the procedures to use in litigating such a motion. In the recent case of ***Barajas v. Superior Court*** (Oct. 4, 2019) 40 Cal.App.5th 944, the defendant moved to dismiss a misdemeanor charge of carrying a dirk or dagger for lack of probable cause under **P.C. § 991**, arguing that the knife was recovered illegally and should be suppressed. The appellate court, however, concluded that suppression of alleged illegally obtained evidence cannot be litigated on a motion to dismiss under **§ 991**. The probable cause determination contemplated by **§ 991** does not include a determination whether evidence was unlawfully obtained. The sole and exclusive means for a misdemeanor defendant to secure that determination is via a noticed motion to suppress under **P.C. § 1538.5**. The only question for a trial court to answer in a defendant's **§ 991** motion is whether facts exist (that have not yet been excluded by operation of a properly noticed **§ 1538.5** motion) sufficient to warrant a prudent person in believing that a public offense has been committed and that the defendant is guilty thereof.

***Gun Violence Restraining Orders*:** In *The California Legal Update* (Vol. 24, #9; August 30, 2019), I wrote an Administrative Note on "*Red Flag Statutes*" dealing with the procedures for law enforcement officers and/or "immediate family members" (soon to be expanded to educators, employers and co-workers, under recently enacted **AB 61**) to seek a court petition (sometimes referred to as "*Extreme Risk Protection Orders*," (or "*ERPO*s") for the seizure of firearms from individuals who are a danger to themselves or to others, offering you a copy of the statutes themselves (combined with my long-published "*Mental Patients and Weapons*" Outline). In response, I was turned on to a patrol officer with the Escondido Police Department (Officer Craig S. Bond; CBond@escondido.org) who has not only used the Red Flag Statute petition process, but also written up a short step-by-step procedural outline on how it is done. Officer Bond has graciously consented for me to pass along his outline to anyone who would like to see it. Recognizing the simple fact that immediate family members cannot realistically be expected to use these procedures themselves to take guns away from mentally unstable relatives, if it is to be done it must be done by a law enforcement officer. Officer Bond and I both agree, therefore, that this is a procedure with which officers should be more familiar and, in the appropriate case, ready to use. If you'd like a copy of Officer Bond's outline, let me (or Officer Bond) know, and it will be forwarded it to you. Also, I've updated and expanded the "*Mental Patients with Weapons*" Outline to include another whole section listing the statutes dealing with the procedures and requirement for the

"*Return of Confiscated Firearms*," P.C. §§ 33850 et seq. This updated outline is also available upon request.

CASE LAW:

***Undercover Sex Sting Operations*:**
P.C. § 288.3(a)*: *Attempted contact with a Minor with the Intent to Commit a Sexual Offense

People v. Korwin **(May 31, 2019) 36 Cal.App.5th 682**

Rule: P.C. § 288.3(a) requires no more than an attempt to communicate with a minor to be a completed crime. The fact that the targeted victim is in fact an undercover adult police officer, when unbeknownst to the defendant, is irrelevant.

Facts: Defendant Anthony Robert Korwin had urges. But he figured out a way to satisfy those urges. After all, that's what the Internet was invented for, was it not? So, accessing an online classified website, and clicking on the "casual encounters" section, defendant posted an advertisement announcing that he was seeking a relationship with a younger female between the ages of 18 and 28, possibly with a "*daddy complex*." The advertisement specified that responding individuals should use the title line "*young and willing*," and stating an age. Suspecting defendant's intentions to be less than honorable, a law enforcement agent working in a child exploitation unit on an Internet task force responded to the ad with an e-mail entitled "*Young and Willing 13*." Giving defendant an obvious out, which would have ended this investigation before it even began, the agent wrote in the message that she knew she was "(*p*)*robably too young, . . .*" adding " *. . . but you sound sweet. Thought I'd say hi anyways*." Failing to just walk away as he no doubt later wished he had, defendant took the bait and responded to the agent's messages, agreeing that although she was in fact too young, they could chat anyway. This seemingly innocent introduction was followed up by 4½ to 5 months of back-and-forth e-mails that quickly degraded into sexually explicit messages. The agent began by asking what was a "*daddy complex*." Defendant responded by telling her: "(*S*)*ome girls like to imagine they are having sex with their daddy, and some dad's [*sic*] fantasize the same. It can extend to getting bare butt spankings and other things*." Defendant went on to explain that his goal in posting the advertisement was to find a "*legal-aged virgin*." Defendant's express wish was to be a woman's first lover, noting that was becoming difficult to do. He also told the agent that he was a high school teacher and that he had had occasional "crushes" on some of his students over the years, but claimed to never have acted upon them. Switching the conversation from himself, defendant inquired about the girl's sexual encounters with boys her age, noting that if she was 18, they could have "*some legitimate fun*." The conversation, as guided by defendant, began to slip further and further into an inappropriate inquisitiveness about the girl's body including whether she had pubic hair, the size of her breasts, and her menstrual cycles. He finally expressed the desire to "*mentor*" her, giving her specific instructions on how to masturbate and give oral sex. At some point, defendant sent her a picture of himself and asked for a picture of her in return. The agent sent an age-regressed photo of another female agent. Eventually, defendant suggested that they meet at a specific fast food restaurant near where she lived. To add to the enticement, he suggested he could take some head shots of her to send to a modeling agency. But he also said he wanted to take naked—or at least suggestive—photos of

her at a park somewhere. Throwing his previously expressed caution to the wind, defendant told the girl to pick out polish so they could paint each other's toenails. He also said he would wear loose shorts when they met so she could touch his genitals with her feet. Foolishly showing up at the agreed-to location, defendant was immediately arrested. As promised, he was wearing loose gym shorts. Several cell phones—one containing the age-regressed photo previously sent to him—and two cameras were located in a search of defendant's vehicle, along with male enhancement pills, condoms, and a camera bag containing women's underwear. Charged in state court, a jury convicted defendant of attempting to commit a lewd act upon a child (Count 1: P.C. § 288(c)(1)), contacting a minor who defendant knew, or reasonably should have known, was a minor, with the intent to commit a sexual offense (Count 2: P.C. § 288.3(a)), and going to an arranged meeting place for the purpose of engaging in lewd or lascivious behavior with a minor or a person he believed to be a minor (Count 3: P.C. § 288.4(b)). Sentenced to three years in prison, defendant appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. On appeal, defendant did not contest that he had attempted to commit a lewd act on a child, as alleged in Count 1 (P.C. § 288(c)(1)), or that he arranged to meet with a person he believed to be minor for lewd purposes, as alleged in Count 3 (P.C. § 288.4(b)). The only issue on appeal was whether there was sufficient evidence to support his conviction under subdivision (a) of section 288.3, as charged in count 2, in that the agent with whom defendant communicated was not actually a minor. Specifically, defendant argued that his erroneous belief that he was communicating with a minor is not a substitute for the statutory requirement that the other person actually be a minor. Engaging in the commonly accepted rules of statutory interpretation, the Court had no difficulty finding sufficient evidence to support defendant's conviction for a violation of section 288.3(a). As noted by the court, a violation of P.C. § 288.3, subd. (a), is proven when it is shown that a defendant (1) directly or indirectly communicated with or attempted to communicate with a person, (2) with the intent to commit one or more of the offenses listed in the section involving that person, and (3) he knew or reasonably should have known that the person was under the age of 18. Pointing out that section 288.3(a) specifically refers to the victim as being a minor, defendant argued that because the agent with whom he communicated was an adult, the elements of this offense were not proven. The Court disagreed. Under section 288.3(a), merely attempting to communicate with a minor is a completed crime. (i.e., "or *attempts* to contact or communicate with a minor, . . ."; Italics added) Defendant in this case clearly attempted to communicate with a minor. Also, the necessary knowledge element makes the crime punishable if the defendant in making the contact or attempting to make the contact either "knows *or reasonably should know* that the person is a minor." (Italics in original) Per the Court: "(T)he knowledge requirement of the statute focuses on the knowledge and intent of the offender by ensuring the offense does not impose strict liability upon someone who does not know or has no reason to know the person with whom he or she is communicating or attempting to communicate is a minor. It does not actually require a minor victim." The key to the Court's reasoning here is that a violation of section 288.3(a) only requires an "attempt to contact or communicate with a minor," with the requisite mental state of having reason to know, or reasonably believe, the individual to be a minor. The fact that the alleged minor turns out to be an adult does not negate defendant's intent, nor culpability. "(T)he lack of an actual minor is not a defense to an attempt to commit a sex offense against a minor." The Court further rejected defendant's argument that he was guilty at most of an attempt to violate section 288.3(a), noting that the section already

provides culpability for an attempt to commit the offense. Lastly, the Court also found its interpretation of section 288.3(a) to be consistent with purposes of the statute, as explained to voters when they adopted this new Penal Code provision in November, 2006, as part of the Sexual Predator Punishment and Control Act; i.e., "Jessica's Law," or Proposition 83. "Our interpretation advances the statutory purpose of supporting law enforcement officers who use undercover measures to identify, deter, and punish Internet predators who attempt to sexually victimize children before they reach (actual) minor victims." Based upon these findings, defendant's conviction for a violation of P.C. § 288.3(a) was upheld.

Note: So why is it not "entrapment" when law enforcement sets up a sting such as this? The Court didn't discuss this potential issue, probably because it was not really an issue at all. Law enforcement stings such as this are quite common and consistently upheld with entrapment defenses uniformly rejected. (E.g., see *People v. Reed* (1996) 53 Cal.App.4th 389, 399-401.) Witkin's Criminal Law (4th Edition, Vol. 1; Defenses, § 100) summarizes the rule best by noting: "The defense of entrapment is available where the crime was not contemplated by the defendant, but was actually planned and instigated by police officers, and the defendant was by persuasion or fraud lured into its commission." In other words, merely providing an opportunity for an already predisposed criminal to commit a specific crime is not entrapment. In *Reed*, an entrapment defense was rejected under circumstances similar to the instant case, it being noted in the Court's "Overview" that; (d)efendant's entrapment defense failed because he initiated the contact and continued the lengthy correspondence with the detective" who the defendant believed was a minor. In this new case as well, the police merely provided defendant with the opportunity to commit a crime he himself fully intended to commit. Such is not entrapment. To the contrary, the Court expends considerable ink discussing Proposition 83, of which enactment of section 288.3 was a part, as mentioned above. At page 690 of the decision, the Court notes that; "(t)he findings and declarations passed by voters along with Proposition 83 emphasize that California 'places a high priority on maintaining public safety through a highly skilled and trained law enforcement as well as laws that deter and punish criminal behavior.' (Prop. 83, § 2, subd. (a).) The findings and declarations observe the 'universal use of the Internet has also ushered in an era of increased risk to our children by predators using this technology as a tool to lure children away from their homes and into dangerous situations. Therefore, to reflect society's disapproval of this type of activity, adequate penalties must be enacted to ensure predators cannot escape prosecution.' (*Id.*, § 2, subd. (d).)" This strong language dictates that statutes such as P.C. § 288.3(a) be given as broad an interpretation as legally and logically possible in order to effectuate the intent of the electorate in passing Proposition 83. This case helps to enforce that goal.

***Vehicle Searches and Probable Cause*:**
***Marijuana Possession and Probable Cause to Search a Vehicle*:**
***Impounding Vehicles and the Community Caretaking Doctrine*:**
***Vehicle Inventory Searches*:**

People v. Lee **(Oct. 3, 2019) 40 Cal.App.5th 853**

Rule: A warrantless search of a motor vehicle requires probable cause to believe it contains contraband or other evidence of a crime. A motor vehicle driver's possession of a lawful amount

of marijuana, absent some other evidence that the vehicle contains more marijuana or that the driver is under the influence, is not sufficient to establish the necessary probable cause to search the vehicle. Despite authorizing statutes, it is illegal to impound a vehicle unless allowable under the Community Caretaking Doctrine. An impound search of a motor vehicle, when done for the primary purpose of finding evidence of ordinary criminal wrongdoing, is illegal.

Facts: Two San Diego Police Department officers stopped Defendant Brandon Lance Lee while driving his gold Cadillac DeVille in August, 2017, upon observing that he had no front license plate in violation of V.C. § 5200, and his windows were tinted in possible violation of V.C. § 26708. Upon contacting defendant (and his passenger, Michael H.), defendant told the officers he did not have his driver's license with him (later determined to having been suspended). Defendant was removed from his vehicle and patted down in a vain search for any sort of identification. During the patdown, however, a bag containing a small amount of marijuana and a wad of cash ($100 to $200) were found in defendant's pocket. (The possible legal issues related to the lawfulness of the patdown for ID and the recovery of the marijuana and cash—irrelevant to the ultimate legal issues in this case—were not discussed.) Some cash (later determined to be only $10) was also visible on the center console. Asked if he delivered medical marijuana, defendant replied that he did. Defendant was handcuffed, "tens(ing) up" as the cuffs were put on. Defendant verbally identified himself to the officers and admitted that the Cadillac was his. Michael (who also didn't have a license) was also handcuffed, but told that if nothing illegal was found in the car, he would be released. Told that his car was going to be impounded, defendant was asked (on three separate occasions) if there was anything illegal in it. Defendant responded each time that there was not. Defendant offered to have someone come pick up the car for him, but the officer declined, responding; "That's not going to work." Upon asking if he could "grab something from the car," the officer told him that "he could take whatever he needed after the search confirmed there was nothing illegal in the car." The car was thoroughly searched, including between the seats and the console, in the back pocket behind the driver's seat, inside the center console, underneath the front and back seats, under the floor mats, and in the trunk. In testimony, the officer later indicated that he searched under the back seat because that was an area where people would commonly secret illegal items. Finally, a backpack was recovered from the trunk (visible upon pulling down the back seat's center armrest). The backpack was found to contain a firearm and a "large sum" of money (how much, not being in the record). The glovebox being locked, it was eventually opened with a key found on Michael. In the glovebox, along with some small plastic baggies, a kitchen knife, and a small glass container, was found an envelope containing two egg-sized plastic baggies containing a white powdery substance later determined to be 56 grams of cocaine. Several small digital scales were later found elsewhere in the vehicle. An impound form (ARJIS-11) was filled out later by another officer (the officers at the scene not having the form with them) after the car was impounded and searched again. Defendant was charged in state court with a host of drug and firearms-related offenses. Defendant filed a motion to suppress the evidence recovered from his car. At this hearing, the officer acknowledged that the small bag of marijuana in defendant's pocket contained an amount consistent with personal use and was not illegal on its own. And he agreed that the money in defendant's pockets combined with the legal amount of marijuana he had was not, by itself, evidence of a crime. The officer further indicated that he asked defendant if he was involved in a medical marijuana delivery service because of his knowledge that illegal delivery services were

becoming common. The trial court granted defendant's motion to suppress and the case was dismissed. The People appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. On appeal, the People argued that the search of defendant's vehicle was lawful in that the officers had probable cause to search it. In the alternative, the search was a lawful inventory search of an impounded vehicle. The Court rejected both arguments.

1. *Automobile Searches and the Fourth Amendment*: Warrantless searches are unlawful unless the search in issue "falls within one of the specifically established and well-delineated exceptions." A search of an automobile is one of those exceptions, at least generally. But to be lawful, unless another exception applies (e.g., inventory searches; see below), there must first be established that the search is supported by probable cause to believe it contains contraband or other evidence of a crime. Sometimes referred to as the "*automobile exception*" to the search warrant requirement, the relaxed standards for searching automobiles are justified by (1) their inherent mobility and (2) a diminished expectation of privacy in a vehicle. The issue in this case was whether the officers had sufficient probable cause to believe defendant's car contained contraband or other evidence of a crime. In determining whether or not probable cause exists, the totality of the circumstances are considered, using an objective standard. The officer's subjective beliefs are irrelevant. The People argued that probable cause existed in this case, based upon a combination of (1) the marijuana found in defendant's pocket, (2) his affirmative response when asked if he delivered marijuana, (3) the wad of cash (between $100 and $200) found in defendant's pocket, (4) the additional $10 in cash observed on the center console, and (5) the manner in which defendant "tensed up" upon being handcuffed. The Court concluded that this was not enough. Although agreeing with the People's argument that finding a legal amount of marijuana does not necessarily deprive the police "of the capacity to entertain a suspicion of criminal conduct" (*People v. Strasburg* (2007) 148 Cal.App.4th 1052.), the Court held that there must be something else in addition to the simple possession of a legal amount of marijuana to justify a search of the vehicle for more. By the time this arrest occurred, it was no longer illegal for a person to possess up to an ounce (28.5 grams) of marijuana. (H&S § 11362.1(a)(1)) In fact, subdivision (c) of section 11362.1 specifically says that legal cannabis and related products "are not contraband" and their possession and/or use "shall not constitute the basis for detention, search, or arrest." Prior cases holding that an officer finding a legal amount of marijuana did in fact justify the subsequent search of the possessor's vehicle for more marijuana found such searches legal only because there was some additional indication (e.g., the odor of burnt marijuana emanating from the vehicle) that more (i.e., an illegal amount of) marijuana might be in the car, or that the person was driving while under the influence of marijuana. (See *People v. Waxler* (Mar. 11, 2014) 224 Cal.App.4th 712; *Cal. Legal Update*, Vol. 19, #9, Aug. 28, 2014, and *People v. Fews* (Sept. 24, 2018) 27 Cal.App.5th 553; *Cal. Legal Update*, Vol. 23 #11, Sep. 28, 2018.) In this case, however, the only marijuana found was a small (legal) amount in defendant's pocket. There was no evidence that he might have been driving while under the influence of the stuff, or that there was any more marijuana in the car. Per the Court; "(defendant's) possession of a small and legal amount of marijuana provides scant support for an inference that his car contained contraband." The Court further found that defendant's admission that he delivers medical marijuana "is not particularly significant in the absence of evidence that his delivery business was illegal." Also, there was no evidence that either the cash found on defendant's person or on the center console was indicative of drug sales,

as the officer admitted when he testified at the suppression hearing. Lastly, the fact that defendant "tensed up" upon being handcuffed—not an unusual reaction—was not significant. Overall, the Court determined that "the totality of the circumstances falls well short of establishing probable cause to search the Cadillac. Those circumstances simply were not enough to support the 'fair probability that contraband or evidence of a crime will be found.'" The search of defendant's car, therefore, cannot be upheld on a probable cause theory.

(2) *Vehicle Inventory Search*: An inventory search of a lawfully impounded vehicle is another well-defined exception to the Fourth Amendment's warrant requirement. However, the impoundment of a vehicle, even when authorized by statute, is legal only when the so-called "Community Caretaking Doctrine" is found to apply. For the community caretaking doctrine to apply, it must be found that the impoundment of a vehicle serves a community caretaking function, such as when the vehicle is parked illegally, is blocking traffic or passage, or stands at risk of being vandalized or stolen. Also relevant to the caretaking inquiry is whether someone other than the defendant is available to remove the car to a safe location, eliminating the need to impound it. In this case, the officer declined to allow defendant to call for someone to come take possession of his vehicle. There was also no evidence that the car was parked illegally, blocked traffic, or was a risk of being stolen or vandalized if left at the scene. Even though allowed pursuant to statute (i.e., Veh. Code §§ 14602.6(a)(1), and 22651(p)), impoundment of defendant's car was illegal. The fact that there is an absence of a proper community caretaking function suggests that impounding a car was done as a pretext to investigate possible criminal activity without probable cause, a purpose which is inconsistent with the legally recognized justifications for an inventory search. Because probable cause is not necessary in order to conduct a lawful inventory search, the purpose of such a search is limited to searches done for the purpose of itemizing the contents of the vehicle, done in order to protect the vehicle's owner's interest in those contents. Even if the community caretaking doctrine had been found to allow for the impounding of defendant's car, the evidence in this case indicates that the officer's search of the vehicle was not done for the purpose of protecting defendant's personal possessions, but rather to discover evidence of possible criminal activity. Such a search is *not* legal when done for the primary purpose of discovering evidence of what is sometimes referred to as "ordinary criminal wrongdoing." In this case, the officer admitted a number of times (either directly or by inference) that he was primarily looking for criminal evidence. For instance, the officer asked defendant several times if there was anything illegal in his car as opposed to whether there were valuables or other items that needed to be inventoried. He also told Michael (the passenger) that he would be released and free to go if nothing illegal was found in the car. The officer also denied defendant's request to remove some of his personal belongings from the car before it was searched. Lastly, the officer searched areas of the car where one might expect illegal items to be stashed as opposed to where valuables would be kept (e.g., under the floor mats). He even admitted in his testimony that he searched underneath the back seat because it is a common place to hide illegal items. It was also noted that an actual inventory search was not done until later—after the car's actual impoundment—by another officer who was the one who filled out the required impound (ARJIS-11) form. Thus, per the Court, "(i)n their totality, these facts provide substantial evidence to support the trial court's finding that the focus of (the officer's) search was finding incriminating evidence (as opposed to conducting a mere inventory of the car's contents). This motivation is inconsistent with an inventory search." The search of defendant's car, therefore, cannot be justified under the theory that it was a lawful inventory search.

Note: I purposely left out the names of the two San Diego police officers in this brief in order to avoid any undue embarrassment to them, they having screwed up. It was also noted in the published decision—the Court having no problem identifying the officers by name—that the trial court judge openly, on the record, questioned the primary officer's credibility. Although the Appellate Court did not specify what it was the officer testified to that caused the trial judge to question his honesty, it's simply not a good thing for it to be noted in a published decision that you might have lied. It might even be enough to get the officer's name included on the D.A.'s dreaded (and often career-ending) *Brady* list. (*Brady v. Maryland* (1963) 373 U.S. 83.) But to my point, I note that neither of the officers involved in this case are on the e-mail list for receiving these *Legal Updates*. While it is understandable that an officer might not know the rule about when possession of a legal amount of marijuana will justify a warrantless probable cause search of a vehicle, this having become an issue only since marijuana's (oh, excuse me, *cannabis's*) legalization, there is really no excuse for not knowing when you can and cannot legally impound a vehicle, the applicability of the community caretaking requirement, and, just as importantly, that impounded vehicles cannot be searched with the primary purpose of looking for contraband. Had either or both officers been reading prior editions of the California Legal Update, they would (or should) have known this. This is, of course, easy for me to say. I've been making an intense study of search and seizure law for longer than some of you have been alive. I understand that police officers do not have the time (or inclination) to spend as much time at this endeavor as I do. But by simply setting aside an hour a month and reading the *California Legal Update*, your effort in doing so will go a long way in helping to make all these sometimes conflicting and often unintelligible rules slowly but surely sink into your cerebral cortex to where they will eventually start making some sense. The alternative is for you to continue to flail around out there in the field, blindly attempting to enforce all the rules and regulations that you don't really understand, screwing up cases, and hoping that just by chance you might get it right (as, admittedly, I did as a cop). *Your choice*. I don't mind briefing these cases. But it should bother you when it is your screw-up that gets publicized, identifying you by name for everyone to read, and causing me to negatively critique your performance in this *Update*. Not good.

***The Second Amendment Right to Keep and Bear Firearms*:**
***The Doctrine of Issue Preclusion*:**
***The Community Caretaking Doctrine as Applied to Residences*:**
***Warrantless Seizure of Firearms from a W&I Code § 5150 Patient*:**

Rodriguez v. City of San Jose **(9th Cir. July 23, 2019) 930 F.3rd 1123**

Rule: Pursuant to the "Doctrine of Issue Preclusion," issues litigated and determined in an earlier legal proceeding cannot be relitigated in a second lawsuit. The "Community Caretaking Doctrine" applies to residences as well as vehicles. Pursuant to the Community Caretaking Doctrine and the "emergency exception" to the search warrant requirement, the warrantless seizure of firearms from the residence of a W&I § 5150 patient's home *may* be lawful.

Facts: Late one night in January, 2013, Lori Rodriguez called 911, asking the San Jose Police Department to conduct a welfare check on her husband, Edward (all 400 pounds of him). Officer

Steven Valentine and others responded, finding Edward to be ranting on about the CIA and the army, complaining that people were watching him. Edward also mentioned "(s)hooting up schools" and that he had a "gun safe full of guns" with which to do it. When asked if he wanted to hurt himself, Edward attempted to break his own thumb. The officers were familiar with Edward and his issues, having been there before on similar calls. Determining that Edward was in the midst of an acute mental health crisis that made him a danger to himself and others, the officers decided that he needed to be taken into custody and transported to a mental health facility for a Welfare & Institutions Code § 5150, 72-hour, evaluation. After Edward was restrained and taken away by ambulance, Officer Valentine spoke with Lori about the firearms in the house. Lori confirmed that a gun safe in the house contained Edward's firearms. Officer Valentine informed her that pursuant to W&I Code § 8102(a), he would have to confiscate the guns. Lori reluctantly provided Officer Valentine with a key and the combination to the safe. Twelve firearms—including handguns, shotguns, and semi-automatic rifles—were found in the safe. One of the handguns was registered in Lori's name, she having owned it since before marrying Edward. The other eleven guns were either unregistered or registered to Edward alone. The officers took Lori's personal handgun over her objection along with the other eleven firearms. Edward, in the meantime, after having repeatedly broken the restraints holding him to the ambulance gurney during his ride to the hospital, was evaluated by doctors and determined to be a danger to himself. Pursuant to W&I Code §§ 5151 and 5152, he was therefore admitted to the hospital for a 72-hour evaluation and treatment. By operation of law, Edward automatically became a "prohibited person," making it illegal for him to own, possess, control, receive, or purchase any firearm for a period of five years following his release from the hospital. (W&I § 8103(f)(1)) He was released from the hospital one week later. A month after the officers had confiscated the firearms, the City of San Jose filed a petition in the California Superior Court pursuant to W&I Code § 8102(c), seeking an order of forfeiture based on a determination that the guns' return would likely endanger Edward and others. Although Edward did not respond, Lori did, asserting outright ownership of her personal handgun and a community property interest in the other eleven firearms. In her response, Lori asserted that taking the firearms from her violated her Second Amendment right to keep and bear arms, and that even if Edward was prohibited from possessing or owning guns, she was not. In support of her argument, she alleged that she had obtained a notice of eligibility to own and possess guns from the California Department of Justice (DOJ) Bureau of Firearms. She further represented to the court that if returned to her, she planned to secure the firearms in her gun safe and that she had changed the combination code so that Edward would not have access to them, eliminating any danger to Edward or to others. Despite Lori's assertions, the Superior Court granted the City's petition for the forfeiture of the guns. In so ruling, the judge noted that there was nothing to stop Lori from buying more guns and putting them into her safe if she so chose to. This fact, however, did not prevent the forfeiture of the guns already owned and, arguably, accessible to Edward despite Lori's best efforts. The Superior Court judge further noted that Lori's Second Amendment rights were outweighed by the public safety concerns at stake. Lori appealed. The Sixth District Court of Appeal affirmed in an unpublished decision (*City of San Jose v. Rodriguez* (Apr. 2, 2015) 2015 Cal.App. Unpub. LEXIS 2315.), ruling that there was substantial evidence supporting the Superior Court's determination that returning the guns to the Rodriguez home would likely result in endangering Edward and others. On the constitutional issue, the Appellate Court held that Lori had not demonstrated a viable Second Amendment claim under the United States Supreme Court's case law, and that she had other "viable options" (e.g., selling the guns or storing them

outside the home). The Court also noted that she had not yet attempted to take advantage of California's statutory procedures for the return of confiscated firearms, pursuant to P.C. §§ 33850. Lori did not seek review of this decision in either the California or the United States Supreme Courts. Instead, she took the necessary steps under P.C. §§ 33850 to 33865 to become eligible for the return of the firearms and changed the registration and ownership of all twelve guns into her name alone. She also obtained release clearances from the California DOJ. Despite all this, the City of San Jose again declined to return the firearms to her. Frustrated (and no doubt pissed), Lori sued the City of San Jose (along with the officers involved) in federal court, pursuant to 42 U.S.C. § 1983, seeking the return of her guns and compensatory damages. The federal district court granted the civil defendants' motion for summary judgment (dismissing Plaintiff Lori Rodriguez's lawsuit). Lori appealed.

Held: The Ninth Circuit Court of Appeal affirmed. At issue on appeal was the possible violation of Lori's Second Amendment right to keep and bear arms, as well as whether the firearms had been lawfully seized in the first place.

(1) *Second Amendment and Issue Preclusion*: Although not raised by any of the parties to this lawsuit, the Court held that because Plaintiff Lori Rodriguez's Second Amendment claims had already been fully litigated at both the California trial and appellate court levels in prior, separate, proceedings, the Ninth Circuit is constitutionally precluded from relitigating it all over again. The legal theory by which a court is prevented from rehearing an issue already litigated to its conclusion in a separate prior proceeding is called "*issue preclusion*," sometimes labeled "*collateral estoppel*." While failing to raise this issue in the courts below, or even in their briefs to the Ninth Circuit, the Court declined to deem the issue "waived" (which is the normal rule). Because the public interest (i.e., "preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results") outweighs any private interests involved, the Court here decided to rule on the applicability of issue preclusion in this case. The doctrine of issue preclusion stems from the U.S. Constitution's "Full Faith and Credit Clause." (U.S. Const. art. IV, § 1.) As given affect by federal statute, 28 U.S.C. § 1738 mandates that federal courts must "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Lori already litigated her Second Amendment arguments before California's Superior and District Court of Appeal. Applying a six-factor test for when issue preclusion applies (labeled the "*Lucido factors*," as described in "California's seminal case on the doctrine," *Lucido v. Superior Court* (1990) 51 Cal.3rd 335, 272, and with which I will not bore you. If you're interested, check pages 1131 to 1133 of the Court's decision.), the Court found the preclusion doctrine to apply to this case. Lori had argued at the state court level (trial and appellate), in separate proceedings litigated to its conclusion, that the civil defendants had violated her Second Amendment right to keep and bear arms by refusing to return the firearms to her because of her husband's prohibited status, even though "she was not prohibited from acquiring or possessing firearms and had promised to take all steps required under California law to secure the firearms in a gun safe." California had rejected this argument. The doctrine of issue preclusion prohibits the federal courts from relitigating this issue in a different proceeding (i.e., a separately filed case). The Court also noted the fact that since the conclusion of her state-litigated attempt to have the guns released to her Lori had obtained exclusive ownership, is irrelevant for preclusion purposes because the state appellate court already assumed that she had an ownership interest in the guns under California's community property laws, and even that one

of the guns was exclusively hers. Her ownership of the guns did not affect the outcome under the Second Amendment. Also, the state had similarly rejected all the other situational changes Lori had effected, such as taking steps to prevent her husband from having access to the guns (e.g., changing the safe's combination), as well as jumping through all the necessary P.C. §§ 33850 et seq. hoops (procedures for the return of confiscated firearms), and obtaining release clearances from the California DOJ. California's courts having already rejected these arguments. The Ninth Circuit declined to relitigate them here in defendant's 42 U.S.C. 1983 lawsuit.

(2) *Fourth Amendment Seizure*: Lori did not raise a Fourth Amendment "search" issue; only that the San Jose officers "*seized*" the firearms at issue in violation of the Fourth Amendment. (This issue, *not* litigated in the state courts, was not subject to "issue preclusion.") The basic, long-standing rule is that with limited exceptions, "(a) seizure conducted without a warrant is 'per se unreasonable under the Fourth Amendment,'" Absent reason to believe that the items to be seized constitute evidence of criminal activity, the "community caretaking" theory (most often used to justify the impounding and warrantless search of vehicles) may be used to justify such a seizure. Community caretaking—"totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute"—applies whenever necessary for the "protection of public health and safety." The civil defendants argued in this case that "community caretaking" (done to protect Edward from himself as well Lori) justified the seizure of the firearms from the Rodriguez's residence. The Court agreed: "A seizure of a firearm in the possession or control of a person who has been detained because of an acute mental health episode likewise responds to an immediate threat to community safety." Searches and seizures performed under the community caretaking function, however, like those performed pursuant to the criminal investigatory function, are subject to the Fourth Amendment's warrant requirement absent a recognized exception. The Court found what is commonly referred to as the "emergency exception" to the warrant requirement to apply to this case. The "emergency exception" authorizes a warrantless home search and/or seizure whenever officers have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm, and that the search's scope and manner are reasonable to meet the need. In this case, the Court agreed with the civil defendants, finding the warrantless seizure of the firearms in issue to be necessary in order to protect Edward from himself as well as protecting others. Despite Lori's assertion that she had changed their safe's combination, and could keep Edward from gaining access to them, the Court held that the officers acted reasonably in their concerns that Edward (given his size) could force Lori to provide him with access to the safe. The Court also noted that the officers had no idea when Edward would be released from his detention at the mental hospital, making the immediate seizure of the firearms reasonable. Even the availability of the telephonic search warrant procedure did not guarantee that Edward would not be returning home before the seizure of the guns could be accomplished. Therefore, the guns, were lawfully seized.

Note: The Court, however, specifically stated that, "(o)ur holding that the warrantless seizure of the guns did not violate the Fourth Amendment is limited to the particular circumstances here." Also, in discussing the telephonic search warrant availability, the Court mentioned that Lori failed to provide any evidence that a telephonic warrant could have been obtained before Edward's return. The telephonic search warrant procedure differs from county to county, but in most cases (at least where I prosecuted; San Diego), a telephonic warrant can be obtained in about an hour or even less. Also, *People v. Sweig* (2008) 167 Cal.App.4th 1145 (petition

granted), dictates that a warrant should be obtained, with P.C. § 1524(a)(10) providing the statutory basis for doing so. Perhaps even more importantly, the seizure decision here is in direct contradiction to the California Supreme Court's very recent decision in *People v. Ovieda* (Aug. 12, 2019) 7 Cal.5th 1034, where the court held that the officers, under similar circumstances (See California Legal Update, Vol. 24, #9, dated Aug. 30, 2019), should have obtained a search warrant. *Ovieda*, by the way, also specifically held that the community caretaking theory *does not* apply to residences, in contradiction to the Ninth Circuit's conclusions here. For California cops, *Ovieda* takes precedence over this new Ninth Circuit case. It is therefore my *strong* suggestion that you either seek a free and voluntary consent, or get a telephonic warrant, before going looking for and seizing guns in a W&I § 5150 patient's house.